Denver Law Review

Volume 66
Issue 3 *Symposium - Dispute Resolution*

Article 11

February 2021

Vol. 66, no. 3: Full Issue

Denver University Law Review

DENVER UNIVERSITY LAW REVIEW

VOLUME 66

1988-1989

Published by the
University of Denver
College of Law

1989 Volume 66 Issue 3

DENVER UNIVERSITY LAW REVIEW

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University of Denver
College of Law

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The Denver University Law Review (ISSN 0883-9409) is published quarterly by the University of Denver College of Law through the Denver University Law Review Association. Publication is in the fall, winter, spring, and summer. Editorial and General Offices are located at 7039 East 18th Avenue, Denver, Colorado 80220; Tel. (303) 871-6172. Subscription price: Domestic, $20.00 per volume; Foreign, $21.00 per volume. Subscriptions are renewed automatically unless notice of discontinuance is received. No discounts are given to subscription services. Separate mailing and billing addresses should add $1.00 per volume. Single issues of the current volume are available from the Association at $8.00 per issue (enclose check with order). All issues of prior volumes may be obtained from William S. Hein Co., Inc., 1285 Main St., Buffalo, New York 14209. Address all other correspondence to the Offices of the Association. Manuscripts should be submitted in typed triple spaced, with footnotes at the end, and should comply with *A Uniform System of Citation*, published by the Harvard Law Review Association. Second class postage paid at Denver, Colorado and at an additional mailing office. POSTMASTER: Please send all address changes to Business Editor, Denver University Law Review, 7039 East 18th Avenue, Denver, Colorado 80220.

* Associate Editor
** Assistant Business Editor

ERRATA

In the article by Prof. Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DEN. U.L. REV. 335 (1989), please affix this page over the portion of Table I appearing on page 349.

TABLE I

QUALITY STATEMENTS AND QUALITY STANDARDS

(Statements defining quality [sub-objectives], grouped according to general definitional categories [standards])*

"Dispute resolution processes or outcomes attain quality when . . . "

A. (INDIVIDUAL SATISFACTION)
1. . . . the process is expeditious.
2. . . . both parties are satisfied with the process and outcome.
3. . . . both parties feel fully heard.
4. . . . both parties feel the outcome was not unduly favorable to the other side.
5. . . . trial in court is avoided. (I)
6. . . . the parties participate directly. (I)
7. . . . creative outcomes are possible and are actually attained. (I)
8. . . . the dispute is resolved finally and comprehensively.
9. . . . the parties comply with the resolution. (I)
10. . . . the parties have the choice whether to participate. (I)
11. . . . the process has a positive impact on the parties' relationship.
12. . . . the outcome meets the parties' needs, subjectively defined.
13. . . . the outcome does not depend on technicalities. (I)

(See also: INDIVIDUAL AUTONOMY 3; SOCIAL CONTROL 2, 3; SOCIAL JUSTICE 22)

B. (INDIVIDUAL AUTONOMY)
1. . . . the process educates the parties in dispute resolution skills.
2. . . . the process or outcome empowers the individual.
3. . . . the parties exercise control over the process or outcome.

(See also: INDIVIDUAL SATISFACTION 6, 10; SOCIAL JUSTICE 19)

C. (SOCIAL CONTROL)
1. . . . the process or outcome reduces social conflict.
2. . . . the outcome serves dominant political interests. (I)
3. . . . the process diverts cases from court so that due process in court can be provided to certain cases. (I)

(See also: INDIVIDUAL SATISFACTION 1, 3-5, 8, 9; SOCIAL SOLIDARITY 4, 5)

D. (SOCIAL JUSTICE)

1. . . . the process gives no procedural advantage to either side. (I)
2. . . . the process neutralizes the advantage of a rich (advantaged) party. (I)
3. . . . the outcome is not harmful to a poor (disadvantaged) party . (I)
4. . . . the process assures access on an equal basis to rich and poor. (I)
5. . . . the outcome produces institutional change.
6. . . . the outcome favors a poor party, as an individual. (I)
7. . . . the outcome redistributes goods or power to the poor as a class. (I)
8. . . . the outcome delegitimizes existing institutions. (I)
9. . . . the process challenges power relationships. (I)
10. . . . the process aggregates individual disputes. (I)
11. . . . the process encourages the surfacing of social conflict. (I)
12. . . . the process suppresses and avoids prejudice.
13. . . . the process promotes decent and unprejudiced behavior.
14. . . . the process stops oppressive behavior.
15. . . . the process or outcome empowers women or minorities.
16. . . . the process or outcome validates women's and minority issues.
17. . . . the process or outcome challenges patriarchal values or structures.
18. . . . the process mobilizes the poor as a class.
19. . . . the process avoids extension of state control over individuals. (I)
20. . . . the outcome is based on legitimate norms. (I)
21. . . . the outcome is not harmful to the public interest or interests of affected third parties.
22. . . . injured parties receive compensation quickly. (I)

(See also: INDIVIDUAL SATISFACTION 9, 13; INDIVIDUAL AUTONOMY 2; SOCIAL CONTROL 2, 3; SOCIAL SOLIDARITY 1, 4, 5; PERSONAL TRANFORMATION 1, 4)

E. (SOCIAL SOLIDARITY)

1. . . . the process articulates norms or reasons for the resolution. (I)
2. . . . the process creates shared narratives or texts.
3. . . . the process strengthens community.
4. . . . the outcome is determined by rules of law. (I)
5. . . . rules of law are created for the future. (I)

(See also: INDIVIDUAL SATISFACTION 11; INDIVIDUAL AUTONOMY 1; SOCIAL JUSTICE 7, 10, 18)

F. (PERSONAL TRANSFORMATION)

1. . . . the process stimulates personal growth in the parties.
2. . . . the process causes the parties to recognize or appreciate the situation of the other party. (I)
3. . . . the process stimulates the parties to be more honest, open or truthful with the other party (and with themselves). (I)
4. . . . the process facilitates the expression of emotions. (I)

(See also: INDIVIDUAL SATISFACTION 11; INDIVIDUAL AUTONOMY 1; SOCIAL JUSTICE 13, 17; SOCIAL SOLIDARITY 3)

ERRATA

In the article by Prof. Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DEN. U.L. REV. 335 (1989), please affix this insert over the last paragraph appearing on page 356.

Therefore, I reject that taxonomy and the underlying view that the opinions on quality expressed at this workshop can do no more than reveal political positions. Rather than subscribing to proposition (2), I adopt a third proposition about defining quality in dispute resolution:

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In the article by Prof. Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DEN. U.L. REV. 335 (1989), please affix this page over the portion of Table I appearing on page 350.

JOHN PHILLIP LINN

DEDICATION

JOHN PHILLIP LINN

On the occasion of his retirement from the University of Denver College of Law, the Board of Editors respectfully dedicate this issue to Professor John Phillip Linn—educator, arbitrator, and artist. Rarely have these elements blended into a single, extraordinary career.

An honor graduate of the University of Denver College of Law in 1955, Professor Linn joined the faculty in 1958. One year later he was appointed Assistant Dean, and he served in that capacity until 1965. During his thirty years of service to the College of Law, Professor Linn taught Labor Law, Labor Arbitration, Commercial Arbitration and Contract Law. A brilliant and demanding teacher, he encouraged his students to think creatively about the law, always urging them to go at least "one step beyond" what was required of them.

Professor Linn always went that "one step beyond." Tirelessly devoted to his role as educator, he adopted new texts in his final year of teaching Contract Law and Labor Law, even though he had to prepare new notes and class outlines. He established and generously funded the John Phillip Linn Labor Law Award, and provided multiple awards in years when he felt more than one student deserved the award.

Students remember Professor Linn with affection and appreciation. They certainly remember the terrifying questions on his Contract Law examinations which read: "Tell me all you know . . . ." But they also remember his immeasurable interest in each student's well being. Some students remember the time he conducted a seventy-minute lecture in total darkness when a tornado knocked out the electricity. One student reported it was a "uniquely exciting educational experience."

Professor Linn's arbitration courses were particularly favored by students because he asked them to assume roles of decision makers, not advocates. Professor Linn delighted in the growing popularity of arbitration classes, which parallelled the growing recognition of arbitration's importance. He steadfastly believed that in order to best serve their future clients and profession, law students should know all methods of dispute resolution, not just litigation.

Professor Linn has been an arbitrator for more than thirty years and has developed a national reputation as an impartial arbitrator. He will continue to arbitrate both labor and commercial disputes in his retirement. In his career he has written over one thousand opinions and awards; none have ever been vacated or modified by a court.

Professor Linn is the only arbitrator in the Rocky Mountain region to have served as Vice President of the Board of Governors of the American Arbitration Association. He was the first President of the Rocky Mountain Association of Federal Labor Relations Professionals. He was

President of the National Organization on Legal Problems of Education. He has served as Special Master in labor related cases in state courts and federal district courts in the Eighth and Tenth Circuits. The College of Law has been extremely fortunate to have this distinguished arbitrator as a member of the faculty.

Professor Linn holds degrees in art and education from New York University. A graduate of the Parsons School of Design, he drew the portrait of the patron saint of lawyers which appears on the certificates of the Order of St. Ives, given to honor graduates of the College of Law. His approach to both arbitration and education mirrors his respect for the artist's creative process. He compares legal analysis to the creative composition processes of such artists as Wassily Kandinsky, envisioning the grouping of facts and legal theories on a palette, which his students recognize as "the legal continuum." Facts and theories, like colors, may be bold and have obvious impact, or may be subtle and appear to have little import until their ultimate relationships on the canvas produce powerful statements. Professor Linn emphasizes that with the initial placement of a factual configuration on the canvas certain forces are created; through successive directional lines and engaging shapes and planes (which are arranged according to laws of constructive counterpoint and correlation) a refined balance of ideas emerges as the finished composition of a convincing legal position.

Kandinsky wrote that the ideal analysis involves precise investigation of each individual phenomenon in isolation, the reciprocal effect of phenomena in combination, and the general conclusions drawn from them. Professor Linn believes that just as the painter's vision does more than sharpen the viewer's aesthetic sensitivities, legal analysis should reveal new possibilities of expression that bring us closer to the perfection of human enlightenment, as well as legal enlightenment.

In the end, one cannot render such an illustrious teaching career in a single written portrait. The portrait does not live; instead, it is Professor Linn's influence upon his students that lives. Upon his retirement, the Board of Editors thanks Professor Linn for showing his students that legal analysis, and life, can be stretched beyond a blank canvas in to the realm of possibility and enlightenment.

Kristi N. Saylors

FOREWORD

Disputes arise inevitably. This symposium is about how best to resolve those disputes. The quality of dispute resolution procedures is a fundamental concern in our society. The debate over how best to handle conflict goes to the heart of our judicial system, the primary dispute resolution process in our society.

The articles in this symposium examine measures of quality used to determine the best processes to resolve disputes. The articles in this symposium reveal the debate over what is "best." As in any symposium, the articles raise many more questions than they answer. The reader is left to consider the ideas put forth.

This issue is the result of a lot of work. It is impossible to mention everyone involved, but I would like to recognize the contribution of several people. I wish to thank Professor Marc Galanter and the contributing authors for favoring the *Review*. I extend a special thanks to the members of the *Review*. I wish to recognize Dean Edward Dauer for his assistance.

Scott W. Burt
Symposium Editor

INTRODUCTION

COMPARED TO WHAT? ASSESSING THE QUALITY OF DISPUTE PROCESSING

MARC GALANTER*

In the past dozen years, interest in Alternative Dispute Resolution ("ADR") has inspired a burst of creative innovation and experimentation. Compared to earlier crusades for alternatives, the contemporary ADR movement is more informed by empirical learning, more theoretically sophisticated and more ambitious in scope. It advocates change not only for the domains of the minor and marginal but for the legal heartland.

The ADR movement has accelerated and popularized a salutary shift in the discourse about law and disputing, a shift that reflects wider intellectual currents. The notion that current legal arrangements embody a single right way to handle disputes has been drained of credibility. We have learned to see legal institutions as part of larger ecology in which various dispute institutions interact and affect one another. As these interconnections become common knowledge, those who would design or justify legal institutions must accept responsibility not only for the small world of adjudication but for the larger world of disputing and bargaining in which it is set.

That dispute processing arrangements are contingent and malleable has moved from academic insight to practical maxim. But once we accept that dispute institutions might be redesigned to maximize benefits and reduce costs, we are committed to comparative assessment. To evaluate a given dispute institution we have to compare its performance with that of modified and alternative modes of resolving (and generating) particular kinds of disputes. Such comparisons are attended by a host of methodological and conceptual difficulties.[1] The perplexities of comparison are compounded when we realize that an encounter or injury could be crystallized into very different kinds of disputes and could be handled in very different kinds of institutions. But although each strategy of comparison is subject to serious problems, comparative assessments are as unavoidable in practice as they are difficult in theory.

Thus ADR has propelled us into a situation in which policy-makers cannot avoid making deliberate if fallible choices among alternative ways of processing disputes. Can inquiry give us any guidance about how

* Evjue-Bascom Professor of Law and South Asian Studies, University of Wisconsin—Madison; Director, Disputes Processing Research Program.

1. *See* M. Galanter, Judges and the Quality of Settlements (1989) (working paper JE-1, Center for Philosophy and Public Policy, University of Maryland) (for a specification of these difficulties in the comparison of settlement with adjudication).

such choices should be made? The many reasons for preferring one dispute mechanism over another can be reduced to two basic arguments. The first of these, which we might call the "production" cluster, is that one or another mechanism will produce "more" with less expenditure of resources. Thus we find arguments that a given device will increase the number and speed of resolutions and lower their cost. A great deal of talk about alternatives consists of claims about production effects. Due to the infirmities of selection and measurement that often attend reform undertakings, there is probably a tendency to overestimate the degree to which programs achieve such production effects.[2]

Even where it can be shown that one process is cheaper and faster than another, such a demonstration is necessarily incomplete, for it is necessary to ask whether what is obtained for the lower cost is equally desirable. We arrive at the question of the benefits or qualities that we attribute to the rival arrangements. This brings us to our second great cluster of arguments—assertions about the superiority of alternative processes or the outcomes that they produce. For example, it may be argued that a given process is superior because it increases the parties' satisfaction, encourages the re-establishment of friendly relations, is more suffused by social norms, fosters integrative solutions, leads to more compliance, generates useful precedents, and so forth. These assertions about beneficial characteristics are "quality" arguments. I use the term "quality" as shorthand for the valued aspects of the process, including but not confined to justice, and including but not confined to those aspects that admit of quantification. The term was adopted to summarize and emphasize the wide range of valued characteristics, apart from cost, time and institutional convenience, that are implicated in disputing. Although quality arguments, explicit or tacit, are everywhere in discussions of dispute resolution, much less attention has been given to analyzing and appraising quality effects than to the more readily measurable production effects.

To explore the theoretical and practical issues surrounding these neglected issues of quality, the Disputes Processing Research Program at the University of Wisconsin organized a workshop on "Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes" that was held in Madison, July 13 and 14, 1987.[3] The Workshop brought together practitioners and academics for two days of intensive discussion of beliefs and practices about quality issues in dispute processing. We thought this uncharted territory could best be explored by preserving a spontaneous, brainstorming character. Participants were encouraged to share their perceptions and perplexities, but not to

2. See the classic exposition of this point by Campbell, *Reforms as Experiments*, 24 AMER. PSYCH. 409 (1969).

3. The workshop was supported by the University of Wisconsin's Dispute Processing Research Program, under a grant from the William and Flora Hewlett Foundation, and by the National Institute for Dispute Resolution. The planning committee consisted of Howard Bellman, John Esser, Carrie Menkel-Meadow, Catherine Meschievitz, Judith Resnik, David Trubek, and the present author.

prepare papers. Instead, we commissioned distinguished scholars in several disciplines (law, philosophy, political science, psychology, and sociology) to report on the proceedings from their several perspectives. The present Symposium consists of those reports and John Esser's review of the evaluations literature on dispute resolution. They are neither a record nor a revision of what was said at the Workshop; instead they are individual responses to those discussions. We hope that they in turn will contribute to a richer and more coherent discourse about the assessment and comparison of dispute processes.

To put these reports in perspective I would add a few observations on the context of the quest for quality. First, the discussion of "quality" is not to be subsumed under the discussion of ADR, as if whatever it is alternative to (presumptively, adjudication) can be taken as unproblematic in quality. Although the issue of assessing performance was raised by the claims of ADR's proponents and the challenges of its critics, the thrust of the quality discussion is not to put ADR in the dock but to challenge the quality credentials of every dispute institution, including the most established "traditional" ones.

Second, it is important not to be distracted by the fiction of a radical split between ADR and "traditional adjudication." Most ADR is not located in autonomous institutions that operate independently of the norms and sanctions of the legal system. Instead ADR is typically situated near legal institutions and dependent upon legal norms and sanctions. Correspondingly, most of what goes on in and around courts is not "traditional adjudication" if that means the decisive application of legal norms to fully presented specific cases. Instead we find maneuvering, bargaining, and (often) mediation in the shadow of possible adjudication—and the expense and risk of obtaining it. That ADR and adjudication reside in distinct normative worlds is a persistent element in the mythology of the partisans of each, in spite of ample evidence of the pervasive continuities.

Third, curiously those dispute institutions that flourish and enjoy relative autonomy tend to be omitted from discussions of ADR. Our social institutions are honeycombed by indigenous forums that elaborate and enforce complex codes of conduct—in hospitals, schools, condominiums, churches, the NCAA and a multitude of other settings.[4] Far more disputing is conducted within these indigenous forums than in all the free-standing and court-annexed institutions staffed by arbitrators, mediators and other ADR professionals. This profusion of indigenous law reminds us that the world of disputing includes much more than traditional adjudication and the new ADR institutions.

Fourth, we should resist the pervasive mischaracterization of ADR as informalism. The displacement of bi-lateral negotiation by court-annexed arbitration or a summary jury trial marks not a decrease but an increase in proceeding through prescribed forms. Nor does it mark a

4. The significance of these forums is discussed in Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

decrease in the involvement of professionals or the reliance upon state coercion. ADR is not so much informalism as "short form formalism;" not so much deprofessionalization as a change in professionals. But it is a species of de-regulation: the tie of procedures and sanctions to decisive application of public rules is loosened.

Fifth, once we appreciate that an encounter or injury may be crystallized into very different kinds of disputes and may be handled in very different kinds of institutions, we recognize that sorting disputes by their suitability to particular dispute processes is not a technical exercise but a political choice of which kinds of disputes deserve which kinds of response, which in turn reflects our commitments about the good society and the good life.

Sixth, if disputes are contingent and malleable, what kind of knowledge is possible about the quality of their processing? Strikingly, the evaluation experts at the workshop made no claim to provide definitive objective answers to quality questions, but offered their technology as a resource for competing programs inspired by different politics of justice. But if talking quality is ultimately talking politics, it doesn't follow that talking politics is talking quality. We still have much to learn by the arts of systematic comparison and measurement.

We seem to be entering a period of intense debate about which disputes should be addressed in the courts and which diverted elsewhere. For example, should social security disputes be removed from the courts? Should major business disputes be encouraged to depart to private forums? What kind of "alternative" tracks should be attached to the courts? And what kind of supervision and review of alternatives should the courts undertake? All of these questions turn on what we have called the quality issues. Debate about quality is inevitable.

Even though these issues are complex and multi-dimensional, they can be advanced though not resolved by careful analysis and by empirical measurement. We can bring a whole repertoire of quality concepts and techniques of inquiry to bear on specific kinds of disputes. We need specified and contextualized studies in which institutional alternatives are compared not in terms of the supposed unvarying characteristics of dispute methods, but in terms of a relevant array of "quality" issues. If our choices are inevitably political we should aspire to a politics about real alternatives not imaginary ones.

DEFINING QUALITY IN DISPUTE RESOLUTION: TAXONOMIES AND ANTI-TAXONOMIES OF QUALITY ARGUMENTS*

ROBERT A. BARUCH BUSH**

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* Reporting on a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School, July 13-14, 1987, and co-sponsored by the Dispute Processing Research Program of the Institute for Legal Studies at the University of Wisconsin-Madison Law School and the National Institute of Dispute Resolution.

** Associate Professor of Law, Hofstra Law School. B.A., Harvard University, 1969; J.D. Stanford Law School, 1974. The author thanks the sponsors of the workshop for their support, and also thanks Marc Galanter, Judith Resnik, and Janet Dolgin for their comments on earlier drafts of this report.

I. DEFINING STANDARDS OF QUALITY IN DISPUTE RESOLUTION: SETTING THE STAGE FOR DISCUSSION

A. *Dimensions of the Discussion*

In anticipating the task of giving a taxonomic perspective on this workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes, I assumed before the event that the discussions would focus heavily on articulating a definition (or definitions) of "quality" in dispute resolution, a specification of the goal(s) being sought in the activity of dispute resolution.[1] For if no definition of quality is articulated, measurement is irrelevant, since no evaluation can measure whether or when quality has been attained. And the workshop agenda seemed to assume that no obvious or agreed upon definition of quality exists; otherwise, the "identification" part of the workshop description would be redundant. Therefore, my task seemed likely to involve describing and interrelating the different definitions of quality proffered and the reasons behind them.

In part, that is what I do below. However, the task was not a straightforward one for a few reasons that bear mentioning at the outset. First, speakers often appeared to assume that there *was* an obvious definition of quality that required no statement of reasons to explain its appeal. More often still, speakers offered comments that carried hidden or ambiguous statements about the definition of quality in dispute resolution. Both of these patterns of non-articulation made it difficult to understand and organize the different quality arguments being made and the reasons behind them.

Second, the effort to define quality touched off arguments about two other major dimensions of dispute resolution. The first argument concerned the proper target of study, in terms of both the dispute resolution processes to be considered and the substantive contexts in which these processes are used. The second argument concerned the identity of the interests or forces at play in defining quality, and then arguing for or against certain dispute resolution processes on that basis. The former argument raised the question of whether, even prior to delineating quality arguments, it was necessary to break down the field of inquiry into discrete process and context segments. The latter argument raised the question of whether definitions of quality must always be considered essentially political.

As a result of these patterns in the discussions, this paper explores three or four separate but related dimensions of arguments about quality in dispute resolution. In each dimension, this article explores what might be called the taxonomies and anti-taxonomies[2] that emerged in

1. The notion that "quality" in general is defined in terms of societal goals that are furthered by dispute resolution is discussed in greater detail below. *See infra* text accompanying note 8.

2. The concept of an "anti-taxonomy"—a conceptual framework that competes with the conventionally accepted framework or taxonomy—was suggested by Judith Resnik in a conversation following the workshop.

the workshop discussions, by which I mean the conceptual frameworks that were presented implicitly or explicitly as valid, and alternative frameworks that were offered to challenge their validity. Part II explains how the proceedings revealed and challenged the "litigation/alternative dispute resolution ("ADR")" dichotomy regarding processes to be studied. Part III describes the argument for context-specific analysis of quality in dispute resolution, the challenge to which is discussed in Part VI. Part IV reaches the original target, definitions of quality in dispute resolution, and presents a categorization or taxonomy of definitions implied by the proceedings. In the process, Part IV describes one view of the different interests engaged in defining dispute resolution quality standards and sets against it an alternative view of interests. Part IV also emphasizes the ambiguity of the definitions of quality suggested in the workshop discussions. Parts V and VI speculate on the reasons for this ambiguity, and suggest the beginnings of an "anti-taxonomy" of quality standards, and directions for future work.

The themes and arguments presented in the workshop and described below have considerable significance. In many respects, the workshop was a microcosm of the larger debate over dispute resolution evaluation and practice among academics, practitioners, administrators, and advocates. The arguments and ways of thinking expressed in the workshop echoed, for every dimension mentioned above, almost every significant viewpoint found in the larger world of dispute resolution research, scholarship, and practice.[3] Thus, the results of this workshop signify what is presently understood about quality in dispute resolution and, more important, what is not understood, why the lack of understanding exists, and what must be done to improve our understanding.

B. *Two Assumptions of the Discussions, and Their Relation to this Report*

Before analyzing the specific issues raised in the workshop, a few words are needed concerning some foundational assumptions about an-

3. The text and notes below will, where appropriate, note how the workshop arguments reflect the arguments made in the now voluminous ADR literature. *See, e.g., infra* notes 18, 28, 33, 47-52, 68-70, and accompanying texts. However, I want to make clear at the outset that this report was prepared not with primary reference to that literature, but rather with primary reference to the workshop discussions themselves. I chose *not* to use this report primarily as an opportunity to comment on major quality themes in the ADR literature, for which the workshop discussions would essentially be a jumping-off point. Rather, I chose to focus my efforts as Reporter on identifying the range of themes and patterns of quality arguments that arose during the workshop itself, with the literature as a background and point of comparison. This seemed an appropriate choice for a "taxonomic" report on the workshop. Moreover, after reviewing the workshop proceedings in considerable detail from written notes and tapes, I found the contents much too rich to set aside in favor of an analysis more focused on the literature.

Therefore, I start from the workshop record and refer where appropriate to the literature. My treatment of the literature is largely confined to these notes. It is referential and suggestive rather than comprehensive and profound because to attempt both a close analysis of the workshop discussions and a thorough critique of the literature was simply beyond the scope of this project. However, I believe the references to the literature are sufficient to establish the proposition of the text and to show how the workshop was a microcosm of the larger debate.

alyzing quality in dispute resolution that seemed to underlie the workshop discussions generally. Not all of us make the same analytical assumptions in approaching the quality issue. Therefore, I hope to make my further discussion clearer and more useful by identifying the analytical assumptions that I perceived underlying the workshop discussion, as well as identifying my relation to them as Reporter.

One assumption concerns the general meaning of the term "quality" as addressed in this workshop:[4] what is meant in general by "quality" in dispute resolution, and what was the general target of the workshop discussions as a whole? I suggest that, even apart from the multiplicity of specific quality arguments and standards I will report on below, the general notion of "quality" in dispute resolution processes might refer to at least two different things, with very different implications for discussion and analysis.

In one sense, the term "quality" may be used to mean that a certain dispute resolution process operates in practice in a way that fulfills the unique and inherent capacities of that particular process. Here, "quality" means fulfillment in practice of the inherent potential or form of the process in question, and therefore the definition of quality will vary from process to process. For example, the classic work of Lon Fuller suggests that quality in adjudication means fulfillment of adjudication's unique capacity to allow participation by presentation of proofs and reasoned arguments,[5] and quality in mediation means fulfillment of mediation's unique capacity to "reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship . . . ."[6] I call this the "process integrity" conception of quality.[7]

In another sense, the term "quality" may be used quite differently to mean that a dispute resolution process, of whatever kind, serves by its operation or outcome to fulfill a private or social goal that the person applying the quality label considers important. Here, "quality" means simply that the process furthers the achievement of the valued end, and therefore the definition of quality will not vary from process to process. If the valued end is, say, distributional equality, quality in *both* adjudica-

4. This discussion of quality as "process integrity" versus quality as "goal furtherance" grows out of comments by Judith Resnik on an earlier draft of this report, and in particular her questioning of my argument that the definition of quality is a constant that does not vary from process to process. *See infra* text accompanying note 23.

5. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365, 382 (1978).

6. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

7. Applications or modifications of these processes that frustrate or obstruct the fulfillment of their unique capacities are seen as abuses of the process in question, "perversions" of its pure form or character. *See, e.g.*, Fuller, *supra* note 5, at 407-09. A similar approach to the notion of quality can be found in the work of Owen Fiss and Judith Resnik, among others, on adjudication, *see, e.g.*, Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) [hereinafter Fiss, *Settlement*]; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms*]; Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) [hereinafter Resnik, *Faith*]; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982), and the work of Joseph Stulberg and Leonard Riskin, among others, on mediation, *see, e.g.*, Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

tion and mediation will be measured in terms of whether, or how much, this goal is furthered by each process. If the valued end is preservation of relationships, quality in both processes will mean the extent to which *this* goal is furthered. Dispute resolution quality, in this conception, is defined entirely in terms of the ultimate goal being sought. I call this the "goal furtherance" conception of quality.[8]

Both the process-integrity and the goal-furtherance conceptions of quality deserve study. Both were evident in the remarks of different speakers at the workshop. For two reasons, however, I address my comments in this report to the goal-furtherance conception of quality and the different specific definitions of quality in this sense that were suggested in the discussions. First, according to my study of the record, the workshop discussions focused more on the goal-furtherance conception of quality than on the process-integrity conception.[9] Second, although I believe that quality in the process-integrity sense is important, I see it as secondary to quality in the goal-furtherance sense. For example, if certain uses of mediation ignore or pervert mediation's unique capacity to heal or transform relationships, the concern is not only for the integrity of the process but also, and ultimately, for the negative effect on a valued goal—preservation of relationships—that could be furthered by "good" mediation.[10] In other words, "bad" mediation is bad not simply because it perverts the process, but because in doing so it obstructs furtherance of a valued social goal. Quality in the goal-furtherance sense thus addresses what is ultimately at stake in the choice to use any dispute resolution process. For this reason, addressing the dispute resolution quality issue on this level is of primary importance in my view, though it may present difficulties.[11] Therefore, in keeping with what seems to

8. The goal-furtherance conception of quality, while also implicitly present to a greater or lesser degree in the work of Fuller and others, *see supra* note 7 and *infra* note 33, is more evident in the work of other ADR commentators, such as Lawrence Susskind, Linda Singer, Raymond Shonholtz, and Richard Posner. *See, e.g.*, Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Shonholtz, *The Citizen's Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, 494 ANNALS 42 (1987); Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569 (1979); Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981). Of course, the views of these and other commentators as to the *specific* definition of quality, that is, the societal goal that dispute resolution should further, are quite divergent, as were those of participants in this workshop.

9. In part this was because the discussion did not focus on any one process closely enough to generate careful consideration of process-integrity quality standards for that process. This might be seen by some as a failing of the workshop, but it meant in any event that for a Reporter there was more material focused on the goal-furtherance conception of quality.

10. *See* R. Bush, Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation (unpublished manuscript to be published in volume 41 of the University of Florida Law Review); Riskin, *supra* note 7.

11. Under this conception of quality, dispute resolution processes are viewed primarily in instrumental terms, that is, as tools for achieving important social or private goals. The corollary is that, since views differ on the relative importance of the different goals that dispute resolution processes might effect, the attempt to define "quality" in dispute resolution inevitably merges into a discussion of the definition of the "good" in society generally. Proffered definitions of quality in dispute resolution, on this level, are really surrogates for positions on the meaning of the good in society generally. Some might

have been the general assumption of the workshop—with which I am in agreement—the term "quality" as used below refers to quality in the goal-furtherance sense, unless otherwise stated.

A second major analytical assumption seemed to be shared by most of the workshop participants, although it runs contrary to my own viewpoint as Reporter. As discussed at length below, the workshop participants suggested, directly and indirectly, a variety of definitions of quality in dispute resolution. This multiplicity of definitions of quality can be approached from at least two viewpoints.[12] According to one viewpoint, this multiplicity is natural and acceptable in a pluralistic society, and it is possible and even desirable to accommodate all of these definitions in using and evaluating dispute resolution processes. It is possible because, according to this view, definitions do not necessarily conflict, or, if they do, some appropriate sphere can be found in which each definition applies. It is desirable because even if definitions do conflict, a single right or true definition of quality does not exist. Therefore, following this view, we should expect and accept a multiplicity of quality definitions, allow quality standards to vary according to choice or on a random basis, employ different quality standards in different contexts, and take other approaches that would accommodate a multiplicity of definitions of quality. I call this the "pluralist" viewpoint on quality standards.[13] From my analysis of the workshop record, as well as from informal comments made to me, most participants seemed to have held this viewpoint.

However, according to a contrary and evidently less popular viewpoint, a multiplicity of definitions of quality is problematic because it is neither possible nor desirable to accommodate all definitions. It is not possible because as a practical matter, according to this view, some or all of the definitions will conflict; and this conflict will not be reconcilable by a "jurisdictional" solution applying different standards in different contexts, because some or all of the conflicting definitions will be seen as universally applicable. Thus, choosing among, or ranking, competing definitions of quality will be a practical necessity. Furthermore, given

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suggest that discussing quality in this sense therefore has little value, since it simply leads to the broader and insoluble discussion of competing conceptions of the good. My view is that this coalescence of the dispute resolution quality issue and the broader social goal question, whatever problems it entails, simply reflects what is actually at stake in the activity of dispute resolution.

12. This discussion of the pluralist versus singularist viewpoints on multiplicity in definitions of quality grows out of comments by Marc Galanter on an earlier draft of this report, and in particular his questioning of my argument below that choice among standards is necessary and that dialogue is the best path to choice. *See infra* text accompanying notes 45 and 86.

13. This view is reflected, sometimes explicitly and sometimes implicitly, in a wide range of ADR commentary. *See, e.g.*, AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, U.S. DEPT. OF JUSTICE, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 8-18 (1984) [hereinafter PATHS TO JUSTICE]; Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 295-96 (1986); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486-90 (1985); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Singer, *supra* note 8, at 571-83.

fundamentally conflicting definitions of quality, it is not desirable to give them all equal weight on the ground that a single right or true definition of quality does not exist. On the contrary, according to this view, a right and true definition of quality does exist and, whether or not it can be known with certainty, common effort to find it will bring us closer to that knowledge and to each other. Therefore, following this view, we should bring proponents of different definitions of quality together, encourage them to clarify their definitions and the reasons underlying them, urge and help them to engage in argument and mutual persuasion over their differences, and take other approaches to search for a single, universally applicable definition of quality in dispute resolution (or a single priority ordering of competing definitions). I call this the "singularist" viewpoint on quality standards.[14]

As noted above, my impression was that most speakers at the workshop held the pluralist viewpoint on quality standards, although it was not always clear. In previous work, I have written from the pluralist viewpoint.[15] More recently, however, I have been persuaded that the alternatives presented in defining dispute resolution quality pose hard choices that demand singular answers and call for common effort to find those answers. Apart from the practical necessity of choice, the value that I place on the common search for a singular definition of quality—by which I mean, in practice, a singular priority ordering of several competing definitions, each of which has some appeal—is twofold. First, this type of searching brings us as close to the truth about quality as human beings can get. Second, the process of searching together for the good binds us together as fellows (or expresses our intrinsic common bond) in a most powerful way, and this binding is itself a primary value for me.[16] Some other speakers at the workshop also seemed to hold what I am calling a singularist viewpoint, although they may do so for different

14. This view is rarely if ever expressed explicitly, as I will do in this report. Nevertheless, it does seem implicit in at least some ADR commentary. The clearest example of this is, I think, in the work of Owen Fiss, which, although it focuses on adjudication in particular, speaks by implication to the issue of quality in dispute resolution generally, and does so from an implicitly singularist perspective. *See* Fiss, *Settlement*, *supra* note 7, at 1085-90; Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122-26 (1982); Fiss, *Forms*, *supra* note 7, at 28-31. In some of her work, Professor Resnik also seems to suggest this view, as in her contrast of "the old order" of "faith in adjudication" to the "new faith" that "proponents of managerial judging and ADR urge upon us," *see* Resnik, *Faith*, *supra* note 7, at 543-44, and especially her conclusion that "we need to *choose one of these views* or identify the cases in which to vary our views." *Id.* at 554 (emphasis added).

15. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 932-62.

16. These views, explained more fully below, are the product of my continuing reflection on the field. I have discovered that they are not unlike the views expressed in contemporary "communitarian" political thought, whose vocabulary I find appealing and useful, although I do not necessarily share all its views. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985) [hereinafter R. BELLAH]; A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984); Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755 (1985); Macneil, *Bureaucracy, Liberalism and Community—American Style*, 79 NW. U.L. REV. 900 (1985); Murphy, *Liberalism and Political Community*, 26 AM. J. JURIS. 125 (1981).

reasons. In any event, I write this report from my own singularist viewpoint on quality standards, even though it runs counter to what I see as a prevailing pluralist viewpoint.

II. Quality Standards for What Processes?: The "Litigation/Alternative Dispute Resolution" Dichotomy, and Alternatives

If the central question is the definition of quality in dispute resolution, one important preliminary question is the general meaning of quality, as discussed above. Another preliminary question is the meaning of "dispute resolution." What is being studied, to determine if it satisfies a specific goal-furtherance quality standard or not? In particular, many speakers opposed what they saw as a tendency of others to treat the field of study as divided into two areas: adjudication in court (litigation)[17] and ADR processes (encompassing everything else from unassisted negotiation to mediation to summary jury trials).[18] Such a "dichotomized and homogenized"[19] process taxonomy was criticized as simultaneously too segmented and not segmented enough. On one hand, it was argued, in-court adjudication itself often involves ADR processes, including negotiated settlement, judicial mediation, mediation by special masters, and so on. Furthermore, much so-called ADR, including summary jury trials, court-annexed arbitration, and compulsory mediation, goes on under the direct authority of the courts. In short, ADR is not an alternative to the courts; it is in and under the courts themselves.[20] So the litigation/ADR distinction is more fiction than fact. Instead, dispute resolution is "all of a piece," all part of one system in which proximity to

17. The interchangeable use of the terms "adjudication" and "litigation" is probably incorrect, since, as Marc Galanter has pointed out, the litigation process includes many steps that only rarely lead to a full-blown adjudicated trial. *See* Galanter, "*. . . A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. & Soc'y 1, 1 (1985). Nevertheless, the use of "litigation" to mean full-dress adjudication continues to be common in ADR commentary. *See, e.g.*, L. Riskin & J. Westbrook, Dispute Resolution and Lawyers 2 (1987); Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tul. L. Rev. 1, 9-11 (1987); Goldberg, Green & Sander, *supra* note 13, at 292; Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 426 (1986); Menkel-Meadow, *Dispute Resolution: the Periphery Becomes the Core*, 69 Judicature 300, 303 (1986). In addition, "litigation" was the term more commonly used at the workshop to refer to adjudication in court, according to my review of the record. Therefore, I use the term "litigation" here to mean, as stated in the text, full-dress adjudication in court. I do not mean to imply by this that the term is a wholly accurate one.

18. This tendency is common in the ADR literature. *See, e.g.*, Brunet, *supra* note 17, at 1 n.1, 9, 11 & n.46; Fiss, *Settlement*, *supra* note 7; Lieberman & Henry, *supra* note 17. However, it has also been criticized in the literature as it was in the workshop discussions. *See, e.g.*, Menkel-Meadow, *supra* note 13, at 499-500.

19. The phrase was used by Carrie Menkel-Meadow in her workshop comments and reflects in part her argument in Menkel-Meadow, *supra* note 13.

20. *See, e.g.* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 672-75 (1986); Galanter, *supra* note 17; Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 442-49 (1986); Resnik, *Faith*, *supra* note 7, at 536; Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. Fla. L. Rev. 1, 8-10 (1985).

or distance from court is not the crucial defining factor.[21]

On the other hand, the argument continued, the litigation/ADR dichotomy obscures the many and important distinctions between *different* ADR processes, lumping them together as if ADR was one homogeneous institution set apart from the courts.[22] In fact, to discuss quality in ADR processes in general is meaningless, if not impossible. Discussion must address quality in arbitration, quality in mediation, and so on. Indeed, comments by workshop participants suggested that even such conventional subdivisions of ADR were not sufficient. Distinctions should be drawn, for example, between private and court-annexed arbitration, between professional-conducted and volunteer-conducted mediation. Perhaps the furthest suggestion in this direction, echoed by several participants, was that the focus should not be on processes at all, but on *processors*. Dispute resolution varies so much according to the specific context and participants that quality can only be studied in particular cases, and labels like adjudication, arbitration, and mediation are largely useless.

It is important to clarify the significance of this discussion of "process taxonomy" in relation to the definition and measurement of quality, recalling that the focus of this report is the goal-furtherance conception of quality. Given that conception, the point of distinguishing different dispute resolution processes is not that the definition of quality will change depending on the process under study. The definition of quality, the valued end we are seeking to further in handling a dispute—for example, distributional justice or preservation of relationships—*may* vary depending on the substantive context or character of the dispute, an issue to be discussed in Parts III and VI below. However, in a given context, this definition will not vary according to the process being used. What probably will vary from process to process is the degree to which the quality standard, the goal sought, is achieved.[23] Therefore, distinguishing processes, while not crucial for defining quality, *is* very important for measuring whether quality, however defined, has been achieved. Misrepresenting ADR and litigation as totally distinct, and all ADR processes as totally indistinguishable, creates false and misleading impressions of the likely effects of each in terms of attaining given quality standards. It suggests that ADR and litigation will have totally different effects on quality, and that all ADR processes will have similar effects on

21. Similarly, it was argued, recasting the litigation/ADR dichotomy by dividing dispute resolution into "the formal system" and "informal alternatives" is equally wrong because in-court dispute resolution often involves considerable informality, while out-of-court alternatives like arbitration can be quite formalized. The latter phenomenon is regularly remarked on by students of mine who observe arbitration hearings at the American Arbitration Association and the New York Stock Exchange.

22. *See* Menkel-Meadow, *supra* note 13, at 499. For examples of this approach, *see* Brunet, *supra* note 17; Fiss, *Settlement*, *supra* note 7.

23. As noted in Part I, the definition of quality in the process-integrity sense will also almost certainly vary from process to process. However, that conception of quality is not the focus of this report. *See supra* text accompanying notes 4-8.

quality. However, neither proposition is likely to be accurate.[24] The more general point is that imprecise characterizations of processes can distort evaluations in quality, however quality is defined. The "dichotomized and homogenized" litigation versus ADR framework is one major instance of imprecise characterization.

A few important conclusions follow from the above. First, the proper focus of study as to evaluating processes should be the entire dispute resolution system, not just ADR processes.[25] Therefore, however quality is defined in a given context, we should be asking not only how do ADR processes perform in satisfying this criterion, but also how do courts perform, and indeed how do non-freestanding, "embedded" dispute resolution processes perform?[26] The same questions should be asked, in other words, across the entire range of dispute resolution processes.

Second, processes do differ in their capacity to achieve specific quality standards, but conventional process labels, for example, arbitration and mediation, are probably inaccurate indicators of these differences. The corollary here is the need, expressed by many speakers, for a more sophisticated vocabulary of process distinctions, a way to characterize processes that would be more helpful in distinguishing them for quality evaluation purposes. One speaker suggested that the description of process should use a language of process components or characteristics, that is, basic process elements that are joined to construct different dispute resolution processes. In fact, in an earlier article, I actually developed a preliminary version of such a process-characteristic vocabulary and showed how it helps to clarify understanding of how specific processes affect achievement of goals or quality standards.[27] My view then was and still is that the only sound method for constructing a process-characteristic vocabulary is by starting from the ultimate quality standards or goals themselves, and then reasoning backwards to determine what elements of a dispute resolution process would logically tend to make a difference (positive or negative) to the achievement of those goals. Those elements then form a process-characteristic vocabulary, and any specific process can and should be described in terms of its inclusion, exclusion, and combination of these elements.

The workshop proceedings demonstrated not only that there is strong interest in more precise process characterization, but also that there is a great need for it. Despite the general criticism of the litigation/ADR dichotomy, some speakers continued to maintain it as a key concept in their comments, even to the end of the workshop. Moreover, despite agreement on the need for great sophistication in process de-

24. For an exploration of some of the kinds of distortions in expectations of process effects that can result, see Bush, *supra* note 15, at 972-94.

25. For an excellent discussion of the breadth, variety, and interrelationship of dispute resolution processes, *see* Galanter, *Justice in Many Rooms*, in ACCESS TO JUSTICE AND THE WELFARE STATE 147 (M. Cappelletti ed. 1981). *See also* Bush, *supra* note 15, at 905-06.

26. On embedded or indigenous processes, *see* Galanter, *supra* note 25, at 161-69.

27. *See* Bush, *supra* note 15, at 951-53, 957-62.

scription, disagreements persisted over what one speaker considered another's mischaracterization of a process ("mediators don't 'decide cases' "; "mediators aren't 'passive' "; "arbitration is not 'informal' "; "mediation is not 'conflict suppressing' "). Particularizing and raising the sophistication of process characterization, even though it is crucial to accurate evaluations of quality, probably will not be accomplished easily or soon.

III. Quality Standards for What Disputes?: Context as a Prerequisite to Definitions of Quality

Yet another, and more important, preliminary question to be addressed before definitions of quality can be explored is whether the definition of quality in dispute resolution necessarily varies according to context, that is, according to the type of dispute being "resolved." In the proceedings, a number of speakers vigorously argued that there is no definition of dispute resolution quality that applies equally to all types of disputes; in different types of disputes—or contexts, or sectors, as some speakers expressed it—the goal to be furthered, the meaning of quality, is different. Or, if quality has several dimensions, if there are several goals to be furthered, the relative priority of those goals will differ in different contexts.

For example, in labor management disputes, finality and closure are high-priority goals, so that when a mediator refrains from stopping workers on their way back into the plant and raising questions about the fairness of the settlement, quality dispute resolution has been achieved. Whereas in family disputes, fairness is a more important goal, so that when a mediator intervenes to stop a couple from reaching a settlement unduly favorable to one side, quality has been achieved. Another speaker argued that the definition of quality for a dispute involving parties of equal power in a single transaction is very different than that for a dispute involving parties of unequal power in a continuing relationship, such as clients of bureaucratic agencies. The definition of quality simply is not the same in these two contexts, nor in any two different contexts.

The implication is that before discussing definitions of quality, it is necessary to somehow subdivide the universe of disputes into distinguishable sectors: labor versus family, environmental versus commercial, public versus private, parties of equal power versus unequal power, and so on. The goals to be furthered differ in these different sectors. Therefore, only within a limited context can a meaningful definition of dispute resolution quality be offered.[28]

It is clear that this question about the definitional venture is more pressing than the one discussed in Part II. As argued above, properly characterizing and distinguishing *processes* is necessary for *measuring* qual-

28. *See* Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 933-49 (1979), for a sustained presentation of this argument. It is also reflected in other ADR commentaries. *See, e.g.*, PATHS TO JUSTICE, *supra* note 13, at 8-16; Bush, *supra* note 15, at 946-51; Goldberg, Green & Sander, *supra* note 13, at 295; Sander, *supra* note 13, at 118-25.

ity in the goal-furtherance sense, but not for defining it. However, if it is true that quality has no universal meaning, but differs in different contexts, then characterizing and distinguishing *contexts* is a crucial prerequisite to *defining* quality. If this is so, then much of the work of this workshop must be called into question, because no real effort was made at the workshop, apart from a few speakers, to propose a "context taxonomy," that is, a system of characterizing and distinguishing disputes that would make meaningful goal definition possible.

In the same article referred to in Part II, I actually tried to elaborate such a "context taxonomy," so I am sympathetic to this concern.[29] However, I do not see it as a prerequisite to the quality definition undertaking, for two reasons. First, I am no longer convinced that the definition of quality in dispute resolution is strictly contextual. I am more persuaded that the definition of quality in dispute resolution is constant across the board; the valued goal to be furthered by dispute resolution (in practice, the relative priority of the several goals to be furthered) is the same, independent of context. This position is connected with my adoption of a "singularist" viewpoint toward multiplicity of quality standards, as discussed above, and I will explain this "anti-taxonomy" of context more fully in Part VI.

Second, even for those who believe that definition of quality must be contextual, I suggest that the specification of appropriate context categories itself can be done only *after* and not prior to the articulation of the possible definitions of quality across the universe of contexts. The reasoning behind this point is similar to that offered in Part II regarding the formulation of a useful process-characteristic vocabulary. Context labeling can be as confusing and misleading as process labeling. Are "environmental disputes" and "family disputes"—or any other conventional context differentiations—useful and proper categories, or just labels as misleading about the nature of context as are "mediation" and "litigation" about the nature of process? Accurate context characterization must utilize a basic vocabulary of context characteristics or elements, and the relevant basic vocabulary can only be derived by starting from the ultimate possible quality goals themselves and reasoning backwards to determine what elements in the dispute situation or context would logically tend to make a difference as to the importance of these goals.[30] All of those elements, and only those elements, then form the basic context-characteristic vocabulary, and specific contexts can then be described in terms of inclusion, exclusion, and combination of these elements.

Thus, regardless of whether one believes that goal definition is ultimately contextual or not, the necessary starting point for analysis is articulating possible definitions of quality that are meaningful in one context or another. While the preliminary questions raised about process and context definition are serious concerns, they are not as funda-

29. Bush, *supra* note 15, at 946-57, 959-62.
30. *Id.*

mental as the concern for articulating definitions of quality in dispute resolution. In Part IV, I summarize and organize the workshop discussions on that issue and suggest where the discussions left ambiguities and points of misunderstanding.

IV. WHAT QUALITY STANDARDS?: DEFINING—AND FAILING TO DEFINE—QUALITY IN DISPUTE RESOLUTION

A. *Sub-objective Statements and General Definitions of Quality*

Assuming for the moment that it makes sense to offer definitions of quality in dispute resolution processes and outcomes across the board, what kinds of definitions emerged from the workshop discussions? After reviewing notes and recordings of the proceedings, I identified fifty different statements defining quality in the goal-furtherance sense. Other statements merely repeated or varied these fifty. However, I do not believe these statements represent fifty different definitions of quality. Rather, following Larry Mohr's suggestion, echoed by other speakers, I see these fifty statements as identifying "sub-objectives" that cluster around a considerably smaller number of general quality goals or definitions.

As explained in Part I, definitions of quality in the goal-furtherance sense correspond in general to valued social goals that dispute resolution can help to further. Dispute resolution quality is defined in terms of the ultimate social goal that is valued. I therefore refer to definitions of quality also as quality "standards" or "goals." Sub-objectives are either *aspects* of the ultimate quality goal or specific *strategies* for achieving the ultimate goal. The significance of distinguishing between sub-objectives and ultimate goals, apart from clarity and simplification, is that conflicts among sub-objectives may simply present strategic choices regarding how best to satisfy a single quality standard, while conflicts among goals represent a more serious problem of choice between competing and inconsistent quality standards.

Specifically, I perceived six clusters of quality statements in the workshop record, corresponding to six general definitions of quality in dispute resolution processes or outcomes. Each of these definitions addresses quality in the goal-furtherance sense; each purports to capture what it is that we desire, what we consider the valued social goal or "good" to be achieved through the handling of disputes. If the process or outcome furthers this good, it has met our standard of quality. Dispute resolution processes or outcomes achieve quality, according to one of these definitions, when:

> (1) they leave disputing parties feeling that their individual desires, as defined by themselves, have been satisfied, in terms of the experience and the outcome of the process (INDIVIDUAL SATISFACTION); or
>
> (2) they strengthen the capacity of and increase the opportunity for disputing parties to resolve their own problems without be-

ing dependent on external institutions, public or private (INDIVIDUAL AUTONOMY); or

(3) they facilitate or strengthen the control of public and private institutions, and the interests they represent, over exploitable groups and over possible sources of social change or unrest (SOCIAL CONTROL); or

(4) they ameliorate, neutralize, or at least do not exacerbate existing inequalities in the societal distribution of material wealth and power (SOCIAL JUSTICE); or

(5) they provide common values, referents, or "texts" for individuals and groups in a pluralistic society, and thereby increase social solidarity among these individuals and groups (SOCIAL SOLIDARITY); or

(6) they provide opportunities for and encourage individual disputants to experience personal change and growth, particularly in terms of becoming less self-centered and more responsive to others (PERSONAL TRANSFORMATION).[31]

The foregoing set of definitions is not an arbitrary categorization, but a reflection of patterns and commonalities implicit in the fifty more particularized quality sub-objective statements. This will be clearer from a listing of the fifty statements themselves, which are presented in Table I. For brevity and clarity, I list the statements in Table I already categorized. However, bear in mind that my process was the reverse; I looked first at the fifty sub-objective statements and then generalized from them to the six general definitions.[32] I believe it should be appar-

31. Marc Galanter suggested; in commenting on an earlier draft of this report, that personal growth may include growth "along efficacy or competency dimensions," not just responsiveness to others. This is so, of course, but I do not believe that this means that the Individual Autonomy standard is really included within the Personal Transformation standard. I see the two as distinct for several reasons. The most important reason is that satisfaction of one may be irrelevant to or even inconsistent with the other. For example, increasing the individual's problem-solving competency and jurisdiction will not necessarily increase sensitivity to others; it may even produce *less* sensitivity as it increases a sense of personal power. On the other hand, increasing responsiveness to others may not be possible except by measures that involve limiting individuals' autonomy to some degree, as occurs in mediation by the very presence of the mediator—without which, however, the parties' mutual responsiveness could be far less. In short, Individual Autonomy and Personal Transformation describe different and, to some degree, competing dimensions of personal growth. The former focuses more on growth in the self-strengthening sense, the latter on growth in the self-transcending sense. The "transformation" or "transformative value," as some speakers put it, involved in the Personal Transformation standard is, as I see it, a transformation from self-centeredness to other-centeredness (or self-and-other-, or relationship-centeredness). This was my reading of the Personal Transformation-associated quality statements made at the workshop. It is consistent with the discussion in the ADR literature that reflects the Personal Transformation standard. *See infra* notes 33 & 51 and sources cited therein. *See also* Bush, *supra* note 15, at 1027-32; Bush, *supra* note 10. Perhaps, in view of the above, it would be better to call this the Self-Transcendence (or the Relationship/Compassion) standard, but the language of personal transformation was used at the workshop, and I have tried to stick closely to the terms of the workshop discussion. *See supra* note 3. I note also that, as with the Individual Autonomy and Personal Transformation standards, I see each of these six quality standards as ultimately distinct and non-replicative, even if there is, as here, some degree of overlap between them.

32. Note that, of the fifty sub-objective statements, twenty-eight can logically pertain

ent from the statements reported how the six general definitions emerged.

TABLE I

QUALITY STATEMENTS AND QUALITY STANDARDS

(Statements defining quality [sub-objectives], grouped according to general definitional categories [standards])*

"Dispute resolution processes or outcomes attain quality when . . . "

A. (INDIVIDUAL SATISFACTION)
1. . . . the process is expeditious.
2. . . . both parties are satisfied with the process and outcome.
3. . . . both parties feel fully heard.
4. . . . both parties feel the outcome was not unduly favorable to the other side.
5. . . . trial in court is avoided. (I)
6. . . . the parties participate directly. (I)
7. . . . creative outcomes are possible and are actually attained. (I)
8. . . . the dispute is resolved finally and comprehensively.
9. . . . the parties comply with the resolution. (I)
10. . . . the parties have the choice whether to participate. (I)
11. . . . the process has a positive impact on the parties' relationship.
12. . . . the outcome meets the parties' needs, subjectively defined.
13. . . . the outcome does not depend on technicalities. (I)

(See also: INDIVIDUAL AUTONOMY 3; SOCIAL CONTROL 2, 3; SOCIAL JUSTICE 22)

B. (INDIVIDUAL AUTONOMY)
1. . . . the process educates the parties in dispute resolution skills.
2. . . . the process or outcome empowers the individual.
3. . . . the parties exercise control over the process or outcome.

(See also: INDIVIDUAL SATISFACTION 6, 10; SOCIAL JUSTICE 19)

C. (SOCIAL CONTROL)
1. . . . the process or outcome reduces social conflict.
2. . . . the outcome serves dominant political interests. (I)
3. . . . the process diverts cases from court so that due process in court can be provided to certain cases. (I)

(See also: INDIVIDUAL SATISFACTION 1, 3-5, 8, 9; SOCIAL SOLIDARITY 4, 5)

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to more than one of the six general definitions (twenty to two definitions, and eight to three). I have listed each under the one definition that, given the context of the statement in the proceedings, appeared to be the primary concern of the relevant speaker. The definitions followed by numbers at the end of each definitional section indicate secondary definitional associations for those statements. A further explanatory point is that the letter "I" following a statement indicates that a speaker took this position implicitly, usually in asking or answering a question, rather than explicitly. This, of course, means that the statement as listed represents an interpretation on my part. However, in view of the frequency of such implicit commentary during the proceedings, a point I will discuss further, *see infra* text accompanying notes 46-61, I had little choice but to offer what I hope are fair interpretations of what was implied.

* The letter "I" following a statement indicates an implicit rather than an explicit statement. *See supra* note 32.

D. (SOCIAL JUSTICE)
1. . . . the process gives no procedural advantage to either side. (I)
2. . . . the process neutralizes the advantage of a rich (advantaged) party. (I)
3. . . . the outcome is not harmful to a poor (disadvantaged) party . (I)
4. . . . the process assures access on an equal basis to rich and poor. (I)
5. . . . the outcome produces institutional change.
6. . . . the outcome favors a poor party, as an individual. (I)
7. . . . the outcome redistributes goods or power to the poor as a class. (I)
8. . . . the outcome delegitimizes existing institutions. (I)
9. . . . the process challenges power relationships. (I)
10. . . . the process aggregates individual disputes. (I)
11. . . . the process encourages the surfacing of social conflict. (I)
12. . . . the process suppresses and avoids prejudice.
13. . . . the process promotes decent and unprejudiced behavior.
14. . . . the process stops oppressive behavior.
15. . . . the process or outcome empowers women or minorities.
16. . . . the process or outcome validates women's and minority issues.
17. . . . the process or outcome challenges patriarchal values or structures.
18. . . . the process mobilizes the poor as a class.
19. . . . the process avoids extension of state control over individuals. (I)
20. . . . the outcome is based on legitimate norms. (I)
21. . . . the outcome is not harmful to the public interest or interests of affected third parties.
22. . . . injured parties receive compensation quickly. (I)

(See also: INDIVIDUAL SATISFACTION 9, 13; INDIVIDUAL AUTONOMY 2; SOCIAL CONTROL 2, 3; SOCIAL SOLIDARITY 1, 4, 5; PERSONAL TRANFORMATION 1, 4)

E. (SOCIAL SOLIDARITY)
1. . . . the process articulates norms or reasons for the resolution. (I)
2. . . . the process creates shared narratives or texts.
3. . . . the process strengthens community.
4. . . . the outcome is determined by rules of law. (I)
5. . . . rules of law are created for the future. (I)

(See also: INDIVIDUAL SATISFACTION 11; INDIVIDUAL AUTONOMY 1; SOCIAL JUSTICE 7, 10, 18)

F. (PERSONAL TRANSFORMATION)
1. . . . the process stimulates personal growth in the parties.
2. . . . the process causes the parties to recognize or appreciate the situation of the other party. (I)
3. . . . the process stimulates the parties to be more honest, open or truthful with the other party (and with themselves). (I)
4. . . . the process facilitates the expression of emotions. (I)

(See also: INDIVIDUAL SATISFACTION 11; INDIVIDUAL AUTONOMY 1; SOCIAL JUSTICE 13, 17; SOCIAL SOLIDARITY 3)

As noted earlier, this workshop was in most respects a microcosm of the larger universe of dispute resolution practice and study. This was certainly true of the range of statements offered to define quality and the general patterns that they formed. There is a close correspondence between the quality criteria represented by the six definitions above and the range of standards discussed in the dispute resolution literature.[33]

33. The INDIVIDUAL SATISFACTION standard of quality is reflected in different ways in the ADR literature. Numerous judicial commentators stress this standard in the course of advocating judicial involvement in settlement activities. For a sampling of this kind of commentary, see Galanter, *supra* note 17, at 2-4, and sources cited therein. ADR practitioners and advocates who stress the "creative solutions" and "superior results" supposedly available through ADR, by which they generally seem to mean solutions and results that give the disputing parties more satisfaction than a "win or lose" solution, also reflect this definition of quality. *See, e.g.*, Lieberman & Henry, *supra* note 17, at 429-31; Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982). Professor Menkel-Meadow's "problem solving" model of negotiation and its emphasis on "meeting parties' needs" also seems to reflect this quality standard, *see* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-806 (1984), although her approach is susceptible of other interpretations. See below regarding the Personal Transformation standard. Finally, the abundance of literature on time and cost savings in ADR could be viewed as partly reflecting this standard (and not just administrative economy concerns), if these savings are viewed as elements of the experience or outcome of the process that may contribute to party satisfaction.

The INDIVIDUAL AUTONOMY standard is fairly directly reflected in some ADR commentary. *See, e.g.*, Nicolau & Cormick, *Community Disputes and the Resolution of Conflict: Another View*, 27 ARB. J. 98, 111-12 (1972); Shonholtz, *supra* note 8; Stulberg, *supra* note 7. See below regarding the Social Justice standard.

Few commentators explicitly adopt the SOCIAL CONTROL standard, but many argue that it is the definition of quality adopted in practice by others, whom they criticize for adopting it. *See, e.g.*, Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 270-95 (R. Abel ed. 1982); Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1005-18 (1979) [hereinafter Nader, *Disputing*]; Tomasic, *Mediation as An Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 246 (R. Tomasic & M. Feeley eds. 1982); Nader, *The Recurrent Dialectic Between Legality and its Alternatives: The Limits of Binary Thinking*, 132 U. PA. L. REV. 621, 637-44 (1984) [hereinafter Nader, *Binary Thinking*] (reviewing J. AUERBACH, JUSTICE WITHOUT LAW? (1983)). *See generally* 1 THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982). Additionally, a substantial body of literature, primarily by judges, stressing the goal of promoting the perceived legitimacy of courts as public institutions, can be read as reflecting this standard. *See, e.g.*, Burger, *Agenda for 2000 A.D.—A Need for Systemic Anticipation*, 70 F.R.D. 83 (1976); Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1 (1976).

The SOCIAL JUSTICE standard is widely reflected in the literature on several different levels. First, it implicitly underlies the position of those commentators who criticize the use of dispute resolution as a tool for social control. See above regarding the Social Control standard and sources cited there. Second, it is reflected explicitly in the work of other commentators critical (in varying degrees) of the "ADR movement." *See, e.g.*, Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Edwards, *supra* note 20, at 677-80; Fiss, *Settlement*, *supra* note 7, at 1076-78; Fiss, *supra* note 14, at 122-24; Singer, *supra* note 8, at 574-81. Third, a sizeable body of ADR commentary that focuses on "rights protection" (whether substantive or procedural rights, *see* Bush, *supra* note 15, at 913 & nn. 42-43) can also be read as reflecting the Social Justice standard. I say this because the concern of the commentators in question is almost always with the rights of a disadvantaged minority or an individual party facing a corporate adversary or a public bureaucracy. In other words, the implicit underlying concern seems to be for social justice, although the framework for the argument is protection of rights. *See, e.g.*, Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134 (1970); Rubenstein, *Procedural Due Process and the Limits of the Adversary Process*, 11 HARV. C.R.C.L. L. REV. 48 (1976); Resnik, *Faith*, *supra* note 7, at 545-56; Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 609-12, 614-19 (1985) [hereinafter Resnik, *Appeals*]; Resnik, *Tiers*, 57 S.

The corollary of this is that analysis of the workshop discussions of these quality standards has direct relevance to that literature and to the field as a whole.[34]

Before analyzing the workshop discussions regarding the six defini-

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CAL. L. REV. 837, 1013-15 (1984). I note that some of the work just cited as reflecting the Social Justice standard could also be read as reflecting the Individual Autonomy or the Social Solidarity standard, and this ambiguity parallels a similar ambiguity in the quality standards suggested in the workshop. *See infra* notes 49-50 & 52 and accompanying text.

The SOCIAL SOLIDARITY standard is reflected, more or less implicitly, in the work of some scholars who focus on the role of dispute resolution processes, and especially adjudication, in articulating public values and shared norms. Norm articulation seems to be valued by these scholars not only because the norms promote desired behavior, for example, social justice, but also or primarily because the articulation of norms itself creates social solidarity. *See, e.g.*, Fiss, *supra* note 14; Fiss, *Forms*, *supra* note 7, at 1-2, 29-31, 34-37; Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 413-14, 417-20 (1987); Resnik, *Faith*, *supra* note 7, at 553-54. *See also infra* notes 50 & 52. As with some of the literature cited above as reflecting the Social Justice standard, the work just cited as reflecting the Social Solidarity standard is also ambiguous to a degree and can be read as reflecting the Social Justice standard. *See infra* note 52 and accompanying text.

Finally, the PERSONAL TRANSFORMATION standard is reflected, more or less implicitly, in some dispute resolution literature. *See, e.g.*, Bush, *Traditional Jewish Ethics and Modern Dispute Resolution Choices*, in SIYUMEI RAMBAM CELEBRATIONS (1986); Bush, *supra* note 10; Bush, *supra* note 15, at 1028-31; McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665-68; Millhauser, *Rush to Mediation: Where is the Bandwagon Going?*, LEG. TIMES, Aug. 10, 1987, at 16; Riskin, *supra* note 7, at 332, 353-57; Riskin, *supra*, at 56-57. Professor Menkel-Meadow's "problem solving" model of negotiation can also be read as reflecting this standard rather than (or in addition to) the Individual Satisfaction standard. *See* Menkel-Meadow, *supra* note 33.

The above illustrates how the quality standards identified in the workshop discussions reflect the ADR literature quite closely.

34. It is also worth noting what quality themes in the ADR literature were *not* reflected in the workshop discussions. (Of course, there is a great deal of attention in the literature to what could be called the administrative economy goal—expeditiousness and low cost. This was not reflected in the discussions because it was not part of the intended scope of the workshop, which focused on standards *other than* administrative economy.) Perhaps most interesting is the absence of reference in the discussions, apart from one passing remark, to the notion that economic efficiency—not in the sense of administrative economy but in the sense of promotion of efficient use of resources in productive activities—should be a quality standard for dispute resolution. This argument is made regularly in the literature, and not only by law and economics commentators. *See, e.g.*, Fuller, *supra* note 5, at 377; Lea & Walker, *Efficient Procedure*, 57 N.C.L. REV. 361 (1979); Nader, *Disputing*, *supra* note 33, at 1018-19; Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973); Singer, *supra* note 8, at 572-73. *See also infra* notes 75-76 and accompanying text.

Second, the discussions also paid only slight attention to the argument that protection of individual rights—seen not simply as an instrument for securing social justice, but as a civil-libertarian value encompassing procedural due process and protective of individuals poor *and* rich—should be a quality standard. This argument appears with some frequency in the literature. *See, e.g.*, Resnik, *Faith*, *supra* note 7, at 545-46; Resnik, *Appeals*, *supra* note 33, at 609-11. In the workshop, rights protection generally was treated as instrumental to the ultimate goal of Social Justice, *see supra* note 33 regarding the Social Justice standard, and concerns for "process values" independent of outcomes were discounted by many. Moreover, statements associated with the Individual Autonomy standard seemed less concerned with protection of rights in the traditional due process sense than with "citizen empowerment." Finally, at times the literature also suggests norm-creation itself as a quality standard. *See, e.g.*, Brunet, *supra* note 17, at 15-27. In my view, norm-creation is simply a sub-objective of some larger goal or standard of quality, usually either Social Justice, Social Solidarity, economic efficiency, or protection of rights. In the literature, one finds it stressed in all four contexts. In the workshop discussion, it was associated exclusively with Social Justice or Social Solidarity, and economic efficiency and rights protection were largely disregarded as distinct quality standards.

tions and their sub-objectives, it is important to stop and explain why we should take any of this information seriously. The central outcome of this workshop, the data it provided us, is essentially a collection of individual positions, statements, or views on what "quality" means in dispute resolution, or what valued social goals dispute resolution should attempt to further. Why should anyone care enough about this data to spend time analyzing and discussing it, as I am about to do? It is, after all, nothing more than data on opinions about quality. Does it really merit much attention? I will explain why I think it does and, in the process, respond anti-taxonomically to yet another "ordering" that was discussed, at least implicitly, in the proceedings—a taxonomy of interests concerned with dispute resolution and ADR.

B. *Whose Quality Standards?: The Taxonomy of Interests, and a Critique*

Consider two propositions about the definition of "quality" in dispute resolution:

(1) There is a clear and unequivocal objective meaning of quality readily discoverable in some accepted authoritative "text."

(2) Quality has no objective meaning at all, and all statements about quality are simply political positions taken to further particular interests.

If the first of these propositions is true, then studying the opinions expressed in our proceedings would have little point. We should, instead, simply open the text and read together. However, proposition (1) is not likely to find much support, since accepted authoritative texts are in short supply today.[35] On the other hand, if proposition (2) is accepted, the workshop results are worth studying, not for what they reveal about the definition of quality—which is indeterminate—but for what they reveal about the political interests and agendas of practitioners and students of dispute resolution.

This second approach was strongly urged by a number of speakers, on two different levels. First, it was argued, identifying the interests behind the ADR movement would disclose a clear political agenda adverse to the welfare of disadvantaged groups.[36] Second, the argument went on, not only do political interests determine attitudes toward ADR, they also determine conceptions of quality in general, so that every definition of quality is essentially a reflection of political self-interest. The usefulness of the opinions gathered at the workshop is that we can use them to disclose the precise interests that lie behind each conception of quality

35. *But see, e.g.*, McThenia & Shaffer, *supra* note 33; Bush, *supra* note 33. I note that the singularist viewpoint of this report does not correspond to this proposition, but to another discussed below. *See infra* text accompanying note 45.

36. For a similar argument, *see, e.g.*, Delgado, *supra* note 33; Harrington, *Delegalization Reform Movements: A Historical Analysis*, in I THE POLITICS OF INFORMAL JUSTICE 35 (1982); Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in I THE POLITICS OF INFORMAL JUSTICE 167 (1982); Nader, *Disputing*, *supra* note 33; Nader, *Binary Thinking*, *supra* note 33.

and, with the political dimensions of the quality issue thus clarified, make our political choices accordingly. As several speakers responded when asked to prioritize conflicting definitions of quality, "[i]t is not a matter of priority, but of politics." While it was never stated in wholly explicit terms, the implied conclusion was that any definition of quality other than Social Justice reflected a political agenda of self-satisfaction, accumulation, and exploitation inimical to the interests of the poor and disadvantaged.

