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Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice

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ARTICLE

DISPUTE RESOLUTION ALTERNATIVES AND THE GOALS OF CIVIL JUSTICE: JURISDICTIONAL PRINCIPLES FOR PROCESS CHOICE

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In recent years, legal scholars have debated the sources of and cures for a "crisis in the courts," that is evidenced by widespread public dissatisfaction with the legal system. Scholars in the law and economics school have focused on analyzing how disputants and policymakers decide which disputes should go to court, arguing that such decisions should be made so as to promote the goal of allocative efficiency. Sociologists of law and legal system reformers have emphasized exploration of alternative forum choices including negotiation, mediation and arbitration. In this Article, Professor Bush integrates the insights of the law and economics scholars, the sociologists of law and the reformers in order to develop jurisdictional principles which can be used to determine the appropriate forum for handling specific categories of disputes. These jurisdictional principles are based on analysis of a wide range of accepted goals of the civil justice system. The author identifies the discrete goals of the civil justice system and the costs engendered by failing to further each goal. He then develops an analytic model for choosing appropriate forums that considers all of these goals and costs. The model matches the costs which a particular dispute would likely engender with the forum most likely to reduce those costs. Applying the model, Professor Bush shows that previous analyses have consistently exaggerated the desirability of handling certain disputes in the courts. Finally, the author concludes that the model suggests the need for the use of public incentives to influence disputants' choice of process.

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In the development of the American system of civil justice, the last decade or more has witnessed an increasing sense of institutional crisis. Views as to the source of the crisis differ. According to one popular view, the civil rights revolution of the 1950's, given teeth by the legal services movement of the 1960's, gave birth to a general legal rights consciousness in the public.[1] The growing demand for legality was met by an increasing tendency of the courts to find or fashion new legal remedies, as for example in the fields of contracts and torts.[2] This welcoming attitude in turn spurred greater interest

1. *See, e.g.*, Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008-11 (1970); *see also* Hurst, *The Functions of Courts in the United States, 1950-1980*, 15 LAW & SOC'Y REV. 401, 409-10 (1981).

2. *See* Hurst, *supra* note 1, at 450-53; *see also*, Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970) (rejecting traditional rule of caveat emptor in context of urban landlord and tenant transactions and recognizing implied warranty of habitability in contracts for urban dwellings, noting earlier decisions to the same effect by the Supreme Courts of Wisconsin, Hawaii and New Jersey); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (recognizing unenforceability of unconscionable contracts at common law in the context of seller's attempt to enforce rights to repossess items purchased, when buyer failed to make installment payments according to the terms of a consumer sales contract); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (allowing recovery of economic expenses of treatment and support in wrongful life action to child born with congenital deafness, where defendant physician negligently failed to advise parents of risk of such a birth defect prior to conception); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)

in pursuing legal rights. In addition, the decreased effectiveness of other dispute handling institutions, due to various social forces, probably encouraged greater reliance on and resort to the legal system.[3] Whatever view is taken as to its source, however, it is widely agreed that this upward spiral of legal activity was soon bumping against the limits of the institutional capacity of the legal system.[4] There were not enough courtrooms for all the would-be litigants, the costs of legal services were too high for many to pursue or defend their rights effectively, and alternatives to legal action were not adequately developed enough to be attractive and useful. By the early 1970's, the substantive rights consciousness movement had necessarily led to a movement for institutional reform in the civil justice system as a whole, including the development of alternative dispute

(recognizing the right to recover for emotional distress suffered as a result of physical harm negligently inflicted on a third party); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (rejecting status-based rules establishing landowner's duty and liability in relation to plaintiff's status as trespasser, licensee or invitee, and adopting instead rule of duty of reasonable care in light of all circumstances); Tunkel v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (recognizing patient's right to sue hospital despite express release from liability for future negligence agreed to by patient as a condition of admission to hospital); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (recognizing right of tenant to make reasonable repairs and offset the cost thereof against rent in response to landlord's breach of implied warranty of habitability or constructive eviction); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (recognizing consumer's right to recover for breach of implied warranty of product fitness despite manufacturer's and dealer's express disclaimer of all implied warranties); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (1970) (holding that a contract may be unenforceable because unconscionable on the sole ground that the purchase price provided for was "shocking" and "flagrantly excessive"); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807 (1978) (allowing recovery of economic loss in wrongful birth action to parents of mongoloid child, where defendant physician never advised them of risks of abnormal children in the kind of pregnancy in question).

3. *See, e.g.*, Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond A Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 413-14 (1980); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 114 (1976); Merry, *Going To Court: Strategies of Dispute Management In An American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891, 893 (1979).

4. *See, e.g.*, Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Sander, *supra* note 3, at 111; Rosenberg, *Civil Justice Research And Civil Justice Reform*, 15 LAW & SOC'Y REV. 473, 474 (1981); Note, *The California Rent-A-Judge Experiment: Constitutional And Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 & n.1 (1981). However, not all commentators see a disproportional or surprising increase, or explosion, in legal activity. Rather, they see simply an increase proportional to population growth and growth in social and economic activity. *See* Friedman, *Claims, Disputes, Conflicts And The Modern Welfare State*, in ACCESS TO JUSTICE AND THE WELFARE STATE 251, 265-66 (M. Cappelletti ed. 1981) [hereinafter cited as ACCESS TO JUSTICE]; Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 36-51, 69-70 (1983); Barlow, *The Litigation Explosion Myth*, 3 CAL. LAW., Dec. 1983, at 39. The problem of institutional capacity to handle this growth nevertheless remains.

resolution mechanisms outside the formal court system.[5] Debate as to the desirability and the proper course of such reform continues, and it is to that debate that this Article is addressed.

I. INTRODUCTION: CIVIL JUSTICE REFORM, DISPUTE RESOLUTION ALTERNATIVES, AND THE SEARCH FOR JURISDICTIONAL PRINCIPLES

A range of positions has been taken on the nature of the civil justice "crisis," and the appropriate direction for reform—especially as regards public policy on dispute resolution alternatives.[6] These positions fall into three camps. Observers in the first camp adopt a laissez-faire attitude and reject the need for reform. Observers in the second camp urge government-sponsored reform. Finally, observers in a third camp recommend rigorous analysis as a prelude to action.

The laissez-faire camp contains four basic positions. Some commentators, adopting an historical perspective, suggest that the present call for reform is neither novel nor indicative of a real crisis, but is simply the most recent recurrence of a cyclical pattern of popular dissatisfaction with institutions of justice, which is particularly strong at present in light of increased expectations of the courts and public institutions generally.[7] From this historical perspective, the implication is that the appropriate response is simply to leave the system alone, for the public interest will eventually swing in another direction as this wave of the cycle passes. A second position, taken by some law-and-economics analysts, is that the complained-of delay and high costs of civil justice are in fact a useful form of rationing that limits judicial activity and promotes out-of-court settlement in

5. *See, e.g.*, Cahn & Cahn, *supra* note 1, at 1011; Cappelletti & Garth, *Access To Justice and the Welfare State: An Introduction*, in ACCESS TO JUSTICE, *supra* note 4, at 1, 14-20; Trubek, *Studying Courts In Context*, 15 LAW & SOC'Y REV. 485, 491 (1981); Galanter, *Justice In Many Rooms*, in ACCESS TO JUSTICE, *supra* note 4, at 147, 148.

6. Discussion of "dispute resolution alternatives" originally meant a focus on processes other than adjudication, that provided *alternatives to* the formal court system. This perspective implicitly regarded adjudication as somehow distinct from all other processes. More recently, commentators have realized that adjudication itself is simply one of a number of process alternatives, among which disputants and policy makers can and should choose in deciding how particular disputes should be dealt with. *See*, Ad Hoc Panel on Dispute Resolution and Public Policy, U.S. Dept. of Justice, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 4 (1984) [hereinafter cited as *Paths to Justice*]. In this Article, the term "dispute resolution alternatives" is used in this latter sense to mean *all* the alternative processes, including adjudication as well as extra-judicial processes, that can be employed to handle disputes.

7. *See, e.g.*, Engel & Steele, *Civil Cases and Society: Process and Order in the Civil Justice System*, 1979 A.B. FOUND. RESEARCH J. 295, 346; Cavanagh & Sarat, *supra* note 3, at 375-76; *see also* Trubek, *supra* note 5, at 491; Galanter, *supra* note 4 at 49-51, 69-71.

an economically desirable manner.[8] From the law and economics perspective, government-sponsored court reform is not only unnecessary but undesirable, and if the demand is high enough to warrant it, private market alternatives or supplements to the public system of civil justice will develop on their own.[9] Another position, which also stresses private sector "solutions," but from a different perspective, is implicit in the many sociological studies of informal and extralegal dispute handling institutions.[10] Documenting the rich and generally effective variety of such institutions—from media action lines, to business complaint departments, to bilateral bargaining—their implication is that public action to reform the system may be unnecessary in light of the wide range of informal mechanisms upon which disputants can and do rely.[11] A fourth position, found in one major strain of the sociology of law literature, reaches the same conclusion, that public reform of civil justice is not crucial, but from a very different basis. Stressing the importance of social justice as an overriding goal, it argues that, as long as different groups have greatly unequal power and hence bargaining strength, social justice cannot be furthered by dispute handling institutions, nor by the legal system as a whole.[12] Political organization to

8. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-21, 445-48 (1973); Engle & Steele, *supra* note 7, at 337.

9. *See* Landes & Posner, *Adjudication As A Private Good*, 8 J. LEGAL STUD. 235, 236-38, 253 (1979); *Discussion By Seminar Participants*, 8 J. LEGAL STUD. 323, 326 (V. Goldberg ed. 1979) (remarks of R. Posner). *See also* Cavanagh & Sarat, *supra* note 3, at 402.

10. *See, e.g.*, Ladinsky & Susmilch, *Major Findings of the Milwaukee Consumer Dispute Study*, in A.B.A. SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES 145, 185-204 (L. Ray ed. 1983) [hereinafter cited as CONSUMER DISPUTE RESOLUTION]; Mattice, *Media in the Middle: A Study of the Mass Media Complaint Managers*, in NO ACCESS TO LAW 485 (L. Nader ed. 1980); Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 LAW & SOC'Y REV. 199, 215 (1978); Ross, *Insurance Claims Complaints: A Private Appeals Procedure*, 9 LAW & SOC'Y REV. 275, 291 (1975).

11. *See* Hurst, *supra* note 1, at 439-40; Galanter, *supra* note 5.

12. *See* Abel, *Redirecting Social Studies of Law*, 14 LAW & SOC'Y REV. 805, 827 (1980) [hereinafter cited as Abel, *Redirecting Social Studies*]; Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974) [hereinafter cited as Galanter, *Why the Haves*]; Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC'Y REV. 247 (1976); Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POL'Y Q. 5, 36-42 (1979) [hereinafter cited as Abel, *Socializing the Legal Profession*]; Kidder, *The End of the Road? Problems in the Analysis of Disputes*, 15 LAW & SOC'Y REV. 717 (1981). *But see* Galanter, *The Duty Not to Deliver Legal Services*, 30 U. MIAMI L. REV. 929 (1976) [hereinafter cited as Galanter, *Duty Not to Deliver*], and especially Galanter, *supra* note 5, at 170, where Galanter seems to moderate his earlier position on the futility of reform in civil justice institutions.

A variant of Galanter's position sees the crisis of overreliance on the courts as merely one manifestation of an underlying and more important crisis in social institutions generally,

achieve parity of power is thus the key strategy to be pursued, and civil justice reform is relegated to a secondary, if not minor, concern.

The common element of these first four positions, then, is that major institutional reform of civil justice is in fact neither necessary nor desirable and that the appropriate public policy is to sit tight and let the storm blow over, allow private sector institutions to operate, and, if anything, focus on political rather than legal reform.[13] A very different view is taken by still other participants in the debate over civil justice reform, namely, the view that public action is indeed crucial. Again, however, among those in this "camp," there are important differences as to the nature of the crisis and the appropriate course for reform.

One position within this pro-reform group is that, despite the existence of informal and other private sector dispute institutions, these institutions lack effective sanctions in many dispute situations. Therefore, ultimate access to the legal process and legal sanctions is crucial, even if it will ordinarily not be the first resort, in order to provide effective incentives to utilize private sector alternatives. Accordingly, reform is necessary to guarantee that the legal process is practically accessible in all cases (although it will often be unnecessary to take advantage of this access); and therefore barriers of time, money and other costs must be eliminated by public action.[14] A second position in favor of reform rejects or at least ignores the possibility of relying in the first instance on informal or private alternatives. Whether for (usually unclear) philosophical reasons or for practical reasons of taking pressure off the courts while maintaining confidence in the public justice system, the position is taken that public action is necessary, not just in providing a last resort, but also in providing alternative processes of resolution in the first in-

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and reaches the similar conclusion that attention should be directed to the root problem, rather than tinkering with the justice system. Cavanagh & Sarat, *supra* note 3.

13. It is interesting to note that this general position has brought together in one camp those who follow a free-market non-interventionist approach, as well as those who generally follow a radical interventionist social justice approach. Scholarship, as well as politics, seem to make strange bedfellows.

14. *See, e.g.*, Nader & Shugart, *Old Solutions For Old Problems*, in NO ACCESS TO LAW 57, 81 (L. Nader ed. 1980); Nader, *Disputing Without The Force of Law*, 88 YALE L.J. 998, 1000, 1019-20 (1979); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-77 (1979). A more demanding variant of this position is that in order to keep intact standards of procedural due process, access must be guaranteed not only to a "mini process" exercising legal sanctions, but to a full blown procedure with all the protections of the formal judicial process. *See* Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R. - C.L.L. REV. 48 (1976); Engel & Steele, *supra* note 7, at 335.

stance.[15] A final pro-reform position, related to but distinct from the last mentioned, envisions a comprehensive public justice system in which many alternative processes would be available, with cases channelled somehow to the appropriate processes, and with no one having to rely on private or informal processes except by choice or preference.[16]

One very important aspect of the civil justice debate spans both the reform and laissez-faire "camps." As noted above, there is increasing recognition in both camps that the civil justice system actually includes (or should include) a broad range of dispute resolution processes, public and private, official and unofficial. This common focus on alternative processes of dispute resolution gives rise to the central issue of process jurisdiction, or process choice: that is, what are the appropriate uses, or jurisdictions, of different processes?[17] Thus, a good deal of the civil justice debate surrounds specific proposals concerning how particular types of cases (consumer disputes, marital disputes, environmental disputes, etc.) should be handled. In each instance, argument centers on which process (adjudication, arbitration, negotiation, etc.) is the best way to handle the type of case in question. Indeed, it is in this area of specific process choice proposals that the debate is often hottest, with numerous and contradictory proposals vying for acceptance—usually without any clear agreement on the criteria by which questions of process choice (or any question of civil justice reform) should be decided.[18]

Finally, there is a third camp in the debate on civil justice reform, which advocates neither laissez-faire nor government-sponsored reform. Instead, this camp holds that what is needed first is not action (nor purposeful inaction), but rather thought. The crisis in civil justice cannot properly be assessed, nor reform charted, nor specific process choice proposals evaluated, without a guiding con-

15. *See, e.g.*, Sander, *supra* note 3, at 130-31; Cahn & Cahn, *supra* note 1, 1016-19; Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927, 947-55 (1966); Galanter, *Duty Not to Deliver*, *supra* note 12, at 934-36. While this position seems to advocate more public action, it may actually be less demanding in the end because the kinds of reform focused on here have tended to deal solely with "minor disputes" and the diversion of disputes that are brought to the courts into less formal and less expensive, although public, forums.

16. *See, e.g.*, Sander, *supra* note 3, at 130-31; Johnson, *The Justice System of the Future: Four Scenarios for the Twenty-First Century*, in ACCESS TO JUSTICE, *supra* note 4 at 183, 195-209; Lea & Walker, *Efficient Procedure*, 57 N.C.L. REV. 361 (1979).

17. *See* Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307, 329, 334 (1971); Sander, *supra* note 3, at 130-31; Galanter, *supra* note 5, at 148; Rosenberg, *supra* note 4, at 480.

18. *See infra* Part III.

ception of what the civil justice system should be doing.[19] In short, it is argued that we lack clarity and, especially, consensus, as to the proper goals and functions of the civil justice system, and that without addressing this basic problem, further debate is pointless. While the notion that the well-established civil justice system lacks clear-cut direction sounds surprising at first, the variety of positions adopted in the debate itself, as outlined above, indeed reveal a considerable range of disagreement, and confusion, about the goals and functions of civil justice.

With this overview of the field of debate on civil justice reform, one might well ask—why cast yet another hat into the ring (or straw into the wind)? In fact, a number of reasons support this new entry into the discussion. First, as demonstrated, the debate on civil justice reform stretches from extreme to extreme, both as to the nature (indeed the existence) of the crisis and as to the appropriate shape of reform. While common positions emerge, they often rest upon different and unrelated bases. Moreover, the debate has often gone on with the participants speaking, as it were, in different halls. Thus, one finds discussion of the issues, corresponding to some of the different positions noted above, in law and economics literature, in sociology of law literature, and in traditional "law reform" literature. However, it is rare indeed that discussions in one "arena" make reference to those of the others, even where the analyses would be mutually supportive. At the least therefore, it is important to bring the debate into a single hall, to relate the views and arguments one to the other. In this, I am allied with the third camp, favoring thought—and preferably cooperative and organized thought—before action. Part of the purpose of this Article is then to relate heretofore unrelated insights of different commentators on the subject of dispute resolution alternatives and civil justice reform.[20]

A second and more important reason for this entry into the discussion also relates to the divergency of the debate. To the extent that the discussion has, implicitly or explicitly, raised questions

19. *See, e.g.*, Engel & Steele, *supra* note 7, at 296 and *passim*; *see also*, Sander, *supra* note 3, at 133. Note, however, that most of Sander's research suggestions are descriptively rather than normatively or conceptually oriented. *See infra* note 21. *See also* Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975).

20. Of course, those interested in civil justice reform have focused on a variety of strategies or approaches, including increased legal assistance, substantive law simplification, and reorganization of disadvantaged parties, as well as the use of alternative dispute resolution processes. *See e.g.*, Galanter, *Why the Haves*, *supra* note 12, at 135-44; Galanter, *Duty Not to Deliver*, *supra* note 12, at 932-44; Cahn & Cahn, *supra* note 1, at 1016-24. This Article will focus exclusively on the discriminating use of alternative dispute resolution processes as one crucial strategy for civil justice reform.

about the goals of the civil justice system, the debate has threatened to come to a grinding halt. This is so, because after the participants assume or articulate two or more distinct goals of civil justice, the question often simply becomes one of ideological preference. That is, the wide divergence of approaches to and proposals for reform stems from a wide divergence of views as to what are the goals of civil justice to begin with, with each proponent fixing upon a different goal and then upon an approach that furthers that goal, with little use for subsequent dialogue or analysis. Yet there has been comparatively little attention directed to this implicitly fundamental level of the debate, little effort to articulate, define and clarify the underlying (and competing) conceptions of civil justice goals and their interrelationships.[21] Perhaps as a consequence, there is a notable lack

21. Here it is important to note more precisely what has and has not been done in this direction. One very significant body of work is devoted to examining, through empirical research, how individual disputants choose to handle disputes, and why they make the choices they do. *See, e.g., Special Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 391 (1980) (containing the research product of the Civil Litigation Research Project); Ladinsky & Susmilch, *supra* note 10 (summarizing the findings of the Milwaukee Dispute Mapping Project); Galanter, *Why the Haves*, *supra* note 12; Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975); Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339 (1976). While this work does focus to some degree on the functions that dispute handling processes serve for the parties that utilize them, it does not try to identify the functions that the dispute handling system as a whole is expected or desired to serve for society at large. In other words, this work does not identify the goals of the system. The latter is almost by definition a conceptual rather than an empirical undertaking, although empirical research can certainly help clarify gaps between goals and realities as well as test the practical feasibility of goals. As noted below, most of this sociolegal research has been consistently directed toward one goal in particular: social justice. *See infra* text accompanying notes 36-40. That is, it could be argued that this literature is produced largely to further a particular goal presumed to be desirable, and not in order to identify, examine and question the desirability of a variety of systemic goals. *See* Lempert, *Grievances and Legitimacy: The Beginnings and End of Dispute Settlement*, 15 LAW & SOC'Y REV. 707, 713-15 (1981) (criticizing the sociolegal literature for its lack of attention to the goals question).