Thus, proposition (2) was the basis for a "taxonomy of interests" in dispute resolution, including the general concept that definitions of quality derive entirely from political self-interest, and the specific views that ADR processes and non-Social Justice definitions of quality are expressions of interests inimical to the poor and disadvantaged. I will explain why I reject this taxonomy of interests and introduce my view that the opinions expressed at the workshop have significance apart from interest analysis.

First, some speakers forcefully made the case that ADR processes are utilized in many areas to disadvantage "have-nots." However, as at least one speaker noted in response, the implication that ADR has worsened the overall position of have-nots, vis-à-vis their originally disadvantaged position in the adjudication process, is very much open to question. Debate over this factual issue is necessary and valid: questions concerning impacts on have-nots must be investigated. But I believe the investigation is far from proving, as some comments suggested, that ADR categorically disserves the poor and disadvantaged.[37]

Second, as noted above, there was an implication that definitions of quality other than Social Justice reflected a political agenda of accumulation and exploitation, or at least indifference to the poor. This seems to me to be a great oversimplification, especially in light of the record of the views expressed in the proceedings. According to that record, practitioner speakers, whose statements focused heavily on the Individual Satisfaction criterion, nevertheless also made strong statements, implicit and explicit, reflecting commitment to Social Justice as a quality criterion. For example, practitioners said that quality required: no procedural advantage to either party, measures to neutralize preexisting advantages of stronger parties, outcomes not harmful to weaker parties, accessibility on equal terms to all similarly situated parties, and outcomes that produced institutional change.[38] While practitioners' statements primarily reflected the Individual Satisfaction definition, it would

37. For some discussion of this question, see Goldberg, Green & Sander, *supra* note 13, at 293; Menkel-Meadow, *supra* note 13, at 501, 504; Sander, *supra* note 20, at 16; Singer, *supra* note 8, at 575-79. Menkel-Meadow points to Marc Galanter's work describing the limited capacity of court adjudication to further the interests of the disadvantaged. *See, e.g.*, Galanter, *Why the "Have's" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975); Galanter, *The Duty Not to Deliver Legal Services*, 30 U. MIAMI L. REV. 929 (1976) [hereinafter Galanter, *Duty*]. *See also* Rubenstein, *supra* note 33.

38. Practitioner commentary in the literature also reflects the Social Justice standard in many cases. *See, e.g.*, Getman, *supra* note 28; Singer, *supra* note 8; Susskind, *supra* note 8.

be an oversimplification to label the speakers on this basis as an interest group inimical to the poor. This kind of group labeling can be as misleading as the process and context labeling discussed in earlier sections, distorting the actual character and concerns of the group in question and foreclosing opportunities for dialogue and persuasion among proponents of different quality standards.

My third and strongest objection to the taxonomy of interests also goes to its negative impact on dialogue. The basic assumption behind the interest approach is that, as proposition (2) above suggests, there is no determinate or true meaning of quality in dispute resolution, and all quality statements are simply reflections of political interests. This argument runs parallel to the arguments raised in legal scholarship by some followers of the Critical Legal Studies ("CLS") school, who argue that legal issues cannot be decided in any determinate fashion by objective principles, legal or otherwise, and that instead, "law is politics."[39] According to this argument, "[a]cts and relations possess no intrinsic meaning," "[t]ruth is seen as relative to any particular social or historical group," "society [is] the vulgar and contingent product of interrupted fighting," and law is a "process through which social structures acquire the appearance of inevitability" and objectivity that conceals their real source in social contingency.[40] As applied to the discussion of quality in dispute resolution, in the goal-furtherance sense, this argument supports proposition (2). The corollary is that reasoned dialogue about quality is impossible and pointless; instead, what is called for is the disclosure of positions by "deconstructing" value statements, as the preface to political struggle.

However, the "deconstructionist" program is increasingly questioned, even by its own adherents, as ultimately self-contradictory (or self-defeating). For the strong and consistent implication of the drive to deconstruct existing institutions is the need to establish, at some point, something better.[41] But, according to the fundamental CLS premise, there can be nothing "better" because there is no standard by which to call it so.[42]

Many CLS scholars do seem to have a vision of the good, and at the heart of that vision, for at least some of them, is something like the So-

39. *See, e.g.*, Kairys, *Legal Reasoning*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 11, 17 (D. Kairys ed. 1982); Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466, 1470-72 (1983) (reviewing POLITICS OF LAW).

40. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 214-17 (1984). *See also id.* at 208-13.

41. *See id.* at 227-30; Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 281-84 (1984).

42. *See* Hutchinson & Monahan, *supra* note 40, at 233, 235-36. Professors Hutchinson and Monahan observe: "All attempts at constructive theory seek to describe the world as it could and ought to be. Consequently, the major hurdle . . . is to provide some *normative* justification. . . . Yet, the very premises underlying Critical Legal thought appear to *preclude* such a justification: . . . [for this would] renege on their basic commitment to social contingency and historical relativity. CLS is ultimately hoisted on its own critical petard." *Id.* at 233 (emphasis added).

cial Justice definition of quality.[43] The same can be said of those who take the "all is politics" position about quality in dispute resolution. However, there is a fundamental inconsistency in arguing that "all is politics" and also arguing that quality means furtherance of Social Justice. Clearly, the implication of this quality argument is not just that its proponents prefer Social Justice to Individual Satisfaction as a matter of self-interest, but that the former somehow is objectively superior to the latter.

For example, in the workshop discussions, one exchange involved a speaker who took the "all is politics" position and also argued that social justice and "the underlying distributional problem" should be the focus of the quality inquiry. At the end of the exchange, the speaker acknowledged that the insistence on a social justice focus was "a normative position." This was indeed implied by the speaker's remarks as a whole, but it is also clearly inconsistent with the "all is politics" premise.[44] If a "normative position" is taken, then norms and objective standards must exist after all. Either "all is politics" and interests and norms are nonexistent; or norms exist, and there is an objective, determinate definition of quality. Both propositions cannot be true. When asked to choose, even deconstructionists seem to doubt proposition (2) and believe in the possibility of determinate standards. If this is so, however, what is called for is not simply political struggle but reasoned dialogue about why Social Justice should be considered superior to the competing definitions of quality. The problem with the taxonomy of interests is that it impedes and undermines the kind of reasoned dialogue and argument that is necessary to identify quality in dispute resolution.

Therefore, I reject that taxonomy and the underlying view that the opinions on quality expressed at this workshop can do no more than reveal political positions. Rather than subscribing to proposition (2), I adopt a third proposition about defining quality in dispute resolution:

43. *See, e.g.*, Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982); Abel, *Torts*, in POLITICS OF LAW: A PROGRESSIVE CRITIQUE 185 (D. Kairys ed. 1982); Gabel & Feinman, *Contract Law as Ideology*, in POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172 (D. Kairys ed. 1982). *See generally* Johnson, *supra* note 41, at 282-85. I note that the Social Justice definition is not the only one that CLS scholarship reflects. Individual Autonomy, Social Solidarity, and Personal Transformation are also major themes in CLS work. *See, e.g.*, Hutchinson & Monahan, *supra* note 40, at 230-33, 240-42; Hutchinson, *supra* note 16. The point of the text nevertheless holds: whatever vision, and whatever definition of quality, it implies a normative and not just an interest-based stance.

44. My colleague Janet Dolgin has pointed out to me that by the statement "all is politics," a speaker might actually mean to say that "all is ideology," that is, that all of our assertions about the meaning of quality are tainted with point of view and conditioning, so that one can never be sure if one's position reflects the objective truth or not. The implication of such a statement is that, while there *is* an objective truth or reality, we can never be certain of having found it. If this is the intended meaning, then "all is politics" is a call to compare and argue over distinct points of view and thus try to come closer to the truth. It is then necessary not only to reveal positions but to articulate reasons and engage in dialogue and persuasion. If this is what was meant by "all is politics" at the workshop, then it corresponds closely to my singularist viewpoint as discussed earlier, and I am in full agreement. However, my perception was that in the workshop discussions, the statement carried the meaning discussed in the text, *see supra* text accompanying notes 39-40, rather than the meaning suggested here.

(3) Quality has a determinate, objective meaning, but one that is discoverable only by reasoned dialogue and argument among holders of different opinions.[45]

This proposition reflects and corresponds to the singularist viewpoint I described in Part I, just as proposition (2) reflects and corresponds to the pluralist viewpoint. I believe that the opinions about quality expressed in this workshop merit careful analysis precisely because they provide the starting point in the dialogic search for a singular definition of quality in dispute resolution, a search that I value for reasons stated above.

C. *Analyzing the Definitions of Quality: Relationships, Ambiguities, and the Problem of Choice*

Returning then to the quality standards suggested in the workshop and summarized in Section A, probably the most useful place to begin analysis is with the insight noted first by David Luban: that the different definitions of quality cannot be treated as complementary criteria, which should all be applied together to evaluate any dispute resolution process. Rather, they are, to some extent at least, mutually inconsistent and must be regarded as alternative, competing definitions of quality, among which we must choose or at least establish an order of priority. This insight echoes the singularist viewpoint on multiplicity of quality standards, especially the argument of the necessity of choice as a practical matter.

This necessity is evident from examining the quality standards and sub-objectives in Table I above. Thus, if Individual Satisfaction is the quality standard, meeting all of its sub-objectives would make it impossible to meet simultaneously many sub-objectives of the Social Justice definition. Satisfying the first criterion precludes satisfaction of the second. The same would apply to the Social Justice and Social Control definitions. In other cases, while mutual satisfaction might not be impossible, it could be extremely difficult, as is evident from comparing the relevant sub-objectives: satisfying Social Justice could make it quite difficult to satisfy Individual Autonomy or Personal Transformation; satisfying Social Solidarity would make it difficulty to satisfy Individual Satisfaction or Personal Transformation.

On the other hand, comparison of sub-objectives also shows that some of the criteria conflict little, or even overlap to some degree. As noted earlier, some sub-objectives relate to more than one goal. There is considerable overlap, for instance, between the Individual Satisfaction and Social Control criteria, suggesting that these two standards may be largely complementary. One interpretation of this could be, as some speakers implied, that the Individual Satisfaction standard is simply a screen for a Social Control agenda. There are, however, other interpretations, as will be discussed below. With other goals, overlap is less ap-

45. I see support for this proposition in the account of the good offered by Sandel in his critique of the liberal theory of justice. *See* M. SANDEL, *supra* note 16, at 165-83.

parent, but sub-objectives do not necessarily appear inconsistent. Individual Autonomy and Personal Transformation sub-objectives do not seem to conflict completely; Social Solidarity and Social Justice sub-objectives may reinforce rather than conflict. This pattern raises the possibility of describing mutually competitive sets or coalitions of criteria: for example, Individual Satisfaction and Social Control, Social Justice and Social Solidarity, Individual Autonomy and Personal Transformation.

However, a major difficulty in clarifying the relationships between and among sub-objectives and quality standards is that the discussions simply left many important questions unanswered, and even unasked. For example, do overlapping sub-objectives indicate complementary standards, or just an imprecise understanding of which standard is the target of the sub-objective in question? Where sub-objectives were stated implicitly (twenty-seven of fifty cases), do they mean what they seemed to mean, and (whether explicit or implicit) are sub-objectives properly associated in this report with the general standard originally intended by the speaker? In other words, when someone made a particular statement about quality, did it mean what it appeared to mean, and what general definition of quality did the speaker really have in mind? In attempting to find patterns in the discussions, it is first necessary to confront the many ambiguities left in the record. In the following section, I analyze more closely the extent of the ambiguity about quality standards left by the workshop discussions.

D. *What Quality Standards (Again)?—Problems of Interpretation*

The six general quality standards articulated in Section A, as inferred from specific statements about quality sub-objectives, appear at one level to present distinct and intelligible alternatives (although certain interrelationships are also evident). However, on closer examination, each of the standards is far more ambiguous than first suggested. The reason is that, despite the logical inference of these standards from specific quality statements made by different speakers at the workshop, the real intent of the speakers was hardly ever completely clear from their statements. As a result, different interpretations of intent are possible, with quite contradictory implications about the definition of quality actually being proffered by the speaker. Two detailed examples follow that focus on the two quality standards most commonly discussed during the workshop—Individual Satisfaction and Social Justice.

Identification of Individual Satisfaction as a quality standard, as inferred from specific sub-objective statements, might actually rest on one of three very different grounds, each of which is consistent with the various sub-objective statements interpreted in Table I as identifying quality with furtherance of Individual Satisfaction. First, and most obviously, concern for Individual Satisfaction might be based on a belief that satisfaction or pleasure is the greatest good in life, so that where dispute resolution produces Individual Satisfaction, it achieves the highest good.

In the workshop, David Luban described this as the hedonistic assumption and saw it as the implicit basis of the Individual Satisfaction standard as maintained by many participants. Dispute resolution, according to this standard, is good when it gives the disputants the greatest possible pleasure (or the least possible pain) that the situation allows.

However, this is not the only possible basis for proffering the Individual Satisfaction standard. A second basis is a very different argument based on the value of individual autonomy or sovereignty. That argument, common to liberal political theory and classical economics, holds that the good cannot be defined collectively because every individual is a sovereign and inviolate being.[46] Therefore, the highest good, in the political sense, is respect for individual choice and autonomy so that each individual will be allowed to realize his or her own self-determined concept of the good. Maintaining the Individual Satisfaction standard in dispute resolution is similar to maintaining the Pareto-optimality standard in economics, with its assumption of the impossibility of interpersonal comparisons of utility. Identification of Individual Satisfaction as a quality standard, on this interpretation, does not rest on belief in pleasure as the highest good, but on the belief that only the individual can define the good, in his or her own terms. Refusal to adopt any standard other than Individual Satisfaction reflects a commitment to allowing individuals to define the good for themselves, a refusal to impose on the individual any external definition of value. Thus, the basis for the Individual Satisfaction standard might be not hedonism, but the value of individual autonomy.

The ambiguity goes further, for there is a third possible basis for the Individual Satisfaction standard: concern for Individual Satisfaction may stem from an interest in "satisfying" individual disputants purely as a way of buying their acquiescence (whether they know it or not) to a structure or system in which one holds, and wishes to keep, a certain degree of power.[47] Since satisfaction is a matter of perception, not objective value, concern for satisfaction has nothing to do with giving disputants the greatest possible pleasure or respecting their autonomy, either of which might change the existing distribution of power; instead,

46. Murphy summarizes the argument as follows: "Society is composed of individuals. It has no reality independent of its members . . . . [T]he group is not a source of value in its own right. For the good is relative to the wants of distinct persons." Murphy, *supra* note 16, at 126. In Nozick's words, "There is no *social entity* with a good [of its own] . . . . There are only individual people . . . with their own individual lives. Using one of these people for the benefit of others . . . does not sufficiently respect and take account of the fact that he is a separate person." R. NOZICK, ANARCHY, STATE AND UTOPIA 22-23 (1974). According to Rawls, "[e]ach person possesses an inviolability . . . that even the welfare of society as a whole cannot override." J. RAWLS, A THEORY OF JUSTICE 3 (1971).

47. Abel, for example, argues that "with respect to grievances that arise out of injury to the consumer . . . , the goal of state and capital is to defuse the anger of those injured and forestall public sympathy by satisfying claims through the payment of small, predictable amounts." Abel, *supra* note 33, at 281. Marc Galanter pointed out to me, in a comment on an earlier draft of this report, that the desire to buy acquiescence may not be limited to "state and capital," but may extend to anyone who is better off in the existing order than they fear might be the case in any potential reordering of power.

the concern is simply with giving the disputants enough of perceived value to keep them content, docile, and agreeable to the continuation of the existing order. The basis of the Individual Satisfaction standard might be neither hedonism nor respect for the individual, but the desire to preserve the status quo.

What should be evident from the above discussion is that quality statements appearing to identify Individual Satisfaction as a quality standard actually may be intended to identify Individual Autonomy or Social Control as standards. The Individual Satisfaction standard itself may be merely a confused or non-explicit version of one of these other two. In fact, this sort of reinterpretation of ambiguous standards seems to have occurred to participants during the workshop discussions. While David Luban characterized the Individual Satisfaction standard as a distinct, hedonism-based standard, others, like Judith Resnik, seemed to see it as deriving from the reluctance of authorized decision makers such as judges to set forth some collective definition of the good that might oppose and override the individual's autonomous definition.[48] In short, the Individual Satisfaction standard was really an Individual Autonomy standard. Still others, like some researcher panelists, implied that they saw the Individual Satisfaction standard as a mere front for the Social Control standard. Given the ambiguity of the record, all three of these interpretations are plausible.

As a second example of the ambiguities latent in the quality standards as earlier defined, consider the possible bases for sub-objective statements interpreted in Table I as proffering the Social Justice standard. The most obvious reason for such statements might be a belief in the value of reducing suffering wherever it exists. On the assumption that the suffering of the poor in an unequal society vitiates the value of the pleasure of the rich, the desire for equity in distribution could be based on a version of the pleasure/pain principle applied to society as a whole, focusing on the elimination of suffering where it is greatest. The elimination of suffering is the good on which the Social Justice standard rests.

However, this argument itself implies another basis for identifying quality as furtherance of Social Justice. The focus on the suffering of disadvantaged *groups* in particular implies that concern for social justice does not stem from valuing pleasure (abhorring suffering) *per se* and wanting everyone to have as much pleasure and as little suffering as possible. Rather, it stems from valuing the individual as such, not his expe-

48. I should clarify that I saw this view as implied by Judith Resnik's remarks, but it was not explicitly stated by her. Professor Burbank does make an explicit suggestion along similar lines. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1486-87 (1987) (reviewing R. MARCUS & E. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (1985)). Second, I do not construe Professor Resnik's implied suggestion on this point as an endorsement by her of an Individual Autonomy quality standard (or an autonomy-based Individual Satisfaction standard). In fact, her writing suggests to me that she would probably incline more to a Social Justice or Social Solidarity standard, or to the view that rights protection in the traditional due process sense is the meaning of quality in dispute resolution. *See supra* notes 33-34 and sources cited therein.

rience of pleasure or freedom from pain. The concern is that no person should be subjected to *class* discrimination, in access to material goods or otherwise, because such discrimination, whenever it occurs, not only causes suffering, but undermines respect for and degrades the individual as such. Discrimination denies its victims not only pleasure but, worse, recognition of their basic worth as individuals—their individuality.[49] Thus, respect for the individual as such is the greatest good. And, in order for the individual as such to be assured respect, autonomy, and dignity, protection against class discrimination, whether based on wealth, race, gender, or otherwise, must be guaranteed for all. According to this interpretation, the Social Justice standard is proffered not because of a concern for improving the material well-being of some individuals, but because of a concern for preserving the autonomy and dignity of all individuals.

On the other hand, the identification of Social Justice as a quality standard may be based on a third reason concerned not with individuals at all, whether their suffering or their autonomy, but with the social fabric as a whole. If strengthening that fabric, that is, overcoming the centrifugal tendency of an individualistic and pluralistic society and creating some measure of commonality and connection among individuals, is considered a good, then this good may be a separate and distinct reason for proffering the Social Justice standard. Articulating a general public value of helping, or at least not hurting, the disadvantaged and encouraging group identification and solidarity, with or among the disadvantaged, are important because they increase social cohesion and balance the centrifugal force of individualism.[50] Furthering Social Justice means quality not because it helps the poor or protects the individual, but because it binds us together as a people.

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49. This type of argument for social justice seems to underlie, for example, Rawls' argument that the basis of equality is the individual human being's "capacity for moral personality," such that class discrimination would violate the equality of "human beings as moral persons." J. RAWLS, *supra* note 46, at 511, 504-12. It also seems implicit in Dworkin's suggestion that the "right to equal concern and respect," or the "right to treatment as an equal" is the "central concept" of his theory of political rights, such that arbitrary class discrimination is "treating a man as less than a man, or as less worthy of concern than other men." R. DWORKIN, TAKING RIGHTS SERIOUSLY 199, 180-81, 198-99, 272-75 (1977). In short, the idea that social justice is necessary to protect individual dignity is central to the egalitarian branch of liberal political theory. *See* Murphy, *supra* note 16, at 131-35. Richard Delgado's explicit concern for controlling prejudice in dispute resolution processes, that is, disregard of an individual's unique qualities because of stereotyping, can be read as an expression of this individual dignity-based argument for a Social Justice standard. *See* Delgado, *supra* note 33, at 1360 n.8, 1380-84.

50. For example, Owen Fiss argues in favor of "structural reform" litigation, *see* Fiss, *Forms*, *supra* note 7, by which he seems to mean efforts to improve social justice through litigation and judicial intervention in restructuring a variety of public institutions. However, this social justice-related argument seems based, in some of his writings, on an even deeper concern for balancing "individualism" and the "privatization of ends" in our society by placing more emphasis on "the existence and importance of public values" through the articulation of norms that express and give shared meaning to such values. In other words, it is the creation of shared meanings and solidarity, and not the attainment of social justice in itself, that is the fundamental concern and value. Fiss, *supra* note 14, at 122-28. *See also infra* note 52.

Finally, a fourth argument could underlie the Social Justice standard. That standard could be proffered because of a concern not for the suffering of the poor, the dignity of the individual (rich or poor) or the solidarity of the society as a whole, but for the transformation of the character of the rich. In other words, the Social Justice standard might rest on the belief that it is good for individuals to overcome their selfishness and be concerned with the welfare of others, especially those less powerful, whom they could have no ulterior motive for helping. Getting the "haves" to share with and help the "have-nots" is important because it accomplishes, at some level, a weakening of selfishness and a strengthening of sensitivity to and compassion for others.[51]

Once again, these four alternative interpretations suggest that subobjective statements appearing to identify Social Justice as a quality standard actually may be intended to identify Individual Autonomy, Social Solidarity, or Personal Transformation as standards. Again, there is some recognition of this in the workshop proceedings. For example, Lucinda Finlay's remarks suggested that her interest in social justice stems in part from a belief in the importance of personal transformation. Joel Handler's remarks clearly expressed the elimination of suffering rationale; nevertheless, he implied in discussions afterward that "transformative values" also motivated his interest in social justice. Richard Delgado implied, especially in his reference to the importance of maintaining a "Rawlsian perspective," that his support for the Social Justice standard rested at least in part on a belief in the importance and value of individual dignity, rather than the elimination of suffering rationale alone.

The discussion here has illustrated the ambiguous meanings of, and alternative interpretations of statements appearing to proffer, the Individual Satisfaction and Social Justice standards. A similar analysis could be made regarding statements that appear to proffer each of the other standards described earlier. Statements apparently identifying Social Control as a quality standard may actually be intended to identify Individual Satisfaction or Individual Autonomy as standards. Statements appearing to identify Personal Transformation as a quality standard may

51. Such an argument is suggested by McThenia and Shaffer in their response to Fiss' critique of ADR. *See* McThenia & Shaffer, *supra* note 33, at 1664-66; Fiss, *Settlement*, *supra* note 7. They tie their argument to traditional religious value systems. I note that, beyond the sources cited by McThenia and Shaffer, traditional Jewish sources regarding the obligation of protecting and helping the weak suggest a similar theory of social justice. For example, one oft-cited commentary explains that, "The poor man [who receives charity] does more for the master of the house than the latter does for him," one implication being that the opportunity to exercise compassion is an even greater value than the alleviation of the suffering of the poor. MIDRASH RABBAH (LEVITICUS) 34:8 (H. Freedman & M. Simon eds. 1939) (commenting on *Ruth* 2:19). *See generally*, Bush, *supra* note 33. There is also an implicit suggestion in Riskin's argument regarding fairness in mediation that the value of fairness is tied to the even deeper value of mutual recognition and compassion. *See* Riskin, *supra* note 7, at 331-32, 354-57. This implication is strengthened by Riskin's reference to the work of developmental psychologist Carol Gilligan on the "ethic of caring" contrasted to the "ethic of justice." *See* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 2 (1982).

actually be intended to identify Social Solidarity as a standard, and vice versa. I emphasize that this problem of ambiguity of standards is by no means a problem limited to the workshop discussions. It is another important way in which the workshop is a microcosm of the field, in which precisely the same kinds of ambiguity abound.[52]

However, some readers may ask why I consider ambiguity of stan-

52. The ambiguity of quality standards in the literature has already been partly suggested in the earlier review of the range of quality standards found in the literature. *See supra* note 33. However, the point is worth elaborating. Some of the work reflecting the Social Justice definition of quality, for example, rests fairly clearly on an elimination of suffering rationale that relates unambiguously to the Social Justice standard. *See, e.g.*, Nader, *Disputing*, *supra* note 33; Singer, *supra* note 8; Tomasic, *supra* note 33. However, other work relates to the Social Justice standard on one level, but seems on closer inspection to rest on other rationales that relate to other quality standards. The effect is to create the same kind of ambiguity in the meaning of the Social Justice standard that is described in the text.

For example, Fiss' explicit emphasis on the importance of "structural reform" litigation on behalf of weak and disadvantaged groups strongly suggests the Social Justice quality standard. *See* Fiss, *Settlement*, *supra* note 7, at 1076-90; Fiss, *supra* note 14, at 121-32; Fiss, *Forms*, *supra* note 7, at 2-5. However, consider his recurring reference to the elaboration of public values, the "meaning-giving enterprise," and especially his argument that judges "enforce and create society-wide norms . . . *as a way* . . . *of giving meaning to public values*." Fiss, *Forms*, *supra* note 7, at 2, 29, 31, 36 (emphasis added). The implication is that the creation and enforcement of norms, including those that promote social justice, is important not only or primarily because of the content and effect of the particular norms, but because of the sense of public, shared meaning—the social solidarity—that the articulation of shared norms itself creates. *See supra* note 50 and accompanying text. Fiss himself writes, at one point, "equality only had [in the sixties] a *representative* significance: it stood for an entire way of looking at social life. It emphasized what I have called public values, the values that define a society and give it its identity. . . . *Rights* . . . *were an expression of our communality rather than our individuality*." Fiss, *supra* note 14, at 128 (emphasis added). Thus, while Fiss' work is not wholly clear on this, his deeper rationale for valuing norm-creation that promotes social justice seems to be a concern for constructing shared meaning—a rationale that relates more to the Social Solidarity than to the Social Justice standard of quality.

Similarly, when Riskin argues that "the ultimate issue in mediation [is] fairness," Riskin, *supra* note 7, at 349, his ultimate concern may not actually be the Social Justice standard, despite initial appearances. In "fairness," Riskin includes both subjective fairness—outcomes (and processes) seen as fair by both parties—*and* objective fairness—outcomes (and processes) that meet external standards of fairness to the parties and affected outsiders. *Id.* at 354. Thus, he seems to adopt a quality standard of Individual Satisfaction *constrained* by Social Justice, making Social Justice the ultimately controlling standard. However, a closer reading reveals that "the most important part of the fairness standard is the subjective fairness notion," *id.* at 356, and that the main value of this notion is that "[it] is aspirational and . . . subjective . . . [and] could encourage the kind of dialogue that would help make a perspective of caring and interconnection available to the participants." *Id.* at 353. If this is the main value of fairness, then Riskin's apparent concern for Social Justice turns out, on closer examination, to rest on a rationale that relates much more closely to the Personal Transformation definition of quality. *See also supra* note 51.

Thus, in Fiss' work the Social Justice standard rests on a social solidarity rationale and may in fact be a Social Solidarity standard, while in Riskin's work the Social Justice standard rests on an expression of compassion rationale and may thus be a Personal Transformation standard. These two examples are discussed in some detail to show how, to the quality taxonomist, ambiguity of quality standards is as much a feature of the literature as it was of the workshop discussions. These are merely examples, however, and, as suggested by these examples and by the discussion of note 33 *supra*, the problem of ambiguity of quality standards is widespread in even the most challenging and thoughtful dispute resolution commentary.

dards a "problem" at all.[53] They may argue that my concern over ambiguity of quality standards is misplaced.[54] I assume, in responding to this argument, that the above discussion has adequately demonstrated that the quality standards identified at the workshop *are* ambiguous. In fact, I think the discussion has shown that the standards as identified in the workshop are unclear in three crucial and related aspects: (1) it is unclear *what* is really meant by each of the six quality standards and *why* each is proffered; therefore (2) it is unclear whether they are really distinct from one another, and if so, how; and therefore (3) it is unclear what ultimate choices are posed between them and what is really at stake in the choices posed.[55]

These elements of ambiguity surely pose serious problems for anyone interested in the measurement and definition of quality—the two

53. This question was raised by, among others, Judith Resnik in the course of her comments on an earlier draft of this report.

54. Such an argument might rest on three points. First, ambiguity is endemic in discussions of social policy. Second, ambiguity is in any event unavoidable in this type of inquiry, so there is no point wasting energy in a futile effort at clarity. Finally, ambiguity of quality standards causes no serious negative consequences, so it is not really problematic anyway. The first point really rides on the other two because if the ambiguity of quality standards is a serious and avoidable problem, the fact that ambiguity also characterizes discussion of other problems is hardly a reason to accept it here. The last point requires a fuller response. If the kind of ambiguity illustrated above is not a serious problem, why indeed should it concern us? I respond in the text here to this question. I will return to the second point in the following section, explaining why I believe that ambiguity is not an unavoidable problem.

55. Similar ambiguities cloud the conceptions of quality found in the literature, as discussed above. *See supra* notes 33 & 52. Given the ambiguity of the standards, one suggestion might be simply to forget about the standards and revert, for identifying and measuring quality, to the original sub-objective statements themselves. After all, the standards are simply generalizations from the more particular sub-objective statements. If the generalizations are too ambiguous to be useful, why not focus directly on the particular quality statements?

There are a few reasons why this suggestion will not solve the problem. First, if each of the fifty quality statements is taken as a separate quality standard, the number is already quite unwieldy for evaluation and measurement purposes. Second, the ambiguity discussed in the text is not simply a problem of the general quality standards. It is equally problematic at the level of the sub-objective statements themselves, as is clear from the fact that many are associated with more than one standard. *See supra* note 32. For example, sub-objective statement 13 under *Individual Satisfaction* says that quality is attained when "the outcome does not depend upon technicalities." This statement is grouped under Individual Satisfaction but is also associated with Social Justice, as is statement 9 under *Individual Satisfaction*, stating that quality is attained when "the parties comply with the result." The joint association means that we do not know whether the speakers' quality concern here was really Individual Satisfaction or Social Justice. In fact, depending on the circumstances, fulfillment of these two sub-objectives would in some cases further Individual Satisfaction at the *expense* of Social Justice (and in other cases vice versa). But if the speakers' real concern was Social Justice, he or she would not then *want* these particular sub-objectives to be met. Therefore, ignoring the standards and focusing on sub-objectives does not help us to identify or measure quality because the crucial question is still the deeper reason *why* particular sub-objectives—*and* standards—are considered important. In short, there is ambiguity at both levels. Thus, the solution to the problem of ambiguity of the general standards is not to focus on sub-objectives instead, but to probe more deeply into, and clarify, the rationale and values underlying *both* the standards and the sub-objectives. For an attempt to do so, *see infra* text accompanying notes 73-80. The above argument does not suggest that definitions of quality are context-dependent, only that context may affect how a particular quality standard can be met. *See supra* note 23 and accompanying text, *infra* note 72 and accompanying text.

major concerns of this workshop. First, if quality standards are unclear, it is difficult to use them in evaluation, that is, to know whether and when a given standard has been met. Second, if standards are unclear, then the relation between them is unclear, and it is difficult to know whether two standards are conflicting, reinforcing, or simply independent. Of course, if none of the quality standards suggested here conflicted—if all could be met simultaneously—then distinctions would not matter. However, as David Luban suggested, it is unlikely that all the standards can be satisfied at once, or that all are equally important. Therefore, choices must be made about which standard to satisfy, or which to put first. If this is so, understanding the distinctions between them, and the reasons behind them, is crucial. Ambiguity obscures these distinctions and reasons, and frustrates the exercise of choice.

Of course, according to what I have called the pluralist viewpoint on quality standards, this kind of frustration of choice might not seem a major problem. Since the pluralist assumption is that no objective grounds exist in any event for making such choices—that is, since choices are based on preference rather than reason—lack of clarity in definition may not seriously frustrate the exercise of choice. (Although even pluralists would probably consider it important to define standards with enough clarity to permit *informed* choices to be made, even if the choices are not based on objective grounds.)

However, as noted earlier, this report assumes the singularist viewpoint on quality standards. Given this viewpoint, ambiguity in suggested definitions of quality is a serious problem because it obstructs the dialogue that is a necessary preface to choice.[56] The singularist view is that choice among (or prioritization of) competing definitions of quality *is* necessary and *can* be exercised on objective grounds, and that dialogue among holders of different views is the best tool for discovering which of the competing definitions of quality (or which priority ordering of definitions) is objectively best. Therefore, obstruction of dialogue destroys a crucial tool for making crucial choices. Furthermore, as stated earlier, I believe that the revelation and expression of individuals' connectedness to one another is a primary value, and that dialogue to define quality in dispute resolution presents in itself an excellent opportunity for realizing this value. Therefore, obstruction of dialogue destroys that opportunity.[57]

56. Ambiguity in the formulation of suggested quality standards is a problem because it frustrates the very initiation of the dialogue and debate. It prevents the engagement of different positions that begins dialogue because there *are* no clear positions with which (or from which) to become engaged. Ambiguity in the articulation of the reasons supporting the adoption of different suggested definitions of quality is a problem because it frustrates the continuation of any dialogue that was started. It limits the engagement of positions that began the dialogue because it makes it impossible to pursue the engagement to a deeper level.

57. This last point is closely connected with my own identification of quality in dispute resolution as some combination of the Social Solidarity, Personal Transformation, and Individual Autonomy standards, a position I discuss more fully in Part VI below. *See infra* text accompanying notes 77-78.

My characterization of ambiguity of quality standards as a problem therefore rests both on my singularist viewpoint and on the value I place on manifesting interconnection.[58] Those who reject this viewpoint and this value may well view ambiguity with less concern. Nevertheless, I believe that others, including some speakers at the workshop, share this concern about ambiguity, whether for the same or other reasons. *One* other important reason to be concerned about ambiguity of quality standards lies in the problem that prompted this workshop in the first place, as noted in the workshop precis. As stated there, the tendency has been for arguments based on administrative efficiency—time and cost savings, and numbers of cases processed—to dominate discussion of ADR and judicial reform.[59] The need to focus attention on other arguments based on "quality," rather than numbers and cost alone, was apparently a key purpose of this workshop. However, as long as quality arguments are vague and ambiguous, they will have scant hope of attracting attention away from efficiency arguments, which—even if they are sometimes factually erroneous—always appear very clear and concrete. In short, quality arguments must be extraordinarily clear and concrete if they are to compete with efficiency arguments in influencing dispute resolution policy. Otherwise, efficiency arguments probably will prevail by default, even if their "clarity" is deceptive and their factual premises questionable.

The foregoing should help to explain why I regard ambiguity of quality standards as a serious problem. Nevertheless, another point remains. If the kind of ambiguity illustrated above is simply *unavoidable*, then it is futile to struggle against it, no matter how serious a problem it creates. However, in my view, ambiguity of quality standards in dispute resolution is not an inevitable problem. In the following Part, I explain why I take this view.

V. Clarifying Quality Standards: Discussing Definitions of Quality, the Problem of Clarity, and Some Alternative Approaches

As illustrated in Part IV, many ambiguities surround the definitions or standards of quality in dispute resolution suggested in the workshop discussions. Was this level of ambiguity simply inevitable, given the nature of the subject? In my view, the answer is both yes and no; that is, given the structural constraints of this workshop, such ambiguity may have been largely inevitable. However, there may be alternative approaches that could, in future work, produce greater clarity in the quality discussion. Examining some of the ways in which the workshop discussions created ambiguity can help to suggest ways of achieving

58. In fact, these two are connected at some level, as I will suggest below. *See infra* text accompanying note 86.

59. *See* Institute for Legal Studies, University of WisconsinMadison Law School, Workshop Materials 1 (1987); Brunet, *supra* note 17, at 11, 17, 27; Galanter, *supra* note 17, at 8-10; Menkel-Meadow, *supra* note 13, at 487-88, 496-97. The argument in the text here grew out of a conversation with Professor Elizabeth Schneider.

greater clarity in future work. With this purpose, I submit the following observations based on my study of the record of the proceedings.

First, as noted earlier, of fifty specific quality sub-objective statements made by different speakers, over half were only implied by the speakers' remarks or by questions they directed to others, rather than stated directly or explicitly. For example, one practitioner panelist explicitly stated his quality standards as efficiency and party satisfaction. However, in telling an anecdote concerning a personal injury case handled by a summary jury trial, he stressed the general problem of individual plaintiffs seeking compensation from corporate defendants with time and economic leverage on their side. Through summary jury trial, the victims in this case received significant compensation within a short time. One implication was that this—neutralization of unequal power and the consequent result of fast compensation of needy victims, not simply the speed and low cost or party satisfaction—was the good to which he was pointing.[60] In short, while this speaker made explicit quality statements focused on party satisfaction and expeditiousness, he also made implicit statements suggesting Social Justice as an important quality standard. Many other speakers also identified quality standards implicitly as well as, or rather than, explicitly.

Second, on several occasions, implicit statements about quality were followed, naturally enough, by questions seeking to clarify the precise meaning of the implication. However, the opportunity for clarification was frequently not exploited, and the original ambiguity remained. For example, some speakers suggested what should be considered important research questions about quality, which themselves carried possible implications about the definition of quality. However, specific questions asked by others to clarify these implications were left unanswered.

Third, even when speakers made quite explicit quality statements, the statements were often about particular quality sub-objectives, and it was not entirely clear why the sub-objective was considered important and hence which quality standard the speakers were ultimately advocating. As illustrated above, specific quality statements can often be interpreted as supporting one or another of several quality standards, and this ambiguity is a major problem in understanding what standards mean and what conflicts really exist among quality standards. For example, one speaker's statement that the "Rawlsian perspective" should be kept on the list of quality standards implied that his explicit quality statements might be read as supporting an Individual Autonomy as well as a Social Justice standard of quality; other speakers' explicit quality statements relating to redistributive impacts and neutralization of power advantages, or empowerment of women, could rest on an elimination of

60. Later, in his response to a question about how to handle a case in which the time delay involved in a mandatory pre-litigation ADR device might prejudice a poor litigant's situation, the same panelist commented that, while adjudication does not guarantee the poor litigant a quick victory, "it would be unjust to submit a poor plaintiff to a system that would hurt him." Another panelist's response to the same question was that the court would have to do something "to preserve the equal position of the parties."

suffering rationale implying a Social Justice standard, or on an attitude modification rationale implying a Personal Transformation standard. Without further clarification of the reasons behind these explicit quality statements, the ambiguity remains; but the discussion did not reach this additional level of clarification.

Finally, some speakers made explicit quality statements clearly tied to particular quality standards, but did so without explaining in any depth the reasons underlying their advocacy of the standard in question. A good example of this was my own statement of my view that the evocation of recognition for the other party is the highest "good" to be sought in dispute resolution, a statement closely connected with the Personal Transformation standard. While the statement and standard were clear, no reasons were offered to explain why this view makes sense or why others should be persuaded of it, although articulation of such reasons is crucial to dialogue over quality standards. The same could be said about statements made by other speakers.

Thus, the record of the workshop discussions shows primarily implicit rather than explicit expression of quality statements, lack of clarification of implicit or ambiguous quality statements, and articulation of explicit statements and standards unaccompanied by reasons.[61] In my view, these different kinds of indirect and incomplete communication were largely responsible for the ambiguity of quality standards discussed in Part IV and the consequent obstruction of dialogue as a tool for choice and an opportunity for interconnection.[62] If this is so, however, then it cannot be said that this ambiguity was *unavoidable*. It could have been avoided at least in part, if speakers had been more direct and clear in their remarks. Of course, this assumes that ambiguity represented either indirectness or imprecision of expression by individual speakers. This was at least sometimes the case, according to my study of the record, and to this extent ambiguity could be avoided by greater directness and clarity on the part of individual speakers. However, I think that an equally significant reason for ambiguity was the presence of certain structural constraints on the discussion. Hence, apart from individual efforts at clarity, it is also possible that the overall structure of a discussion on quality could be arranged in a different manner, likely to produce greater clarity and more dialogue.

Discussions to identify quality in dispute resolution, where the participants hold different and even contrary views, will almost inevitably leave much unresolved ambiguity where time is short, the number of

61. Some participants commented on these points during the workshop itself. For example, one speaker, voicing frustration with the discussion, said that she wanted to hear why the different standards suggested by different speakers were important to them, to hear "any question pursued in depth." Another echoed this desire, commenting that discussion of "quality" implies personal judgments, and if so, more explicit discussion was necessary of "what do you want to know, and why is that important to you?" Others made similar observations.

62. In a sense, then, the ambiguity of quality standards was both the result of limitations in the dialogue that did take place and the cause of obstruction of further dialogue. *See supra* note 56 and accompanying text.

voices is large, and an audience is watching.[63] All three of these things were true of this workshop—although I understand that this was not the original design[64]—and I believe that this goes a long way to explaining the patterns of communication illustrated above and the resulting level of ambiguity of quality standards. In short, while greater individual efforts at clarity could have made *some* difference, a good deal of ambiguity probably *was* largely unavoidable in this workshop because of structural factors like those mentioned. However, the structural factors *themselves* are not unavoidable. It is possible to imagine, and plan in the future, a discussion with more time, fewer voices, and more privacy, and such an environment would stand a good chance of producing considerably more clarity about the different quality standards and their relationship. It is similarly possible to imagine, and plan in the future, a discussion where, whatever structural constraints are present, a facilitator is present to help, if necessary, focus discussion, clarify positions and differences, surface reasons for positions, and otherwise overcome the effects of those constraints.[65] Again, such an approach could help produce more clarity about quality standards.

In sum, one important outcome of this workshop, apart from substantive insights about quality standards themselves, can be methodological insights about how to continue and improve efforts to identify and measure quality. The observations of this Part regarding the workshop discussions are intended, and included here, as the basis for this methodological conclusion: ambiguity about quality standards is *not* an unavoidable problem, but avoiding it depends both on individual efforts at clarity and, equally if not more so, on controlling certain structural features of the discussion—time, numbers, publicity, and perhaps others—and providing for a facilitative agent to help overcome these and other problems in discussion.

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63. Consider an analogy. Parties to negotiations often begin by making ambiguous opening statements in which goals and priorities are buried at considerable depth. They do so not necessarily by design or lack of care, but because at the beginning of discussions parties are often genuinely unclear about their positions and naturally hesitant about revealing themselves to one another. Clarity and communication often improve as the process progresses. Whether this occurs may depend on factors such as the time available, the number of parties, and the degree of publicity. Clarity and rapport require time to achieve, discussions are usually freer and more direct without an audience, and effective interchange is easier with smaller numbers. But, if the time is short, the number of parties is large, and the discussions themselves take place before an audience of nonparticipants, the likelihood of getting stuck at or near the initial level of ambiguity, and facing impasse, is high.

64. The original intent was, as I understand it, to have a smaller group in which all would be full participants and there would be no nonparticipating observers. The degree of interest in the workshop was so high, however, that it was understandably difficult to avoid the expansion that occurred.

65. To return to the above analogy, even where negotiations flounder because of structural factors, a facilitator or mediator can often reinstate dialogue by various means. In fact, after the workshop, one of the practitioner panelists actually suggested that a mediator could have made a big difference to the discussions, despite the structural factors. The point here is not to suggest that agreement would necessarily be reached on any one definition of quality. However, greater clarity could be produced about the *different* definitions proffered and the reasons underlying them.

As noted above, ambiguity of standards is as characteristic of the larger field as it was of the workshop discussions. The methodological conclusion here, while derived from the workshop experience, can also be applied to the larger discussion of quality, for example in the ADR literature. In the literature, the phenomena of implicit, unclear, and unexplained quality arguments are also common.[66] Since the structural features of the discussion in the literature are relatively fixed, this makes it all the more important to insist on the greatest possible clarity on the part of every individual contributor to the discussion in stating what it is that he or she considers quality in dispute resolution and why. Despite the proliferation of literature on ADR, I think we can go much further in this direction than we have gone thus far. Indeed, for reasons explained above, I think we must.

Ambiguity about the definition of quality in dispute resolution is thus, in my view, an avoidable and, as discussed above, serious problem. My reason for calling attention to it in this report is, as explained above, my belief in the importance of engaging in dialogue to identify the meaning of quality in dispute resolution. In the final Part of this report, I try to respond to my own call for greater clarity, by laying out some thoughts, suggested in part in earlier comments, on how I would articulate and define quality and how my definition appears to differ from what I *think* I hear others saying, despite the ambiguity left by the discussions.

VI. WHICH QUALITY STANDARD?: THE SINGULARIST VIEWPOINT, A CLARIFIED SET OF CHOICES, AND MY DEFINITION OF QUALITY

A. *Preface: An Anti-Taxonomy of Context*

Before discussing my own definition of quality, it is important to clarify one more implication of the singularist viewpoint of this report, an implication referred to but not fully discussed above. I therefore introduce this final Part with a question framed in the singular: *Which quality standard?*

As discussed in Part III, a number of speakers argued that quality cannot be defined, or standards prioritized, except in reference to specific contexts or "sectors" of disputes. The argument that quality standards differ according to context is logically appealing, and I, myself, have taken this view in the past.[67] As noted earlier, this view does not obviate the need to articulate supracontextual quality standards, as a matter of sound analytical methodology. However, apart from methodology, I believe today that the definition of quality in dispute resolu-

66. The earlier review of quality standards and ambiguities in the literature, and other references to the literature, *see supra* notes 33 & 50-52, have already offered examples of this. Again, the works cited there are intended merely as examples of how to approach the literature, like the workshop discussions, with an eye toward greater clarification of quality standards. The same approach could be applied to many other works, but, as noted above, *see supra* note 3, this report is not intended as an exhaustive review of the literature.

67. Bush, *supra* note 15, at 946-51.

tion—in the goal-furtherance sense—is a constant, independent of contextual differences. I do not mean by this that people do not differ about the proper definition of quality, or ordering of standards. Obviously, they do. What I mean is that when a particular definition of quality is proffered, its adherents probably do not believe that it applies in some cases only, depending on context. If someone accepts the Social Justice standard of quality, or considers it superior in any ordering of standards, then social justice is probably their highest concern across the board, in all types of situations. Thus, my view is that each of us ultimately has, in the terms I have adopted here, a singular and universal definition of quality.

Recall the example cited earlier from the workshop discussions: if workers are on their way back to the plant after the settlement of a strike, no mediator would stop them and urge them to rethink the contract package because they did not get a fair wage. While if a divorcing couple were on the verge of finalizing a separation agreement, a mediator might well "slow down" the process if it looked like the agreement was grossly unfair to one side. The implication of the example was that the standards of quality are different in these two contexts: in the former, closure (a sub-objective of Individual Satisfaction) is the priority standard; in the latter, fairness (a sub-objective of Social Justice) is more important. I disagree both with the scenario of the example and with its implications.

My analysis would go like this: One possible argument is that the scenario is just wrong. A mediator would have the same quality standard in either context, whether that standard were Social Justice or Individual Satisfaction. Therefore, if there were, in fact, gross injustice present in both cases, a Social Justice-standard mediator would intervene in both cases, and the closure goal would not take precedence in either; while an Individual Satisfaction-standard mediator would intervene in neither, as long as both parties appeared to understand the settlement and accepted it. In fact, in the mediation literature, one finds advocates of both of these positions, and neither view is presented as context dependent.[68]

On the other hand, assume that the scenario is right, and that most mediators would intervene to block "unfair" settlement in the family context, but not in the labor context. Does this mean that the accepted quality standard differs in each context—Individual Satisfaction in labor,

68. Stulberg, and Nicolau and Cormick, for example, all agree that mediators must remain neutral as to outcome, regardless of the type of dispute, implicitly suggesting the Individual Autonomy standard. *See* Stulberg, *supra* note 7, at 86-88, 96-97; Nicolau & Cormick, *supra* note 33, at 111-12. However, Riskin argues that the mediator has an obligation to ensure, to some degree, the substantive fairness of any agreement, implying the Social Justice standard of quality. *See* Riskin, *supra* note 7, at 354-57. The same argument underlies many recently adopted codes of mediation practice. *See e.g.*, Schneider, *A Commentary on the Activity of Writing Codes of Ethics*, MEDIATION Q., June 1985, at 83, 89 & app. A. None of these commentators presents their position as limited to a particular type of dispute or context. *See also* Bernard, Folger, Weingarten & Zumeta, *The Neutral Mediator: Dilemmas in Divorce Mediation*, MEDIATION Q., June 1984, at 61.

Social Justice in family? I do not think so. I suggest that the standard is the same in both and that what differs is the way in which the process itself works to meet, or fail, the quality standard. In other words, the context makes a difference as to how processes must work to achieve the same ultimate goal. In the family context, given the inequality between the parties, the achievement of social justice depends on the mediator's substantive intervention. In the labor context, the original inequality of power has been changed by worker organization, which can itself be seen as part of the dispute resolution process, through which social justice can thus be achieved without the mediator's substantive intervention.[69] In other words, assuming that it is important in general, social justice is no less important in labor disputes than in family disputes. However, the process options for achieving this goal are different in the two contexts because of contextual differences.[70]

Joel Handler suggested something like this at the end of his remarks when he noted that for identifiable and potentially cohesive groups, collective organization was probably the best strategy for social justice, while for nonorganizable individuals, some other process, such as "proactive" mediation, was possibly a better strategy. Handler's quality standard is Social Justice, whatever the context or dispute; only the strategy or process varies. I suggest that the reason the standard remains constant, not only for Handler but for all of us whatever our standards, is that positions about quality standards in dispute resolution stem from deeply held and coherent world-views that relate our response in any context or situation to the same fundamental value ordering. A believer in the Social Justice standard will see social justice implicated everywhere; a believer in the Personal Transformation standard will see transformative potential everywhere. And both will be right. Their proposed responses will differ, of course, but because of value and vision differences rather than contextual differences.

Despite all of this, however, isn't it clear that contextual circumstances do affect priorities of standards? For example, when the parties are of wholly equal bargaining power, how can the Social Justice quality standard be as important as when they are of unequal power? The answer is evident from another example discussed in the workshop: the dispute between Wisconsin Electric and American Can, described by Robert Gorske.[71] Although neither party was disadvantaged and the parties had relatively equal bargaining power, many questioners immediately had social justice concerns about the case and the minitrial resolution process. The concerns pointed not to the parties at all, but to the public interest and affected third parties, including rate payers, consumers, and environmental interests, who might well be "disadvantaged" by comparison to both of the actual parties. The Social Justice standard

69. Galanter, *Duty*, *supra* note 37, at 940-44.

70. This explanation is in accord with the literature on the problems of using labor mediation as a model for community or family mediation. *See, e.g.*, Getman, *supra* note 28.

71. Gorske, *Alternative Dispute Resolution: The Minitrial*, WIS. B. BULL., Feb. 1985, at 21.

was certainly implicated in this dispute and was the primary concern for its adherents, but it was implicated in a different way. In fact, several speakers commented in passing that the "public-private" dispute distinction is probably a fiction because of the pervasiveness of potential external impacts like those in the Wisconsin Electric case. This is another way of saying that the Social Justice standard is always implicated and is always important to its adherents, regardless of context. This example also suggests that while context does not determine whether a given standard is important, it may determine *how* the standard is implicated. Another way of saying this is that context may affect which sub-objectives of the standard are involved.[72]

In sum, even if differences of context are relevant and important in some respects, they do not affect the answer to the fundamental question of what is the definition of quality in dispute resolution (or the priority ordering of quality standards). The answer each of us gives to this question will not vary according to context because it derives not from circumstances, but from the vision each of us has about the nature of society. These visions will not change as we cast our attention from situation to situation, and neither will our standards of quality. Therefore, we will not solve the problem of identifying quality by segmenting the discussion, as some suggested, on the assumption that a single, noncontroversial definition of quality will emerge for each sector or context of

72. For example, in the original table of quality definitions and statements, *see supra* Table I, at 415, the Social Justice standard included, among its sub-objectives, these two sub-objectives: "the process attains quality when outcomes are not harmful to poor (disadvantaged) parties," and "the process attains quality when outcomes are not harmful to the public interest or interests of affected third parties." In the Wisconsin Electric case, only the second sub-objective is relevant as a standard. In the family dispute scenario cited earlier, only the first sub-objective is relevant. In the labor scenario, both may be relevant. Yet, in all three cases the Social Justice standard is relevant and will probably be seen by its adherents as the main measure of quality.

The focus on sub-objectives as variable in relation to context might seem to suggest that quality analysis should focus primarily on them; that is, since sub-objectives do change according to context, why is it necessary to define general standards at all? Why not just specify sub-objectives, determine which are implicated in a particular context, and evaluate process quality accordingly? The answer to this question returns us to the problem of ambiguity and choice, even at the sub-objective level, which was discussed at length above. *See supra* note 55 and accompanying text.

The central point to be added here is that, even if sub-objectives vary according to context, relative priority of different quality standards, according to my argument, does not. Thus, in the Wisconsin Electric, labor and family examples above, the different Social Justice sub-objectives may be of differing levels of importance, and this is important to know. However, it is even more important to know whether the Social Justice standard itself is more or less important than, for example, the Personal Transformation standard, which is also implicated in all three cases. Context can tell us which of the various Social Justice sub-objectives are implicated more in a case, but it cannot tell us whether any of these are more or less important than Personal Transformation sub-objectives (or those of some other standard), some of which are also bound to be implicated. Such a decision rests on a comparison and ranking of the general standards themselves, which can be understood properly only in terms of their overall character and rationale, and not simply as the sum of various sub-objectives. In addition, as discussed earlier, it is difficult to tell which sub-objectives pertain to which standard until the governing standards of sub-objectives are themselves fully understood. Therefore, without clarification of standards, we have no reliable way to compare the importance of different sub-objectives. *See supra* note 55.

disputes. This is not to say that segmented study is unnecessary. On the contrary, segmented and focused discussion may well be necessary to reach ultimate conclusions about quality, given the impact of context on sub-objectives. However, before we can reach that level of analysis, even in a segmented discussion, we must confront precisely the same issues posed by the general discussion of quality in this workshop: what are the different candidates for the meaning of quality in dispute resolution in general, and, assuming the singularist view that choice is necessary and desirable, what is the priority among them? Answering these questions might be easier if the discussion were made more concrete by focusing on a given context. However, it still would be necessary to generalize and, especially, to articulate not only the possible quality standards, but also the reasons why each is maintained. This means relating the competing standards to the visions of society that they reflect. In this workshop, we barely scratched the surface of this discussion for reasons described in Part V. In the next section, I offer some ideas on how quality standards are linked to visions of society, as an example of some of the dimensions we need to explore, and suggest my definition of quality and its underlying vision.

B. *Visions of Quality, Visions of Society*

Given the ambiguities surrounding quality standards that were described in Part IV, it may seem futile to try again here to identify clear and distinct quality arguments based on the workshop discussions. However, I believe that those ambiguities themselves may suggest a way of understanding what different quality standards the speakers were implicitly suggesting and for what reasons. If the workshop discussions had reached greater clarity, perhaps they would have confirmed my present interpretation. As it stands, what follows can be read as a thesis proposed for further examination in future work.

As discussed in Part IV, statements appearing to suggest a Social Justice quality standard could be interpreted instead to suggest the standard of Individual Autonomy, Personal Transformation, or Social Solidarity. The same interpretive ambiguity could be found in statements appearing to support the other standards. Perhaps the reason for this ambiguity, which was not clarified at the workshop for reasons discussed above, is that there are actually several competing *priority orderings* of quality standards implicit in the discussion, in each of which the same six standards occupy different positions *and* conform to different interpretations, because the underlying vision of society is different. Therefore, each quality standard *does* have different interpretations, depending on which ordering and organizing vision is adopted. Specifically, I see three such orderings and three visions.

The first ordering rests on an Individualist vision of society in which the greatest good is the fulfillment of the individual's freely self-deter-

mined desires.[73] In the related ordering of dispute resolution quality standards, the Individual Autonomy and Individual Satisfaction standards are most important, although the Social Justice standard may be considered an equally important or constraining standard. In this vision, the Social Justice standard has a dual character, encompassing both the elimination of suffering and the protection of individuality interpretations. The latter probably gives it greater importance, as a constraint on the Individual Autonomy and Individual Satisfaction standards.[74] The Individual Satisfaction standard here encompasses both its hedonism and autonomy interpretations, although the latter is more important in keeping with the vision's stress on self-determination. The Social Control standard is important, but only as a facilitating agent for the first three; that is, order is valued only because it facilitates individual choice and fulfillment, not for some collective or partisan purpose. Finally, the Personal Transformation and Social Solidarity standards are relatively unimportant in this vision since each carries connotations of other-directed social interaction which, unless freely chosen and thus relegated to facets of the Individual Satisfaction standard, would violate the vision's emphasis on the liberated and unconstrained (as far as possible) individual self.

The second implicit ordering of standards rests on a diametrically opposed Collectivist or Corporate vision of society in which the greatest good is the maximization of the welfare of society in the aggregate. As a corollary to aggregate welfare, this vision values the preservation of an existing regime of private or public institutions, such as private markets or social administrators, which is seen as uniquely capable of channelling or suppressing individualism and assuring maximum societal welfare.[75] In this ordering of dispute resolution quality standards, the Social Control standard comes first, interpreted here not as facilitator of the Individual Autonomy and Individual Satisfaction standards, but as a

73. This is the vision of rights-based liberal theory in its libertarian and egalitarian forms. *See, e.g.*, Hutchinson, *supra* note 16, at 759-60; Murphy, *supra* note 16, at 130-41; Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15-16. *See also supra* note 46 and accompanying text.

74. As noted earlier, social justice in the protection of individuality sense is central to egalitarian individualism, operating as a constraint on unrestrained liberty to pursue individual ends. *See supra* note 49 and accompanying text. One implication of the text here is that advocates of the Social Justice, Individual Satisfaction, and Individual Autonomy standards may have much more in common than they generally recognize, and articulating this common commitment to protection of individual dignity might suggest measures of dispute resolution quality on which all would agree.

75. This is the vision of utilitarian political-economic theory. *See, e.g.*, M. SANDEL, *supra* note 16, at 3-7; Hutchinson, *supra* note 16, at 758-59; Sandel, *supra* note 73, at 15-16. Its most influential current incarnation is law and economics theory. *See, e.g.*, Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 33-34, 48-51 (1980); Wright, *Actual Causation v. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 436 (1985). The latter theory, despite roots in liberal individualism, has all but abandoned concern for individual autonomy and adopted an essentially collectivist viewpoint according to which aggregate welfare is the primary concern. *See* Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1505-06 & n.107 (1986).

surrogate for aggregate welfare.[76] The Individual Satisfaction and Social Solidarity standards follow in importance, interpreted in both cases as devices for securing acquiescence and acceptance of an established collective or corporate order. The Individual Autonomy and Social Justice standards are both relatively unimportant in this vision, if not inimical to it. The Personal Transformation standard may also be similarly ranked, unless it can be interpreted as promoting acquiescence in some way.

The third ordering rests on a Communitarian or Relational vision of society in which the greatest good is the connection of the individual self to others in interpersonal and communal relations.[77] In this ordering of standards, the Personal Transformation and Social Solidarity standards are most important since both focus, according to their plainest interpretations, on the effectuation of interpersonal connections. The Social Justice standard is also important, interpreted in all four senses.[78] First, according to the modification of attitudes and social solidarity interpretations, it fits directly into this vision. Second, according to the protection of individuality interpretation, the Social Justice standard is also important, despite the de-emphasis on individuality in this vision. The reason is that, in order for the recognition of and connection to the other to have the greatest value, the self must have substance and value as well.[79] For the same reason, Social Justice interpreted as elimination of suffering is also important in this vision. Therefore, both the Social Justice standard—in the protection of individuality and elimination of suffering senses—and the Individual Autonomy standard are important here in the same kind of constraining or conditioning role that the Social Justice standard plays in the Individualist vision. The

76. As noted above, *see supra* note 34, the workshop discussions paid little attention to the question of whether allocative efficiency—as distinct from administrative economy—was an important quality standard. However, it *is* viewed in the literature as an important standard, which might be called the Aggregate Welfare standard. *See supra* note 75. For those who advocate this standard, it certainly would be foremost in the Collectivist vision's ordering of standards, and the Social Control standard must therefore be seen as a surrogate for the Aggregate Welfare standard. I also note that it is possible to see this vision as assigning the greatest good to maximizing the aggregate welfare of a particular class, rather than that of society generally, in which case the Social Control standard is a surrogate not for aggregate welfare but for class privilege.

77. This is the vision of communitarian political theory, at least in part. *See, e.g.*, M. SANDEL, *supra* note 16, at 62-65, 143-54, 168-83; Bush, *supra* note 75, at 1537-42; Macneil, *supra* note 16, at 934-39, 944-45. This vision is reflected presently in a variety of fields besides political theory. *See, e.g.*, J. AUERBACH, JUSTICE WITHOUT LAW? (1983) (history); R. BELLAH, *supra* note 16 (sociology); C. GILLIGAN, *supra* note 51 (developmental psychology); J. LYNCH, THE LANGUAGE OF THE HEART (1985) (research medicine).

78. The importance of so many interpretations of the Social Justice standard in this vision suggests to me that advocates of the Social Justice standard may hold a Communitarian rather than an Individualist vision of society, and may thus have much in common with advocates of the Personal Transformation and Social Solidarity standards. Articulation of the commitment to interpersonal recognition and connection common to all three standards might suggest measures of dispute resolution quality that all could support. As for the idea, implied above, that visions are mutually exclusive, *see infra* text accompanying notes 81-82. *See also infra* note 80.

79. *See* M. SANDEL, *supra* note 16, at 143, 150, 154-61; Bush, *supra* note 75, at 1552-53.

Individual Satisfaction and Social Control standards are least important in this ordering.

I believe this outline of the three orderings of quality standards and their underlying visions, while necessarily sketchy, helps to make sense of the conflicting and ambiguous interpretations of quality standards described in Part IV.[80] According to my thesis, there are operating underneath the discussion three quite different and powerful visions that shape three different orderings of the same quality standards, and in each ordering the six quality standards are given very different interpretations. However, since none of these orderings, and certainly not the underlying visions, was articulated in the workshop discussions, clearly or otherwise, the standards by themselves were fraught with confusion and ambiguity.

Clearly, to go back to David Luban's insight, these three orderings are competing and not complementary definitions of quality, and a clear problem of choice is posed. It is also clear, according to the discussion in Section A, that the choice cannot be avoided by segmenting the universe of disputes and applying different standards in different contexts. Each of the three orderings rests on a vision that encompasses society as a whole, and each, therefore, would be seen by its proponents as applicable across the board. Therefore, the problem of choice of standards is very real. If, as I argue, the best tool for choice is dialogue, then the dialogue must encompass the articulation and discussion of not only the standards and priority-orderings themselves, but also the underlying societal visions. My definition of quality in dispute resolution, as implied by comments throughout this report, is the ordering of standards based on the Relational vision, in which interconnection of individuals is the guiding principle.

Whichever of these three standard-orderings is accepted, the implication of Section A is that it would apply across the board irrespective of context. Does this imply further that each standard-ordering would dictate one ideal dispute resolution process to be used for all disputes? This would run counter to the strong view expressed by many at the workshop that diversity of process was a good thing. The answer to the question posed is probably no. Whatever the quality standard or order-

80. The typology of visions laid out in the text is, as stated, sketchy and preliminary, and can certainly be questioned and improved. It is presented here as a starting point for discussion, not a developed theory. I note, for example, that there is no reference to a possible Socialist vision. The reason is that, in my view, the attempt to describe a Socialist vision and conception of the good winds up repeating one of the visions already suggested: a vision in which individual dignity is the highest good, or one in which collective welfare (or workers' welfare) is the highest good, or one in which interpersonal connection is the highest good. That is, the Socialist vision, where it is expressed, seems to rest on one or the other of these three conceptions of the good, which I see as primary competitors. Others also have suggested that the Socialist vision is not distinct, but rests on some other more fundamental vision of self and society. *See, e.g.*, Levinson, *supra* note 39, at 1480-82; Macneil, *supra* note 16, at 939-43. However, I am open to argument on this point, as on other aspects of the suggested typology of visions. My main point is to suggest that whatever they may be specifically, such competing visions exist, and heavily influence, perhaps determine, positions on dispute resolution quality standards.

ing of standards, contextual differences will, as noted above,[81] affect the *way* the standard is implicated, and hence require different processes to respond appropriately.[82] At the same time, however, the concept of a broadly applicable single ordering of standards does suggest that, even with specific process differences, there might be reason to contemplate a certain uniformity in what might be called process priorities. For example, if the Individualist vision standard-ordering were adopted, it would make sense to require, in every case, some type of process element designed to guard against discriminatory operation or impact, although the specific design would certainly have to vary according to context.[83] Similarly, if the Relational vision were adopted, it would make sense to require, in every case, some process element designed to evoke mutual recognition between the parties in the most effective way possible.[84] Again, the specific design would and should vary according to context. Thus, while there would still be process diversity under any of the three visions, there would also be a degree of commonality of general process priorities.

Finally, the picture of three underlying societal visions and three quality-standard orderings suggests an explanation for another ambiguity reflected in the workshop proceedings: the ambiguous character of the ADR "movement" as a whole. Depending on who is speaking, the trend toward greater interest in and use of diverse dispute resolution processes, whether out of or in court, can seem like three entirely different phenomena: ADR is an opening up of new avenues for individual choice and fulfillment of individual needs—the consumer movement of dispute resolution; or ADR is a highly effective and therefore dangerous strategy for tightening social control over, and expanding opportunities for exploitation of, the weak by the powerful; or, ADR is the manifestation in the legal system and its surrounding structures of an expanded interest, in the larger society, in changing the basis of our social life from acquisition to relation—the "dawning of a new age," as one speaker at the workshop sardonically put it.

Clearly, these three interpretations, or stories, of the ADR movement stem from the three underlying societal visions mentioned above. Each is plausible, given the corresponding societal vision. Each is separated from the others by a wide gulf of difference in vision.

In keeping with my belief in the Relational vision, with its accompanying quality standard-ordering, I interpret the ADR movement—and especially its expansion of mediative and party-connecting activity in various forms—as a *potential* move in this direction. However, I stress

81. *See supra* note 72 and accompanying text.

82. As for the notion of a process-context grid, suggested by some at the conference and advocated by me in the past, I am not now sure that, given the number and complexity of relationships between contexts and sub-objectives, it would be a feasible task, although Larry Mohr may convince me otherwise.

83. Some authors come close to suggesting this. *See, e.g.*, Brunet, *supra* note 17, at 47-56; Delgado, *supra* note 33, at 1402-04.

84. *See, e.g.*, Bush, *supra* note 33.

the word "potential" in my interpretation of ADR because I am not sure that the ADR movement's potential to express a larger shift to relational values will be realized. There are many reasons to believe that ADR will be swept into the gravitational field of the Individualist or Corporate visions, the one arguing for greater emphasis on protection of rights in ADR and the other arguing for efficiency and party satisfaction as the only concerns. Some workshop participants expressed similar concerns, although perhaps for different reasons than mine. One way to keep relational values alive, I believe, is to articulate more fully the Relational vision of ADR and of justice itself—to identify appropriate quality standards and to demand that ADR in practice fulfill its potential to live up to these standards.[85]

Beyond this concern for the fate of ADR, there is another reason to encourage clearer articulation of the Relational vision. The Individualist and Corporate visions of society and of dispute resolution have been articulated much better than the Relational vision. Clearer articulation of the Relational vision, in contradistinction to the other two, is important if the ultimate choice between competing definitions of quality is to be a sound one.

C. *A Closing Conundrum*

The last comment suggests a conundrum that I cannot really resolve, but that has been running beneath the surface of my analysis and that I want to acknowledge before closing this report. Two notions have permeated my analysis: the view that definitions of quality are inconsistent and that choice among them is necessary and desirable, and the view that dialogue is a crucial tool for clarifying the options and reaching this choice. I have identified both of these as aspects of the singularist viewpoint on quality standards. In these last few paragraphs, following my sketch of the three visions, these notions reappear several times: "the three orders compete, and a problem of choice is posed," "the best tool for choice is dialogue," and "whichever order is accepted would apply across the board." In short, I continue to conclude that, confronted with the three visions, the appropriate response is to apply the singularist approach of dialogue, choice, and universal application. However, others may conclude that the appropriate response to the different visions is to appreciate the diversity they represent, encourage bargaining or exchange with holders of different visions, combine elements from the three into a kind of eclectic vision, or the like. In es-

85. To some extent this is beginning to happen. *See, e.g.*, Bush, *supra* note 10; Menkel-Meadow, *supra* note 13; Millhauser, *supra* note 33; Riskin, *supra* note 7. Nevertheless, much more can be done in this direction. It is important, for example, to avoid the tendency to adopt "codes of practice" for mediators and others that establish without much discussion standards reflective of the Individualist rather than the Relational vision. *See* Bush, *supra* note 10; Riskin, *supra* note 7. On the other hand, it is equally important to demand, for example, that mediators both strive to evoke mutual recognition between the parties and guard against oppressive overreaching, rather than simply preside over (and push) the "march to agreement" that many have rightly criticized. *See generally* Bush, *supra* note 10.

sence, they may take what I have called a pluralist response to these three visions.[86]

The conundrum is that this methodological difference over how to *approach* visions of quality and society is itself *part of* the larger difference in visions. Thus, it appears to me that the singularist methodological prescriptions are products of, and dependent on adoption of, the Relational or Communitarian vision, which posits that a common good exists, in dispute resolution as in other areas of social life, and that it can be discovered or revealed by dialogue, which is also good in itself. In contrast, the pluralist prescriptions are products of the Individualist vision, which sees the good as necessarily individually defined and subjective. As a singularist, I want others to clarify and make choices among societal visions and definitions of quality; but to suggest this is to ask others to begin by adopting a Relational vision, which is itself the subject of argument. On the other hand, a pluralist will want to emphasize eclecticism and individual choice in identifying quality; but to suggest this methodology is to ask others to begin by adopting the Individualist vision. If this connection between methodological assumptions and larger societal visions exists, the conundrum is that singularists and pluralists may have trouble even talking to each other about quality, unless one adopts the vision of the other in the first place!

To solve this conundrum is not only beyond the scope of this paper, but also, at the moment, beyond my ken. I invite suggestions on this point from both singularist and pluralist readers. Of course, the conundrum suggests that pluralists may have considerable difficulty accepting some of my singularist analysis. I can only hope that their commitment to pluralism extends far enough to allow for a few singularists to stick their oar in from time to time.

86. This point was raised by Marc Galanter in his comments on an earlier draft of this report, and it suggested to me the conundrum described in the text.

THE QUALITY OF JUSTICE*

DAVID LUBAN**

Alternative dispute resolution ("ADR") elicits a startling variety of responses from commentators. These range from suspicions that ADR is little more than a con game designed to swindle the poor out of their hard-won legal rights or "blame the victims,"[1] to concern that ADR waters down the morality of law,[2] to advocacy of ADR on efficiency grounds—speed of disposition, cheapness relative to litigation, increased access—to an almost millenarian enthusiasm for ADR as a mode of social ordering.[3]

Such a welter of answers suggests that students of ADR are not asking the same questions. "Come, let us go down, and there confuse their language, that they may not understand one another's speech."[4] In a heated and, perhaps, stalemated controversy we should return to very basic questions. What criteria should be used to evaluate ADR programs? What are the programs supposed to do? What do we mean when we claim that they succeed or fail? What is the justice that they pursue? Ultimately, what is justice?

Proponents of court-sponsored programs such as summary jury trials and court-annexed arbitration tend to focus attention, understandably enough, on speed of disposition. Judges want to clear their dockets. Similarly, vendors and consumers of commercial ADR services focus on ADR's cheapness relative to litigation. These are among the most significant and visible proponents of ADR, and as a consequence their concerns have dominated much of the debate. The effect has been to assess ADR primarily on grounds of efficiency—what Marc Galanter calls "the

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* This essay originated as a report on a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School, July 13-14, 1987, and co-sponsored by the Dispute Processing Research Program of the Institute for Legal Studies at the University of Wisconsin-Madison Law School and the National Institute of Dispute Resolution.

** Professor of Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy, University of Maryland at College Park.

1. *See* J. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 142-47 (1983); Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in THE POLITICS OF INFORMAL JUSTICE 119 (1982); Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

2. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

3. For example, Ron Kraybill, Director of the Mennonite Conciliation Service, comments:

> I view conflict resolution . . . as a basic way of thinking about the world, how we relate to other people, and how we solve problems. So our calling is to carry this into the way of our society functions. I think about this much more broadly than in professional terms: of beginning with children and teaching them of [sic] ways of thinking and solving problems; of families, community institutions and churches; of how government functions, of a whole way of being.

Kraybill, DISPUTE RESOLUTION F., March 1987, at 6.

4. *Genesis* 11:7.

production argument."[5]

At least as important, however, is the "quality argument."[6] The quality argument, in the words of one federal judge, stems from the premise that "the absolute result of a trial is not as high a quality of justice as the freely negotiated, give a little, take a little settlement."[7] It is not just that ADR programs are supposed to be cheaper, faster, and provide more access—it is that ADR is supposed to yield better justice. As Richard Abel summarizes proponents' claims, informal justice "expresses certain fundamental values; rapid and thorough airing of controversies, participation by the disputants in resolving their own conflicts, reduction of dependence on professionals, and greater involvement of citizens in an essential aspect of democratic government."[8]

The present essay, originally composed as a workshop report, is intended as a self-standing comment. My aim is to explore the quality argument in light of contemporary work on the theory of justice, utilizing the workshop discussions as a reservoir of themes, arguments, and illustrative material. Some of what I say synthesizes related points made by several workshop participants, or extrapolates from their stated views. Imitating Thucydides, "my method has been, while keeping as closely as possible to the general sense of the words that were actually used, to make the speakers say what, in my opinion, was called for by each situation."[9]

The essay is in three principal sections, each with subsections. The first section draws some distinctions among theories of justice. The second section addresses the very important question of whether ADR should measure itself against the baseline of adjudication or the baseline of unmediated negotiation. The third section surveys contending accounts of what constitutes the quality of justice in ADR.

I. THE FORMS OF JUSTICE

All Generalizations are Loose and Imperfect

At the outset, we must remind ourselves of Montaigne's self-referential warning that "all generalizations are loose and imperfect." As Howard Bellman stresses, ADR is far too broad a category to say anything sensible about. ADR includes, after all, mediators and arbitrators, but also "med-arbs," "reg-negs" (regulatory negotiators), ombudsmen, judges engineering settlements in conference or conducting summary jury trials, special masters, conciliators, purveyors of mini-trials, and

5. Galanter, . . . *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. & Soc'y 1, 8 (1985).

6. *Id.*

7. *Id.*

8. THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982).

9. THUCYDIDES, HISTORY OF THE PELLOPONNESIAN WAR 47 (R. Warner, trans. 1954). I am grateful to Peter Christiansen for the Thucydides allusion. Throughout this paper unfootnoted statements attributed to specific individuals refer to their oral presentations at the workshop. Tapes of the discussions are available through the Disputes Processing Research Program, Madison, Wisconsin.

others. These people can work for public agencies or private dispute resolution companies; they can be court-annexed or not; their backgrounds can include law, psychotherapy, social work, industrial relations, or none at all; and they can work in sectors ranging from collective bargaining to environmental disputes to small-claims court to family mediation. They can focus on interest-disputes or rights-disputes; they can be paid by the disputants, by third parties, or by programs; they can be professionals or volunteers; and the process itself may be voluntary or compulsory. The number of relevantly different contexts may thus range into the hundreds (a point stressed by Lawrence Mohr).

Why "relevantly different" contexts? Because the expectations and understandings of the process may be wildly different in one context than another. Labor mediators, for example, typically insist on absolute confidentiality of the proceedings, but court-sanctioned divorce mediators may be legally obligated to report child abuse. Similarly, labor mediators would find a requirement to introduce the interests of third parties (such as consumers) into collective bargaining discussions intolerable and weird, but family mediators who did not insist that parents consider the interests of their children would be derelict in their duty, and mediators of a major environmental dispute should surely remind the parties of the public interests involved.[10]

On Bellman's analysis, the key dimensions distinguishing ADR contexts are their modalities—mediation, arbitration, summary jury trial, and others—and their settings—labor, family, business litigation, and others. This suggests classifying ADR programs on a two-dimensional grid indexed by these variables. We must then consider the possibility that the requirements of justice may differ among the many entries on the grid.

This possibility would, I believe, have to be argued on a case-by-case basis, and I do not propose to attempt this here.[11] Instead, I will confine myself to one type of setting—legal disputes in which ADR is undertaken either to forestall litigation or as part of litigation—and will venture some loose and imperfect generalizations, trusting to those more knowledgeable to correct and qualify them in modes and settings to which they do not apply.

Justice Within the System and Revisionary Justice

A running disagreement pervades recent discussions about the quality of justice in ADR. Proponents of ADR argue that ADR resolves disputes more justly than either litigation or unmediated negotiation, while critics—especially critics on the left—suspect that ADR programs simply "cool out" legitimate grievances and thereby perpetuate a system that is fundamentally unjust.

10. Engram & Markowitz, *Ethical Issues in Mediation: Divorce and Labor Compared*, 8 MEDIATION Q. 19 (1985).

11. *But see* Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893.

Though this tension is real, the dichotomy is not, for an ADR program may resolve disputes justly (in one sense of the word) *and* cool out legitimate grievances, thereby perpetuating a system that is fundamentally unjust (in another sense). Indeed, the better the ADR system is at resolving disputes justly (in the first sense), the more effectively it will cool out legitimate grievances and perpetuate the system, which may itself be unjust (in the second sense). Thus, one reason that proponents and critics arrive at different answers to the quality question may be that it is not one question but two, corresponding to the two senses of "justice."

These two senses are *justice within the system* and *revisionary justice*. The former treats the social world we live in and the constraints it imposes as given, seeking justice within the terms defined by that social world and those constraints. Revisionary justice measures justice according to a more detached or even utopian standard, abstracts from constraints imposed by the system as it is currently constituted, and subjects the social world in which we live to assessment and criticism.

Take, for example, Edelman's analysis of voluntary non-union grievance procedures instituted by employers. According to Edelman, employers were motivated to introduce in-house grievance procedures primarily to buffer themselves from normative and legal encroachment by the outside world.[12] Such a grievance procedure possesses both real and symbolic value for the employer. Its real value lies in its capacity to forestall employee litigation, bad public relations, union activism, and other costs. Symbolically, introducing a grievance procedure demonstrates concern about fairness to the employees and the public. Equally important, if an employee litigates, a court is likely to take the existence of an in-house grievance procedure as evidence that no discrimination existed or was intended. In short, the grievance procedure is intended to deflect criticism and cool out discontent. Actually removing the source of the grievance is at best a secondary aim.

Edelman argues that from "a substantive or class standpoint" the correct measure of ADR programs is not, as many evaluators propose, user satisfaction or the finality of resolutions, but whether ADR defuses struggle, creates false consciousness, or reinforces capitalist control over the conditions of work. This "substantive or class standpoint" is one version of what I am calling "revisionary justice:" it focuses on the justice *of* the capitalist system, not justice *within* the system. The reproduction of the system is the real issue. In order to measure the justice of the system, we need a yardstick outside the system, that is, a revisionary conception of justice.

If we employ a conception of justice *within* the system, we will ask only whether voluntary non-union grievance procedures really rectify cases of discrimination within the workplace. If the procedures really rectify discrimination, they do justice; if not, they do not. If they do

12. *See* L. Edelman, Organizational Governance and Due Process: The Expansion of Rights on the American Workplace (1985) (dissertation at Stanford University).

justice, moreover, they will surely tend to dampen the motivation for revising a racist or sexist based social structure by easing the shoe's pinch. In this way, they will reproduce the existing hierarchy and thus reproduce the injustice of the system. From the point of view of revisionary justice, they are unjust.[13]

Properly speaking, the distinction between justice within a system and revisionary justice is not a distinction between two theories of justice but between two classes or families of theories of justice; it is a taxonomy of theories of justice. Marx's "from each according to his ability, to each according to his needs"[14] and Rawls' "difference principle" that inequalities are just only if they make those least well-off better off are both revisionary conceptions. Neither is tied to the existing system, and both could be instituted only by changing that system rather drastically.[15] Nevertheless, they are clearly very different principles. Similarly, there are many possible views of justice within the system—otherwise every appellate judicial opinion would be unanimous.

As a classification scheme, the distinction between justice within the system and revisionary justice is too crude, however. "Justice within the system" can refer either to legal justice or to some extra-legal standard of what the existing system implies for justice. If our criterion is legal justice, the question we would ask about ADR programs is whether they by-and-large approximate the "shadow verdict"—the outcome a fair court would have decided upon less litigation costs. However, if our criterion is extra-legal, we would ask whether ADR programs produce outcomes that are just according to standards implicit in our institutions, whether or not these standards are recognized in law.[16]

It is also important to distinguish revisionary conceptions of what justice *ultimately* requires from revisionary conceptions of what constitutes a step in the right direction. Otherwise we are left denouncing everything short of utopia as—simply—unjust.

Marx's theory illustrates this latter distinction. According to Marx,

13. More accurately: on some views of revisionary justice they are unjust. We should not forget that racists and sexists have their own utopian visions, disagreeable though they are. The hallmark of a revisionary conception of justice is not its advocacy of progressive social change, but its unwillingness to take any set of social constraints as a given, that is, its insistence that even the basic structure of society is up for grabs in a discussion of justice.

14. K. MARX, CRITIQUE OF THE GOTHA PROGRAM (1966).

15. J. RAWLS, A THEORY OF JUSTICE (1971). *But cf.* Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 224-25 (1985) ("[J]ustice as fairness is framed to apply to what I have called the 'basic structure' of a modern constitutional democracy."). It is nevertheless still true that the existing United States (for example) is unjust according to Rawls' conception.

16. Such outcomes may be quite different from legally just outcomes: rights may be implicit in the logic of current institutions and yet not be honored in law. For example, I have argued that the right to legal services for people too poor to afford them is implicit in our notion of "equal justice under law;" and yet Congress and the Supreme Court have persistently failed to honor that right. D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 243-66 (1988). Michael Walzer has argued ambitiously for many demands of justice implicit in our institutions that we are far from meeting. M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

when communism first arises it will be "in every respect, economically, morally and intellectually, still stamped with the birthmarks of the old society from whose womb it emerges." People will not accept the revisionary principle "to each according to his needs" until "a higher phase of communist society" has been attained, and so the principle of justice in the "first phase" of communism is "to each according to his work."[17] Judged from the utopian standpoint of the higher phase, this principle is just as flawed as its capitalist predecessor; but judged historically from the standpoint of what counts as a step in the direction of justice, it is a clear improvement.[18]

That is, a theory of justice also needs a theory of progress—a rank order of states of affairs, perhaps grounded as is Marx's in a theory of social change, according to which we can assess such ambiguous, second or third-best achievements as the grievance programs Edelman studies. Edelman found that such programs perpetuate the system; had she instead discovered that they stimulate employees to push for further reforms, or that the symptomatic relief afforded by the grievance procedures was important enough to justify them, one might conclude that they are a step toward social justice even though by a revisionary standard they remain unjust.

This is not to say that every theory of justice accepts the need of a theory of progress. Eschatologies, such as some versions of Christianity or revolutionary Marxism, deny the possibility of a halfway point between salvation and damnation. The Book of Acts, for example, contains passages very similar in spirit to Marx's "from each according to his ability, to each according to his needs" (indeed, Marx may have drawn his principle from these passages).[19] In *Acts*, however, the principle of justice is not combined with a theory of history or of progress. Instead, the community leaps into utopia, and the unjust are struck dead. The Messiah cuts history in two.

The problem with all such views is that they compel us to disdain marginal improvements, such as transforming third-best justice to second-best justice. Messianic theories regard both as injustice, with nothing more to be said. But this approach is no more useful than the Greek philosopher Thales' startling theory that everything in the universe is ultimately made of water. Even if you believe the theory, you still need to distinguish the kind of water that gets poured into a glass from the kind that *is* the glass.[20] Similarly, despite the messianic urge we sometimes have to denounce minor improvements as mere reformism, any

17. K. MARX, *supra* note 14, at 8.

18. *See* J. ELSTER, MAKING SENSE OF MARX, 229-30 (1985); J. ROEMER, A GENERAL THEORY OF EXPLOITATION AND CLASS 265 (1982).

19. "The whole body of believers was united in heart and soul. Not a man of them claimed any of his possessions in common .... They ... had never a needy person among them, because all who had property in land or houses sold it, brought the proceeds of the sale, and laid the money at the feet of the apostles; it was then distributed to any who stood in need." *Acts* 3:44-45. *See also Acts* 2:44-45.

20. I owe the Thales analogy to my colleague Bob Fullinwider.

usable revisionary account of justice should be able to distinguish small steps forward from, for example, large steps back.[21]

These considerations are quite important in discussions of ADR, for surely whatever virtue ADR programs possess will lie in the fact that they are marginally better than existing alternatives-adjudication, unmediated bilateral negotiation and not in the expectation that they achieve utopian justice.[22] To make such comparisons, we must first of all address what I shall call the "baseline problem," by which I mean the question of what alternative to compare ADR to. In the next section, I examine two solutions to the baseline problem: measuring ADR against the results of trial, and measuring ADR against the results of unmediated bilateral bargaining. These are, in effect, criteria of quality, for they answer the question, "When is a settlement brought about via ADR fair?" One proposal answers, "when ADR's result closely approximates that of fair adjudication." The other proposal answers "when ADR's result approximates the settlement 'on the courthouse steps.'" Both of these are serious and plausible solutions to the baseline problem, but I shall argue that neither one is right.

II. The Baseline Problem

Shadow Verdict and Shadow Bargain

Implicit in such arguments as those of Delgado,[23] Fiss,[24] and an earlier essay of my own[25] is the thought that ADR procedures should be measured against the anticipated result of a trial—the so-called "shadow verdict." After all, the reasoning runs, this is *alternative* dispute resolution, and adjudication is the dispute resolution process to which it is the alternative.

This choice of the shadow verdict as baseline carries with it a significant normative freight, however, for the shadow verdict must be figured in the light of guiding legal norms. These include both the substantive law bearing on a dispute and the procedural devices of adversary trial used to even the scales and move the dispute "from the realm of unilateral power into a realm of public accountability."[26] Anyone who thinks

21. *But cf.* W. Benjamin, *Theologico-Political Fragment*, in Reflections 312-13 (1978); W. Benjamin, *Theses on the Philosophy of History*, in Illuminations 253-66 (1969). Benjamin's works contain deep and sympathetic discussions of messianic theories of history. I discuss these in D. Luban, Difference Made Legal: The Court and Dr. King (1989) (to be published in volume 87 of the Michigan Law Review).

22. One might object that in fact utopian justice *can* be achieved, right here and right now, through ADR. For the moment, let me beg this question; later in the paper I shall argue explicitly for the claim I am making here.

23. Delgado, Dunn, Brown, Lee & Hubert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359.

24. Fiss, *supra* note 2.

25. Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 Phil. & Pub. Aff. 397, 404 (1985).

26. Galanter, *Reading the Landscape of Disputes: What We Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 70 (1983). This is an oversimplification, for appeal to the shadow verdict need not take the form described here, in which the result is infused with legal norms abstractly (or ideally) understood. Instead it

that legal norms possess great moral significance is likely to insist that the shadow verdict is the only appropriate baseline against which to measure the justice of ADR, and thus to insist that if ADR does not do a fair job of approximating the shadow verdict it works an injustice. This is the heart of Owen Fiss's critique of ADR.[27] Fiss believes that legal norms are the public morality of our society, and worries both that ADR will slow down the evolution of that public morality by removing disputes from the reach of judicial rulemaking, and that out-of-court settlements are likely to be unfair. Both criticisms measure ADR against the shadow verdict and find it wanting.

Powerful objections have been raised to the idea that state-made law is the public morality of society.[28] Some participants at the workshop raised a different objection: that the shadow verdict is largely irrelevant to the natural history of litigation in the real world.[29] They pointed out that ninety percent of all cases are settled out of court; as a consequence, the correct baseline against which to measure an ADR procedure is not the shadow verdict but the unmediated and unsupervised negotiation in a lawyer's office or on the courthouse steps—not the shadow verdict but the "shadow bargain," as we may call it. Proponents of this view argue further that if ADR deviates too far from the shadow bargain, powerful disputants will lose the incentive to use ADR procedures, since they will do better in unmediated hardball negotiation.[30] I argue that the shadow bargain is an unsuitable baseline for assessing the justice of ADR procedures.[31] (Please note that this does not imply that the shadow verdict *is* a suitable baseline—we must later examine the possibility that the justice of ADR processes casts a shadow of its own without standing in the shadow of anything else.)

Legal Norms and the Shadow Bargain

How does one compute the shadow bargain? It will help if we first define the term a bit more precisely. In the same way that the shadow verdict is the outcome of an ideally fair trial, the shadow bargain should be understood as the outcome of an ideally fair negotiation. That

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can take a "realist" form, in which the result is gotten by asking what a judge or jury would actually do rather than what the law would prescribe. The realist computation of the shadow verdict will often downplay legal norms and emphasize situational factors (such as jury bias) of the same order as those at work in a negotiation. Thus, in the Agent Orange litigation one attorney recollected his calculations as follows: "Getting to a Brooklyn jury with three cancers and four birth defects against seven chemical companies would have rung the bell." *See* P. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURT (1986). This is hardly a shadow verdict calculated according to the legal norms—a point that proved highly relevant in assessing the fairness of the settlement.

27. Fiss, *supra* note 2.

28. *See, e.g.*, Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Galanter, *Justice in Many Rooms*, in ACCESS TO JUSTICE AND THE WELFARE STATE 147 (1981).

29. *See, e.g.*, Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DISPUTE RESOLUTION 141.

30. *Id.* at 146.

31. I am therefore partially abandoning my view expressed in Luban, *supra* note 25, at 407-10.

means, first, a negotiation conducted under fair rules of engagement. These may include rules against force or fraud, structural rules such as the various axioms assumed in formal bargaining theory, and relevant pieces of law: contract doctrine, labor relations law, lawyers' ethical rules, or whatever else seems appropriate. Second, the notion of shadow bargain understood as the outcome of an ideally fair negotiation must abstract form differences in the skill levels of the negotiators, and indeed it assumes that both are highly skilled. However—and importantly—the shadow bargain does *not* abstract from disparities in bargaining power or threat advantage, for in that case all the facts of the dispute and of the parties' situations would be filtered out, and every shadow bargain would have the same uninteresting outcome: a fifty-fifty split. To put it another way, the shadow bargain is the result of a fair game between skilled players, but they are stuck with the hand they are dealt.

Thus, to figure the shadow bargain we must ask how skilled negotiators would fairly appraise the settlement value of the dispute. One might suppose that here, as in the shadow verdict, legal norms will enter, for it is plausible to suppose that assessing and arguing the merits of the issue—the shadow verdict—will figure prominently in negotiating a legal dispute. If true, this would make the shadow bargain more appealing to those (such as Fiss) for whom legal norms and legal justice embody our collective political morality.

But it isn't true, for in negotiation the legal merits may well be swamped by non-legal concerns, notably concern about delay if the case isn't settled promptly. Moreover, each side must discount the worth of the case by the probability of prevailing, and so the expected value of the case will generally be less—often considerably less—than the shadow verdict. To figure the shadow verdict I put myself in the position of an adjudicator (judge, juror, arbitrator) and ask myself how I would decide the case and what it is worth. But to figure the shadow bargain I must afterward put myself in the position of a negotiator and ask about the likelihood that the real adjudicator will arrive at the same outcome.

Take a concrete example, a personal injury case involving a disputed factual issue but straightforward law and undisputed damages of $5,000. Suppose that if I were an adjudicator I would decide that the plaintiff's factual evidence is slightly better, just above the fifty percent required on a preponderance of evidence standard. Consequently, I would award the plaintiff $5,000, and that is how I ought to assess the shadow verdict. *On the legal merits, then, the case is worth $5000 awarded to the plaintiff.* However, if I am a negotiator representing the plaintiff, I must consider that by my own assessment of the evidence I have only slightly better than a fifty percent chance of prevailing. Then the expected value of the case is just above $2,500, and *that* will be the shadow bargain. For just above $2,500 is what a risk-neutral negotiator would settle for, given that the trial is in effect a lottery with a slightly better

than fifty percent chance of recovering $5,000 and a slightly less than fifty percent chance of recovering nothing.

Thus, in negotiation the merits of the case enter the discussion in the form of expected value rather than shadow verdict, and so the discrepancy between expected value and shadow verdict implies that in negotiation the legal merits may not only be swamped by extra-legal concerns but may also become distorted.

This is all the more so because it is likely that a one-shot litigant, such as a typical tort plaintiff, will be risk averse, while a repeat-player litigant, such as an insurer of tort defendants, is likely to be risk neutral.[32] In that case, the one-shot player's shadow verdict is discounted not only for risk but also for risk aversion.

Thus, in unmediated negotiation the shadow verdict is swamped and doubly discounted. This means that the merits will be reflected at best indirectly; the shadow bargain will filter out the normative concerns reflected in the shadow verdict.[33] In fact, abstracting from irrational behavior and disparities in the negotiators' skills, as we must in projecting the result of a *hypothetical* negotiation, the shadow bargain is determined by just one thing: the parties' ultimate threat of walking out.

Fisher and Ury introduce the concept of the BATNA, the "*b*est *a*lternative *t*o a *n*egotiated *a*greement."[34] If the BATNA is too sparse in comparison with some package that the parties believe to be acceptable, rational parties will reach an agreement; otherwise they will not.[35] Thus, the outcome of a negotiation is ultimately determined solely by the relative strength of each party's threat to walk out, to throw the other party back on his or her BATNA.

"To Each According to His Threat Advantage"

This is why in formal bargaining theory a bargaining game is defined by just two things: a utility possibility space, that is a set of possible agreements measured in terms of their utility to the parties, and a threat-point, that is, a BATNA. In this respect, formal bargaining theory

32. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

33. *See* Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985). Condlin suggests that legal argument is often little more than a ritual lawyers go through before turning to the dance of counter-offers that in their practice constitutes the real heart of negotiation.

To avoid misunderstanding: the fact that the shadow bargain will filter out the legal merits, what I have called "the normative concerns reflected in the shadow verdict," is *not* necessarily bad. For sometimes the law is unjust, so that an outcome accurately reflecting the legal merits may be precisely what we do not want. In that case the shadow bargain could be better.

34. R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

35. It may be objected that this neglects strategic behavior undertaken to preserve or establish a bargaining reputation. But the importance of bargaining reputation will have already been considered by each party, both in determining whether a package is acceptable and in assessing the BATNA.

is a good model of reality.[36] Since the question of justice has been vigorously debated in formal bargaining theory, it will be useful for us to raise the question in that context.

"This," Jules Coleman writes, "is the Bargaining Theory 'Theory of Justice:' to each according to his initial advantage—or 'threat value.' "[37] To state it is to see one important objection to it: the threat-point (BATNA) may reflect a horribly unjust initial situation, and this fact will simply wash out if we define justice as the outcome of a bargaining game. This is so even if fair rules are imposed on the bargaining game itself. For example, in "a labor market with unemployment, workers may be agreeable to accept subhuman wages and poor terms of employment, since in the absence of a contract they may starve . . . [starvation is their BATNA!], but this does not make that solution a desirable outcome in any sence (sic)."[38]

We may illustrate this point by examining briefly the most sustained contemporary attempt to derive a principle of distributive justice from bargaining conducted under fair rules of engagement, that of David Gauthier.[39] Gauthier proposes that a two-party bargain is fair if the parties concede the same proportion of their opening demands, or equivalently, receive the same proportion of their opening demands. More generally, a bargain with more than two parties is fair if no party receives a smaller proportion of his or her opening demand than other parties would get on alternative deals.[40]

Formally, this proposal is the dauntingly-titled "Principle of Maximin Relative Benefit," which requires that the *min*imum relative benefit that any party receives be the *max*imum possible. In a two-party negotiation this implies equal relative benefits. The "relative benefit" is the proportion that a party ultimately receives of the party's opening claim on the bargaining surplus.[41]

Gauthier's idea is intuitively related to Rawls' Difference Principle:

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36. The unreality of formal bargaining theories arises from additional assumptions that are made in order to render problems mathematically tractable, for example the assumption that bargainers will entertain not merely possible agreements but lotteries among them (convexity of the utility possibility space).

Utility is treated in this section simply as a measure of preference, not as a psychological reality ("pleasure" or "pain," "hedons," or whatever). Thus, the construction of a utility possibility space amounts to nothing more than a description of the parties' preferences among different deals, and that means their thumbs-up and thumbs-down decisions. *But see* D. GAUTHIER, MORALS BY AGREEMENT 22-29 (1986), for a more subtle notion of preference.

37. Coleman, *Liberalism, Unfair Advantage, and AVF*, in CONSCRIPTS AND VOLUNTEERS: MILITARY REQUIREMENTS, SOCIAL JUSTICE AND THE ALL-VOLUNTEER FORCE 109, 111 (1983) (using the formulation of J. RAWLS, *supra* note 15, at 134). *But cf.* Barry, *Don't Shoot the Trumpeter—He's Doing His Best!*, 11 THEORY & DECISION 153, 164-65 (1979), for an important caution regarding this point.

38. A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 21 (1970).

39. *See* D. GAUTHIER, *supra* note 36. *See also* Gauthier, *Bargaining and Justice*, 2 SOC. PHIL. & POL'Y 29 (1985). For an informal treatment see Gauthier, *Bargaining Our Way into Morality: A Do-It-Yourself Primer*, 2 PHIL. EXCHANGE 15 (1979).

40. D. GAUTHIER, *supra* note 36, at 154-55.

41. That is: let B represent a party's BATNA, D the party's opening demand or (in

a bargain is fair if the party who does worst nevertheless does better than in any other available bargain.[42] Nevertheless there are two problems with Gauthier's seemingly attractive principle.

First is the problem we have just noted, that each party's outcome is a function of threat advantage. For example, let one party's BATNA be unilaterally increased, making it easier for him to walk out and thereby increasing his threat advantage; let all other factors be held constant. Then the Principle of Maximin Relative Benefit implies that the party with the unilaterally increased BATNA will receive a larger outcome than he did when his BATNA was smaller.[43]

Second, the party that most desperately needs to make a deal will get relatively higher utility from small payoffs than the less desperate party, and will therefore get a higher relative benefit from a bad deal. Thus, the Principle of Maximin Relative Benefit will typically be satisfied by the more desperate party getting the worse deal.

For example, consider an artificial bargaining game in which Rich and Poor are to divide $100 however they choose; if they reach no agreement they get nothing. Since Poor needs the money badly, she will get more utility from lower amounts than Rich. Suppose that each gets a utility of one from the full $100; then their utilities may look something like this:[44]

Gauthier's terminology) "claim," and S the amount for which the party finally settles. The bargaining surplus initially claimed was D-B, so the relative benefit is (S-B)/(D-B).

In Gauthier's scheme both parties make an initial claim to the entire bargaining surplus, and the BATNA is determined by the best result each party could achieve without cooperation (the game-theoretic equilibrium). But these additional pieces of his theory are independent of the Principle of Maximin Relative Benefit.

Gauthier's solution is identical in the two-person case to an arbitration scheme proposed in Raiffa, *Arbitration Schemes for Generalized Two-Person Games*, in CONTRIBUTIONS TO THE THEORY OF GAMES II (1953). It is Raiffa's "equitil" solution. H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 242-243 (1982). But the two-person case is best known as the Kalai-Smorodinsky solution. It has been axiomated in Kalai & Smorodinsky, *Other Solutions to Nash's Bargaining Problem*, 43 ECONOMETRICA 513 (1975).

42. *See* Gauthier, *Bargaining and Justice*, 2 SOC. PHIL. & POL'Y 29 (1985).

43. This may be shown geometrically in the two-party case in a simple fashion. Connect the threat point (the point representing the two parties' BATNAs) with the claim point (the point representing the two parties' opening demands). It is easy to show that this line represents all possible solutions satisfying the Principle of Maximin Relative Benefit. The solution to the bargaining problem is the intersection of this line with the northeast (Pareto-optimal) frontier of the utility possibility space. A unilateral increase in a party's BATNA will improve the party's outcome, as illustrated in Figure 1.

The other theoretically important approach to fair bargaining is that of Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950). Unilaterally increasing a party's BATNA increases that party's outcome in the Nash solution for a large class of cases, but not for all.

44. The numbers in this example is adapted from Coleman, *supra* note 37.

Payoffs		Utilities		Minimum Relative
Rich	Poor	Rich	Poor	Benefit
0	100	.00	1.00	.00
25	75	.25	.98	.25
50	50	.50	.90	.50
75	25	.75	.73	.73 (max)
100	0	1.00	.00	.00

The maximum among these minimum relative benefits is .73, corresponding to a distribution that gives Rich $75 and Poor $25. This, then, is what the Principle of Maximin Relative Benefit prescribes as a fair division. Poor's desperation leads her to settle for less.

The Poverty of Bargaining

This example illustrates a second problem with attempts, including Gauthier's, to derive justice from bargaining, a problem that is independent of inequalities in threat advantage. Suppose we ask what is so bad about the 75/25 split in our bargaining game. Not only does it satisfy the Principle of Maximin Relative Benefit, but close inspection of the table shows that Rich and Poor get fairly equal utilities (.75 and .73) from such a split.[45]

Clearly, the answer has to do with the fact that although the resultant utilities are roughly equal, the division of resources is not. There is something manifestly unfair about a division of resources that awards three times more to Rich than to Poor, especially since the underlying reason is merely that Poor is more desperate! *But within the vocabulary of bargaining theory—consisting, as we have seen, of nothing beyond a BATNA and utility information, that is, information about what deals the parties prefer—this unfairness cannot even be discussed, let alone resolved.* Bargaining theory relies on information that is just too thin and impoverished to capture any plausible pre-analytic notion of justice.[46]

All that ultimately matters in the bargaining perspective is whether a party accepts or rejects a deal, and that is equivalent to saying that utility is all that matters. The bargaining perspective systematically eliminates all reference to the nature of the resources that produce these utilities, the manner in which the parties will use the resources to produce the utilities, and the features of the parties' life histories and make-ups that explain the differences in their utility functions.

That is, bargaining theory is *welfare sensitive* or *welfarist*—it is interested only in utility levels. However, any plausible account of justice must in addition be *resource sensitive (resourcist)*—it must take into account information about resources as well as utilities.[47] We can go further: it must be *utilization sensitive*, taking into account *how* the resources are used

45. Incidentally, it is also the Nash solution. Coleman, *supra* note 37, at 123.

46. *See* Roemer, *The Mismarriage of Bargaining Theory and Distributive Justice*, 97 ETHICS 88 (1986). *See also* Barry, *supra* note 37; Scanlon, *Equality of Resources and Equality of Welfare: A Forced Marriage?*, 97 ETHICS 111 (1986).

47. *See* Roemer, *supra* note 46.

INCREASING THE THREAT-POINT UNDER MAXIMIN RELATIVE BENEFIT

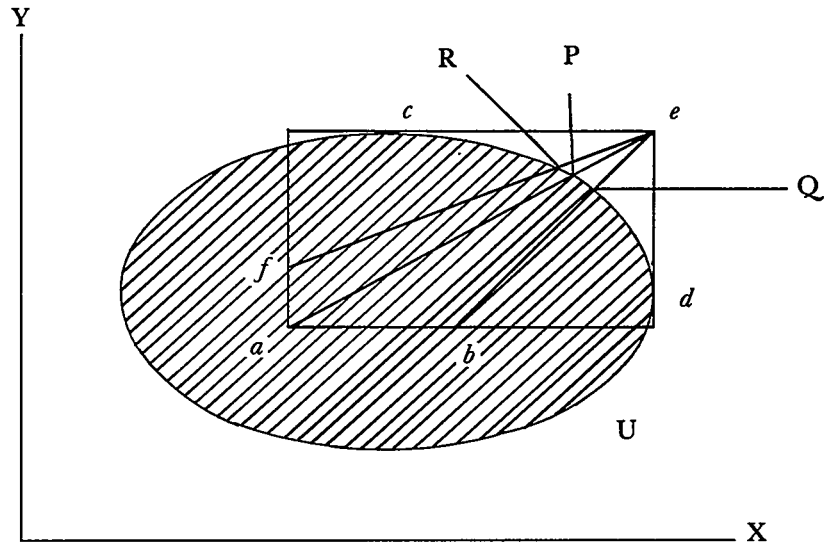

Figure 1

Figure 1 represents a bargaining game between X and Y. U is the utility possibility space, representing all possible bargains between X and Y. Point *a* is the threat-point or BATNA. *c* represents the best possible outcome for Y and Point *d* represents the best possible outcome for X; on the assumption that each claims his or her best possible outcome, *e* is the claim-point. The points satisfying the Principle of Maximin Relative Benefit lie on the line *ae*; *ae* intersects the Pareto frontier (arc *cd*) at point P, which is therefore the solution. Point *b* represents a unilateral increase of X's BATNA, just as *f* represents a unilateral increase in Y's. These result in solutions Q and R (respectively). Since every point on line *be* lies to the right of *ae*, and every point on *fe* lies above *ae*, Q gives player X a bigger payoff than does P, and R gives player Y a bigger payoff than does P. This demonstrates that increased threat-advantage yields increased payoffs.

to produce utility. Suppose that two people each lay claim to a Rembrandt painting, and suppose that they would obtain equal levels of utility from it. From a welfarist and resourcist standpoint, we cannot distinguish their claims, for their welfare levels are equal and the resource is identical. Nevertheless, we *ought* to distinguish their claims if it turns out that one of them obtains his utility by contemplating the painting's beauty, the other by locking it away, never looking at it, and enjoying ownership of it purely because now other people envy him.[48] Finally, a plausible account of justice must be *biography sensitive*, taking

48. *See* Yaari & Bar-Hillel, *On Dividing Justly*, 1 SOC. CHOICE & WELFARE 1 (1984). The authors constructed several distribution problems involving identical resources and utilities. In one type of problem, the parties get utility from the resources because they *need* them; in the second, because they *have a taste* for them; and in the third, because they *believe* (without basis) that the resources are good for them. Yaari and Bar-Hillel presented these problems to hundreds of subjects and discovered (not surprisingly) that the subjects opted for radically different distributive principles in the three types of problems despite the fact that from a welfarist or resourcist perspective the problems are identical. In my terms, this shows that the subjects' moral intuitions are utilization sensitive.

into account the circumstances in the parties' lives that give them the preferences, values, and bargaining power they have.

This general point—the informational poverty of bargaining—appears to be the underlying motivation behind Fisher and Ury's theory of *principled* bargaining.[49] It is simply not enough to lay claim to a share of the bargaining surplus, appealing merely to the threat of no deal. Instead, one must offer reasons ("objective criteria") for staking that claim. I take it that those reasons will be complex appeals to information about preferences, the intrinsic nature of the goods at issue, what one proposes to do with those goods, and how one has gotten to the present situation. Principled bargaining thus is at once welfare sensitive, resource sensitive, utilization sensitive *and* biography sensitive.

Once again, one may illustrate the problem of non-principled bargaining by examining Gauthier's account of justice. Gauthierian bargainers each make an opening demand for the entire bargaining surplus. Why? The reason is entirely strategic: "Each person expects that what he gets will be related to what he claims. Each wants to get as much as possible; each therefore claims as much as possible."[50] Gauthier then demonstrates that in purely strategic terms the parties ought to employ the Principle of Maximin Relative Benefit. However, when he comes to argue that justice, and not strategy alone, requires appeal to his principle, he neglects to explain why justice, and not strategy alone, permits the parties to open negotiations by claiming the entire bargaining surplus.

The point is that no *a priori* reason *could* be advanced for claiming the entire bargaining surplus in all negotiations. For the bargaining surplus is a quantum of utility, of brute preference or ungrounded "Gimme!" which is claimed independently of resource, utilization, and biographical information. Any plausible pre-analytic conception of justice must be sensitive to such information. In short: the shadow bargain represents an inappropriate baseline for assessing the justice of ADR mechanisms.

The Shadow Bargain and Justice Within the System

One might resist this conclusion by appealing to our earlier distinction between justice within the system and revisionary justice. Threat advantage or unequal bargaining power are, after all, facts of life, givens of the world we live in. So is the fact that whether a deal is consummated depends ultimately on whether the parties assent to it, that is, on the parties' preferences measured by utility—and not on information about resources, utilization, or the parties' biographies. Within the system, that is, bargaining games really *are* the setting in which justice arises or fails to arise.

Thus, a theory of justice within the system will ask only how to tell if

49. R. FISHER & W. URY, *supra* note 34.
50. D. GAUTHIER, *supra* note 36, at 133.

a bargain is just, given a threat point and utility information. Gauthier's Principle of Maximin Relative Benefit is just such a principle of justice within the system; so is Nash's solution to the bargaining problem. By contrast, the criticisms we have just offered of the shadow bargain as a criterion of justice refuse to take the threat point and utility information as given: rather, they take the threat point and utility information to be proper subjects for moral evaluation. This is revisionary justice.

This argument apparently leads to the conclusion that a theory of justice within the system should accept the shadow bargain as a baseline for assessing ADR institutions, and conversely that rejecting the shadow bargain as a baseline presupposes some revisionary theory of justice. But these conclusions do not follow. The argument shows only that a theory of justice within the system *of unmediated negotiation* must take the threat point and the bargainers' utilities as given, while a revisionary view of the justice *of unmediated negotiation* will not.[51] It says nothing about *mediated* negotiations, that is, about ADR.

Clearly ADR is an entirely different system from unmediated negotiation. The presence of the ADR professional or "neutral" adds a new element, for the neutral has the capacity to shape the parties' preferences or utilities, to introduce many kinds of information into discussions, and perhaps even to alter the parties' perceptions of their BATNAs. Many neutrals believe it is wrong to exercise this power, but whether or not this is so, the mere existence of the power makes ADR a different system and thereby transforms the question of what justice within the system requires.

In particular, the fact that the neutral can influence utilities, agendas, and perceived threat points implies that in a mediated negotiation *these can no longer be regarded as given.* In effect, moving a negotiation from "the courthouse steps" into ADR mandates a revisionary view of the justice of the unmediated negotiation. Thus, even justice within the system of ADR cannot rest content with the shadow bargain—the outcome of an unmediated negotiation—as its baseline. For even if the unmediated negotiation is fair in its own terms, those terms are thrown into question the moment a neutral enters the picture.

We are Not Here to Create Disorder, We are Here to Preserve It

Next let us consider the argument I described earlier, that if ADR mechanisms deviate too far from the result of an unmediated negotiation then powerful disputants will have no incentive to go into ADR. This is called the "incentives argument."

As a case in point, consider Joel Handler's description of mediators working for the state on disputes between the parents of handicapped children and school officials attempting to place the children in special

51. These correspond to the "intrinsic" and "extrinsic" standards of fairness in negotiation discussed in Luban, *supra* note 25, at 407-10.

education programs.[52] Some of these mediators attempted to inform parents of their legal rights, see to it that they received more than perfunctory or *pro forma* hearings, and help them become more sophisticated and knowledgeable about dealing with the bureaucracy. In this way the mediators pushed the disputants away from the shadow bargain in the direction of outcomes that were more satisfactory to the parents but less satisfactory to the officials. Here the bureaucracy could not walk away from the mediators, although the incentives were certainly there; but the actual outcome effectively demonstrates the point of the incentives argument: the mediators lost their jobs. If Mohammed can't walk away from the mountain, he gets the mountain fired.

Some workshop participants (Bellman and Honeyman) suggested that the mediators were fired because they had abandoned their neutrality, their mediative role, by intervening on the side of the parents. Their view is shared by many ADR professionals, but it is far from unanimous. Thus, Albie Davis and Richard Salem tell mediators confronting a power imbalance to "compensate for low-level negotiating skills," to "interrupt intimidating negotiating patterns," to "watch to see that one party does not settle out of fear of violence or retaliation," and, ultimately, "[i]f the mediator has exhausted available techniques for balancing power and the imbalance persists and is undermining the basic objectives of mediation, the mediator should consider terminating the session."[53] In the same vein Standard IV(A) of the Mediation Council of Illinois Professional Standards of Practice for Mediators insists that "[i]mpartiality is not the same as neutrality in questions of fairness,"[54] and the Association of Family and Conciliation Courts ("AFCC") Model Standards assert that "[t]he mediator has a responsibility to maintain impartiality while raising questions for the parties to consider as to the fairness, equity, and feasibility of proposed options for settlement."[55]

This difference in views has ignited a highly divisive and polemical debate among ADR professionals about their professional responsibility, which surfaced in the Society of Professionals In Dispute Resolutions ("SPIDR") deliberations over its code of ethics. Some believe that a mediator should intervene on behalf of the underdog if the other party attempts to strong arm a favorable settlement by raw exercise of threat advantage or bargaining power; others believe that such intervention is unethical, reflecting merely a "bias of social reform" on the part of the neutral.[56]

The incentives argument is an attempt to buttress the anti-interven-

52. J. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986).

53. Davis & Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 MEDIATION Q. 17, 25 (1984).

54. THE MEDIATION COUNCIL OF ILLINOIS PROFESSIONAL STANDARDS OF PRACTICE FOR MEDIATORS, *reprinted in* Schneider, MEDIATION Q. 83, 92 (June 1985).

55. ASSOCIATION OF FAMILY AND CONCILLIATION COURTS (AFCC) MODEL STANDARDS, *reprinted in* Milne, *Model Standards of Practice for Family and Divorce Mediation*, 8 MEDIATION Q. 73, 76 (June 1985).

56. Honeyman, *Bias and Mediators' Ethics*, 2 NEGOTIATION J. 175 (1986).

tion side of this debate. It stresses that consistently favoring "have nots" will simply lead "haves" to avoid ADR. Then unmediated bargains will rule the roost, and the haves will enjoy free play for their threat advantage.

In line with the incentives argument, Honeyman defends the cynical definition of a mediator as "someone who listens to and reasons politely with both parties only until he is sure which is weaker, and then jumps on that one with both feet" as follows: "Pressing the weaker party at what is aptly called 'crunch' time is not evidence of bias, because it is necessary to recognize differences in power. If mediators ignored the 'real world' and attempted to base all settlements on reason and brotherly love, stronger parties would obtain little benefit from mediation and would soon avoid it."[57]

If the incentives argument is right, it is a powerful one. But there is an equally powerful reply: if mediation simply gives powerful parties everything they can obtain without it, what is the point of mediation? At this point ADR professionals begin to resemble the Chicago police in 1968 as Mayor Daley described them: "The police are not here to create disorder, they are here to preserve it." Indeed, if the cynic's definition of the mediator has any truth to it—and I fear that it does—the weaker party does *worse* in mediation than outside of it, because now the mediator and the stronger party are ganging up on him or her to expedite the settlement.

The Modified Incentives Argument

There is also reason to believe that the incentives argument is only partially correct. Some ADR programs are compulsory rather than optional, in which case the argument does not apply, since the stronger party cannot walk away. Others, though not compulsory, are part of some agency's standard operating procedure. Still others, such as mediation or summary jury trial undertaken by litigants at a judge's request, will be hard to refuse, since neither party wants to risk antagonizing the judge.

More importantly, in some cases the stronger party does worse in ADR than in unmediated negotiation simply because during the course of ADR he has been brought to see that his adversary really has a valid point. When that happens, he is unlikely to come away harboring suspicions that the ADR process has served him badly. The incentives argument seems curiously oblivious to this possibility—"curiously" because such evolution in a party's outlook (from adversarial truculence, to grudging acknowledgment of the adversary's point of view, to genuine cooperation) is in a sense the entire point of ADR at its best.

Finally, a stronger party who refuses ADR must consider the risk that a dispute will end up being tried rather than settled. The very act of refusing ADR might increase that risk by angering the other party—"He

57. Honeyman, *supra* note 29, at 146.

won't go into mediation with me? The hell with him! We'll go to trial!"—but even if this doesn't happen the risk of no settlement will often be substantial.

And provided that litigation costs and risks are high enough, powerful parties may find ADR in their best interests even if mediators intervene on behalf of the weaker parties to bring about a fairer outcome. In strictly economic terms, it is rational for the powerful party to participate in ADR provided her marginal expected cost of refusing ADR and thereby upping risk of trial exceeds her marginal expected loss of ADR relative to unmediated settlement. After all, even without mediation insurers, for example, settle nuisance suits even though they could probably mount a successful defense, simply because it isn not worth the effort. Presumably a powerful party who is willing to sustain a certain amount of bite from parasites would be just as willing to pay a claim when he discovers through the mediation process that it is actually fair. Many people would rather pay fair settlements than legal fees.

To illustrate, let us take a dispute that the stronger party defending a suit for damages could settle for $2,000 in unmediated hardball negotiation, because it is painful for the weaker party to tolerate delay. Suppose that the probability of the weaker party going to trial rather than accepting a $2,000 settlement is close to zero: two thousand dollars is the shadow bargain. If the case does go to trial, there is a fifty percent chance that the stronger party will lose, and a jury will probably bring in a judgment of $60,000. Moreover, the stronger party's additional legal fees entailed by trial will amount to $5,000.

The judge suggests bringing in a mediator, and the stronger party estimates that if he refuses, the probability that the weaker party will become angry and insist on trial even though doing so is economically painful goes up from zero to ten percent. Thus the probability of achieving the $2,000 out-of-court settlement drops to ninety percent. For simplicity we will suppose that the stronger party's legal fees are the same whether the case is settled by unmediated negotiation or by mediation, so that mediation entails no increase in legal fees.[58] The expected value of refusing mediation is thus:

	.10 x .50 x	$60,000	(judgment)
+	.10 x	$ 5,000	(added legal fees)
+	.90 x	$ 2,000	(settlement)
=	$5,300		

If the mediation produces any settlement less than $5,300 to the plaintiff, therefore, it is economically rational for the defendant to go into mediation, because the marginal expected cost of refusing mediation is greater than the marginal loss of mediation. The incentives argument said that it is rational for the stronger party to avoid mediation whenever the mediation produces a settlement in which the

58. Dropping this assumption does not affect our conclusions, it just makes for more numbers.

stronger party pays more than the shadow bargain ($2,000). We now see that even in strictly economic terms the argument must be modified.

This last point suggests, however, that a qualified form of the incentives argument will be valid. Whenever participation in ADR is completely optional, whenever powerful parties do worse than the shadow bargain in ADR for reasons other than fully voluntary concession, and whenever their marginal expected loss in ADR relative to the shadow bargain exceeds their marginal expected loss of refusing ADR, then they will have an incentive to avoid ADR. Let us call this the "modified incentives argument." It is simply the original incentives argument qualified by the three "whenevers." It will figure in our subsequent discussion, for it sets an upper limit to the extent redistributive social reform can be pursued through the use of ADR.

The Shadow Verdict

All these arguments point to the conclusion that the shadow bargain cannot be taken as the normative baseline for assessing ADR programs. ADR programs must be held to a standard of justice that is less dependent on the brute bargaining power of the parties and more sensitive to morally relevant information.

This is *not* to say, however, that the shadow verdict—the anticipated result of a fair trial—is a better standard of justice. That would be true only if we are speaking of legal justice, and then it is true tautologically. We have seen that legal justice is only one of at least four conceptions of justice, and perhaps not the most important of the four. On any of the other three conceptions of justice—extra-legal justice, ideal justice, or second-best justice—the shadow verdict carries decisive normative weight only when the law is itself just, both in general and in the case at hand.

An example is the settlement of the Agent Orange class action, brought by exposed Vietnam veterans against seven chemical companies that manufactured Agent Orange. Scant hours before trial was scheduled to begin, the case was settled for $180 million in a weekend bargaining session conducted by Judge Jack Weinstein and two special masters.

The case was a tricky one. If it ever got to a jury it was pretty clear that the defendants would lose a lot of money. However, it was unclear to the lawyers whether the plaintiffs' causation evidence was good enough to take to a jury. To prove by a preponderance of evidence that any individual veteran's cancer had been caused by Agent Orange, the cancer rate among the veterans would have to be more than twice the rate in the general population, which was not the case. Thus, even if the cancer rate among veterans was significantly higher than the background cancer rate, the veterans might lose on summary judgment.[59]

59. On this evidentiary problem with Agent Orange see P. SCHUCK, *supra* note 26, at 185-86.

Many of us think, however, that this simply shows that the preponderance-of-evidence requirement is unreasonably demanding in cases of statistical causation such as Agent Orange. If you believe this, you must also believe that the settlement, in which the plaintiffs got $180 million, is much more just than an adjudication in which they would receive nothing. The settlement resulted, moreover, because the defendants thought trial was too risky—the expected value for the defendants was much worse than the shadow verdict. That is, for precisely the reasons we have discussed, the bargain did not reflect the legal norms. Nevertheless, in this case the bargain was *preferable* to the shadow verdict.

Nor did the Agent Orange settlement approximate the shadow bargain, the result the parties would have reached negotiating without assistance. First of all, it is unclear that there *was* a shadow bargain. Without Weinstein's ADR intervention, it is clear that the case would have gone to trial. Second, we will find it virtually impossible to estimate the shadow bargain even on the assumption that the parties would have settled during the trial. Left to their own devices, a week before the settlement they were still a quarter of a billion dollars apart! Finally, during the weekend bargaining session the two sides were on the verge of agreeing to $200 million, but Weinstein forced it down to $180 million because he thought the higher number unfair.[60]

Let us leave to one side whether Weinstein was right. The point is that through ADR he was attempting to fashion a fair and just outcome that was not tailored to *either* the shadow bargain or the shadow verdict. That, after all, is the initial claim made by the quality argument—that the "give a little, take a little settlement" is higher quality justice than the all-or-nothing adjudication. Perhaps the standard of justice in ADR lies in its creative capacity to bring disputants to solutions that are modeled on neither law nor bargaining power.[61] But what standard is that?

III. QUALITY

Four Criteria of Quality

Participants at the workshop suggested four criteria of quality of justice in ADR. The first three are:

(A) participant satisfaction,

(B) the furthering of social justice, and

(C) the transformation of the parties.

The root idea of criterion (C) was well described by Lon Fuller in a classic article. The central quality of mediation is "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions to-

60. *Id.* at 159.

61. *See* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

ward one another."[62]

The transformation of the parties actually means one of two rather different things. On the one hand, it can mean empowering the parties so that they are able to participate more actively and constructively in the relationship and exercise more control. Often this means educating, boosting, or otherwise supporting the weaker—less articulate, less self-confident, more oppressed—party. Empowerment, therefore, involves a redistribution of political control.

On the other hand, the transformation of the participants can mean restructuring or reconstituting their relationships—getting them to acknowledge each others' points of view, encouraging them to see each other as flesh-and-blood people without tails or horns, and transforming "I/It" relationships to "I/Thou" relationships. In short, we may subdivide criterion (C) into criteria (C1) empowerment and (C2) reconciliation.

It is tempting to play the role of the pluralist at this point. All four of these criteria look good; why not say that the quality of justice is a combination, perhaps a weighted sum, of all of them? I believe, however, that one should resist the allure of syncretism as long as possible. This is partly for theoretical parsimony (hypotheses are at their most fruitful when they *don't* multiply!), but the more important reason is that several of these criteria are responses to what appear to be conflicting visions of the human good. This makes them at least *prima facie* competitors.

Thus, on one reading of participant satisfaction the criterion seems motivated by a broadly utilitarian, or, alternatively, therapeutic world view. In fact, several workshop participants suggested that the quality of ADR is indexed by whether participants "feel good about the process." Proponents of reconciliation draw inspiration from communitarian social thought[63] or religious conceptions of community.[64] And empowerment will seem crucial to those whose conception of the human good stresses autonomy, self-reliance, or, alternatively, dealienated political participation.

The pursuit of social justice does not, at first blush, entail commitment to a particular view of the human good, for as we have seen in Section I "justice" can mean many things, and, even when one meaning is fixed, alternative theories of justice will always exist. It is reasonably clear, however, that the pursuit of social justice through ADR arises within the larger movement of left wing politics that has made social justice its explicit aim. Commentators who stress the importance of social justice mean to connect ADR with the larger movement. Such politics itself has utilitarian, therapeutic, communitarian, and pro-participatory strands. It is a mistake, however, to equate the pursuit of

62. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

63. *See, e.g.*, Bush, *Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1532-63 (1986).

64. *See, e.g.*, McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

social justice to these other visions of the human good. Those who emphasize social justice typically insist that in an unjust society, community and participation are merely illusory, utility and healing merely provisional and co-optive.

Thus, there does seem to be a distinctive form of the human good associated with the pursuit of social justice. It is one that stresses our status as moral beings possessing distinctively moral interests. One thinks here of Rawls' assertion that justice is the first virtue of social institutions, or Brecht's poem "The Bread of the People:"[65]

Justice is the bread of the people.
Sometimes it is plentiful, sometimes it is scarce.
Sometimes it tastes good, sometimes it tastes bad.
When the bread is scarce, there is hunger.
When the bread is bad, there is discontent . . . .
If the bread is good and plentiful
The rest of the meal can be excused.
One cannot have plenty of everything all at once.
Nourished by the bread of justice
The work can be achieved
From which plenty comes.
As daily bread is necessary
So is daily justice.
It is even necessary several times a day.

Let me comment briefly on each of these criteria. I shall argue that, of the four, participant satisfaction is the only untenable criterion of justice for ADR. The other three are important and tenable alternatives. My cautionary remarks about them are intended not as criticism, but only to point out complexities that their proponents must address. I will suggest that although social justice is of vital importance we should not expect ADR to figure prominently in achieving it, that empowerment may be difficult to identify in a non-circular manner, and that the goal of reconciliation among the parties may have to be understood in a rather narrow fashion.[66]

Participant Satisfaction

The most obvious and attractive criterion of quality of justice is the satisfaction of the participants. Its rationale takes several forms. The first is straightforward utilitarianism: the aim of social institutions in general, and institutions of justice including ADR in particular, *is* the maximization of utility. Judge Richard Enslen recommended that summary jury trials be assessed by exit questionnaires asking litigants how satisfied they were with the process. This, I take it, makes sense on a utilitarian rationale.

65. B. BRECHT, POEMS 1913-1956 (1976).

66. Let me stress that the judgments of ADR advanced here are generally intended as absolute, not comparative, judgments. That is, when I argue that ADR is not an especially promising vehicle for the pursuit of social change, I do not intend to suggest that its alternatives—adjudication or unmediated bargaining—are any better.

Furthermore, commercial providers of ADR services depend upon satisfied consumers for their livelihood. The market will register consumer preferences. Therefore, any market-oriented approach to assessing ADR will necessarily focus on participant satisfaction as its ultimate benchmark.

Finally, ADR practitioners with a background in social work or therapy stress the importance of ADR techniques as a way for people to deal with complex feelings, particularly anger and resentment aroused by a dispute. While nobody thinks mediation is group therapy, several workshop participants invoked therapeutic criteria. Not participant satisfaction, but participant subjective feelings, become the measure of success.

I believe, however, that participant satisfaction is an unacceptable criterion of quality of justice for four fundamental reasons: externality problems, sour-grapes phenomena (so-called "adaptive preference formation")[67] induced by attorneys cooling out their clients, distributional insensitivity, and informational poverty. Let me explain these in turn.

Externality problems

Robert Gorske described the successful resolution of a multi-million dollar dispute between the Wisconsin Electric Power Company and American Can Company through a mini-trial procedure proposed by Endispute, Inc. The terms of the settlement were confidential, and this fact led Stewart Macaulay to worry that no outside check existed to ensure that the terms were beneficial to electric power consumers a regulated utility. In general, Macaulay believes, an ADR process may well succeed because the participants are able to pass the losses and downside risks on to third parties.

Consider a typical "nimby" or *n*ot *i*n *m*y *b*ack *y*ard problem of a sort familiar to environmental mediators.[68] A hospital plans to build a halfway house for convalescent schizophrenics in a well-to-do neighborhood. The neighborhood's residents object and initiate legal action to prevent the construction. The hospital persists. The mayor sends in a mediator, and the disputants solve their problem by the hospital agreeing to erect the halfway house in a poor neighborhood instead. The poor neighborhood's residents find out about it in the newspaper; they do not complain because they believe that complaining will be unsuccessful. Here, the primary disputants have achieved a satisfactory outcome only by displacing the negative externality onto an uninvolved and unrepresented party.

67. *See* Elster, *Sour Grapes—Utilitarianism and the Genesis of Wants*, in UTILITARIANISM AND BEYOND 219 (1982).

68. *See* A. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION (1983). In *Settling Things*, the author discusses a nimby problem mediated by Howard Bellman. My hypothetical is based on a current dispute in Washington, D.C. over attempts by the District government to build halfway houses in Georgetown, the District's most affluent neighborhood. A Georgetown citizen group is attempting to prevent the plan by taking legal action. I do not mean to imply that the real-life dispute will proceed along the lines of my hypothetical, however.

The point of such examples is that as long as negative externalities can result from ADR proceedings, the satisfaction *of the participants* will not be an adequate measure of justice. In the familiar language of the economic analysis of externalities: the private costs of the negotiated solution do not reflect its true social cost.

Similar externality problems arise on the therapeutic version of participant satisfaction. As William Simon argues, lawyers who view their representation of clients on the therapeutic model—what he calls the model of "homo psychologicus"—typically regard the lawyer-client relationship as a "community of two" for which the rest of the world consists of adversaries to be neutralized.[69] This world view is surely an invitation to solve the problems of the community of two by passing them along in the form of externalities.

The same criticisms will clearly apply to a neutral who views herself together with the disputants as a "community of three." Precisely such an attitude is reflected in SPIDR's ethical standard entitled "Unrepresented Interests," which reads: "[t]he neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of the parties dictate, to assure that such interests have been carefully considered by the principal parties."[70]

Notwithstanding the strong-sounding "must" and "has an obligation" language, the rule is squarely within the community-of-three tradition. The first sentence obliges the neutral merely to think about unrepresented interests; the second sentence obliges the neutral—but only when "the needs of the parties dictate," which they presumably do not in our nimby example—to make sure that the parties also think about unrepresented interests. The rule gives no indication *what* the neutral or the parties ought to think about unrepresented interests, or *how* they ought to think about them, or what they ought to do after they have thought about them. The view here is clearly that though externality problems are troubling, they must be subordinated to the needs and interests of the primary disputants.

Sour grapes and cooling out.

The second problem with taking participant satisfaction as a criterion of justice is simple to state. Participants are not necessarily satisfied because the process has been a good one; they can be satisfied simply because their expectations have been illegitimately lowered. Attorneys interested in facilitating a settlement are great client-expectation lowerers: it is well known that a crucial part of settling a case involves cooling out one's client by overstressing the risks of litigation.[71] The result is

69. *See* Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

70. SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ETHICAL STANDARDS at 5 (1987).

71. *See, e.g.*, D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

what Jon Elster calls "adaptive preference formation," as typified in the phenomenon of sour grapes: one adapts one's preferences to the possibility of satisfying them. What you cannot have, you do not want. If your lawyer tells you that the case is worth a maximum of $3,000 you will be satisfied to settle for that amount.

On Elster's analysis, which I endorse, the phenomenon of adaptive preference formation spells trouble for utilitarianism—and Elster's criticism applies squarely to judging ADR procedures by participant satisfaction:

> [W]hy should individual want satisfaction to be the criterion of justice . . . if people tend to adjust their aspirations to their possibilities? For the utilitarian, there would be no welfare loss if the fox were excluded from consumption of the grapes, since he thought them sour anyway. But of course the cause of his holding the grapes to be sour was his conviction that he would be excluded from consumption of them, and then it is difficult to justify the allocation by reference to his preferences.[72]

The motivations for attorneys to cool out their clients are clear: if a dispute goes to trial there will be a loser, and no attorney wants to lose. It is bad for the ego, bad for the pocketbook, bad for the reputation, and bad for business. Federal Judge H. Lee Sarokin has remarked that asking attorneys if they want his help in settling a case is like asking a drowning man if he wants a life preserver. Moreover, as Rosenthal argues, it is in attorneys' financial interest to settle cases sooner rather than later, for the marginal costs of preparing for trial inevitably rise more rapidly than the marginal benefit in increased settlement and (therefore) contingency fee.

As long as attorneys cool out clients, therefore, worry about adaptive preference formation should lead us to suspect participant satisfaction as a criterion of justice. Even if the ADR procedure does not involve attorneys, it will often be that the mediator brings home the settlement by damping down the disputants' expectations.

Distributional insensitivity

Participant satisfaction is also subject to the usual criticisms of utilitarianism for its nonchalance about how satisfaction is distributed among the parties. Even Pareto-improvements—bargains in which at least one party gains and nobody loses—may be suspect.

For example, Judge Susan Steingass remarked that in a divorce mediation the ideal settlement is one that both parties can live with but neither party is happy with. If one party leaves the mediation smiling, it is time to worry. In line with this, we may consider two imaginary mediations. In the first, both parties leave in the condition Steingass describes: they can live with the outcome, but they find it essentially mediocre. In the second, only one party finds it essentially mediocre but bearable, while the other party is completely delighted. The second me-

72. Elster, *supra* note 67.

diation is a Pareto-improvement over the first, and exit questionnaires will register more gross participant satisfaction in the second. However, we are certainly entitled to suspect that in the second mediation someone got skinned.

Informational poverty

The last worry about participant satisfaction is simply a reprise of our earlier discussion of bargaining: any plausible criterion of justice must be sensitive to information about resources, their utilization, and the lives of the participants, not just information about welfare. But participant satisfaction is a purely welfarist measure.

It may be objected to this entire line of criticism that we have misunderstood and trivialized participant satisfaction by viewing it along utilitarian, or therapeutic, or generally "feel good" lines. Participant satisfaction is not valued for its own sake, but for the sake of whatever it is the participants feel good *about*. For most likely what the participants feel good about is the justice of the procedure.

That is, participant satisfaction need not be subjective or inward looking. It can be satisfaction that they got a fair hearing, that the neutral was helpful and constructive in fashioning a solution, that they, rather than their lawyers, controlled the process, and so on.[73]

In that case, however, participant satisfaction is not the criterion of justice at all: fairness, correct outcomes, empowerment and party-control are the criteria. Participant satisfaction is invoked here simply as evidence that these criteria are satisfied. However, it is not decisive evidence, because the participants may have been bamboozled into believing that the neutral was fair or constructive when in fact a savvy observer could see otherwise. Thus, participant satisfaction must either be understood on welfarist lines, in which case our objections to it stand, or else it must be understood as a proxy for some *other* criterion of quality, in which case we should not be looking at participant satisfaction.

Social Justice

Social justice is an ambiguous criterion of quality in ADR for reasons we have already elaborated on. "Social justice" can refer to legal justice or to getting what the system implicitly promises. Both of these are conceptions of justice within the system. "Social justice" can also refer to progress or to ideal justice. Both of these are revisionary conceptions of justice.

Earlier I argued that the better an ADR regime is at providing justice within the system, the better it will be at eliminating incentives to work for the global system change demanded by revisionary justice. This suggests that if social justice is understood along revisionary lines only an *ineffective* ADR regime will facilitate the pursuit of social justice! One can hardly come right out and propose making ADR regimes inef-

73. This argument was suggested to me by Marc Galanter.

fective. Thus, anyone who is committed to pursuing revisionary justice through ADR will have to do so by secretly subverting the process in order to raise the temperature of disputes so the weaker participants press for more global social change.

This may not be so improbable a scenario. Handler's cautionary tale about the mediators in school-placement disputes described their aims as: informing the parents of their legal rights even though the bureaucracy wanted to keep them uninformed, empowering them, making them better negotiators, and slowing down the bureaucracy in its attempt to facilitate fast, perfunctory hearings. The clear outcome of such interventions is that the parents become feistier, more skeptical, and more demanding. This will lead to *more* disputes, not fewer disputes, and it is hard to imagine that the mediators were not perfectly well aware of this. My uninformed guess is that they *aimed* to create problems for the bureaucracy that would force it to reform itself.

This amounts to the neutral providing the weaker parties with glimpses of greener grass on the other side of the fence so that they become discontent with the fence. Elster terms this "counteradaptive preference formation." "The grass is greener on the other side of the fence" is, after all, the mirror image of sour grapes. Elster adds: "[f]or the record, it may well be adaptive in some larger sense to have counteradaptive preferences, because of the incentive effects created by a moving target."[74] That may be how ADR effects widespread revisionary social change.

The objection to such a program is simply that it is paternalistic and manipulative. The neutral will have to disguise her real aims (empowerment, counteradaptive preference formation), or whatever from the participants—who will often be paying clients—and perhaps even from herself (since few of us are able to live successfully in the role of double agent). Surely this is not a viable or stable self-image for ADR.

There is one other way in which ADR can contribute to revisionary justice. Occasionally a revisionary or even utopian principle of justice may be satisfied within the context of a single mediation. A lucky and skillfully-conducted mediation might actually end in both parties giving according to their abilities and receiving according to their needs. For this to happen the Fullerian transformation of the parties' relationship must be astonishingly deep, for they will be resolving their dispute in a way that is far removed from the materials that are ready to hand in our culture. (A revisionary principle of justice is by definition a principle that is not business as usual within our culture.) The ADR session will be little less than an intimation of utopia. However, such ADR epiphanies are bound to be rare, as rare as great sex or perfect friendship. They will surely *not* be ADR as usual. While we must take note of their possibility, we should not get our hopes up that mediation can bring a

74. Elster, *supra* note 67.

better, brighter world into existence before our very eyes, one dispute at a time.

ADR is likely to be better at helping realize justice within the system than revisionary justice. If legal justice is the aim, then ADR may well come close to the shadow verdict, at lower costs and with greater expeditiousness than the trial process. This is the efficiency argument that is most commonly made on behalf of ADR. Nevertheless ADR's real strength may lie in pursuing extra-legal justice within the system, and that is an argument based on quality, not efficiency. Recall that "extra-legal justice within the system" refers to goods or rights that are implicit in existing institutions but to which we have no legal right. Here we need no intimations of utopia; here the cultural materials for discussion and negotiation are already in place, in the form of existing institutions and their logic.

Imagine, for example, an employment discrimination suit in which the law almost certainly grants the plaintiffs no remedy even though their grievance is real. A good mediator may well help the disputants achieve a consent decree in which the defendant establishes an affirmative action program to which the plaintiffs had no legal entitlement, just because it seems as though the time is ripe for such a program. The fact that the logic of existing institutions is on the side of the plaintiffs may well lead the defendant to look favorably on a compromise.

In ADR, that is, parties can come to accept the qualified validity of each others' viewpoints and grant concessions that go beyond legal entitlements, because those concessions are already inherent in shared principles and existing institutions. This is the reason why "the absolute result of a trial is not as high a quality of justice as the freely negotiated, give a little, take a little settlement"[75]—our opening statement of the quality argument.