Elsewhere in the literature, the question of the social goals of civil justice is addressed more explicitly, but always in ways that stop short of being specific or comprehensive enough to be helpful in evaluating or guiding systemic reform. Thus, some writers recognize the system's goals as being rule-making and dispute settlement. *See* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 637 (1976); Landes & Posner, *supra* note 9, at 236; Scott, *supra* note 20. In fact, as will be shown below, *see infra* Part II(A) and (B), each of these two goals is really only an instrument for achieving several other more fundamental goals. These fundamental goals need to be specifically identified in order to clarify their significance and interrelationship and in order to use them in guiding civil justice reform. Thus, this formulation of goals is neither comprehensive nor specific enough to be very valuable.

A few writers have taken care to distinguish a wider range of civil justice goals. For perhaps the best efforts in this area, see, Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974); and Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, in CONSUMER DISPUTE RESOLUTION, *supra* note 10, at 353. *See also* McGillis, *Minor Dispute Processing: A Review of*

of precise analysis, at the theoretical level, of any set of "neutral principles" that might guide civil justice reform, especially with regard to development and use of dispute-resolution alternatives. This is perhaps most evident in the context of specific process choice proposals, and explains the lack of accepted evaluative criteria referred to above. As Professor Fuller noted, there has been "little attention to . . . a comparison of the pros and cons of rival processes. . . ."[22] Others have agreed that there is a crucial need for "jurisdictional principles" to help distinguish the appropriate uses and limits of different processes.[23]

In fact, it is often the case that divergent—even contradictory—goals are incorporated into the operation of a single system according to coherent principles. Indeed, few systems of any significant size are uni-directional. Thus, my primary aims in this Article

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Recent Developments, in CONSUMER DISPUTE RESOLUTION, *supra* note 10, at 243; *Paths to Justice*, *supra* note 6 at 9-10, 15-18, and Table 4. In each case, the author distinguishes and discusses a considerable range of goals or values to be employed in evaluating the civil justice system and its constituent processes. In each case, however, the presentation is incomplete in several important respects. First, each makes the mistake noted above, confusing instrumental and ultimate goals. The result is either to confuse the picture by identifying too many goals as separate, or to leave it ambiguous by failing to identify important ultimate goals separately. For instance, Summers numbers procedural fairness, procedural legality, privacy and consensuality as separate goals. However each is logically part of, and instrumental to, one or the other of two more fundamental goals he cites, legitimacy and humaneness or dignity. Summers, *supra*, at 20-27. On the other hand, he cites procedural rationality as a goal per se, *id.* at 26-27, whereas it is better seen as a means to a number of goals, some of which Summers notes, such as legitimacy and humaneness (understood as protection of fundamental rights), and some of which he omits altogether, such as allocative efficiency and social justice. Singer's analysis, while it identifies different goals, suffers from the same kinds of confusion. *See* Singer, *supra*, at 356-65.

A second problem is that each author identifies goals without being adequately specific about what each goal means or entails, or, conversely, what specifically is sacrificed when the goal is foregone. Summers calls process peacefulness a goal. Summers, *supra*, at 22. But he says little about why it is a goal. What is important about process peacefulness? What happens if this goal is not attended to? A sense of specific (positive and negative) consequences of attention to or neglect of goals is missing both here and, at least in part, in Singer, and thus so is a sense of the reality of the goals identified. Third, while Summers recognizes the possibility of confiict between goals, Summers, *supra*, at 39-42, Singer gives this less notice, and neither suggests how this key problem can be addressed in civil justice reform.

As a result of these limitations, it is difficult to perceive the real significance of the goals identified as well as the interrelationships among them, or among goals, cases and processes. Consequently, these presentations do not help to answer such questions as: what goals are significant in a given set of cases, how significant is each in relation to the others, and how would each be affected by a proposed process reform? Indeed, neither writer uses the goal framework systematically to formulate such questions or otherwise make a practical link between goal definition and the evaluation of civil justice reform.

22. Fuller, *supra* note 17, at 334. *See also id.* at 307, 329.

23. *Dispute Resolution*, 88 YALE L.J. 905, 909 (1979). *See supra* text accompanying notes 16-18; *see infra* notes 71-74 and accompanying text; Part II.D.3-4; *see also* Sander, *supra* note 3, at 113.

are: to bring the goals of civil justice, which have thus far lain in the background of the debate, into the forefront; to show how they can and must be seen as interrelated elements in an integrated conception of the civil justice system's purpose; and to show how this conception—and the goals themselves—can and must be used as the basis for developing analytically sound jurisdictional principles to guide and evaluate civil justice reform—especially as concerns proposals on process choice.

Specifically, the jurisdictional principles developed herein provide a means of making process choices by comparing the costs that would be involved in using different processes for the handling of a given type of dispute. The cost analysis used here differs from other attempts at this kind of approach in several important respects, including the fact that it is predicated on explicit consideration of a wide range of goals considered significant in the civil justice system. The organization of the Article is as follows. In Part II, various and sometimes conflicting goals of the system are identified, and each is framed in terms of the costs associated with failure to attain it. An "overall cost" framework for interrelating civil justice goals is then suggested. This theoretical framework is used to identify the factors that will predict the overall costs of using a given process to handle a given type of dispute. These factors provide working principles for making process choices by comparing such costs for different processes. In Part III, this theoretical approach is applied to analyze actual proposals advocating specific processes for different types of cases. The analysis of this Part shows that previous discussions of process choice have systematically and unduly tended, whether because of inadequate analysis or some sort of underlying bias, to favor using adjudicative processes and to disfavor the use of mediation and related processes. In Part IV, it is shown that some public intervention in the dispute-handling "market" is necessary to encourage process choices that reflect the interests of not only the parties to the dispute but also the society of which they are a part. Finally, in Part V, the problem of the bias evident in previous process analysis is reconsidered, and it is suggested that its underlying source is a distortion in the larger framework of values that underlies the civil justice system itself. It is shown that the approach taken here can be useful not only in guiding civil justice reform, but also in providing corrective insights about this underlying value framework.

II. A Goal-Centered Approach to Reform: Civil Justice Goals, Process Choice, and Jurisdictional Principles

What are the goals of the civil justice system? What is it that is to be accomplished, what is important to achieve, through the handling of a civil dispute? Without some agreement about the answers to such first order questions it is difficult to formulate policy for or evaluate civil justice reform, because it is not even clear whether any need for reform exists. Without goals, one lacks criteria for evaluation, and hence direction (and justification) for reform. Without goals, one lacks any basis for comparing dispute resolution alternatives or responding to specific process choice proposals, since there has been no determination of the ends to be achieved. In addition, assuming there may be a number of goals pointing in different directions, some means is needed of interrelating them so that choices can be made in an integrated fashion. In fact, the wide divergence of views described in Part I concerning civil justice reform is a manifestation of a deeper divergence in views as to the goals of civil justice themselves.[24] Those views are sometimes made explicit, but are more often implicit, in discussion of civil justice reform. If any integrated conception of civil justice goals is to be formed, the first step is to articulate openly the different conceptions of civil justice goals that seem to underlie the debate.

Before doing so, however, a few words are in order about definition and scope of inquiry. Most important, what is meant herein by "the civil justice system"? The term as used above was chosen primarily for its association with the present concern over the "crisis in the courts" and related institutions for dispensing justice in civil cases. However, it is clear that the range of literature relating to this problem, as reviewed above, focuses not merely on courts, but on widely differing institutions and processes, from arbitration to department store complaint procedures, from bilateral negotiation between disputing parties to media action lines. Indeed, this breadth of focus is completely appropriate in discussing the "civil justice system" and its reform. The common ingredient is that any one of these may be called into play when parties disagree over the use of resources and seek a non-violent way to get beyond this point of disagreement and continue their respective activities most profitably and with least disruption and restriction. In such a situation, what the parties want is whatever will work to serve this purpose (although each may assess this differently). Their definition of civil jus-

24. *See* McGillis, *supra* note 21, at 247-49; Singer, *supra* note 21, at 355-56.

tice is thus primarily functional, and the limits of the system in which they seek it are also functionally defined. Whether they do or do not enter the courts or other legal institutions of the state, will often be a function of individual choice or of time and money barriers, rather than of any fundamental functional division between judicial and extrajudicial, legal and extralegal, institutions.[25]

So, in discussing the "civil justice system" and its reform, it makes sense to define the system as it in fact exists, especially since whatever public policy is adopted will in fact affect all parts of this system. Moreover, a significant part of the discussion of civil justice reform has focused on alternatives to the judicial process. So, again, adopting a definition of the system that includes these alternatives facilitates a clear analysis of all dimensions of the reform issue. Thus the definition employed herein is that the civil justice system consists of all those institutions and processes, judicial and extrajudi-

25. In essence, the courts and other dispute-handling institutions are alternatives or substitutes for one another, their relative desirability depending upon a variety of factors in each party's decision calculus. To put the matter another way, the parties to disputes may be seen, and they in fact behave, as prospective consumers of dispute-handling services. Together with anyone providing some variety of such services, they form a market. And that market operates, subject to imperfections and interventions, to regulate resource flow to dispute-handling activities. One major intervention in this market, the justification for which has been discussed elsewhere, is the public institution of courts of law and a regulated legal profession licensed to operate them. *See* Bush, *The Economic Significance of Access To Justice: An Analysis of Resource Allocation to Dispute-Resolution Services In Relation To Public Policy-Making and the Public Interest*, in 3 ACCESS TO JUSTICE 193, 225 n.30 (M. Cappelletti & B. Garth ed. 1979); *see also id.* at 224-27; Landes & Posner, *supra* note 9, at 240-42, 261. However this intervention, while major, by no means eliminates the rest of the market. Rather the market as a whole continues to function, even if distorted by this major intervention. And indeed the different parts of the market continue to interact with and affect eacb other, with business shifting back and forth as relative prices and consumer preferences shift. What this means is that civil justice reform, whatever its intended target, in fact affects and is affected by this entire market or system (for a market is simply a particular kind of system).

It may occur to the reader that, if the civil justice system is indeed like a market for dispute-handling, any discussion of goals and direction for the system becomes moot, for where a market operates, the whole point of market activity is to answer such questions directly by aggregating individual consumption and production decisions, obviating the need for second-hand theorizing about what society needs. In the main, discussion of this point will be deferred to Part IV *infra*. Suffice it to say here that, if only because of the massive public intervention already made into this market (i.e., the public court system) it is scarcely possible to argue now that public policy here can simply defer to market processes. In other words, the market analogy is used here to give a proper characterization and proper dimensions to the subject of the discussion, not to suggest that the public policy questions can be done away with altogether. The market analogy has been suggested by other commentators as well. *See* Cahn & Cahn, *supra* note 15; Landes & Posner, *supra* note 9. Still others, while not specifically using the market analogy, recognize the position of the courts as one element in a much wider dispute handling system. *See, e.g.*, Galanter, *Why the Haves*, *supra* note 12, at 126-35; Trubek, *supra* note 5.

cial, legal and extralegal, that operate in the activity of handling civil disputes.[26]

26. The focus of this Article is on civil disputes and the civil justice system because the reform debate to which this study is addressed concerns itself with that system and has generally been treated as separate from the parallel ongoing debate as to reform of the criminal justice system, even if they are related in some respects. It is true that the civil-criminal distinction blurs in certain areas and that the "civil justice" reforms discussed herein sometimes are linked to the criminal justice system itself. *See, e.g.*, Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359 (1975); McGillis, *supra* note 21, at 252-54. However, where this is so, the point of the linkage is usually to treat the criminal offense as a civil dispute and deal with it as such, *see* Stulberg, *supra*, rather than to reform some aspect of the criminal justice system per se. In short, while there are clearly points of interaction, the elements, issues and goals of the two systems are sufficiently different to justify and indeed require separate treatment. It is possible, however, that the approach of this study could be separately applied to the question of criminal justice reform.

As to the terminology of "dispute handling," it should be noted at the outset that the literature has grown quite sophisticated as to the precise significance of such terms. Thus, a "dispute" is now differentiated from a problem, grievance or claim. *See, e.g.*, Ladinsky & Susmilch, *supra* note 10, at 151; Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1981); Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1981). In effect, the notion is that an individual first experiences a problem, then defines it as a grievance against someone in particular, and then makes a claim against the identified party. A dispute exists only if the claim is contested or rejected, in whole or in part. This definition of dispute is quite workable for purposes of this study, although the demarcation between a claim and a dispute, as regards the negotiation process, for example, may in practice be rather hard to make. However, by saying that "civil justice" means dealing with civil disputes so defined, the implication is that "claiming" processes, or processes for bringing unvoiced "grievances" to light, are outside of this system. This is not the intent here in adopting the "dispute" terminology. Rather, since most (though not all) of the processes under debate, and to be discussed herein, involve dealing with disputes as defined above, it makes sense to use this terminology. It should still be understood that at times the stricter usage might speak of "claims", and that processes more involved with claims and grievances specifically are omitted from the analysis for practical and not conceptual reasons. These processes could be analyzed by extensions of the approach developed in this analysis with specific reference to dispute handling.

Similarly, the analysis here does not specifically address the question of the appropriateness or competency of the judicial process versus the legislative process in particular contexts, a question that has generated considerable controversy in different areas. *See, e.g.*, Cavanagh & Sarat, *supra* note 3; Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982) [hereinafter cited as Henderson, *Process Constraints*]; Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982). On the other hand, to the extent the legislative process is itself understood as a type of negotiation process, *see* Eisenberg, *supra* note 21, at 665, it can be examined by using or elaborating on the framework developed here. Indeed, the concern for "polycentricity" which has led some to favor the legislative over the judicial process in certain kinds of cases, *see, e.g.*, Henderson, *supra*; Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978) [hereinafter cited as Henderson, *Manufacturers' Liability*], was originally articulated by Professor Fuller as an argument for leaving certain kinds of cases to negotiation or mediation type processes, not to the legislative process per se. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-404 (1978); Fuller, *supra* note 17, at 334-37. Fuller notes simply that, ". . . the majority principle is quite incapable of solving polycentric problems." Fuller, *The Forms and Limits of Adjudication*, *supra*, at 399.

A. The Goals of Civil Justice

Considering the civil justice system in its broadest sense, what are society's goals for this system? To answer this question, it is important to return to the literature produced by the civil justice reform debate. In the following sections a number of such goals will be identified as underlying the views taken in the debate: resource allocation, social justice, fundamental rights protection, public order, human relations, legitimacy, and administration. In each case, the questions will be: What is the general societal goal in question? How is it that this goal can be furthered by the dispute handling system? What are the implications for the structure of the system if it is viewed as an instrument for attaining this goal?

1. RESOURCE ALLOCATION

One important societal goal as articulated by economics is the allocation of society's scarce resources among various resource-consuming activities so that the maximum benefit or value is extracted from those resources.[27] While the resource allocation efficiency goal has been severely criticized from different sides,[28] it is certainly true

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Finally, the terminology of the debate has also been refined as regards the activity of dealing with disputes. Early reference to "resolution" or "settlement" was seen as implying a finality rare in dispute handling activities. *See, e.g.*, Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 63 n.1 (1974) [hereinafter cited as Felstiner, *Social Organization*]. Focus on processes of dispute handling led to the use of "dispute processing" as a descriptive label. *See id.*; Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695 (1975) [hereinafter cited as Felstiner, *Avoidance*]; Sander, *supra* note 3. More recently, "dispute resolution" has regained popularity and familiarity, *see e.g.*, *Symposium, Alternative Dispute Resolution in the Law School Curriculum*, 34 J. LEGAL EDUC. 229 (1984), and for this reason the Introduction above employed this term. Hereafter, however, the term "dispute handling" is employed as a more accurate, inclusive, and straightforward way of describing all the different processes used in the civil justice system to deal with disputes.

27. Most narrowly stated, the goal is to reach an allocative optimum or point of efficiency, at which point no reallocation of resources is possible that will result in a benefit to one person without harming any other. In classical economists' eyes the primary social choice tool for accomplishing this goal is the market economy. However, even where private markets do not function perfectly and government is therefore called on to intervene, allocative efficiency is still an important goal of any governmental action. Furthermore, many argue that efficiency remains an important goal even when it is uncertain that a reallocation will benefit some and harm none; for if "the winners win more than the losers lose," a net societal gain results and the resulting allocation is an improvement in resource use for society as a whole. *See, e.g.*, Steiner, *The Public Sector and the Public Interest*, in 1 The Analysis and Evaluation of Public Expenditures 13 (1969) (submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, 91st Cong. 1st Sess.); Turvey, *On Divergences Between Social Cost and Private Cost*, 30 ECONOMICA 309, 312 (1963).

28. *See, e.g., Symposium On Efficiency As A Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 BRIT. J. LAW &

that, in some form, it is widely considered to be an important societal goal. In theory at least, needless waste—in government, business or personal life—is widely viewed as an evil; and the avoidance of waste at all levels is what the efficiency goal is about.

Can the dispute handling[29] system be an instrument for furthering the efficiency goal? According to one view, probably most closely identified with Judge Posner and other practitioners of "the new law and economics approach," the foremost goal of the civil justice system is to foster efficient resource allocation.[30] Posner's well-known thesis is that the rules of the common law operate and were probably designed to create incentives on economic actors to use resources efficiently.[31] The individual dispute has little importance per se, and instead is most important as a basis from which to derive and articulate a general rule which will create appropriate incentives for future actors to adopt cost-minimizing or benefit-maximizing behaviors. Thus the dispute handling system is essentially a screening, channelling, and signalling mechanism. It attracts or captures high leverage cases, i.e., those with potential for generating new (or refining older) resource allocation incentives; and it handles these cases in such a way as to accumulate accurate information relevant to the resource allocation implications of the case,[32] so that an accurate decision or rule can be formulated. The effect is then to send a message to future actors and thereby induce future behavior consistent with efficient resource use in similar situations. In run of the mill cases where disputes nevertheless arise, the system encourages and relies upon voluntary settlements induced by preexisting

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SOC'Y 158, 173-74 (1980); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 462-69 (1974); Polinsky, *Economic Analysis As A Potentially Defective Product: A Buyers Guide To Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1680-81 (1974).