It is important to realize, however, that ADR's contribution to social change will be modest. Earlier we considered the "incentives argument" that if parties with bargaining advantages do not do as well in ADR as in unmediated negotiation they will avoid ADR. We saw that as long as the added concessions they make in ADR are less than the marginal increase in expected legal fees or litigation costs that result from avoiding ADR, strong parties will still have an incentive to use ADR. This was our "modified incentives argument." However, this sets an upper limit on how much extra-legal social justice ADR can provide: sooner or later strong parties will look to the bottom line, and then they will give away legal entitlements only to the point where the marginal cost of the giveaway equals the marginal cost of insisting on their legal rights. This gives some latitude for the realization of extra-legal justice within the system—but not much.

Some critics of ADR take an even dimmer view of the matter, arguing that ADR is an enemy of progressive social reform. In Mark Lazer-

75. Galanter, *supra* note 5.

son's essay *In the Halls of Justice, the Only Justice is in the Halls*,[76] and Jerold Auerbach's book *Justice Without Law?*[77] we find arguments that ADR is an almost conspiratorial backdoor attempt to take back formal legal rights won by have-nots after arduous political struggles. Other authors in Abel's anthology accuse the ADR movement of establishing a two-tier justice system—the rich get trials and the poor get mediators—or treating disputants as "a commodity from which various professionals and entrepreneurs extract a profit."[78]

Lazerson describes an ingenious campaign by South Bronx legal services lawyers to tie slum landlords in knots by skillful use of time-consuming legal formalities as the landlords sought to evict poor tenants. Only after this tactic succeeded were the landlords ready to negotiate with their tenants. The landlords retaliated by lobbying for the creation of an ADR process—an informal housing court—which in practice simply gave poor tenants the bum's rush into quick evictions. The informal housing court undid the formal legal victories of the legal services lawyers.[79]

However, this example cannot be generalized to a wholesale critique of informalism. As William Simon points out, the tenants were able to exploit the formal legal system only because the burden of initiative in seeking evictions rested on the landlords—the landlords could be tied in knots by delay because they needed a court order to evict. Change the law so that the burden rests on the tenants—say, by permitting landlord self-help, with the tenants needing a court order to prevent eviction—and the formal system would benefit the landlords, while a faster ADR procedure would benefit the tenants.[80]

The point of Simon's discussion is to suggest that whether ADR or the formal system better protects hard-won rights of have-nots depends on context, not on innate properties of ADR or the formal system. Thus, contrary to the critics, no *general* story can be told about whether ADR will help or hurt have-nots. Clearly the effects of ADR on women, minorities, or poor people is a matter for empirical investigation and not *a priori* argument, as Delgado, Finley, and Wilkins stressed in their presentations, which pointed to problem areas in which empirical investigation is urgently needed.[81] In any event, it will probably be true that

76. Lazerson, *supra* note 1.

77. J. AUERBACH, *supra* note 1.

78. *See, e.g.*, Scull, *Community Corrections: Panacea, Process, or Pretense?*, in THE POLITICS OF INFORMAL JUSTICE 105 (1982).

79. Lazerson, *supra* note 1.

80. Simon, *Legal Informality and Redistributive Politics*, CLEARINGHOUSE REV., Summer 1985, at 384-91.

81. *See also* Lerman, *supra* note 1. Critics also suggest that ADR amounts to a two-tier justice system, with haves monopolizing the courts while have-nots get the mediators. Thus, Auerbach writes: "Bar associations do not recommend that corporate law firms divert *their* clients to mediation." J. AUERBACH, *supra* note 1, at 144. *See also* THE POLITICS OF INFORMAL JUSTICE 78 (R. Abel ed. 1982). But Gorske's example of the dispute between American Can and Wisconsin Electric Power, and the practice of organizations such as Endispute or the Center for Public Resources suggests that Auerbach is wrong.

ADR can, at best, represent a marginal contribution to the pursuit of social justice in either its within-the-system or revisionary forms.

Empowerment

"Empowerment" has been defined as "giving assistance to one of the parties so that both parties have equally valued input into the decision-making process of mediation."[82] As I have indicated, it is a matter of considerable controversy among the ADR professions whether empowerment is ethically commanded or ethically forbidden to the neutral. Without addressing that question, we may still consider the possibility that empowerment is a criterion of quality in ADR.

An initial objection to an empowerment theory of quality is that it focuses exclusively on process rather than outcome: as long as "both parties have equally valued input into the decision-making process" they are empowered, but the outcome may still be relentlessly lopsided or otherwise unappealing. True, empowerment of the weaker party will be necessary to prevent a mere contest of bargaining strength, but empowerment may still not be sufficient for justice.

But this objection is not decisive, for it begs the question of what justice is. For on some accounts the outcome of a discussion in which both parties have equally valued input, because coercive and hierarchical structures have been provisionally neutralized, *is* justice. Such a view has been defended most elaborately by Jürgen Habermas.[83]

According to Habermas, discussions are typically distorted by imbalances in power, by social class, by neurosis, and by ideologically-induced false consciousness. However, implicit in any discussion, no matter how distorted, is the "ideal speech situation" in which all these constraints are removed and in which "participants, themes and contributions are not restricted except with reference to the goal; . . . no force except that of the better argument is exercised; and . . . as a result, all motives except that of the cooperative search for truth are excluded."[84] Habermas argues that valid norms (for example, of justice) simply *are* the outcome of such a discussion, that we mean nothing more by the notions of validity and truth than "whatever we would reach consensus on in an ideal speech situation"—the so-called "consensus theory of truth."[85]

It seems fairly clear that an empowerment theory of quality makes sense only on a theory of justice in which just outcomes are defined in terms of ideal process. Habermas's theory is not without its difficulties,

82. Engram & Markowitz, *supra* note 10, at 23.

83. J. HABERMAS, LEGITIMATION CRISIS (1975); J. HABERMAS & N. LUHMANN, THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE—WAS LEISTET DIE SYSTEMFORSCHUNG? (1971); Habermas, *On Systematically Distorted Communication*, 13 INQUIRY 205 (1970); Habermas, *Towards a Theory of Communicative Competence*, 13 INQUIRY 360 (1970). *See also* R. GEUSS, THE IDEA OF A CRITICAL THEORY (1981).

84. J. HABERMAS, *supra* note 83, at 107-08.

85. J. HABERMAS & N. LUHMANN, *supra* note 83, at 123-36. *See also* R. GEUSS, *supra* note 83, at 65-67.

but many of these pertain to portions of the theory that are of no concern to us.[86] The idea that justice in ADR should be measured against a Habermasian standard of the projected outcome of an ideal speech situation, and the related suggestion that a neutral should try to bring about an ideal speech situation by empowerment, are clearly very attractive.

The real difficulty with such a view is not its theoretical adequacy but its practical meaningfulness. Once we acknowledge, as Habermas does and as any reasonable person should, that constraints and distortions can be unconscious and hard to localize, we need to know how we are supposed to recognize an ideal speech situation, a situation of undistorted communication. How do you tell when a disputant is acting out of neurosis or false consciousness? It is unfortunately very likely that we will recognize distorted communication only by its outcome, by whether the parties after all arrive at a fair settlement. In that case, we have proceeded in a circle, defining justice in terms of consensus in the ideal speech situation while specifying the ideal speech situation in terms of how just its outcomes are.

The problem is precisely analogous to the terrible difficulties lawyers have found interpreting the notion of "unconscionable" agreements. Sometimes unconscionability seems to refer to the substance of the agreement, sometimes to the bargaining process. It is temptingly easy to fall into the vicious circle of saying "the process must have been unfair, else it wouldn't have produced such a horrible outcome; the outcome is unconscionable, because the process was unfair." The only general conclusion one can reach is that "unconscionability" is so infected with ambiguity as to be nearly useless.[87]

Before leaving the topic of empowerment, it is important to consider another version of the idea, one that overlaps with our earlier discussion of social justice. Handler's story provides an entry to this version of empowerment. Recall that the mediators in the school-placement program attempted to make the parents more savvy about their legal entitlements and sophisticated in their dealings with the bureaucracy. This was empowerment, to be sure, but empowerment of a particularly potent kind. It does not merely empower the parents for the negotiation at hand and allow them to provide equally valued input about today's dispute. It also empowers them for a whole range of future dealings with the bureaucracy. This is empowerment as pump priming, which moves the empowered folks out of a position of dependency into an action-oriented position of self-reliance. It attempts to

86. Such as his belief that the ideal speech situation is "transcendental," that is, culturally universal, because it is built into the very structure of language, his view that empirical truth as well as moral agreement should be analyzed in terms of consensus, or, finally, his very strong requirement that consensus on any issue must be achieved in an across-the-board consensus on all principles connected with this issue. *See* J. HABERMAS & N. LUHMANN, *supra* note 83, at 320-21.

87. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

transform them into self-moved movers.[88]

The politics of this version of empowerment are closely connected with a view of poverty-law practice according to which the lawyer's job is to mobilize and catalyze the clients rather than simply doing a job on their behalf.[89] For example, William Simon relates an anecdote Gary Bellow tells about his practice for California Rural Legal Assistance. Bellow once insisted on deposing an official in plain view of his farm-worker clients. "I insisted that the deposition be taken in front of those [farm-workers] so they could see me challenge him, question him, and get information from him that they had previously been unable to obtain."[90] The experience proved so "empowering" to the clients that they were able to force a victory in their dispute even though they ultimately lost on the legal issue.

This version of empowerment is an attractive conception of justice, appealing to a vision of human autonomy and self-reliance and to active political participation, which some philosophers[91] have identified as the most characteristically human good. As in our earlier discussion of social justice, however, it is important to remark that ADR is unlikely to be an especially appropriate vehicle for this kind of empowerment. Once again, the modified incentives argument implies that too much empowering activity on the part of neutrals will lead to underutilization of ADR by the more powerful parties who find themselves getting goosed by the process. Thus, ADR as political organizing is a machine that turns itself off. Moreover, it is important to distinguish the roles of advocate and neutral. It may well be the professional responsibility of the poverty lawyer to empower her clients.[92] However, the neutral, unlike the advocate, necessarily has an equal responsibility to the other parties in ADR, and it strikes me as inconsistent with the neutral's role to become what is in effect an advocate for one of the disputants.

Reconciliation

The fourth criterion of justice is what I have called "reconciliation"—transforming the disputants and their mutual relationships so that they come to acknowledge each other's point of view and common humanity. One appealing version of justice as reconciliation is explicitly religious:

88. Menkel-Meadow has assimilated such empowerment to what she terms the educative function of ADR, a function that also includes situations "when one or both parties learn, on a metalevel, about conflict, its functions and dysfunctions, and how to think about resolving them (where resolution is appropriate . . .)." Letter from Carrie Menkel-Meadow to David Luban (November 14, 1987). I agree that the educative function of ADR is valuable, though I do not believe that it constitutes an independent criterion of justice: the education of disputants may lead to more justice in the future, but it does not in and of itself mark an increase in justice.

89. Simon, *infra* note 90; Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

90. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 483 (1984).

91. The most noteworthy is Hannah Arendt. *See* H. ARENDT, THE HUMAN CONDITION (1958).

92. *See* Simon, *supra* note 90.

> Hebraic theology puts primary emphasis on relationships, a priority that is political and even ontological, as well as ethical, and therefore legal. And so, most radically, the religious tradition seeks not *resolution* . . . but *reconciliation* of brother to brother, sister to sister, sister to brother, child to parent, neighbor to neighbor, buyer to seller, defendant to plaintiff, *and judge to both*.[93]

Reconciliation theories need not be religiously based. Recent feminist writing has emphasized reconciliation as a moral ideal.[94] Communitarian social theory also plays a role in the pursuit of a non-rule-bound, informal restoration of solidarity. Thus, for example, Roberto Unger contrasts legal formality to solidarity—which he describes as "the social face of love . . . , love struggling to move beyond the circle of intimacy"[95]—in terms that are virtually a textbook argument on behalf of mediation:

> There is a simple reason why no set of rules and principles can do justice to the sentiment of solidarity. A legal order confers entitlements and obligations . . . . But solidarity means that one takes no entitlements for granted. A powerholder who acts out of a sense of solidarity will always have to ask himself whether the exercise of his power in a particular situation would be consistent with the aim of sharing the burden of the people with whom he is dealing. To this question, there can never be a general answer, laid down in advance. Everything will depend on issues like the degree to which the other person has acted wrongly in the particular relationship and his ability to bear the loss that would result from the exercise of the power.[96]

These are precisely the issues that will be ventilated in good ADR. In the workshop, Millhauser and Baruch-Bush suggested a reconciliatory vision of quality. Baruch-Bush has defended a communitarian notion of responsibility.[97]

It is important to realize, however, that the goal of reconciliation need not take a communitarian form. Consider, for example, the mini-trial. In Gorske's example, executives from Wisconsin Electric Power and American Can sat with a professional judge to hear an abbreviated adversary presentation of the dispute by lawyers representing the two companies. The idea of the mini-trial is to compel executive decision makers to hear how strong the adversary's case is. In this way they come to appreciate the adversary's viewpoint, and are more amenable to good faith negotiation.

This is reconciliation if anything in ADR is, but I think it is clearly

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93. McThenia & Shaffer, *supra* note 64, at 1666.

94. *See* C. GILLIGAN, IN A DIFFERENT VOICE (1982). *See also* Menkel-Meadow, *supra* note 61.

95. R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976).

96. *Id.* at 207.

97. Bush, *supra* note 63. (*Editor's note*: For Professor Baruch-Bush's recent views see his article in this issue.)

wrong to describe the example in terms as hyperbolic and purple as Unger's. American Can's settlement with Wisconsin Electric Power had nothing to do with love or solidarity.[98] Nor can we speak of anything like Martin Buber's I/Thou relationship: "When I confront a human being as my Thou and speak the basic word I-Thou to him, then he is no thing among things nor does he consist of things .... Neighborless and seamless, he is Thou and fills the firmament."[99] Buber would be startled, to say the least, to find the "basic word I-Thou" invoked in a context so clearly part of the realm of I-It as American Can's dispute with Wisconsin Electric Power.[100]

It seems evident that the kind of reconciliation, of transformation of the parties, that takes place in a mini-trial, must be characterized in more restrained terms than those we have been examining. The parties do come to appreciate the other's viewpoint when ADR succeeds. They do treat the other as a person rather than as a pothole in the highway of life. In a word, they come to *respect* the other. It isn't love, it may not be solidarity, but it is not to be denigrated.[101]

The natural model here is Kant's injunction to respect other people by treating them as ends in themselves, not as means—as beings who have a "dignity," not a "price." Kant called the imaginary realm in which everyone obeys this injunction the "Kingdom of Ends." The vision of justice as reconciliation that seems most clearly to correspond to ADR is a vision in which ADR seeks to bring the Kingdom of Ends down to earth.

Unger denigrates the appeal to respect: "Respect . . . sets aside each individual's distinctiveness .... Love differs from respect because it prizes the loved one's humanity in the unique form of his individual personality."[102] This simply seems wrong. Respecting another is fully compatible with coming to appreciate her individuality. As a matter of fact, respecting another's point of view in a dispute is *impossible* if you set aside her distinctiveness. On the flip side, it is just too much to expect that ADR will transform angry adversaries into loving I's and Thou's—but it is not too much to expect that it can transform them into people who grudgingly and reluctantly admit that the other has a point and who settle their dispute with a not-terribly-enthusiastic fairness, a mumbled "live and let live," and a handshake.[103]

98. Is this merely because the disputants are corporations rather than individuals? I do not think so: the executive decision makers are individuals, and it is their reconciliation that the mini-trial seeks.

99. M. BUBER, I AND THOU 59 (1970).

100. Yet McThenia and Shaffer *do* invoke Buber in their defense of ADR. *See* McThenia & Shaffer, *supra* note 64, at 1666.

101. Buber deliberately used the second-person familiar *du* in his "I-Thou" (*ich-du*). In German "*du*" is generally reserved for those with whom one is most intimate. For everyone else the formal "you" (*Sie*) is employed. Perhaps the best way to characterize reconciliation based on respect is to suggest that it transforms I-It relationships not to *ich-du* but to *ich-Sie* relationships.

102. R. UNGER, *supra* note 95, at 206-07.

103. More fundamentally, if respect is good enough for Aretha Franklin, it's good enough for me.

One may quarrel with the very idea of making reconciliation the touchstone of justice. Reconciliation seems to place a higher value on social order and conviviality than on fairness, and one may fear that people can become reconciled in morally outrageous relationships. This realization is, after all, at the heart of the feminist critique of sexist marriages.[104] I shall not pursue this line of criticism here, for it quickly moves us to a difficult debate about whether reconciliation into master-slave relationships counts as reconciliation in the sense that the proposal intends. Instead, I wish simply to pursue the question of whether communitarian solidarity or Kantian respect provides a better reading of what reconciliation is about.

Reconciliation based on respect is an unexciting and decidedly liberal idea, while the communitarian versions of reconciliation are often coupled with critiques of liberalism. For this reason the stakes are large in a debate between the two. Rather than venture into such troubled waters, I shall merely offer one final argument in favor of the less titillating respect-based view of reconciliation.

That argument is based on the "publicity principle" of Kant and Rawls. The publicity principle—intended as a moral requirement on public policy—requires of any defensible policy that it be capable of withstanding general, public knowledge that it is in place. The publicity principle is meant to rule out secret or esoteric policies, and is perhaps the backbone of democratic theory. I wish to ask which version of reconciliation best comports with the publicity principle.[105]

My suspicion is that reconciliation as solidarity would run afoul of the publicity principle. Could a mediator or arbitrator really kick off the proceedings—an attempt to resolve a business dispute, let us say, in which both disputing parties are quite angry with each other—by announcing: "The aim of these sessions is not merely to resolve your dispute. It is to do so by transforming you so that you come to regard each other as fellow members of a loving community?" Surely the answer is no. That may be the last thing the disputants want. They may hate each other's guts. Even if the disputants were receptive to the idea of a loving community, they would rightly suggest that the proposed transformation would be a welcome but incidental byproduct of a process the primary aim of which *is* merely to resolve the dispute. What the neutral takes as the primary touchstone of justice—the transformation of the disputants into people in solidarity—is not the aim of the disputants. At best it is something they regard as strictly secondary; at worst it is a

104. See Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985), and Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279 (1987), for criticisms of jurisprudential views that place harmony over justice in the ranking of social values. Lerman rightly excoriates mediators in wife abuse cases who try to get the wife to change the behavior that makes her husband beat her up, an example that Finley pressed forcefully in the workshop. *See* Lerman, *supra* note 1.

105. It may seem that the publicity principle is too strong, that it would rule out all state secrets (including vital security information), but that is not correct. Provided that a policy of keeping certain things secret can itself withstand public knowledge, secrecy is consistent with the publicity principle.

prospect they abhor. Because of this discrepancy, the neutral will have to keep the reconciliation agenda hidden from the disputants. Thus, this version of reconciliation violates the publicity principle.

Reconciliation as respect, on the other hand, is quite capable of withstanding publicity. There is nothing at all untoward about the mediator explaining: "The aim of these sessions is not merely to settle your dispute but to do so by getting you to appreciate and respect each other's point of view." In fact, the parties probably understand already that this is how mediation works. As Millhauser remarked, parties who don't understand this, who gird their loins with full adversarial armor when they enter ADR, are simply parties for whom ADR will fail.

IV. An Inconclusive Conclusion

This rather unsystematic survey of proposals about what constitutes justice in ADR is intended to be diagnostic rather than critical. It appears that only one of the four proposals—participant satisfaction—is clearly inadequate, and the discussion of the others has suggested limitations and complications rather than objections. If I am right in suspecting that beneath each proposal lies a general view of the good life, then the debate among the proposals is unlikely to come to more closure than the debates in political philosophy and value theory that address the question of the good life. That is no resolution at all, for in two thousand years no mainstream philosophical theory has ever gone completely out of business.

This is bound to be dismaying to researchers, evaluators, and practitioners who want definite answers to questions raised by the quality argument. However, I do not view the no-resolution idea as a counsel of despair. Indeed, if it were possible to get decisive answers to the question, "What constitutes quality justice in alternative dispute resolution?" while the hardy perennial debates about what justice itself is remained unsettled, that would show merely that ADR is no instrument of justice. In that case, the quality argument would receive an abrupt and skeptical answer. The fact that ADR does raise the Hardy Perennials is an indicator that the quality argument passes the threshold of seriousness. Perhaps we should take comfort in the thought that the worth of an institution can often be judged by the size of the questions it begs.

THE QUALITY OF DISPUTE RESOLUTION PROCEDURES AND OUTCOMES: MEASUREMENT PROBLEMS AND POSSIBILITIES*

TOM R. TYLER**

In recent years, many members of the legal establishment, including judges, lawyers, and disputants, have expressed concern over perceived inadequacies in traditional adjudicative procedures for dispute resolution. These concerns have led to the development of a wide variety of "alternative" dispute resolution procedures, including settlement conferences, mediation sessions and court-annexed arbitration.[1] Both proponents and skeptics about such procedures for the "alternative" resolution of disputes have recently become interested in examining their quality.

Evaluating the quality of alternative dispute resolution programs involves an assessment of the degree to which such programs achieve the objectives for which they were designed. Such assessments involve a determination of the level of achievement against which alternative dispute resolution programs should be judged and an identification of the appropriate objectives against which to evaluate them.

I. DEFINING THE LEVEL OF ACHIEVEMENT TO USE AS A STANDARD

A key issue in any effort at evaluation is the standard to which the program should be compared. Several standards are possible. One is the operation of the traditional court system which handles disputes through adjudication. In existing evaluations of alternative dispute resolution programs the most typical comparison has been against the way similar cases would be handled in the adjudication procedures of the traditional court system. This standard assumes the status quo as a given and compares innovative procedures to it.

In comparing alternative dispute resolution programs to dispute resolution in traditional court systems, it is important not to assume that alternative dispute resolution programs are being compared to case settlement through trials. Although there is an image of case resolution

* This paper summarizes issues raised at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School, July 13-14, 1987, and co-sponsored by the Dispute Processing Research Program of the Institute for Legal Studies at the University of Wisconsin-Madison Law School and the National Institute of Dispute Resolution. I would like to thank Marc Galanter, Robert MacCoun, Carrie Menkel-Meadow, Margo O'Brien, Sharon Peelor, and Judith Resnik for comments on a draft of this paper.

** Professor of Psychology, Northwestern University and Research Fellow, American Bar Foundation.

1. *See* Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 296 (1986).

through courtroom trials, which is often viewed as allowing for an open and public discussion of the case, cases are most typically resolved through informal negotiations occurring outside of the courtroom. Menkel-Meadow suggests that over ninety percent of civil cases are settled in this way.[2]

Informal negotiations to settle cases often occur without the judge or the affected parties being present. Hence, alternative dispute resolution programs typically replace one type of informal dispute resolution procedure in which cases are settled in discussions between lawyers or between lawyers and the judge with another type of resolution in which they are settled in a mediation session involving the parties, a third party, and possibly the parties' attorneys.[3]

Although alternative dispute resolution programs typically replace one type of informal dispute resolution procedure with another, it is not therefore obvious that those two forms of informal justice should be compared to each other in evaluating alternative dispute resolution. It is also possible to follow the suggestion of some legal scholars and argue that court procedures should themselves be improved or reformed. To demonstrate a case for such reforms, both alternative dispute resolution and current forms of informal case settlement should be compared to a situation in which cases are resolved through formal trials. To the extent that currently existing court practices are themselves a deterioration of the adversary trial model, they may not be the appropriate standard of comparison for assessing the value of alternative dispute resolution programs.

Rather than using traditional or idealized trial-based systems of dispute resolution as criteria against which to evaluate alternative dispute resolution programs, it may be more reasonable to define a set of desired attributes for a dispute resolution program and to compare any program to those abstract standards. Rather than beginning with existing procedures, such an effort would ask what goals the justice system is seeking to achieve and then examine the ability of different procedures to achieve those goals.

A. *Variation within Procedures*

This discussion of standards for comparison has implicitly assumed that "traditional court procedures" and "courtroom trials" are categories which exist in generally similar form across settings. In fact, widespread variation exists within traditional court procedures, as well as in the many types of procedures which have been labelled as "alternative" dispute resolution. As a result, it is very important for a study to establish the actual attributes of both the alternative dispute resolution procedure being studied and of the traditional court procedure to which it is

2. Menkel-Meadow, *For and Against Settlement: Use and Abuses of the Mandatory Settlement Conferences*, 33 UCLA L. REV. 485 (1985).

3. *See* Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Course*, 69 JUDICATURE 300, 303 (1986).

being compared. This can be done by directly observing cases handled in each procedure.[4] In the McEwen and Maiman study the actual attributes of mediation and adjudication, such as the time taken to settle and the extent to which disputants were given the opportunity to speak, were compared in small-claims court cases.[5] Pearson and Thoennes conducted a similar study of divorce mediation.[6]

Studies that observe mediation and adjudication suggest that these procedures, as actually enacted, are more similar than is often suggested in abstract descriptions of their features. For example, Silbey and Merry suggest that "mediation is more formal and less voluntary than its ideal would imply; while adjudication is less formalized and less punitive than its formal description allows."[7] The range of issues considered under different alternative dispute resolution procedures is also more similar than is often recognized,[8] as is the degree of interaction with the third party and the extent to which issues of right and wrong are emphasized.[9]

A neglected comparison group in most studies evaluating alternative dispute resolution programs is "lumping it," i.e. not resolving the dispute. Most research has focused only on those who bring their disputes to a court for resolution, comparing the various procedures which might be used to resolve the dispute. We do not know how many people have chosen not to bring their dispute to court and how they have fared relative to litigants with similar problems.[10]

An interesting analogy to "lumping it" in disputes is "lumping it" with personal problems. Studies of the effectiveness of therapy often assess the relative effectiveness of different therapies by examining whether a person solves the problem for which they initially enter therapy. However, these studies typically ignore those people who have a problem, but do not seek help. When studied, large proportions of such untreated controls are found to resolve their problems on their own, without any third party assistance.

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4. *See* Kressel & Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. Soc. Issues 179, 185 (1985). *See also* R. Wissler, Disputants' Assessments of the Processes and Outcomes of Mediation and Adjudication (1986) (unpublished manuscript available at Boston College Library).

5. McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me. L. Rev. 237, 246-48 (1981).

6. *See* Pearson & Thoennes, *Mediation Versus the Courts in Child Custody Cases*, 1 Negotiation J. 235, 236 (1985).

7. S. Silbey & S. Merry, The Problems Shape the Process: Managing Disputes in Mediation and Court (1982) (unpublished manuscript available from Susan Silbey, Wellesley College).

8. *See* Silbey & Merry, *What Do Plaintiffs Want? Re-examining the Concept of Dispute*, 9 Just. Sys. J. 151, 172 (1984).

9. *See* McEwen & Maiman, *supra* note 5, at 248-49.

10. *See* Felstiner, *The Influence of Social Organization on Dispute Processing*, 9 Law & Soc'y Rev. 695, 705 (1974). *See also* Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Social Change*, 9 Law & Soc'y Rev. 95, 107 (1974); S. Silbey & S. Merry, *supra* note 7. *See generally* Presentation by F. McGovern, Managing Complex Litigation, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

B. *Standards for Evaluating Alternative Dispute Resolution*

An appropriate comparison of "traditional" and "alternative" dispute resolution procedures requires prior knowledge of what "traditional" procedures are like. Unfortunately, from the point of view of evaluation, "traditional" procedures seem to vary enormously, both within and across courts. In part, this is true because traditional systems involve a substantial informal component which functions according to implicit local norms of behavior. In addition, judges have enormous discretionary authority to vary their approach with different cases. Finally, different court systems have different formal rules. Hence, the "control" group against which alternative programs are being evaluated is both highly variable within any given situation and highly variable across situations. As a consequence, it is difficult to make valuative statements concerning alternative dispute resolution versus "traditional" handling of cases.

In addition to the difficulty of defining "traditional" case resolution procedures, evaluation is also complicated by the lack of normative agreement that traditional procedures are desirable. Many scholars dislike informal case settlement and invoke images of the formal trial, even though formal trials are not widely used in case resolution.

Neither of the problems raised is unsolvable. Both require an effort to clearly specify the alternatives to which alternative dispute resolution programs will be compared. Such an effort should identify the actual nature of the alternative and traditional programs which will be compared as they actually exist in operation and focus on differences in the approaches.

C. *Identifying Objectives*

Perhaps the most difficult task involved in assessing the quality of alternative dispute resolution procedures is the identification of appropriate objectives against which to evalute the quality of such programs. While this is a difficult issue in any effort to evaluate social programs, it is especially difficult in the case of alternative dispute resolution programs. Such programs have been advocated by people from widely varying positions in society and have been adopted in different settings by different groups for a variety of reasons. Hence, there is no common agreement as to why such programs should be adopted or what benefits and harms they might produce.

There may not be any single objective against which all alternative dispute resolution procedures should be evaluated. Within different settings, alternative dispute resolution procedures may have been adopted to deal with different problems and may, as a result, be appropriately evaluated against different objectives.

The lack of consensus about the objectives of alternative dispute resolution programs makes evaluation difficult. Before any evaluation can occur there must be a definition of the objectives of a program.

These objectives should define the criteria against which the program will be evaluated. Without such an underlying consensus evaluation is problematic, if not impossible. The lack of consensus about what alternative dispute resolution programs are supposed to be doing has led to the proliferation of standards against which alternative dispute resolution programs can be and are evaluated. McEwen elaborates a variety of such criteria, including success rates, disputant satisfaction, court costs, time spent, the impact of the procedure on the relationship between the disputants, and the broader social and political effects of resolving disputes in particular ways.[11] Galanter provides a similar elaboration of criteria which might be used in evaluating judicial participation in settlement conferences.[12] Given the long list of potential criteria against which to evaluate alternative dispute resolution programs, the process of evaluation can easily become unmanageably complex.

The process of evaluation is further complicated by the recognition that the same procedure may not produce similar effects if used to resolve different types of disputes. Practitioners typically believe that alternative dispute resolution procedures such as mediation and summary jury trials are especially useful for resolving some types of disputes.[13] This proposition has received empirical support in studies demonstrating that the stability of mediation agreements varies across disputes,[14] that the effectiveness of various mediation strategies differs depending on the type of dispute,[15] and that the effectiveness of third-party intervention differs across disputes.[16] Consequently, any evaluation process needs to test not only the general ability of a process to produce "quality," but the possibility that different processes might produce "quality" in some situations, but not in others.

Although no consensus about appropriate criteria for evaluating alternative dispute resolution procedures exists, there are several identified groups of criteria mentioned in the literature. Four groups seem particularly important: issues of economy and cost, questions of inter-

11. Presentation by C. McEwen, Toward a Multi-Dimensional View of Quality, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

12. Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & Soc'y 1, 11 (1985).

13. *See* Presentation by R. Ensler, ADR: Another Acronym or a Variable Alternative to the High Cost of Litigation and Crowded Court Dockets, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987). *See also* Presentation by S. Steingass, The Mediation of Civil Cases, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

14. *See* Roehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. Soc. Issues 161, 163 (1985).

15. *See* Shapiro, Drieghe & Brett, *Mediation Behavior and the Outcome of Mediation*, 41 J. Soc. Issues 101, 105 (1985).

16. *See* Rubin, *Third Party Intervention in Family Conflict*, 1 Negotiation J. 269, 279 (1985); Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 Psychology Bull. 379, 382 (1980).

personal climate, assessments of outcome quality, and community perspectives.

D. *Issues of Economy and Cost*

Discussions of the court system have frequently criticized its handling of the dispute resolution process on the grounds of economy, suggesting that the resolution of disputes through the courts is too costly. This criticism includes concerns about the cost of court proceedings to the disputing parties, who must hire attorneys, who in turn may engage in discovery and sometimes participate in complex and lengthy pretrial and trial proceedings. Court proceedings are also costly to the state, which must hire judges and other court personnel, empanel jurors, and build and maintain the courts.

The length of traditional court procedures leads to a second, and related, concern with delays in the settlement of disputes. In many courts multi-year delays in the resolution of disputes are not uncommon. To many court administrators issues of delay and cost are two key problems with the court system which alternative dispute resolution procedures can and should be designed to rectify.

Those who are primarily concerned with issues of economy view various forms of alternative dispute resolution as important because they are potentially less costly and less time consuming methods of resolving disputes. This focus accepts the current outcomes of litigation and does not attempt to change them. It attempts to use alternative dispute resolution procedures to achieve those outcomes more efficiently. In fact, one complaint about settlements is not that they occur, or that their form is inappropriate, but that they occur too late in the settlement process and hence are too costly.[17] Evaluations guided by this perspective focus on the cost of settling cases in alternative dispute resolution programs in comparison to traditional courts and the speed with which settlements are reached under these varying procedures.

Evaluations focusing on economy typically presume, as do many judges, that reaching settlements is a positive goal in itself. The "quality" of those settlements is not independently assessed beyond some effort to see that they are not due to fraud, dishonesty or overt coercion.

The ability of alternative dispute resolution programs to reduce the cost and time involved in litigation has been the most widely studied aspect of alternative dispute resolution.[18] One example of such an evaluation effort is the work of the Institute for Civil Justice on court-administered arbitration. The Institute's work examines a variety of effects of instituting programs that require disputants to engage in informal mediation settlement conferences prior to going to trial. While the Institute's evaluations are not limited in scope to studying the economic

17. *See* R. Ensler, *supra* note 13.

18. J. Esser, An Evaluation of Empirical Dispute Resolution Research (1987) (unpublished manuscript available in University of Wisconsin-Madison Law School Library).

effects of such innovations, the study of the economic effects of instituting alternative dispute resolution programs will be the focus of concern in this discussion.

Hensler[19] recently summarized the results of the Institute for Civil Justice evaluations of court-administered arbitration programs already conducted in California[20] and Pittsburgh[21] and similar evaluations currently being conducted in Pennsylvania and New Jersey. Hensler's overall conclusion is that the effects of such programs depend heavily on the way in which they are implemented.

Hensler notes that pretrial hearings are consistently found to be less costly than trials. As a result, if the hearings are conducted in such a way that disputants reach and accept an agreement, the costs of case disposition are lower for the court system than settling the same cases through trials. If substantial proportions of disputants appeal alternative dispute resolution settlements and go on to trial, the alternative dispute resolution hearings represent an additional expense which may or may not be compensated for by the simplification of the trial process.

As will be noted later, it seems possible to design alternative dispute resolution programs in a way that most disputants assigned to them will reach and accept settlements. Hence, well designed, court-administered alternative dispute resolution programs seem able to reduce court costs in comparison to trials. Similar conclusions have been reached in evaluations of divorce mediation[22] and child custody cases.[23]

The effort to estimate potential cost reductions through the use of alternative dispute resolution procedures is complicated by the complex nature of traditional court procedures. While alternative dispute resolution procedures are less costly than many types of trials, most cases are not ultimately resolved by trials. In traditional court systems most cases are resolved through private negotiations between lawyers or between lawyers and the judge.[24] Whether such informal procedures are more or less costly than a mediation session depends on the form which each procedure takes. Attorneys may be present at mediation sessions and are usually present in informal settlement conferences, so the potential costs for attorneys depend on the amount of time involved in different types of sessions. If judges do not negotiate case settlements, but use attorneys or lay mediators to resolve disputes, judges consequently have more time for other duties. This results in a potential cost savings.

Whether court-administered alternative dispute resolution pro-

19. Hensler, *What We Know and Don't Know About Court Administered Arbitration*, 69 JUDICATURE 270, 272-77 (1986).

20. D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981)

21. J ADLER, D. HENSLER & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983).

22. *See* Pearson & Thoennes, *supra* note 6, at 235.

23. *See generally* McIssac, *Mandatory Conciliation Custody/Visitation Matters*, 19 CONCILIATION CTS. REV. 73 (1981).

24. *See* Menkel-Meadow, *supra* note 2.

grams lessen costs to disputants also depends on whether attorneys utilize their potential cost-cutting opportunities and pass those savings on to their clients. Hensler suggests that most attorneys have not changed their billing practices due to arbitration.[25] If they bill by the hour, as defense attorneys typically do, then savings may be realized. For attorneys on contingent fees reduced time does not necessarily translate into reduced costs to the disputant. Thus, the conclusion as to the potential effects of such programs on attorneys' fees is unclear. In a related context, Pearson and Thoennes suggest that divorce mediation can save disputants modest amounts of money.[26]

All calculations of the gains and costs to the parties of a dispute are complicated by potential changes in the amount or nature of what is won or lost under varying procedures. It may be to one party's advantage to spend more on a procedure in which they will receive a larger monetary outcome or prevail on issues that they care a great deal about. Unfortunately, research has not examined how variations in procedure influence outcomes in disputes of various types. Research does suggest, however, that compromise outcomes are more likely in mediation than in trials.

E. *Can Alternative Dispute Resolution Procedures Lower Costs?*

The results of the evaluations outlined suggest that modest cost savings can occur in alternative dispute resolution programs. The important point, however, is that both traditional court procedures and alternative procedures offer tremendous opportunities for cost savings, provided court officials and lawyers want to use those alternatives. It would be possible to save money in many ways that do not involve alternative dispute resolution programs. Similarly, it would be possible to save money through the use of an alternative dispute resolution procedure if the procedure is implemented appropriately. Lowering costs depends on the desire of those involved to do so.

F. *Delay*

There is little evidence in the Institute for Civil Justice studies to suggest that the use of pre-trial settlement conferences necessarily expedites case disposition.[27] While use of pre-trial settlement conferences can reduce the average time to case disposition, such an effect depends upon issues such as court scheduling of conferences. Presumably, courts could also speed the disposition process by refusing to allow trials to be delayed or by encouraging informal settlements. Conferences can, at least in theory, be scheduled more easily than trials, because conferences do not require the presence of a judge and take less time for actual hearings.

It is difficult to imagine that alternative dispute resolution proce-

25. Hensler, *supra* note 19, at 275.
26. Pearson & Thoennes, *supra* note 6, at 241-42.
27. *See* Menkel-Meadow, *supra* note 2.

dures do not offer the potential for speeding case dispositions if the alternative is a complete trial. As previously noted, however, the alternative is likely to be settlement through conferences involving lawyers, or lawyers and judges. Case settlement conferences between lawyers are probably easier to arrange than mediation sessions since they do not require the presence of clients.

As this review of findings suggests, there are often economic gains associated with the introduction of alternative dispute resolution programs. These gains are typically modest.[28] While the impetus for many alternative dispute resolution programs lies in the belief that they will lower the costs of dispute resolution, such gains appear to be small. The greatest gains from such programs fall in the area of disputant satisfaction. As the discussion in the next section indicates, disputants are typically very satisfied with mediation procedures, irrespective of whether or not they reach a settlement in their mediation conference. In addition, mediated settlements are reached in the majority of cases and appear to be adhered to at least as frequently as court settlements.

In considering issues of economy, it is important to recognize that informal dispute resolution is not something which began with the alternative dispute resolution movement. Both criminal and civil cases are typically settled informally in the existing court system. Hence, to many judges and lawyers the alternative dispute resolution movement is a continuation of business as usual. It represents an effort to enhance, and in some cases institutionalize, existing informal dispute resolution procedures so that they can achieve their objectives more economically and quickly.

The formalization of dispute settlement may also represent an effort to impose some procedural order on currently operating informal court procedures. For example, instead of encouraging disputants to settle "voluntarily" by creating a series of obstacles which increase the personal and monetary costs of continuing to seek a trial,[29] an alternative dispute resolution procedure may instead require disputants to attend a mediation session.

G. *Issues of Interpersonal Climate*

A second area of concern about the adversary trial process is its effect on the interpersonal climate of dispute resolution. Critics suggest that the adversary relationship into which parties are thrown by the court system has destructive effects on them and on their existing, ongoing social relationships. A variety of such effects have been suggested, including: failure to see integrative possibilities for resolving disputes, destruction of a positive exchange relationship, and prolongation of conflict in an effort to injure the other party.

28. Kressel & Pruitt, *supra* note 4, at 181-82.

29. *See* M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

This second area of concern about dispute resolution in the courts is related to the previously discussed question of economy. To the extent that the adversary process promotes and prolongs conflict, it creates inefficiencies. Furthermore, the destruction of positive exchange relationships has economic costs for both the parties and for society.

The adversary climate of the courts may also lessen the likelihood that the parties to a dispute will accept and comply with decisions reached by judicial authorities, since agreements often require one party to give resources to another party with whom they have had a conflict. If the parties return to court repeatedly concerning the same matter because one or both refuses to abide by the agreement, additional court time and resources must be used, in addition to the time and money of the parties.

The potentially damaging effects of litigation on ongoing relationships has been widely recognized among businesses. In his classic study of contracts, Macaulay noted that businesses typically do not take their disputes to court even when they have a legally compelling case.[30] Only when the parties to a dispute do not anticipate continued interaction is the dispute taken to court.[31]

One important argument in favor of alternative dispute resolution is that techniques such as mediation can resolve disputes in ways that are less conflicting than the normal court procedures. This leads to better feelings among the parties concerning the settlement and toward the court system. Such arguments emphasize different aspects of alternative dispute resolution, with some focusing on the process of dispute resolution and others on the outcome or settlement reached.

Process arguments focus on the greater opportunities which disputants have to participate in solving their dispute in the context of informal alternative dispute resolution settings. This increased participation both creates commitment to the solution and enhances satisfaction. Because the rules of evidence and trial procedure are relaxed, disputants have a greater opportunity to explain their problem and to participate in trying to solve it.

Outcome arguments emphasize the greater likelihood that the parties will reach a compromise settlement in informal dispute resolution settings. In the court situation one party is more likely to win all or most of what they want, while alternative dispute resolution procedures focus on seeking a compromise settlement. As a result, alternative dispute resolution is more likely to produce a settlement with which both parties feel at least somewhat satisfied.

If a mediated settlement flows from a discussion of the underlying problems in a conflict it may be a much "better" solution to the problem than could be achieved by a trial. As Menkel-Meadow notes: "What set-

30. Macaulay, *Noncontractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61-2 (1963).

31. R. LEMPERT & J. SAUNDERS, LAW AND SOCIAL SCIENCE (1986).

tlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication."[32]

Research supports the suggestion that mediation in small claims settings is more likely than litigation to lead to compromise agreements for an intermediate amount of the initial claim.[33] This difference should not, however, be exaggerated. McEwen and Maiman found that one-fourth of the mediated settlements they studied were basically "all or none,"[34] while one-third of judges' decisions were intermediate.[35]

Beyond issues of cost, discussions of the interpersonal dimensions of dispute resolution introduce user satisfaction as a potential criterion for evaluating a dispute resolution procedure. The above discussion has implied that the parties to a dispute might feel better about the dispute resolution procedure, as well as the settlement itself, if an alternative dispute resolution procedure were used to resolve the dispute. Such satisfaction has been viewed as both good in and of itself and likely to enhance acceptance of and compliance with decisions.

Studies of various forms of alternative dispute resolution have found that people typically express satisfaction with mediation experiences. Pearson and Thoennes studied divorce mediation and found that ninety percent of those who reached agreement and eighty-two percent of those who did not reach agreement in mediation expressed satisfaction with mediation as a procedure.[36] This finding accords with other evidence that satisfaction with alternative dispute resolution procedures is typically high.[37]

It is in the area of disputant satisfaction that much of the compelling evidence in favor of alternative dispute resolution has been found. A wide variety of evaluations have concluded that people like alternative dispute resolution procedures, even when those procedures do not result in a settlement of their case. People appear to value the opportunity to present their case in a less constrained manner than is often possible in courts, to have an informal discussion with the third party which suggests to them that their views are being listened to and considered, and to participate more directly in efforts to resolve their conflicts. Since those involved in dispute resolution focus heavily on the question of disputant satisfaction in judging the value of dispute resolution procedures[38] the general popularity of alternative dispute resolution

32. *See* Menkel-Meadow, *supra* note 2.

33. Pearson & Thoennes, *supra* note 6, at 236-38.

34. *See* McEwen & Maiman, *supra* note 5, at 248. For example, seventy-five percent of the settlements were compromises.

35. For example, thirty-three percent were compromises. For a further discussion of these issues, see Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155, 156-58 (1987) and Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 538 (1984).

36. Pearson & Thoennes, *supra* note 6. Those who did not reach agreement are equivalent to those whose case went on to trial or to a post-mediation settlement.

37. Kressel & Pruitt, *supra* note 4, at 180-82.

38. *See* R. Ensler, *supra* note 13.

procedures is a strong point in their favor.

Satisfaction with alternative dispute resolution procedures is usually higher than is satisfaction with case handling in traditional courts. For example, McEwen and Maiman found that small claims disputants were more satisfied with their "overall experience" in court if their case was resolved through mediation.[39]

Evidence also suggests that those whose cases are resolved through alternative dispute resolution procedures are often more likely to feel committed to accepting the solution.[40] The commitment created by mediation has been found to lead to higher compliance rates following mediated solutions.[41] For example, McEwen and Maiman found compliance in seventy-one percent of successful mediations, and fifty-three percent of unsuccessful mediations.[42] Similarly, Vidmar found eighty-four percent of awarded amounts are paid in mediation and fifty-four percent are paid in adjudication.[43] Finally, Pearson and Thoennes found that sixty-six percent of those arranging child support in mediation paid it regularly, as compared to fifty percent in adjudication.[44] This general finding in civil cases has not, however, been replicated in criminal cases.[45]

H. *Measuring Satisfaction and Compliance*

From an evaluation perspective litigant satisfaction and compliance with decisions are ideal criteria against which to evaluate dispute resolution programs. Both can be easily measured and have compelling face validity. Hence, a focus on such issues in assessing the "quality" of dispute resolution procedures, however appropriate, would make the task of program evaluation much easier.

I. *Concerns About the Quality of Outcomes*

A third perspective on alternative dispute resolution programs focuses on the outcome of the dispute resolution efforts which occur in such programs. From this perspective, the key issue in evaluation is how the nature of dispute resolution settlements differs between traditional courts and alternative dispute resolution programs. One level of concern is with the impact on the disputants themselves. Alternative dispute resolution programs are viewed as possibly providing a "second class" of justice which lacks the protections of the formal justice system.

39. McEwen & Maiman, *supra* note 5, at 246-48. *See also* Pearson, *Child Custody: Why Not Let the Parents Decide*, 4 JUDGES J. 5, 10 (1981); McGillis, *The Quiet Revolution in American Dispute Settlement*, HARV. L. SCH. BULL. 20-25 (Spring 1980).

40. *See* McEwen & Maiman, *supra* note 5, at 248-49.

41. *See* Pearson & Thoennes, *supra* note 6; Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 135-44 (1985).

42. *See* McEwen & Maiman, *supra* note 5, at 248.

43. *See* Vidmar, *The Small Claims Court: A Reconceptualizati on of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 538-40 (1984).

44. *See* Pearson & Thoennes, *supra* note 6, at 236-37.

45. *See* Roehl & Cook, *supra* note 14, at 164-65.

One key characteristic of informal justice programs is their emphasis on compromise. Because these programs focus more heavily on reaching accord than is true in a formal trial, the parties are encouraged to "split the difference" and settle. A party with a legitimate claim may not feel that they should be encouraged or required to compromise. Instead, they may feel that the court system should enforce their claim by making an all or nothing judgment favoring them. Alternative dispute resolution programs may lessen the opportunities for pressing claims by encouraging parties to reach a settlement.

Because of the possibility of denying disputants the protections associated with formal courts, alternative dispute resolution programs are particularly likely to be harmful to disputants if those disputants lack power. In divorce cases, for example, the court may take the role of protecting wives and children against husbands with greater economic power.[46] Such protections may be lacking in cases settled in mediation.

Some general social science research suggests that informality might lessen the restraints to the expression of prejudice and the use of power.[47] There is, however, little empirical evidence currently available to suggest that this problem actually occurs in alternative dispute resolution programs.[48] On the other hand, systematic evidence is not available to reassure those who worry that alternative dispute resolution programs might lead to abuse or to assure critics that such abuse does not occur. Given that lawyers who handle cases for people lacking power have expressed reservations about the use of mediation,[49] this is an important area for exploration in future studies evaluating alternative dispute resolution.

Lehrman details a number of harms which might occur through the use of mediation in spousal abuse cases.[50] In such cases women lack power vis-a-vis men and could profit from court procedures protecting their legal right not to be abused. Since mediation programs often try to find a compromise settlement that restores the status quo within a family rather than help one party assert rights, such programs may harm women whose efforts to assert their rights have provoked violence from men seeking to maintain the status quo.

In studying potential harm to disadvantaged parties through the use of alternative dispute resolution programs, the issue of reasonable comparison groups is of great importance. Given that most court cases themselves are settled through informal negotiation there is ample opportunity for powerful parties to exercise subtle and not-so-subtle coercion, using the delays and costs of litigation as one source of pressure on weaker parties. Hence, simply finding that disadvantaged parties may

46. *See* Pearson & Thoennes, *supra* note 6, at 238-39.

47. *See* Delgado, Dunn, Brown, Lee, & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1395.

48. *See* Roehl & Cook, *supra* note 14, at 171-72.

49. *See* Lehrman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L. J. 57, 62 (1984).

50. *Id.*

suffer under alternative dispute resolution procedures does not suggest that these procedures are more problematic than adjudication. It has been widely recognized that "powerful parties" also come out ahead in adjudication. The issue is whether or not the position of disadvantaged parties is worsened when the "safeguards" associated with adjudication are removed or weakened. If weak parties are unable to use current safeguards to their advantage, then legal protections may only be theoretically beneficial.

A second perspective on outcomes emphasizes the important role of using the courts to air public issues and establish legal rules for dealing with those issues.[51] From this perspective, alternative dispute resolution threatens the ongoing process of establishing legal precedents and dealing with issues of public policy. Alternative dispute resolution procedures typically privatize a dispute by resolving it in a private agreement reached outside of a public forum. Consequently, the reasons for the decisions made are not articulated and no public record is available. As a result, the public airing of disputes occurs only to the extent that cases currently end up in public courts.

Discussions of outcome "quality" present particular difficulties for evaluators. The discussions require making a judgment about what the best solution to some dispute is. In other words, they imply a standard about how a dispute "ought" to be resolved. What, for example, is a just solution to a divorce case? What evaluations can do is to try to test for some of the more obvious types of unfairness that underlie this line of concern. For example, do disadvantaged parties in a dispute fare more poorly under alternative dispute resolution programs than under traditional adjudication? Unfortunately, these questions have not been systematically addressed.

A second aspect of the concern with outcome quality is a distrust of participant satisfaction as a measure of the quality of a procedure. As has already been noted, judges and court administrators often focus on the satisfaction of disputants. In fact, criticisms of alternative dispute resolution procedures have been met with the rebuttal argument that the disputants usually express satisfaction with the settlement.

It is important to note that disputant satisfaction has a dangerously seductive quality as a criterion of evaluation. It is easy to measure and seems to have face validity. Reliance on satisfaction may not, however, be objectively justified. Disputants may not be aware of the rights to which they are entitled and may, as a result, not realize what they are giving away in an alternative dispute resolution procedure. In addition, disputants may not have experienced the alternative procedures which might have occurred, so the disputants have no basis for knowing if they could have received more under a different procedure. Finally, satisfaction with a mediocre outcome may simply reflect disputants' beliefs that they expected to get even less of what they were entitled to than they

51. *See* R. Ensler, *supra* note 13.

actually received. If people expect little from the legal system they may be happy to get anything. This is not an endorsement of the legal system.

The question of the comparison group is particularly important in discussions of outcome quality. Although the formal trial is often put forward as the comparison group for alternative dispute resolution, most cases are not settled in formal trials, but through informal bargaining. Bargaining is motivated, at least in part, by the costs of formal trials. Disadvantaged parties are driven to settle their cases by the costs of litigation, so that their issues are seldom adjudicated and their case settlement may be "second class justice" even in the traditional courts. It is possible that people are more likely to receive a hearing at which they can present their case in their own words in an alternative dispute resolution procedure than in the traditional courts.

II. COMMUNITY EDUCATION

A. *Community Organizing as a Goal*

Another perspective on alternative dispute resolution programs views them as a tool for community organizing and the empowerment of the disadvantaged. This perspective emphasizes social change. Many early alternative dispute resolution efforts were community based. By providing forums for community members to discuss and resolve disputes it was hoped that community groups would be created, community leaders would be produced, and community members would feel empowered and be better able to work on their own behalf. Hence, communities were viewed as benefiting from taking control over the resolution of their own disputes. These gains require that the community have some control over the forum of alternative dispute resolution.

As the formal court system has increasingly adopted its own alternative dispute resolution programs some of those involved in social change efforts have come to view court-controlled alternative dispute resolution programs with suspicion. Traditional courts are one institution which citizens can approach with grievances and the courts can, as a result, be part of an effort to organize disadvantaged groups and push for political and social change. From such a perspective alternative dispute resolution programs can be viewed as good or bad. By diverting the cases of the disadvantaged out of court settings into informal settlement procedures, lacking in public forums, the political potential of community grievances is being defused. While individual litigants may fare well in such forums, the overall impact of their availability is to individualize disputes. Thus, court-controlled alternative dispute resolution programs may undermine social change strategies which seek to build groups and a sense of common identity and grievances among the disadvantaged.

Edelman has articulated the key value difference which separates those operating from a community perspective and those concerned

with issues of efficiency or interpersonal harmony.[52] The community perspective emphasizes that society is composed of different social groups, each with different interests. The purpose of organizing is to reveal those differences and build political groups which articulate the common interests of disadvantaged groups. This runs directly counter to the ideology of much of the alternative dispute resolution movement. Alternative dispute resolution programs typically seek to build consensus around compromise solutions that resolve disputes between particular parties. Such forums can also focus on process instead of outcome, operate on the level of individual problems rather than group interests, and regard satisfaction with settlements as a criterion of success. In all of these ways many alternative dispute resolution programs are motivated by a set of values which are fundamentally different from those motivating social activists.

B. *Community Education as a Goal*

In addition to being viewed as a potential tool for community organizing, alternative dispute resolution can be viewed as a more general strategy for educating adults about how to handle conflict. This perspective is articulated by Millhauser, who argues that the traditional adversary system of dispute resolution connects easily with a particular view of conflict, a view which focuses only on short term outcomes.[53] Unlike alternative dispute resolution procedures, the adversary system does not promote an effort to find integrative, mutually beneficial solutions. Furthermore, the adversary system does not focus on the harm which conflict, aggressiveness and dishonesty cause in interpersonal relationships.

Education is one important aspect of the alternative dispute resolution movement. It involves training people to focus on the possibility of integrative solutions to conflict rather than on winning at all costs. One example of such an effort are recently developed high school education programs teaching students how to handle conflict. Although such programs teach students to be mediators, many gains are found irrespective of whether students actually function in that role. What students learn is a new approach to conflict, one which emphasizes an openness to the possibility of mutual gain through creative, integrative conflict resolution. Rather than being destructive to interpersonal relations, conflict resolution of this type can actually strengthen the ties between people involved in ongoing social relationships.

52. Presentation by L. Edelman, Dispute Processing in Work Settings, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

53. Presentation by M. Millhauser, The ADR Bandwagon: Where is it Going?, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

III. SUMMARY

It would vastly simplify the task of evaluating alternative dispute resolution programs if there were a general consensus about what those programs were supposed to achieve and the alternatives to which they should be compared. Unfortunately, no such consensus exists. As a result, the possibility of conducting evaluations of alternative dispute resolution programs that will satisfy all of those concerned with the quality of such programs depends on the success of a prior effort to define the key measurement concerns of the different constituencies in the alternative dispute resolution debate.

The measurement problems which have surfaced in recent disagreements about quality of alternative dispute resolution procedures reflect underlying differences in values. Different groups have approached the purpose of alternative dispute resolution procedures from different perspectives and, from these varying perspectives, have found different issues to be of primary importance in assessing the "quality" of dispute resolution efforts. This is not only a difference of opinion about how alternative dispute resolution procedures should be evaluated, but a reflection of value differences about the goals of dispute resolution. Similar differences in opinion would also emerge if the measurement problems of concern involved evaluating traditional court procedures.

In addition, differences in perspective about alternative dispute resolution reflect different roles within the legal system and, to some extent, political differences. Court administrators are directed by their official roles to be concerned with issues of efficiency and case settlement. Administrators also tend to be supportive of the administrative structure within which they work. Many of the practitioners discussing alternative dispute resolution are interested in improving the way that they solve the interpersonal, labor, and business disputes which they handle in their work. Other practitioners view the legal system as failing to provide some groups or individuals with the help that they need and should be receiving. Finally, some writers view the legal system from a perspective which is critical of its basic assumptions and modes of operation. The legal system reflects the values of our culture and those critical of our cultural values are also, not surprisingly, critical of the legal system.

Given basic differences about the goals of a dispute resolution system, traditional or alternative, disagreements about how to evaluate the quality of dispute resolution procedures seem natural. However, despite differences of the type outlined there does seem to be a general interest in understanding "the facts" about alternative dispute resolution programs. A detailed examination of many of those "facts" is available elsewhere[54] and suggests several basic points. First, alternative dispute resolution programs can be implemented in ways that will lower costs to disputants and to the court system. Such gains, when found

54. *See* J. Esser, *supra* note 18.

however, are small. Of central importance to the cost question is the desire of those in positions of authority to cut costs. If there is such a desire, many approaches can be taken to achieving that objective. Alternative dispute resolution procedures are one such approach.

The timeliness of dispute resolution can also be enhanced by the use of alternative dispute resolution procedures and through changes in adjudication procedures. It is not clear whether one of these approaches is intrinsically better than another. In addition, such gains will not occur automatically. Rather, whether such gains occur depends on the effective implementation of innovative programs.

Perhaps the most striking aspect of alternative dispute resolution programs which emerges from evaluations is the general popularity of ADR programs. People typically seem satisfied with informal dispute resolution efforts, often more so than with traditional adjudication, and generally feel committed to the decisions reached in them. Compliance is also as high or higher with decisions following such sessions, as with decisions reached in adjudications. Having the opportunity to present one's complaints and work toward a solution in an informal setting is clearly highly valued by disputants and leads to positive feelings. This finding emerges in both the comments of judges and mediators and in evaluations of alternative dispute resolution programs.

There are also a number of potential concerns about alternative dispute resolution programs. These concerns include whether disputants receive second-class justice and whether alternative dispute resolution programs are disruptive of community efforts to build programs that empower citizens and heighten their understanding of their collective interests and shared grievances.[55] These concerns are important, but have received less attention in evaluation efforts. As a result, it is not possible to reassure those concerned with such issues that their concerns are unwarranted. On the other hand, currently available evidence does not provide support for the suggestion that alternative dispute resolution programs hurt the disadvantaged to a greater degree than does the traditional process of adjudication. The resolution of these controversies requires the collection of additional information concerning the effects of alternative dispute resolution programs.

Finally, there are clear dangers in treating either adjudication or alternative dispute resolution as a single entity. Both are umbrella terms for a wide variety of programs, many of which are very similar. Distinguishing between "trials" and "alternative dispute resolution procedures" creates conceptual abstractions which obscure the wide variety of ways in which disputes are dealt with under either procedure.

55. *See* J ADLER, D. HENSLER & C. NELSON, *supra* note 21.

DISPUTE PROCESSING IN LAW AND LEGAL SCHOLARSHIP: FROM INSTITUTIONAL CRITIQUE TO THE RECONSTRUCTION OF THE JURIDICAL SUBJECT*

SUSAN SILBEY** AND AUSTIN SARAT***

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I. INTRODUCTION

Though talk about disputing has, for a long time, been common in labor and international relations, as well as on baseball fields and playgrounds, it is only recently that such talk has begun to occupy an important place in law. Arguments in legal scholarship and scholarship about law,[1] as well as struggles over law reform, have increasingly occurred on a terrain marked by language of disputing, dispute processing, and dispute resolution. These arguments and struggles divide legal scholars and practitioners and raise questions about the nature and function of

* The authors wish to acknowledge the helpful comments of Mary Joe Frug, Joel Handler, Christine Harrington, Craig McEwen, Sally Merry, Martha Minow, Elizabeth Spellman, Deborah Stone, and David Trubek. An earlier version of this paper was prepared for the Workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes which was hosted by the Institute of Legal Studies at the University of Wisconsin School of Law, July 13-14, 1987.

** Professor of Sociology, Wellesley College

*** William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College

1. Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175 (1973). Some have talked about reformulating many important legals concepts and problems using that language. *See* Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1980-81). Others resist the incursions of such discourse into the domain of law. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

courts, the relation of legal scholarship to broader intellectual and political movements, and the status of individual rights and entitlements.

The debate about dispute processing within law entails a competition of ideas about the role of lawyers and a competition of interests within the market for legal services. Some welcome the turn to disputing and dispute processing as a relatively straightforward extension of traditional professional concerns with judicial procedure.[2] They seek to extend the reach of the legal field to encompass new forms of dispute processing and to build alliances with dispute processing professionals.[3] Others believe that thinking about law in terms of disputing and dispute processing threatens basic commitments and values of lawyers and the legal system.[4]

The debate about dispute processing also entails a struggle over appropriate ways to study law. For some researchers, the effort to describe legal practice as a particular form of dispute processing furthers the social scientific ambition to observe and report on social action free of cultural and professional biases. They hope to develop neutral concepts and units of analysis, such as the dispute, to facilitate comparative analysis of the widest range of social behaviors and institutions, including the law, without reproducing the assumptions of those institutions. For these scholars, the turn to dispute processing promotes thus legitimates the role of social scientists in legal scholarship.[5] For others, however, it challenges the singular importance of the legal system in the social order, and threatens the special authority of the legal profession to both study and minister to the law.

This paper describes and assesses struggles over disputing and dispute processing within the legal field. We see the clash between traditional legal authorities and proponents of new forms of dispute processing as a struggle over the definition of the space of law in society.[6] We believe that this contest both transforms the law and reaffirms its importance in social life. As judges and mediators compete within a market for dispute resolution services, the law is challenged and redefined. As Dezalay puts it,

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2. *See* Rifkind, *Are We Asking Too Much of Our Courts?* 70 F.R.D. 96 (1976); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

3. *See* Bordieu, *The Force of Law: Toward A Sociology of the Judicial Field*, 38 HASTINGS L.J. 805 (1987). The term legal field is derived from what Bordieu calls the "juridical field." In his work a field is an area of structured, socially defined activity or practice, especially professional activity. "If one wanted to understand the 'field' metaphorically, its analogue would be a magnet: like a magnet, a social field exerts a force upon all those who come within its range. But those who experience these 'pulls' are generally not aware of their source." Bordieu's conception of the juridical field invites examination of internal conflicts and politics in the legal profession which, in his view, exert a pervasive influence on every aspect of law. Such conflicts are associated with hierarchies of power and prestige within and attached to legal work and legal institutions. Professionals within the legal field are constantly engaged in a struggle with others outside the field to sustain their conception of law's appropriate internal organization and relation to the social whole.

4. *See* Fiss, *supra* note 1.

5. Bok, *A Flawed System*, HARV. MAG. 38 (1983).

6. T. Dumm, The Fear of Law (1989) (to be published in volume 10 of *Studies in Law, Politics and Society*).

> The ceaseless struggle and opposition between these two concepts of justice [adjudication and mediation] must not however conceal their complementarity; it is a division of labor which allows simultaneously for the autonomy of law, its transcendence within time and social space and its permanent updating in accordance with social transformations. Both of these modes of justice, no matter how antagonistic they appear, represent essential components of the belief in law, and from there of the very survival of a field of professional practices.[7]

Like Dezalay, we see dispute processing as an addition to, rather than a displacement of, the legal field. The discourses of dispute processing frame a more layered and complex set of legal practices.

Yet the complementarity of dispute processing within the legal field cannot mask what Dezalay describes as a competition between an array of "goodfellows" who insist upon "a natural pre-existing need for community justice," who seek expanded but less expensive state control of socially troubled persons, and those who want to annex to legal practice and the service of capital techniques previously considered the exclusive prerogative of social welfare practitioners.[8] The dispute processes and programs advocated by this array of reformers, he claims, is a "rationalized, formalized, codified practice set entirely within the scope—albeit in a subordinate place—of the professionalization projects of the legal field."[9]

Dezalay suggests that the struggle over disputing and dispute processing within the field of law is carried out at the level of institutions and turns on the question of who will control them.[10] For Dezalay, the major question is whose idea of "justice" will organize the practices of dispute resolution within courts and in non-judicial institutions. Moreover, in his view, conflict within the legal field over issues of disputing and dispute processing involves ". . . a fundamental opposition between theorists, devoted to pure doctrinal construction, and practitioners, limited to applying law to particular disputes . . . ."[11] That conflict is characterized by the separateness of legal practice and academic law.

We disagree with Dezalay's understanding of the politics of disputing and dispute processing in three ways. First, contestation has not been limited to the question of who will control institutions and develop institutional practices. It has, in addition, been carried out in struggles over the best ways to *study* and *describe* legal institutions and in efforts to define appropriate relations of persons and legal institutions. Analysis of the politics of disputing and dispute processing must be carried out at both of these levels. Second, contestation has not produced a neat divi-

7. Y. Dezalay, Negotiated Justice as Renegotiation of the Division of Tasks Within the Legal Field (June, 1987) (presented to Conference on Dispute Resolution Research in Europe).

8. *Id.* at 7.

9. *Id.* at 24.

10. *Id.*

11. Y. Dezalay, The Forum Should Fit the Fuss . . .: The Economics of Negotiated Justice 4 (December, 1987) (unpublished manuscript presented to the Amherst Seminar).

sion between legal practitioners and theoreticians. On each level of political combat, the interests of scholars and practitioners in a variety of professions have found common ground. Third, by examining several levels of conflict within the legal field and by asking how the interests of practitioners and scholars are simultaneously at issue in debates about disputing and dispute processing, we can see how arguments about institutional practices depend upon, and arise from, the organization of disciplinary activity with the field of academic legal studies. The struggle within the field of institutional practice is enabled by the outcome of a particular struggle among legal scholars. Finally, we argue that competition within the legal field over the place and organization of dispute processing enables and promotes struggle over the meaning of the juridical subject.

In Part II, we describe the politics of dispute processing at the level of legal institutions. We argue that the contemporary alternative dispute resolution ("ADR") movement is held together by a critique of courts and by a concern for judicial competence and capacity. In addition, we suggest that the ADR movement involves an effort to recast the market for dispute resolution services by different interests attempting to advance their own professional projects. Part III describes conflicts within the legal academy precipitated by the growth of the modern social scientific study of law. It is, in our view, the partial success of that movement within academic legal study that fuels the institutional struggle. Thus, attention must be given to the involvement of social scientists in developing the concept of dispute as an alternative way of thinking about law. In Part IV, we suggest that struggles over the organization of legal institutions and struggles among academics to legitimate the scientific study of law are reflected in debates about the nature of the juridical subject. Those debates are then located in the contemporary critique of rights. Locating those debates in the critique of rights, we suggest that the apparent success of ADR reinforces the social power of law by adding to its repertoire of socially efficacious discursive practices. New vocabularies of control and dependency which, at first, appear to be at odds with rights talk play a parallel social role.

II. The Institutional Domain: ADR and The Critique of Courts

Dezalay is surely right to suggest that the ADR movement simultaneously transforms and reaffirms institutional life within the legal field and to direct attention to challenges ADR poses to the activities and organization of judicial institutions.[12] ADR is part of a continuing contest over the dominance of courts in the apparatus of state law. It arises from and requires an argument about the capacity of courts to advance different political and professional projects.

The contemporary ADR movement parallels in important ways sim-

12. Y. Dezalay, *supra* note 7.

ilar disturbances and struggles within law at the turn of the century.[13] In the earlier period, disillusionment with the courts led to the creation of specialized tribunals offering informal procedures for dealing with minor monetary or domestic relations disputes. These tribunals were, however, established within unified court systems and increased the organizational complexity of courts rather than establishing an effective alternative.[14] Although these new courts were responsive to the emerging human sciences, legal professionals retained control, and, as a result, transformations of institutional practice reaffirmed the place of law in society.

The expanded, greatly centralized court system, which grew as a result of the early twentieth century reform movement, itself eventually became an object of criticism for failing to provide responsive and flexible justice. By the 1970s, critics were again advocating systemic alterations, decentralization of the unified courts, and greater "responsiveness to environmental" and community demands.[15] As in the earlier period, reformers also recommended channeling minor disputes into alternatives which would provide participatory and individualized justice.

Contemporary reform efforts have, however, been more than organizational, and have been given a special boost by the "discovery" of, and responses to, a "litigation explosion."[16] Critics of litigiousness claim that reliance upon legal authority is excessive. The responsiveness of courts to demands for redress encourages, in the critics' view, ever more extensive demands and expectations of total justice.[17] Although a "litigation explosion" could be anticipated in a society willing to entrust important decisions to reasoned public argument, critics assert that "the principal thrust of the movement toward a fiduciary social order is the creation of affirmative duties couched in the terminology of ill-defined and often undefined standards."[18] As a result, we create the need for even more litigation, and according to former Chief Justice Warren Burger, "we may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated."[19] A former deputy attorney general of the United States complains that "the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy."[20] We suffer, in a word, from hyperlexis, too much law.

13. C. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); Harrington, *Delegalization Reform Movements: A Historical Analysis*, in 1 THE POLITICS OF INFORMAL JUSTICE 35 (1982).

14. Harrington, *supra* note 13, at 58.

15. Hays, *Contemporary Trends in Court Unification*, in MANAGING THE STATE COURTS 130 (1977).

16. Galanter, *Reading the Landscape of Disputes*, 31 UCLA L. REV. 4 (1983).

17. L. FRIEDMAN, TOTAL JUSTICE (1985).

18. J. LIEBERMAN, THE LITIGIOUS SOCIETY 29 (1981).

19. *Those #*X!!!! Lawyers*, TIME 56 (April 10, 1987).

20. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, 15 REG. 10 (1978).

While some have advocated abandonment of the judicial form,[21] most contemporary criticisms of litigation and adjudication, like earlier ones, combine claims of shared allegiance to principles of legitimacy for example, equality, justice, liberty, with the search for new and improved procedures. Now, as earlier in the twentieth century, reformers have promised to extend the realm of self-government and "real" community.[22]

The success of the reform movement in creating alternatives to adjudication has depended, in large measure, upon the availability of non-judicial models of decision making and dispute resolution which also seem to serve goals of equality, justice, and autonomy. Thus, anthropologists provided examples of successful non-adjudicatory dispute processing from African tribes, the Zapotec indians of Mexico, Scandinavian fisherman, and some Bavarian villages, each of which offers, proponents say, ways of resolving disputes without the imposition of authority or force characteristic of formal adjudicatory processes. Closer to home, historians described American communities—in Dedham, Massachusetts, Oneida, Chinatown—and business associations in which peace, harmony, and mediation have seemed preferable to conflict, victory, and litigation.

Those latter examples have been particularly notable because they suggest that American history is more than the story of "the glorious triumph of law over inferior forms of communitarian extra-legal tyranny."[23] It appears that American allegiance to the rule of law has been accompanied by "a recurrent dialectic, between legality and its alternatives"[24] which results in repeated efforts to create dispute processing mechanisms outside the courts.[25] These mechanisms are supposed to

21. The turn away from formal legal procedure has also been justified by claims that the extension of legal rights failed to provide substantive justice.

> The principal objection to legal formalism advanced at both points in time is that substantive justice ideals invoked on behalf of *legality* in a liberal democracy (equality, justice, and liberty) come into conflict with *legalization* (the extension of procedure rules governing the processing of disputes). Such a view opposes the extension of legal rights on the ground that formal rationality, the necessary basis of legal legitimacy, fails to provide substantive justice. Consequently, the reform movement favors delegalization . . . . [The] advocates of delegalization justify their proposals as reconciling, harmonizing, and balancing formal and social justice.

Harrington, *supra* note 13, at 36.

22. Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, in 1 THE POLITICS OF INFORMAL JUSTICE 249, 265 (1982).

23. J. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 14 (1983).

24. *Id.*

25. If historical examples of alternatives to law, or justice without procedural formality, encouraged contemporary reformers, some have urged caution to those who would use the historical record to reconstruct—or to transplant—what may be American but are nonetheless culturally alien social arrangements. Auerbach writes:

> The . . . indwelling sense of common purpose that turned communities away from litigation to alternatives like mediation and arbitration is likely to fascinate but ultimately distress modern Americans. It is not easy to empathize with our communitarian forebears. They were too involved in each others lives to satisfy our craving for privacy and solitude. They were mutually supportive, but also intrusive and suspicious; they were cooperative, but also coercive. The strength of a

replace the formality of the court with the informality of the neighborhood, principles of law with general considerations of morality and shared responsibility, win or lose outcomes with compromises, and the coercion and authority of the state with social pressures of the group or community.

In addition to examples of community moots, the contemporary ADR movement also draws upon models of non-judicial decision making within labor relations, especially highly developed and sophisticated techniques of mediation and arbitration. As Getman notes, labor arbitration has been "frequently pointed to as the paradigm of private justice,"[26] offering final, guiding, predictable, efficient, neutral, fair dispute resolution. Because labor arbitration is believed to successfully achieve these values, commentators often conclude "that it offer[ed] a technique for dispute resolution that [could] be routinely applied, with only minor adjustments, in other situations."[27] As a consequence, there has been little reticence about transferring this procedure from its historical and organizational context—collective bargaining between labor and management—to other settings. "Speeches by AAA [American Arbitration Association] officials and AAA pamphlets aggressively sell the process as having something to offer in a variety of circumstances."[28] Arbitration has, as a result, been advocated as a means of dispute resolution for consumer disputes,[29] family disputes,[30] medical malpractice,[31] prisoner grievances,[32] shareholder conflicts in close corporations,[33] community

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> unified community, after all, implies the ability to compel adherence to its norms, at the expense of contrary individual preferences. The choice of a non-legal alternative to adjudication never was a decision to replace power with love, or coercion with cajoling. It was the application of power to serve the common interest at the expense of competing individual claims. It was, therefore, the exercise of the power of the community on its own behalf. This was possible because the meaning of justice was clear to its members .... Precisely that clarity rendered courts and lawyers not only superfluous but even subversive. Only when there is a congruence between individuals and their community, with shared commitment to common values, is there a possibility for justice without law.

Id. at 15. *See also* Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, in 2 THE POLITICS OF INFORMAL JUSTICE (1982).

Despite such cautions, the contemporary ADR movement draws upon examples of both contemporary and historical communities of common value to support the institutionalization of local, community-based informal justice outside, or more accurately, beside, the law. Despite radically different historical and social contexts, some promoters of informal dispute resolution attempt to turn the tide against modernization and formal rationality and to return control of disruptive, injurious, or offensive behaviors and transactions to communities where they could be managed through mediation, compromise and restriction enforced by social sanctions and disputants' desire to settle. *See* Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

26. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

27. *Id.* at 917.

28. *Id. See also* Coulson, *Annual Report: Responding to a Changing World*, 1 AM. ARB. A. NEWS & VIEWS 3-6 (1975).

29. Comment, *Non-Traditional Remedies for the Resolution of Consumer Disputes*, 49 TEMP. L.Q. 385 (1976).

30. Coulson, *Family Arbitration: An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969).

31. Nocas, *Arbitration of Medical Malpractice Claims*, 13 FORUM 254 (1977).

32. Goldfarb & Singer, *Redressing Prisoner's Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

or citizen disputes,[34] government contract disputes,[35] and employment disputes in higher education.[36] In all these situations, the labor experience is used to support proposals for alternatives to adjudication.[37]

Finally, in its critique of adjudication, the contemporary ADR movement drew upon and incorporated Freudian/psychoanalytic critiques of rationalism which have achieved a nearly taken-for-granted status in popular and intellectual discourses.[38] At the most obvious level, the psychoanalytic challenge to rationalism derived from its claims to unmask and explore the irrational foundations of human behavior. Beyond this, Freudian perspectives promoted interpretive and imaginative forms of understanding, rather than objective and positivistic marshalling of material evidence associated with science and with law. Integral to both the new subject of study—the irrational aspects of human behavior—and the new emphasis on interpretation and imagination, was a particular process of communication. Although the forms and techniques of therapy were advanced as both a scientific and a professional activity, its widespread acceptance was founded in shared values associated with personal revelation, personality growth, and development.[39] Moreover, such values energized the so-called helping professions and supplied them an outlook and a world view with which to take on, and combat, the allegedly alienating ideologies of legal practitioners.[40]

Armed with the techniques of psychotherapy and labor mediation and with associated ideologies of empowerment and self-knowledge,

33. Leffler, *Dispute Settlement Within Close Corporations*, 31 ARB. J. 254 (1976).

34. Note, *Arbitration of Attorney Fee Disputes*, 5 UCLA-ALASKA L. REV. 309 (1976).

35. Hardy & Cargill, *Resolving Federal Contract Disputes*, 34 FED. B. J. 1 (1975).

36. Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, 30 SW. L.J. 389 (1976).

37. One prominent labor specialist claims that advocates of alternatives to law who draw upon labor practices and arbitration underestimate the importance of context. *See* Getman, *supra* note 26. Reformers assume that the experience of labor arbitration is universally successful, that its success is attributable to speed and informality, and that it is extractable from the ongoing relationships and organization of collective bargaining.

Moreover, Getman argues that advocates of labor-like alternatives to law are mistaken in their assumption that arbitration is somehow fundamentally different from adjudication or administrative decision making, and he urges caution because "much of the writing describing and evaluating [labor arbitration] has come from practitioners whose professional egos are intertwined with the success of the process." *Id.* at 948. There is a marked tendency by professional associations and practitioners to downplay the critical and to accentuate the importance of the professionalized technique. Getman suggested, very early, a need to attend to the powerful array of interests promoting this "new" reform.

38. P. REIFF, TRIUMPH OF THE THERAPEUTIC (1966).

39. At a more abstract and yet critical level the valorization of intersubjective communication and exchange, which is at the heart of the psychoanalytic model, has been given a political boost by the work of Jurgen Habermas, and others in the Frankfurt School, who have been actively seeking both philosophical and political responses to the apparent dilemmas and injustices—crises—within liberalism and modernity. *See* J. HABERMAS, LEGITIMATION CRISIS (1973); J. HABERMAS, TOWARD A RATIONAL SOCIETY (1970). *See also* R. GEUSS, THE IDEAL OF CRITICAL THEORY (1981). Although the communicative theories of Habermas are themselves challenges to the Freudian paradigm, they nonetheless validate increased attention to the processes of interpersonal, as well as organizational, communication which are central to the ADR movement.

40. *See* Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

promoters of ADR have abundant resources upon which to draw in mounting their criticisms of courts and adjudication. Indeed, the history of the ADR movement can be told as a story of a series of entrepreneurs, what Howard Becker has called moral entrepreneurs, "whose initiative and enterprise overcame public apathy and indifference and culminated in the passage of federal legislation,"[41] state legislation, and the appropriation of millions of private foundation dollars for the establishment of ADR programs.[42] Here, ADR proponents have combined demands for substantive justice with technocratic concerns for efficiency, adaptability, and cost effectiveness. Indeed, efficiency and substantive justice claims often seem inseparable in this field. Thus, the ADR movement found a variety of models and antecedents to draw upon, and it developed a range of voices promoting dispute resolution as a way to limit, transform or avoid courts and adjudication.

The Teams and the Players

We can identify three major groups each of which has been, during the last decade, actively struggling to establish non-judicial means of dispute resolution. While we recognize that the supporting arguments of each group are not mutually exclusive, they suggest important differences of emphasis within a broad framework of agreement. Professional and institutional support for ADR comes from all positions along the political spectrum; it has produced, nonetheless, a recognizable, if not fully coherent, political movement. The struggle over the place of judicial institutions, and law itself, in the provision of dispute resolution services has enlisted proponents from inside and outside the legal field and legal scholars as well as practitioners.

41. H. BECKER, THE OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 135 (1963).

42. Moral entrepreneurs work to remedy evils which disturb them. They identify a general cause or harm which threatens all and propose specific remedies to alleviate the social problem thus named. Gusfield writes that reform crusades frequently reveal "the approach of a dominant class toward those less favorably situated in the economic social structure." Gusfield, *Social Structure and Moral Reform: A Study of the Women's Christian Temperance Union*, 61 AM. J. SOC. 223 (1955).

> Moral crusaders typically want to help those beneath them to achieve a better status. That those beneath them do not always like the means proposed for their salvation is another matter. But this fact—that moral crusades are typically dominated by those in the upper levels of the social structure—means that they add to the power they derive from the legitimacy of their moral position, the power they derive from their superior position in society.

H. BECKER, *supra* note 41, at 149.

The obvious consequence of a successful crusade is the creation of new rules and procedures, and with the establishment of organizations of "rule enforcers" or service providers, the crusade—in the case of dispute, the idea—becomes institutionalized. "What started out as a drive to convince the world of the moral necessity of a new rule finally becomes an organization devoted to the enforcement of the rule." *Id.* at 155. While much of the continuing support for the ADR movement has come from those who want to provide expanded dispute resolution services to persons unable to secure access to legal justice, it is important to note that the movement is not solely devoted to providing services to the less powerful and subordinate classes. Merry, *Disputing Without Culture* (Book Review), 100 HARV. L. REV. 2057 (1987).

The Establishment Bar and Legal Elites

We begin with the establishment bar and legal elites who have promoted ADR as a way of dealing with the contemporary crisis of the courts. Theirs is not a critique of the essence or ideals of adjudication; instead, they seek to save adjudication by limiting it, to preserve the space of law by not overtaxing its institutional capacity.[43] Elite lawyers want to conserve judicial resources for the resolution of business and commercial disputes and are willing to see other matters removed from courts if not from the legal field itself. This precipitates conflict with lawyers whose share of legal business would be radically diminished by limitations on adjudication and is reflected in the opposition to ADR by groups like the American Trial Lawyers Association.

Yet the elite bar interest in ADR is not simply a practitioner interest. Scholars and theoreticians have taken up the cause. Foremost among academic proponents is Frank Sander. His work has played a critical role in promoting the study of dispute processing in law schools and in mobilizing the legal establishment's support for ADR. His *Varieties of Dispute Processing*[44] helped set the agenda for efforts both inside and outside the law school. In that article, Sander promoted the dispute processing perspective as a way of thinking about judicial administration and legal procedure. He argued that procedure might be improved if scholars treated adjudication as one of many ways of resolving society's disputes. In his view, legal thought was cabined, and the legal profession was threatened, by an unrealistic view of the limits of adjudication. As a result, lawyers were unable to understand why courts were increasingly swamped with litigation and how to "reserve the courts for those activities for which they are best suited."[45] This concern, as much as any other, animated Sander's early efforts and led to the creation of the American Bar Association's Committee on Minor Dispute Resolution.

For the establishment bar, judicial inefficiency endangers judicial and legal legitimacy by preventing courts from responding appropriately and quickly to important matters. In addition, the inability of legal forums to respond to the accumulated grievances of any or all social groups is perceived to be a source of serious latent instability and a general breakdown in law and order.[46] As Representative Kastenmeier, chairman of the House Judicial Subcommittee on Courts, Civil Liberties and the Administration of Justice, put it in a debate concerning federal financial support for alternative dispute resolution:

43. *See* COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY (1984).

44. Sander, *supra* note 2.

45. *Id.* More recently Sander has produced an extended treatment of the dispute processing perspective in the form of a law school textbook. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985). That text pulls together and organizes a wide range of material on the disputing process, but it is more than an ordinary collection. It is animated by, and develops, a distinctive perspective on the role of courts and of non-judicial mechanisms for processing disputes.

46. These themes are explored in SMALL CLAIMS STUDY GROUP, LITTLE INJUSTICES (1972).

> The federal government is not interested in silencing a particular barking dog or solving a given family squabble; it is interested in assuring that forums exist at the State and local level to resolve these disputes so that State and local governments may preserve public order, promote harmony among citizens and guarantee access to legal justice.[47]

The American Bar Association ("ABA") has also taken a leading role in this effort because the development of responsive dispute resolution mechanisms is thought to contribute to legal legitimacy. The ABA sponsored the 1976 Pound Conference on Popular Dissatisfaction with the Administration of Justice which launched a national campaign to experiment with mediation and arbitration. Following the recommendations of the Pound Conference, the United States Department of Justice created the Office for Improvements in the Administration of Justice (OIAJ) one of whose tasks was to develop support for informal dispute resolution. Several offices of the Justice Department (National Institute of Law Enforcement and Criminal Justice as well as OIAJ) collaborated with local sponsors in the development of experimental neighborhood justice centers following national guidelines established with the help of the ABA. These pilot programs, and legislative efforts to expand and institutionalize them, drew support from the highest ranks of legal establishment including former Chief Justice Warren Burger, Attorney General Griffin Bell, as well as a host of local legal elites.[48]

At the same time, however, these efforts generated opposition from inside and outside the legal community. Supporters of legal services for the poor opposed the federal government's involvement with ADR as an effort to undermine government legal services programs.[49] Moreover, the alliance between the ABA and the Department of Justice encouraged opposition from organized consumer groups who had been working for nearly a decade to establish a national consumer protection agency and other formal processes specifically designed to redress consumer grievances. They criticized the neighborhood justice center experiments as

47. COMMITTEE ON THE JUDICIARY, DISPUTE RESOLUTION ACT REPORT, H.R. DOC. NO. 492H.2, 96th Cong. 1st Sess. (1979). *See also* C. HARRINGTON, *supra* note 13, at 101 (for an analysis of the political interests and groups who lobbied for and against federal legislation creating federally sponsored and funded ADR programs).

48. From 1977-1980, House and Senate committees held hearings on an act to institutionalize ADR. Among those testifying in favor of the legislation were Daniel Meador, Assistant U.S. Attorney General; John Cratsley, Acting Presiding Justice of Salem District Court, Commonwealth of Massachusetts; Talbot D'Alemberte, Chairman, and Professor Frank Sander, Harvard Law School, representing the ABA Special Committee on Resolution of Minor Disputes; Samuel E. Zoll, Chief Justice of District Court Department, Trial Court, Commonwealth of Massachusetts; Jeffrey L. Perlman representing the U.S. Chamber of Commerce; Lee Richardson, Acting Director U.S. Office of Consumer Affairs; as well as representatives from the OIAJ, the Better Business Bureau, and the National Home Improvement Association.

49. *See* Sarat, *Informalism, Delegalization and the Future of the American Legal Profession*, 35 STAN. L. REV. 1217 (1983); C. Harrington, *supra* note 13, at 78. According to Harrington, Ralph Nader's Public Citizen Litigation Group only reluctantly supported some aspects of the neighborhood justice concept. The Director of the Legal Services Corporation, Thomas Erhlich, was also reluctant to join a coalition of the ABA and the Department of Justice. C. HARRINGTON, *supra* note 13.

likely to evolve, like small claims courts, into collection agencies for business rather than effective forums for redressing failed market transactions. Opponents of ADR favored expanded opportunities and resources for the legal protection of a wide range of commercial, public, and private rights rather than wholesale delegalization through the creation of informal dispute resolution.

For legal elites, maintenance and protection of the legal field and the capacity of courts to protect already existing rights required active resistance to such expansionist demands. Maintaining legal legitimacy and judicial capacity required, in their view, a coordinated effort at rationalization in which asking less of courts was an essential first step. The technique of "fitting the forum to the fuss" and of devising alternatives to courts like Neighborhood Justice Centers[50] was part of an effort to develop rational mechanisms for allocating and channeling disputes into appropriate processes. Elite practitioners and academics sought to create a generalized engineering capacity for managing legal and social issues. They looked to ADR as a strategy of incremental adjustment, not radical transformation,[51] and, in so doing, they focused on the question of how disputes and dispute processing techniques could be matched up, of how an understanding of different forms of dispute processing could "be utilized so that some criteria can be devised for allocating various types of disputes to different dispute resolution processes."[52]

Here they have frequently drawn on the work of Lon Fuller.[53] In a series of well known papers, Fuller identified characteristics that differentiate various dispute resolution processes from other modes of social ordering.[54] In each work, he sought to abstract from history and con-

50. Rosenberg, *Let the Tribunal Fit the Case—Establishing Criteria for Channeling Matters into Dispute Resolution Mechanisms*, 80 F.R.D. 147, 166 (1977).

51. Sander, *supra* note 2.

52. *Id.* at 26. Those who imagine this kind of rational allocation of society's dispute resolution business employ, or would employ, several standards for making allocative decisions. Although they may not state it exactly in this fashion, their approach suggests the following standards for channeling disputes: (A) *The magnitude of the rights at issue.* Disputes involving questions of fundamental or basic rights belong in a formal judicial process. Other disputes, which do not raise such issues, can be dealt with informally. (B) *Complexity.* The standard of complexity seems to be offered to justify both formal and informal processes. Thus some argue that technical complexity, for example in complex economic litigation, should be accompanied by formality; mirroring arguments that supported the establishment of small claims courts, promoters of informalism suggest that the simpler the dispute, the more appropriate informal treatment. However, some promoters of informalism suggest that very complex issues, such as those in some tort or environmental litigation or regulatory rule-making, are better handled and should be considered through informal negotiating fora. (C) *Finality.* Court judgments, so the argument goes, fail to resolve disputes where the real cause of the dispute cannot be captured in or by the legal cause of action. This is often the case in disputes arising out of ongoing personal relations. In such cases, informal dispute processing seems more appropriate. (D) *Cost.* Informalism is said to be less expensive. Disputes should be processed by the least costly alternative so long as that alternative is able to meet other salient allocation standards. *See* Sarat, *The Role of the Courts and the Logic of Court Reform*, 64 JUDICATURE 300, 305 (1981).

53. *See* COUNCIL ON THE ROLE OF COURTS, *supra* note 43; Sander, *supra* note 2.

54. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979) [hereinafter Fuller, *Adjudication*]; Fuller, *Mediation, Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 1.

text, to see beyond variations in local practices and to define the essential form of adjudication, negotiation or mediation.[55] Like Fuller, Sander[56] suggests that dispute processing techniques can be classified into discrete and separate clusters, for example, negotiation, mediation, and adjudication, by identifying the essential attributes of the techniques in each cluster.[57] In this work, the contexts and various forms of dispute processing practice are given less attention than the effort to achieve definitional purity.

Proponents of ADR use the essential attributes of each technique or institution to deduce an understanding of its distinctive capacities and limits, an understanding of what kinds of disputes different forms of dispute processing are best equipped to handle.[58] Fixed characteristics appear, in this argument, to impose fixed limits such that disputes appropriate for one dispute processing technique may be inappropriate for another.[59] As one example, Sander argues that disputes should be channelled to and matched with, appropriate dispute processing techniques. He assumes that the nature and characteristics of disputes and disputing processing mechanisms are sufficiently stable so that each dispute can be assigned to an appropriate process. In their discussion of adjudication Sander and his co-authors announce that "our goal is to understand better what tasks courts are particularly well suited to perform and what tasks they are less well suited to perform."[60] Institu-

55. Fuller writes that his goal is to "define 'true adjudication' or adjudication as it might be if the ideals that support it were fully realized." Fuller, *Adjudication*, *supra* note 54, at 357. While there have been other attempts to define essential characteristics of dispute processing techniques, Fuller's was, and remains, the most influential. *See, e.g.*, M. SHAPIRO, COURTS (1981).

56. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 45; Sander, *supra* note 2.

57. For other similar attempts, see D. HOROWITZ, COURTS AND SOCIAL POLICY (1977); J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA (1984); Cappelletti & Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective*, in 1 ACCESS TO JUSTICE 3 (1978); Eckhoff, *The Mediator, The Judge and the Administrator in Conflict Resolution*, 10 ACTA SOCIOLOGICA 148, 158 (1967).

58. *See also* D. HOROWITZ, *supra* note 57.

59. Sander's advocacy of dispute resolution is based on his belief that given the right match of dispute and dispute processing technique, harmony can be restored, problems can be dealt with so as to produce resolutions that satisfy the disputants and are therefore likely to be final. Sander, *supra* note 2. Thus, *Dispute Resolution* talks about dispute resolution rather than dispute processing, suggesting closure and completion of the dispute. *See also* J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 57; Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 LAW & SOC. REV. 473 (1980-81). This emphasis on resolution suggests an image of social life in which harmony prevails, in which conflicts are idiosyncratic and in which mediation, arbitration, adjudication and other dispute processing techniques work to put an end to such conflict. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 45. *See* Rosenberg, *supra*.

60. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 45, at 150. Sander's advocacy of a dispute processing approach emerges from and is continuous with one major effort to reconstitute and reconstruct legal thought in the aftermath of legal realism. *Compare* B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985). It is, from this perspective, an extension of the so called "legal process" approach to an apparently more disputatious world. H. Hart & A. Sacks, The Legal Process (1958) (unpublished materials). *See also* Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (1982); Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the 70s*, 57 TEX. L. REV. 1307 (1979). For a

tional capacity problems are in this view largely problems of institutional overload.[61] In this way, the critique of adjudication becomes a defense of adjudication.

Access to Justice Proponents

Another part of the contemporary ADR movement begins with a very different critique of adjudication. It focuses on the costs and delays associated with adjudication and, in particular, on its resulting inaccessibility. For these proponents ADR is a means to increase access to justice. The access to justice group is generally thought of as progressive and motivated by a desire to help the socially disadvantaged.[62] Yet from within the legal field, practitioners and scholars turned to ADR as a half century earlier others had looked to small claims and juvenile courts to increase their market share of legal work. Calls for increased access to justice have long been associated with the professional interests of marginal practitioners and those who seek to bring the poor and dispossessed within the network of legality.

Following on the heels of the civil rights movement and the extension of the new legal rights to blacks, members of ethnic and religious minorities, women, the aged, and the handicapped, increased access to justice professed to address the needs of a broad constituency.[63] The phrase itself, "access to justice," is a rhetorical symbol of undeniable attractiveness and mobilizing power.[64] Beyond its symbolic import however, the phrase, and the political/legal movement it named, incorporated an ambivalent attitude toward, and a systemic contradiction within, liberal legalism. To increase access to justice means changing the structure and procedures of adjudication; yet, at the same time such demands reaffirm faith in law and in legal procedure, and in the justice they provide.[65]

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more complete treatment see Sarat, *The New Formalism in Disputing and Dispute Proceeding*, 21 LAW & SOC'Y REV. 695 (1988).

61. Edwards, *Commentary. Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 669 (1986).

62. *E.g.*, J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR: ISSUES FOR SOCIOLOGICAL RESEARCH (1967).

63. Although much legal policy and research treats persons with these status attributes as if they were socially and materially—ontologically—distinct, it is important to remind ourselves that we do not experience ourselves simply as a member of a racial, ethnic, religious, or gender category without also experiencing that status modified by one's other characteristics. Despite the too common notion that rights have been extended on the basis of particular, and favored, statuses, no one is, for example, black without also having a religious, class, and gender identity. For an extended discussion criticizing the contrary notion, that there are essential social characteristics or roles experienced unmediated or modified by other aspects of identity, see E. SPELLMAN, THE INESSENTIAL WOMAN (1988).

64. *See* Sarat, *Access to Justice*, in LAW AND THE SOCIAL SCIENCES (1987).

65. Friedman explains, however, that access to justice becomes a noticeable social problem when liberal legalism, with its insistence that law be both general and equal in its application, becomes widespread, as it seemed to be in the civil rights movement of the 1950s and 60s. Friedman, *Access to Justice: Social and Historical Context*, in 2 ACCESS TO JUSTICE (1978). Indeed, the liberal desire to equalize social relationships, or at least to ensure that the legal order treat all citizens equally, has typically provided the energy behind the "access to justice" movement.

Because legal systems habitually recognize a broader range of legal rights than they are capable of vindicating,[66] there is always a "huge latent demand" for adjudication that calls for "rethinking of the system of supply—the judicial system."[67] Rights, it is argued, are meaningless without effective institutional mechanisms for their vindication.[68] This argument presupposes[69] that the political and legal order actually intends legal rights to have significant instrumental value.[70] Legal rights are, in this view, created to alter political relationships, and to redress basic social inequities; if they fail to do so—to change the distribution of social resources—the failure must be one of implementation, not intention. Thus, the problem is a problem of institutions and institutional design. To increase access to justice means expanding dispute processing mechanisms in order to decide questions of right that would otherwise not be addressed.

Reformers have tried to increase access to justice by expanding legal representation and improving adjudicative procedures to accommodate different types of litigants and issues.[71] Reformers also seek,

> changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms.[72]

They want to encourage the creation of new dispute processing institutions and procedures, and they imagine the judicial system supplemented, though not supplanted, by a number of different forums to which citizens might bring their disputes. The defining characteristic of these forums would be their informality,[73] speed, and low cost which

66. Friedman, *The Idea of Right as a Social and Legal Concept*, 27 J. Soc. Issues 189 (1971). *Cf.* Silbey & Bittner, *The Availability of Law*, 4 Law & Pol'y Q. 399 (1982).

67. Cappelletti & Garth, *supra* note 57, at 51.

68. *Cf.* O. Holmes, The Common Law (1881).

69. *E.g.*, Access to Justice (M. Cappelletti ed. 1978).

70. For a criticism of such a view, see S. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change (1974).

71. Access to justice reforms have occurred in what Cappelletti and Garth describe as three distinct "waves." The first wave began in the early 1960s and provided for the extension of legal aid to the poor through state subsidized and privately funded legal services. In this wave, incorporating the poor within the legal field required the legal profession to compromise one of the central tenets of its ideology—independence from the state. Since, by definition, the poor could not provide a market for legal services the state substituted for the market mechanism. As in other areas, professional self-interest overcame professional ideology.

The second wave focused upon the representation of diffuse or collective interests, especially, although not exclusively, the interests of consumers and environmentalists. The vindication of many public, collective, or diffuse rights seemed to require the relaxation of standing rules, provisions for class actions, as well as activist judiciary. *Cf.* Orren, *Standing to Sue: Interest Group Conflicts in the Federal Courts*, 70 Am. Pol. Sci. Rev. 723 (1978). This wave promoted the adaptation of adjudication to changes in both the substance and volume of demands newly voiced through expanded legal representation. The third wave incorporates the first two, but goes beyond the traditional concern with legal representation and procedure that is basic to both. Cappelletti & Garth, *supra* note 61.

72. Cappelletti & Garth, *supra* note 57, at 52.

73. There has been, of course, extensive discussion in the dispute processing litera-

collectively would mean more access to justice.

Quality Proponents

A third group of ADR proponents directed their critique of courts to issues of quality not issues of efficiency or access. This group criticized adjudication for its alleged inadequacy in addressing the substance of disputes and relationships between disputants. These advocates envisaged processes that would get at the "underlying" trouble from which disputes emerge, and they proposed dispute resolution techniques that would both restore harmony and empower disputants while responding to personal needs and to detailed understandings of their situations.

Such "ideal" resolutions required dispute processes that were forward looking, constructive and creative rather than processes that narrowed issues to fit the prescribed forms of legal argument.

> For the most part, litigation is a way of viewing the past through the eyes of the present. Perhaps justice is best done by starting with the present—with present needs and present demands—and using the past only where it reveals equitable considerations which will provide guidance in shaping a remedy. . . . We are still—in contract law, in domestic law, in landlord-tenant law, in tort law—engaged in a quest for fault, for 'who did what when' as a way of deciding how the risk should be borne and who should pay, perform or provide remedy. Yet, in domestic relations, industrial injuries, automobile accidents, we are finding that the quest for fault is time consuming, elusive and not particularly productive in terms of enabling human beings to get back on their feet and to cope with the present or chart a rational course for the future.[74]

For this third group, ADR is one method of moving dispute resolution procedures away from the alleged adversarial all-or-nothing, blame-or-guilt orientation of courts.[75] Just as centuries earlier, equity sought to reform law by expanding the range of actions and remedies, this group seeks to expand the range of relevant issues to be taken into account when disputes are processed. As a result of their ability to reach

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ture about the distinction between formal and informal dispute processing institutions; indeed, the effort to work through these distinctions spurred the growth of the "disputes" industry. Abel says that: "institutions are informal to the extent that they are non-bureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic." Abel, *Introduction*, in 1 THE POLITICS OF INFORMAL JUSTICE 2 (1982). As Abel acknowledges, however, this definition is more a rough sketch of potential traits of informal justice than a precise delineation of exclusive characteristics.

74. Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME L. REV. 927, 932 (1966). The Cahns did not specifically advocate what has come to be known as ADR although they did urge the creation of "community based crisis intervention teams" employing a variety of professional skills. These suggestions, however, fed the call for alternative processes in a variety of institutional settings and social problem areas and were frequently cited in the literature recommending the adoption of ADR.

75. Danzig, *supra* note 25, at 15.

and assess all relevant issues, alternative dispute resolution procedures, it was argued, would resolve disputes by developing a consensus about future conduct rather than by assigning responsibility for events in the past. Freed from formal legal categories and procedures, informal alternatives could get at the heart of problems and actually solve them, rendering true or better justice, contributing to social harmony and stability.

Thus, for example, in place of the conventional models of the criminal process,[76] Griffiths proposed an altogether different conception, what he called the family model of criminal procedure.[77] He began by noting that whatever the variations were in conventional images of the criminal justice system, all formulations relied upon a singular ideology which pitted the individual against the community in a battle for the detection, apprehension, prosecution and punishment of offenders.[78] He wanted to radically alter the ideology of criminal adjudication—promoting reconciliation, resolution, and adjustment of differences within an environment of harmony and love. Others followed Griffiths with very concrete proposals for restructuring the courts, if not to reproduce the ideological premises of the family, then to incorporate a broader range of procedures and to achieve substantively better results.[79]

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76. These models are described by H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

77. Griffiths, *Ideology in Criminal Procedure, or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1971). It should be noted that unlike many of the supporters of ADR and others whose work was used to promote the institutionalization of ADR, Griffiths was more tentative. He writes:

> I should nevertheless induce the doubter to suspend disbelief, at least temporarily, by making the proposed alternative ideology as plausible as possible. So I propose to gather some respectability by using an allusive name for it: a name, that is, that invokes a "real world" institution which occasionally inflicts punishments on offenders for their offenses but which is nonetheless built upon a fundamental assumption of harmony of interest and love—and as to which no one finds it odd, or even particularly noteworthy, that this is the case. I will, then (following Packer in using the word "model" only for convenience sake, and preferring to think of it as an ideological metaphor) offer a "Family Model" of the criminal process. I wish to emphasize, however, that this allusive reference is to our family ideology as I take it to be, not to the facts of all or particular families.

Id. at 372.

78. Griffiths notes that punishment goes on in other settings, especially families, and there punishment is neither conceived of nor executed as a battle of antagonistic interests. "A parent and child have far more to do with each other than obedience, deterrence and punishment, and any process between them will reflect the full range of their relationship and the concerns growing out of it." *Id.* at 373. If criminal courts functioned as families in adjudicating offenses and meting out punishment, Griffiths argued, we would be required to reconceptualize both the crime and the criminal from anti-social acts and persons demanding exclusion to a recognition of the variability of social behavior and the ultimate reconcilability and interconnectedness of the offender, the offense and the community. Offenses would be acknowledged to be what they are—regular not extraordinary occurrences, just as punishment is not an isolated phenomenon but part of a continuing relationship between child and parent.

These changes in the conception of offenses and offenders would also entail changes in the attitude toward, and of, public officials in the legal system. Rather than removed and disinterested, the family model presupposes a close, dependent, and caring relationship between officials and suspects, as well as fundamentally altered procedures for responding to troubles, crimes and disputes. Griffiths, *supra* note 77.

79. Danzig, for example, recommended the creation of community moots to handle

Supporters of ADR argued that adjudication frequently fails in cases involving persons with ongoing relationships and that this failure could be responded to in a new system which built upon those relationships.

> A moot might handle family disputes, some marital issues . . . juvenile delinquency, landlord-tenant relations, small torts and breaches of contract involving only community members and misdemeanors affecting only community members. The present system does not, after all, perform the job of adjudication in most of these cases. Civil proceedings are generally avoided because the parties are too ignorant, fearful, or impoverished to turn to small claims courts, legal aid, or similar institutions. Many matters which may technically be criminal violations will not be prosecuted because they are viewed by the prosecuting attorney as private and trivial matters. The criminal adjudicative model seems particularly insufficient and a system of conciliation correspondingly well advised when we know that due to institutional overcrowding and established patterns of sentencing the vast majority of misdemeanants and some felons are not likely to be imprisoned. For these defendants, the judicial process is not a screen filtering those who are innocent from those who will be directed to the corrective parts of the process. Rather, it is the corrective process; as such it fails to be more than a "Bleak House," profoundly alienating, rather than integrating.[80]

Courts, it was argued, subjected the delicacy of interdependent and ongoing relationships to a very considerable degree of overkill. As Simon Rifkind puts it, the object of judicial intervention in disputes is to bring them "to an end by determining whether the plaintiff or the defendant prevailed."[81] The judge is obligated to declare who was or was not guilty or at fault for what actions, and the judicial decision must state whether the claim originally asserted in the lawsuit was or was not valid. Such clarity about blame can be unfortunate in relationships involving trust, spontaneity, and reciprocity. Here, it was argued, adjudication has the tendency to disrupt further rather than to heal.[82]

Because, for the third group of ADR entrepreneurs, the problems

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local disputes and disturbances, and Fisher called for the establishment of community courts to adjudicate minor criminal offenses. Danzig, *supra* note 25; Comment, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 AM. U.L. REV. 1253 (1975). Adopting a therapeutic approach, in contrast to the traditional adversarial justice concern with responsibility and just dessert, they urged that local courts be supplemented by dispute resolution processes that emphasized integrative and conciliatory outcomes.

80. Danzig, *supra* note 25, at 44.

81. Rifkind, *supra* note 2, at 101.

82. The dynamics of interpersonal relations require a mutual acceptance of responsibility as a face-saving way out of conflict. Social practice has it that apologies should be met either with a polite acceptance or with a professed, if not sincere, sharing of guilt. *See* Wagatsuma & Rossett, *The Implications of Apology*, 20 LAW & SOC'Y REV. 461 (1986). Branding one party to a dispute as blameworthy makes reintegration and resumption of previous relationships difficult. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). *Cf.* Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623. This is especially so when the label is applied authoritatively and pub-

of courts were to be found in their inability to resolve disputes fully and finally, increasing court and law enforcement capacities would not solve the problems plaguing the courts. Those problems were attributed to the distant, bureaucratic and authoritative character of courts. To remedy these structural failings, those who advocated community moots relied on emotional bonds and community networks joining judge and disputants rather than upon social distance and hierarchy; they encouraged wide ranging discussion "so that all tensions and viewpoints psychologically—if not legally—relevant to the issue were expressed."[83] Rather than emphasizing the trappings of formal authority and coercive power, moots would operate in familiar surroundings of the home and the community and employ everyday logic, norms and manner.

This critique of courts was advanced simultaneously by those trying to break out of the legal field and develop a strategy for community empowerment, and by those trying to extend the precinct of legal control by softening its allegedly rough edges. Groups like the American Friends Service Committee ("AFSC"), a private nonprofit Quaker organization, were active in the critique of adjudication described above and in promoting what they called community dispute resolution. They hoped that "community mediation centers [would] provide an avenue to strengthen and empower local communities by decentralizing social control functions and providing community residents with an enhanced sense of their ability to handle legal and political problems on their own."[84] The AFSC created the Grassroots Citizen Dispute Resolution Clearinghouse which served as a resource center for community groups seeking to organize citizen dispute resolution ("CDR") programs.[85]

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licly, and when the adjudication of guilt or blame, juxtaposed with an original denial of responsibility, may be construed as an official finding that the denial was a lie.

The substance of a dispute, however, includes more than the relationship between the parties; it refers to facts in dispute, to issues and questions and details of the problematic events or relationships. Therefore, some of those who advocated reform because it would provide substantively better justice were concerned less with disputes between persons in ongoing relationships than with disputes where the issues were complex, technical, and apparently beyond the expertise of judges. Two kinds of litigation in particular seemed to raise calls for different forms of dispute resolution: 1) cases in which the issues were scientific or so technical that the litigation became a matter of debate between experts, and beyond the generalist expertise of many judges, and 2) cases in which the issues were so broad as well as complex that they were likely to confound any single attempt at amelioration. *See* Cavanagh & Sarat, *Thinking About Courts: Toward And Beyond A Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371 (1980).

83. Danzig, *supra* note 25, at 43.

84. Merry, *supra* note 25, at 17.

85. Although it closed within a decade for lack of funding, the CDR Clearinghouse was, during its lifetime, a national advocate for grass roots programs, that is, programs of informal dispute resolution unattached to courts, police, or prosecutorial offices. The Community Dispute Settlement Service of the Friends Suburban Project in Delaware County, Pennsylvania, just outside of Philadelphia, and the Community Association for Mediation in Pittsburgh were prominent examples of CDR, the former middle class dominated and the latter an effort to build CDR "directly into the fabric of a black neighborhood." Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in 1 THE POLITICS OF INFORMAL JUSTICE 75, 93 (1982). The San Francisco Community Board Program, established in 1978, is another example of the promotion of informal justice as a way to strengthen neighborhoods and communities.

AFSC did not view dispute resolution as an alternative to existing processes or institutions. It was for them a constituent part of community life. The neighborhood and volunteer orientation of dispute resolution programs was, in their view, essential. "From the Clearinghouse's perspective the importance of dispute resolution is not just in providing another nicely packaged court service, but is in the potential for restoring to neighborhoods the responsibility of taking a major role in problem solving. Neighborhood responsibility is the key."[86]

This focus upon community empowerment meant that CDR programs would not easily fit with court-sponsored ADR. In fact, CDR programs would not operate where the coercive power of the state was part of the dispute situation and therefore would not accept referrals of disputes that had already been filed in courts. Moreover, court-annexed dispute resolution programs were rejected because they were organized in tandem with the institutional structure of the court system, often on a city-wide or county-wide pattern, and thus did not mesh with neighborhoods. Finally, the state-sponsored programs did not easily accommodate staffing on a part-time or totally volunteer basis as the community groups required.[87] CDR thus represented a direct and frontal challenge to programs and experiments, for example, neighborhood justice centers,[88] favored by the elite bar and its theoreticians. CDR appeared to threaten the legal profession's ability to control new developments in dispute processing and to contain them within the domain of their expertise and authority.

By the mid-1980s, the hopes of those who had joined the critique of adjudication from the community empowerment perspective had largely been dashed. The CDR Clearinghouse was closed and many community-based programs were either abandoned or taken over by courts or

86. Letter from Paul Wahrhaftig to W. Philip Mclaurin, Director, Urban Crime Prevention Program, Office of Domestic and Anti-Poverty Operations, ACTION, Washington D.C. (1979) (on file with the authors). The Clearinghouse published a quarterly, *The Mooter*, which devoted its Summer, 1979, issue to the role of volunteers in CDR.

87. Because the community empowerment focus was somewhat at odds with proliferating state ADR programs, much of the Clearinghouse's energy went into monitoring and critiquing such efforts. Wahrhaftig described the dual role of the AFSC as a resource for, and critic of, dispute resolution programs. *See* Wahrhaftig, *supra* note 86. The AFSC attempted to provide information and resources to funding recipients so that they had current information from experienced sources on community organizing, while also attempting to monitor the experience of government sponsored programs. "We will critique and analyze the problems and pitfalls that are inherent in the structure of the programs or arise under it. We hope that by focusing attention on problem areas as soon as they arise we may be able to help groups avoid pitfalls initially or at least avoid repetition."

88. There was some discussion as to whether the Neighborhood Justice Center ("NJC") established by the Justice Department in Venice, California was a "grass roots" effort. Although the three experimental centers were sometimes presented as three alternative models (Kansas City NJC was viewed as an extension of the criminal justice system, Venice California as a grass roots program, and Atlanta as a hybrid—location in the community but with strong court sponsorship) Wahrhaftig wonders "whether Venice might more properly be called a strawman." *See* Wahrhaftig, *supra* note 85, at 88. Attorney General Griffin Bell, whose strong support was instrumental in the creation of the NJCs, regarded their creation as an effort to increase access to and reduce the costs of justice. The Venice NJC was an hierarchical organization, monitored and evaluated on the basis of its contribution and relationship to the criminal justice system.

other state agencies.[89] The result within the ADR movement has been increased professionalization.[90] ADR is now firmly within the domain of the legal field and has been effectively made to service the professional projects of practicing lawyers.[91]

ADR extends the reach of the legal field, even as it is based on a critique of adjudication, through a set of complex strategies. Non-adjudicatory alternatives diminish the visible coercion and "violence" associated with the judicial process.[92] Because coercion is less extreme and less visible in these informal institutions, the reach of control can be wider, less resistance is generated, and even "trivial" problems can be subject to regulation.[93] Moreover, because informal processes appear to be less expensive—at least to begin with—they permit intervention, in one form or another, in a larger number of cases. The quantity of resources for state social control is increased by relieving formal legal institutions of some demands while nonetheless maintaining the overall capacity of those institutions.[94] Because informal processes do not require violations of law to initiate action, and do not stigmatize participants—who are respondents and complainants not defendants and victims—intervention can be earlier, covering a wider array of behaviors and attitudes, unconstrained by jurisdictional boundaries or legal categories.[95] Coercion is replaced by persuasion, threat, manipulation, but power and authority is exercised nonetheless.[96] Finally, ADR expands

89. R. HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY 98 (1987).

90. One need only note the growth of such organizations as the Society of Professionals in Dispute Resolution and the growth of private, for-profit providers of dispute resolution services. The promise of increased efficiency and lower costs which were associated with ADR have been used by economic entrepreneurs to market ADR for private concerns (for example businesses, insurance companies) that are regular users of court services. They argue that just as privatization promises cost/effect, market sensitive action in the regulatory or administrative arena, private justice would produce similar benefits for users of the court system. *See generally* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 134 (1974).

Mini-trials and rent-a-judge programs as well as mediation and arbitration services were promoted by for-profit concerns like ENDISPUTE. Businesses were prepared to buy the product and support ADR in these areas because they perceived themselves as all too often victimized by public justice and runaway juries. The result has been the creation of a two track world of ADR—the lower world of publicly-supported programs for minor criminal, neighborhood, and family disputes; the upper world of privately marketed dispute resolution services for business disputes. Merry, *supra* note 42, at 2067.

91. Y. Dezalay, *supra* note 7; R. HOFRICHTER, *supra* note 89.

92. Cover, *Violence and the Word*, 95 YALE L.J. (1986).

93. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 270-71 (1982).

94. *Id.*

95. R. HOFRICHTER, *supra* note 89; Abel, *supra* note 93, at 272.

96. S. Silbey & S. Merry, Interpretive Process in Mediation and Courts (1986) (unpublished manuscript). The notion that power disappears in the absence of hierarchy seems fundamental among ADR promoters. If the direct, legally sanctioned ability to exercise or command the exercise of coercion, force, or confiscation of property is lacking, observers too often assume that power in its other forms is also absent or, if not missing, is somehow shared. *See generally* M. FOUCAULT, POWER/KNOWLED GE (1980); S. LUKES, POWER: A RADICAL VIEW (1974); D. WRONG, POWER: ITS FORMS, BASES AND USES (1979). The attention to greater participation by disputants in the processes of dispute resolution suggests to some observers that the outcomes are therefore shaped by the parties. This argument, however, ignores the possibility that the parties may be participating in the legitimation of their own

the legal field by coopting or undermining mechanisms of dispute processing in traditional social institutions and by bringing them within the preview of law and the legal profession.[97]

III. The Disciplinary Domain: Social Science and Legal Thought

The ADR movement and its critique of adjudication also emerges out of the efforts of social scientists to find a place for themselves in the production of academic legal scholarship. The issue here is whether legal study can be made scientifically respectable, empirically rigorous and theoretical[98] or whether legitimate legal scholarship is irreducibly normative. Like the contemporary critique of institutions which has fueled the ADR movement, the modern struggle for scientifically-sound scholarship about law replays earlier struggles within the legal academy which were precipitated by the effort of legal realists to advance an instrumentalist conception of law and to ground legal policy in empirical observation.[99]

Realists saw the start of the twentieth century as a period of knowledge explosion and knowledge transformation.[100] Some saw in both the natural and emerging social sciences the triumph of rationality over tradition, inquiry over faith, and the human mind over its environ-

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subjugation or control. *See* S. Silbey, On the Relationship Between State Theory and Sociolegal Research (1988) (paper presented at the 1988 Annual Meeting Law and Society Association, Vail, Colorado); S. Silbey & S. Merry, *supra*.

97. Abel, *supra* note 93. This is ironic, Abel suggests, because some impetus for the creation of alternatives derives from a nostalgia for traditional authority. *See Joint Hearings on Resolution of Minor Disputes. Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary and Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. (1979) (statement of Daniel J. Meador); Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 Brit. J.L. & Soc'y 141 (1981). *Cf.* Silbey, *Who Speaks for the Consumer?* (Book Review), 1985 Am. B. Found. Res. J. 429. Traditional institutions do not simply wither away but are, Abel claims, actively destroyed by the growth of state, state-supported institutions and professions. *Cf.* C. Lasch, Haven in a Heartless World (1977). The institutionalization of ADR furthers the state's monopoly of social control by mobilizing additional mechanisms and processes of social regulation and further expropriating the conflicts and troubles of citizens. Paradoxically the appropriation of conflict takes place within processes which attempt to narrow the interactions, number of participants and public/justice considerations within any disputes, thus both neutralizing and privatizing conflict. Christie, *Conflicts as Property* 17 Brit. J. Criminology 1 (1977). *Cf.* Silbey, *The Consequences of Responsive Regulation*, in Regulation Enforcement (1984).

Although this analysis suggests that the expansion of state power increases oppression, it is important to remember, as Joel Handler has reminded us, that traditional institutions are not necessarily havens of freedom and solicitude, nor are they models of equality and neutrality. Recourse to law is often undertaken to get out from under the oppression of personalistic, idiosyncratic decision making.

98. *See* D. Black, The Behavior of Law (1976).

99. Legal realism was by no means, however, a unified or singular intellectual movement. At one and the same time, the label "legal realist" embraced radical skeptics and those who exhibited strong faith in science and technique. *See* A. Hunt, The Sociological Movement in Law (1978); L. Kalman, Legal Realism at Yale 1927-1960 (1986); Cohen *Transcendental Nonsense and the Functional Approach*, 35 Calif. L. Rev. 1152 (1985); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431 (1930); Peller, *supra* note 60.

100. Reisman, *Law and Social Science: A Report on Michael and Eschsler's Casebook on Criminal Law and Administration* (Book Review), 50 Yale L.J. 636 (1941).

ment.[101] They took, as one of their many projects, the task of opening law to this explosion and transformation. Moreover, some realists argued that the law's rationality and efficacy were ultimately dependent upon an alliance with science.[102] By using the questions and methods of science to assess the consequences of legal decisions, realists claimed that an understanding of what law *could* do would help in establishing what law *should* do.[103] Thus, realism initiated a dialogue between law and social science by staking a claim for the importance of phenomenon beyond legal categories and by attacking the self-centered arrogance of legal decision makers.[104]

While realists fought, fifty years ago, to transform legal scholarship by bringing social science into the legal academy, in the contemporary period the effort to further develop and legitimate the social scientific bases of legal scholarship has been associated with attempts to advance the concept of dispute as a way of talking about law. In search of methods that would be scientific, that is independent of the subjects and contexts of study, anthropologists began, in the 1950s, to elaborate the concept of dispute as a way of understanding the role of law in society.[105] Motivated by intellectual dilemmas specific to their discipline, and by a desire to bring law within their professional study, these social scientists tried to reconstitute the subject matter of law by transforming talk about law into talk about disputes.

At first, they defined disputes as public assertions, usually through some standard procedures, of what are initially dyadic disagreements.[106] They argued that the use of this concept offers a way of developing neutral and objective tools of inquiry while overcoming static dichotomies that had characterized anthropological studies of law. Traditionally, anthropological studies had alternately focused upon either particular legal institutions or upon particular legal ideas and conceptions.[107] By focusing upon cases and disputes, researchers tried to get beyond the abstracted categories of institutional or ideational analyses and to attend

101. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827 (1941).

102. *See* Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980).

103. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931).

104. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, (1921); Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923). By pointing to the scientific impulse in realism, however, we do not want to suggest that there was only one model of empirical social science available for adoption just as we do not want to suggest that there was only one thread of realist practice. The social scientific styles within realism included a wide range of institutionalists as well as very quantitative behavioralists. *See* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973).

105. The following discussion begins from an analysis of the concept of dispute presented in Merry & Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 15 (1984).

106. *See* Gulliver, *Dispute Settlement Without Courts*, in LAW IN CULTURE AND SOCIETY 14 (1969).

107. Moore, *Law and Anthropology*, in BIENNIAL REVIEW OF ANTHROPOLOGY (1969), *reprinted in* S. MOORE, LAW AS PROCESS 214 (1978).

to the social action which constituted legal forms—ideas and institutions. The effort was to find ways of studying law that could be truly scientific, free of socio-cultural and legal/doctrinal categories. This effort was, thus, part of a struggle for control of legal scholarship itself. In this sense their use of the concept of dispute was both an effort to legitimate social scientists' activities in the field of legal scholarship and was part of a debate within the discipline of anthropology itself.

By viewing disputes as a sequence of events, noting changes over time, anthropologists began to describe social processes dynamically. The suggested shift in the unit of analysis also promised to overcome the dichotomy in anthropology between law as prescription and law as reflection of social conditions. It did so by treating law as a "manipulable, value-laden language" available for any number of purposes.[108]

Attention to disputes emerged as part of a more general resistance to the structural functional paradigm which had dominated anthropological research, and which had been used to describe relationships among social processes and institutions, such as law and society. Structural functionalism was criticized for its ahistorical quality, and its reliance upon a consensual vision of social order which viewed conflict as a matter of failed conformity with unproblematic normative standards. Thus, during the 1950s and 1960s, research in the anthropology of law,

> however diverse in other respects, shared certain characteristics. [The studies] were mainly ahistorical, ethnographic descriptions, based on inductive empiricism and using some form of case method. All concerned a single ethnic group that was deemed to be relatively homogeneous and capable of being isolated, as a "society," for purposes of analysis. Most relied, explicitly or implicitly, on Western conceptions of law, and they considered disputes as the main index of law or its primary locus. Though conducted during the colonial period, they abstracted, by and large, from the processes of colonial domination and from the profound economic and social changes occurring during that period. They were generally functionalist in orientation and concerned with the maintenance of social order. Except for the studies by Malinowski and Gulliver, they considered law primarily as a framework rather than as a process.[109]

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108. S. MOORE, LAW AS PROCESS 225 (1978). *Cf.* Silbey & Bittner, *supra* note 66.

109. Snyder, *supra* note 97, at 143. The dominance of this paradigm was reflected in particular in the work of Radcliffe-Brown who used the term "function" to refer to "the interconnections between social structure and the process of social life," and the term "social structure" to refer to the raw material of social life, to what might be called "social relations" and the patterns of those relations. A. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 12 (1952). Radcliffe-Brown used the term "structural form" to denote the abstracted and sociologically constructed models of societies which Levi-Strauss called "social structure." *See* C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (1963); THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN (A. Kuper ed. 1977). RadcliffeBrown insisted, however, that the social structures he was describing were directly observable phenomena and not abstracted models.

> The starting point was a set of living human beings involved in a series of social relationships with one another. This "social network," as he sometimes de-

Radcliffe-Brown, for example, regarded social structures as observable phenomenon which possessed a dynamic quality yet nonetheless displayed, like human beings, significant continuity over times. In structural functionalism, however, attention to continuity was joined to a concern for conformity so that the stability—equilibrium or disequilibrium—of a society could be measured by the amount of deviance in that society. "Where there is marked divergence," he wrote, "between the ideal or expected behavior and the actual conduct of many individuals, this is an indication of disequilibrium."[110] From this perspective, conflict among members of a group about the rules of behavior, or methods for formulating those rules, signify a deeper social instability. For Radcliffe-Brown the goal of structural functional analysis was, in the end, to determine how institutions, like law, maintained the equilibrium and wholeness of a society.

Within anthropology itself, some scholars claimed that this way of talking about law simply replicated the political biases of traditional legal scholarship. They looked for ways scholarship could explain, and promote, social transformation. Some looked for alternative concepts and methods for describing the place of law in that process and, in so doing, emphasized the importance of situations of trouble or cases of hitch, to use the phrase Llewellyn and Hoebel coined in *The Cheyenne Way*.[111] Trouble cases, or disputes, provided an opportunity, in this view, to link the study of norms and institutions with the study of change and evolution.

In a widely referenced survey of the literature, Laura Nader took up the cause and actively championed the concept of dispute as a way for social scientists to study law.[112] In order to place legal processes more directly within social contexts, while simultaneously achieving more reliable empirical and explanatory generalizations, Nader urged anthropologists to use the concept of dispute and make efforts at describing disputing behavior.[113] She argued that an analysis of disputes and responses to disputing was essential for understanding processes of social

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scribed it, and as it would be termed today, he called the "social structure." But behind the flux of everyday interactions, regularities could be established. The regular forms could thus be abstracted. Together these constituted the "structural form" of the society. This again was empirically real, since it corresponded to the stated norms and customary usages of various kinds of social relationships. Being real in this sense, the structural form could be functionally related to the actual processes of social life. In the paradigmatic case, recurrent social activities maintain the structural form, and are in turn determined by it.

THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN 29 (A. Kuper ed. 1977).

Although he asserted that social structure was dynamic, "like that of the organic structure of a living body," *Id.*, Radcliffe-Brown emphasized the continuity of social structure through time. He argued that like biological organisms society experiences constant renewal and change. Nevertheless, he believed that the "general structural forms . . . remain relatively constant," and he insisted that "even in the most revolutionary changes some continuity of structure is maintained." *Id.*

110. A. RADCLIFFE-BROWN, SYSTEMS OF KINSHIP AND MARRIAGE, *reprinted in* THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN 197 (A. Kuper ed. 1977).

111. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY (1941).

112. Nader, *The Anthropological Study of Law*, 67 AM. ANTHROPOLOGIST 3, 23 (1965).

113. *Id.*

control, but equally important for sophisticated and contextual analyses of law and courts, should they exist in a society. From this perspective, disputes are windows on society, openings in the social fabric, moments of exploration in which the collectivity is challenged, transformed, or repaired. Observing disputing processes within their social location, social scientists would witness discussion, reenactment or transformation of norms along with active competition among various interpretations of norms.[114]

Adopting the concept of "dispute," scholars moved from the analysis of law as a system of rules to the study of law as a process of handling trouble cases. With this move, however, formal definitions of law become unnecessary, theoretically pointless and sterile.[115] Emphasis was placed on the continuity of law and other social institutions and processes[116] rather than on the distinctiveness of law. Here, the realist

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114. As Llewellyn and Hoebel suggest in describing the virtues of this lens—the trouble case or dispute:

> It is . . . the felt "norms" for conduct, whether or not derived from practice, which are likely to be injected into the case of breach. Per contra, it is the case of hitch or trouble that dramatizes a 'norm' or a conflict of 'norms' which may have been latent. It forces conscious attention; it forces the defining of issues. It colors the issues, too, as they are shaped, with the personalities which are in conflict, and with matters of "face," and with other flavors of the culture. It forces solution, which may be creation. It forces solution in a fashion to be remembered, perhaps in clear, ringing words. It is one more experiment toward new and clearer or more rigorous patterning both of behavior and of recognizable "norm" into that peculiarly legal something one may call a "recognized imperative."

K. LLEWELLYN & E. HOEBEL, *supra* note 111, at 21.

115. *See* S. ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979); Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217 (1973); Snyder, *supra* note 97.

116. This move paralleled a more general shift within anthropology to a more voluntaristic, actor-centered mode of analysis. The description of societies came to focus more on actors' strategies and choices rather than rules of behavior. In order to escape the notion of society exclusively patterned by norms and rules, anthropologists followed sociologists of the social constructivist perspective and moved toward an analysis of actors operating through and by means of rules, yet constructing those rules and social orders on the basis of choices and strategies. *See, e.g.*, P. BERGER & T. LUCHMAN, THE SOCIAL CONSRUCTION OF REALITY (1966); E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). The individual was conceived as free to exercise choice within the constraints imposed by her culture and social structure, while simultaneously constructing that context through her actions and interactions. Study of disputes fit nicely here. Scholars could examine the choices which those involved in a dispute made as to the appropriate ways to handle disputes as well as the processes of giving meaning to those disputes in different dispute processing arenas. *See* Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes; Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81); Mather & Yngvesson, *Language, Audience and the Transformation of Dispute*, 15 LAW & SOC'Y REV. 775 (1980-81); Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY (1969). *See also* B. Yngvesson, Public Nuisance, Private Crime: The Clerk, the Court and the Construction of Order in a New England Town (1987) (unpublished manuscript); S. Silbey & S. Merry, *supra* note 96; Sarat & Felstiner, *The Legal Construction of Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737 (1988).

> Snyder describes the intellectual movement as follows:
>
> [I]ts approach shifts the main enquiry from social organization to processes and also from groups to networks of individuals. It emphasizes the action of parties in disputes just as much as those of negotiators or adjudicators, hence it aims to map the perceptions of individual disputants and gives special attention to the cultural meanings and rationalizations of social action.

Snyder, *supra* note 133, at 145. Other scholars have also discussed the greater emphasis

tradition in legal scholarship legitimated the use of disputes as a way of studying law in action, and thus enabled social scientists outside law schools to claim an important place in the legal field.

The move to study law through the lens of trouble and disputes was part of a move to connect the discipline of legal study to more general developments in the human sciences. Within the human sciences, efforts were being made to cross restrictive disciplinary boundaries. There was active theoretical interest in the functions of a large variety of social institutions and concerted efforts to identify common variables and frames of reference. While anthropologists were adapting or resisting the structural functional paradigm, there were similar adaptations, challenges and echoes in the other social sciences, and continuing efforts to build links across the disciplines. The anthropological formulation of social action and disputing as choice-making strategies bore a close similarity to rational choice models in economics and political science, and it suggested some convergence with role analysis in sociology and psychology. It thus fit well with the desire to move in the direction of a unified social science with fundamental and common units of analysis. "Dispute" looked like it might be one of these essential elements and organizing concepts of social life. The notion of dispute and dispute processing fit well with a behavioral—rather than normative or legal—conception that could be used in a wide variety of situations. It did not carry with it connotations of cultural or institutional bias that were present in many early anthropological analyses that began with a model of law predicated on Anglo-American experience.[117]

In one sense, the development of the concept of dispute as a primary focus of social science research on law can be read as the culmination of a particular moment in the history of ideas in which the model of

on processes, transactions and individual choices. *See* THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978); POLITICAL ANTHROPOLOGY (M. Swartz, V. Turner & A. Tuden eds. 1966); Barth, *Models of Social Organization*, in ROYAL ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN AND IRELAND (1963) (Occasional Paper 23); Nader & Yngvesson, *On Studying the Ethnology of Law and Its Consequences*, in HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY 884 (1973); Van Velsen, *The Extended Case Method and Situational Analysis*, in THE CRAFT OF ANTHROPOLOGY (A. Epstein ed 1967).

117. S. MOORE, *supra* note 108, at 214. Van Velsen argued that faulty comparisons persisted in anthropological treatments of African legal systems, because anthropologists, with or without legal training, operated with "imperfect understanding of their own legal system, with which, explicitly or implicitly, they tend to compare African legal systems." Ethnocentrism seems to have been, in this argument, exacerbated by naivete, leading to very common myths concerning both Anglo-American and African law. Van Velsen describes these as the myth of informality of African law, and the formality, limitation by rules and procedures in Anglo-American courts. He also describes a second myth which asserts that African tribunals seek reconciliation while Anglo-American courts are preoccupied by other concerns which do not address considerations of social organization and composition. Van Velsen suggests that the myths derive from insufficient attention to the "lower" courts in Britain and the United States which are more likely parallels to the African tribunals under examination; he also questions whether scholars have actually determined that reconciliation is the outcome of the African processes. Van Velsen, *Procedural Informality, Reconciliation and False Comparisons*, in IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW 137 (1969). *See* Abel, *supra* note 115 (for extended argument that focus on dispute processes would provide a less ethnocentric, more culturally valid subject of study than law).

elementary particles and general theory in physical science fueled the dream of a true social science with equally fundamental, objective, and verifiable units of analysis. The dispute was for empirical legal research what "demands and support" would be for political science, what "stimulus and response" would be for behavioral psychology, what "utility" would be for neo-classical economics: a new paradigm that would advance the science of law.[118] Dispute became the prism for observing courts and their settings as well as other institutions for interpreting and responding to conflict. For socio-legal scholars, the way to study law was to carve out and construct from social reality "a particular social relationship called the dispute."[119]

The Civil Litigation Research Project, funded by the United States Department of Justice in 1978, was perhaps the largest and most ambitious attempt to use the concept of dispute to organize empirical work on law. Its ambition directed attention to the limitations as well as the possibilities of using "disputes as a link between law and society."[120] What started out as no more than "a general set of orientations"[121] had crystallized into a major perspective and direction for research. The result was to generate and encourage revisionism, criticism and questions about the status and adequacy of the dispute perspective in scholarship about law.

Questions about the utility of the dispute perspective in legal scholarship occurred first within the social science community and reflected narrow struggles for hegemony among legal scholars outside law schools. Some anthropologists argued that the focus on trouble and the management of trouble distracts attention from the far more general pattern of acquiescence and normative integration in social life.[122] They worried that the dispute perspective condemned social science to studying the tip of the iceberg and, as a result, limited the claim of social science knowledge within the legal field.

Engel argued that the legal culture of a community involves "patterns of behavior and norms that are recognized and respected among

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118. Thus Trubek writes that,

> it seemed desirable to find a way to identify and describe conflicts which did not reach the courts, as well as to compare the performance of courts with that of other possible arrangements for resolving conflicts and protecting rights. These tasks called for a common unit of analysis, some way to compare the controversies in courts and other institutions; it was also necessary to identify potential judicial 'business' that never reached the courts. The answer to these problems was found in the dispute, and the idea of dispute processing.
>
> The dispute was conceived of as the common denominator uniting events outside our institutional machinery with those handled both by courts and by other forms of third-party dispute processing mechanisms. If similar disputes could be identified in court and in other settings, and if the impact of different institutions on such disputes and disputants were measured, the dispute focus would answer the need of functional analysis and institutional comparison.

Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485 (1981).

119. *Id.* at 498.

120. *Id.* at 494.

121. *Id.*

122. *See* Engel, *Legal Pluralism in an American Community: Perspectives on Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425.

particular groups in a community," and he suggested that the interaction between local "customary law," (that which is ordinarily done in a community and recognized as what ought to be done, what is proper and obligatory) and the formal legal system produces a synthesis which reflects the actual legal life and legal culture of the community.

> Conflicts, disputes and breaches of norm may become a part of the analysis [of legal culture] to the extent they show the systems at work or illustrate the limits of such systems or friction between them. Dispute is not the foundation of the analysis, however, nor is it logically even a necessary part of it.[123]

While he acknowledged that no system exists without some breaches and that disputes "always play some part in our broader understanding of the normative order as a whole,"[124] he warned that the focus on the breach directed attention away from the facticity of regular observance.[125]

"It is simply incorrect," Engel argues, "to assume that 'customary law' emerges from social conflict in the same sense that the common law emerges from cases and controversies."[126] The dispute perspective presents social relations as generated and sustained by relatively rare instances of conflict rather than the repetitive patterns of unstressful interaction through which expectations and obligations are created and particular patterns of order maintained. By conceiving of society and custom in the same way that law is conceived, the effort to understand legal culture begins from assumptions which end up denying analytic and theoretical independence to non-legal concepts. Upon a single unit of analysis, the dispute, researchers built an elaborate edifice to carry the burden of producing an accurate understanding of all of legal life. That was, in Engel's view, a burden that the concept could not adequately discharge.

Other socio-legal scholars criticize the dispute perspective for its boundless quality. They worry that that perspective would, if taken to

123. *Id.* at 432.

124. *Id.*

125. Moreover, in Engel's view, attention to disputes and breaches of social norms leads to the kind of functionalism discussed above, where courts and legal institutions become understood simply as dispute processing and dispute resolving institutions. Such a perspective offers very little insight about the most frequent and perhaps most significant activities of many civil courts which rarely involve actively contested disputes, and which routinely require the court to oversee or legitimate decisions and settlements made elsewhere. Although it is well understood that these decisions and settlements take place within the shadow of the court, a central focus on the dispute processing functions of courts obscures its role in processes in which disputing is minimal. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). "Emphasizing as it does an idealized and misleading image of the adversary process in civil trial courts, dispute analysis tends to relegate the major part of the court's work to residual categories (such as 'routine processing'), which typically receive little, if any, analytic attention." Engel, *supra* note 122, at 435. Furthermore, the focus upon the dispute, and the individual case which is reproduced in the dispute paradigm, ignores the impact of the pattern of court activity for legitimation and for the creation of culture. Lempert, *Grievances and Legitimacy: The Beginnings and End of Dispute Settlement*, 15 LAW & SOC'Y REV. 707 (1980-81).

126. Engel, *supra* note 122, at 436.

its logical extreme, undermine its own scientific aspirations by moving social science research farther and farther away from the institutions of the official law. This criticism reflects a concern that the sociology of law will dissolve or will lose its claim to distinctiveness within the various social science disciplines. The battle of social scientists to achieve status within the legal field may, in this view, be won at the cost of a loss of status within the human sciences. This criticism arises as a worry over the kinds of professional and disciplinary claims that socio-legal scholars can make.

This worry is a reaction to recent developments in which researchers began to push inquiry in the direction of examining the life history and development of disputes. While earlier work took the existence of disputes for granted, more recent research emphasizes the problematic nature of dispute development and urges attention to the process through which unperceived injurious experiences become perceived as injurious, injuries ripen into grievances and claims, and become disputes.[127] This paradigm directs attention to the context and transformation of disputes while it gives much less attention to their resolution. Because the "potential for disputes is infinite" and "the possible sources of disputes . . . innumerable," dispute researchers argue that the "disputes which do arise are only a tiny proportion of those which might develop."[128] Thus, studying dispute transformation required a further broadening of inquiry, just as a generation earlier the study of dispute processing required a broadened inquiry in legal scholarship.

Those who urged attention to the dispute development process also urged a redefinition of the concept of dispute itself. They tried to move away from Gulliver's insistence on the *public* assertion of a dyadic disagreement. Miller and Sarat[129] and others[130] argued that grievances emerged from an "individual's belief that he/she is entitled to a resource which someone else may grant or deny," and that a "dispute exists when a claim based on a grievance is rejected either in whole or in part." From this perspective, Gulliver's definition seems to beg one of the more important questions about disputing: how do conflicts and differences enter a particular public arena, including the legal system?[131]

127. *E.g.*, Felstiner, Abel & Sarat, *supra* note 116; Mather & Yngvesson, *supra* note 116; Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81). *Cf.* Emerson & Messinger, *The Micropolitics of Trouble*, 25 SOC. PROBS. 121 (1977).