29. *See supra* note 26, for the reasons behind the choice to use the term "dispute handling."

30. *See, e.g.*, Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-34 (1972); Posner, *supra* note 8, at 400-05; Calabresi & Melamed, *Property Rules, Liability Rules, And Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-98, 1106-10 (1972); Scott, *supra* note 20; Lea & Walker, *supra* note 16.

31. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 179-81, 189-90 (2d ed. 1977); Posner, *supra* note 8, at 400; Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 288-90 (1979); Scott, *supra* note 20, at 938-40.

32. In particular, it focuses on information about relative cost avoidance capabilities of the parties or those similarly situated. The discussion of goals of dispute handling here is related in part to the continuing discussion of appropriate criteria for judicial decision-making. *See, e.g., Symposium On Efficiency As A Legal Concern, supra* note 28. For the goal of the activity will be relevant not only to the process but to the decision criteria employed. However, the point here is to identify goals specifically in connection with questions of process reform.

rules, unless the case presents a novel question and hence a new opportunity for refining the rule and further improving resource allocation.

This view thus sees the dispute handling system as a two-component system consisting of a judicial component and a settlement/negotiation component (with the latter left to the private sector). Given the goal of efficiency and this conception of how it is furthered by the system, delay and high costs in the judicial component operate as useful rationing devices to keep the rule-formulating component of the system from being overwhelmed by routine cases. High settlement rates, regarded by some as evidence of the system's failure,[33] are to be expected and encouraged.[34] At the same time, cases that involve significant potential for furthering resource allocation should be formally adjudicated, and the system should make known the rules adopted and the fact that they are of general application.[35]

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33. *See, e.g.*, Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 1-2 (1976); Hurst, *supra* note 1, at 444-45.

34. It is only when the settlement rate approaches 100% that problems arise as a result of the lack of opportunities to reaffirm and clarify efficiency-promoting rules. *See* Posner, *supra* note 8, at 429.

35. While Posner may be the best-known advocate of this view of civil justice, he is by no means alone. Thus, Scott articulates what he calls the "behavior modification" model of the civil process as a means of advocating greater utilization of the class action device in civil litigation. *See* Scott, *supra* note 20, at 938-45. Lea and Walker, who correctly expand upon Posner's narrow focus on the judicial system, nevertheless implicitly view resource allocation as one of the major goals of the broader dispute handling system. *See* Lea & Walker, *supra* note 16, at 371, 376 and *passim*. Even those who place more stress on other, often contradictory, goals of civil justice frequently point to the efficiency goal when it serves their purpose. *See, e.g.*, Nader, *supra* note 14. While Nader generally emphasizes the social justice goal, *see infra* Part II.A.2, she nevertheless stresses the efficiency goal quite emphatically at times. *See id.* at 1002, 1007, 1018; *see also* Best, *Current Consumer Complaint Research: Suggestions For Its Context And Focus*, in CONSUMER DISPUTE RESOLUTION *supra* note 10, at 209, 210, 223; Singer, *supra* note 21, at 360-61. Fuller places considerable emphasis in some of his writings, *see* Fuller, *supra* note 17, on the human relations goal, *see infra* Part II.A.5; nevertheless, he also implicitly recognizes the importance of the resource allocation goal, indirectly identifying it as a source of the principles, rational argumentation over which he describes as the core of the adjudication process. *See* Fuller, *supra* note 26, at 377.

While Posner and most other law and economics writers have concentrated their discussion on the judicial system, the view of efficient resource allocation as a goal could apply even if the broader conception of the dispute handling system is adopted as in this Article. Thus, the goal would be that all the institutions and processes of this system should handle disputes so as to generate incentives for efficient resource use, rather than merely dealing with individual cases with no regard for their broader impact (or handling cases based on broader impact on a different goal). Some, like Lea and Walker, have argued as much, and expanding upon Posner's narrow focus on the courts, have implicitly set efficient resource allocation as one of the major goals of the broader dispute handling system they picture. *See* Lea & Walker, *supra* note 16.

2. SOCIAL JUSTICE

Economists who stress the efficiency goal freely admit that by their terms it is possible to attain efficiency in allocation of resources even where 90% of society's resources is held by a very small and very rich minority, and the remaining 10% is divided among a miserably poor majority. Many therefore argue that another societal goal, at least on a par with efficiency, is social or distributional justice—the attainment of equity in the distribution of society's resources, including all forms of wealth and power. Whether the goal is absolute equality or the reduction of inequality to an acceptable level, the essential notion is to narrow the gap between the haves and the have-nots.

Proponents of the social justice goal argue that the dispute handling system can operate to further this goal, through both the criteria used to decide individual cases and the structure of the system as a whole. This view finds its most consistent expression in the sociology of law literature.[36] As is the case with the efficiency goal, the handling of an individual dispute is seen as a leverage point at which to effectuate the larger social goal. Here, the individual case can serve as an opportunity to articulate a rule that shifts wealth and power beyond a particular case.[37] Unlike the efficiency goal, the social justice goal may also be served in the individual case, even without the articulation of rules or future-oriented action.[38] Thus, each case can serve as an opportunity to shift wealth and power between the parties, based on their relative status.[39] Beyond this, the goal of social justice can be furthered not only by the substantive principles employed to decide a case, but also by the way the case is handled.

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36. *See, e.g.*, Galanter, *Why the Haves*, *supra* note 12, at 149-51; Abel, *Socializing the Legal Profession*, *supra* note 12; Nader, *Alternatives To The American Judicial System*, in NO ACCESS TO LAW 3, 44-49 (L. Nader ed. 1980); Kidder, *supra* note 12. Of course, this view is not limited to sociology of law writers, and is shared by many writing from a more general background. *See* Cahn & Cahn, *supra* note 1; Cahn & Cahn, *supra* note 15. Note also that the social justice goal is not the only goal that law and sociology researchers have focused on; the human relations goal has also been identified in this field by many as a major concern, even though the concern has not been defined in exactly these terms. *See infra* Part II(A)(5); Miller & Sarat, *supra* note 26, at 526-27.

37. Of course, to further the social justice goal, decision and rulemaking criteria will focus not on relative cost-avoidance capability, but on relative wealth and power.

38. In the case of the efficiency goal, the individual case is of little interest per se, since the resources in question will either be consumed already, as in an accident, or subject to allocation through private bargaining; thus, it is only resource savings in future cases that are sought.

39. Nevertheless it is often suggested that such individual shifting is relatively ineffectual in distributing wealth and power, *see supra* note 12 and accompanying text, so that the individual case may be more important as proxy than for its own sake in furthering this goal.

Thus, even if a decisional rule based on efficiency is used, a process that gives assistance to the relatively disadvantaged party in presenting his case, or otherwise procedurally advantages him, automatically redistributes wealth and power and may result in outcomes that do likewise, in the individual case or prospectively. Thus, there are a number of ways in which the goal of social justice can be furthered by the dispute handling system.[40]

3. FUNDAMENTAL RIGHTS PROTECTION

A society whose goal is to achieve efficient resource use, or social justice, or some measure of both, may nevertheless be insensitive to certain fundamental rights of individuals. In fact it may ignore, tolerate or even sanction violations of those rights when necessary to further one or both of the other goals. Thus, some argue that the articulation and protection of fundamental individual rights should be considered a prime goal of society, no less important (if not more so) than the two above.[41] It is beyond the scope of this Article to

40. This being the case, it is perhaps surprising that the strongest advocates of the social justice goal often adopt the view that the dispute handling system per se can really do very little to further the goal. *See, e.g.*, Abel, *Redirecting Social Studies, supra* note 12, at 827; Abel, *Socializing the Legal Profession, supra* note 12, at 36-42; Kidder, *supra* note 12. The argument seems to be that, in the activity of dispute handling itself, the weaker party is at a natural disadvantage that probably cannot be overcome by any reform of the process. Even if reforms somehow eliminated this disadvantage, so that dispute handling outcomes redistributed power (either in individual cases or prospectively), this formal redistribution would be negated by the reality that the powerful can in fact ignore or avoid these outcomes because of their pre-existing and continuing power advantage in many other contexts. Thus, with workers and employers, significant redistribution of power did not occur until workers organized and became in fact relatively more equal in economic power to producers. The implication seems to be that the social justice goal can be served by dispute handling only if and when the have-nots become more equal to the haves outside that context. Despite this pessimistic view, many social justice advocates, not willing to rely solely on political organization or to let the dispute handling system off the hook, continue to stress wealth and power equalization as a goal of the dispute handling system. *See, e.g.*, Galanter, *Why the Haves, supra* note 12; Nader, *supra* note 14.

41. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978); Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134 (1970); Rubenstein, *supra* note 14; Summers, *supra* note 21; Blumrosen, *Civil Rights Conflicts: The Uneasy Search for Peace In Our Time*, 27 ARB. J. 35 (1972). It should be noted that the "rights" view often suggests that the fundamental rights goal is not merely one goal, but the supreme goal of the system, identifying it with the essence of justice itself. *See* Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980); R. DWORKIN, *supra*, at *xi-xii*, 92, 146-47, 269. Or alternatively, it is seen as a goal of a higher order, operating as a veto or constraint on other civil justice goals. *See* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24-26 (1970); Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980). The position taken in this Article is that the protection of fundamental rights is not incomparable with other goals of dispute handling, but rather commensurate with them, and subject to being overridden by, as well as overriding,

enter into a discussion of the content of the notion of fundamental rights. However, it is important to note here that advocates of the rights protection goal seem to focus on two general types of rights. The first could be called "outcome rights," i.e., rights of individuals to certain treatment by others (whether other private parties or the state) in various contexts outside of dispute handling processes.[42] The second could be called "process rights," i.e., rights of individuals to certain treatment by others (whether adverse parties or third parties, including the state) within dispute handling processes per se.[43] What is common to both is a concern for the integrity of the individual person, the desire to protect against any kind of action that seriously denigrates or devalues the significance of an individual human being as such. The preservation of the individual's unique value is seen as the very foundation of the social enterprise.[44] The advocate of this goal is thus not seeking an expansion of societal wealth, nor even its more equal sharing per se, so much as the preservation of what are seen as the basic conditions to which social organization must adhere in order to be justifiable.

The civil justice system can act as a monitor for violations of fundamental "outcome rights," because violations of such rights will often surface in or cause disputes.[45] The dispute handling system can also further protection of "process rights," since such rights are potentially in question any time an outside decisionmaking process threatens to affect an individual's affairs, as is generally true *par excellence* in dispute handling. As with the efficiency and social justice goals, the civil justice system can create incentives for future

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other goals in the appropriate case. The reasons for taking this position are discussed in the text below. *See infra* notes 110-14 and accompanying text. In fact, some of those who discuss the issue seem implicitly if not openly to accept this view. *See* R. DWORKIN, *supra*, at 92, 191-92, 199-200. Moreover, in the jurisprudence of fundamental rights (i.e., constitutional law), it is well recognized that other interests, when sufficiently compelling, can override such rights. Notwithstanding this general position, however, and as will be discussed below, there may be good analytical reasons to believe that the fundamental rights goal will often outweigh other goals when it is involved in a case. *See infra* text accompanying notes 46, 98-101, 110-12.

42. These would include rights to nondiscriminatory or equal treatment, to privacy, to dignity, to self expression, or to more material benefits such as adequate housing, guaranteed employment, etc. *See, e.g.*, R. DWORKIN, *supra* note 41, at 184-205, 272-78; Higginbotham, *supra* note 41; Summers, *supra* note 21, at 29-31.

43. These would encompass rights generally treated under the rubric of procedural due process, including notice, opportunity to appear and be heard, evenhandedness, and so on. *See, e.g.*, Summers, *supra* note 21, at 20-27; Rubenstein, *supra* note 14.

44. *See* R. DWORKIN, *supra* note 41, at 198-99, 204-05, 271.

45. While these points, like those examined above, have generally been voiced with reference to the courts, rights-protection advocates would presumably be no less concerned with protection of fundamental rights in extrajudicial or extralegal dispute handling institutions.

protection of outcome or process rights by using individual cases as leverage points. However, here more than with either of the other two goals, the individual case is important per se. Fundamental rights are, by definition, those rights of which each individual violation is highly significant. Furthermore, the potential for violation of process rights is inherent in every case. Thus the dispute handling system, by virtue of its involvement in and impact on individual dispute situations and their handling, has a unique advantage in furthering this goal. Perhaps this is one reason that the goal is often given special status in discussions of the judicial system and the bases of judicial decision-making.[46]

If protection of outcome rights is the goal, ready accessibility of all levels of the dispute handling system to individual disputants becomes a major concern. Settlement or compromise may be impossible and inappropriate where a fundamental right is involved, and each individual instance of violation is of great concern. Furthermore, any case may present a new fundamental right, and thus an opportunity and need to recognize and articulate it for future protection. At the same time, the importance of protecting process rights suggests that this goal, unlike the two previously discussed, depends for its furtherance not only on the outcome of the dispute handling process, but also on the way the parties are treated in the process itself. One way of describing the difference is to say that the first two goals are essentially outcome-oriented while the rights protection goal is both outcome- and process-oriented. This double character may further explain the special solicitude seen, by some, as proper with respect to this goal.[47]

4. PUBLIC ORDER

One of the basic conditions for social existence is some degree of public or social order, without which the previous three goals would themselves often be difficult to pursue, much less to attain. Maintenance of order is therefore a basic societal goal. Moreover, while it often supports the other goals, this is not always the case. The goal of maintaining order may run counter to social justice and fundamental rights, and even to allocative efficiency. Thus, it is a discrete goal, considered important for its own sake.

46. *See supra* note 41 and accompanying text.
47. *Id.*

The dispute handling system can further this goal.[48] A dispute often presents the potential for disruption and disorder, if not the actual fact. Thus dispute handling activity is an opportunity to prevent, or put an end to, open hostilities that disrupt public order.[49]

More than any of the goals yet described, the public order goal demands an emphasis on the handling of individual disputes on their own terms and for their own sake. Not the articulation of rules, rights or equities, but the prevention or cessation of hostilities is the goal, and doing so in one case will not necessarily affect future situations. More important, if an individual case arises in which public order is threatened or disrupted, it cannot very well be ignored on the grounds that the damage has already been done (as with the efficiency goal), since even more damage may occur if hostilities continue. And unlike the view taken by some in relation to social justice, it is clear that public order can be significantly affected by the way in which an individual incident is handled. Even with the fundamental rights goal, it may be that an individual case in fact presents no instance of such a right, despite the party's claim; but a threat to public order cannot be averted by declaring it nonexistent.

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48. Discussions of the goals of the civil justice system often forget or overlook the fact that the early common law system, like many "primitive" legal systems, had as one of its main purposes the maintenance or restoration of public order. *See* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 36-38, 288-92, 298 (2d ed. 1978). That is, dispute handling as an organized social activity was a substitute for private, uncontrolled combat, with the primary goal of reducing disturbances of the public order. That "trial by combat" remained one way of dispute handling did not mean that the goal was unmet, since a controlled and limited form of combat had been substituted for a much more unpredictable and thus disturbing one. Consequently, the interest of the system was not in any future-oriented or normative goal at all, but simply in "keeping the peace." This absence of norms may have indeed been more pronounced in the early common law than in many early legal systems, since it developed primarily as an administrative response to the need to keep the peace and develop social unity in a suddenly formed state from which the influence of previously operating norms was absent. The common law is "secreted in the interstices of procedure," precisely because the procedure preceded the law, and this was so because the goal of creating and maintaining a condition of public order was historically precedent.

49. Although this function is basic to dispute handling, it receives surprisingly little attention in the civil justice reform debate. Most of the discussion of public order, of course, is centered on the criminal justice system. Perhaps the assumption is that civil disputes rarely lead to public disorder. However, this view flies in the face of logic and reality, and in particular fails to recognize that criminal incidents may often stem from pre-existing disputes which escalate to open hostilities. *See* Danzig & Lowy, *Everyday Disputes And Mediation In The United States: A Reply To Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 685 (1975); Merry, *supra* note 3, at 920-23. Therefore, not only the criminal but the civil justice system can serve to further the goal of public order. This is recognized by commentators who perceive the connection between unresolved disputes and subsequent disruptions of public order on either an individual or a mass level. *See* Danzig & Lowy, *supra*; Merry, *supra* note 3, at 922; Miller & Sarat, *supra* note 26, at 561-62, 564.

The public order goal also highlights the significance of the finality and acceptability of the outcome of each individual case. Efficiency, social justice and fundamental rights goals can all be prospectively furthered, whether or not all the issues in a given case are put to rest, and whether or not both parties are willing to abide by the outcome. But furtherance of the public order goal may depend largely on whether the individual dispute itself is handled with finality by treating all the issues and reaching an outcome that will be adhered to.

5. HUMAN RELATIONS

While it is not cited in the civil justice reform debate as often as some of the previous goals, another important societal goal is that the members of a society be able to get along with one another, on the individual and the group level.[50] This involves mutual tolerance, respect, and even appreciation of different points of view and different modes of existence. It also involves a sense of common, shared humanity, and as a result, a sense of social solidarity. Positive human relations and social solidarity are important for their own sake, although they also relate to other goals. In a sense, this goal can be seen as a preventive approach to maintaining public order; but the latter is a discrete and more limited goal and need not involve direct attention to the quality of human relations. Social order is not necessarily social harmony. Nor will an emphasis on human relations always work to maintain public order. Furthering the human relations goal may also contribute to achieving social justice or more efficient resource utilization. However, by focusing on the quality of relationships, rather than the manipulation of resources, this goal has a very different practical emphasis. Moreover, improved human relations not only facilitates improvement in resource allocation and distribution, but actually results in resource expansion, like the discovery of new reserves of a raw material—in this case the raw material represented by human energy. Finally, it can be argued that it is desirable per se to have positive inter-personal and inter-group relations. That is, the experience itself of friendliness, neighborliness, etc., is a thing of value, apart from any further beneficial consequence to society in relation to other goals.

50. *See* Riskin, *Mediation And Lawyers*, 43 OHIO ST. L.J. 29, 30 (1982); Summers, *supra* note 21, at 22-23; Abel, *A Comparative Theory Of Dispute Institutions In Society*, 8 LAW & SOC'Y REV. 217, 293-96 (1973); Miller & Sarat, *supra* note 26, at 526-27, 531-32. *See generally* Danzig & Lowy, *supra* note 49.