128. Fitzgerald & Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 LAW & SOC'Y REV. 681, 684 (1980-81). In significant ways, this work mirrored earlier work by Emerson and Messinger on the natural history and sociological development of troubles, what they called "the micro-politics of trouble." Emerson & Messinger, *supra* note 127.

129. Miller & Sarat, *supra* note 127, at 527.

130. CONTENTION AND DISPUTE: ASPECTS OF LAW AND SOCIAL CONTROL IN MELANESIA (A. Epstein ed. 1974); Starr, *A Pre-Law Stage in Rural Turkish Disputes Negotiations*, in CROSS-EXAMINATIONS: ESSAYS IN MEMORY OF MAX GLUCKMAN (P. Gulliver ed. 1978).

131. Lempert, *supra* note 125, at 708, also emphasizes the "normative claim of entitlement" underlying disputes, while Mather and Yngvesson adopt Gulliver's definition, stressing the importance of the audience in the formation and recognition of social relationships and disputes. Mather & Yngvesson, *supra* note 116, at 776. In this view, the

Kidder summarized the disciplinary concern generated by this expanded definition of disputes:

> If we called all dyadic difficulties 'disputes,' even those private cases which Gulliver termed disagreements, then we would have to include nearly all of human interaction (within our study). One of sociology's major theoretical traditions tells us that everything social, even reality itself . . . is a product of negotiation, and that all things social should be thought of as a process of bargaining . . . . From this perspective, the most routine experiences become sessions in negotiation. Even humor and joke telling are treated as exercises in bargaining . . . . If we stretch the term 'dispute' to include all dyadic bargaining . . . we would have no way to address the issues of access to justice, alternative dispute mechanisms, or the levels of disputing in society as a social problem. Every instance of human interaction would be a candidate for dispute processing analysis. Disputing would be indistinguishable from all human interaction.[132]

Thus attention to the histories of disputes and especially the genesis of disputes aroused suspicion that the sociology of law would no longer have a subject,[133] and sociologists of law would have no particular or distinctive professional claim.

These criticisms suggest that the debate within legal scholarship and scholarship about law over the status of the concept of dispute is itself a struggle for power within the legal field. The claim that studying disputes helps avoid cultural and institutional biases associated with traditional legal scholarship can be acknowledged only so long as it is recognized that that concept carries its own biases. The search for a concept or method to free social science research on law from the interests and values of the community of observers—to use the concept of dispute as a fundamental social fact—was an illusion and a fantasy.[134]

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conflict between two parties must be asserted publicly, that is, before a third party, for a social relationship to have reached the state of dispute. *Cf.* Abel, *supra* note 115, at 226-27; THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978).

132. Kidder, *The End of the Road? Problems in the Analysis of Disputes*, 15 LAW & SOC'Y REV. 707, 721-22 (1980-81).

133. Fitzgerald and Dickins go further and question whether the study of disputes has particular value for understanding law. According to their critique, because studying disputes commits social scientists to study virtually all social interactions, it makes the dispute itself less useful as a unit of analysis. Fitzgerald & Dickins, *supra* note 128. They wonder whether the subject will become so broad as to be unmanageable, and whether "the context is overwhelming the law." *Id.* at 702. They wonder whether the sociology of law will lose all definition and its claims to professional identity, and to participation in the recognizable universe of scholarship about law.

134. Cain and Kulczar suggest that as the concept of dispute was used in social science research on law it became clear that the aspirations to, and claims of, scientific status for that concept were both deeply political and deeply problematic. They state that "[d]ispute theorizing starts with the dispute, as legal theory starts with the law," and they point out that it begins by asserting the primacy of its object of study rather than posing it as a problem. Because "questions are posed about disputes in society, or in their social context . . . the primary task of the [dispute] theorist is to understand the dispute." Cain & Kulczar, *Thinking Disputes: An Essay on the Origins of the Dispute Industry*, 16 LAW & SOC'Y REV. 375 (1982). But in Cain and Kulczar's view the anticipated understanding of disputes is

Cain and Kulczar suggest that struggle over the concept of dispute was fought on the basis of a distinction between science and ideology.[135] They understand science as public discourse, with objects of study developed from known theories, identified logics, and recognizable research traditions. Subjects which are atheoretical, or make claims to be ahistorical, are, for them, ideological. Without a theory of social action, the significance of the object must be taken for granted and assumed, embedded in unstated suppositions and preferences about what is important, what is worth knowing, and why it is worth studying. The assertion that disputes provide the link between law and society[136] is "ideological" because it disguises, that is, fails to locate or theoretically specify, the sources, status, and implications of the object of study—the dispute. This criticism suggests that claims for the universality and comparability of disputes are themselves products of a particular, historically located and culturally specific notion of science, and a particular historically located and culturally specific struggle among academics within the legal field.[137]

This debate about the relative utility and ideological status of the concept of dispute among legal scholars is closely connected to strug-

limited precisely because the dispute, as a supposed form of social action, is appropriated without establishing connections to any theory of social action. Dispute scholars have, in this view, failed to specify what constitutes social interaction, so that dispute would be understandable as a subset of the interaction. Thus, the relationship between disputes and other forms or subsets of social action, and aggregated patterns of action in institutions such as law, remains problematic and undefined. *Id.* at 383.

135. *Id.*

136. Trubek, *supra* note 118, at 494.

137. The claim for the universality of disputes is stated succinctly by Roberts: "Disputes, both within groups and between them, are found everywhere in human society." S. ROBERTS, ORDER AND DISPUTES: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979). *Cf.* C. WITTY, MEDIATION AND SOCIETY (1980); THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978); Nader, *supra* note 112. It is flawed, again according to Cain and Kulczar, because universality is a presumption, such as when the term is applied to some universal phenomenon for which a common meaning is implied by the application of the label; it cannot then be an empirical discovery. Cain & Kulczar, *supra* note 134. Moreover, empirical use of dispute has tended to apply the label to such a wide range of phenomena that it lacks boundaries and definition, and thus is suspect as a universal observation. The claim that the concept of dispute offers a fundamental unit for comparative social analysis is closely associated with the claim that disputes are universal social phenomena. "If disputes are everywhere in society, at all times and places . . . then it becomes possible (and for other reasons, desirable) to compare the ways in which this phenomenon is dealt with, and to explain any differences that occur." *Id.* at 381.

Furthermore, the criticisms which have challenged particular research methods, or definitions of dispute, as well as the relevance of value judgments and justice claims in the concept, necessarily raise questions which go beyond what Trubek refers to as "narrow" notions of method. Trubek, *supra* note 1, at 740. "The problem is not one of method," he writes, "in the narrow sense of surveys versus observation, but one that reaches to the nature of social research itself . . . . The strategy of defining injuries, grievances, and disputes in ways that avoid the issue of the researcher's values is not, paradoxically, value-free." Methods which attempt objectivity in the sense that they desire to be not only universal and comparative, but also free of the researcher's and the subject's valued preferences, "makes inaccessible to thought those injuries and injustices for which there is no objective referent in existing law, consensus, or the consciousness of affected individuals." Indeed, the researcher can try to access only that which is accessible to both her own consciousness and to the subject's consciousness. Any method will therefore be limited to the terminology, language, and methods recognized in those cultures. *Id.*

gles within the domain of institutions. Advancement of the concept of dispute among academics facilitated the critique of courts as well as the search for alternative dispute resolution mechanisms, yet it also facilitated a defense of the social importance of both courts and their alternatives.[138]

Although the concept of dispute was promoted as a general analytic category, the very earliest formulations of the dispute perspective connected the observation and study of disputes with an implicit recognition of the necessity or desirability of dispute resolution. Thus Nader's call for anthropologists to adopt a focus on disputing for cross cultural description also claimed that dispute settlement was a universal social function.

> How people resolve conflicting interests and how they remedy strife situations is a problem with which all societies have to

138. The concept of dispute facilitates the critique of courts as well as a defense of their social importance, in part, by individuating and depoliticizing social conflict. By adopting dispute, not law, as the major theoretical concept, researchers shifted inquiry from social organization to processes and from groups to individuals. They tried to "map the perceptions of individual disputants, and give special attention to the cultural meanings and rationalizations of social action." Snyder, *supra* note 97, at 145. In this effort to write from the bottom up, researchers concentrated on micro-studies of the management of conflict. Individual perceptions, interpretations, responses and strategies became the focus of research with little attention to systematic outcomes, no less to the structural sources or organization of these individual experiences.

Kidder suggests that by focusing on individual decisions as a way of understanding disputing behavior, scholars also adopted the "strong presumptions of equality, case discreteness, and individualism" prevalent in the anthropological literature. Kidder, *supra* note 132, at 719. In this way, researchers inadvertently replicated the conceptual and institutional biases in the methods of studying law that they were attempting to reform. The conception of individuated grievances and cases interacted with an abstracted vision of the parties and created a radically depoliticized vision of conflict. According to this critique, the concept of "dispute" reproduces a legal ideology rather than subjecting legality and legal ideology to critical inquiry.

In the small scale agricultural and hunter-gatherer societies which anthropologists study, the relative equality of the parties in any particular dispute, in terms of organizational structure (individuals, groups, status), disputing competence and social resources, is taken for granted. These assumptions prove problematic when the model is applied to advanced industrial societies, and although much of the more recent literature on disputing has paid homage to the importance of the relative power of the parties, the concepts "power" and "equality," like the concept of "dispute" itself, are used without a theoretical framework to help identify relevant indicators or aspects of power and social position. Merry, *supra* note 25. Without such a framework, allusions to power and inequality do little to challenge the individualistic assumptions of the dispute paradigm because both the disputant and the dispute are removed from the social fabric which provides definition and meaning for the participants as well as for the observer's analysis of the situation.

According to Cain and Kulczar, the dispute model suggests that "differences in power are capable of being equalized: more money, more knowledge, more organization, even more experience, may be given to the weaker party, and then the difference would disappear." Cain & Kulczar, *supra* note 134, at 380. The problem, according to this criticism, is that qualitative, experiential and cognitive differences between parties are treated quantitatively, as independent dimensions which can be manipulated, either reduced or increased and aggregated to construct equal parties—equivalent social actors. The model suggests that social equality can be reduced to quantitative measures without attention to consciousness, cognition or context. The result is a radical abstraction of social action; stripped of its situated and socially constructed meanings, the model of dispute reduces social action to behavioral phenomenon without the accompanying consciousness of others and interpretation of context which constitutes sociability and social interaction.

> deal; and usually they find not one but many ways to handle grievances. In any society . . . there are various remedy agents which may be referred to when a grievance reaches a boiling point, and an understanding of all such agencies is necessary for a comprehensive analysis of social control and for a sophisticated analysis of the court system, should one exist.[139]

Dispute researchers treated disputes as social eruptions that needed to be eliminated, managed and contained. Kidder described this as the "pressure cooker model" in which "dispute processing mechanisms [serve] as relief valves preventing social catastrophe . . . . The functionalist assumption, or pressure cooker model, is that each dispute is a discrete disruption which can be rectified if given appropriate and timely treatment."[140] This bias toward dispute settlement reflects the assumption that a dispute constitutes some imbalance or upset requiring treatment or restoration.[141] From this perspective, the trajectory of disputing is "a settlement in the specific case which permits the group to return to normal."[142] Dispute researchers identified different forms of dispute resolution which would provide channels through which social eruptions might pass, with informal mechanisms of social control in the family and the neighborhood handling everyday conflicts, and more formalized complaint and grievance systems of the market and the legal system managing more serious conflicts not settled informally. The image of a funnel with dispute resolution regulating the flow of social interaction and maintaining the balance of pressure between conflict and conformity became a powerful image in the effort to institutionalize ADR.

Indeed it is the very convergence of the effort to promote a scientific study of law through the concept of dispute and the promotion of dispute resolution as a model for adjudication that precipitated the strongest opposition from within traditional legal scholarship. That reaction and opposition is elaborated by Owen Fiss in *Against Settlement*.[143] There Fiss warns that the dispute perspective and the equation of adjudication with dispute resolution are based on a fundamental misunderstanding of the nature of law as well as of judicial institutions.[144] Fiss argues that proponents of the dispute perspective "act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help. Courts are seen as the institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power."[145] This account, in his view, "trivializes" the purposes of adjudication and the nature of legal procedure.[146] In his view adjudication is not comparable in any important

139. Nader, *supra* note 112.
140. Kidder, *supra* note 132, at 718-19.
141. Nader, *supra* note 116.
142. Kidder, *supra* note 132, at 719.
143. Fiss, *supra* note 1.
144. *Id.* at 1075.
145. *Id.* at 1082.
146. *Id.* at 1085.

way to other mechanism for resolving disputes. Thus the effort to treat courts as just another dispute processing mechanisms and to develop a scheme for rationally allocating disputes among courts and other institutions makes no sense to Fiss. As he puts it, courts possess "power that has been defined and conferred by public law not by private agreement."[147] As a result, "their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts . . . to interpret those values and to bring reality into accord with them."[148]

The dispute processing perspective is dangerous, in Fiss' view, precisely because it elevates process over substance. It portrays law as just another way of ordering private relations rather than as embodying and articulating public values, values that have determinable meanings. In his view the task of legal scholars should be to help identify those values and meanings and to encourage judges to use them in dealing with matters of public consequence. Legal scholarship is, in this view, a type of moral philosophy for which social scientists, among others, have no claim to competence.[149] Fiss' response to the dispute processing perspective embodies a claim to hegemony within the legal field as well as a claim about the distinctive nature of law. He worries that by embracing the perspective of social scientists, of those who administer courts, or of social workers, traditional legal scholars lose control of the legal product. The opportunity to articulate legal values gives way to an overemphasis on efficiency and technique[150] which diminishes the value of law and, as a result, the distinctiveness and social utility of the legal profession itself. Thus the debate about the place of the dispute processing perspective in legal scholarship is, in this view, a debate about fundamental issues confronting law and lawyers.

147. *Id.*

148. *See* Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1 (1986).

149. *See* Fiss, *supra* note 1, at 1086. Fiss' conception of the challenges facing legal scholarship is, in turn, challenged by some, like Bruce Ackerman who suggests that lawyers should be skilled practitioners of both moral philosophy and social science. B. ACKERMAN, *supra* note 60. *See* Fiss, *supra* note 148.

150. Fiss opposes the dispute processing perspective because it encourages legal scholars and judges to regard litigated cases as annoyances or administrative inconveniences. For him the legal field is defined by the efforts of legal professionals to make judgments about the content and applicability of values like equal protection and to think about the ways those values are systematically undermined by the practices of political and social institutions. His critique is thus overtly political. As he argues, the proponents of the dispute processing perspective "begin with a certain satisfaction with the status quo . . . ." Fiss, *supra* note 1, at 1086. But, Fiss continues, "when one sees injustices that cry out for correction . . . the value of avoidance diminishes and the agony of judgment becomes a necessity. Someone has to confront the betrayals of our deepest ideals and be prepared to turn the world upside down to bring these ideals to fruition." *Id.*

Fiss worries that the dispute processing perspective represents a "capitulation to the condition of mass society." *Id.* at 1075. He believes that lawyers and legal scholars should be skeptical about the attempt to encourage diversion or settlement of cases from courts. In his view, adjudication neither mirrors inequalities in private relations nor translates those inequalities into judicial decisions; mediation, negotiation and other dispute processes, on the other hand, do nothing to counteract inequalities among or between disputants. For another view see Galanter, *supra* note 90. *See also* D. BLACK, *supra* note 98.

IV. RECONSTITUTING THE JURIDICAL SUBJECT: RIGHTS, INTERESTS AND NEEDS

The struggle over the place of ADR in the institutional domain and the competition among legal academics and socio-legal scholars for hegemony within the theoretical domain would, in and of themselves, be enough to command the attention of those trying to assess the significance of disputing and dispute processing within the legal field. However, more is at stake than possible rearrangements in the division of society's dispute resolution labor or in the configuration of disciplinary power within legal scholarship. The combination of such institutional and disciplinary changes makes possible, and is made possible by, a reconstitution of the juridical subject.[151] Thus, Fiss' defense of law[152] is more than a defense of adjudication and of legal scholarship as the explication and critique of public values through legal doctrine; it is even more than a defense of the social authority and professional terrain of lawyers. He defends law and lawyering to promote the idea that the relationship of citizens and legal institutions is, or should be, defined by the idea of rights. He seeks to protect rights against those who would displace them as central juridical ideas. The ADR movement and the social science colonization of legal scholarship participate in, and advances, a critique of rights, a critique which in turn promotes alternative conceptions of the relationship of actors within the legal field.

In American legal theory, the juridical subject has been traditionally conceptualized as a possessor of rights, of entitlements to particular kinds of treatment by the state. The legal field has been considered the province for the vindication of claims of right, for the resolution of disputes between persons or between the collectivity and particular individuals. Moreover, the definition of rights, the articulation of the values protected by rights and the fashioning of remedies to vindicate claims of right has been largely the province of judges and of courts.[153] Although rights claims may be asserted against political authority, they are always advanced through public authority; thus, rights have a clear public aspect in the sense that they imply a willingness to make demands on the state, to use public institutions, or to appeal to collective sentiments for validation of those claims.

Contemporary rights discourse has many voices. For example, Dworkin describes rights as trumps, that is, claims that are not matters of discretion.[154] He describes two models of rights, one a "natural"

151. Foucault suggests that it is precisely the reconstitution of the subject which necessarily accompanies the development of the human sciences. M. FOUCAULT, DISCIPLINE AND PUNISH (1977). The reconstitution of the subject makes possible, as it compels, the development of new institutional arrangements.

152. Fiss, *supra* note 148.

153. J. BRIGHAM, THE CULT OF THE COURT (1987); R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989).

154. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978). In contrast, Michael Perry says that, although *one may not want to, one can dispense* with rights talk because it adds nothing to the discussion of duties, obligations and discretion. He argues that rights talk is derivative

model and the other a "constructive" model of rights. The "natural" model locates rights in an objective moral reality where rights are not created by persons or societies but rather are discovered just as we are said to discover the laws of physics. Rights, in this view, rest upon the notion of universal, perhaps eternal and immutable, principles of social action that constitute our shared human nature. The natural model of rights implies the possibility of a plan of life, a blueprint of general principles, according to which life evolves and is ordered, an underlying structure which is in fact discoverable by human reason. "Moral reasoning or philosophy" according to Dworkin's conception of natural rights, "is a process of reconstructing the fundamental principles by assembling concrete judgments in the right order, as a natural historian reconstructs the shape of the whole animal from the fragments of its bones that he has found."[155] In practical terms, this means that the role of courts and judges is to discover fragments of the natural moral order by acknowledging particular claims of right and establishing their relationship to written laws and policies. In this model, positive law or legislative mandates are entitled to obedience only so long as they record, transcribe, or fit with these general principles of natural right.[156]

The "constructive" model of rights, which Dworkin prefers, is based on a vision of moral principles more like to common law adjudication than the discovery of fundamental general principles of morality. The constructive model "treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory" that must be constructed through human action.[157] In this model, rights are neither pre-existing, to be discovered, nor can they be either true or false representations of some external objective moral reality. Rather, the constructive model of rights assumes that persons, and especially public officials who exercise power over others, have a responsibility to justify their actions, or the judgments on which they act, by demonstrating their place in a coherent and general program of action. The role of the judge is to read past decisions and precedents in light of present demands and to both compose and articulate a general theory. This model of rights and judging "presupposes that articulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice."[158]

The constructive model neither denies not affirms the natural model of rights; instead, it is a claim for reasoned consistency, independent of any argument for the objective standing of these reasoned positions. Yet both the natural and constructive models rest in large

and thus dispensable. Perry, *Rights-Talk and the "Critique of Rights"*, 62 TEX. L. REV. 1405 (1984).

155. R. DWORKIN, *supra* note 154, at 160.

156. For an extended discussion of natural rights, see L. STRAUSS, NATURAL RIGHTS AND HISTORY (1953). *See also* H. ARKES, FIRST THINGS (1986).

157. R. DWORKIN, *supra* note 154, at 160.

158. *Id.* at 162.

part on Dworkin's modest claim for legal justice, that "it is unfair for officials to act except on the basis of a general *public* theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases."[159] Both models establish a special relationship between persons, conceived as rights' claimants, and particular public officials, judges, whose job it is to articulate and protect rights.

Fiss's conception of rights derives from his understanding of the function of adjudication as the process through which we give meaning to public values.[160] He describes legal debate as an effort to specify the content of those values. "Whether in the nineteenth century or twentieth century, torts or criminal law, contract or anti-trust, McCulloch v. Maryland, or Brown v. Board of Education," the function of adjudication, "has not been to resolve disputes between individuals, but rather to give meaning to our public values."[161] In this conception, rights are legal facilities used to express and specify fundamental values. "A right", Fiss writes, "is a particularized and authoritative declaration of meaning."[162] It can exist without a remedy as a standard of criticizing social practices. Remedies, however, expresses the judge's desire to give tangible, efficacious, and "fullblooded" meaning to constitutional values rather than merely to declare what is right.[163]

Fiss argues that the range of voices that participate in the process of giving meaning to constitutional values and to rights "is as broad as the public itself."[164] Nonetheless, like Dworkin, he also makes a strong argument for the special role of the judiciary in concretizing and harmonizing the public values expressed in the Constitution. He points to the structure of judicial office, and what he sees as constraints upon ideological and personal bias, that enable and encourage judges to be more rather than less objective and to "constantly strive for the true meaning of the constitutional value."[165]

Fiss stresses the judge's obligation to participate in a public dialogue by giving reasons for his decisions as that aspect of the institutional design of the office which makes the judiciary especially appropriate for articulating public values and for protecting rights.[166] The quality of the judicial process, he argues, is an indicator of the judge's authority to speak to public issues and the obligation of others

159. *Id.* at 163.

160. Fiss, *The Supreme Court 1978 Term. Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

161. *Id.* at 36.

162. *Id.* at 52.

163. *Id.* at 46.

164. *Id.* at 1-2. *See* J. BRIGHAM, *supra* note 153 (for an extended discussion of how the Supreme Court has come to monopolize discourse on the public values embodied in the Constitution and for an argument that the debate on public values and the Constitution should be a less professional and more public enterprise).

165. Fiss, *supra* note 160, at 13.

166. *Id.* at 14.

to listen. In the end, he believes, the legitimacy of the adjudication depends upon reasoned, independent, and careful attention to the process of articulating rights.

Minow elaborates a conception of rights as dialogical opportunities rather than already articulated values or the construction of judges.[167] She suggests that legal texts, and rights-talk as a common theme in those texts, help "to create communities, to establish shared discourse and to provide contexts for linking past with future, and creativity with tradition."[168] Building upon Dworkin's sense that "law's attitude is constructive," laying "principle over practice to show the best route to a better future, keeping the right faith with the past,"[169] yet rejecting his notion that rights are trumps and Fiss's notion that rights are grounded in particular meanings, Minow sees rights as "the language we use to try to persuade others to let us win this round."[170] She wishes to retain what she sees as the attractive features of rights talk in American culture, its association with notions of equality, freedom, respect for individuals; at the same time, she wants to eschew positivistic notions that assign authoritative or fixed meanings to rights "beyond current human choices."[171]

In this conception, the emphasis is on process with rights "understood as the language of a continuing process rather than the fixed rules" of that process. This imagines a community of interaction focused upon competing claims, a discourse in which decisions signify resting points "from which new claims can be made."[172] Rights, then, are markers which guarantee the opportunity to participate in this discourse. The juridical subject is, however, understood to be neither an already constituted possessor of entitlements nor a supplicant awaiting the articulation or constitution of rights by a judge. The juridical subject is, in Minow's conception, whole but incomplete, connected in an ongoing and shared process of building humane social arrangements. Minow seeks to establish the importance of rights talk while leaving open the shifting content of those rights, noting that what draws the community together is less specific claims than the notice and debate which those claims demand. "The rhetoric of rights," she says, "draws those who use it inside the community, and urges the community to pay attention to the individual claimants." At the same time as rights discourse includes participants within a shared community, it "underscores the power of the established order to respond or withhold response" to those claims.[173] In the end, Minow, like Dworkin, makes a seemingly

167. Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).
168. Minow, *supra* note 167, at 1865.
169. R. DWORKIN, *supra* note 154, at 413.
170. Minow, *supra* note 167, at 1876. "Rights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted." *Id.* at 1867.
171. *Id.* at 1877.
172. *Id.* at 1876.
173. *Id.* at 1877.

modest claim for rights, but here the claim is one of participation rather than publicly defensible coherence.

Despite the variation within rights talk, it nonetheless takes place within a terrain which, as Minow suggests, draws the participants together in a community of argument and struggle. The boundaries of that discourse are marked by the consistency, in each of these conceptions, of the association of rights with public moral debate. Each vision emphasizes the collective or public articulation of claims and responses. Variation in these formulations centers on the forms of participation and the relative position and authority of different participants in this discourse. While Dworkin and Fiss stress the role of the judge as the authoritative voice for publicly articulating values and portray the juridical subject in terms of autonomy and individuality (which is paradoxically constituted by judicial authority), Minow emphasizes the shared context and interdependence within a public discourse which is constituted by making claims as well as responding to them.

Rights talk and the conception of the juridical subject which it constitutes is, of course, the object of intense struggle within the legal field. A critique of rights and the juridical subject as a rights holder has been an important part of ADR's critique of adjudication. Some critics suggest that rights talk has gotten out of hand so that instead of functioning as the grounds for shared discourse, rights have become a source of social conflict. The proliferation of rights has been unhealthy, it is argued, because new rights have been recognized in the absence of legitimate authority. These newly created rights, so the argument goes, lack foundation in the Constitution and thus, rather than securing the "blessings" of law, weaken the foundations of all legitimate legal claims. Thus, conservatives suggest that rights consciousness and rights talk undermine the community.

From this perspective, rights are associated with litigiousness and blamed for a variety of social and institutional disorders. Critics of litigiousness in American society argue that we seek legal redress for every injury and, in so doing, allow law to invade hitherto immune areas and drastically raise the costs of professional and business life. Rights discourse is, according to this argument, just a cover for self-interested behavior which threatens to disrupt social equilibrium.[174] Critics argue

174. Although research on why people sue is scanty, there is some evidence challenging this view. It suggests that plaintiffs litigate to vindicate rights and debate social values rather than to pursue individualistic self-interest. Litigants frequently describe their actions as an attempt at social rehabilitation, claiming that they want to send a message to the government, to their neighbors, or simply to the person who injured them, saying that the offending action was wrong, has to stop, and should be publicly condemned.

> [Plaintiffs] say that money is not their prime motivation. On the contrary, they believe it often makes more sense in purely economic terms to settle before going to court. But . . . their grievances have turned into matters of principles. And many plaintiffs say they want to "send a message" to the rest of the country.

Stewart, *Seeking Justice: People Prone to Sue Have Many Reasons and Money is But One*, Wall St. J., May 20, 1986, at 1.

However, many litigants express great reluctance to take action against others whose behavior has injured them because they feel that "minding your own business" is an essen-

that too much of modern social interaction is waged by deploying rights in a game which should be, and in the past has been, played outside the legal field. The ability to overcome normative reluctance to take public action and thus the desire to vindicate rights through litigation is seen as a reflection of the decline of traditional sources of authority, indeed a transformation in the valued currencies of social life.[175]

Critics from the political left suggest that the use of rights in contemporary political environments impedes rather than promotes progressive social forces.[176] They argue that rights are incoherent, contradictory, unstable and indeterminate.[177] This critique suggests that rights are abstract and unstable because small changes in circumstances often "make it difficult to sustain the claim that a right remains implicated."[178] Tushnet, for example, maintains that "rights-talk often conceals a claim that things *ought* to be different within an argument that things *are* as the claimant contends."[179] Every situation or setting opens debate anew as to the merits of particular rights claims; there seems to be little generalizability or transferability beyond particular claims. In addition, this critique suggests that the language of rights is so open and indeterminate that competing interests can use similar language to express opposing positions.

A claim of right, this critique asserts, "falsely converts into an empty abstraction . . . real experiences that we ought to value for their own sake."[180] By describing an aspect of experience in the language of rights, we deny and subvert the complexity, ambiguity, and contradiction of social experience. The juridical subject crystallizes experience, not in an authentic form but as a set of alienating abstractions.[181] More-

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tial ethic in modern urban life. Thus, many grievances are never articulated or acted upon. Miller & Sarat, *supra* note 127. But sometimes the circumstances seem so painful, or so unlikely to change, that plaintiffs overcome the normative reluctance "to go public" with their problems and decide to file suit. Only when talk or avoidance fails do they turn to an outside agency. And when that happens, "the parties no longer wish to settle the dispute by discussion and negotiation. At this point they conceptualize their problem as a principled grievance for which they seek an authoritative and binding solution, not as a conflict of interest in which they have limited and negotiable goals," but as a matter of right and justice. Merry & Silbey, *supra* note 105, at 154.

175. "The father, the priest, the prison warden—they've all suffered a decline in public confidence. But the federal judge has gained in stature. People file lawsuits," according to Lawrence Friedman, "because they have confidence in the legal system." L. FRIEDMAN, *supra* note 17 (quoted in Stewart, *supra* note 174).

176. Tushnet, *An Essay on Rights*, 61 TEX. L. REV. 1363 (1984).

177. *See* Singer, *The Players and the Cards*, 94 YALE L.J. 997 (1984).

178. Tushnet, *supra* note 176, at 1363.

179. *Id.* at 1371 (emphasis added).

180. *Id.* at 1364.

181. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

Marx described the alienated self as a product of the liberal state's denial to each of us of our species membership, and the institutionalization of an isolating loneliness that is then justified as human nature. The liberal state, he argued, abolished distinctions based upon birth, social rank, education, and occupation when it declared, as it did in the American Declaration of Independence or the French Rights of Man, that all men are created equal. The liberal state assured to each citizen the equal right to participate in the collective sovereignty and denied the relevance of birth, social rank, education and occupation

over, rights talk defines a sphere of allegedly individuated actions without acknowledging the social context which produces and nurtures the individual. Rights constitute the juridical subject by constructing boundaries between persons while denying the arbitrariness and violence of those boundaries. More importantly, rights discourse suggests that painful existential contradictions, the problem of being in but not totally within society, the necessity but abhorrence of others, the reliance upon sociality for meaning at the same time as we are dominated by its power, have been resolved.[182]

The entrance of disputing and dispute processes, as well as the ADR movement, into both the institutional and disciplinary domains of the legal field advances, as well as depends upon, such criticisms of rights. There is a way in which some forms of rights-talk, especially the dialogic concept of rights, as well as some of the critiques of rights, especially those which point to the alienating consequences of rights, seem

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to that participation. However, far from denying the importance of these distinctions, Marx argued, the liberal state presupposed and institutionalized these distinctions by relegating inequalities of birth, social rank, education and occupation to protected status in the realm of civil society, liberalism creates a fundamental schism between man (in civil society) and citizen (in the state) which is naturalized in the conception of universal and fundamental human rights. The liberal state, Marx argued, derived its raison d'etre—the protection of the fundamental rights of man—by cabining the material inequality of civil society. As a consequence, Marx wrote, the citizen lived in a state organized by a set of "privatized" relationships which it claimed—through the conception of rights—were beyond the state to affect. Rights, in this conception, are the means by which participation is organized but they could not provide fundamental and "real" emancipation; here, rights are creations of the liberal state and the means of alienating the individual from his species consciousness—life in civil society.

Following this tradition, Gabel defines alienation as a "paradoxical form of reciprocity between two beings who desire authentic contact with each other and yet at the same time deny this very desire in the way they act toward one another." Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1567 (1984). He argues that individuals desire intersubjective recognition—authentic connection—but deny this desire as they confront others across a "forbidding distance." As a consequence, the individual "withdraws her own self and adopts a false self," with which she confronts and interacts in the world. Thus we live in a world in which we perpetually feel "at once unconnected to everyone else and yet anxiously committed to the pretense of connection that is manifested in the reciprocity of roles." *Id.* at 1573. Rights provide a basis for denying this dilemma. They become part of the stories we tell ourselves about how we are collectively constituted, yet remain individuals.

182. Thus, critics assert, rights-talk is fundamentally mystifying. It masks the ambiguity it reproduces, incorporating its partiality in claims of universality. More importantly, it silences opposition by encouraging people to think that so long as rights are protected, and argued about through "non-political" legal processes, that political action aimed at transforming the content of those rights is misplaced and illegitimate. Rights-consciousness mystifies because it is portrayed as the complete and total embodiment of rights as well as the process for validating rights-claims. Thus law supplants the ideals for which it is an incomplete, partial, and distorted substitute. Moreover, rights-talk tends to blind us to social problems for which no rights currently exist and to focus attention on the absence of legal remedies rather than on the organization of social problems. M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 275 (1987). Rights-talk has historically developed a particular tautological formulation in which rights exist only in so far as remedies exist; where there is no remedy, there is no right. *Cf.* O. HOLMES, *supra* note 68. In the absence of remedy and right, "there is no significant interest to vindicate," and the "absence of a ready legal solution becomes confused with the absence of a significant social problem; the world appears perfect . . . because our tools for further perfecting it are so dull." M. KELMAN, *supra*, at 276.

to advance ADR by pointing out the importance of attending to very basic forms of human connection and communication. Thus, one can easily imagine the heady confidence that might develop by throwing off the entire mantle and burden of rights-talk and trying to reconceptualize the nature of the juridical subject. There are indeed moments in the movement for ADR when one can detect this kind of passion for going beyond modest tinkering with new procedures by reimagining the grounds on which persons interact and relate to legal institutions.

There is also a degree to which the ADR movement fails to engage the critique of rights. ADR advances a non-rights based conception of the juridical subject, one that neither the dialogic conception of rights, nor the phenomenological critique of alienation can fully capture. Eschewing rights, ADR proponents deploy the discourse of interests and needs. They reconceptualize the person from a carrier of rights to a subject with needs and problems, and in the process hope to move the legal field from a terrain of authoritative decision making where force is deployed to an arena of distributive bargaining and therapeutic negotiation.

From Rights to Interests

Disputing and dispute processing, as portrayed in some parts of the ADR movement and by some social scientists, reconceptualize the juridical subject by emphasizing interests and preferences as the grounds on which individuals relate to legal authorities. By moving their focus from rights to a concern with interests, advocates of dispute resolution build on the work of those American legal realists, who having exposed conventional rights-talk as just so much "transcendental nonsense,"[183] tried to build a realistic jurisprudence through closer attention to interests.[184]

Although Llewellyn advocated a move from rights to interests as a move toward realism in law, he recognized that interest as a fundamental category for legal decision making would be no more objective than using rights as a fundamental category. His reasoning was straightforward: At first, legal thinkers believed that the rules of law specified the remedies which law would make available to a litigant. The rules of law were statements governing the specific ways one man might get courts to deal with another man. Later legal writers regarded this as primitive and realized that the remedies made available through law served social,

183. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 309 (1935).

184. Llewellyn, *supra* note 99. The methodological advice of the realists was to maintain, at all times, a healthy skepticism, a skepticism about the adequacy of legal concepts and received categories for ordering social phenomenon, and about the tendency of categories "to take on the appearance of solidity, reality and inherent value which has no foundation in experience." *Id.* Thus by urging attention to interests, Llewellyn made no claim to remove the fundamental inadequacies and ambiguities clouding conventional legal categories and reasoning; he meant only to promote a form of legal analysis that would invite discovery of those inadequacies.

not merely individual, purposes. In this move, the rules of law articulated protected purposes, claims and values which remedies were meant to realize. The move to rights, however, created fundamental and irreducible ambiguities, some of which we discussed above.

Identifying interests as a basis of law would not, Llewellyn argued, remove such ambiguity. While interests emphasized more strongly the social purposes which rights served, "we do not know what interests are."[185] With the move to interests, he argued, law achieved not greater clarity but a more complete and honest subjectivity. Nonetheless, Llewellyn believed that a focus upon interests would do better than rights in encouraging lawyers and judges to pay homage to law as,

> something manmade, something capable of criticism, of change, of reform—and capable of criticism, change and reform not only according to standards found inside the law itself . . . but also according to standards vastly more vital *outside* law itself, in the society law purports both to govern *and to serve*.[186]

Although the attribution of social interest necessarily involved value judgments, Llewellyn claimed that it nonetheless isolated these judgments from the observed phenomenon on which they rested. Attention to interests, he argued, pushed legal inquiry into a more pronounced and self-conscious attention to behavior, empirical data, facts, "the actual doings of judges and the effects of their doings on the data claimed to represent an interest."[187] Interests seemed to more forthrightly demand and empower empirical demonstration and would therefore provide the basis for a more realistic legal science.

The work of Vilhelm Aubert constructed a bridge between the realists' formulation of the role of interests in law and ADR's conception of disputes as conflicts of interests.[188] Aubert, a Norwegian sociologist of law, described two forms of conflict which he characterized as competition and dissensus. The former referred to conflicts of interest that derived from situations of scarcity in which two or more actors desired or valued the same thing. Such conflicts were resolvable, he argued, through the market or through mechanisms which compromised the demands, gains, and losses to each side. Because differences between the parties were not differences of commitment or ethics, but arose instead from competition over scarce resources, they could be resolved by mechanisms which "minimize[d] the likelihood of maximal loss" to each side. Conflicts of interest, he continued, "emphasized the similarity of the contestants, their common needs and aspirations."[189]

In contrast, conflicts of value arose not from competition but from disagreements "concerning the normative status of a social object."[190]

185. *Id.*
186. *Id.*
187. *Id.*
188. Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 J. CONFLICT RESOLUTION 26 (1963).
189. *Id.* at 29.
190. *Id.*

According to Aubert there was nothing in dissensus that should lead people to attack one another; nonetheless, it is apparent that conflicts of value do often lead to serious and violent aggression.[191] Although he was skeptical that conflicts of value could be resolved or compromised in the ways conflicts of interest could, he suggested that successful conflict resolution might depend upon the "interrelations between the dissensus and the interests of the parties."[192] Furthermore, he suggested that for dissensus and conflicts of value, law and courts would provide the most appropriate mode of conflict resolution.

Aubert's analysis was cautiously framed; he noted that although there was a correspondence between the sources of conflict (interests and values) and mechanisms of conflict resolution (bargaining and law), there was no reason to assume that the source or type of conflict would fully determine the appropriate mechanism. He hypothesized that the invocation of law and judicial conflict resolution would, however, transform conflicts of interest into dissensus and conflicts of value, and suggested that the dyadic relationship between disputing parties became in the legal process a triad with the possibilities of resolution constructed out of the probable alliances between the third party and one of the disputants.[193]

Aubert's analysis laid a theoretical foundation for alternative dispute resolution. He argued that so long as conflicts of interest could be kept uncontaminated by dissensus and normative objectification through law, compromise solutions were possible. Solutions to such conflicts would necessarily involve what he called "a natural adjustment of needs"[194] because no grounds existed for differentiating better or worse, right or wrong, true or false values. Judges, in his view, lacked rational grounding for their normative decisions. Against this background, proponents of ADR have argued that law fails to take account of disputants interests. It necessarily abstracts and objectifies their situations by transforming conflicts of interest into conflicts of value which are, in the end, resolved by raw power rather than reason or truth.[195]

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191. The classic statement of the view that disagreements of value, that is, basic fundamental moral disagreements, cannot be settled by argument was presented by Ayer. A. AYER, LANGUAGE, TRUTH, AND LOGIC 51 (1936). *Cf.* C. STEVENSON, ETHICS AND LANGUAGE (1944). The position is sometimes referred to as emotivism, suggesting that value statements are expressions of emotion and disagreement is non-cognitive.

192. Aubert, *supra* note 188, at 30.

193. Aubert wrote:

> The clash of interests is now formulated as a disagreement concerning either certain facts in the past or concerning what norms apply to the existing state of affairs or both, in a way which often makes it hard to distinguish clearly between questions of fact and questions of law. *The needs of the parties, their wishes for the future, cease to be relevant to the solution.* Whether the solution harmonizes two contrasting sets of needs and plans for the future is no longer material. *The problem has become objectified in the sense that a solution can be reached by an outsider who knows the rules of evidence and is able to perform logical manipulations within a normative structure.*

Id. at 30.

194. *Id.* at 34.

195. Aubert's analysis suggested that successful dispute resolution should respond to the parties' interests and needs, which after all was, from the perspective of legal realism, the real foundation of law, remedies and rights. Moreover, his analysis alluded to the

Aubert's work was published just as anthropological and cross cultural studies of disputing were becoming well known, at a time when social scientists were becoming more actively engaged in legal scholarship, and attention to disputes was becoming prominent in the legal field. Aubert offered an analysis which explained why forms of dispute resolution observed in small scale societies of Africa, central Asia and central America worked as they did. Mediation, negotiation, and other processes of informal dispute resolution based upon compromise and conciliation succeeded, following Aubert's analysis, because they addressed conflicts of interest without transforming them into conflicts of value or institutionalizing responses through formal law.[196]

Over the next two decades Aubert's analysis has become orthodox. Courts are, ADR promoters claim, preoccupied with rights talk, while mediation, negotiation and other forms of alternative dispute resolution encourage disputants to think in terms of interests.[197] Descriptions of the mediation process, guides for practitioners and training manuals for students repeatedly describe mediation as a process designed to eluci-

possibilities for processes of conflict resolution which might increase opportunities for autonomous decision making while limiting the scope of authoritative social control. Aubert suggested that conflict resolution ought to, by definition, "harmonize two contrasting sets of needs and plans." Modes of resolution which focused upon the conflicts of interest, eschewed concern with normative valuations, judgments of right and wrong, assignment of blame, and pronouncements of innocence would, it followed, be able to compromise differences and address the "needs and interests" of the parties. *Id.*

196. Three years after Aubert's article appeared, Torstein Eckhoff published a paper in which he elaborated the implications of Aubert's analysis, with specific reference to the roles of mediator and judge. *See* Eckhoff, *supra* note 57. Eckhoff began his paper by defining mediation as the process of "influencing the parties to come to an agreement by appealing to their own interests." The mediator, according to Eckhoff, works on in order disputants to give more weight to their common interests or less consideration to their competing interests. Although mediators do not have to promote compromise solutions, Eckhoff suggested mediators would normally do so because it added to their prestige as moderate and reasonable third parties. Eckhoff acknowledged that mediators might use threats of sanction if the parties did not seem anxious or willing to settle and mediators might also mobilize normative rules as a means of urging parties to renounce unreasonable demands. If, however, the parties acknowledged common norms but disagreed as to the particular applicability of a norm, or as to the way in which the norm might be used to resolve the current dispute, then mediation was less likely to succeed. Thus Eckhoff reiterated Aubert's observation, which he also supported by references to anthropological studies of disputing, that disagreements about norms were generally unsuitable for mediation. He also emphasized the fact that both mediators and judges needed to be seen as neutral to be effective in their roles, but nonetheless drew on different sources of authority and prestige and were therefore unlikely to be combined well in one office.

Following Aubert, Eckhoff distinguished the judge from the mediator by associating the judge with the domain of norms rather than interests. As a result he identified several important differences in the two methods of conflict resolution. The mediator is looks forward, explores a variety of possible solutions, is generally adaptable, cooperative and constructive. The judge, on the other hand, looks backward toward events already past, determins or allocats rights and responsibilities, and abandons the contest and the parties once this function was performed. The judge speaks with authority but has less of an investment in resolving disputes. *Id.*

197. Economic analysis of law constitutes the juridical subject in similar terms. Instead of interests, economic analysis speaks in terms of preferences. Disputes are understood to arise as rational utility maximizers; each pursue optimizing strategies. Appropriate resolutions facilitate the movement of resources to their most highly valued use; they ape the free market, and are, as a result, efficient. *See* M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

date disputants' interests while developing options to meet those interests. For example, Patton reminds students that the overall goals of mediation remain constant despite variations in practice; those goals are "to help parties separate relationship from substance, to elucidate their interests, and to focus their attention on options that take into account both sides' interests and on independent objective standards for choosing among such options."[198]

Ury, Brett and Goldberg argue that mediation can be understood as an effort to change the frame of dispute resolution from power and rights to interests.[199] They suggest that interest based claims say "I want it;"[200] and thus framing disputes in terms of interests "tends over a series of disputes to generate the highest level of mutual satisfaction with outcomes."[201] This is because wants and interests constitute the real motivation for claims, while rights are merely justifications. "Another way of saying this" they write, "is that focusing on interests deals directly with the problem that led to the dispute in the first place in a way that focusing on rights and power cannot."[202] The juridical subject is thus constituted as a bearer of desires or preferences who is forced, when dealing with judicial institutions, to speak a "foreign language" instead of the more natural language of interests.[203]

In this analysis, disputes arise from conflicts of interest that frustrate the satisfaction of wants and desires. The disputing process can be modeled, following this approach, as a series of "dispute decisions" designed to maximize the free exchange of individuated wants, perceptions and resources.[204] Although it borrows from standard conceptions

198. B. Patton, A Brief Outline of the Mediation Process 2 (1982) (unpublished manuscript). *But see* Susskind & Madigan, *New Approaches to Resolving Disputes in the Public Sector*, 9 JUST. SYS. J. 179 (1984).

199. W. Ury, J. Brett & S. Goldberg, Into the Fray 2-25 (1987) (unpublished manuscript).

200. *Id.* at 2-3.

201. *Id.* at 2-20.

202. *Id.* at 2-19.

203. Contemporary promoters of ADR try to overcome what Llewellyn thought was the necessary subjectivity in the concept of "interest" by following lines of Aubert's analysis and converting interests into economic commodities which can be measured by objective criteria. *See* Llewellyn, *supra* note 99. Thus, Fisher and Ury include within their five rules of successful interest-based negotiation the need to separate the people from the problem, to focus on interests and not positions, to invent options for mutual gain, and to insist on objective criteria. Raiffa also urges mediators to help parties seek joint gains as well as "derive responsible reservation prices." Mediators are urged to develop objective standards for discussing the terms of a negotiation, for measuring the interests and demands of the parties, and for assessing compliance with settlements. *See* H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

204. Trubek, *supra* note 118, at 496-98. Trubek describes the "interdisciplinary" model adopted by the Civil Litigation Project as follows:

> Our working theory can be described as a "modified stakes" model of dispute decision-making. We began by focusing on the decisions made by disputants. To explain these choices, we took the economic model, illustrated by Johnson (1980-81) and Gollop-Marquardt (1980-81), as a starting point and assumed that a major determinant of decision-making in a case would be the relationship between what the parties perceived to be at stake and their estimates of the costs of various dispute choices (Posner, 1977). Parties would invest in litigation and other forms of dispute processing as long as the expected gain (or loss reduction) exceeded

of economic markets, this rational-choice model of disputing adds to the usual economic variables factors describing the nature of the relationship between the parties, personal and organizational characteristics, the professional organization of legal resources, and a "series of factors related to the type of dispute itself, including areas of law, legal complexity, forum."[205] At the heart of the dispute decision model is the conception of the dispute as an arena of competitive decision making by rationally calculating individuals motivated by utility maximization.[206] The model predicts that disputants will respond enthusiastically, that is, rationally, when presented with more efficient fora in which to negotiate their interests. Thus when disputants did not turn voluntarily or in large numbers to newly created, supposedly less expensive and more efficient alternatives to the courts,[207] promoters suggested that it must be because the parties lacked sufficient knowledge or were actively discouraged from making informed and rational choices.[208] In this economic/interest model, more information and "freedom" from the pressure of legal institutions and ideology should correct for "irrational" choices.[209] Cost reduction and party satisfaction become the benchmarks of negotiated justice and ADR, objective measures of the ability of various processes to serve disputants' interests.

Moving to Needs

The image of the juridical subject in dispute processing discourse is not fully captured through the language of commodification or the appropriation of economic metaphors. The constitution of the subject in ADR is elaborated further in other descriptions of the purpose of negotiation and dispute processing. Those descriptions focus on needs and, in so doing, portray ADR not as a response to socially located and con-

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the cost. They would prefer the choice that offered the highest ratio of expected return to estimated expenditure. Incorporating non-monetary goals and costs, however, presented significant difficulties.

Id. at 498. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Gollop & Marquardt, *A Macroeconomic Model of Household Choice*, 15 LAW & SOC'Y REV. 611 (1980-81); Johnson, *Lawyer's Choice*, 15 LAW & SOC'Y REV. 567 (1980-81).

205. Trubek, *supra* note 118, at 498-99.

206. *See* Merry & Silbey, *supra* note 105 (for an extended criticism of the concept of disputing as rational choice decision making).

207. *See* C. HARRINGTON, *supra* note 13; Harrington, *The Politics of Participation and Non-Participation in Dispute Processes*, 6 LAW & POL'Y Q. 203 (1984).

208. *See* Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1982).

209. Although the model of disputing as a form of rational optimizing behavior drew most prominently from models associated with economic transactions, it also built upon game theory and strategic analysis which has been used in a variety of settings including international relations and labor management as well as commercial disputes. *See* Kidder, *supra* note 132, at 717. Cain and Kulczar comment upon a particular irony, however, in the use of the dispute model by liberal and moderate reformers who "end up with a more economic-determinist interpretation than any contemporary Marxist scholar would adopt." *See* Cain and Kulczar, *supra* note 134, at 381. Here, "knowledge (ideology) and organization (politics), when reduced to quantitative dimensions which are, furthermore independent of each other, become facets of an equally quantitative dimension called money (economy)." *Id.* at 380.

structed demands but rather to essential human requisites and capacities. One begins to see this movement in discussions of what are called underlying interests.[210] Interests articulated as wants, preferences, or desires, may not fully constitute a disputant's "real" interests, and successful dispute resolution must explore more fundamental, deep-seated matters.

Some proponents of ADR warn that dispute processing should not be exclusively centered upon each party's strategies for optimizing their interests.[211] In place of this limited focus third parties "can more effectively accomplish their goals by focusing on the parties' *actual objectives* and creatively attempting to *satisfy the needs of both* parties."[212] What is called "problem-solving" negotiation tries to explore disputants' needs where "adversarial negotiation" speaks only of articulated interests. Thus, Menkel-Meadow suggests that dispute resolution should be designed to meet what she calls the parties' "total set of 'real' needs . . . in both the short and long term."[213]

While Menkel-Meadow talks about disputants in terms of needs, her understanding of needs remains quite narrow. By needs, she says she means only something other, or more, than a legally justifiable claim.[214]

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210. *See* W. Ury, J. Brett & S. Goldberg, *supra* note 199.

211. *See* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

212. *Id.* at 758 (emphasis added).

213. *Id.* at 760. Menkel-Meadow offers six additional criteria for successful ADR:

> Does the solution promote the relationship the client desires with the other party? Have the parties explored all the possible solutions that might either make each better off or one party better off with no adverse consequences to the other party? Has the solution been achieved at the lowest possible transaction costs relative to the desirability of the result? Is the solution achievable or has it only raised more problems that need to be solved? Are the parties committed to the solution so it can be enforced without regret? Has the solution been achieved in a manner congruent with the client's desire to participate in and affect the negotiation? Is the solution "fair" and "just"? Have the parties considered the legitimacy of each others claims and made any adjustments they feel are humanely or morally indicated?

Id. at 760-61. She claims that her criteria, with the exception of the last, are utilitarian; that is, she argues that legal negotiations that meet these standards will produce agreements that are "more satisfactory to the parties, thus enhancing commitment to and enforcement of the agreement." *Id.* at 761.

214. Menkel-Meadow writes: "Problem solving is an orientation to negotiation which focuses on finding solutions to the parties' sets of underlying needs and objectives." She elaborates this by stating: "By 'real' problem or objective I mean that which the client wants to accomplish, not how those needs are translated into legal remedies. In disputes it is often useful to look not only at what the dispute is about," here she seems to mean legally possible or probable remedies, "but what brought the parties into a relationship in the first place." *Id.* at 794 & n. 155.

There is an interesting tension in her analysis which imagines very different grounds for negotiation than those we have conventionally institutionalized through adjudication and negotiation, new grounding in the attention to "total needs, goals and objectives"; at the same time, she seems to worry that she has bitten off too much and retreats by creating a strawperson of conventional legal negotiation. In Menkel-Meadow's analysis, adversarial negotiations use law, legal claims, and arguments, as chips to meet disputants' interests. However, she mistakes the chips that are bartered, for the goals—that is, winning the negotiation—and thus imagines the goal of adversarial negotiation to be the successful staking of a legal claim. It is against this reified version of negotiation that she can offer attention to "needs" as something distinct from legal "interests" while simultaneously de-

Despite the limitations of her analysis, it nonetheless signifies an important movement in dispute processing discourse which reconceptualizes the focus of disputes from conventional legal claims of right, beyond utilitarian demands of interest, to both relational and therapeutic understandings of need. The fundamental premise of this analysis is that disputants share certain essential human needs and that attention to those needs will reveal grounds of interdependence, reciprocity, and compatibility which are masked, if not explicitly denied, in adversarial proceedings.

The analysis of need begins with the assumption that "not all needs will be mutually exclusive."[215] By identifying underlying needs, negotiators, according to Menkel-Meadow, can identify shared purposes that would be collapsed in the specification of legal remedies and, in so doing, open up possibilities for solutions that meet both parties' needs.[216] The notion of a satisfactory resolution is not compromise between antithetical preferences. It requires, instead, penetration to the layer of shared attributes and common needs in which the juridical subject is constituted by allegedly universal and invariant human attributes.

In their effort to create effective problem solving mechanisms rather than adversarial claims adjustment systems, proponents identify particular human needs and capacities which they argue are better met by ADR.

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nying that she is moving beyond more traditional notions of "interest." Thus Menkel-Meadow begins with a narrow reading of the literature on negotiation which explicitly speaks to meeting clients' interests, which she argues means legal interests. Menkel-Meadow then argues that meeting disputants' needs is a way of moving beyond law without stating the terrain to which she is moving— except in a negative way.

215. *Id.* at 795.

216. Menkel-Meadow's premises are justified by reference to Carol Gilligan's work on gender differences in moral reasoning. *See* C. GILLIGAN, IN A DIFFERENT VOICE (1982). Gilligan challenges the necessity and utility of hierarchical and deductive reasoning as a model of problem solving, arguing that it limits the possible solutions and denies the ambiguities, relationships, and attachments which constitute the experience of moral dilemma. She criticizes the way in which dilemmas are traditionally formulated in experiments and public discourse so that right answers demand win or lose solutions. In their place, she urges attention to different ways in which problems can be framed and analyzed to produce shared outcomes. She thus proposes what she considers a feminist conception of moral reasoning, which involves a valorization of relationships, and which demands careful attention to the reciprocal needs which bind the parties or which do not necessarily set them in perfectly opposed positions.

Menkel-Meadow concurs with Gilligan's argument that conventional models of moral reasoning narrow questions and disputes to simplistic bi-polar constructions, ignoring the wider array of contextual frames. In response she identifies five basic categories of need: economic, legal, social (relationships), psychological (feelings, including risk aversion), and ethical or moral (fairness), which more accurately map the terms of social relationships and disputes while expanding the possibilities for types of settlement and satisfaction. She calls for a careful inquiry by attorneys, and by implication, other dispute handlers, concerning the relative weights of these needs, their implications in the short and long run, as well as their manifest or latent status for parties in dispute. She does not, however, provide any suggestions for mediating among competing and incompatible needs but seems to assume that in most cases they can be worked out. She concludes that value differences may persist and keep parties at odds, but insists nonetheless that the attempt to take account of both parties' needs, "regardless of how limited the possible solutions may appear to be [are] far more likely to satisfy the parties and effectuate a more permanent agreement." Menkel-Meadow, *supra* note 211, at 808-09.

For example, both Lincoln[217] and Patton[218] suggest that cooperative styles of dispute resolution and mediation meet people's psychological needs for harmony and peace. Echoing earlier functional theories of disputing, Lincoln says that "most people don't like chaos"[219] and are frustrated by it. Thus, he argues, mediation should begin by engaging disputants in the creation and discovery of ground rules by which to manage the chaos of their dispute situation. "Ventilation" is another necessary part of mediation because it allows the people to air the "few things burning inside them" which they are usually afraid to air because people are generally "afraid to . . . ventilate anger."[220] Others argue that cooperative, problem-solving, alternative dispute resolution mechanisms are more likely to meet human needs for autonomy, integrity and dignity.[221] For these proponents, the development of ADR is part of a rethinking of our entire culture, not only the legal system but the culture of corporations and other institutions in which the social self lives and develops. This argument suggests that our dominant culture and institutions foster orientations and attitudes which work against our real human needs.[222]

New dispute resolution methods promote integrity, it is argued, because they require "enormous personal commitment and commitment to hold one's emotions and ego in check long enough to absorb all sides of a problem."[223] Individuals are invited to accept responsibility for their mistakes, without requiring anyone to suffer for misjudgments and lapses. In contrast to legal procedures which instantiate rights, and traditional negotiations which validate while distributing competitive interests, ADR relies less upon well-defined rules, standards or tactical orchestration developed in those processes, and more explicitly upon the integrity and sense of responsibility of the participants.

Unfortunately, Millhauser argues, some of the unspoken resistance to ADR also derives from "often unstated and sometimes unrecognized human needs and desires,"[224] those same needs and desires which ADR

217. *See* W. LINCOLN, MEDIATION (1976).

218. *See* B. Patton, *supra* note 198.

219. W. LINCOLN, *supra* note 217, at 15.

220. *Id.* at 16.

221. *See* Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOTIATION J. 29 (1987).

222. The transformation of needs into legal claims involves, in this view, a process in which the individual becomes not merely a client but a dependent of the lawyer who provides not merely a legitimate voice in the process but an authoritative vision of social relations generally. *See* Sarat & Felstiner, *supra* note 116; Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986). The client must rely on the lawyer for representation within the legal process and for explanations and interpretations of that process. Along with this very expected advice, however, the client also receives what is experienced as authoritative interpretation of his or her own feelings, wants, and experiences and learns from the lawyer not only what is appropriate behavior in the legal process, but how to understand and interpret other experiences and events. Given this perception of the legal system and legal professionals, ADR is advanced as part of a general strategy of personal empowerment.

223. *See* Millhauser, *supra* note 221.

224. *Id.* at 29.

would work both to satisfy and to change. "Left to their own devices and instincts today, most lawyers and clients will seek to 'win' in a traditional sense," Millhauser says.[225] Those instincts can be transformed, she believes, by recognizing more fundamental needs for trust, cooperation, and relationship. In this view, dispute processing gets to the "core" of human personality and human character; in this view, the right form of disputing processing can encourage disputants to see themselves as essentially similar beings rather than as creatures of irreconcilable rights and interests.

Others link ADR to more comprehensive theories of needs.[226] Some theories rest upon a picture of universal, ontological and generic/genetic human needs transcending observable differences of race, class, or culture, in other words, human needs that transcend variations in norms, laws, social structures and institutions.[227] They speak of dispute resolution as aiding "individuals who seek to fulfill a set of deep-seated, universal needs . . . ."[228]

Based on the work of Robert Ardry, E. O. Wilson in sociobiology, Abraham Maslow in psychology, as well as research in stimulus response behaviorism, Burton[229] and Burton and Sandole,[230] following Sites,[231] postulate nine fundamental human needs which collectively constitute human nature: a need for consistent response, a need for stimulation, a need for security, a need for recognition, a need for distributive justice, a need to appear rational, a need for meaning in response, and a need for role defense, defined as the "protection of means and tactics that

225. *Id.* at 34.

226. *See, e.g.*, J. BURTON, DEVIANCE, TERRORISM AND WAR (1979). Burton provides one of the most synthetic formulations of this type of needs-based approach to dispute resolution which he describes as a Kuhnian "paradigm shift" in the study of conflict and conflict management. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). The shift Burton describes moves away from a model of conflict and social exchange based upon power, coercion, and zero-sum calculations, to one based upon problem-solving and "win-win" outcomes. He also moves away from institutional structural analyses which were important in interest-based dispute resolution to a social theory that places primary analytic importance upon the individual.

Avruch and Black challenge Burton's claim that his model constitutes a paradigm shift in studies of conflict. They argue that his emphasis upon individual agency and consciousness instead of social organization and institutions is simply a restatement of the debate between Freud in *Civilization and its Discontents* and Durkheim in *The Rules of the Sociological Method.* A restatement of these arguments, even an elaboration and extension of traditional arguments does not, in Avruch and Black's perspective, constitute a paradigm shift. *See* Avruch & Black, *A Generic Theory of Conflict Resolution: A Critique*, 3 NEGOTIATION J. 87 (1987).

227. This model of conflict, Burton claims, applies to all levels of social exchange—interpersonal, inter-organizational, international—and thus eschews any disciplinary-based (for example, psychological, anthropological, sociological) understandings of conflict which accept or respond to the reality of different levels of social interaction. J. BURTON, *supra* note 226.

228. Avruch & Black, *supra* note 226.

229. *See* J. BURTON, *supra* note 226, at 72-73.

230. *See* Burton & Sandole, *Generic Theory: The Basis of Conflict Resolution*, 2 NEGOTIATION J. 333 (1986).

231. *See* P. SITES, CONTROL: THE BASIS OF SOCIAL ORDER (1973).

actors develop for purposes of protecting and fulfilling needs."[232] "Conflicts," Burton and Sandole argue, "may involve . . . not a clash of basic needs as such but a clash of . . . culturally determined ways in which needs are expressed."[233] Rights talk, for example, is one such culturally determined way of expressing our essential needs. Thus the reconstitution of the juridical subject requires a confrontation with the language of rights which both artificially generates conflict and contributes to human alienation.[234] Proper techniques of conflict management do not just respond to dominant cultural motifs for expressing needs. They transform culture itself by making available "better" modes for expressing and realizing our needs.

This argument suggests that conventional models of conflict begin with erroneous assumptions about scarcity and differences between individuals and groups. As against those assumptions, Burton argues that social goods, associated with the nine basic human needs are not limited and, indeed, may increase through use and exchange.[235] Thus for example, identity, security, and responsiveness, are not, in his view, in short supply and can be increased by greater interaction and exchange. However, positional goods, those attached to specific social roles, for example leadership and prestige, may be in relatively short supply. These are not, however, truly fundamental human needs nor do they respond to basic human nature. Thus persistent conflict is, in this argument, a surface problem, one which is exacerbated through the constitution of the juridical subject in terms of rights or interests. Identification of shared needs provides a basis for the resolution of particular disputes and, more importantly, for building a more harmonious social life.[236]

232. Burton & Sandole, *Expanding the Debate on Generic Theory of Conflict Resolution: A Response to a Critique*, 3 NEGOTIATION J. 97 (1987).

233. Burton & Sandole, *supra* note 230, at 343.

234. It is to this type of confrontation that Fiss responds. *See* Fiss, *supra* note 1.

235. J. BURTON, *supra* note 226.

236. Burton and Sandole suggest that the juridical subject as traditionally conceived is based on untested and untheorized assumptions about order, harmony, conformity and the role of law in meeting these needs. The extensive and apparently successful movement for alternative dispute resolution, they claim, signifies a shift away from these conventional, perhaps mythical, understandings to scientifically based explorations of the specific ways in which institutions and motivations can be harmonized with human aspirations. Thus contemporary dispute resolution promises to reconceptualize the juridical subject to conform to the logic and insights of the human sciences. *See* Burton & Sandole, *supra* notes 230, 232.

Milner, Lovaas and Adler describe the prevalence of this conception of human needs in a series of rather diverse ADR programs. They find that the six mediation programs they studied vary in organizational structure and goals and the degree to which the program seeks to transform subject/authority and public/private distinctions in contemporary American society. Nonetheless, they share a common vision of conflict and human needs that transcends the differences between them. *See* N. Milner, K. Lovaas & P. Adler, The Public and the Private in Mediation: The Movement's Own Story (1987) (working paper for Program on Conflict Resolution, University of Hawaii). Milner, Lovaas and Adler argue that the program differences may be homogenized by a "myth of relationships" which conceptualizes human subjectivity in terms of the needs of the private self rather than in terms of entitlements, as in the conception of rights. "Contemporary North American mediation programs may share an overriding singularly unanimous vision of mediation as a discourse in which the language of interdependence, relationships and interests dominate." *Id.* at 26. This "relational language of mediation often stresses the need for the

The Significance of the Shift From Rights to Interests and Needs

Rights, interests and needs appear to derive from, and participate in, different epistemologies and, coincident with those alternative knowledge claims, appear to provide different rationalizations for competing sources of authority. Each vision seems to constitutes a different human subject; each constitutes its own grounds for legitimate legal and political debate and for activity within the legal field. Each, however, displays a similar set of contradictions within itself, and, in so doing, each reinforces, even as it critiques, the claims of the other. Each plays out a set of complicated relationships between and among autonomy and connectedness, self and community.

While the jurisprudence of rights, with its associated focus on courts as the proper institutional location for authoritative interpretations of those rights, has been criticized for expanding the domain of legal authority beyond reason, and for obscuring and mystifying the grounds of human interaction,[237] judgments between conflicting rights both distinguish among alternative moral claims and establish grounds for human connection. Rights arguments carve a space for legitimately generalizing an individual's preferences by saying that what is good for me may also be good for you.[238] Thus in articulating my claim, I stake a claim for you as well.

Although rights talk in its classical formulations may seem to constitute an alienating individualism, as the radical critique suggests, its voice, nonetheless, creates a recognizable way to understand social life, that is, what constitutes "we" rather than solely "me." There is a way in which rights make possible the kind of community, interaction and connection sought in the discourse of needs at the very moment that they seem to encapsulate individuality, separateness and difference. Thus, one might ask, what the movement for ADR offers in place of the contradictions of legal rights? What does the discourse of interests and needs offer as grounds for political debate and social decisions? How does it conceptualize "me" and "we"?

While the critique of rights empowers advocates of ADR, the discourses of interests and needs fail to solve the contradictions of rights talk. At first glance, the turn to interests flattens human interaction to a marketed exchange of preferences[239] while the move to needs suggests a more complex but unfortunately essentialist ground for interaction.

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private self to emerge and to be expressed more freely . . . . The myth conceptualizes interactions between parties in terms of their interests rather than in terms of entitlement and obligations." *Id.* at 2. "Subscribers to this myth believe that relationships emphasizing interests rather than rights, bring us closer to ourselves and to valuable cultural tools whose existences have been threatened by modern life." *Id.* at 3. Finally, "decisions based on relationships will be implemented successfully enough to bring about important political and social change." *Id.* at 26. *Cf.* Silbey & Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y Q. 7 (1986).

237. *See* R. UNGER, POLITICS (1987).

238. *See* Minow, *supra* note 167.

239. *See* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

In one vision, the alienating aspects of individual rights are extended so that the juridical subject is not simply treated for limited purposes as an individual but is thoroughly isolated into a set of behavioral responses, wants and preferences. Yet this vision cannot convincingly demonstrate that juridical subjects begin in, or aspire to, a condition of perfect competition for the maximization of those wants and preferences. As Coleman argues, it is equally compatible with the idea that human subjectivity is basically a series of preferences to assume cooperation as the original condition.[240] Thus the conception of the juridical subject in interest terms replicates the contradiction between self and other which plagues the rights conception.[241]

In the move to needs the juridical subject is provided with a more complicated, richer human character. Yet that character stands at some distance from itself and, as a result, presents an incomplete understanding of "real" needs. While we may know what we want, that very knowledge is believed to prevent us from clearly seeing or articulating our needs.[242] As a result, the juridical subject is never complete without an external reference helping to sort out the short-term expression of wants from the long-term recognition of essential needs. Self is again made possible by the mediation of other.

The move to interests makes preferences and wants the basis of the juridical subject and seems to challenge rights discourse's inherent need to generalize or join individual claims in an interactive moral engagement. Interest claims seem both individuated and irreconcilable because human wants are understood to be the constitutive elements of distinct and separate human personalities—no two are ever the same. Personality is, in this view, the unique prism of an ontological, physical individuality which generates competitive and distinct preferences as a direct product of that ontological separateness. The legal field should function in this view to maximize the realization of individual preferences by imposing the fewest possible moral constraints on the allegedly free activities of individuals. The activity of legal professionals should be as much technical or instrumental as moral or philosophical.[243]

Interest-based dispute processing while emphasizing the seemingly irreconcilable individuality of wants and preferences insists upon their compromisability. ADR proponents consider interests, preferences and wants compromisable because interests and wants are understood behaviorally. Wants and preferences are seen as responses to a bundle of ever-changing experiences and stimuli. Those responses are understood as if they were distinct from the social or moral context which gives them meaning and value; only by ignoring that context can interest-based dispute resolution deny to third-party dispute handlers any le-

240. *See* Coleman, *Competition and Cooperation*, 98 ETHICS 76 (1987).

241. *See* Kennedy, *supra* note 181.

242. *See* I. ILLICH, TOWARDS A HISTORY OF NEEDS (1977).

243. *See* B. ACKERMAN, *supra* note 60.

gitimate claim to look behind or beyond the articulated preferences of the disputants.

The focus on interest requires, even as it denies, the exploration of the basis of competing claims and the social or moral grounds which sustain them. Yet it often does not develop a language with which to deal with those issues. It is not surprising, therefore, that the written agreements produced through negotiation and mediation, agreements which articulate the compromises and "shared" interests uncovered and constructed through "creative problem solving," often read like sets of performance instructions and indicators.[244] Such agreements transform structural and normative disputes into behavioral strategies which sidestep or ignore the sources of difference[245] even as they flatten the basis

244. *See* Nelken, *The Use of "Contracts" as a Social Work Technique*, in CURRENT LEGAL PROBLEMS (1987).