This goal, like those discussed earlier, can be furthered through dispute handling activity.[51] By its nature, a dispute tends to involve a negative interaction between the parties, in which the possibility for generating or adding to enmity and alienation is great. On the other hand, the dispute may represent an opportunity to avoid or reduce such enmity and alienation, or actually transform them into toleration and solidarity. In short, disputes can be seen as pressure points in social relationships, at which the relationship is especially susceptible to change, whether for better or worse. Therefore, the system of handling disputes can have significant impact on the goal of maintaining and improving human relations.[52]

With respect to this goal too, dispute handling may be interested in the individual case not only for its own sake but for its ramifications in other situations. However, there is a difference here, in that these ramifications are not the result of a particular outcome which is communicated to others as a general rule. Rather they are the result of the parties' experience in the dispute and the dispute handling process itself, as carried over by the parties themselves to other, similar situations. Two points emerge from this difference. One is that, more so than with efficiency and social justice, the furtherance of this goal, as that of public order and fundamental rights, depends upon the handling of individual cases on a routine basis and not as "proxies" for classes of similar cases. Second, furtherance of this goal, more than those previously discussed, depends not so much on the outcome of the dispute handling process, or the parties' reaction to that outcome, but rather on the parties' experience in the process itself. For while the outcome of the process may have a significant effect on how the parties feel about one another afterwards, the dispute handling experience itself may have an even more profound effect.[53] Thus, furtherance of the human relations goal, more than any of the others discussed thus far (except the process rights aspect of the fundamental right protection goal), depends on

51. *See* Abel, *supra* note 50, at 296; Fuller, *supra* note 17, at 325-27.

52. Moreover, it is not only the specific relationship between the disputants that may be affected. People often relate to one another on the basis of patterns or stereotypes, so that a positive change in a given relationship may affect others of the same type which are well outside the context of the particular dispute. *See infra* text accompanying notes 148-57. Furthermore, a positive experience of human relations in the context of a dispute may have a profound effect on a party's approach to social relations generally. The way in which people relate to others in situations of pressure and crisis may influence, either positively or negatively, the way in which they relate in more routine situations.

53. For example, even if the outcome reduces a pre-existing inequality in the parties' positions and thus furthers social justice, this may not signify an improved quality of human relations between them. In fact, it may be accompanied by the exact opposite, depending on the parties' experience in the dispute handling process itself.

the manner in which the dispute handling activity is conducted, and in particular, whether attention is paid to how the parties relate to each other during this process. In the terms adopted above, while the previous goals are either outcome- or outcome-and-process-oriented, the human relations goal is almost wholly process-oriented. One corollary of this difference is that furtherance of this goal, unlike most of the others, does not depend upon the use of given decision criteria, or indeed any decision criteria, in the dispute handling system.

6. LEGITIMACY

Every society strives to ensure that its governing institutions and structures appear legitimate in the eyes of its members.[54] Note that this goal is defined in terms of appearance and perception, not some objective standard of fairness or political economy. Even if the society denies certain citizens the right to participate in decision-making, it may nevertheless achieve legitimacy in the eyes of its members, if it appears to them that this is an appropriate thing to do. Indeed, even the victims of the denial may accept it as legitimate. Thus, this goal is not concerned with fundamental conditions for legitimacy objectively defined—as might be one view of the fundamental rights goal—but rather with the appearance of legitimacy to the society's members.[55]

Can the dispute handling system further the goal of legitimacy? In fact, a good deal of the discussion of civil justice reform in traditional law reform literature seems concerned primarily with this goal, and perhaps rightly so.[56] In disputes between individuals and groups, one or both sides will feel threatened. That is, being involved in a dispute is a situation of social vulnerability, and it is not unnatural to look to societal and governmental institutions for help in

54. *See* Abel, *Redirecting Social Studies*, *supra* note 12, at 824.

55. The distinction could work the other way. A society's members may demand a certain condition that would not be described objectively as a fundamental political or social right (*e.g.* guaranteed employment) and view their government as illegitimate because it does not fulfill this condition.

56. *See, e.g.*, Burger, *Agenda For 2000 A.D.—A Need For Systematic Anticipation*, 70 F.R.D. 83, 91 (1976); Kaufman, *supra* note 33, at 2-5, 15-16; Summers, *supra* note 21, at 21-22. The sociology of law literature has also noted the significance of this goal. *See, e.g.*, Abel, *Redirecting Social Studies*, *supra* note 12; Lempert, *supra* note 21, at 712-15; Miller & Sarat, *supra* note 26, at 561-62. *See generally* Williams and Hall, *Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences*, 7 LAW & SOC'Y REV. 99 (1972); Walker, Richardson, Denyer, Williams & McGaughey, *Contact and Support: An Empirical Assessment of Public Attitudes Toward the Police and the Courts*, 51 N.C.L. REV. 43 (1972) [hereinafter cited as Walker].

such a situation. Again, the fact that the vulnerability arises in the context of social relations—in contrast to the vulnerability of illness, poverty, etc.—seems to make the appeal to the state for help even more natural. Therefore a disputant's perception and belief as to how he has been treated, not by the other party, but by the society he is counting on to help, may have a significant impact on the goal of legitimacy. If a disputant feels he is entitled to some assistance in handling his dispute, and none is forthcoming, or if he feels that the handling of his case by some aspect of the system was manifestly unfair in some way, then he may well feel betrayed by society and question the legitimacy of its institutions. This kind of crisis of confidence in the system is precisely what many court reformers seem to be worried about, and their concern shows their belief in the importance of this goal.[57] On the other hand, as long as dispute handling is seen as an activity meriting social assistance, the provision of such assistance, in a way that appears even-handed, directly furthers the goal of legitimacy through the dispute handling system.

Moreover, this goal may be furthered whether or not the outcome is to the disputant's liking. Despite an unfavorable outcome, the disputant may be satisfied that he was given a fair chance, and therefore his confidence in the legitimacy of society's institutions may be reinforced. And this may be so even if by some objective standard he was not given a fair shake. In short, like the previous goal of human relations, and unlike the others, legitimacy is essentially a process-oriented and not an outcome-oriented goal. Furtherance of the goal depends on the party's experience of the dispute handling process, not necessarily on the outcome of that process. In at least two respects however, this goal differs from the human relations goal. First, it is dependent not only on the parties' process experience, but on their pre-existing expectations. Lowering such expectations is one way to maintain legitimacy without any institutional reform. Second, this goal focuses on a different aspect of the parties' dispute handling experience. The focus is not on how the parties treat each other during the process,[58] but rather on how the parties feel they have been treated by the system as a whole (and

57. It may be true that the attitude of reliance on social institutions for help, as described above, is neither necessary nor healthy. Even if this undue reliance has itself been encouraged by a steady extension of public services over many years, it may be that this policy was wrong and ought to be reversed. However, legitimacy is not a question of objective truth but one of appearance. So that the response today that "it is none of the state's business" may do little to further the goal of legitimacy, whatever the effect on other goals.

58. *See supra* text accompanying notes 52-53.

its agents), both in the directing of their case to a particular part of the system and in its actual handling at that point.

7. ADMINISTRATION

Minimizing the cost of administration of social enterprises, although rather pedestrian by comparison to the other goals discussed, is a well established and independent societal goal. Even where action must be undertaken in the public interest to achieve desired goals the action should itself be conducted so as to consume as few resources as possible in administrative costs. This goal differs from the others in the sense that it is a negative or restrictive aim rather than a positive or programmatic one. Nevertheless, it is impossible to disregard it in any discussion of societal goals.

Nor is it disregarded in the civil justice reform debate, where it is widely recognized that the dispute handling system can further this goal. In fact, among civil justice professionals writing in traditional law journals, this goal is stressed almost as much as the legitimacy goal.[59] Articles on how to streamline procedures, use modern technology, and otherwise cut the costs of judicial administration are commonplace today. Moreover, the emphasis on this goal is also one major reason for development of interest in the parts of the dispute handling system outside the courts. Diversion of cases to these "alternative" institutions is often supported by reference to decreased per-case costs of handling.[60] It is thus probably the administration goal more than any of the others that has led to a practical

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59. *See, e.g.*, Hufstedler & Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A.J. 965 (1980); Kaufman, *supra* note 33, at 6-15; Burger, *Today's Challenge: Improving the Administration of Justice*, 55 N.Y. ST. B.J., Feb. 1983, at 7; Janofsky, *Reducing Court Costs and Delay*, 71 ILL. B.J. 94 (1982); Rosenberg, *Devising Procedures That are Civil To Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 814 (1971); Burger, *supra* note 56, at 92. As with the other goals discussed, even though the goal is often mentioned in connection with the judicial system per se, it is equally significant in the wider context of the dispute handling system as a whole. No matter how disputes are handled, some effort and resources go into the process itself, even if it is simply the parties' time in negotiating, and this is administrative expense.

60. *See, e.g.*, Norton, *Mediation—An Alternative to Adversary Divorce*, 16 STAN. LAW., Spring/Summer 1981 at 10, 15; Riskin, *supra* note 50, at 33, 53-54; Max, *Arbitration—The Alternative to Timely, Costly Litigation*, 42 ALA. LAW. 309, 311 (1981); MacLean, *Voluntary Arbitration as an Alternative to Litigation*, 10 COLO. LAW. 1300, 1304-05 (1981). It is not clear that diversion actually results in decreased administrative costs, both because it may lead to greater case volume and hence greater overall costs of administration, and because many alternatives may be equal in cost to the court system itself. *See* Posner, *supra* note 8, at 448; 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, 17-19 (1983). The real savings may lie elsewhere, as discussed below. *See infra* text accompanying notes 172-92.

interest in widening the vision of the civil justice system beyond the courts to include all levels of dispute handling institutions.

B. The Problem of Goal Competition

The goals identified in the previous Section explicitly or implicitly underlie the various positions taken in the civil justice reform debate. Each is seen by some as a social goal that it is or should be the purpose of the civil justice system to further. In each case, it is indeed justifiable to view the goal in question as a goal of civil justice, because the dispute handling system is a logical and uniquely effective instrument for furthering that goal. At the same time, employing the system to further each specific goal imposes a particular, and different, set of demands on the processes of civil justice. Several other important points also emerged from the discussion of goals, which should be summarized before going further.

First, the various goals mentioned in Section A of this Part are not instrumental, but ultimate goals. That is, each is important in itself and not as a means to one of the others, or some further goal. As such, these goals are conceptually and practically distinct from one another. That is, the fulfillment of one, while important for its own sake, does not necessarily guarantee that of another.[61] Because the goals are ultimate and distinct, each can and must be considered in its own right and not as a subset of another goal.[62]

Second, while the discussion illustrated that different "constituencies" emphasized different goals, there are probably few who would maintain that one goal should be pursued, by society or by the civil justice system, to the exclusion of the others. This point is probably most familiar in the context of the "efficiency-equity" balance,[63] but it applies equally to the other goals discussed. In each

61. In some cases, this was obvious; in others less so. Thus, obviously, one can improve allocative efficiency while doing nothing to improve social justice or human relations, and vice versa. Perhaps less obviously, one can, for example, improve social justice without directly affecting human relations, improve human relations without guaranteeing the appearance of institutional legitimacy, achieve legitimacy without protecting fundamental rights, etc.

62. The presentation of goals here avoids the problem noted earlier, of confusing instrumental and ultimate goals and thus not adequately separating out or specifying important ultimate goals. *See supra* note 21.

63. Even the strongest advocates of social justice would probably not find it preferable that society remain in a condition of absolute equality, but abject poverty, if a reallocation of resources would increase everyone's wealth but at the same time lead to some degree of distributional inequality. And, as noted earlier, supporters of the resource allocation goal would not necessarily defend, on that ground alone, an efficient but vastly unequal distribution of wealth.

case, the stress placed on that goal by its advocates does not mean that they would demand its pursuit "at all costs," including ignoring all other goals.

Third, while the goals defined are distinct, they are nevertheless not always totally unrelated to or independent of one another. That is, while the fulfillment of one does not automatically assure the fulfillment of another (they are not practically identical), it may sometimes affect, positively or negatively, the furtherance of that other (they are not practically independent). In some cases, two or more goals may be positively correlated. Thus, furtherance of public order may facilitate (if not directly further) improvements in resource allocation. Furtherance of human relations or fundamental rights may facilitate (if not directly further) improvements in social justice. However, in other cases—and this is most important—the correlation may well be negative or inverse. Furtherance of public order may be possible only by obstructing the advancement of social justice. Furtherance of social justice may be possible only by diminishing (to some observers) the appearance of legitimacy. Furtherance of resource allocation efficiency may require giving up some degree of social justice. Thus, the choice to further one goal may obstruct another's fulfillment.[64] More particularly, furthering a given goal through the civil justice system will require the adoption of certain processes, and the processes conducive to the furtherance of one goal may in some cases ignore or preclude furtherance of other goals.

The above summarizes the problem of goal competition in the civil justice system. The most important consequence of goal competition is that wherever the present operation of the system is evaluated or reform considered, positions and proposals cannot be justified by reference to present or expected furtherance (or obstruction) of one goal alone, without consideration of the present status or expected effects on other goals. For, given the multi-goal character of the system, a single-goal focus in evaluation or reform always poses the risk of inadvertently choosing a gain for one goal at the cost of even greater losses for other goals, and thus suffering an ultimately counterproductive result.

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64. Summers recognizes a similar problem in his discussion of process values, some of which may inevitably conflict with others or with outcome values. *See* Summers, *supra* note 21, at 39-44. But, as noted earlier, he does little to suggest how this problem may be overcome. *See supra* note 21. These positive and negative correlations need not always be present nor run in the same direction; rather, in the context of dispute handling, their existence and direction will probably depend upon the class of cases one is addressing. And there may be many situations where there is no significant correlation, and the choice to further one goal will simply not affect others in any way.

The problem of goal competition could be resolved by adopting the position that one or more of the goals is intrinsically more important than some or all of the others. Alternatively, one could take the position that one or more of the goals is by its nature more dependent upon the civil justice system, as opposed to other social institutions, for its furtherance. However, it is neither practical, nor theoretically sound to raise one of the above goals to a position of unequivocal superiority, regardless of context; and, as indicated in the discussion of goals in Section A, the dispute handling system has a unique contribution to make to the furtherance of each goal, that cannot be duplicated by other social institutions, since they do not deal as directly with individual dispute situations.[65]

In short, the problem of goal competition cannot be avoided. The dispute handling system is asked to further a considerable number of important social goals, each of which has a legitimate claim on the system, but each of which demands the existence of different processes, so that they sometimes compete with one another for the attention of the system. Is it any wonder in this case that the civil justice system appears to be "in crisis"? The real wonder would be if the system were actually accomplishing all of the numerous, difficult, and mutually inconsistent goals that its operators and critics demand! Apart from the educational system, which is similarly criticized, few institutions are called upon at present to do so much for so many different reasons.[66] The temptation therefore arises to say that, after all, there is merit in the position noted earlier: that this is not a crisis of performance at all, but one of expectation; that the dispute handling system cannot do all that is being asked; that once this message is delivered, unrealistic and false expectations will decline, and along with them the undue demand for legal services, and the "crisis" will be over.

It is tempting to make this argument. But it is also wrong. For even if it is true that the civil justice system cannot be expected to fulfill perfectly all the goals discussed, the "false crisis" answer itself fails to address the basic question on which the debate is founded: what are the goals of the system—and how are they interrelated?

65. This does not mean that because of specific contextual factors, one goal will not in fact dominate in a certain situation. In fact, the model suggested below is based on the proposition that this will be the case. But the dominance is due to the situational factors involved, not the intrinsic or abstract superiority of the goal. Thus, often the competition between goals can be decided by reference to the fact that, in given circumstances, the competition is more apparent than real, in that one goal is practically of little significance, while another is very weighty indeed.

66. Cavanagh & Sarat, *supra* note 3, at 376, 413-15.

Without a clear and coherent answer to this question, then even if expectations are temporarily "deflated," the system can only continue to be pulled, first by one goal and then another, until eventually the crisis returns. That is, a crisis of expectation *is* a crisis of performance. It is an instance of the failure of the system to articulate goals, priorities and limits for itself, and this is a crucial aspect of the system's performance.

However this leads to a conundrum. The system requires clear goals and priorities to function. But the goals that are advanced cannot all be met simultaneously without overburdening the system, nor can any of them be categorically dismissed or even de-emphasized across the board. Perhaps this explains why the goals question and the problem of goal competition has been largely left in the background in the discussion of civil justice reform. However it cannot be avoided forever; nor is the problem intractable.

C. Possible Approaches to the Problem, and Limitations

Suggestions of an approach to dealing with the problem of goal competition can in fact be found in distinct branches of the literature.[67] Thus in the socio-legal and law reform literature, as noted earlier, one often finds the argument or implication that the dispute handling system should not be seen as limited to one or a few structures or processes for handling disputes—i.e., usually, the courts. Rather, it should be recognized that there are many alternative processes operating (or having the potential to operate) in different parts of the system, and these can be and often are tailored to handle different types of cases.[68] What these arguments imply is that different parts of the system can and do serve different goals, by applying different processes to different types of cases. In this way the system as a whole may indeed be able to address a wide range of goals, by employing a "specialization approach" that consciously exploits the present level of "pluralism" of alternative dispute handling processes and where necessary extends such pluralism even further.

Another branch of analysis, found chiefly in the law and economics literature, focuses directly on the problem of goal competition. It employs a conceptual framework borrowed from economic analysis, which addresses the similar problem of competition among

67. It is worth noting that in each case the assumption is made that all the goals are important and hence none can simply be dismissed from consideration.

68. *See, e.g.*, Sander, *supra* note 3, at 113, 126-31; Galanter, *Duty Not To Deliver*, *supra* note 12, at 934-36; Cahn & Cahn, *supra* note 1, at 1013, 1026-31; Cahn & Cahn, *supra* note 15, at 927-50. *See also* Fuller, *supra* note 17, at 307, 329, 334.

resource-using activities. The approach defines each goal in terms of minimizing different kinds of costs, and then interrelates the goals by subsuming them all in an overall goal of total cost minimization.[69] Thus, if a given action would greatly reduce one type of cost (significantly further one goal), while causing a slight rise in another (slightly impeding another goal), the result would be to minimize the sum of both kinds of costs (come closest to meeting all the desired goals).[70] The advantage of the cost-minimization approach, as applied to a multi-goal system, is that this approach, if applied properly, explicitly assures recognition and consideration of the existence and interrelationship of different, competing goals. In short, it makes it more difficult to fall into a single-goal focus.

Thus, the problem of goal competition is addressed, implicitly or explicitly, in two branches of the literature. But it has been addressed from different perspectives, which have operated more or less oblivious of one another. On the one hand, is an approach to multiple-goal attainment through *process pluralism*; on the other is an approach to multiple-goal attainment through *cost-minimization*. In fact the two approaches are not—or need not be—separate and unrelated. Indeed, while each by itself has significant weaknesses, using the two approaches in combination can not only provide a framework for dealing with goal competition, but also lay the foundation for addressing the further and crucial question, raised in Part I, of the need for jurisdictional principles to gnide and evaluate civil justice reform involving dispute handling alternatives. Thus, it is by bringing together the insights of previously distinct approaches that this Article will try to suggest how the need for principles can be met. However, this integration of approaches can only be attempted by first specifying the weaknesses of each of the two above approaches and then working to avoid them.

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69. Veljanovski, *supra* note 28, at 171.

70. One of the earliest, and most influential, exponents of this approach was Calabresi, who applied it to develop a theory of accident law severely critical of the common law negligence system. *See* G. CALABRESI, *supra* note 41, at 26-33 and *passim*; Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972). The approach was subsequently adopted by Posner, in his analysis of negligence law, even though he reached strikingly different conclusions. *See generally* Posner, *supra* note 30. The reasons for the difference are arguably parallel to criticisms offered herein of approaches to the question of civil justice goals. Thereafter, Posner went on to apply the approach to "legal procedure and judicial administration." *See generally* Posner, *supra* note 8. Although few involved in the civil justice reform debate picked up Posner's lead, at least one recent article has taken a similar approach to the question of civil justice system goals. *See* Lea & Walker, *supra* note 16.

1. WEAKNESSES OF THE PROCESS PLURALISM APPROACH

With respect to the process pluralism approach, a number of problems exist. First, and perhaps most significant, this approach threatens to assume away the entire problem of competition among civil justice goals. The implication seems to be that by channelling different types of cases to different parts of the system, all different goals can be met, since each part of the system can concentrate on furthering a particular goal, in the cases it handles, and the system as a whole can thus do the entire job. The problem is that it is unrealistic to assume that each (or any) set of cases involves one and only one of the goals of the system, so that it can be channelled to a certain structure designed to further that goal and no other. Most cases probably involve a number of goals, some of which may indeed conflict. The danger of the process pluralism approach is that it risks a continuation of the single-goal approach on a more sophisticated level. Instead of arguing that a given goal is *the* goal of civil justice as a whole, the goal-advocate will argue that it is *the* goal in a given set of cases. The risk is still that other important goals will be ignored, since this approach allows them to be placed "out of sight, out of mind." Thus, process pluralism is not necessarily goal pluralism; and without a framework that forces a multi-goal focus, process pluralism, even with its emphasis on dispute handling alternatives, does not necessarily help to overcome the problem of goal competition.[71]

A second problem with the process pluralism approach is what was referred to in Part I above as the lack of jurisdictional principles.[72] That is, even assuming the channelling approach for goal furtherance can be structured effectively to address goal competition, how is this channelling actually to occur? If the ultimate objective is maximum furtherance of civil justice goals, several questions remain unanswered: Which goal or goals stand to be affected most by dispute handling, and hence should be considered primary, in different types of cases? What kind of process is necessary to further each of the different goals? What practical way is there of answering such questions for different kinds of cases? Assuming these questions can

71. Another problem with the "division of labor" solution is that it neglects to address the more obvious problem that, even if different structures could practically focus on one and only one goal each, this would simply recast the original problem on a new level: given limited resources, which of the different structures should be supported most heavily, which should be restricted first when resources dwindle, and thus, which goal should take precedence. The problem of choice still remains.

72. *See supra* text accompanying notes 17-18, 23.

be answered, how can the desired channelling best be implemented? The pluralism approach has grappled with such questions to some degree,[73] but rarely if ever have they been addressed comprehensively and in depth.[74]

Two who have addressed the issue are Professors Fuller and Sander.[75] Yet while each has done more than almost anyone else to explore these questions, their work on the subject is unclear in important respects, and is not enough to provide the comprehensive and consistent "principles" that are needed to make sound process decisions. While each has identified (explicitly or implicitly) a relatively limited number and range of factors to help in process decisions, even these are not always sharply defined or distinguished from one another, and neither author has produced a clear or articulated framework of analysis that can explain the significance of these particular factors, or point to still others that may be important.[76]

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73. Of course, there has been no shortage of writers who have proposed specific solutions for specific cases, focusing on one factor which points to a single goal. The ongoing relationship factor has thus been widely used to support mediation proposals in a variety of contexts, implicitly focusing on the human relations goal. *See infra* text accompanying notes 132-36, 144-45. The size-of-stakes or small-claim factor has been used to support proposals for arbitration or summary proceedings in other contexts, implicitly focusing on the administration goal. *See infra* text accompanying notes 142-43. Few, however, have tried to identify or analyze the whole range of factors that might be relevant to deciding on process proposals in different cases.

74. The approach may be appealing, and has focused considerable interest on the development of alternative dispute handling structures in recent years. *See, e.g.*, Hurst, *supra* note 1, at 413; Trubek, *supra* note 5, at 491-92; *Dispute Resolution*, *supra* note 23, at 906; Cahn & Cahn, *supra* note 15, at 947-55; Waxman, *Moving Apart Together: Alternatives to Litigation*, 7 DISTRICT LAW., Mar.-Apr. 1983, at 28, 29; Cotta, *Neighborhood Courts: San Jose's Neighborhood Small Claims Court*, 2 CAL. LAW., June 1982, at 44, 45. Nevertheless, the approach has been criticized precisely for its lack of clear and coherent operational principles, and its application has probably remained unduly limited for this very reason. *See infra* note 115. Moreover, the practical experiments thus far undertaken following this approach may not always have been well conceived, again due to lack of attention to the kinds of questions asked above. As a result the approach as a whole may have suffered unduly negative reaction from those rightly concerned about casual applications. *See, e.g.*, *Dispute Resolution*, *supra* note 23, at 908-09; Cover, *Dispute Resolution: A Forward*, 88 YALE L.J. 910, 913-15 (1979); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 934-49 (1979); Nader, *supra* note 12 at 1005-07; Rubenstein, *supra* note 14, at 79-82; Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 35-41; Fuller, *supra* note 26, at 405-09; Diamond & Simborg, *Divorce Mediation's Weaknesses*, 3 CAL. LAW., July 1983, at 37, 37. *See generally* Blumrosen, *supra* note 41.

75. *See* Fuller, *supra* note 17; Fuller, *supra* note 74; Fuller, *supra* note 26; Sander, *supra* note 3.

76. Both Sander and Fuller discuss characteristics of cases that may point to the desirability of certain processes, and characteristics of processes that suggest application in certain cases. This analysis refers to such characteristics as case-type and process factors. *See infra* Part II.D.4. However the distinction between the two kinds of factors is not clearly recognized, and it is an important one, because in a logical analysis of process choice, the two types of factors are relevant to different questions which demand separate analysis. *See infra*

None of this is to say that the process pluralism approach cannot be useful in resolving the question of how to define civil justice goals

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text accompanying note 120 and following note 121. Thus Sander, in his discussion of "criteria that may help us to determine how particular types of disputes might best be resolved," discusses nature of dispute, party relationship and size of stakes, which are case type factors, together with cost and speed, which are process factors. *See* Sander, *supra* note 3, at 118-26. Similarly, Fuller does not sharply distinguish between his discussion of the reasoned-proofs-and-arguments factor, a process factor, and his discussion of party relationships and person-versus act-centered situations, both case-type factors. *See* Fuller, *supra* note 26, at 365-72; Fuller, *supra* note 17, at 327-31.

This confusion of case-type and process factors points to, and probably stems from, a more significant problem. That is, while these two writers see the importance of defining the factors that can help to link cases and processes together, neither sees that this cannot be done rationally except by reference to some framework of goals. *See infra* Part II.D.3 and 4. And indeed, neither explicitly discusses civil justice goals in any depth, if at all, although some view of those goals must underlie their views on appropriate process uses. Apart from a brief footnote, *see* Sander, *supra* note 3, at 113 n.7, Sander points only to the goal of reducing court congestion, *id.* at 111-13, before launching into a discussion of processes and criteria for process selection. *Id.* at 114-26. Fuller stresses again and again that the essence of adjudication is that it guarantees the parties the opportunity to present proofs and reasoned arguments. *See* Fuller, *supra* note 26, at 365-67, 382, 391, 393. Yet he says nothing about the goal or goals to which this essential factor is relevant. In fact, in the terms of this article, *see infra* Part II.D and Part III, Fuller's argument could be understood as follows. The opportunity-for-reasoned-argument feature of adjudication really includes a few distinct process factors, particularly rule orientation (reasoned argument necessarily implying principles, *see* Fuller, *supra* note 26, at 370) and guaranteed hearing. These two factors, in turn, are relevant not to one, but to a number of goals: resource allocation, social justice, and fundamental rights protection, which are all furthered in some measure by rule utilization and accuracy of information (which latter may be dependent on party presentation), and legitimacy, which may be furthered by party participation.

The problem with Fuller's (and Sander's) failure to address goals explicitly is not necessarily that it leads him to ignore the limits of a given process. Fuller is extraordinarily sensitive to this point. *See* Fuller, *supra* note 26, at 394-404; Fuller, *supra* note 17. However, this sensitivity derives from a clear intuition about and grasp of the multiplicity and competition of civil justice goals, which are points that may not be so clear to everyone. His discussion of the inappropriateness of adjudication in areas where "human association depends upon spontaneous and informal collaboration," is understandable in terms of an implicit recognition that the adjudication-sensitive goals noted above are sometimes unattainable, or of small importance, in comparison to other significant social goals, such as human relations. *See* Fuller, *supra* note 26, at 370-72. The problem is, however, that precisely because Fuller's intuitive and implicit reasons for process choice and limits are not explicitly articulated, they do not provide a clear framework of analysis for others with less refined intuition about such matters. The lack of an articulated discussion of goals does not necessitate, but certainly permits and facilitates, impartial and incomplete analysis. The result may often be, as with Sander and Fuller themselves, that while some significant factors about the situation or process in question are stressed, other equally or more significant factors are entirely ignored. *See infra* Part II.D.3 and 4 and Part III.A.

In short, it is unwise to depend on intuition in analyzing civil justice reform. What is needed is an articulated and comprehensive set of "principles", and this can only be built on the basis of an articulated discussion of civil justice goals. Neither Sander, Fuller, nor others of the process pluralism orientation have yet fulfilled this need. *But see, Paths to Justice, supra* note 6, at 8-16 and Table 5 for one recent effort in this direction.

and articulate criteria for reform. However, its usefulness depends upon modifying it to address the above weaknesses.

2. WEAKNESSES OF THE COST-MINIMIZATION APPROACH

The cost-minimization approach, as it has been utilized thus far in the context of civil justice goals, also poses a number of problems. Since only a few authors have explicitly used this approach, the remarks made here focus on the work of one of its leading exponents, Judge Posner, as representative. Posner's use of the cost-minimization approach is, first of all, limited to "legal procedure and judicial administration."[77] In other words, one problem with his work is that it assumes that the relevant system of dispute handling is the legal/judicial system, consisting of the courts and litigation-induced settlement activities. His approach thus ignores the above-noted pluralism of dispute handling structures and the wealth of processes that operate extrajudicially or extralegally. However, minimizing the total cost of judicial administration does not necessarily minimize the costs generated in other parts of the system. And by ignoring alternative processes, Posner also ignores the possibility that total costs might be reduced by channelling some number of cases from the judicially-based subsystem to other parts of the overall system. In short, those who have recognized cost-minimization as a way of approaching the problem of civil justice goal competition, have nevertheless narrowed their framework so as to exclude or ignore large parts of the civil justice system as it actually operates.[78] The result is that their models address only part of the problem. The question of how to overcome goal competition—i.e., how to minimize total costs—in the civil justice system as a whole is not adequately addressed.

A second problem is that, even within Posner's limited focus on the judicial system, his cost-minimization analysis is flawed by his definition of the different costs involved. As mentioned, the cost-

77. Posner, *supra* note 8, at 399-400.

78. In Posner's case, this is understandable, since Posner's piece was written well before the notion of looking at the larger dispute handling system was accepted. Moreover, it could be argued that Posner's model is simply a prototype from which to expand to deal with other cases. However, as the discussion below points out, the question is more complex than this. Lea & Walker's more recent article, *see* Lea & Walker, *supra* note 16, at 364-65, 377-78, while explicitly adopting the cost-minimization approach from Posner, goes further in recognizing the possibility for greater overall cost-minimization if the spectrum of processes under consideration is broadened. However, the piece is directed more to the choice between the Anglo-American adversary and the European "inquisitorial" methods of judicial procedure than to the choice among the whole range of extrajudicial and extralegal processes included in the concept of the civil justice system as defined herein.

minimization approach involves expressing different goals in terms of minimizing potential costs, so that the overall goal becomes the minimization of the total of the different potential costs. Thus, Posner writes "The purpose of legal procedure is conceived to be the minimization of the sum of two types of costs: 'error costs' (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it), and the 'direct costs' (such as lawyers', judges', and litigants' time) of operating the legal dispute-resolution machinery."[79]

However, this formulation is either incomplete or inadequately specific, and as a result undermines the effectiveness of the cost-minimization approach altogether. Although Posner nominally includes in "error costs" the social costs of not carrying out "other social functions," he then focuses entirely on costs arising from failures of the "allocative function," i.e., errors resulting in resource misallocation.[80] Thus, in practice, Posner's error costs are resource misallocation costs. It should be clear that the two types of costs Posner focuses on are therefore related to two of the civil justice goals discussed in Section A above: resource allocation and administration. Minimization of the sum of these costs represents the closest we can come to furthering both goals simultaneously. But what of the other important goals discussed in Section A above? Are they simply unimportant? To be sure, Posner mentions "other social functions" as a goal, whose obstruction may also generate error costs. However, unless these "other functions" are more clearly specified, the term lacks all meaning and usefulness in the model.[81]

The chief advantage of the cost-minimization approach is that it helps to assure consideration of the various different goals of the system and their interrelationship. However, the approach is of little help if the definition of costs is itself incomplete or vague. The specific interrelationships of goals are wholly obscured if all non-administrative goals are lumped together as one. Yet this is precisely what Posner's undifferentiated "error costs" formulation does. Why and where has the "error" arisen; what specific goals are affected; could overall goal accomplishment be improved by using a different

79. Posner, *supra* note 8, at 399-400. In Lea & Walker's model, the goal is to reach "the point on the procedural spectrum at which the sum of transaction and imposition costs is minimized." Lea & Walker, *supra* note 16, at 376.

80. *See* Posner, *supra* note 8, at 402-06.

81. Only once in his article does Posner even mention another possible goal, and he gives it little real attention. *See id.* at 405. Indeed, it is this heavy emphasis on resource allocation, to the exclusion of other goals, that has led many to reject Posner's approach. Nevertheless, the approach can be useful and need not exclude other goals, as shown below.

dispute handling process addressed to the specific goal involved? Answers to these questions are obscured by Posner's imprecise formulation. Thus, Posner either ignores important social goals or fails to adequately define and differentiate such goals. Either way, while the basic approach is valuable, the formulation is flawed even as a model for judicial dispute handling goals, and still more so as a model for the goals of the wider civil justice system.[82]

A third problem arises when Posner goes beyond the stage of formulating a cost-minimization goal, and faces the issue of how to pursue this goal. In this part of his work, there is some recognition that one crucial variable in cost-minimization is process choice, even if the range of processes considered is quite limited. Thus, Posner discusses how greater utilization of settlement may drive error costs up even while it reduces direct costs, while litigation may have the opposite effect. Here Posner, like the process pluralism advocates, recognizes that different goals can be furthered by using different processes.[83] Nevertheless he offers no developed discussion of how the effects of process choice on cost-minimization will differ in different classes of cases. That is, assuming that utilization of adjudication as opposed to negotiation will tend to decrease misallocation costs, is this necessarily true in all types of cases? Or are there whole classes of cases where the level of misallocation costs will be affected very little by the choice, or even remain the same either way? If so, on what factors does this depend? In short, the cost-minimization approach, like the process pluralism approach, has done little thus far to address the key issue of developing jurisdictional principles for process choice.[84]

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82. Lea & Walker's piece is, if anything, worse from this viewpoint. Although they explicitly criticize Posner for his "narrow view," Lea & Walker, *supra* note 16, at 361 & n.20, of dispute handling costs, their formulation is even narrower. Their model would minimize the sum of "transaction costs" and "imposition costs." *Id.* at 376. Upon examination, it is clear that their "transaction costs," *see id.* at 368-69, are identical to Posner's direct costs, and their "imposition costs," *see id.* at 370-71, are identical to the narrow reading of Posner's error costs, i.e., resource misallocation costs. However, while Posner at least nominally recognizes the possible significance of other types of error costs, and hence other social goals, Lea & Walker fail entirely to go beyond the two factor framework.

83. Lea & Walker's article shows an even greater appreciation of this point, stressing that the key variable to focus on in minimizing costs is the choice of procedural model. *See id.* at 361, 376-78. It nevertheless remains clear in the cost-minimization approach, that such choices cannot avoid conflicts between goals, a point often glossed over in the pluralism approach.

84. It could be argued that Posner, and Lea & Walker, do discuss the type of case variable to some degree. Even if this point is conceded, the problem remains that in each case the identification and specification of goals and costs, as well as the range of consideration of possible dispute handling structures, are so limited as to be of little use in developing case-type jurisdictional principles relevant to the civil justice system as a whole. One reason for this lack

A final problem, not related to the specific analysis of Posner but to the cost-minimization approach as a whole, is the problem of goal comparability. The whole basis of this approach, as noted, is expressing different goals in terms of avoiding or minimizing different types of potential costs. The assumption is that these different costs can be stated in a common currency, so that they can be aggregated, and different combinations compared, to determine the point of minimum aggregate costs. If the costs are not expressed in the same units, a serious problem exists: that of comparing the incomparable. The strongest critics of the cost-minimization approach, and the economic orientation on which it is based, rest their objections on this ground.[85] Social justice, allocative efficiency, and fundamental rights, it is argued, not to mention other goals, simply cannot be expressed in comparable units. If they are monetarized and expressed in dollar terms, important but intangible values inevitably are excluded from consideration, and the resulting comparisons are distorted.[86] Without monetarization or some similar technique, however, the cost-minimization approach is left comparing units of social justice to units of public order; and simple mathematics cannot answer questions concerning such comparisons. Thus, according to this criticism, the approach as a whole is either illegitimate or merely unhelpful.

Again, as in the case of the process pluralism approach, the point is not that the cost-minimization approach is necessarily to be rejected. However, if it is to be useful and acceptable, the above problems must be addressed.

D. An Integrated Approach to Dispute Resolution Alternatives and Civil Justice Reform

Practical questions about reform of the civil justice system cannot be answered unless it is known what that system, and its constituent processes, are supposed to do. Should judicial procedures be streamlined in certain cases? This may depend upon the relative sig-

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of development of jurisdictional principles is probably that both Posner and Lea & Walker seem content to leave the question of process choice to the parties themselves. *See, e.g.*, Posner, *supra* note 8, at 417-29; Lea & Walker, *supra* note 16, at 361-76. Therefore, predicting these choices may be of interest, but influencing them or actually making them is not a crucial concern of policy makers. The problems and errors involved in this attitude are discussed at length in Part IV below.

85. *See* E.F. SCHUMACHER, SMALL IS BEAUTIFUL 43-49 (1973); Veljanovski, *supra* note 28, at 175-79.

86. According to some, the monetarization process itself may be damaging. *See, e.g.*, G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 39-41, 49-50, 88-89, 214 nn.9-10 (1978).

nificance of the administration goal, the fundamental rights goal, and the resource allocation goal, in those cases. Should greater encouragement be given to informal, extralegal dispute handling activity in certain situations? This may depend upon the relative significance of the administration goal, the social justice goal, and the legitimacy goal, in those situations. Should reconciliatory measures be mandated as a preliminary or primary process in certain types of cases? This may depend upon the relative significance of the human relations goal, the administration goal and the fundamental rights goal in those cases. In short, it is not possible to formulate coherent answers to these questions, or many others related to civil justice reform, without a clear and coherent picture of the different goals of civil justice, how these goals interrelate in general and in particular cases, and how these goals will fare in particular plans for reform of the system.