245. Kolb reports on the ways in which organizational ombudsmen, charged with mediating conflicts within formal organizations such as corporations and universities, pacify complainants by removing them from their situations of distress. *See* Kolb, *Corporate Ombudsmen in Organizational Conflict Resolution*, 31 J. CONFLICT RESOLUTION 673 (1987). Ombudsman routinely arrange transfers of employees from one department to another when employees report situations of conflict, harassment, inefficiency, neglect of duty and the like. The ombudsman becomes the mechanism for legitimating and facilitating exit and avoidance. *Cf.* A. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970); Felstiner, *Influences of Social Organizations on Dispute Processing*, 9 LAW & SOC'Y REV. 63 (1974). Moreover, the ombudsman's ability to act is predicated upon strict confidentiality and an explicit agreement that the ombudsman will deal only with parties who voluntarily seek the ombudsman's help. Therefore, the relevant parties and interests for the ombudsman must be limited to the situation presented to the third party. It follows that no records are kept, and no patterns of complaint can be constructed in order to respond to systemic sources of dispute. *Cf.* Abel, *supra* note 93; Silbey, *supra* note 97. Such interest focused negotiation turns all disputes into problems of behavior. Silbey and Merry describe the ways in which differences in cultural expectations about what constitutes a good person or what is required to be a neighbor, are transformed in mediation into instructions about how to behave when these disagreements prove unavoidable. Since the mediator cannot ally with one or another conception of the good wife or the good father, and the parties have not been able to agree about what is required for these roles, the solution is an agreement about what to do when disagreements become unendurable. Silbey & Merry, *supra* note 236.

The behaviorizing consequences of ADR are seen most clearly in interpersonal disputes. It has been observed repeatedly, for example, that in labor negotiation and mediation, the field of ADR with the longest and most respected history, the employment relationship has been reduced to a set of behavioral rules. Rather than a discourse about how we might organize materials and manpower to sustain and improve human life, employment and production has been turned, in Dunlop's phrase, into a "web of rules" about hours, pay and working conditions. Although it is widely reported that shortly after World War II, Walter Reuther, at the time head of the United Auto Workers, asked the management of General Motors to enter a partnership with labor to develop methods of more efficient automobile production, or at least to discuss a variety of means of organizing that production. General Motors considered those issues irrelevant to labor/management negotiations. *Cf.* H. KATZ, CHANGING GEARS (1985).

Kolb describes in great detail the ways in which labor negotiations turn the employment relationship into a set of measures and behavioral instructions. *See* D. KOLB, THE MEDIATORS (1985). She describes how negotiations are orchestrated to produce settlements by ignoring, and sometimes denying, the framework of assumptions which allows the negotiations to continue and by removing from contention the issues which cannot be transformed into commodity and behavioral exchanges. Kolb's work describes how mediators who work for a federal mediation agency organize their work—the scheduling of meetings, the appropriate topics of conversation, the dimensions of better or worse agreements—on the basis of a set of cognitive maps which define for them the meaning of labor

of connection which make them possible.

Because the constitution of the juridical subject in terms of needs seems to assert the existence and primacy of an historically developed but nonetheless essential human nature,[246] it appears rooted in a search

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negotiation. The mediator's activities take place within a framework of assumptions about the relative roles and rights of capital and labor, the appropriate issues for negotiation, and the place of the state in these relationships. This ideology of free collective bargaining assumes the legitimacy of strikes in labor conflict and denies a legitimate role for government or any outsider in collective bargaining. Although these issues frame the negotiations, they are never explicitly discussed and the negotiations become a process of trading chips that never threaten to expose the lines of cleavage and disagreement. These frames, both at the industry level and the macro-sociological level, constrain both the methods and issues in negotiation, although they never surface for discussion. The history of labor negotiations thus becomes a story of the ways in which contested moral ground can be denied and excluded by effective dispute resolution.

Many proponents of interest-based negotiation deny the charge that attention to "interest" necessarily leads to disaggregation, individuated or merely behavioral responses. They argue that the negotiator must encourage the parties to explore a wide range of possible interests and must delve beneath surface preferences. As we have already seen, advocates of ADR claim that the process of dispute resolution itself encourages a readjustment of personal values and attitudes as well as behavior. But this concern to guard against the narrowing conceptions of articulated wants and preferences raises troublesome issues about the authority and legitimacy of the third-party dispute handler. At what point is this person a facilitator of communication between the parties and at what point does this facilitation become instruction and leadership? Moreover, what set of professional norms, and what social theories, govern the mediator's exploration and possible construction of underlying interests? If third parties lead disputants to places, claims, and values, that the parties had not themselves articulated or been conscious of, how can one claim that the third party lacks power? If the mediator's social and economic theories about what constitutes underlying interests shape the manner in which the dispute is understood by the parties, what is the distinction between informal dispute resolution and formal dispute resolution through law? Are third parties exercising authority and power without accountability? Are third parties practicing law without rights? Or are they possibly practicing politics without a constituency? *Cf.* Mather & Yngvesson, *supra* note 116.

The responses move in two directions. In one approach, third party mediators are advised to develop criteria of fairness and justice by which to assess the quality of negotiations and agreements; they are encouraged to develop a moral discourse about mediation. Thus in various descriptions of public issue negotiation, Susskind suggests a set of questions which third party facilitators should address to determine whether interests have really been met, to make sure they have successfully delved beneath surface claims so that the solutions achieved meet the real interests of the parties. *See* L. SUSSKIND & J. CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987). These questions or criteria for professional mediation of public disputes constitute, without so naming them, a jurisprudence of mediation. They lack, however, any mechanism for checking the individual mediator's performance or holding the mediator accountable for her personal assessments of fairness and justice. Moreover, the moral discourse of mediation is conceived of as a personal morality of professional mediators and as a standard for professional achievement. The second direction in which interests are pushed beyond articulated preferences and wants, side-steps the criticisms and calls for responsiveness by dispute handlers to parties' fundamental needs.

246. Ignatieff's conception of "need" points to essential elements of human subjectivity, but posits these as nonetheless historical and relative. We create needs for ourselves; "we are the only species with the capacity to create and transform our needs, the only species whose needs have a history." M. IGNATIEFF, THE NEEDS OF STRANGERS (1984). Thus the only needs which we can specify are those "absolute prerequisites for any human pursuit . . . because whatever we choose to do with our lives, we can scarcely be reconciled to ourselves and to others without them." *Id.* at 14.

> In the end, a theory of human needs has to be premised on some set of choices about what humans need in order to be human; not what they need to be happy or free, since these are subsidiary goals, but what they need in order to realize the full extent of their potential. There cannot be any eternally valid account of what

for objectivity that is absent in the analysis of wants, desires and preference. Moreover, the force of a needs claim derives in part from that perceived objectivity.[247] Although some welfare economists claim that the only thing that ultimately matters is the satisfaction of wants, proponents of needs discourse argue that something much more basic is at stake. In making such an argument, Thompson for example, suggests that the failure to meet needs implies serious harm;[248] harm cannot be defined in terms of either actual desires or well-informed wants, the grounds of utilitarian reasoning, because we can need something without knowing that we do.[249] Here again we see the external, objective perspective which informs needs discourse, a perspective which suggests the radical incompleteness of the juridical subject.[250]

Although needs discourse describes a dependent juridical subject, public discourse about needs points to much more than the basic necessities of survival. "To define human nature in terms of needs is to define what we are in terms of what we lack, to insist on the distinctive emptiness and incompleteness of humans as a species."[251] The discourse of needs portrays the human tragedy wherein the spiral of created, recreated and escalated needs render subjects impotent to meet needs of which they are aware only when they are connected to others. The lack of that connection stimulates the recognition of the need.

Needs talk in politics or dispute resolution thus generates at least two types of dependency. There is the logical, syntactical dependency which Nancy Frazer describes as "in order to" statements.[252] Needs

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it means to be human. All we have to go on is the historical record of what men have valued most in human life.

Id. at 15.

247. *Cf.* D. BRAYBROOKE, MEETING NEEDS (1987); D. WIGGINS, NEEDS, VALUES, TRUTH (1987).

248. *See* G. THOMSON, NEEDS (1987).

249. Thus Thompson argues that the normative claim of need is much stronger than a claim for wants because desires are clearly not preemptory in the way that harm is. Brian Barry writes that "we tend to think that needs possess a kind of preemptory status that mere desires lack; if you say you need something you seem to be presenting a weightier claim than if you say you want it." *See* Barry, *Priorities of the Selfgovliset*, N.Y. Times, Feb. 5, 1988, Literary Supplement, at 140. Further, Wiggins provides an elaborated version of the absolute or normative claim of need: "The thought we have now arrived at is that a person needs *x* [absolutely] if and only if . . . he will be harmed if he goes without *x*." D. WIGGINS, *supra* note 247, at 14. His discussion explores the ways needs are entrenched within future expectations, are substitutable, immediate and urgent, basic, etcetera.

250. The discourse of "interests" suggests no such incompleteness: No one can know my wants or preferences better than I. Thus it makes no sense to suggest that in the articulation of those preferences I am in any way dependent on others.

251. *See* M. IGNATIEFF, *supra* note 246, at 14.

> Rights language offers a rich vernacular for the claims an individual may make on or against the collectivity, but it is relatively impoverished as a means of expressing individual's needs for the collectivity. It can only express the human ideal of fraternity as mutual respect for rights, and it can only defend the claim to be treated with dignity in terms of our common identity as rights-bearing creatures. Yet we are more than rights-bearing creatures and there is more to respect in a person than his rights . . . . It is because money cannot buy the human gestures which confer respect, nor rights guarantee them as entitlements, that any decent society requires a public discourse about the needs of the human person.

Id. at 13.

252. *See* N. Frazer, Talking About Needs: Cultural Constructions of Political Conflict in

have a relational structure, "x needs y in order to," describing needs claims as a nested series or chains of such "in order to" statements. Thus needs, in contrast to the things needed, are "states of dependency which have as their proper object things x needed."[253] However, there is also a material and behavioral dependency which develops historically through the social and political creation of needs. Offers of help and provision of service create needs, discourage self reliance, and thus foster a sense of incompetence and dependency.[254]

But the discourse of need, even as it establishes human interdependence, creates a domain of independent authority for those who specify and service human needs.[255] By asserting the existence of shared and objective grounds for dispute resolution, the concept of need denies legitimacy to those who disagree about what is needed, or who is needy, while empowering those who work within the "uncontested" arena. By mobilizing the discourse of need, proponents of ADR remove specific areas of human interaction from political and moral argument, or what appears to be interminable and ineffective debate, and in so doing empower alleged experts. Thus needs discourse, like the discourses of rights and interests, embodies claims to both connection and separateness.

The movement from rights to interests might have exaggerated the political dimensions and inefficiencies of dispute resolution by challenging the possibility of collective or disinterested grounds for settlement of differences except through market transactions. The move to needs, however, suggests the possibility of not only disinterested but relatively unproblematic grounds for dispute resolution. When deployed by ADR advocates, needs talk is of this latter type, apolitical and distinctly technocratic.

Needs-based dispute resolution takes for granted the desire of expert helpers to meet needs, and defines the dispute as merely a technical and individual problem of correlating available means to essential needs. Disputes are no longer arenas of competition for the distribution of valued goods, or the legitimation of moral claims. Dispute resolution becomes a technocratic activity because it is defined as the creation or design of pragmatic solutions to problems. Compromise between the parties allows people to live with their problems. Here the claim is made that all problems can be solved. As such, dispute resolution is similar to many other forms of engineering in which knowledge is mobilized to achieve material and behavioral goals.[256] What technology produces, however, is not only the creation of solutions but the

Welfare State Societies (Feb. 3, 1988) (talk presented to Mary Ingraham Bunting Institute, Radcliffe College, Cambridge, Mass.).

253. *See* D. WIGGINS, *supra* note 247, at 16.

254. *See* I. ILLICH, *supra* note 242. *Cf.* Abel, *supra* note 93, at 283; R. TOMASIC, LAWYERS AND THE COMMUNITY 22-25 (1978).

255. *See* I. ILLICH, *supra* note 242; J. HABERMAS, TOWARD A RATIONAL SOCIETY (1970); C. LASCH, *supra* note 97.

256. *See* M. HEIDEGGER, BASIC WRITINGS (1965).

externalization of guidance, which specifies the relationship between means and ends—the solutions to problems.[257] Because technocratic problems involve control through explicit and exhaustive instructions and rules, they appear to be independent of human will; thus, technological decision making is presented by its promoters to be apolitical and uncontroversial.[258] By legitimating a conception of dispute resolution that is simultaneously independent of the articulated preferences, wants or interests of the parties, and independent of the historical context of collective wants and preferences embodied in rights, the discourse of needs enables a form of dispute resolution that also seems outside of power or authority while it nonetheless gives independence to experts who can specify the correct relationship between relatively unproblematic needs and available means.[259]

Constituting the juridical subject in terms of needs thus makes possible some of the institutional critiques of courts which we described in Part II. Judges think in terms of rights and are, as a result, not able to get to what is 'really' at issue. As a result, so the argument goes, needs are unmet; moreover, the language of rights is said to overlay and prevent the recognition of either the sources or nature of the conflict. Thus conflict continues or takes new forms.[260]

V. CONCLUSIONS

The emergence of disputing and dispute processing within the legal field takes place at several interdependent levels. At each level dispute processing involves both a competition among different professional projects and an incorporation of different professional projects within

257. What else is a computer or any machine but a set of instructions formulated for endless production? Nonetheless those instructions are specified by people whose job it is to create such formulas. *See* J. WEIZENBAUM, COMPUTER POWER AND HUMAN REASON (1976).

258. *See* Bittner, *Technique and the Conduct of Life*, 30 SOC. PROBS. 249 (1983). Thus the discourse of "needs" imagines a dispute handler in much the same way that some varieties of liberal theory imagines judges. *See* Singer, *supra* note 177.

259. It also neutralizes and depoliticizes disputes by offering to meet needs through creative, responsive and participatory problem-solving; nonetheless the needs pursued through participatory dispute processes may not be the needs the parties articulate or desire. Thus Delgado criticizes ADR for the ways in which it denies to minority and impoverished populations the ability to make a social claim against the collectivity, to get that claim validated as legitimate for others as well as the individual complainant, and to demand a response from more than the particular respondent. *See* Delgado, *Fairness and Formality*, 1985 WIS. L. REV. 1359. Law, Delgado argues, necessitates that others, not party to the particular dispute, nonetheless acknowledge the legitimacy of the claims of the prevailing party. By denying dispute resolution on grounds other than the particular interests of the specific parties, ADR closes the door to those who seek affirmation that they are not alone in their wants or needs. Needs-talk, like interest-negotiation, responds to the individual claimant but denies that person's desire to have her want acknowledged by the community. Moreover, Delgado argues that minority populations have particular needs for processes of dispute resolution which challenge racial and ethnic prejudice, and which empower the disadvantaged. Such groups, Delgado suggests, do not want, nor do they need, dispute resolution forums which are neutral and disinterested. Inequalities of status and power demand institutions which provide partisanship rather than unchannelled responsiveness and participation.

260. *See* Felstiner, Abel & Sarat, *supra* note 116.

the legal field. Within the domain of legal institutions, elite lawyers, access to justice reformers and community organizers compete to control the market in dispute processing just as in the domain of legal scholarship social scientists contest the hegemonic position of traditional law professors by reformulating the subject of law as disputing and dispute processing. Yet each of these contests takes place within the legal field and is fully contained within it just as each brings new professional projects within its reach. Moreover, competition within each domain is made possible by developments within the other. Theoreticians provide new weapons for combat over, and within, institutions just as that combat energizes and legitimates theoretical production. Competition and interdependence are also visible in the constitution of the juridical subject. Here the explicit rhetoric is a rhetoric of competition and displacement, yet, as we have shown, the discourses of rights, interest and needs embody similar contradictions between autonomy and connection, individuality and sociality, separateness and relationship.

Thus, to speak of the reconstitution of the juridical subject or the transition within the legal field from rights to interests and needs suggests more completeness than is attained or attainable. Rights talk is by no means displaced;[261] it is, however, transformed, and, in some ways domesticated, in the face of the discourses of interest and needs. The rights language of Dworkin,[262] Fiss[263] and Minow[264] is recognizably modern and different, perhaps less terrifying and compelling than the rights discourse of earlier eras.[265] Unalienable rights become products of a judicially-led process of textual interpretation. Rights become parts of the fabric of social life rather than constraints existing outside or prior to it. Alternatively, in other voices, rights no longer serve as guarantees against non-interference or the sanctity of an inviolable personal space;[266] they aren't guarantees that individuals can dictate or control the uses of their own persons or property. They become, instead, guarantees that when others make particular decisions regarding my person or my property I will have a claim to a judicially enforced obligation to payment for their preferred uses. This domesticated rights talk represents a discursive accommodation of significant proportions. It makes possible an uneasy pluralism of communities with the legal field.[267] No longer is rights talk a hegemonic form; no longer does the juridical subject as a possessor of rights reign supreme. At the same time, however, ADR has not been able, itself or in combination with other things, to dislodge the rights conception.

In addition, the language of rights reshapes and challenges the way

261. *See* Haskell, *The Curious Persistance of Rights Talk in the "Age of Interpretation"*, 1988 J. AM. HIST. 1.

262. *See* R. DWORKIN, *supra* note 154.

263. *See* Fiss, *supra* note 1.

264. *See* Minow, *supra* note 167.

265. *See* H. ARKES, *supra* note 156.

266. *See* Calabresi & Malamed, *Property Rules, Liability Rules and Inalienability*, 85 HARV. L. REV. 1089 (1972).

267. *See* Minow, Law Turning Outward (1987) (unpublished manuscript).

interests and needs are expressed in debates over dispute processing. The latter take on meaning only as theoretical counterweights to rights. Interests and needs become, if nothing else, alternative bases for claims of rights. Moreover, while the language of interests and needs seems at first to strengthen strains of opposition within the legal field, it serves in the end to strengthen the social position of the legal field by making it more complex and resilient, by selectively incorporating, and making accommodations with, political opponents and by extending the sphere of surveillance and control that gives the legal field its place within society. ADR by precipitating accommodations at the level of institutional practice, academic theorizing and the constitution of the juridical subject supplements rather than displaces the force of law and the social space which it occupies.

EVALUATIONS OF DISPUTE PROCESSING: WE DO NOT KNOW WHAT WE THINK AND WE DO NOT THINK WHAT WE KNOW

JOHN P. ESSER*

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INTRODUCTION

The past two decades have witnessed a growing body of empirical studies of dispute processing. A significant number of these articles form a distinct type of literature which we call "evaluations." Evaluations report assessments of existing dispute processing programs in a form which contributes to our general knowledge of dispute processing.

* Hewlett Fellow, Dispute Processing Research Program, University of Wisconsin-Madison. I am grateful to Marc Galanter, David Trubek, Cathy Meschievitz and Tom Tylerm for their critical comments on this paper. I am also indebted to the fellowship support I received from the William and Flora Hewlett Foundation through the Dispute Processing Research Program of the Institute for Legal Studies, University of Wisconsin-Madison.

Their production and distribution involve the combined effort of policy makers, dispute processing professionals, and academics. Policy makers, professionals, and academics are also the primary consumers of this literature.

Published evaluations of dispute processing programs are now so numerous that it is difficult for the average scholar, policy maker, or practitioner to locate, read or digest them all. This difficulty does not obviate the need felt by many of these potential readers to obtain a mastery of this material. Scholars of dispute resolution believe that to speak with authority as experts, they must know the state of knowledge in the field. Policy makers believe that in order to best address the problems their jurisdictions experience, they must identify those reforms which have had the greatest success. Practitioners, called on to account for the success or failure of their programs, seek models to follow when instituting evaluations of their own. For these readers, a review article and bibliography on the topic appears to be the answer. Such an article can abstract and summarize the essence of the important results reported by the literature so that these readers can obtain the information they need without having to identify, collect and review the entire literature themselves.

This article will identify, describe, and review the existing evaluations literature on dispute resolution. However, it may not provide the quick answers that some readers are looking for. Prior to reviewing the literature for its results, I will review the questions which have framed this literature and which, I argue, frame the field's interest in a literature review of the kind suggested above. This is an important first step, for the contribution which the empirical results of evaluations research makes to dispute processing knowledge, depends on the questions which the field asks of it. This article will argue that the framework of questions predominant in dispute resolution today blinds us to some of the significant findings of existing evaluations research and also arouses unreasonable expectations about what such research can find in the future. In other words, our framework can divert us from thinking about what we already know and may deceive us into believing that we know more than we actually do. It is my hope that the reader will use this paper not only to assess the results of existing research, but also to assess the framework through which she renders these results meaningful.

I. WHY MUST WE EXAMINE OUR FRAMEWORKS BEFORE WE EXAMINE OUR RESULTS

This preliminary section will explain and substantiate the importance of critically examining the frameworks through which policy makers, program implementors, program evaluators, and evaluation readers understand processes of dispute processing. I will make four points. First, the reporting of empirical results is framed by the conceptual perspective of the author. Second, while these frameworks facilitate our understanding of certain aspects of dispute processing, at the same time,

they distract our attention from other aspects of these processes. Third, these conceptual frameworks are not specific to individual evaluators but are shared by other evaluators, policy makers, program administrators, and additional consumers of published evaluations. Fourth, by shaping our perceptions and expectations, these frameworks help shape our motivations, our actions, the strategies of reform we pursue, and the institutions we establish to achieve these reforms.[1]

All researchers are aware that dispute resolution programs, like all aspects of social life, are extremely complex phenomena. In order to describe and evaluate the success of a given program, researchers must structure their observations, measurements, and reports to highlight a few characteristics or variables which are, in the eyes of the researcher, particularly significant.[2] The reviewer of the evaluations literature faces a similar task. This body of literature presents a vast array of observations and conclusions across thousands of pages of text. In order to summarize these findings in a concise, interesting, and useful form, the reviewer must abstract those which are, to his eyes, the most important—the most essential.

While a framework of questions facilitates our understanding of a particular program or body of literature by focusing our attention on certain aspects of this complex reality, it also diverts our attention from those aspects of the program or literature which are deemed irrelevant by the framework's perspective. Measuring the time to disposition of a

1. The importance of interrogating the conceptual frameworks which orient socio-legal research was the central theme of the Law and Society Association's 1988 annual meeting. Calling this theme the "Archeology of Sociolegal Studies: Constructing Questions," the program committee specified six issues for discussion:

1. How we define the legal phenomena that are studied.
2. How we determine what questions are asked. How we select propositions to guide our research. In short, what questions are asked and what questions remain not asked or left unexamined.
3. How certain forms of data, "evidence," and arguments become persuasive in developing the knowledge base of our field and what accounts for the sources of influence.
4. How disciplinary orientations and/or theoretical paradigms inform and limit our perspectives on socio-legal phenomena.
5. How explicit and implicit ideologies, values and belief systems create assumptions, biases, and silences in our research (e.g. positivism, critical theory, feminism, ethnocentrism).
6. How varied purposes (e.g. policy, evaluation, litigation, basic research) affect the content of our research.

LAW AND SOCIETY ASSOCIATION, ARCHEOLOGY OF SOCIOLOGICAL STUDIES: CONSTRUCTING QUESTIONS (1988). This paper can be seen as an attempt to apply these questions to the specific field of dispute processing evaluations rather than the more general field of socio-legal research *per se*.

2. Lind and Shapard, for example, begin their evaluation of three federal court-annexed arbitration programs by explicitly stating the aim of their research: "The primary aim of the evaluation effort reported here was to determine whether these local rules produce the beneficial consequences anticipated without unacceptable adverse consequences. The anticipated benefits of the rules are that they will reduce both the time and expense of resolving certain civil cases and the burden these cases place on court resources" A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 5 (1983). In this passage Lind and Shapard are telling the reader that they have decided to focus on the cost in time and money of processing certain civil cases. They have used the anticipated benefits of the rules to define this focus.

given case in an arbitration program may help systematize our knowledge concerning the speed with which this arbitration program can process cases, but this focus diverts our attention from the interactions between disputants, counsel, and arbitrator which take place within this time period and which actually cause the resolution of the case.[3] Consequently, the facilitation of our understanding comes at a cost. While our framework helps us to systematize our understanding of the data which our questions deem significant, it also diverts us from making other observations which may have as great, if not greater, significance for our knowledge of dispute processing.

While the orienting conceptual frameworks used by individual evaluators vary to some degree, they can not be entirely idiosyncratic. When seeking funding for research, when conducting an evaluation, and when writing up results, the evaluator must be concerned with the interests of her audience. For example, she must ask herself: "What is it about this dispute resolution program that my readers are interested in knowing?" Also, "How do I report it in a manner which is useful, comprehendible, and interesting to my readers?" If orienting frameworks were entirely idiosyncratic, answering such questions would be impossible. However, answering questions like these is not impossible. Despite their differences, policy makers, practitioners, and academics often share common or related goals, interests, evaluative criteria, and perspectives. It is only because of some minimal agreement over the nature of disputes and dispute processing that individuals from such diverse occupations as law, social work, and social science scholarship can perceive themselves as members of a shared field. We can expect, for example, that anyone active in the dispute processing field who is reading the results of an evaluation will immediately question the type of program being evaluated (arbitration, mediation, negotiation, and others), the type of data examined (court records, interviews, questionnaires with disputants, and others), and the measure of success or failure (cheaper, faster, more equitable, and others). This sharing of outlook constitutes, in part, the boundaries of the dispute processing field.

In establishing the importance of shared perspectives in defining the dispute resolution field, I do not mean to suggest that behind this minimal level of agreement there are not important differences. On the contrary, I accept the existence of these differences but seek to explain them as differences in conceptual perspectives rather than as differences in the perspectives of individuals. I argue that the most important differences are not differences among particular individuals' works, but rather between a small number of distinct and competing shared outlooks within the field. Consider, for example, differences over the proper term for labeling our field. Is our focus of concern "dispute res-

3. Consider the example of Lind and Shapard discussed in the previous footnote. By restricting their perspective to the analysis of the case costs in terms of time and expense to the courts, the authors have purposely decided to ignore, for example, which arbitrator techniques facilitate settlement and which do not. *Id.*

olution," "*alternative* dispute resolution" ("ADR"), or "dispute *processing*?" Such debates have more at stake then semantics: they express differences in which programs colleagues look at, differences in the criteria used in assessing program success, and differences in what it is hoped these programs will achieve. If we use "alternative dispute resolution," then we tend to focus on forums for dispute resolution outside the traditional court system.[4] If we use "dispute resolution" rather than ADR, then we tend to include the processes of pre-trial negotiation and judicial settlement which already exist in traditional institutions of adjudication. If we use "dispute processing" rather than "dispute resolution," then we tend to emphasize that the purpose or the result of the "dispute resolution" institutions is not always the resolution of disputes.[5]

Conceptual frameworks provide more than descriptions of what we find and expect to find in dispute processing programs. By framing our experience of dispute processing, they define what we perceive to be problematic with those processes, suggest reforms which promise to address these problems, and thereby suggest actions and institutions required to achieve these reforms. Consequently, in addition to providing us with an orienting perspective, conceptual frameworks provide us with strategies of policy reform and strategies for socio-legal research.

The reader should be aware that the degree and direction of causality between these various determinants of social life such as conceptual perspectives, individual motivations, strategies of policy reform, and others, is a subject of great debate. It is unclear, for example, whether the modern ADR movement originated either with reform proposals by academics suggesting that reform strategies originate with new conceptual perspectives, with court administrators experiencing an explosion of litigation which suggests that new conceptual perspectives result from institutional crises, with grass-roots demands for increased access to justice which suggests that innovations in conceptual perspectives as well as institutional reforms result from social movements, or with some other source. Most of the disputes processing literature ascribes some determination to a combination of these causes without specifying their interrelationship or individual degree of determination.[6]

In the analysis that follows, I will use a description of a prevailing conceptual framework as my point of departure. I will then go on to discuss the policy reforms, research agendas, institutional innovations, actions, and impacts suggested by such an orienting framework. The reader should not take this choice to imply that conceptual frameworks are the sole or primary determinant of individual motivations, individual actions, policy reform strategies, research strategies, or the creation and persistence of institutions. Rather, it should be understood simply as

4. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

5. *See, e.g.*, Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63 (1974).

6. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 3-5 (1985).

my selection of one from many analytic approaches to the study of the complex field of social phenomena called "dispute processing." The selection of this point of departure over others is defined by the objectives of the paper: to identify, describe, and review a body of literature produced and published by this field.

II. THE NEW FORMALISM

The evaluations literature combines a particular perspective on dispute processing with particular methods of social science research. *The New Formalism* is the predominant conceptual perspective in the dispute processing field. It provides its adherents not only with a description of dispute processing, but also with agendas for socio-legal research and for policy reform. *Impact analysis* is a type of empirical social science investigation whose assumptions and methods are particularly well suited to New Formalism's research agenda. In this section, I will use a description of The New Formalism and of impact analysis as an analytic approach to identify, describe, review and critique evaluations of dispute processing as a component of a policy reform project.

A. *The New Formalist Perspective*

Fuller,[7] Danzig,[8] and Sander[9] are often cited as the intellectual origins of the modern disputes processing field. Implicit and explicit assumptions concerning the nature of disputes and disputes processing presented in these early works have formed an orienting conceptual framework that has been used and advanced by subsequent writings in the field. After Sarat, I call this framework "the New Formalism."[10]

Lon Fuller's work establishes the possibility of a general theory of dispute processing.[11] Fuller sought to distinguish the various "order-producing and order-restoring processes of society"[12] on the basis of their "distinguishing characteristics,"[13] "general structure,"[14] or "central qualities."[15] Fuller assumes that these central qualities determine

7. *See generally* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) [hereinafter Fuller, *Adjudication*]; Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [hereinafter Fuller, *Mediation*]; Fuller, *Collective Bargaining and The Arbitrator*, 1963 WIS. L. REV. 3 [hereinafter Fuller, *Collective Bargaining*].

8. Danzig, *Towards the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

9. Sander, *supra* note 4.

10. *See* Sarat, *The "New Formalism" in Disputing And Dispute Processing*, 21 LAW & SOC'Y REV. 695 (1988). For a similar discussion see Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987). The New Formalism is not the only perspective on disputes processing present in the current literature and Fuller, Danzig, and Sander are not its only intellectual origins. For the origins and development of another, "non-formalist" perspective on disputes processing present in the current literature, see Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217 (1973), and the articles found in volume 9, issues 1 and 2, of Law and Society Review.

11. *See* sources cited *supra* note 7.

12. Fuller, *Mediation*, *supra* note 7, at 327.

13. Fuller, *Adjudication*, *supra* note 7, at 357.

14. Fuller, *Mediation*, *supra* note 7, at 309.

15. *Id.* at 327.

the intrinsic limitations of the process; that is, they determine which types of social problems the process is and is not well suited to handle. Actually existing programs may vary in the degree to which they maintain the "integrity" of a pure process type and its ideal jurisdiction. A particular program may mix distinguishing properties from a variety of general process types and may be applied to social problems which it is not well suited to address. In such cases where the "integrity" of the general form is lost, the program outcomes will be characterized by "failure" and ineffectiveness.[16]

Danzig demonstrates how assumptions such as Fuller's can be used to explain the failure of governmental institutions and to recommend policy reforms to correct these failures.[17] Danzig questions why the existing American urban justice system fails in its efforts to control crime through criminal adjudication. He argues that this is not the result of a failure of adjudication *per se*, but rather of the application of adjudication to too broad a range of social problems. Hence, failures in crime control can best be addressed not by replacing adjudication but by supplementing it with complementary processes of social regulation. The proper balance of complementary processes can be identified by assuming a systems approach to society's handling of crimes and criminals.

A systems approach views the various processes which a society uses for handling social problems as forming a system. "The systematic perspective views a change in one component of the subsystem as forcing changes in the others."[18] In regard to Danzig's issue of urban criminal justice, a change in one component means changing the jurisdictional boundaries of a given procedure. "Widening or narrowing the definition of crimes increases or decreases police, court, and correction business; changes in police techniques may overburden or free the time of judges and prison staffs . . . ."[19] Problems with existing public institutions can thus be explained as the result of an unbalanced system: when adjudication is applied to too wide a range of social problems, it fails to effectively process all its cases. The resolution of these problems can be understood as changes to the system which restore balance: introducing decentralized community moots as a complementary component of the criminal justice system not only improves the system's resolution of problems which the moot takes over from traditional adjudication, but also improves the system's resolution of those problems which remain in adjudication's jurisdiction.

Sander accepts Fuller's assumption concerning the possibility of a general theory of order-restoring processes, accepts Danzig's systems approach to the diagnosis of public policy reform, and applies these assumptions to the processing of civil disputes.[20] Like Fuller, Sander as-

16. Fuller, *Adjudication*, *supra* note 7, at 382.
17. Danzig, *supra* note 8.
18. *Id.* at 5.
19. *Id.*
20. Sander, *supra* note 4.

pires to develop a general theory of alternative dispute processing programs. Like Danzig, he uses the principles of this theory to explain the ineffectiveness of the existing system, a burdensome judicial caseload, and to propose reforms which will produce a more effective system, by increasing use of alternatives outside the courts. Sander goes on, however, to argue that the principles of a general theory can be used as "rational criteria for allocating various types of disputes to different dispute processes."[21] That is, these principles are useful not only for program designers, such as legislators, foundations, and policy intellectuals who provide funding and authorization for programs but also for program implementors, such as administrators who run the program from day to day.[22]

Implicit in these early works of the dispute processing field are three propositions:

1. There are a small number of essential types of procedures for the resolution of disputes.[23] These are distinguished by their distinctive general characteristics. These characteristics make each essential process particularly well suited to resolve certain types of disputes.[24]
2. Every society establishes a number of dispute processing programs, each with its own distinctive jurisdictional boundaries. These programs form a system which functions effectively or ineffectively depending on the type of programs it includes, the type of jurisdictional boundaries it defines for each, and the manner in which these different programs complement one another.[25]
3. The ineffectiveness of an existing system of dispute processing programs can be explained and reforms which correct this ineffectiveness proposed by applying the general principles of a dispute processing theory.[26]

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21. Sander summarizes the questions he addresses as follows:
1. What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?
2. How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?

Id. at 113.

22. This is the program feature which advances Danzig's concept of a complementary system to Sander's concept of a multi-door courthouse. To Danzig's complementary system Sander adds a gatekeeper which allocates cases according to rational criteria rather than depending on each citizen to make the "which process" decision herself.

23. In this paper I will use "process" and "mechanism" interchangeably to refer to essential types of dispute processing procedures. I will use "dispute processing programs" to refer to the institutionalization of a given process or mechanism in a specific concrete organization.

24. *See also* M. CAPPELLETTI & B. GARTH, ACCESS TO JUSTICE (1978); D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA (1984); Fine, Moukad & Taylor, *CPR Working Taxonomy of Alternative Legal Processes*, ALTERNATIVES, May 1983, at 9, Aug. 1983, at 4, Nov. 1983, at 5, Dec. 1983, at 5.

25. *See also* Abel, *supra* note 10; McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

26. *See also* Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional*

These three propositions describe the general features of disputes, dispute processing, dispute processing institutions and dispute processing systems. They constitute "the New Formalism."

B. *The New Formalism as a Vision of the Future*

As I have argued above, perspectives do more than simply frame the descriptions we have of the world around us. By defining what *does* exist, frameworks also define what *should* exist and *can* exist. They help shape one's diagnosis of what is wrong with the present as well as one's prescription for an improved future. Such is the case with the New Formalist perspective. The three propositions identified above include not only a description of the present but also a vision of the future.

Proposition one makes claims about the nature of social processes. These claims identify a field of social phenomena—dispute processing—which operates according to certain social laws. The implication is that researchers can construct a general theory concerning dispute processing by identifying the social laws which govern these phenomena. If social life indeed follows such laws, then researchers can use methods of scientific investigation to construct verifiable descriptions of the properties of various types of disputes and dispute resolution institutions, can state these properties as principles, and can interrelate these principles as a theory of dispute resolution.

Proposition one also suggests the form such a theory will have once it is constructed. It suggests that a theory of dispute resolution will have at least six variables. It assumes that there are a finite number of essential processes for the resolution of disputes (X_1, X_2, X_3, . . .). These types of disputes are distinguished by a particular combination of a finite set of process characteristics (a_1, a_2, a_3, . . .). There are also a finite number of essential types of disputes (W_1, W_2, W_3, . . .). These are distinguished by a particular combination of a finite set of dispute characteristics (b_1, b_2, b_3, . . .). For each type of dispute there is one set of outcomes which results from the application of the various general types of processes to this particular type of dispute (Y_1, Y_2, Y_3, . . .). These types of outcomes are characterized by their own set of characteristics (c_1, c_2, c_3, . . .). For each type of dispute, one outcome (Y) constitutes the most effective processing of this given type of dispute. This outcome identifies the optimum match between process type and dispute type. Each optimum match between process type and dispute type can be stated as a scientific principle.[27] These principles can then be interre-

Principles for Process Change, 1984 WIS. L. REV. 893; Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

27. In his three articles on mediation, arbitration, and adjudication, Fuller proposes a number of principles of the type described. Consider, for example, the following statements regarding mediation:

> The central quality of mediation [is] . . . its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another . . . .

Fuller, *Mediation*, *supra* note 7, at 327.

lated to create a general theory of dispute processing. This archetypical theory of dispute processing is graphically represented in Chart I.

Proposition two makes claims about the nature of dispute processing institutions. These claims provide an explanation as to why some dispute processing programs succeed while others fail. The degree to which a given program is effective or ineffective depends on the degree to which the program's institutional design and jurisdictional limits correspond to those laws of social action which govern dispute processing; these laws determine the ideal "match" between process type and dispute type. Consequently, the "effectiveness" of a program is a technical question rather than a question of value. Individuals may disagree as to why an effective program is desired. But from the New Formalist perspective, these desired outcomes will all be achieved under the same set of conditions. When the design of an actual program (in terms of the technique applied and the jurisdiction of cases it is applied to) corresponds to the social laws governing dispute processing, *all* desirable program outcomes or impacts will be achieved simultaneously.

A program's "effectiveness" should be distinguished from its "efficiency." "Efficiency" is usually interpreted as meaning the achievement of a desired outcome with a minimum of time, effort, or expense. Many reformers are interested in a general theory of dispute processing because they are interested in instituting an "efficient" dispute processing system—that is, one which minimizes the cost and time required to process disputes. Within the New Formalist perspective, the most "efficient" dispute processing system is the system which has the most "effective" design—that is, the system whose existing programs and jurisdictions correspond to the principles of the general theory of dispute processing.[28]

Proposition two not only assumes the possibility of an effective dispute processing system but also suggests how the design for such a system can be obtained: namely, through social science research. If dispute processing mechanisms are things with stable attributes, capacities, and limits which are ideally suited for resolving certain types of disputes with stable attributes of their own, then the world is such that human beings can identify a rational ground for defining and orienting enlightened social policy regarding disputes processing. Scientific

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> Mediation is itself subject to intrinsic limitations; I have discussed two of these: (1) it cannot generally be employed when more than two parties are involved; (2) it presupposes an intermeshing of interests of an intensity sufficient to make the parties willing to collaborate in the mediational effort

Id. at 330. In these sentences, Fuller defines the pure mechanism type "mediation" using its distinctive characteristic features. He defines two general characteristic features of disputes, and he identifies disputes which have these characteristics as those which mediation is most ideally suited to process.

28. Reformers can disagree as to whether the outcomes desired and the measures used should be limited to questions of *efficiency* (some reformers may wish to include other outcomes such as increased access to justice, increased quality of justice, and others). But they can disagree regarding desired outcomes and measures while agreeing that their various outcomes will be achieved under the same conditions: when the system is designed *effectively*.

CHART I

Outline for a General Theory of Dispute Processing as Defined by the New Formalist Perspective

Type of Dispute		Type of Mechanism						
		X_1	X_2	X_3	X_4	X_5	X_6	$X_7 \ldots X_k$
Type of Dispute	W_1	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	$Y_7 \ldots Y_k$
	W_2	Y_8	Y_9	Y_{10}	Y_{11}	Y_{12}	Y_{13}	$Y_{14} \ldots Y_m$
	W_3	Y_{15}	Y_{16}	Y_{17}	Y_{18}	Y_{19}	Y_{20}	$Y_{21} \ldots Y_n$
	W_4	Y_{22}	Y_{23}	Y_{24}	Y_{25}	Y_{26}	Y_{27}	$Y_{28} \ldots Y_o$
	W_5	Y_{29}	Y_{30}	Y_{31}	Y_{32}	Y_{33}	Y_{34}	$Y_{35} \ldots Y_p$
	W_6	Y_{36}	Y_{37}	Y_{38}	Y_{39}	Y_{40}	Y_{41}	$Y_{42} \ldots Y_q$
	W_7	Y_{43}	Y_{44}	Y_{45}	Y_{46}	Y_{47}	Y_{48}	$Y_{49} \ldots Y_r$
		:	:	:	:	:	:	: :
	W_k	Y_a	Y_b	Y_c	Y_d	Y_e	Y_f	$Y_g \ldots Y_z$

Where:

$$X_k = a_1 + a_2 + a_3 + a_4 + \ldots a_k$$
$$W_k = b_1 + b_2 + b_3 + b_4 + \ldots b_k$$
$$Y_k = c_1 + c_2 + c_3 + c_4 + \ldots c_k$$

And Where:

X_k = Type of Mechanism
W_k = Type of Dispute
Y_k = Type of Outcome
a_k = Mechanism Characteristics
b_k = Dispute Characteristics
c_k = Outcome Characteristics

knowledge of the laws of social behavior which define the most effective fit between types of disputes and types of dispute processing institutions can provide policy makers and implementors with rational guidance in designing, employing, assessing, and adjusting the legal system so that it most effectively achieves its goals and functions. In short, the design for an effective system can be found in the general theory of dispute processing.

Proposition three makes claims regarding the responsibilities of policy makers, practitioners, and researchers and the use they must make of a general theory of dispute processing in executing these responsibilities. Implicit in these claims is a vision of the proper division of labor between these three vocations in a society which implements New Formalism's enlightened dispute processing policy. In such a society *researchers* are charged with identifying the properties of various types of dispute resolution institutions, with stating these properties as principles, and with interrelating them as a theory of dispute resolution. *Policy makers* use this knowledge to guide their construction of a balanced system of dispute resolution institutions. The theory tells them what type of mechanisms are best suited to process different types of disputes. It is then their job to make sure that each type of mechanism is available and accessible in the society. *Professional practitioners* locate and implement these programs so that they operate in the most effective manner. A theory of dispute resolution can help them in this responsibility in two ways. First, this knowledge can provide practitioners with rational criteria for assigning disputes to the most effective arena for their resolution. Second, this knowledge can provide practitioners with standards by which they can assure, through periodic evaluations, that operation of their programs optimize the efficiency and quality of their output. Should the institution fall short, these principles can be guides to adjust the institution.

C. *The New Formalism as a Social Project*

While writers such as Fuller, Danzig, and Sander anticipate a general theory of dispute resolution and a rational dispute processing system, they do not propose that these are already completed projects.[29] While they assume that disputes and dispute processing follow social laws, they do not pretend that human beings have as yet specified these laws as principles of knowledge. They think that a balanced, effective system of dispute processing institutions is possible, but they do not assume that such mechanisms have actually been established, or, if instituted, have been applied to those types of disputes for which they are most ideally suited.

29. "Nothing said in this Article," writes Danzig, "should be taken to mean that the time for looking has passed and that we are ready to leap. Though advanced with enthusiasm, recommendations based on so rudimentary a collection of observations as those presented here should be tested in practice (and doubtless modified) before it can be decided whether and how they should be put into effect on a large scale. This Article should be read only as a blueprint for experimentation." Danzig, *supra* note 8, at 12-13.

However, by juxtaposing the description of a flawed present and a perfect future, New Formalist assumptions can provide incentives to make its vision of the future a reality. If social scientists define their vocation as the accumulation of general knowledge, they will interpret the definition of a new field of phenomena as both an opportunity and demand for new research. If policy makers see it as their duty to fulfill social needs in the most effective manner possible, they will interpret the promise of a more effective dispute processing system as a call to action. If practitioners are charged with administering their programs as successfully as possible and with substantiating that success, they will find appealing the promise of a set of guidelines which insure effective program operation.

If social actors aspire to achieve New Formalism's aspirations then they adopt the framework's vision of the future as their goals for the present. Through this process, the framework's assumptions can shape the direction and style of social action. Researchers who adopt the New Formalist perspective will use it to define their research goals: to construct a general theory modeled on the archetype illustrated in Chart I. Policy makers will use it to define their policy objectives: to construct a balanced and effective system of dispute processing institutions by organizing new programs and by adjusting those that already exist. Practitioners will use its principles to fine-tune the operation of their programs: to maximize the effectiveness of their program by insuring that the program applies the right set of procedures.

Undertaking the realization of New Formalism's vision of the future as a social project raises questions of *strategy* and *method*. If such a theory is possible and its construction is accepted as a goal, by what method should one construct such a theory? Should it be deduced from principles or should it be induced from empirical experience? If an enlightened system of institutions can be designed using a general theory and fabrication of such system accepted as a social project, what strategy should be followed in constructing its institutions? Should the general theory be completed before designing and implementing programs? Or should the development of theory and the development of programs be concurrent enterprises?

While some New Formalists have relied on methods of deduction,[30] most argue that a verified theory can only be developed using a method of empirical observation and experimentation. "[T]he system presented here," writes Danzig, "is designed to move from existing knowledge, empirically derived, to a scheme of larger, more coordinated experiments, and then ultimately, to a higher level of implementation."[31] Sander concurs:

30. *See, e.g.*, D. LUBAN, THE QUALITY OF JUSTICE (1987); D. WATERMAN & M. PETERSON, MODELS OF LEGAL DECISIONMAKING: RESEARCH DESIGN AND METHODS (1981); Bush, *supra* note 26; Fuller, *Adjudication*, *supra* note 7; Fuller, *Mediation*, *supra* note 7; Fuller, *Collective Bargaining*, *supra* note 7; Priest & Klien, *supra* note 26.

31. Danzig, *supra* note 8, at 13.

> [T]here is so much we do not know. Among other things, we need better data than are presently available in many states on what is in fact going on in the courts so that we can develop some sophisticated notion of where the main trouble spots are and what types of cases are prime candidates for alternative resolution. We need more evaluation of the comparative efficacy and cost of different dispute resolution mechanisms. And we need more data on the role played by some of the key individuals in the process (e.g., lawyers) . . . .[32]

Adopting a method of empirical research has important consequences for the strategy pursued. Researchers cannot obtain the data they require without observing existing institutions. Since a variety of dispute resolution mechanisms have not been tried in practice, researchers are dependent on policy makers to institute untested experimental mechanisms.[33] Therefore, the selection of a method of empirical observation and experimentation requires a strategy which develops a general theory and a reformed system of dispute processing institutions concurrently.

This method and strategy requires the cooperation of policy makers, practitioners, and researchers. Since a complete and verified general theory does not yet exist, all three classes of actors pursue their projects with imperfect information. Policy makers must experiment with new or untried types of dispute processing mechanisms. When implementing these programs, practitioners must select among a range of unproved criteria to use for sorting cases and for evaluating program success. Researchers must use hypothetical typologies of mechanisms and dispute types when constructing, conducting, and interpreting experiments.

Given imperfect knowledge, all three classes of actors can facilitate their respective goals through cooperation and the exchange of information. Researchers cannot obtain the data they require to either induce general propositions or to test the validity of these propositions without observing existing institutions. Policy makers cannot design new institutional forms that promise improved dispute processing without theoretical suggestions from researchers or descriptions of what has already been tried by existing programs. Practitioners can neither assess the success of programs nor justify their continued funding without standards, measures, and methods of success provided by researchers.

In summary, if the New Formalist perspective is correct, if a grounded theory of dispute processing does not yet exist, and if a method of empirical experimentation and a strategy of concurrent development are the proper means to achieve an enlightened future, then policy makers, practitioners, and researchers must unite in a common project of *evaluation*. An evaluation is "an internal effort to define and

32. Sander, *supra* note 4, at 133.

33. Such programs are often "experiments" not only in the sense that they are new, but also in the sense that they are programs with limited jurisdiction for a provisional period of time.

improve operations over time while providing descriptive information to the field."[34] It combines the "internal" interests of policy makers and practitioners to assess and improve the success of their particular program with the "external" interest of researchers to construct scientific knowledge which is of general use to all programs.

D. *Impact Analysis*

Researchers who see the world in New Formalist terms can use evaluations to construct an empirically-grounded theory of dispute processing.[35] With the implementation of each new type of mechanism X_1 with jurisdiction for dispute type W_1, social scientists can observe the outcome Y_1 which this configuration produces. Once a sufficient number of experimental programs ($X_k + W_k$) have yielded a sufficient number of outcomes (Y_k), then the cross-comparison of these results should manifest discernable patterns of effective combinations of program type and dispute type.

This method requires periodic literature reviews of the existing body of evaluations.[36] These reviews summarize the data required for such a cross-comparison. The review identifies those evaluations that have been conducted, summarizes the type of programs that have been tried ($X_1 + W_1$), and reports the outcomes (Y_1) that have resulted from each program. These data can then be arranged according to the archetype in Chart I. Given sufficient data, such a chart should manifest those combinations of mechanism type and dispute type which yield the best results. These patterns of effective combinations represent a first approximation of the principals of a general theory.

However, in order for this research strategy to succeed, the data must be collected in a manner which insures its validity and be presented in a form which allows for cross-comparison. New Formalist assumptions do not specify how these conditions of validity and comparability can be achieved. While there are a number of social science methods available which claim to produce valid and comparable results, the method of choice in dispute processing evaluations has tended to be "impact analysis."[37]

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34. Comment by Janis Roehl at a workshop on Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes, held at the University of Wisconsin-Madison Law School. (July 14, 1987) (quoted by Christine Harrington).

35. In this paper I use the terms "researchers," "sociologists of law," and "socio-legal scholars" interchangeably. I will also use the term "social scientists." Unless otherwise specified, when I use the term "social scientists" I mean to imply social scientists involved in the study of dispute processing.

36. "Above all . . . we need to accumulate and disseminate the presently available learning concerning promising alternative resolution mechanisms, and encourage continued experimentation and research." Sander, *supra* note 4, at 133.

37. For an explicit prescription for the use of impact analyses in dispute processing, see FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW, EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981). The disputes processing literature uses social science methods other than impact analysis to insure the validity and comparability of measured outcomes. For the use of social psychological methods of experimentation

Impact analysis is a social science method whose assumptions are particularly compatible with the assumptions of the New Formalism. The objective of the New Formalist research strategy outlined above is to empirically assess the effectiveness with which a particular dispute program processes the particular disputes in its jurisdiction. Impact analysis is a set of procedures for assessing the impact of a set of activities on a set of objects in a manner which is comparable and valid. It insures the comparability of data by compiling it in a quantitative form. It insures the validity of the data by using collection procedures that are open to logical substantiation.

Larry Mohr has recently completed a formal presentation of impact analysis:

> Let us take the term *impact analysis* to mean determining the extent to which one set of directed human activities (X) affected the state of some objects or phenomena (Y_1 . . .) and—at least sometimes—determining why the effects were as small or large as they turned out to be. We usually think of X as being some established program and each Y as being one of the many possible outcomes of the program . . . .[38]

According to Mohr, every impact analysis has, implicitly or explicitly, a program theory. The theory predicts that a particular problem will be resolved by applying a particular treatment to a set of objects. It is expected that this treatment will result, by way of a set of intermediate causal links, in an outcome which remedies or improves the problem.

The purpose of the impact analysis is to construct a measure which assesses the degree to which the actual outcome of the treatment improves or fails to improve the problem at hand over the situation that would have resulted had the treatment not been applied. This measure thus tests whether the theory of treatment outcome is correct. Sometimes the impact analysis also includes measures of intervening causal conditions in order to substantiate the expected causal mechanism as well as the expected outcomes. These measures can test whether the explanation given by the theory of outcome is correct. Therefore, Mohr asserts that all impact studies have three major components:

> 1. *The theory* has component elements; impact analysis consists largely of making observations about these elements and relat-

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see Thibaut & Holden, *Discovery and Presentation of Evidence in Adversary and Non-Adversary Proceedings*, 71 MICH. L. REV. 1129 (1973); Thibaut, Walker, LaTour & Holden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972). For the use of general random surveys, see W. BRAZIL, SETTLING CIVIL DISPUTES (1985) (judicial settlement); D. KING & K. MCEVOY, NATIONAL TECHNICAL INFORMATION SERVICE, U.S. DEP'T OF COMMERCE, A NATIONAL SURVEY OF THE COMPLAINT-HANDLING PROCEDURES USED BY CONSUMERS (1976); Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873 (1981); Brazil, *Views From The Front Lines: Observations by Chicago Lawyers About the Civil Discovery System*, 1980 AM. B. FOUND. RES. J. 217 (1980); Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness*, 1980 AM. B. FOUND. RES. J. 787 (1980); *Special Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 391 (1980-81).

38. L. MOHR, IMPACT ANALYSIS FOR PROGRAM EVALUATION 1 (1988).

> ing them to one another. The primary elements are the problem, the activities, the outcome of interest (sometimes called the objective) and the subobjectives . . . .
> 2. There must be some means for determining whether the theory is correct. Whatever means one uses can be called *the design*.
> 3. There must be *a way of quantifying the program's effectiveness*. This is accomplished through statistics . . . .[39]

In both impact analysis and the New Formalism, the goal of research is to assess the extent to which a program impacts on a set of objects. In the New Formalist study of dispute processing, an existing suboptimal match between a dispute processing mechanism and dispute type is the problem and counterfactual, the experimental dispute processing program is the treatment, the disputes that fall within the jurisdiction of the program are the objects to which the treatment is applied, and the improved performance of the program in processing the dispute is the desired outcome.

Lind and Shapard's evaluation of court-annexed arbitration in three federal district courts is a good example of the use of impact analysis in the evaluation of dispute processing programs.[40] Consider the following passages from this evaluation:

> The anticipated benefits of the rules are that they will reduce both the time and expense of resolving certain civil cases and the burden these cases place on court resources . . . .[41] We can suggest two potential functions of court-annexed arbitration and consider the consequences . . . that these functions might produce. The first potential function of the rules is that they compel subject cases to obtain an advisory verdict through an informal, trial-like proceeding. This advisory verdict might resolve the case prior to trial, either by being accepted by the parties or by serving as the basis of a post-hearing settlement. The second potential function of the rules is that they set a time limit on preparing the case for the arbitration hearing, by requiring that the hearing be held within about seven months from the time the case is filed . . . .[42] A prompt time schedule for the arbitration hearing provides a motivation for counsel to prepare their cases promptly, and the expense of attorney time spent in the arbitration hearing may motivate settlement in advance of the hearing. If the case goes to arbitration, the hearing itself may provide an excellent basis for assessing the strengths and weaknesses of the case, and the arbitrator's award may be regarded as a reliable estimate of the likely verdict at trial; both sorts of information may provide a sound foundation for negotiated settlement. This may lead to acceptance of the arbitration award, or to settlement soon after the

39. *Id.* at 2.
40. A. LIND & J. SHAPARD, *supra* note 2.
41. *Id.* at 5.
42. *Id.* at 8.

award is issued.[43]

> The most obvious way in which the arbitration rules may reduce the time from filing to termination of subject cases is if all, or nearly all, cases reaching an arbitration hearing were terminated by acceptance of the arbitration award *and* if a substantial number of cases reached an arbitration hearing in less time than it would normally take to resolve them.[44]
>
> If the rules provide a realistic and prompt time frame for the preparation of cases, or if the arbitration hearings produce reliable judgments of case value, then there is reason to hope that the rules will expedite settlement. The evaluation attempts to determine the effects of the rules on time from filing to termination by two methods: (a) direct comparison of the duration of arbitration cases with an estimate of what the duration would have been in the absence of the rule, and a survey of attorney perceptions of the effects of the rule on case duration.[45]

In this *program theory*, the *problem* is "the burden" which civil cases put on the courts. The *treatment* is (1) compulsion to attend an arbitration hearing and (2) a limit on the time period within which the hearing must take place. These treatments are applied to the *objects* "federal personal injury or contract cases involving damages of not more than $100,000." The *ultimate outcome* is to reduce the burden which civil cases place on the courts. The *outcome of interest* is to have nearly all arbitrated cases end with an arbitrated award reached in less time than a fully adjudicated trial. The *counterfactual* is the time and expense of resolving a civil case in the absence of arbitration and its time limits. The *subobjectives* include (1) early settlement, resulting from (2) an early framework for settlement, (3) acceptance of an early advisory verdict, or (4) parties experiencing the cost of attorneys time earlier in the process due to (5) attorneys preparing their cases earlier in the process. There are two *quantitative measures*. First, a measure of the average duration of arbitrated and non-arbitrated cases is used to assess the outcome of interest. Second, a measure of attorney perception regarding whether arbitration contributed to early settlement is used to assess the theory's explanation of why the outcome of interest occurred.

E. *The New Formalism as Ideal Type*

The reader should not expect to find the New Formalist perspective present in published evaluations with the conceptual purity of the description above. It will not be found in its totality within the head of any concrete individual or in the argument of any written evaluation. However, the reader will find *elements* of this perspective in most of the dispute processing literature. These New Formalist elements will be found mixed in with elements from other perspectives on dispute process-

43. *Id.* at 10.
44. *Id.* at 8-9.
45. *Id.* at 11-12.

ing.[46] In other words, my description of "the New Formalist perspective" should be understood as an *ideal type*.[47]

If the New Formalism is a sometimes present and sometimes absent set of assumptions, then it is instructive to consider at what times it is present and at what times it is absent in the body of published evaluations. My presentation above suggests that New Formalist assumptions define a project for knowledge, provide a set of procedures through which this knowledge should be pursued, provide a set of orienting concepts to be used in presenting the results of these procedures, and explain how the results from one evaluation should combine with the results of other evaluations to construct general knowledge regarding dispute processing. In short, these assumptions *promise* that if experience is digested in a particular form in the present, it will yield a definitive type of result in the future. Specifically, it will yield an empirically-grounded theory of dispute processing that can be used as a rational ground for enlightened policy-making.

Therefore, New Formalist assumptions most frequently appear in the disputes processing literature at those moments when the author needs some guidance as to which experiences will prove to be significant and as to how such experiences can be reported so as to have an impact on future work. Thus, the real impact of the New Formalist perspective can be found in *the promises it makes*. These promises impact on social action by motivating and shaping current perceptions. It encourages policy makers, practitioners, and evaluators to accord significance to certain of their experiences of experimental programs and to ignore others as insignificant. New Formalism influences the experiences that evaluators report, the manner in which these experiences are patterned, and the form in which they are presented as published evaluations. Further, these anticipations of the future explain to those who read and review published evaluations how to cross-compare and synthesize them into a body of knowledge. When one constructs or reads a literature review, New Formalist assumptions lead one to see certain results in cer-

46. *See, e.g.*, C. HARRINGTON, SHADOW JUSTICE (1985); Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE 267 (1982); Dezalay, Negotiated Justice as Renegotiation of the Division of Tasks Within the Field of Law: The French Example, (June 15, 1987) (paper presented at the Conference on Dispute Resolution Research in Europe, Washington, D.C.); Dezalay, 'The Forum Should Fit The Fuss . . .': The Economics and Politics of Negotiated Justice: A Historical Approach (December 4, 1987) (paper presented to the Amherst Seminar, Amherst, Mass.); Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980-81); Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS L. REV. 623.

47. According to Weber, an ideal type:

> . . . is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct. In its conceptual purity, this mental construct cannot be found empirically anywhere in reality . . . . Historical research faces the task of determining in each individual case, the extent to which this ideal-construct approximates to or diverges from reality . . . .

WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 90 (1949) (emphasis added).

tain forms as significant and open to cross-comparison and to see other results as idiosyncratic and insignificant.

III. A New Formalist Literature Review: We Do Not Know What We Think

In this section, I will assess New Formalism's claims by constructing a review of the results collected from the research projects it has inspired. New Formalist assumptions propose that the most crucial features of an experimental program are the type of mechanism used, the type of dispute to which it is applied, and a measure of the success of the outcome this match generates. They promise that if this essential information is extracted from a sufficient number of experiments (evaluations), the pattern of results should reveal matches which achieve optimal results. Organizing the experimental results in this form should yield a general theory of dispute processing.

In the following pages, I will attempt to organize actual results from published impact studies in this manner. As the Appendix demonstrates, there are now a number of impact studies of dispute processing programs that have been completed and reported. If the premises and promises of the New Formalism are correct, then it should be possible to use these premises to organize published impact study results. If there are a sufficient number of results, organizing these results in the form of Chart I should reveal which combinations of mechanism and dispute type are effective and which are ineffective. The specification of effective combinations will constitute the postulates of a general theory.

This exercise will critically assess the New Formalist research project in three ways. First, it will assess the extent to which this research project is complete. By organizing the results reported in the form dictated by New Formalism's premises, I will show the extent to which the universe of process types, dispute types, and process/dispute matches have been tried.

Second, this exercise will make manifest some of the difficulties involved in completing the New Formalist project. The New Formalism makes certain promises about what its research project will yield at its completion. However, it does not identify the difficulties encountered in getting there nor does it give instruction on how to overcome these difficulties. In constructing a New Formalist review of impact study results, I will come across a number of the difficulties which must be addressed before the New Formalist project can be completed. As will be seen, overcoming these difficulties often requires making certain assumptions. If these assumptions are unacceptable, then completing the New Formalist research project becomes difficult.

Finally, this exercise will test the veracity of New Formalism's premises. As visions or promises of the future which orient our understanding, perspectives such as the New Formalism are rarely tested. However, since New Formalism's premises make certain predictions about patterns which should emerge in empirical results, we can test the

veracity of these premises by seeing whether the pattern of outcomes they predict in fact occur in published results. In using New Formalist assumptions to organize the existing knowledge in the field of dispute processing evaluations, I am simultaneously "testing" the predictive power of these assumptions.

For this exercise, I will assume that New Formalism's premises are correct descriptions of the laws of social action. My purpose in this section is not to criticize these premises outright, but to examine the difficulties one encounters if one assumes that these premises are correct and attempts to follow through on their promises. I am also assuming the results reported by impact studies to be "facts." That is, I assume that the outcomes reported are accurate descriptions of the outcomes which "actually" occur. This means, first, that there have been no errors in measuring or reporting the outcomes and, second, that the measurement of outcomes is not subject to the particular perspective or biases of the evaluator. It is assumed that any evaluator who replicates these impact studies using acceptable scientific procedures would obtain the same results. In Section IV below I will once again relax these assumptions.

A. *The Extent of the Existing Data*

In order to organize impact study results in the manner called for by New Formalist assumptions and illustrated in Chart I, I must specify a typology of dispute resolution mechanisms (X_k), a typology of disputes (W_k), and a set of comparable measures (c_k) of program outcomes (Y_k). New Formalist assumptions presume that the correct typologies and measures are already defined by the laws of social action. Unfortunately, the dispute processing field has yet to ascertain these "true" taxonomies and measures. Consequently, evaluations of dispute processing programs must be used not only for measuring outcomes, but also for inferring typologies or for confirming theoretically-hypothesized typologies.

This lack of knowledge regarding proper typologies and measures creates an unfortunate indeterminacy in the proper interpretation of evaluation results. Assuming the principles of New Formalism are true, a more effective outcome indicates one or both of the following. First, a more effective outcome indicates that the mechanism or dispute jurisdiction being evaluated more closely approximates the characteristics of a pure type then those programs which yield less effective results. In this case, the program is effective because it maintains the integrity of the pure process or dispute type. In other words, the effective outcome indicates that in designing the program, the administrator has "happened" to apply the true typology of mechanisms or the true typology of disputes as defined by the, as yet unknown, laws of social action.

Second, a more effective outcome indicates that the correlation of mechanism and dispute type provided by the program approximates more closely an ideal match of mechanism and dispute type than those

with less effective results. In this case, the program is effective because the program has applied a mechanism to its appropriate subject; the program conforms to the laws of social action which govern dispute processing.

Therefore, charting these outcomes tests two elements of existing knowledge simultaneously: the accuracy of the taxonomies and the effectiveness of the different correlations they define.[48] While this simultaneity is not desirable from the standpoint of scientific research design, it is unavoidable because in practice it is impossible to separate these effects.

Given that the "true" taxonomies are not known, which available approximations should be used in charting impact study results? There are two possibilities: the best taxonomy currently developed by dispute processing theorists or a compilation of the types actually used by the programs evaluated.

Mechanism Types (X_k)

It would seem that comparison of tested outcomes requires using a typology constructed from the mechanisms and jurisdictions actually tested. Unfortunately, a review of the existing evaluations literature reveals a wide variety of program types. Arbitration, for example, may be court-annexed or independent of the court, may have mandatory participation or be voluntary, may sanction or not sanction parties for refusing to accept the arbitrated award, may or may not have a time limit within which the hearing takes place, and so on. If programs that differ in institutional features such as these are treated as distinct types of mechanisms, then the catalogue of mechanism types quickly multiplies to a large number of types with one entry each.

However, if the premises of the New Formalism are taken seriously, then mechanism categories need not be multiplied in this manner. These premises suggest that dispute processing techniques can be classified into separate and distinct types by identifying the essential characteristics of the program. While individual arbitration programs may vary in some of their institutional features, all arbitration programs should share certain important and essential features. And it is these features which make this type of mechanism well suited to address particular classes of disputes. Therefore, one can utilize a theoretically-derived taxonomy of mechanism types where types are distinguished by important differences in their essential characteristics if the programs reported lend themselves to re-classification within such categories.

48. If I knew and used the "true" taxonomies, then charting the outcomes would only test the optimal correlations between their categories. However, since we do not yet have a verified general theory of these social laws, I must use approximations to the "actual" taxonomies. It is remotely possible that I am in fact using the "true" categories and do not know it. But since I cannot be sure, I must assume that I am using the outcomes reported by actual impact studies to test both the accuracy of the taxonomy and the efficiency of the correlation simultaneously.

In the introduction to their casebook on dispute processing, Goldberg, Green and Sander[49] identify four types of mechanisms (adjudication, arbitration, mediation, negotiation) and five "hybrids" (private judging, neutral expert fact finding, mini-trial, ombudsman, summary jury trial) on the basis of seven characteristics (voluntariness of the proceeding, binding nature of the agreement, presence and responsibilities of the third party, degree of formality of the proceeding, nature of the proceeding, and whether the proceeding is public or private). This definition of nine mechanism types (X_k) based on seven essential characteristics (a_k) is reproduced in Table I. While the programs evaluated by impact studies vary widely in design, most are labeled or characterized by the program evaluators as one of these nine mechanism types. Thus, in choosing a taxonomy of mechanisms, the two sources of such a taxonomy (theoretically-defined or practically-defined) appear compatible.

Dispute Types (W_k)

It is more difficult to select a taxonomy of dispute types. One reason for this difficulty is the lack of any concrete proposals for such a taxonomy by theorists in the field. Once again Goldberg, Green and Sander provide the best lead. While they do not propose specific categories of disputes (W_k), they do identify six characteristics for distinguishing disputes by type (b_k):

1. The relationship between the disputants (whether it is ongoing or not).
2. The nature of the dispute (whether it is polycentric, whether it involves a novel legal issue, etc.).
3. The amount at stake.
4. The speed of processing the dispute.
5. The cost of processing the dispute.
6. The power relationship between the parties (whether one disputant has significantly less bargaining strength).[50]

If researchers have been slow in constructing a taxonomy of dispute types, policy makers have been even slower in experimenting with a wide range of theoretically-significant dispute types. A review of existing impact studies reveals that evaluated programs draw their jurisdictional boundaries in two general ways. The most common characteristic for drawing jurisdictional boundaries is the jurisdictional boundary of a court ("criminal cases," "civil cases," or "minor civil cases") usually further restricted by a limit as to the amount at stake. Other programs define their jurisdictions according to the subject under dispute. Some of these subjects are defined using legal categories such as "medical malpractice" while others use non-legal categories such as "neighborhood disputes," "consumer disputes," or "employment disputes." Many evaluations specify categories within the program's broad jurisdic-

49. S. GOLDBERG, E. GREEN, & F. SANDER, *supra* note 6, at 7-10.
50. *Id.* at 10.

tions, but few measure program outcomes separately for each of these subdivisions.

Therefore, there is an unfortunate incompatibility between a theoretically-significant taxonomy of dispute jurisdictions ("dispute types") and the taxonomy of actually-existing jurisdictions. Jurisdictions actually used in evaluated programs are self-defined using only one of Goldberg, Green, and Sander's six dispute characteristics ("amount at stake"), and it is difficult if not impossible for the reviewer to code evaluated programs using their other five characteristics. Since I must depend on actually existing programs as the source of my data, I must use the jurisdictional limits defined by the authorizing rules of the programs to construct my typology of disputes.[51]

Mapping Combinations Tested

Using the single typology of mechanism types and the two typologies of dispute types, I have constructed *two* specifications of Chart I. In Chart II I have coded existing impact studies which define their dispute jurisdiction by court and case value. In Chart III I have coded existing impact studies which define their dispute jurisdiction by the substantive nature of the case. In both charts the type of mechanism is defined using Goldberg, Green, and Sander's nine-fold typology. Charts II and III illustrate those combinations of mechanism type and dispute type that have been tested and "scientifically" measured by existing evaluations. In other words, they illustrate the extent of the data presently available to the field.