This Section therefore presents a new approach for using the civil justice goals described in Section A above to construct principles by which civil justice reform with regard to dispute handling alternatives can be evaluated and guided. It does so by building upon both of the approaches—cost-minimization and process pluralism—discussed above, attempting to avoid the weaknesses of previous uses of these approaches. Thus, this analysis integrates these two approaches to a greater degree and more explicitly than has been done previously. The result is a clear and concrete formulation of the multiple goals of civil justice emphasizing the unique importance of each as well as their inevitable interrelationship—a cost-minimization "model"[87] together with a means for attaining these goals to the greatest possible degree—process choice in a system of process pluralism. Various objections to and criticisms of this integrated approach are anticipated and answered. Then, the analysis goes beyond the previous approaches altogether, returning to the goals themselves and deriving from them coherent principles to guide and rationalize the exercise of process choice, thus responding to the earlier-discussed need for evaluative criteria and jurisdictional principles.

87. The term "model" is used here in the analytical sense, i.e., as a way of picturing something that helps to analyze a problem. It is not used in the purely descriptive sense. *See, e.g.*, Scott, *supra* note 20.

1. A COST-MINIMIZATION "MODEL" OF CIVIL JUSTICE GOALS

This Section develops the cost-minimization approach for "modelling" the goals of the civil justice system. The key advantage of this format is that it emphasizes the multiplicity and interrelationship of civil justice goals and thus tends to prevent the common error in a multi-goal system—omission or nonconsideration (inadvertent or otherwise) of goals. The model is based on the articulation and analysis of the private and social costs generated by the frustration of each of the goals described above. These costs may take the form of monetary losses or some other type of resource depletion. The main point is that, if they are incurred, the society as a whole is poorer than it would have been if the goal were attained. Thus, each goal of civil justice is related to an analogous cost associated with failure to achieve the goal. The relationship is obviously an inverse one: the cost rises as the level of goal attainment falls, and vice versa.[88] Therefore, the goals can be stated in terms of such costs. The goal in each case becomes to avoid the associated cost as much as possible, i.e., to minimize that cost. The interrelationship and competition among goals can then be embodied in the model, by stating the overall goal of the civil justice system in terms of total cost minimization: the goal is to minimize the sum of all the different costs associated with failure to achieve different civil justice goals.

Posner speaks of "failure" to achieve the goal "generating" certain costs,[89] and this is the terminology adopted above. In fact, the costs involved are inevitable at some level. Thus, a clearer expression of the relationship between goals and costs would be to say that lower levels of attainment of the goal increase certain costs, while higher goal attainment lowers those costs. The following is a brief analysis of the costs associated with failure to meet each of the goals enumerated earlier.

a. Resource allocation: activity costs

Posner's work includes a good analysis of how the failure to attain the resource allocation goal can result in future costs to resources, for example unnecessary consumption of resources in avoidable accidents.[90] Posner calls these "error costs," and they were

88. The same notion is behind Posner's formulation of error costs as costs generated from failure to achieve social functions. *See* Posner, *supra* note 8, at 400.

89. Posner, *supra* note 8, at 400.

90. *See, e.g.*, Posner, *supra* note 8, at 402-06; *see also*, Nader, *supra* note 14, at 1002, 1007, 1018. *See generally* Posner, *supra* note 30. Actually, this example can help to refine un-

described above as "misallocation costs." In fact, the costs involved here are simply the combined amount of resources consumed in two or more conflicting activities. Resource consumption is inevitable; but with low attainment of the resource allocation goal, overall resource consumption by conflicting activities will be greater. The costs associated with the resource allocation goal might thus best be described as *activity costs*, i.e., the combined level of resource consumption in sets of activities involved in disputes.[91] It is certainly clear that activity costs are real, and that they are influenced by various devices affecting the allocation of resources between conflicting activities, including dispute handling processes, as discussed in Section A above. Thus the resource allocation goal of the civil justice system can be expressed in terms of minimizing activity costs, identified and described as above.

b. Administration: processing costs

In the case of the administration goal, an associated cost is on some level also a given: the direct cost of being involved in and handling a dispute, by whatever course of action.[92] That is, once involved in a dispute, practically any course of action involves costs, ranging from capital expenditures on physical plant or supplies, to the value of the time of all personnel involved (including the parties themselves), to the psychological impact of participation (anxiety,

derstanding of the notion of cost minimization generally. The economist views the resource universe like a human life, finite and constantly depleting, so that costs are always being generated and resources constantly being used up. Any choice of activity (including no choice, or the choice of no activity) consumes resources. So the goal is to choose whatever produces the most while consuming the least resources, thus leaving the most resources for other uses. While this seems to necessitate a discussion of benefits as well as costs, to do so would pose the problem of double counting, since every benefit is an avoidance of a cost and every cost is a foregone benefit. That is, if I enjoy an afternoon at the movies, I avoid boredom costs/gain diversion benefits, and because I no longer have as much money to buy food, I forego eating benefits/incur hunger costs. The two terms in each set are equivalent and should not both be expressed, and to keep the terms consistent, I can express my choice about going to the movies in terms of minimizing the sum of two kinds of costs, boredom costs and hunger costs. This explains the absence of talk of benefits in the cost minimization approach. Furthermore, the assumption is that both kinds of costs are probably inevitable to some degree, since as long as I am alive I have a tendency to get hungry unless fed and bored unless entertained. Similarly the costs involved in disputing and handling disputes are in reality all natural and inevitable to some degree.

91. See R. POSNER, *supra* note 31, at 179, where Posner himself suggests the idea of characterizing the costs involved here as activity costs: "[t]he common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities." *Id.*

92. Posner indeed employs the term "direct costs." Posner, supra note 8, at 400.

fear, etc.) on all persons involved. Sociological literature has been especially helpful in documenting the existence and significance of such *processing costs* even in cases where the choice is to ignore or run away from the dispute.[93]

c. Public order: disorder costs

Disruptions of public order represent another kind of cost that is inevitable in society to some degree. Without a completely pacified or completely repressed citizenry—i.e., without a cop or a therapist on every corner—such disruptions will occur. There are various costs involved in disruptions of public order. These include costs of quelling disturbances (policing costs), costs of repair or replacement for damages inflicted on person and property during the disruption (damage costs), and costs of decreased productivity during and following the disruption until equanimity is restored (productivity costs). Such *disorder costs* are real.[94] Where dispute handling succeeds in advancing the public order goal, these costs will likely decrease.

d. Human relations: enmity costs

The human relations goal of dispute handling is associated with what might be called *enmity costs*. In any society, and especially one characterized by crowded conditions and widely differing lifestyles and values, social interactions will often involve misunderstanding, suspicion, mistrust and outright hostility. These states of mind—inevitable to some degree—cause anxiety, decreased productivity, and even illness, which fall as costs upon affected individuals. Alternatively, such individuals may respond by isolating or shielding themselves from unpleasant interactions, incurring other costs, either directly by paying for shielding devices (such as premium housing that excludes all but certain types of people) or indirectly by foregoing the possible benefits of interaction. Finally, mistrust and enmity directly affect the cost of necessary interactions, i.e., interactions that cannot be avoided in normal business or routine affairs,

93. *See, e.g.*, Johnson, *Thinking About Access: A Preliminary Typology of Possible Strategies*, in 3 ACCESS TO JUSTICE 3, 113-14 & n.251 (M. Cappelletti & B. Garth eds. 1979); L. Wechsler and R. Warren, Consumption Costs and Production Costs In The Provision Of Antipoverty Goods, 16-21 (mimeo, American Political Science Association, 1970). *See also* Cavanagh & Sarat, *supra* note 3, at 390-94; Miller & Sarat, *supra* note 26, at 563-64; Danzig & Lowy, *supra* note 49, at 678-79; G. CALABRESI & P. BOBBITT, *supra* note 86, at 55-56.

94. *See* Danzig & Lowy, *supra* note 49, at 684-85; Merry, *supra* note 3, at 900-01, 920-23.

since mistrust on one or both sides makes the consummation of any transaction more difficult.[95] Such enmity costs will rise or fall in inverse relation to the degree that the human relations goal of the civil justice system is attained.

e. Social justice: disparity costs

Where disparities exist in resource distribution—again, a condition inevitable to some degree—various costs also exist as a consequence. The proximity of a group of haves and a group of have-nots engenders resentment and envy among the have-nots, and fear and guilt among the haves. These mental or emotional states produce anxiety and frustration and associated costs. Furthermore, they lead both camps to expend resources strategically. The haves incur costs of self defense, both directly by paying taxes for protection of property and by buying self-defense products, and indirectly by restricting their activities so as to be less exposed to attack. The have-nots incur costs of self-help, both directly and especially indirectly, by exposing themselves to risk of injury and loss of liberty. Finally, distributional inequality on a long term basis also appears to engender attitudes of self-hate on the part of the have-nots, and bigotry on the part of the haves. Besides emotional costs, the former also involves clear productivity costs, as the individual's low self-esteem blocks the development and utilization of productive ability. The latter involves a different kind of cost, namely the foregone benefits of potentially productive interactions between haves and have-nots as a result of categorical refusal by haves to tolerate such interaction. Once again the social justice goal of the civil justice system can be expressed in terms of minimizing such *disparity costs*, according to the familiar inverse relationship seen in earlier cases.[96]

f. Legitimacy: disaffection costs

In every society, some level of dissatisfaction with social institutions is inevitable. Such dissatisfaction leads individuals and groups to doubt or reject the very legitimacy of these institutions, and this doubt and rejection involve various costs. Perhaps most

95. For a discussion of one or more of the above kinds of enmity costs arising from failure to attend to the human relations goal, see, e.g., Felstiner, *Avoidance*, *supra* note 26, at 696-99; Danzig & Lowy, *supra* note 49, at 678-79; Summers, *supra* note 21, at 22-23; D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 273-79 (1974); Nader, *supra* note 14, at 1001, 1008; Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 U.C.L.A. L. REV. 1233 (1974).

96. *See, e.g.*, Miller & Sarat, *supra* note 26, at 562, 564-65.

significant are costs of decreased participation in and cooperation with societal institutions. Assuming that the quality of government's performance is dependent in part upon citizen involvement and concern, such performance may decline and thereby impose various costs on citizens such as poor service, waste and corruption, to mention a few. Furthermore, much societal action depends upon voluntary cooperation of individual members or citizens. Failure to cooperate, or actual obstruction of government activity, vastly increases the costs of operating society's institutions. Such noncooperative behavior is evident in response to many specific areas of government activity, including income tax reporting and collection, observance of traffic laws, appearance for jury and other civic duties, voting and draft registration. Minimizing the *disaffection costs* resulting from lack of citizen participation in and cooperation with government is thus the converse way of expressing the legitimacy goal of the civil justice system.[97]

g. Fundamental rights: oppression costs

The goal of protecting fundamental rights focuses on two kinds of potential depredations, whether practiced by the state or by private parties: violations of individual rights in civil affairs generally, including discrimination against individuals solely because of their status as members of a certain group, and violations of individual rights in dispute handling processes specifically. The concern for such depredations is related to the high value placed on the individual in western legal culture.[98] Violations of fundamental rights involve a number of costs, some parallel to costs discussed earlier, some unique. Where a violation of individual rights by the state is involved, the costs are similar to the disaffection costs described in connection with the legitimacy goal, in that the violation will itself lead the individual involved, and possibly others, to question the legitimacy of the state that so acts. Where discrimination by status is involved, the costs include both disaffection costs and the type of disparity costs discussed in connection with the social justice goal, since the effect of the discrimination is to institutionalize a gap of wealth, privilege or power between different groups. In either case

97. *See* Abram, *Access To The Judicial Process*, 6 GA. L. REV. 247, 249-50, 256 (1972); Miller & Sarat, *supra* note 26, at 562, 564-65; Lempert, *supra* note 21, at 711-15; Nader, *supra* note 14, at 1002-08; G. CALABRESI & P. BOBBITT, *supra* note 86, at 60-61; Williams & Hall, *supra* note 56; Walker, *supra* note 56.

98. *See supra* notes 42-44 and accompanying text; *see also infra* notes 240-42 and accompanying text.

the costs may include disorder costs as described above, since the response of affected or sympathetic groups or individuals may be to directly attack the state or the private groups perceived as responsible for the oppression.

However, a different type of cost is also involved where fundamental rights are violated, which could be called *oppression costs*. There is usually a tension in society between the desire for individual self-determination and freedom and the tendency of governing institutions or powerful groups to accumulate and exercise greater degrees of control. To the extent that individuals value their freedom—whether because of natural psychological factors, acculturation, or preference—acts of the state or powerful groups that abridge such freedom result in costs. Most significantly, the productivity of individuals may decline because of their insecurity as to their continued right freely to develop their abilities and dispose of what they produce. The incentive to creativity and productivity is diminished when an individual is uncertain about his freedom to work productively and enjoy the fruits of his efforts. Violations of fundamental rights create such uncertainty in varying degrees.[99] The result is a concrete loss to society of human energy as it is applied to the exploitation of other resources. The effect of this loss is likely to be a poorer society overall. Another type of cost associated with violations of fundamental rights relates to the ideological importance of individual rights in western culture.[100] The undermining of this ideal by rights violations contributes to intellectual insecurity and confusion over basic values. Apart from effects on productivity as above, this insecurity itself has negative impacts on emotional and physical well being.[101] Thus oppression costs, like other costs detailed above, are concrete and real, and are inversely associated with one of the goals of the civil justice system.

In sum, each of the civil justice goals is associated with some set of real and concrete costs to society which can be identified and described. The relationship between goal and costs in each case is inverse: as the level of goal attainment rises, the costs fall, and vice versa. Thus the goal can be expressed in terms of the costs: striving for allocative efficiency means minimizing activity costs; striving for

99. *See* R. POSNER, *supra* note 31, at 27-28.

100. *See supra* notes 42-44 and accompanying text; *see also infra* notes 240-42 and accompanying text.

101. *See* G. CALABRESI & P. BOBBITT, *supra* note 86, at 39-41, 49-50, 88-89, 214 nn. 9-10.

better human relations means minimizing enmity costs.[102] The cost formulation sounds less noble, perhaps, but it has a number of virtues. It clarifies the concrete nature and impact, and hence the real significance, of the goal in each case, a point discussed more fully below.[103] It provides a way of evaluating the accomplishment of the goal, assuming the measurement problem can be met. Finally, the cost formulation provides a common frame of reference in which the goals can be subsumed and interrelated. In short, it is possible to state an overall goal for civil justice that recognizes and interrelates all the particular goals discussed.

This goal can be stated as follows. The overall goal of the civil justice system is to minimize the sum of all the different costs associated with all the different goals of civil justice. In particular, the goal is to minimize the sum of: activity costs, disparity costs, disorder costs, enmity costs, disaffection costs, oppression costs, and administrative costs. Symbolically this can be expressed as follows:

$$\text{Goal} = \text{Min}\,\Sigma\, C = \text{Min}\,[C_{AC} + C_{DP} + C_{DO} + C_{EN} + C_{DA} + C_{OP} + C_{AD}].^{104}$$

This symbolic formulation demonstrates graphically the primary value of the cost-minimization approach as applied to civil justice goals. The essential step in evaluating system performance or reform proposals is to include in consideration *every* goal, and to recognize its *interrelationship* with other goals. By its very character, the cost-minimization formulation ensures that each cost (goal) is considered, for if even one is omitted, the summation simply cannot be made.[105] Also, the structure of the formulation makes plain the

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102. Some goals actually appear to be associated with more than one cost; but even so, they can be expressed in cost terms. For example, striving for social justice means minimizing the sum of disparity costs, enmity costs, and disorder costs; striving for fundamental rights means minimizing the sum of oppression costs, disaffection costs, disorder costs, and disparity costs.

103. *See infra* text accompanying notes 113-14.

104. In this formulation, some goals are reflected in one term. For example, the resource allocation goal is reflected in activity costs. Other goals are reflected in more than one term. For example, the social justice goal is reflected in disparity costs, disorder costs, and enmity costs. In fact, once the costs have been adequately specified, it is not necessary to refer constantly to the goals represented and to know which is which. The significance and importance of goal and cost definition is to assure that the catalogue of costs is not incomplete or imprecise, a major weakness noted in earlier cost-minimization models. By considering separately all the goals discussed in Part II.A above (i.e., all the goals argued as relevant to civil justice), and in each case taking care to specify and differentiate all the significant costs associated with the goal, the discussion here has led to a formulation that is far more complete, precise and reflective of the full range and interrelationship of civil justice goals than any previous formulation.

105. Of course, where the formulation itself is incomplete, or vague, problems persist despite this approach, as discussed in Part II.C above. This is why such pains were taken in Part II.A above, and here in this subsection, to be as specific and complete as possible in

essential point that the goals cannot be viewed in isolation, but must be seen in relation to one another. It is easy to see and grasp from the cost format that if a drop in one cost is accompanied by an even greater rise in another, the game is simply not worth the candle. All of this may appear overly simple-minded. However, without a discipline such as that imposed by the cost-minimization structure, it is only too easy to overlook these "simple-minded" points.[106]

The second major advantage of the cost framework, of course, is that by translating goals into cost-minimization terms, not only the awareness but also the resolution of goal competition is facilitated. The cost terms offer a common currency in which effects on different goals can be directly compared and weighed against each other, and decisions made based on the total effect on the system, expressed in the common denominator of cost effects.[107] Thus, if an action lowers one cost by an amount greater than the increase in any other or others, the action decreases overall costs and thus is an improvement over the existing situation. However, it is one thing to say that a given proposal would result in an improvement over the present situation. An opponent may still claim, and rightly so, that a different policy (favorable to his preferred goal) will reduce total costs by even more. In fact, the model is designed to address this very problem, since it facilitates the choice of an optimal policy from among several competing proposals—namely, the one that does not merely decrease the total costs of the system below the present level, but minimizes total costs.[108]

Thus the model as developed so far has a number of advantages over, and avoids several weaknesses of, earlier approaches to formulating the goals of the civil justice system, even while it is firmly based on those approaches. It adopts a broad definition of the civil justice system, which is appropriate in light of the range of formal and informal institutions that play a part in the system. It reflects the whole range of civil justice goals that are considered important

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formulating the elements for inclusion in the overall goal. In any event, the degree of completeness and specificity here represents an advance over previous work.

106. If the analysis is left in goal terminology, how is it so graphically expressed that every goal counts? How is it made so clear that an evaluation lacking consideration of one goal is no evaluation at all? How is it driven home that a gain for one goal can easily be vitiated by a loss for another? Of course, these are simply the converse statements of those made by the cost-minimization format. In fact, it is much harder to remain conscious of and subject one's analysis to these "rules" when using straight goal-attainment terminology than when using converse cost-minimization terminology.

107. Of course, some might regard this as a defect of the approach rather than an advantage, as discussed below. *See infra* text accompanying notes 111-14.

108. *See* Sander, *supra* note 3, at 133.

by various constituencies. It defines such goals concretely and with more precision than earlier approaches by focusing on the variety of specific impacts associated with different levels of attainment of each goal. It explicitly represents and addresses the problem of competition among different civil justice goals. Finally, by relating such goals to a common factor—cost-minimization—it provides a way of analyzing and resolving this competition and assessing the overall performance of the civil justice system.