These charts demonstrate that existing impact studies do not provide the field with sufficient data to construct a general theory of dispute processing as envisioned by the New Formalist perspective. At the present time, there has not been sufficient experimentation with either mechanism types or dispute types. Only two mechanisms have been the subject of more than a handful of impact studies: mediation and arbitration. Arbitration has been experimented with exclusively in civil cases. The types of cases to which arbitration has been applied have been limited mainly to those defined in terms of one general dispute characteristic: amount at stake (although this single dispute characteristic has been specified at varying amount limits). Mediation has been applied to both civil and criminal cases. In some programs, it has been applied to a single type of substantively-defined case. These studies of mediation and

51. The difficulty of integrating a taxonomy of dispute types based on jurisdictions actually used with a taxonomy based on theoretically-defined case characteristics is a major obstacle in New Formalism's research strategy. The New Formalism suggests that there are essential types of mechanisms and disputes, and that it is possible to know what these essential types are. Evaluations and literature reviews of evaluations are often written as if each new evaluation brings us one step closer to revealing the character of these essential types. But if the definition of jurisdictional limits using valuation, severity, or substantive legal types is an incorrect strategy for specifying the essential types of disputes, then the New Formalist research project is in trouble: for there is no promise that in the future experimental programs will test jurisdictions drawn using theoretically-identified case characteristics.

CHART II
A Mapping of Sources of Evaluations Data

TYPE OF DISPUTE [W]	TYPE OF MECHANISM [X]								
	Adjudication	Arbitration	Mediation	Negotiation	Private Judging	Neutral Expert Fact-Finding	Mini-Trial	Ombudsman	Summary Jury Trial
ALL CIVIL CASES (Unspecified)									Jacoubovitch, 1982 Lambros, 1985
CIVIL CASES WITH CASE VALUES:									
Under $150,000		Lind, 1983							
Under $25,000	Seltzer, 1980	Weller, 1982a							
Under $20,000		Cerino, 1984							
Under $15,000		Hensler, 1981							
		Hensler, 1983							
		Rolph, 1984							
Under $10,000		Adler, 1983	Shuart, 1983						
			Shuart, 1985						
Under $6,000		Weller, 1982a							
		Weller, 1982b							
Under $2,000		Rosenberg, 1961							
Under $1,000		Kritzer, 1983							
		Bartolini, 1957							
Under $800			McEwen, 1981						
			McEwen, 1984						
			Vidmar, 1987						
MINOR CIVIL (Unspecified)			Cook, 1980						
			Roehl, 1982						
			Bales, 1980						
MINOR CRIMINAL (Unspecified)			Connor, 1977						
			Cook, 1980						
			Roehl, 1982						
			Felstiner, 1978						
			Felstiner, 1980						
			Felstiner, 1982						
			Snyder, 1978						
			Davis, 1982						

CHART III
A Mapping of Sources of Evaluations Data

TYPE OF DISPUTE [W]	TYPE OF MECHANISM [X]								
	Adjudication	Arbitration	Mediation	Negotiation	Private Judging	Neutral Expert Fact-Finding	Mini-Trial	Ombudsman	Summary Jury Trial
Consumer				Ross, 1975 Ross, 1978		Whitford, 1974		Hanning, 1977	
Education			Singer, 1985						
Employment			Wolf, 1985						
Family			Pearson, 1981 Pearson, 1982 Pearson, 1984						
			Maddi, 1977 Bahr, 1981						
			Merry, 1985						
Medical Malpractice		Heintz, 1977							
Bodily Injury				Ross, 1970 Ross, 1975 Ross, 1978					

arbitration provide the best hope for using empirical data to make general distinctions between dispute types on the basis of dispute characteristics. There is insufficient data regarding the other seven mechanism types to draw general distinctions.

B. *Measuring Outcome: Problems of Validity and Comparability*

While Charts II and III illustrate the combinations of dispute and mechanism type for which impact studies exist, they do not actually report the results of these studies. In order to construct a general theory of dispute processing, one must report the outcomes determined by impact studies in a manner which permits cross-comparison of results. Only by measuring the effectiveness of each outcome and comparing it with the outcomes of other studies can one discern patterns of effectiveness and ineffectiveness across different combinations of mechanism and dispute type.

The New Formalism defines increased effectiveness of dispute processing as the ultimate outcome desired from experimental programs. New Formalism's archetypical general theory (summarized in Chart I) presumes that this outcome can be measured directly (as Y_k). If this can be done, then patterns of effectiveness across different combinations of mechanism and dispute type can be observed.

Unfortunately, effectiveness cannot be measured directly. In fact, it is difficult to imagine what an "effective" outcome would look like, much less how it could be measured. In practice, evaluators must always operationalize this ultimate outcome as a number of more specific outcomes of interest. A review of the existing evaluations literature shows some agreement on seven outcomes of interest. An effective dispute processing program will *minimize the cost* of processing disputes, *minimize the time* it takes to process a dispute, *maximize the permanence* of the resolution obtained, provide a dispute resolution process which is more *fair*, provide greater *party satisfaction* in the process, process disputes in a more *equitable* manner, and will insure that dispute processing and the resolutions it produces contribute to *the strengthening of community*.[52] These outcomes of interest may be thought of as the "general characteristics of outcomes" expressed as "c_k" in Chart I. These general characteristics constitute the ultimate outcome "effective system operation."[53]

While the operationalization of program effectiveness (Y_k) as seven outcomes (c_k) of interest gets us closer to a practical measure of effectiveness, it does not guarantee that different impact studies will use the same measures. Does this invalidate any cross-comparison of results?

The comparability of outcomes raises a number of issues. First, are

52. For a more complete discussion of these outcomes, see Bush, *supra* note 26, and Merry, *supra* note 10.

53. The presumption is that the counterfactual—the existing system of dispute processing institutions—does not minimize cost, speed of processing, permanence of resolution, fairness, equity, or strength of community because it is not designed to process each type of dispute using the type of mechanism most ideally suited to address it.

the various impact studies being compared testing the same outcomes of interest? Second, does the research design of each evaluation insure equal validity of results? Third, are the outcomes assessed using measures which are either the same or comparable? The three major components of impact analysis—program theory, research design, and quantitative measures of assessment—are each designed to address these three issues within a particular program evaluation. In constructing a review of various program results, one must address these same three issues as they apply to the cross-comparison of impact studies.

The Program Theory

In order to insure comparability, the various evaluations must be examined to insure that they share common or compatible program theories. I have demonstrated that program theories include a problem, a treatment (the program), an ultimate outcome (effectiveness) which is not measured, and various outcomes of interest (the objectives) which are measured. The New Formalist program for knowledge does not require that all problems, treatments, or outcomes be the same; it does require that all problems, treatments, or outcomes be subject to classification using a consistent typology of problems, treatments, and outcomes. I have established such a consistent set of typologies in the discussion above. The typology of problems is the typology of disputes (W_k); the typology of treatments is the typology of disputes processing mechanisms (X_k); and the typology of outcomes is the various measures of program effectiveness (Y_k).

Research Design

The degree to which one can place stock in the validity of particular program results depends on the validity of the procedures followed in executing the program and in collecting the data. The issue here is not whether each program uses the same set of procedures, but whether the procedures followed are equally valid. Different procedures can yield equally valid results. Further, differences in the validity of results are not necessarily barriers to the comparability of results. While variations in validity across results adds to the uncertainty of the overall pattern in effectiveness, it does not prevent the comparison of individual outcomes. Consequently, this problem is similar to the problem of specifying the types of mechanisms and the types of disputes: it adds to the uncertainty of overall results, but it does not bar one from constructing some provisional findings.

Quantified Measures

Given the specification of seven outcomes of interest, evaluation results should be compared using these outcomes. Ideally, each impact study would assess all seven outcomes of interest using a standardized quantitative measure for each outcome. The seven standardized meas-

ures for each outcome of interest would then be combined into a single measure of the program's overall effectiveness.

The operationalization of "effectiveness" into outcomes of interest coupled with the small number of typical data sources available to an evaluator produces the appearance that these seven objectives of interest can themselves be measured directly. For example, it would seem a rather straightforward exercise to measure the time savings of using a more appropriate dispute processing mechanism. Since almost all programs record the date of case filing and the date a case is resolved, average case disposition time would appear to be a relatively easy measure to obtain.[54]

In fact, it is more difficult then it appears to obtain measures of these seven outcomes which are directly comparable. Each outcome of interest is mixed with a host of other determinative forces to constitute program results. In evaluating a particular experiment, a method such as impact analysis is needed to discern each outcome of interest from other aspects of program results. A review of existing evaluations shows a variety of measures used for each outcome of interest. This suggests that there are no absolute measures of time savings, cost savings, fairness, and others, just as there are no absolute measures of effectiveness. Consequently, measures of the seven outcomes of interest are indirect and must make implicit or explicit comparisons with a counterfactual. Hence, the measures reported by impact studies are not absolute assessments of program success; rather, each impact study compares the degree to which its treatment group achieves an outcome of interest as compared to its own control group.

However, this need not be a problem in comparing results. The New Formalist perspective assumes that each of these outcomes is determined by the same underlying laws of social behavior. Therefore, an overview of various independent measures should demonstrate an overall pattern of outcomes which reveals their common determination by the same laws of social action. In fact, the variety of different measures of outcome used by the various impact studies should provide a more convincing confirmation of these underlying laws. Webb, Campbell, Schwartz and Sechrest write:

> Once a proposition has been confirmed by two or more independent measurement processes, the uncertainty of its interpretation is greatly reduced. The most persuasive evidence comes through a triangulation of measurement processes. If a proposition can survive the onslaught of a series of imperfect measures, with all their irrelevant error, confidence should be placed in it.[55]

In short, while the variety of measures produced by different studies

54. This accounts, perhaps, for the failure of many impact studies to explicitly identify their counterfactual. If an evaluator believes that he is measuring his objective of interest directly, then he feels no need to contrast this measure with a standard for comparison.

55. E. WEBB, D. CAMPBELL, R. SCHWARTZ & L. SECHREST, UNOBTRUSIVE MEASURES: NORMATIVE RESEARCH IN SOCIAL SCIENCE 4 (1973).

CHART IV
Specification of a Theory of Dispute Processing
as Defined by the New Formalist Perspective

		Type of Mechanism						
		X_1	X_2	X_3	X_4	X_5	X_6	$X_7 \ldots X_k$
Type of Dispute	W_1	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	$Y_7 \ldots Y_k$
	W_2	Y_8	Y_9	Y_{10}	Y_{11}	Y_{12}	Y_{13}	$Y_{14} \ldots Y_m$
	W_3	Y_{15}	Y_{16}	Y_{17}	Y_{18}	Y_{19}	Y_{20}	$Y_{21} \ldots Y_n$
	W_4	Y_{22}	Y_{23}	Y_{24}	Y_{25}	Y_{26}	Y_{27}	$Y_{28} \ldots Y_o$
	W_5	Y_{29}	Y_{30}	Y_{31}	Y_{32}	Y_{33}	Y_{34}	$Y_{35} \ldots Y_p$
	W_6	Y_{36}	Y_{37}	Y_{38}	Y_{39}	Y_{40}	Y_{41}	$Y_{42} \ldots Y_q$
	W_7	Y_{43}	Y_{44}	Y_{45}	Y_{46}	Y_{47}	Y_{48}	$Y_{49} \ldots Y_r$
		:	:	:	:	:	:	: :
	W_k	Y_a	Y_b	Y_c	Y_d	Y_e	Y_f	$Y_g \ldots Y_z$

Where:

X_k = Type of Mechanism = adjudication, arbitration, mediation, negotiation, private judging, neutral expert fact-finding, minitrial, ombudsman, and summary jury trial.

W_k = Type of Dispute = civil cases under $150,000, civil cases under $50,000, civil cases under $25,000, etc., *or* consumer disputes, education disputes, employment disputes, etc.

Y_k = Type of Outcome = more effective vis-a-vis counterfactual, less effective vis-a-vis counterfactual.

a_k = Mechanism Characteristics = voluntariness, bindingness, third party type, degree of formality, nature of proceeding, nature of outcome, private or public proceeding.

b_k = Dispute Characteristics = undefined.

c_k = Outcome Characteristics = time, cost, party satisfaction, equity, fairness, permanence, community.

CHART V
Effectiveness of Outcome Measures From Evaluations of Family Mediation Programs

EFFECTIVENESS OF OUTCOME [Y]		MEDIATION	
Outcome Characteristic	Measure of Effectiveness Characteristic	More Effective Vis-à-Vis Counterfactual	Less Effective Vis-à-Vis Counterfactual
Time	Average Disposition Time		
Cost	Average Cost per Case for the Court System	Pearson, 1981	
Cost	Average Cost per Case for the Disputants	Bahr, 1981	Pearson, 1982
Time/Cost	Court Backlog	Merry, 1985	Maddi, 1977
Party Satisfaction	Disputant and/or Counsel Satisfaction with Outcome	Pearson, 1984 Bahr, 1981	
Party Satisfaction	Disputant and/or Counsel Satisfaction with Process	Merry, 1985 Pearson, 1981, 1982, 1984	
Equity	Equity of Access Across Disputant Characteristics		Pearson, 1981
Equity	Equality of Outcome Across Disputant Characteristics	Pearson, 1981	
Fairness	Disputants and/or Counsel Perceive Program to be a Fairer Process	Merry, 1985 Pearson, 1984 Bahr, 1981	
Permanence	Longer Lasting Resolution	Merry, 1985 Pearson, 1982, 1984	
Community	Strengthens Community		

does not allow one to compare fine differences in the degree to which effectiveness is achieved, it does permit one to stand back and compare crude patterns in these reported outcomes. A rough standardization across studies can be achieved by determining in each case whether or not the application of the treatment improved the outcome of interest as compared to the counterfactual case. Reducing outcome measures to "yes or no" answers facilitates a search for patterns in outcomes. The one drawback to this approach is that it does not permit the aggregation of outcome-of-interest measures into a single measure of overall program effectiveness.

C. *Mapping Outcomes*

In attempting to organize evaluation results in the form called for by a New Formalist theory of dispute processing, I have had to accept a number of assumptions. I have accepted:

1. The three propositions which constitute the New Formalist perspective.
2. The premises of impact analysis.
3. That the essential types of dispute processing mechanisms (X_k) are the eight identified by Goldberg, Green, and Sander.
4. That the essential types of disputes (W_k) include, correspond to, or fall within (but are not necessarily exhausted by), the jurisdictional limits used by existing programs.
5. That the general characteristics of system effectiveness (c_k) assessed by existing evaluations can be summarized as cost, time, permanency, fairness, party satisfaction, equity, community.
6. That different statistical measures of the same outcome of interest can be standardized by expressing each outcome as either "improvement over its counterfactual" or "no improvement over its counterfactual."[56]

Chart IV illustrates how these assumptions give specification to the general theory of dispute processing provided in Chart I.

If these six assumptions are acceptable, then the outcomes of published impact studies can be compared by coding them onto Chart IV. Unfortunately, actually producing such a chart is difficult given the fact that the effectiveness of each program involves seven or more measures. Therefore, I have taken two steps to make my presentation of these results more manageable. First, I have only coded outcome measures for arbitration and mediation because Charts II and III show that these are the only mechanism types which have a sufficient number of data points (individual outcome measures from individual programs) to manifest any pattern of outcomes. Second, in coding these results I have eliminated differentiation of evaluations by dispute type. These two steps

56. We should also keep in mind that: (1) our categorization of types of mechanisms and types of disputes may be slightly off; and (2) the validity of various outcomes vary because the validity of the research designs used vary.

allow me to present a manageable summary of empirical measures of outcomes in Chart V.

While I cannot actually present a version of Chart IV fully coded with the outcome measures from all evaluated mediation and arbitration programs, Charts II, III, and V provide the reader with the raw materials she needs to construct such a chart herself. To construct a fully coded version of Chart IV or one of its cells, use Charts II and III to identify the evaluations that have actually tested a given combination of mechanism and dispute type. Then use Chart V to identify the measures taken by each evaluation identified.

For purposes of illustration, I will present a coding of measures for a single combination of mechanism and dispute type (a single cell in Chart III): evaluation results of programs which have applied mediation to family disputes. These evaluations of family mediation are compared in Chart VI.

With the help of Chart VI, we can use the empirical results from evaluations of family mediation to test several of the New Formalism's key assumptions. If New Formalist assumptions are correct, then it would be expected that Chart VI would demonstrate certain patterns in outcomes.

First and foremost, New Formalist assumptions predict that several programs with the same or similar mechanism and jurisdiction features should yield the same results. However, Chart VI demonstrates that this expectation is not substantiated by impact studies of family mediation. In Chart VI, we see that programs with the same general mechanism and the same general jurisdiction yield opposite results. Bahr,[57] Merry & Rocheleau[58] find a reduction in costs vis-a-vis their counterfactual while Pearson & Thoennes[59] and Maddi[60] find an increase in costs vis-a-vis their counterfactual.

Second, New Formalist assumptions predict that a given program should yield consistent results across the seven outcomes of interest. Contrary to these expectations, Chart VI demonstrates differences across measures for a given program. Pearson & Thoennes[61] find a less efficient cost vis-a-vis their counterfactual but more efficient party satisfaction vis-a-vis their counterfactual. Similar inconsistencies can be found by comparing results from impact studies evaluating other combinations of mechanism and jurisdiction type.

57. Bahr, *Mediation is the Answer*, 3 FAM. ADVOC. 32 (1981).

58. S. MERRY & A. ROCHELEAU, MEDIATION IN FAMILIES: A STUDY OF THE CHILDREN'S HEARINGS PROJECT (1985).

59. Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC. 26 (1982).

60. Maddi, *The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage*, 13 J. FAM. L. 767 (1977).

61. Pearson & Thoennes, *supra* note 59.

CHART VI
Effectiveness of Outcome Measures For Arbitration and Mediation Programs

EFFECTIVENESS OF OUTCOME [Y]		ARBITRATION		MEDIATION	
Outcome Characteristic	Measure of Effectiveness Characteristic	More Effective Vis-à-Vis Counterfactual	Less Effective Vis-à-Vis Counterfactual	More Effective Vis-à-Vis Counterfactual	Less Effective Vis-à-Vis Counterfactual
Time	Average Disposition Time	Adler, 1982 Bartolini, 1957 Kritzer, 1983 Lind, 1983 Rolph, 1984 Weller, 1982	Weller, 1982	Cook, 1980 Wolf, 1985 Roehl, 1982	
Cost	Average Cost per Case for the Court System	Bartolini, 1957 Rolph, 1984	Kritzer, 1983	Pearson, 1981 Wolf, 1985	Connor, 1977 Cook, 1980 Felstiner, 1980 Felstiner, 1982
Cost	Average Cost per Case for the Disputants	Barolini, 1957 Hensler, 1981 Weller, 1982		Bahr, 1981 Shuart, 1983	Pearson, 1982 Wolf, 1985
Time/Cost	Court Backlog	Lind, 1983 Rolph, 1984 Rosenberg, 1961	Hensler, 1981 Weller, 1982	Merry, 1985 Shuart, 1983	Cook, 1980 Conner, 1977 Maddi, 1977 Roehl, 1982 Snyder, 1978
Party Satisfaction	Disputant and/or Counsel Satisfaction with outcome	Bartolini, 1957 Weller, 1980 Cerino, 1984 Lind, 1983		Bahr, 1981 Connor, 1977 Pearson, 1984 Roehl, 1982 Vidmar, 1987 Wolf, 1985	
Party Satisfaction	Disputant and/or Counsel Satisfaction with Process	Alder, 1983 Bartolini, 1957 Weller, 1982 Lind, 1983	Weller, 1982	McEwen, 1981, 1984 Merry, 1985 Pearson, 1981,1982,1984 Roehl, 1982 Wolf, 1985	Davis, 1982

CHART VI - continued

EFFECTIVENESS OF OUTCOME [Y]		ARBITRATION		MEDICATION	
Outcome Characteristic	Measure of Effectiveness Characteristic	More Effective Vis-à-Vis Counterfactual	Less Effective Vis-à-Vis Counterfactual	More Effective Vis-à-Vis Counterfactual	Less Effective Vis-à-Vis Counterfactual
Equity	Equality of Access Across Disputant Characteristics	Adler, 1983 Hensler, 1981			Pearson, 1981
Equity	Equality of Outcome Across Disputant Characteristics	Cerino, 1984	Adler, 1983 Rosenberg, 1961 Hensler, 1981 Weller, 1982	Pearson, 1981	Cook, 1980 Davis, 1982 Felstiner, 1980 Wolf, 1985
Fairness	Disputants and/or Counsel Perceive Program to be a Fairer Process	Adler, 1983 Cerino, 1984 Weller, 1982 Hensler, 1981 Weller, 1982		McEwen, 1981, 1984 Merry, 1985 Pearson, 1984 Bahr, 1981 Roehl, 1982	Wolf, 1985
Permanence	Longer Lasting Resolution or Lower Recidivism			Cook, 1980 Davis, 1982 McEwen, 1981, 1984 Merry, 1985 Pearson, 1982, 1984 Roehl, 1982 Snyder, 1978	Conner, 1977
Community	Strengthens Community				Roehl, 1982

D. *Conclusions*

Because New Formalist assumptions present themselves as descriptions of reality, we often fail to recognize that these assumptions are just that: assumptions. Further, because these assumptions call for an empirical research strategy, we often fail to recognize that *the assumptions themselves* are rarely subjected to this empirical testing.

While the inconsistency of results manifested Chart V, together with similar inconsistencies identifiable through Chart VI, do not definitively disprove the assumptions of the New Formalism,[62] such discrepancies between the pattern of results anticipated by New Formalist assumptions and the pattern of results actually found in existing impact studies highlights the importance of questioning and testing New Formalism's assumptions. We should make these claims explicit and examine their veracity before we allow them to chart our reform projects for the future.

IV. NEW FORMALISM'S BLIND SPOTS: WE DO NOT THINK WHAT WE KNOW

I have argued that evaluators use the New Formalist perspective to frame their experience of particular programs and to relate the significance of these experiences to their readers. In the preceding section, I used this perspective to frame a review and synthesis of various evaluation results. In so doing, I accepted without question the truthfulness of New Formalism's assumptions. In this section, I will demonstrate that framing our experience with this perspective narrows our field of vision and blinds us to the significance of certain experiences and insights which fall outside its boundaries. In so doing, I will call into question the usefulness and the truthfulness of New Formalism's assumptions.

A. *How New Formalism Structures Program Experience*

When an evaluator or her readers adopt a New Formalist perspective, their experience of a program is framed in a particular way. This framing conforms that experience to the principle elements of impact analysis: program theory, research design, and quantified measures.

Program Theory

The dispute processing field brings together groups with different agendas: court administrators are concerned with the time and cost involved in processing cases and with the court backlogs that delays create; liberal legal practitioners are concerned that traditional adjudica-

62. They can be explained in a manner which does not challenge the perspective. From within a New Formalist perspective, inconsistencies such as those in Chart VI result because (1) existing impact studies yield invalid results because they follow poor research design; (2) an insufficient number of studies exist to discern between small but significant variations in mechanism or jurisdiction type; or (3) the measures are not properly comparable.

tion constitutes an institutional barrier to the provision of equal access to justice; professionals in mediation, arbitration, and other non-traditional dispute resolution skills seek to advance their technique, and their practice of that technique, as social reform; and other groups as well.

While the New Formalist perspective is not the source of these various interests, it does provide a framework which appears to bring these interests and strategies of action together under a common project. Because the New Formalism relies on a systems logic, it does not have to specify the values or interests which are achieved by securing a proper fit between mechanism type and dispute type. By assuming that "effective" correlations are defined by laws of social behavior, the New Formalism implicitly assumes that all values and interests are maximized when a match established between a mechanism and a dispute corresponds to the social laws governing dispute processing.[63] It can thus present itself as a framework which combines various interests without privileging any one, and presents the advancement of these interests as an objective and scientific project of enlightened reason.

However, the seven outcomes of interest which dispute processing experiments are designed to achieve are stated so abstractly that *no specific content* can be given to these terms. Rather, a variety of meanings can be read into each of these phrases and these interpretations can be changed from time to time and from place to place. Each phrase has been used to refer to a number of *different benefits* assumed to accrue to a number of *different actors* through a number of *different intervening mechanisms* or subobjectives.

Consider as an example, one of the most common goals used to rationalize dispute resolution innovations: minimized cost. The assertion that, for example, a court-annexed arbitration program can 'improve efficiency' has been interpreted to mean:

1. That the court system will experience a decreased average cost for processing filed cases due to an earlier settlement of disputes.
2. That the court system will experience a decreased average cost for processing filed cases due to the use of a less costly alternative preceding (due, perhaps, to the use of volunteer arbitrators rather than high-salaried judges).
3. That the court system will experience a decreased average cost for processing filed cases because the court system can process cases remaining in the courts in a faster or less-expensive manner.
4. That the court system will save money because arbitration

63. A muted form of New Formalism can be constructed which does not assume that all outcome characteristics are simultaneously maximized. In this form, exemplified by Bush, *supra* note 26, it is acknowledged that some outcomes of interest may be mutually incompatible with other outcomes of interest. However, this muted approach still assumes that "optimum outcomes" are possible. Rather than maximizing all outcome characteristics simultaneously, these outcomes provide the most improvement for the most outcomes possible despite some loss in a few outcomes. Note that even in this case selection of the most "effective" design remains a technical question rather than a question of values.

provides longer-lasting settlements, thereby eliminating the costs of processing future recidivism.

5. That disputants save money directly because arbitration decreases attorney fees or decreases witness fees and other trial costs.

6. That disputants save money indirectly because arbitration renders earlier settlements, thereby reducing the amount of time disputants must miss work to tend to their dispute.

Table II lists these and other advantages, interests, and mechanisms which I found through a cursory review of the literature. The purpose of this table is not to provide an exhaustive enumeration, but rather to demonstrate how quickly such a list proliferates. The reader is invited to identify advantages, interests, and mechanisms not included in Table II as a demonstration that this list is not, and cannot be, exhaustive.

By bringing together a variety of interests under its common framework, the New Formalism does not thereby guarantee that all evaluations conducted within its premises will address each of these interests. It does assume, however, that evaluations which overemphasize the examination of one set of problems can eventually be integrated with evaluations which examine other types of problems. It also assumes that once the right match between mechanism type and dispute type is found, that all interests will be simultaneously achieved. In other words, the New Formalist framework assumes that one set of interests need not be advanced at the expense of others. If one set of interests does suffer, it is due solely to ignorance (insufficient knowledge) or error (insufficient dissemination of what we know). Both can be corrected through expanded experimentation and evaluation.

Unfortunately, the evaluations themselves present evidence that the objectives of dispute processing experiments are neither consensual nor commensurate. All groups in the dispute processing field do not agree on all the objectives advanced and furthermore it is impossible to achieve all the objectives advanced simultaneously. Also, just as the seven characteristics of effective outcomes identified above may not be consensual nor commensurate, so each of these issues may serve as umbrella terms for a variety of non-consensual and contradictory outcomes. For example, Hensler, Lipson and Rolph found that court-annexed arbitration in California reduced case-processing costs to disputants while simultaneously increasing case costs to the state.[64] They also found that arbitration may cost the state more while costing the counties less. Therefore, one cannot make statements such as: "arbitration reduces costs."

Charts II, III and V provide us with a means to test the New Formalist assertion that there is an ideal correlation of types of dispute processing mechanisms to types of disputes. New Formalist assumptions suggest that a given treatment should advance all seven issues simulta-

64. D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981).

neously. If this assumption is true, then we should find a consistent pattern of outcomes for a given program across the seven outcomes of interest. If, for example, arbitration is ideally suited to processing all civil disputes of valuation less than $10,000.00, then the evaluation testing this type of program should find improvement in cost, time, permanency of resolution, fairness, party satisfaction, equality, and improved community. In other words, the same pattern of "yes" and "no" should appear on a chart like Chart IV. However, a review of Chart VI shows this not to be the case. For almost all measures of effectiveness, experimental outcomes show both positive and negative results vis-a-vis the counterfactual. Inconsistency in outcomes even occurs within a given study.[65]

Research Design

The New Formalist perspective, through its appropriation of impact analysis, assumes that if we are able to construct a good research design for our experimental program and data analysis (before and after treatment data collection, random assignment between treatment and control group, and so on), then we can be certain that the empirical data produced are a valid description or measure of the way things are. Conversely, if we are unable to implement a good research design, then the validity of our data will be questionable.

Unfortunately, given the conditions under which adjudication and the alternatives to adjudication are implemented, a program can rarely meet the rigid demands of good research design. Program implementors have interests other than good research design in implementing programs.[66] And even where program implementors are willing to try their best to incorporate good design features like random assignment of disputes into their experimental program, the pressures and responsibilities of public institutions and the rights of individuals processed through those institutions makes it difficult to maintain the design. Several arbitration programs have attempted random selection, and in both cases, judges had to acquiesce to disputant demands that they have their right to a trial immediately (rather than follow through on their random assignment to an arbitration hearing).[67]

The consequence of the application of these rigid standards for research design to programs which are almost always either unwilling or unable to incorporate these designs is that evaluators and their readers are continually troubled by the validity of their findings. As a result,

65. *See, e.g.*, Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 JUDGES J. 3 (1982) (arbitration); R. COOK, J. ROEHL & D. SHEPPARD, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST—FINAL EVALUATION REPORT (1980) (mediation).

66. *See* FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW, *supra* note 37.

67. *See* A. LIND & J. SHAPARD, *supra* note 2; M. ROSENBERG, PRETRIAL CONFERENCES AND EFFECTIVE JUSTICE (1964). For an example of similar pressures in experimentation with ombudsman programs, see Gwyn, *Obstacles within the Office of Economic Opportunity to the Evaluation of Experimental Ombudsmen*, 1976 PUB. ADMIN. 177, 185.

when various impact studies produce inconsistent outcomes, New Formalists are predisposed to blame these inconsistencies on the poor validity of their data rather than the usefulness of New Formalist assumptions. This makes poor research design, coupled with the small number of evaluations which have entered the professional literature, an easy scapegoat for all the shortcomings which true believers in New Formalist assumptions find between the empirical data actually accumulated and the expectations promised by the New Formalist perspective.

Quantified Measures

The New Formalist perspective *assumes* that disputes and dispute processing programs are things with essential characteristics. It therefore seeks to explain variations in outcome in terms of variations in the essential characteristics of these mechanisms and dispute types. If it finds variation within essential types or change in these objects over time, it ascribes this change to the current state of empirical evidence rather than to a fault in the assumptions.

When impact analysis is used in the service of New Formalist objectives, further limits are placed on the types of experience which are recognized as valid and legitimate assessments of outcome. Impact analysis requires assessing the extent of the divergence between the outcome of treatment and the counterfactual using a quantified measure. Therefore, non-quantifiable sources of experience are either eliminated or the time, effort, and importance given to their investigation limited.

The field of valid experience is restricted yet again when one considers the extent to which quantifiable data is actually available in the evaluation of dispute processes. Existing dispute processing programs offer limited sources for data which are subject to quantification and statistical manipulation. A review of the literature shows that the quantitative data used in dispute processing evaluations is almost exclusively derived from program records, forms designed by evaluators and filled out by program staff, and interviews with or questionnaires given to parties, lawyers, third party interveners, and program administrators. Consequently, there is a relatively small set of quantitative measures which evaluators tend to depend on in constructing, conducting, and reporting their evaluations, and which their readers tend to draw on in cross-comparing their work.

Unfortunately, while there is some consistency in measures used, there is great difference in how these measures are interpreted. Consider "average case duration" as a measure of the outcome "time saved." Some studies, such as Adler, Hensler and Nelson interpret a decrease in average case duration as a measure of successful time reduction.[68] Other studies, like Lind and Shapard, interpret a decrease in average case time as a measure of successful *cost* reduction.[69] Still other

68. J. ADLER, D. HENSLER & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH ARBITRATION PROGRAM (1983).

69. A. LIND & J. SHAPARD, *supra* note 2.

studies, such as McEwen and Maiman, interpret an increase in average case duration as an increase in the judge time applied to the case, which in turn is interpreted to be a measure of successful increases in fairness because McEwen and Maiman assume that increased judge time provides a fairer hearing.[70]

In addition to variations in how measures are interpreted, there are also variations in the manner in which these measures are constructed. Even when evaluations are able to agree on the same *theoretically-defined* measure for assessing the same outcome of interest, differences in constraints force them to construct the same measure in different ways. These different ways of constructing the same "measure" often involve different types of data and different assumptions.

Compare, for example, Hensler[71] with Felstiner and Williams.[72] Both evaluations attempt to measure the general outcome "reduced costs." Both attempt to assess this goal using the same theoretically-defined measure: a comparison of the average cost of processing a case in an innovative program with the average cost of processing the case using traditional adjudication. Both find that data regarding this seemingly straightforward measure does not exist. Therefore, both research teams are forced to construct estimates using proxy data and assumptions. In each case, selecting different proxy data or going the other way on a required assumption can mean the difference between finding the program successful or unsuccessful in achieving its goal of cost savings.

These differences make it highly questionable whether the findings of these two studies can be compared. This is true even if the studies are using the same measure and even if they both come up with a quantitative estimate of the "same" measure.

B. *The Return of the Repressed*

New Formalist assumptions have a powerful impact on the manner in which the evaluations literature is produced and read. Its tendency to narrow one's field of vision in the ways outlined above is powerful as well. Nevertheless, such a framework is not the only perspective which guides our experience. I have argued that the New Formalism is not the exclusive determinant of the questions, structure, strategy, or perspective of any single concrete evaluation. Despite the powerful influence which the New Formalist perspective has over how individual evaluators pattern their observations, program experiences which are not consistent with New Formalist assumptions but whose importance in determining outcomes is self-evident to the evaluator often do work their way into written evaluations. In this section I would like to examine a few of the insights reported in the evaluations literature which are often over-

70. McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. LAW REV. 237 (1981).

71. D. HENSLER, A. LIPSON & E. ROLPH, *supra* note 64.

72. W. FELSTINER & L. WILLIAMS, COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS (1980).

looked in the search for effective correlations between disputes and mechanisms. They are overlooked because they challenge the assumptions of the New Formalist framework.

We might consider the insistent presence of these insights despite the power of New Formalism's assumptions to filter experience as "the return of the repressed." Despite New Formalism's tendency to "repress" these observations because they are not recognized as significant in relation to other observations, the determinative importance of these repressed experiences continues to impress the observer to the point where they "return." That is, they work their way into the text of an evaluation despite the fact that they violate the assumptions which frame and explain what the evaluation reports as significant.

Institutional Features

Within the New Formalist framework, certain general institutional features of programs are viewed as essential defining characteristic which distinguish which type of mechanism the program is. For example, the acceptance of a hearing with a third-party decision maker is an institutional feature which coupled with other essential characteristics defines a program as an example of arbitration. In contrast, other institutional features which are more specific to particular programs, are viewed as inessential characteristics which distinguish one arbitration program from another.

The New Formalism allows for such variations within essential types of mechanisms. While these features may affect the degree to which a given program "fits" with a particular type of dispute, the occurrence of a non-essential, "accidental" feature should not change the "fit." Otherwise, New Formalist assumptions would be violated.

Nevertheless, a review of existing evaluations finds an argument for the importance of specific process features to be one of the most recurring conclusions across studies. For example, Lind and Shapard find in their study of court-annexed arbitration that the success of the program in reducing processing time is a direct consequence of a court rule demanding that the arbitration hearing take place within a specific period of time:

> It appears that court-annexed arbitration can serve as an effective deadline for case preparation, substituting for trial not as a forum for case resolution, but as a stimulus to settlement. Questionnaires from counsel whose cases were terminated prior to arbitration support the view that the arbitration rule expedited settlement and show general endorsement of the arbitration rules.[73]

Such a rule, however, is never cited as an essential defining feature of arbitration.

If the success of an arbitration program in reducing the duration of

73. A. LIND & J. SHAPARD, *supra* note 2, at xiii.

a case vis-a-vis the regular adjudication process is dependent on certain institutional features which may not be present in every arbitration program, then specifying this feature must be a necessary qualification whenever the results of arbitration are discussed or compared. This directly challenges the New Formalist assumption that all institutionalizations of a given type of mechanism share essential properties which make them ideally suited to deal with particular types of disputes.

In order to preserve this assumption, New Formalism must assume that arbitration with a time limit provision and arbitration without a time limit provision are entirely different types of mechanisms. However, if we further divide Sander's eight types into a larger number of mechanism types on the basis of differences in their institutional features, then the number of permutations quickly threatens the parsimoniousness of the model. Consequently, following this path to save New Formalism's assumptions has consequences which call these assumptions into doubt.

Even more damaging to the assumptions of New Formalism are the conclusions by some studies that the importance of specific institutional features changes from program to program, place to place, and time to time. For example, Shuart, Smith and Polanet, in their study of mediation in Wayne County, Michigan, conclude that:

> A settlement mechanism must be designed to meet the needs and to utilize the resources of the jurisdiction developing a procedure .... The experience in Wayne County highlights those procedural aspects which should be considered in planning a settlement device: the administration and financing of the procedure, the type of settlement technique employed, the composition and selection of the valuation body, the timing of the hearing, the selection of appropriate cases, the format of the hearing, and the inclusion of the penalty. *The importance may not be in the way each of these aspects is ultimately handled, but rather that each is addressed.*[74]

This conclusion directly contradicts the most fundamental assumptions of New Formalism that specific mechanisms, disputes, and outcomes hold essential characteristics across time and space.

Dispute Characteristics

The New Formalism assumes that disputes are things that are present in every society. It therefore begins with the assumption that they exist, and goes on to question the most effective way to process them. The selection of a mechanism is a purely technical matter. Dispute processing mechanisms are tools which are more or less useful in dealing with the inevitable problem of disputes.

However, consider the conclusions emerging from some evaluations regarding the characteristics of disputants who use the treatments tested and who win or lose in the outcomes determined by the treat-

74. Shuart, Smith & Polanet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307, 323 (1983) (emphasis added).

ments. These questions can be legitimately raised from within the New Formalist perspective. Optimal outcomes should include maximization of fairness and equality as outcomes. But addressing these questions from within New Formalism brings results that have implications more for the question of *where disputes come from* and *why they end up in experimental programs* than *how the programs treat these disputes*.

For example, Cook, Roehl and Sheppard found that there was an over-representation of low income persons in the cases processed by Neighborhood Justice Centers:

> The information gathered on disputants indicates, with the exception of individuals representing businesses, that the people who use the NJCs are generally representative of the community in terms of ethnicity. However, it appears that the NJCs attract primarily low income residents. This may be partially a reflection . . . of the characteristics of the litigants in the court system. It may also be the case that middle-and upper-income people tend to hire third party (attorneys, counselors, etc.) to resolve their disputes. On the other hand, this finding indicates that the NJCs are providing dispute resolution services to poor people, some of whom may have had less access to the justice system in the past. But if, as originally intended, the Centers are to serve a cross-section of their communities, they will have to attract more higher income citizens.[75]

Note that the lesson the evaluation draws from its quantitative results is that the goal of equality (equal access to justice) is being achieved. Further, the rationale for why low-income people are over represented in the NJCs is that this reflects who uses the court system. The interesting question here, however, is not whether the operation of the system increases access, but *for whom* is access increased and *for what* purposes. This raises the question of where disputes come from, and why one type of disputant tends to use, or be channeled, into public dispute processing agencies while other types are not. The results suggest that where disputes are taken differs by economic class. However, since the New Formalist perspective assumes that dispute types are formally the same everywhere (regardless of changes in the class of the disputants), that they occur naturally in all societies, and that they are individual objects, this perspective cannot explain why economic class is an important indicator of the dispute process utilized.

V. CONCLUSION

For the past two decades, the New Formalist perspective has given the dispute processing field a set of comforting explanations as to what the field is, what it should do, and how its work can contribute to a better future. However, while New Formalist assumptions have inspired useful scientific research and improved social policy making, the results of the research so inspired have not substantiated the intellectual coher-

75. R. COOK, J. ROEHL & D. SHEPPARD, *supra* note 65, at 107.

ence which these assumptions promise and predict. New Formalist assumptions have also blinded researchers to the significance of certain data which they have collected in their research. There is a good deal of data which has impressed these researchers as significant experiences but which has not been analyzed because it violates New Formalist definitions of significance. Most importantly, New Formalist premises have blinded the dispute processing field to the political dimensions of dispute processing and dispute processing research. Therefore, as we assess the current state of empirical knowledge in the dispute processing field, it is important that we also assess the framework we are using to evaluate this knowledge.

Table 1-1*

	"Primary" Dispute Resolution Process			
CHARACTERISTICS	*Adjudication*	*Arbitration***	*Mediation*	*Negotiation*
Voluntary/Involuntary	Involuntary	Voluntary	Voluntary	Voluntary
Binding/Nonbinding	Binding, subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract	If agreement, enforceable as contract
Third Party	Imposed, third-party neutral decisionmaker, generally with no specialized expertise in dispute subject	Party-selected third-party decisionmaker, usually with specialized subject expertise	Party-selected outside facilitator, usually with specialized subject expertise	No third-party facilitator
Degree of Formality	Formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
Nature of Proceeding	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private/Public	Public	Private, unless judicial review sought	Private	Private

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** Court-annexed arbitration is involuntary, nonbinding and public.

Table 1-2*

"Hybrid" Dispute Resolution Processes

CHARACTERISTICS	*Private Judging*	*Neutral Expert Fact-Finding*	*Mini-Trial*	*Ombudsman*	*Summary Jury Trial*
Voluntary/Involuntary	Voluntary	Voluntary or involuntary under FRE 706	Voluntary	Voluntary	Involuntary
Binding/Nonbinding	Binding, subject to appeal	Nonbinding but results may be admissible	If agreement, enforceable as contract	Nonbinding	Nonbinding
Third Party	Party-selected third-party decisionmaker, may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court	Party-selected neutral advisor sometimes with specialized subject expertise	Third-party selected by institution	Mock jury impaneled by court
Degree of Formality	Statutory procedure but highly flexible as to timing, place and procedures	Informal	Less formal than adjudication; procedural rules may be set by parties	Informal	Procedural rules fixed; less formal than adjudication
Nature of Proceeding	Opportunity for each party to present proofs and arguments	Investigatory	Opportunity and responsibility to present summary proofs and arguments	Investigatory	Opportunity for each side to present summary proofs and arguments
Outcome	Principled decision, sometimes supported by findings of fact and conclusions of law	Report or testimony	Mutually acceptable agreement sought	Report	Advisory verdict
Private/Public	Private, unless judicial enforcement sought	Private, unless disclosed in court	Private	Private	Usually public

TABLE II

1. Economic Benefits to Court System:
   (a) Decrease in average cost of ADR-processed cases because of:
      i. earlier settlement of disputes.
      ii. less costly processing of disputes.
   (b) Decrease in average cost of traditionally-processed cases because:
      i. reduction in number of court-processed cases provides reduction in amount of court resources required.
      ii. preliminary processing by ADR procedure decreases length of traditional adjudication or encourages selection of less-costly adjudication procedures.
   (c) Reduction in number of cases because of:
      i. longer lasting resolutions to processed disputes.
      ii. improved resolutions resulting in improved social relations which result in fewer new disputes.
2. Economic Benefits to Disputants:
   (a) Decreased costs for case processed by ADR program because of:
      i. decreased attorney fees.
      ii. decreased incidental case costs.
      iii. decreased average processing time for case.
      iv. more flexible timing of hearings.
      v. disputant found eligible for social service benefits.
   (b) Decreased costs for case which remains in the now-less-backlogged court system because of:
      i. decreased attorney fees.
      ii. decreased incidental case costs.
      iii. decreased average processing time for case.
3. Political Benefits To Court System:
   (a) Reduced community conflict.
   (b) Increased legitimation of court system.
4. Political Benefits to Disputants:
   (a) Quicker settlements/resolutions.
   (b) Improved access to justice.
   (c) Longer lasting resolution of conflits.
   (d) Improved quality of case preparation and presentation.
   (e) Improved quality of settlement/resolution decision.
   (f) Increased responsiveness of government.
   (g) Empowerment of individuals in determining their social relations.
5. Political Benefits to the Community:
   (a) Decreased conflict between individuals/groups/government.
   (b) Underlying community norms rendered explicit.
   (c) Increased local autonomy vis-à-vis state and national institutions.
   (d) Development of local leadership with dispute settlement skills.
6. Benefits to Policy Intellectuals and Professionals:
   (a) Increased funding for research.
   (b) Increased funding for program.
   (c) Increased acceptance, jurisdiction, and/or use of program.
   (d) Increased acceptance and use of general program type.
7. Benefits to Program Planners and Third Party Intervenors:
   (a) Increased knowledge regarding effective implementation techniques.
   (b) Increased knowledge regarding effective third party intervenor skills.

APPENDIX: A BIBLIOGRAPHY OF DISPUTE PROCESSING EVALUATIONS

The accompanying article argues that proponents of the New Formalist approach to the study of dispute processing and social scientists trained in impact analysis have combined a particular project for policy reform with a distinctive project of social science research to establish a joint strategy of social reform. More specifically, this joint strategy seeks to identify an enlightened system of dispute processing institutions through experimentation with and evaluation of various dispute processing mechanisms.

This bibliography identifies publications which contribute to this project. It is less than a list of all articles addressing dispute resolution, but is more than a list of just impact studies. Because the impact study is the pre-eminent form of New Formalist evaluation and the central focus of the accompanying article, I have attempted to provide a complete list of all published impact studies of dispute processing programs which contribute to our general knowledge of dispute processing while defining and improving the internal operation of the program assessed. However, I have also provided a less than complete list of other types of publications which advance the New Formalist project. I call this body of work "the evaluations literature."

The evaluations literature can be separated into six categories according to the contribution they make to the New Formalist project:

Impact Studies: As the accompanying article suggests, the consummate type of New Formalist evaluation is the impact study. Impact studies use scientific methods of quantitative measurement to assess the outcomes produced by a particular dispute processing program or system of programs.

Case Studies: This category includes evaluations of dispute processing programs which neither make New Formalist assumptions nor use impact analysis as their assessment technology. From a New Formalist perspective, these studies are enigmas because the purpose of the method used, the case study, and the form of the material presented are incongruous with the purposes, methods, and forms of presentation used by impact analysis. Of course, most evaluations combine elements of both impact analysis and case study. If a study includes even a few elements of impact analysis study, I have included it in the impact studies category.

Descriptions of Particular Programs: When government agencies or private foundations institute an experimental program, or when government agencies, foundations, or academics identify an existing program which might have relevance for future reform, they often undertake or commission a description of the implementation and operation of the pilot program. These works are not impact or case studies because they do not attempt to assess or explain program outcomes. Rather, they simply describe the institutional design of the program.

Descriptive Reviews of Alternatives: If a policy maker is considering the

design and implementation of a dispute resolution program, then she needs descriptive reviews of alternatives which can be considered in selecting and constructing a program. These descriptions may review ideal typologies of general mechanism types (such as the Goldberg, Green and Sander typology reproduced in Table 1), may review the range of existing programs (to serve as models to be emulated), or may combine descriptions of existing programs with prescriptions for untried designs. Such descriptive reviews are included in this category. This category also includes a second type of descriptive review. As the number of innovative dispute resolution programs have outstripped carefully planned experimentation, policy makers and intellectuals concerned with the administration of justice *as a system* have sought to discover what is out there. This second type of descriptive review is constructed for purposes of comprehending the extent to which various types of innovations have been institutionalized and the degree to which this institutional development has been coordinated. The scope of these reviews is sometimes limited by the jurisdictional boundaries of the institution initiating the study.

Methodological Prescriptions for Good Case Studies: There are a few articles written to provide evaluators with "good" research designs to be used when conducting impact analyses. These studies provide a methodological framework for collecting and analyzing data in a manner which provides valid and comparable results. These methodological prescriptions usually do not collect and analyze actual data themselves.

General Research Using Other Methodologies: This is a residual category. It includes articles which contribute to the general knowledge of dispute processing using research methodologies other than evaluation and impact analysis. These studies are often based on data surveys covering a number of programs simultaneously. For example, Brazil constructs general statements regarding the nature of judicial settlement from questionnaires sent to a sample of attorneys who have had experience with this technique.

The State of Existing Knowledge: This final category includes literature reviews which identify and assess the state of general knowledge regarding dispute processing or a subcategory of the field. These articles review the extent to which knowledge regarding the characteristics of various techniques, various forms of institutionalizing these techniques, and the characteristics of various disputes processed by these techniques, have been collected and empirically verified. Also included in this category are a number of reviews which limit the scope of their study to knowledge derived from programs or studies conducted by the organization instituting or conducting the evaluations reviewed.

Because the impact study is the preeminent New Formalist evaluation, I have provided more than simple bibliographic information for the publications in this category. In addition to the full cite, I have specified the following information for each impact study identified:

1. The Technique Evaluated: Using Goldberg, Green, and

Sander's nine-fold typology (see Table 1), I have specified whether the program or system of programs evaluated can best be characterized as adjudication, arbitration, mediation, negotiation, private judging, neutral expert fact-finding, a mini-trial, an ombudsman, or a summary jury trial.

2. Program Jurisdiction: This entry specifies the type of institution which administers the program and its geographic jurisdiction. These include federal (district) courts, state courts (county courts of general jurisdiction), limited jurisdiction state courts (municipal courts), public non-profit organizations (organizations that operate on a national scale), community programs (non-profit public organizations that operate on the local level), or private programs (programs run by private for-profit organizations).

3. Case Types: This entry specifies the substantive jurisdiction of the program as defined by its rules. These rules define the types of cases which the program will and will not accept for processing.

4. Program Evaluated: This entry identifies the specific program or programs evaluated.

5. Data Sources: This entry identifies the types of data used by the study to assess the impact of the program. These include program records, questionnaires, interviews, and participant observation.

For a summary of this information and of the outcomes measured, see the accompanying charts.

I began the construction of this bibliography by searching through the footnotes and sources of a handful of well known evaluations and general articles on dispute processing. I then moved through the footnotes and sources of each new cite until no new references appeared. I then double checked the resulting list for completeness by reviewing standard legal bibliographic sources: The Index to Legal Periodicals, The Legal Resources Index, and The Current Law Legal Resources Index. The following is the product of this search.

I. IMPACT STUDIES

J. ADLER, D. HENSLER & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH ARBITRATION PROGRAM (1983).

TECHNIQUE EVALUATED: Compulsory Arbitration.
PROGRAM JURISDICTION: County.
CASE TYPES: Civil cases under $10,000.00.
PROGRAM EVALUATED: Pittsburgh (Allegheny County) Court of Common Appeals.
DATA SOURCES: Review of state authorizing statutes and local court rules; interviews with court administrative staff and attorneys active in arbitration as arbiters or as counsel; on site observation of cases; abstracted information from court files for a sample of 544 cases from all cases for 1980 and 1981; a sample of 157 cases appealed between 1979 and 1981; interviews with a non-random sample of 66 litigants prior to hear-

ing, immediately after hearing, and after announcement of award; interviews with 15 attorneys and 14 institutional litigants (insurance companies, financial institutions, etc.).

Bahr, *Mediation is the Answer*, 3 FAMILY ADVOCATE 32 (1981).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Private.
CASE TYPES: Divorce.
PROGRAM EVALUATED: Family Mediation Service, McLean, Va. and Fairfax County Courts.
DATA SOURCES: Questionnaires to a sample of privately mediated cases and a sample of county court adjudicated cases.

W. BALES & J. PLANCHARD, THE CITIZEN DISPUTE SETTLEMENT PROCESS IN FLORIDA: A COMPREHENSIVE ASSESSMENT (1980).

TECHNIQUE EVALUATED: Mediation (Consumer Dispute Settlement).
PROGRAM JURISDICTION: County.
CASE TYPES: Misdemeanor and Small Claims.

Comment, *Compulsory Arbitration In Pennsylvania*, 2 VILL. L. REV. 529 (1957).

TECHNIQUE EVALUATED: Compulsory Arbitration (three lawyer panel).
PROGRAM JURISDICTION: Limited jurisdiction county civil courts (court-annexed).
CASE TYPES: Civil cases under $1,000.00.
PROGRAM EVALUATED: Court-annexed compulsory arbitration of Delaware and Montgomery (Pa.) County Courts.
DATA SOURCES: 130 questionnaires of lawyers in two PA counties with compulsory arbitration. Survey of 10 counties.

Cerino & Rainone, *The New Wave: Speedy Arbitration Hearings—But Are They Fair?*, 29 VILL. L. REV. 1495 (1984).

TECHNIQUE EVALUATED: Compulsory Arbitration.
PROGRAM JURISDICTION: County.
CASE TYPES: Civil cases under $20,000.00.
PROGRAM EVALUATED: Philadelphia County Court of Common Pleas Arbitration Program.
DATA SOURCES: Questionnaires to all arbitrators concerning random cases process during July-December, 1983. 185 cases covered.

R. CONNER & R. SURETTE, THE CITIZEN DISPUTE SETTLEMENT PROGRAM: RESOLVING DISPUTES OUTSIDE THE COURTS—ORLANDO, FLORIDA (1977).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Private (by the bar).
CASE TYPES: Minor criminal cases (ordinance violations and misdemeanors).
PROGRAM EVALUATED: The Orlando Citizen Dispute Settlement Program.
DATA SOURCES: Post-mediation ratings of process by complainants, respondents, and hearing officers; follow-up client interviews; program records.

R. COOK, J. ROEHL & D. SHEPPARD, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST—FINAL EVALUATION REPORT (1980).

TECHNIQUE EVALUATED: Neighborhood Justice Center (Mediation).
PROGRAM JURISDICTION: Private (court referral).
CASE TYPES: Interpersonal disputes in domestic, neighbor, family, and other close relationships which may be civil or criminal in nature; civil disputes between tenants and landlords; consumers and merchants, employees and employers, others.
PROGRAM EVALUATED: Atlanta, Kansas City, and Los Angeles (Venice/Mar Vista) Neighborhood Justice Centers.
DATA SOURCES: Includes interviews with mediation clients regarding their experiences and satisfaction with the process and the durability of their agreements (Pearson, 1982).

Davis, *Mediation: The Brooklyn Experiment*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 154-170 (1982).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Private (court referrals).
CASE TYPES: Custodial Felony Arrests.
PROGRAM EVALUATED: Brooklyn Dispute Center.
DATA SOURCES: Interviews with victims before, after, and four months following.

W. FELSTINER & L. WILLIAMS, COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS (1980).

TECHNIQUE EVALUATED: Mediation (two person panel).
PROGRAM JURISDICTION: Limited jurisdiction county (municipal) courts.
CASE TYPES: Interpersonal and property disputes (petty criminal cases) where the victim and defendant are not strangers.
PROGRAM EVALUATED: Dorchester (Mass.) Urban Court Program.
DATA SOURCES: 1) Interviews with project staff and mediators. 2) Program files on first 500 cases. 3) Observation of 34 mediation sessions. 4) Surveys of disputants and mediators. 5) Caseload information regarding case volumes, dispositions, and costs (Pearson, 1982).

Felstiner & Williams, *Community Mediation in Dorchester, Massachusetts*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 111-153 (1982).

TECHNIQUE EVALUATED: Efficiency, Quality.
PROGRAM JURISDICTION: Minor criminal offenses.

Hannigan, *The Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment*, 11 LAW & SOC'Y REV. 679 (1977).

TECHNIQUE EVALUATED: Ombudsman (private newspaper).
PROGRAM JURISDICTION: Private.
CASE TYPES: Consumer complaints.
PROGRAM EVALUATED: "Sound Off" in the *London* (Canada) *Free Press*.

DATA SOURCES: Random sample of 282 residents who made a written complaint to one newspaper ombudsman.

D. HEINTZ, AN ANALYSIS OF THE SOUTHERN CALIFORNIA ARBITRATION PROJECT (1977).

TECHNIQUE EVALUATED: Arbitration.
PROGRAM JURISDICTION: Private.
CASE TYPES: Medical malpractice.
DATA SOURCES: Admissions data from two hospitals over an eight year period; insurance company records.

D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981).

TECHNIQUE EVALUATED: Court-annexed arbitration.
PROGRAM JURISDICTION: State.
CASE TYPES: Civil cases under $15,000.00.
DATA SOURCES: Evaluation of the first year of judicial arbitration in the superior courts of six California counties. Includes an analysis of caseload information regarding case volumes, dispositions, and costs.

D. HENSLER & J. ADLER, COURT-ADMINISTERED ARBITRATION: AN ALTERNATIVE FOR CONSUMER DISPUTE RESOLUTION (1983).

TECHNIQUE EVALUATED: Court-annexed arbitration.
PROGRAM JURISDICTION: State.
DATA SOURCES: Case characteristics drawn from court records, interviews with litigants.

M. JACOUBOVITCH & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (1982).

TECHNIQUE EVALUATED: Summary jury trial.
PROGRAM JURISDICTION: Federal.
CASE TYPES: Various civil cases.
PROGRAM EVALUATED: Federal District Court, Northern District of Ohio.
DATA SOURCES: Questionnaires to attorneys, jurors and magistrates.

Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost In the American Arbitration Association and the Courts*, 8 JUST. SYS. J. 6 (1983).

TECHNIQUE EVALUATED: Arbitration.
PROGRAM JURISDICTION: Private.
CASE TYPES: Tort or commercial contract cases over $1,000 or of "significant non-monetary issue."
PROGRAM EVALUATED: Federal trial courts, state trial courts, and AAA arbitration in eastern Wisconsin, eastern Pennsylvania, central California, New Mexico and South Carolina.
DATA SOURCES: 1) Court Records from five federal judicial districts. 2) Court Records from state trial courts from the same five districts. 3) American Arbitration Association records from the same five districts. 4) Interviews with lawyers.

Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute*

Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System, 103 F.R.D. 461 (1985).

TECHNIQUE EVALUATED: Summary Jury Trial.
PROGRAM JURISDICTION: Federal.
CASE TYPES: Negligence, products liability, personal injury, contract, discrimination, antitrust.
PROGRAM EVALUATED: Summary Jury Trials in the Northern Federal District of Ohio.
DATA SOURCES: Court statistics for 1983 and 1984, Northern Federal District of Ohio. Disposition of cases referred to Summary Jury Trial. Average juror time and costs required for SJT and for full jury trial.

A. LIND & J. SHAPPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983).

TECHNIQUE EVALUATED: Court-Annexed Arbitration.
PROGRAM JURISDICTION: Federal.
CASE TYPES: Contract and tort under $150,000.00.
DATA SOURCES: Includes an analysis of caseload information regarding case volumes, dispositions and costs.

Maddi, *The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage*, 13 J. FAM. L. 767 (1977).

TECHNIQUE EVALUATED: Conciliation (mediation).
PROGRAM JURISDICTION: Limited jurisdiction state court annexed.
CASE TYPES: Divorce filings requesting conciliation services.
PROGRAM EVALUATED: Los Angeles County Conciliation Court.
DATA SOURCES: California Bureau of Vital Statistics, The Family Law Department's case files, The Conciliation Court's records, private disputant questionnaires; sample of 6,682 cases.

McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981).

TECHNIQUE EVALUATED: Adjudication, Mediation.
PROGRAM JURISDICTION: State.
CASE TYPES: Civil Disputes under $800.
PROGRAM EVALUATED: Biddeford, Lewiston, and Waterville (Maine) District Courts and their annexed mediation programs.
DATA SOURCES: Includes follow-up interviews with disputants in both mediated and adjudicated cases.

McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: State.
CASE TYPES: Civil Disputes under $800.00.
PROGRAM EVALUATED: Biddeford, Lewiston, and Waterville (Maine) District Courts and their annexed mediation programs.
DATA SOURCES: Interviews with litigants, observations of

court and mediation sessions, analysis of docket book information, and analysis of state court mediation reports.

S. MERRY & A. ROCHELEAU, MEDIATION IN FAMILIES: A STUDY OF THE CHILDREN'S HEARINGS PROJECT (1985).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Local.
CASE TYPES: Family conflicts involving rebellious and truant adolescents.
PROGRAM EVALUATED: The Denver, Colorado Children's Hearing Project.
DATA SOURCES: Background data on sample of disputants, program and court file statistics, surveys of mediators. Interviews of family members, mediators, social workers, and school and court personnel. Observation of mediation and court sessions.

Pearson, *Child Custody: Why Not Let The Parents Decide?*, 20 JUDGES J. 4 (1981).

TECHNIQUE EVALUATED: Voluntary mediation.
PROGRAM JURISDICTION: County.
CASE TYPES: Divorce (contested custody and visitation).
PROGRAM EVALUATED: Denver Mediation Custody Project.
DATA SOURCES: 436 cases: 310 mediation, 126 control group. Disputant interviews before, immediately after, 6-12 month follow-up; court case-filing records.

Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC. 26 (1982).

TECHNIQUE EVALUATED: Adjudication; Mediation.
PROGRAM JURISDICTION: Community, but cases court-referred.
CASE TYPES: Contested child custody and visitation disputes.
PROGRAM EVALUATED: The Denver Custody Mediation Project.

Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L. Q. 497 (1984).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Private (sponsored by the local bar and The Piton Foundation).
CASE TYPES: Child Custody.
PROGRAM EVALUATED: Denver Custody Mediation Project.
DATA SOURCES: 436 cases: 310 mediation, 126 control group. Disputant interviews before, immediately after, 6-12 month follow-up; court case-filing records.

Roehl & Cook, *The Neighborhood Justice Centers Field Test*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (1982).

TECHNIQUE EVALUATED: Neighborhood Justice Center.
PROGRAM JURISDICTION: Local.
CASE TYPES: Interpersonal disputes, civil disputes, consumer disputes.
DATA SOURCES: Various.

Rolph & Hensler, *Court-Ordered Arbitration: The California Experience*, 3 CIV. JUST. Q. 163 (1984).

TECHNIQUE EVALUATED: Court-annexed arbitration.
PROGRAM JURISDICTION: State.
CASE TYPES: Civil cases under $15,000.00.
DATA SOURCES: Court and program statistics.

Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961).

TECHNIQUE EVALUATED: Compulsory arbitration.
PROGRAM JURISDICTION: Municipal.
CASE TYPES: Small claims cases under $2,000.00.
PROGRAM EVALUATED: Compulsory arbitration program of the Philadelphia Municipal Court.
DATA SOURCES: Municipal Court statistics (1955-1958) and judge's worksheets from the Arbitration Commission in Philadelphia.

M. ROSENBERG, PRETRIAL CONFERENCES AND EFFECTIVE JUSTICE (1964).

TECHNIQUE EVALUATED: Pre-trial Conferences.
PROGRAM JURISDICTION: State.
DATA SOURCES: Court records, court clerks' entries on special record sheets, questionnaires from judges and lawyers.

H. ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS (1970).

TECHNIQUE EVALUATED: Bilateral settlement.
PROGRAM JURISDICTION: Private.
CASE TYPES: Bodily injury claims.
DATA SOURCES: Interviews with insurance company claims adjusters, observations of adjusters at work, plaintiff attorney interviews and insurance company claims files.

Ross, *Insurance Claims Complaints: A Private Appeals Procedure*, 9 LAW & SOC'Y REV. 275 (1975).

TECHNIQUE EVALUATED: Private appeals procedures.
PROGRAM JURISDICTION: Private.
CASE TYPES: Insurance claims.
PROGRAM EVALUATED: A large, traditional insurance company.
DATA SOURCES: Insurance company appeals files.

Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 LAW & SOC'Y REV. 199 (1978).

TECHNIQUE EVALUATED: Complaint.
PROGRAM JURISDICTION: Private company.
CASE TYPES: Consumer complaints.
PROGRAM EVALUATED: Complaint handling at Western Television and Appliance, a 7-store chain in Denver, CO.
DATA SOURCES: Interviews with business employees and management, observations, company and Better Business Bureau records on complaints, customer questionnaire.

Seltzer, *California's Pilot Project in Economical Litigation*, 53 S. CAL. L. REV. 1497 (1980).

TECHNIQUE EVALUATED: Adjudication (streamlined procedures).
PROGRAM JURISDICTION: State courts.
CASE TYPES: All civil actions filed in the participating municipal courts except for small claims actions and special proceedings plus all cases filed in the superior courts seeking less than $25,000.00.

K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN (1985).

TECHNIQUE EVALUATED: Mediation-Arbitration.
PROGRAM JURISDICTION: Federal.
CASE TYPES: Civil cases concerning money or division of property with valuation over $10,000.00.
DATA SOURCES: Interviews with judges, judicial staff, and attorneys; court calendar and case disposition statistics.

Shuart, Smith & Polanet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program,* 8 JUST. SYS. J. 307 (1983).

TECHNIQUE EVALUATED: Mediation (panel valuation of case).
PROGRAM JURISDICTION: State.
CASE TYPES: Civil cases concerning money or division of property with valuation over $10,000.00.
PROGRAM EVALUATED: Mediation Tribunal Association, with board ties to the Wayne County (Mich.) Circuit Court.
DATA SOURCES: Review of mediation and disposition information for more than 200 cases, interviews with 120 attorneys and a number of Circuit Court judges, and observation of several mediation hearings.

Singer & Nace, *Mediation in Special Education: Two States' Experiences,* 1 OHIO ST. J. ON DISPUTE RESOLUTION 55 (1985).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: State (education agencies).
CASE TYPES: Complaints by parents of handicapped children concerning quality of education.
PROGRAM EVALUATED: State education agencies in Massachusetts and California.
DATA SOURCES: Case statistics, interviews with parents, education agency representatives and mediators.

Snyder, *Crime and Community Mediation—The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program,* 1978 WIS. L. REV. 737.

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Local.
CASE TYPES: Petty criminal cases and other referrals.
DATA SOURCES: Dorchester Urban Court Program case statistics.

Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance,* 21 LAW & SOC'Y REV. 155 (1987).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: State.

DATA SOURCES: Court statistics regarding case characteristics, forum characteristics, and outcome characteristics.

Weller, Ruhnka & Martin, *American Experiments for Reducing Civil Trial Costs and Delays*, 1 CIV. JUST. Q. 151 (1982).

TECHNIQUE EVALUATED: Compulsory arbitration; case load management and mediation.
PROGRAM JURISDICTION: Municipal.
CASE TYPES: All civil cases under $6,000 except eviction and small claims (Rochester, NY); all civil cases under 25,000 (Los Angeles, CA).
DATA SOURCES: Rochester and Syracuse: Systematic samples of court case filings for 1968, 1972, and 1977 in both courts; personal interviews with judges and court staff; mail questionnaires sent to a sample of 300 attorneys whose names appear in Rochester arbitration case files. Los Angeles Municipal Court and Torrence Superior Court: A sample of 500 court records from civil cases filed in 1976 and 1978; personal interviews with relevant court personnel in both courts; a mail survey of all attorneys in both courts whose names appeared in our 1978 record sample.

Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 JUDGES J. 3 (1982).

TECHNIQUE EVALUATED: Arbitration.
PROGRAM JURISDICTION: Local.
CASE TYPES: Civil cases under $6,000.00.
DATA SOURCES: Evaluation of the Rochester compulsory civil arbitration program. Includes follow-up interviews with disputants in both mediated and adjudicated cases. Case records, interviews with judges and court staff; questionnaires from attorneys.

Whitford & Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin*, 1974 WIS. L. REV. 639.

J. WOLF & S. LUND, EVALUATION OF MEDIATION AS A MEANS OF RESOLVING EMPLOYMENT DISCRIMINATION DISPUTES (1985).

TECHNIQUE EVALUATED: Mediation.
PROGRAM JURISDICTION: Private.
CASE TYPES: Employment discrimination.
DATA SOURCES: Court and program statistics and follow up questionnaires.

II. OTHER CASE STUDIES

Buckle & Thomas-Buckle, *Doing Unto Others: Dispute and Dispute Processing in an Urban American Neighborhood*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 78-90 (1982).

Engel, *Cases, Conflict, and Accommodation: Patterns of Legal Interaction in an American Community*, 1983 AM. B. FOUND. RES. J. 803 (1983).

Erlanger, Chambliss & Melli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585 (1987).

Felstiner & Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 LAW & HUM. BEHAVIOR 223 (1978).
Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267 (1976). Lempert, *More Tales of Two Courts: Exploring Changes In the 'Dispute Settlement Function' of Trial Courts*, 13 LAW & SOC'Y REV. 91 (1978).
Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891 (1979).
Merry & Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).
Nejelski & Zeldin, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983).
Silbey, *Case Processing: Consumer Protection in an Attorney General's Office*, 15 LAW & SOC'Y REV. 849 (1981). Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515 (1984).
Wilson & Brydolf, *Grass Roots Solutions: San Francisco Consumer Action*, in NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (1980).

III. DESCRIPTIONS OF PARTICULAR PROGRAMS

Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).
Crowe, *Complaint Reactions to the Massachusetts Commission Against Discrimination*, 12 LAW & SOC'Y REV. 217 (1978).
Heher, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L. J. 475 (1978).
Pearson, *How Child Custody Mediation Works in Practice*, 20 JUDGES J. 11 (1981).
Simoni, *Court-Annexed Arbitration in Oregon: One Step Forward and Two Steps Back*, 22 WILLAMETTE L. REV. 237 (1986).
K. TEGLAND, MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON (1984).

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D. AARONSON, B. HOFF, P. JASZI, N. KITTRIE & D. SAARI, THE NEW JUSTICE: ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION (1975).
AMERICAN BAR ASSOCIATION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES (1983).
AMERICAN BAR ASSOCIATION, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE (1976).
AMERICAN BAR ASSOCIATION, REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION (1977).
CHALMERS & CORMICK, RACIAL CONFLICT AND NEGOTIATION (1971).
P. EBENER & D. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (1985).

T. GLADWIN, THE MANAGEMENT OF ENVIRONMENTAL CONFLICT: A SURVEY OF RESEARCH APPROACHES AND PRIORITIES (1978).
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