Before turning to the practical problems of applying this model to the formulation of civil justice reform policy, it is necesary to address two potential objections to the expression of civil justice goals in cost-minimization terms. These are the questions of measurement and comparability.

2. BASES OF THE COST-MINIMIZATION APPROACH: MEASUREMENT AND COMPARABILITY OF COSTS

One major question that may be raised is whether the above approach is at all realistic or practical, since its application depends upon evaluating cost impacts that are quite difficult to trace and measure. There are a few points to be made in response to this kind of objection. First, there are techniques available to trace and measure the kind of cost impacts discussed above, particularly if such measurements do not try to cover the entire system at once, but rather focus on manageable parts thereof, and subsequently are aggregated. How this can be done without losing the system-wide perspective of the model is discussed below. Assuming it is possible, measurement could occur in each of two ways. Where feasible, measurement could be based on statistical sampling of cost impacts in various types of dispute handling situations, as has been done in the past.[109] Second, if it is possible to articulate a set of factors which logically determine the magnitude of a certain kind of cost, then cost estimates can be made by analyzing these factors in given situations. This is the approach that will be discussed in more detail below. Suffice it to say that a combination of sampling and projection techniques as suggested here is responsible for generating much of the data on which both business and government policy are routinely conducted. The admitted imperfection of such techniques is not an adequate reason to reject their use entirely. However, a third point that emerges from this is that the notion of cost "measurement" when viewed practically must be understood as cost estima-

109. *See, e.g.*, D. CAPLOVITZ, *supra* note 95.

tion. In other words, the values of the terms in a cost-minimization model will rarely be more than rough indicators of the magnitude of the different costs involved. However, to reject the model on this basis would be to argue that in the absence of perfect information, no information has any value. However theoretically appealing such a position, it is probably not relevant in any practical context. The cost terms are *concrete* indicators of the impact or value of pursuing, or not pursuing, different civil justice goals. Even if measurement is not completely precise, the model will give more concrete dimensions to debate over the meaning and relative significance of different civil justice goals in different situations, and facilitate their interrelation in evaluating and forming policy for the civil justice system.

This point leads into the other potential objection to a cost-minimization model: the incomparability of different civil justice goals. The model, by its very approach and terms, implies that the various civil justice goals can be expressed in common terms and thus compared with one another. As noted above, this notion is likely to be anathema to many readers, who view certain goals as being, as it were, of different currency, and hence incomparable to others.[110] Thus, it has been argued, the idea of a "trade-off" (the inevitable consequence of comparability) between efficiency and social justice, for example, or between public order and protection of fundamental rights, is fundamentally wrong. A number of points can be made concerning this objection.

First, as noted earlier, this position is simply impractical in the context of public policy making, whether political or legal. As a matter of fact, such trade-offs are made. For example the Chief Justice of the Supreme Court has advocated what amounts to a cut-back of supposedly fundamental rights in order to improve the condition of public order.[111] The advocate of the disfavored "higher" or "superior" goal would do better in practice to argue his case on the common ground of concrete social impact, since otherwise he may lose that ground by default, while maintaining the high ground of principle or ideology to little avail.

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110. *See supra* note 33 and accompanying text.

111. *See* Pressman, *Chief Justice Calls For Stepping Up of War on Crime, Urges Curtailing of Appeals and Retrials, Teaching of Integrity, but Spares Lawyers*, L.A. Daily J., Feb. 9, 1981, at 1, col. 6; Middleton, *Burger Takes a Tough Stance On Fighting Crime*, 67 A.B.A.J. 268 (1981); *U.S. Criminal Justice System Must Change, Burger Tells A.B.A.*, Wall St. J., Feb. 9, 1981, at 12(E), col. 4; *Burger's "Shocker" Speech: A Bid to Stir Debate on Criminal Justice*, Christian Sci. Monitor, Feb. 10, 1981, at 1, col. 1.

A second point is that there is room in the model to assign certain goals extra weight, precisely because of their greater concrete impact. For example, in the above discussion of costs, it was seen that certain goals were reflected not in one but in several costs. Thus the social justice goal was related not only to disparity costs, but also to enmity costs, disorder costs, and possibly also disaffection costs. The fundamental rights goal was also related to several costs: not only oppression costs, but also disparity, disaffection, and disorder costs. Thus it may be that some goals carry greater weight precisely because they involve, more than other goals, several kinds of concrete impacts. Where this is true, the model, by focusing on the impacts themselves, will automatically give these goals the consideration they deserve, and thus be a help and not a hindrance to their proper furtherance.

Third, the objection to comparability is often based on an antipathy to "monetarization" of certain values. How can a dollar value be placed on denigration of individual dignity, it is asked, or on social injustice? There are two possible answers to such a question. First, the civil justice system routinely places a dollar value on physical pain and emotional suffering, grief, sorrow, and even life itself. Indeed, courts have recently begun to consider placing a dollar value on the right not to have been born at all![112] Beyond this, courts do not hesitate to evaluate denigrations of individual dignity monetarily in civil remedies for violation of civil rights. In sum, monetarization of intangible values is quite common in the civil justice system. Why is it inappropriate in a model for evaluating that system, especially when the reason for it is the same in both cases—practical necessity?[113]

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112. See Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983); and Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), which all recognize a cause of action in tort for "wrongful life," where a child is born with a physical defect and subsequently argues that, but for defendant's wrongful failure to advise the child's parents of the risk of a birth defect, the child would never have been born (or conceived) at all and would thus have avoided the costs and suffering involved. *See also* Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L.J. 480 (1980); Barnett, *Liability for Wrongful Life: California Fashions a Compromise*, NAT'L L.J., Aug. 23, 1982, at 18; Furrow, *The Causes of "Wrongful Life" Suits*, 88 CASE & COM., Jan.-Feb. 1983, at 28.

113. A second response would be to admit the inadequacy of monetarization in many cases. (Indeed, some have noted that monetarization itself has costs. *See, e.g., supra* note 86.) However, as noted above, the point is that the cost terminology is not meant to be taken completely literally or applied slavishly. It is, rather, one way of giving concrete dimension to various values and allowing for sensible discussion of their relative weights in different circumstances. It thus facilitates the kind of discussion necessary to make and assess practical policy. It does not prevent introduction of nonmonetary concerns or dimensions into the discussion.

More to the point, as long as it is not applied over-literally, the cost-minimization model can be used to further, not obstruct, concerns for non-quantifiable values. To say that a certain policy seems preferable on cost-minimization grounds does not foreclose further discussion. Advocates of a goal involving non-quantifiable values, which they believe have not been clearly reflected in cost-minimization, will still be able to challenge the policy. In fact, the model offers them an advantage—value clarification. That is, in the context of a comparison of concrete impacts, advocates of such a goal have an incentive to be far more precise about identifying and articulating the concrete impacts associated with that goal. This is an advantage to all concerned because abstract or vague values may thus be translated into more concrete terms under the pressure of cost specification. The original goal itself may have specific cost impacts that have been overlooked, such that even under strict cost-minimization, the challenged policy turns out to be undesirable. Alternatively, even without reference to costs, the non-quantifiable values behind the original goal may be articulated more clearly and forcefully, so that others are more fully persuaded of their importance. Either way, the impact of the cost-minimization format is not to exclude from consideration or depreciate non-quantifiable aspects of goals. Rather, it is to clarify those aspects so that their significance can be brought home more forcefully.[114]

Those who object to cost-minimization approaches because of the monetarization technique may do so because they regard monetarization, or use of cost terminology, as a way of downgrading and trivializing the ultimate importance of the goals involved. Thus, for example, it may be argued that to speak about the human relations goal in terms of avoiding enmity costs is in itself to devalue the goal and to trivialize the concern for decent human relations. As a matter of fact, nothing could be further from the truth. Indeed,

114. One of the early uses of such an approach was Calabresi's analysis of the negligence system of accident law. During the course of his analysis he gave a very specific economic meaning to the goal of victim compensation, which had previously been justified on a variety of comparatively vague grounds. At the same time, Calabresi's assault on the negligence system provoked greater clarity of thought about the values and goals behind that system both in Calabresi's work and others. *See, e.g.*, G. CALABRESI, *supra* note 41; Calabresi, *supra* note 70; Calabresi & Hirschoff, *supra* note 70; Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); Posner, *supra* note 30; Fletcher, *Fairness & Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Epstein, *Causation & Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Another example of the way the model assists in value clarification and specification is detailed in Part III of this Article. This Part examines, among other points, the significance of the human relations goal in civil justice, which has often been understated precisely because of vagueness of argument.

concrete definition of the consequences of poor human relations has precisely the opposite effect. It has the effect of demonstrating that the goal of improving human relations is indeed a concrete and vital matter, not a vague idealistic notion without real and practical significance. In short, the concretization of goals that otherwise have a tendency to be conceived, expressed and understood rather vaguely, works to give substance to such goals, not to trivialize them.

3. PROCESS CHOICE AS A MEANS OF ACHIEVING COST-MINIMIZATION

The model of interrelated goals developed above is, by itself, only part of what is needed in an integrated approach to dispute handling alternatives and civil justice reform. The remaining question is how such a model can be practically applied. Precisely because of the breadth of the civil justice system, it would appear very difficult to formulate even rough estimates of the various cost terms on a system-wide basis. Moreover, how is the cost-minimization goal to be attained—by trial and error, by piecemeal efforts, by massive reform or by private choice? In short, the formulation of civil justice goals is not enough. It is also necessary to articulate the means by which the goals can be pursued in the operation and reform of the system. Such an approach can be formulated as follows, building here upon the process pluralism approach. First, the potential for furthering each of the different civil justice goals is not the same in all disputes. Therefore, it is possible to define various classes of disputes, based on similarity of relationship to the different civil justice goals. Each such class would be homogenous with respect to its potential for goal furtherance (cost impact). If costs are minimized in each such class of cases, the aggregate result would be total cost-minimization for the entire system. Thus the practical problem of goal attainment can be framed in more manageable terms as one of minimizing civil justice costs in each class of cases defined. This approach also helps make the cost measurement problem more approachable.

A second point, also implicit in the process pluralism approach, is that advancement of each of the different civil justice goals depends upon certain characteristics in dispute handling processes. Certain kinds of processes are better suited for furthering some goals, other processes for furthering other goals. Translating goals into costs, the character of the dispute handling process utilized is the key variable factor affecting cost levels in each class of cases. For any given class of cases, costs can be minimized by choosing among alternative dispute handling processes. Thus, a practical means of achieving the civil justice goals expressed by the cost-minimization

model is to focus on dispute handling processes as tools, and, for each class of cases, choose the process that minimizes the sum of actual dispute handling costs for that class of cases. If this is done for every class of cases, the aggregate effect is to minimize the sum of civil justice costs for all cases. That is, process choice is the means to goal attainment, the goals themselves having been formulated in a cost-minimization model.

The above may seem no more than a restatement of the process pluralism approach, clothed in cost-minimization language. On the contrary, it goes beyond *both* these approaches in several important respects.

First, each of these approaches, as previously used, has had serious weaknesses. The process pluralism approach has glossed over the problem of goal competition and thus perpetuated the problem of goal omission in analysis of the multi-goal civil justice system. The cost-minimization approach, on the other hand, has failed to consider more than a narrow range of processes as relevant to process choice and hence cost-minimization. The approach here avoids both of these weaknesses. Recognition and interrelation of multiple goals is an intrinsic part of the cost-minimization model; and using process choice as the means to these goals stresses the importance of considering a full range of process alternatives. By integrating the two earlier approaches, the strengths of each are used to overcome the weaknesses of the other; and the insights of distinct branches of commentary are shown to be complementary, rather than contradictory or merely unrelated.

Second, both of the previous approaches to civil justice policy have suffered from a lack of firm theoretical foundation. The pluralism approach, focusing attention and reform efforts on dispute handling alternatives, has been popular and intuitively appealing; but it has developed no thorough theoretical justification to support the desirability of such reforms. As a result, the embryonic "alternative dispute resolution" movement has remained marginal, and there has been little support for extensive public investment in and development of a wider range of dispute handling structures.[115] At the

115. There is no lack of support for the proposition that there is a good deal of pluralism in dispute handling, especially in light of private, extralegal processes. There is both empirical evidence to this effect, *see supra* notes 10 & 21, as well as theoretical support for the view that this is a desirable state of affairs. *See, e.g.*, Galanter, *supra* note 5. The question is whether public policy should consciously encourage, foster and increase process pluralism by various means. On this point, theoretical support has been much thinner.

That the "alternative dispute resolution" (ADR) movement has as a result remained marginal may at first be questioned, since ADR programs appear to be springing up everywhere, together with a wealth of interest in the subject in the literature. As to interest in the

same time, the cost-minimization approach, while generally founded in respectable economic theory, has not been adequately developed in relation to the dispute handling debate. The failure to define and specify a full range of costs completely and adequately, and the failure to confront the problems of measurement and comparability, have led many either to dismiss this approach as an interesting but impractical abstraction, or to reject it as an insidious assault on values. This Article's analysis is a first step toward filling in the theoretical foundation with respect to key aspects of both approaches. It demonstrates the legitimacy and usefulness of cost-minimization concepts in direct relation to a full range of recognized civil justice goals. Further, it establishes the central importance of process pluralism and process choice theoretically and practically, showing that the development and proper use of dispute handling alternatives is a necessary and appropriate means of effecting reform and thus furthering civil justice goals.

Finally, and most important, the approach taken herein lays the basis for overcoming another serious weakness of previous analyses of dispute handling alternatives and civil justice reform. It allows for the development of *coherent principles* showing *how* to use process choice to better achieve the goals of civil justice—i.e. jurisdictional principles for process choice.[116] Here, the present approach must go beyond simply integrating previous work, and extend the analysis onto a new level. At the same time, clarity about

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literature, see, e.g., D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (Washington, D.C.: U.S. Government Printing Office 1977); CONSUMER DISPUTE RESOLUTION, *supra* note 10; NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (R. Tomasic & M. Feeley eds. 1982); F. SANDER, REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTE RESOLUTION (1977); R. ABEL, THE POLITICS OF INFORMAL JUSTICE (1982). As to the number of actual ADR programs (ranging from court-ordered arbitration to community-based mediation), estimates vary, but run in the range of 150-200 such programs across the U.S. *See* McGillis, *supra* note 21, at 249 (140 programs); Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 423 (1982) (180 programs); McCarthy, *Dispute Resolution: Seeking Justice Outside the Courtroom*, VIII CORRECTIONS MAG., Aug. 1982, at 33 (190 programs); Brenner, *Dispute Resolution Movement Gathers Momentum*, Legal Times, Mar. 21, 1983, at 27 (160 programs).

However, interest in the literature proves little about significance in actual practice. And despite the impressive sense of growth conveyed by the above numbers, and high hopes that ADR programs represent a major change in the civil justice system, *see* McGillis, *supra* note 21, at 265-66, these programs, whether voluntary or mandatory, remain marginal both in numbers and in utilization compared to the tremendous size of (and volume of cases handled by) the court system, *see* Pearson, *supra*, at 426-28, 437-39, not to mention the immensely greater expanse of the more unstructured and informal elements of the overall civil dispute handling system. *See* Ladinsky & Susmilch, *supra* note 10, at 185-202; Hurst, *supra* note 1, at 424, 428-30; Miller & Sarat, *supra* note 26; Sarat, *supra* note 21, at 546.

116. *See supra* text accompanying notes I7-18 & 23; *supra* notes 71-74 and accompanying text.

the limitations and weaknesses of previous analysis of this issue helps to suggest the direction for this new level.

The crucial practical question, in using dispute handling alternatives as a means of reform, is always the jurisdictional question—*which* process to use in *which* type of case, which "match" will be cost-minimizing? However, neither cost-minimization nor process pluralism analysis has delved carefully into this question. Instead, previous analysis has tended to resolve the question with a kind of one-step reasoning from type of case to type of process. Thus it is argued: cases where parties have close and ongoing relationships (divorce, neighborhood disputes, landlord-tenant) require a process like mediation that preserves those relationships;[117] cases that involve small claims and simple, factual issues (consumer disputes, minor commercial and accident cases) require a process like arbitration that provides a final decision with little delay;[118] cases that involve individual liberties (discrimination claims, government benefit claims) require a process like adjudication that incorporates formal protections that prevent undue compromising of claims of rights;[119] cases involving large sums or significant issues of principle (product design defect and consumer fraud claims) require a process like adjudication that articulates and applies rules to guide future behavior and induce avoidance of significant future problems.[120] All of these assertions have a certain intuitive appeal, and indeed most of them have found support in the discussion of civil justice reform.[121] However, they are all simplifications, and many of them

117. *See, e.g.*, Fuller, *supra* note 17, at 310, 330-33 (divorce and family); Cavanagh & Sarat, *supra* note 3, at 394-401 (landlord and tenant, divorce and family, neighborhood); Riskin, *supra* note 50, at 31-33 (neighborhood, divorce); Danzig & Lowy, *supra* note 49, at 685-91 (neighborhood); Sander, *supra* note 3, at 120-23 (neighborhood, divorce & family); Ebel, *Landlord-Tenant Mediation Project in Colorado*, 17 URB. L. ANN. 279 (1979) and McGillis, *Neighborhood Justice Centers and the Mediation of Housing Related Disputes*, 17 URB. L. ANN. 245 (1979) (landlord and tenant); Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1981), Gold, *Mediation in the Dissolution of Marriage*, 36 ARB. J., Sept. 1981, at 9, Norton, *supra* note 60, and Freedberg, *The Custody Compromise*, 3 CAL. LAW., June 1983, at 22 (divorce).

118. *See, e.g.*, MacLean, *supra* note 60, at 1304, 1308-09; Sarat, *supra* note 21, at 352-73; Comment, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 TEMP. L.Q. 385 (1976); Kritzer & Anderson, *supra* note 60; *Discussion By Seminar Participants, supra* note 9, at 346-47 (comments of H. Steiner); Note, *Arbitration of Attorney Fee Disputes: New Direction for Professional Responsibility*, 5 U.C.L.A.-ALASKA L. REV. 309 (1976); Getman, supra note 24.

119. *See, e.g.*, Higginbotham, *supra* note 41; Rubenstein, *supra* note 14.

120. *See, e.g.*, Landes & Posner, *supra* note 9, at 238-42; *Discussion By Seminar Participants, supra* note 9, at 346-47 (comments of H. Steiner); Nader, *supra* note 14, at 1002, 1007, 1018-19; Twerski, *supra* note 26; Posner, *supra* note 8, at 399, 402.

121. It should be noted that other proposals resting on contrary assertions could be cited in each area due to the lack of consensus on issues of process choice. *See, e.g.*, Diamond &

are misleading and probably wrong, because the one-step reasoning on which they are based conceals the issues involved and hence obscures clear analysis.

Each of the above assertions is based on the logic that different types of cases require different processes. But which case requires which process? While the analysis behind these kinds of assertions rarely if ever articulates it, there is actually a three-step logic involved. Step one is the observation (often the assumption) that in case-type "C," goal "G" is very important. Step two is the observation (often the assumption) that process "P" is effective at furthering goal "G." Step three, the conclusion, is that in case type "C," process "P" should be used. Thus the key element in the implicit logic is the linking of a certain case-type and a certain process to the same goal, and hence to each other. This suggests that the place to look for principles of process choice is in the civil justice goals themselves, which are the key link in matching case type to process. However since the implicit reasoning outlined above is not articulated, it often occurs that: it is not clear that the basis of the match is a social goal that necessarily relates to other social goals; the goal involved is never defined, examined, or related to other goals; the links between case-type and goal, and process and goal, are, as noted, assumed rather than analytically established. These are serious weaknesses; but they can be eliminated by a more articulate use of the reasoning involved.

Thus the basic assertion—that different types of cases require different processes—can and should be broken down into logically separate assertions: 1) furtherance of a range of social goals is desired; 2) in different types of cases, different goals are important in differing degrees; 3) with different dispute handling processes, different goals are affected in differing degrees. Now it can be seen much more clearly that to use process choice as a policy tool, several questions must be answered: 1) Which goals are to be furthered, and to what degree? 2) What determines which goals are important, and in what degree, in different types of cases? 3) What determines which goals are furthered, and in what degree, by different dispute handling processes? The one-step reasoning behind the views mentioned above obscures all of these questions, and therefore makes it quite difficult to arrive at sound answers. Answers can be found, however, in terms of the approach developed here. Moreover, answering ques-

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Simborg, *supra* note 74; Sikes, *Small Claims For Arbitration: The Need for Appeal*, 16 COLUM. J.L. & SOC. PROBS. 399 (1981); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

tions 2) and 3) can provide a set of factors that determine goal importance (cost potential) and goal furtherance (cost reduction) in different cases and through different processes; and these determining factors constitute the kind of criteria or principles, for exercising and evaluating process choice, that are being called for in the civil justice debate.

4. JURISDICTIONAL PRINCIPLES FOR PROCESS CHOICE: FACTORS DETERMINATIVE OF COST POTENTIALS AND COST REDUCTION

The answer to the first of the above questions (which goals are to be furthered) is reflected in the overall cost-minimization function itself, as detailed above. To adopt the terms of that formulation, the costs to be minimized (goals to be furthered) are *all* the costs identified earlier, and each cost is to be reduced as much as can be done without causing an even greater increase in other costs. Therefore, in answering the next two questions—i.e., in considering both type of case and process—one must always determine the relationship of the case-type or process to *each* of the different civil justice costs, individually and in relation to one another. Indeed, this is why the earlier adoption of the cost-minimization approach, with its safeguards against goal omission, is ultimately very important for the derivation of process choice principles.

To answer the second question posed above (how to determine the significant goals for different case types), one must establish the general characteristics that differentiate between one type of dispute and another in determining each type's potential for generating different civil justice costs. For example, in relation to disorder costs, what differentiating characteristics, relating to the circumstances and features of the type of dispute, seem to logically determine the potential level of disorder costs, in one type of dispute as opposed to another? Once these general characteristics or "case-type factors" are logically enumerated for each civil justice cost, the second question can be answered by observing which of these case-type factors are found, and in what degree, in different types of cases. This will provide a basis for a set of predictions of the potential for different civil justice costs in different types of cases. A corollary that emerges from this reasoning is that there will be a different cluster of case-type factors associated with each cost (although some factors may be associated with several). Since in every instance the goal of policy remains total cost-minimization, a sound analysis of cost potentials—that is, relative goal importance—requires attention to *all* the case-type factors associated with *all* different civil justice costs. One-factor analysis is thus inherently suspect, though, as

noted above, it is fairly common in assertions about appropriate process choice.

To answer the third question posed above (how to determine the goals furthered by different dispute handling processes), a similar course is necessary as in the case of the second. First one must establish the general characteristics that differentiate between one dispute handling process and another in determining the extent to which *potential* civil justice costs would *actually* be generated, if each dispute handling process were to be used. Note that here the question is what differentiating characteristics, relating to the features of the *process*, seem to logically determine the *actual* level of different potential civil justice costs. Again, once these general characteristics or "process factors" are logically enumerated with reference to *all* of the civil justice goals, the third question can be answered by observing which process factors are found, and in what degree, in different processes, and from this basis generating predictions about the cost reduction impact of different processes on different civil justice costs. Note that the corollary mentioned above also applies here. That is, a different cluster of process factors will be associated with each cost, so that given the overall goal of total cost-minimization, an accurate estimate of the cost impact of the process requires attention to *all* the process factors, associated with *all* the different civil justice goals. Again, one-factor analysis, while common, is incomplete and potentially misleading. Thus it is now even clearer that the multi-goal focus inherent in cost-minimization is crucial in the derivation of a complete set of case-type and process factors.

The definition of these factors is not a descriptive process, but an analytical one. The idea is not to compare various processes and note descriptively their differences. Thus, in previous analysis, some factors that have been mentioned as significant factors distinguishing different processes are: participation of a third party, control of process or outcome by a third party, and degree of formality.[122] To the extent that these terms can be precisely defined, they may describe differences between alternative processes. However, the question is whether, and especially why, these differences are important? For a difference to be significant as a factor affecting process choice this difference must be *relevant* to the basis on which that choice is made. Previous analysis ignores this key question. Why is third

122. *See, e.g.*, Lea & Walker, *supra* note 16; Galanter, *Why the Haves*, *supra* note 12, at 126-35; Gulliver, *Negotiations As a Mode of Dispute Settlement: Towards a General Model*, 7 LAW & SOC'Y REV. 667, 667 (1973); Max, *supra* note 60, at 311; Sander, *supra* note 3, at 114-15; D. MCGILLIS & J. MULLEN, *supra* note 115, at 4-25; Cavanagh & Sarat, *supra* note 3, at 400-01; Sarat, *supra* note 21, at 339, 354-55.

party participation or control a significant factor? To what important concern or goal is this difference relevant? Since it starts from description and not from analysis, the descriptive approach has difficulty answering the question. The answer can come only from some discussion of the goals to which process choice is relevant, the goals of civil justice. One must start with goals, and identify process factors relevant to each of the goals. One can then ask, for any given process, which of the factors identified as relevant to different goals is associated with this process? The result is to define specific processes by reference to significant (i.e., goal-related) process factors—the exact opposite of the approach of previous analysis. The same point applies, with some variation, to definition of different types of cases.

Thus, three analytical steps are crucial in order to derive principles by which process choice can be employed to achieve civil justice goals. These steps are: 1) identification of the full range of civil justice costs; 2) identification of case-type factors which determine cost potential, for each such cost; and 3) identification of process factors which determine actual cost reduction, for each such cost. As for step 1), it has already been elaborated in earlier Sections, and does not require further detail here. However, it is important to recognize that there may be disagreements about the way in which civil justice goals, and related costs, have been defined above. Others might include additional goals, or differentiate in another manner among goals included above. The point of this Article, however, is not to define categorically the goals/costs of civil justice, but rather to illustrate their legitimate diversity and to develop an analytical model that ties process choice as a means of civil justice reform to that diversity in a consistent and logical way. Therefore, disagreement about the goal definitions offered here by no means undermines the analytical approach. Indeed the approach invites, as its first step, a vigorous discussion of goals and costs. The same proviso applies to the following analysis of steps 2) and 3). That is, the purpose in the following paragraphs is not to exhaustively or authoritatively establish the cost-determining factors, but rather to illustrate how a goal-based analysis can generate a clearer, richer and more varied view of such factors than previous analysis has done, and to generate debate and discussion on this level.

The following subsections illustrate the kinds of case-type and process factors that can be derived through a goal-based analysis.

a. Case-type factors

To identify case-type factors that determine the potential for different civil justice costs, the basic analytical process is a simple one. Specifically, it is to ask, with respect to each civil justice cost/goal: if this cost/goal is viewed as a central concern, then what characteristics of a dispute would worry us, as it were, by indicating a significant potential for the occurrence of such costs? By asking the simple question—what case characteristics would worry us if we cared about a given cost/goal—we can generate a good set of case-type factors determinative of cost potentials.

1. Thus, if the concern is for *activity cost* minimization (the resource allocation goal), the question is what case-type characteristics would worry us as tending logically to indicate potential for generating such costs. Reflection on this question, in the light of the earlier discussions of the resource allocation goal and converse activity costs,[123] leads to the conclusion that the potential for activity costs in a given type of case will depend upon factors such as the average size or importance of the stakes in that type of case, the frequency of occurrence of that type of case, and the degree to which the type of case involves questions of resource allocation principles as opposed to questions of fact.

Applying the same analytical approach to each of the other civil justice cost/goals, in light of the earlier discussions of goals and costs,[124] the following sets of determinative case-type factors emerge.

2. The potential for *disparity costs* in a given class of cases will depend upon factors such as: the absolute and relative levels of wealth[125] of the types of parties typically involved in the dispute (the typical wealth differential between the parties), the size or importance of the stakes typically involved, the frequency of the type of dispute, and the degree to which the type of dispute typically involves questions of wealth equalization principles as opposed to questions of fact.

3. The potential for *disorder costs* in a given class of cases will depend upon factors such as: the frequency and intensity of contact in the relationship between the parties, the size or importance of the stakes typically involved, and the sensitivity of the surrounding context to disruption.

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123. *See supra* Part II.A.1; *see also supra* notes 89-91 and accompanying text.

124. *See supra* Part II.A.1-7; *see also supra* notes 89-101 and accompanying text.

125. "Wealth" is meant to include all forms of endowments, including preexisting rights, position and power.

4. The potential for *disaffection costs* in a given class of cases will depend upon factors such as: the perceived importance of the stakes typically involved, and the degree to which the issues are perceived by the parties as appropriate and deserving subjects for concern and attention from outside third parties.

5. The potential for *enmity costs* in a given class of cases will depend upon factors such as: the intensity of the parties' relationship with and feelings about each other (as a result of past dealings or the dispute itself), the expected frequency and value of future contacts between the parties themselves, and the expected frequency and value of future contacts between each of the parties and others of an identifiable class with which the opposing party is associated (associated-party contact).

6. The potential for *oppression costs* in a given class of cases will depend upon factors such as: the existence of a threat or a perceived threat to a right perceived as basic to the integrity of the individual, the size of any class particularly affected by the threat, and the degree of identification with and sympathy for the affected class by others.

7. The potential for *processing costs* in a given class of cases will depend upon factors such as: the number of parties typically involved, the number and complexity of issues typically involved, the absolute and relative wealth of the parties typically involved, the intensity of the relationship between the parties,[126] the value of the parties' time, the frequency of occurrence, the degree of deterrability of others in identifiable classes with whom the parties are associated,[127] and the degree to which the dispute typically involves questions of principle as opposed to questions of fact.

The above is not intended as an altogether complete specification of case-type factors, but rather as some indication of how much richer and more complex the matter is than is suggested by previous analysis. In every type of case, analysis of the full range of cost potentials requires identification and assessment of factors such as: size or importance of stakes, frequency of occurrence, absolute and relative wealth of parties, number of parties, perceived importance of stakes, frequency of contact between parties and party-associates,

126. This factor may affect party flexibility and rigidity in negotiation or settlement and hence may have an impact on processing costs.

127. This factor may reflect the extent to which either or both parties are involved in organized—that is, insurable—activities related to the subject of the dispute. Additionally, this factor may in part determine the extent to which similarly situated parties are influenced by the determination made in the instant case, which will have an impact on future processing costs in the type of case in question.

number and complexity and nature of issues, and so forth.[128] Viewed against the background of such a picture of determinative

128. One case-type factor that has received significant attention in previous analysis is omitted from the above discussion. That is the factor of "polycentricity," i.e., the interdependence of the issues presented in a dispute such that they cannot be resolved individually, in a sequential or linear fashion, but require a comprehensive or reiterative process of consideration. *See* Fuller, *supra* note 26 at 394-404; Henderson, *supra* note 121, at 1534-39; Henderson, *Process Constraints*, *supra* note 26, at 907-08. While it is claimed that this factor is important, especially in defining the limits on the capabilities of the adjudication process, it is not immediately evident from a goal based analysis that polycentricity is an independent factor relevant to one or more of the cost/goals.

Where the effect of the interdependence of issues is to render the dispute in effect *sui generis*, such that it does not present a question of principle relevant to future cases for which it can be a "proxy," the polycentricity factor is included in the principle/fact proportion factor mentioned in the text. Professor Fuller, the father of the concept of polycentricity as applied to dispute handling, seems to see this factor as working in this way to render dispute situations susceptible of being addressed solely on their own terms and without reference to more general principles. Thus, in his early work on adjudication (published posthumously), he recognized that polycentric problems usually involve a "fluid state of affairs," Fuller, *supra* note 26, at 397, and all of his examples suggest highly individualized and nonrecurring situations. *See id.* at 394-404. In his later work on mediation, he draws a distinction between person- and act-oriented situations, stressing the "shifting contingencies" and individualized character typical of the former, which echoes the earlier discussion of the polycentricity factor. *See* Fuller, *supra* note 17, at 326, 328-31. One of the examples Fuller gives of personalized situations is almost exactly parallel to those he earlier characterized as polycentric. Thus, Fuller seems to view polycentricity as a particular subset of the fact/principle factor.

(It should be noted that a highly polycentric or individualized dispute may still involve considerable potential for activity and other costs. If the stakes are large enough, as they may be for example in environmental disputes of this character, the potential for activity costs may be high even though the dispute involves a unique and nonrecurring situation. At least this is so if the dispute is prospective, i.e., it concerns actions not yet completed. If the action is completed, activity costs are already fixed as regards the situation in question, although disparity cost potential, for example, could still be variable (and considerable).)

Sometimes, however, disputes involving interdependent issues nevertheless represent recurring types of situations susceptible of some level of generalization in treatment. This kind of situation seems to be closer to the heart of Professor Henderson's concerns. *See* Henderson, *supra* note 121. Here, the interdependent issue factor can still be seen as one particular subset of a factor mentioned in the text, the complexity of issues factor, which affects potential for processing costs. That is, interdependence of the issues, like other complexities in the issues (or like multiplicity of parties, a factor Fuller also mentions in connection with polycentricity, *see* Fuller, *supra* note 26, at 397), increases the potential for processing costs. That potential may then be affected in different ways by different process factors characteristic of adjudication, mediation, negotiation, and so on.

However, Henderson seems to believe that interdependence of issues, in a recurring type of case, can affect not only processing costs, but also others, such as activity costs. Where such interdependence exists, it has the potential to complicate or obstruct the rule articulation necessary to reduce activity (and other) costs in future similar cases. If so, he implies, additional process factors are relevant, beyond rule orientation per se, to reduction of activity costs in such cases, including such factors as whether rule articulation is based on linear versus reiterative consideration of issues, partial versus comprehensive treatment of the situation, and so on. Henderson is led by these considerations to prefer the legislative over the judicial process in one specific area characterized by interdependence of issues, product design defect cases. *See* Henderson, *Manufacturers' Liability*, *supra* note 26. But see Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39-44 (1979), for a contrary view on this point.

case-type factors, the type of one-factor analysis typical in previous commentary appears even more narrow and superficial.

b. Process factors

Just as with case-type factors, the range of significant process factors is clarified by a goal-based analysis. In the past, analyses have tended to focus on one or a few process variables, such as the degree of party control and the existence of a third-party intervenor. Considering the matter in light of the full range of civil justice cost/goals, it again becomes clear that it is not so simple. Here, as with case-type factors, the analytical process is to ask a simple and straightforward question with respect to each civil justice cost/goal. Assuming a specific cost/goal is significant in a class of cases (based on case-type factor analysis), then what characteristics of a dispute handling process will attract us, as it were, by indicating that the process has the capacity to hold down or reduce such costs? Reflecting on this question in relation to the different civil justice cost/goals, and in light of the above discussions of those cost/goals,[129] sets of determinative process factors such as the following can be identified.

1. The actual level of *activity costs*, given a potential range of such costs in a certain type of case, will depend upon factors such as the extent to which the chosen process: articulates generally applicable rules for deciding cases, applies those rules to decide individual cases, communicates such rules to similarly situated parties (so that it can influence their behavior), formulates such rules based on principles of efficient resource allocation, involves a fact finding process that focuses on cost-avoidance (resource-conservation) capabilities of different parties or classes of parties, operates without undue delay, and involves sanctions for party participation in and compliance with the results of the process. The greater the degree to which the dispute handling process has some or all of these characteristics, the greater the degree to which it will minimize the activity costs

Henderson's position, so understood, implies that identification and correlation of cost-determining factors might well be developed more fully than they have been in the analysis in the text above. However, the point at which polycentricity may become an independently significant factor not included in others mentioned in the text, is, as just shown, at a fairly involved level of analysis. To avoid even greater complication of an already complicated model, analysis of this particular factor, as an independent variable, was deferred. Hopefully, others will join in future work to develop more fully this and other possible lines of analysis.

129. *See supra* Part II.A.1-7; *see also supra* notes 89-101 and accompanying text.

actually incurred out of the potential activity costs possible for that type of case.[130]

2. The actual level of *disparity costs* will depend upon factors such as the extent to which the chosen process: is rule-articulating, rule-applying, and rule-communicating (as described above in relation to activity cost reduction), formulates rules based on principles of income and wealth equalization, involves a fact finding process focused on wealth determination, provides unilateral assistance to the apparently disadvantaged party in gathering and presenting information to the decisionmaker, and involves sanctions for participation and compliance. Again, presence of some or all of these characteristics will tend to minimize the disparity costs actually incurred out of the potential disparity costs possible in the type of case under consideration.

3. The actual level of *disorder costs* will depend upon factors such as the extent to which the chosen process: operates without undue delay, involves restraints or other controls on the parties' aggressive behavior outside of the dispute handling process itself, disposes conclusively of all significant disputed issues, results in an outcome satisfactory to all parties, and involves sanctions for participation and compliance.

4. The actual level of *enmity costs* will depend upon factors such as the extent to which the chosen process: results in an outcome satisfactory to all parties, prevents or avoids antagonistic behavior between the parties during the process, allows all parties as much time as desired to fully express or "ventilate" their positions, explains or "translates"—i.e., renders sympathetic—each party's position and perspective to the other, and involves a fact finding process focused broadly on the relationship between the parties in all its aspects.

5. The actual level of *disaffection costs* will depend upon factors such as the extent to which the chosen process: provides an opportunity to be heard that is perceived as real and significant, presents the appearance of even-handedness vis-a-vis treatment of all the parties, avoids undue delay, and results in an outcome satisfactory or fair in the eyes of all parties.

130. However, a second level of analysis may sometimes be necessary to analyze cost reduction capability in direct relation to the case-type factors responsible for cost potential.

6. The actual level of *oppression costs* will depend upon factors such as the extent to which the chosen process: is rule-articulating, rule-applying and rule-communicating, formulates such rules on the basis of protection of rights perceived as crucial to the integrity of the individual, operates without undue delay, involves a fact finding process focused on the existence and violation of rights perceived as fundamental, provides unilateral assistance to the party alleging a colorable violation of fundamental rights, involves sanctions for participation and compliance, and provides mechanisms for protection against procedural abuses.

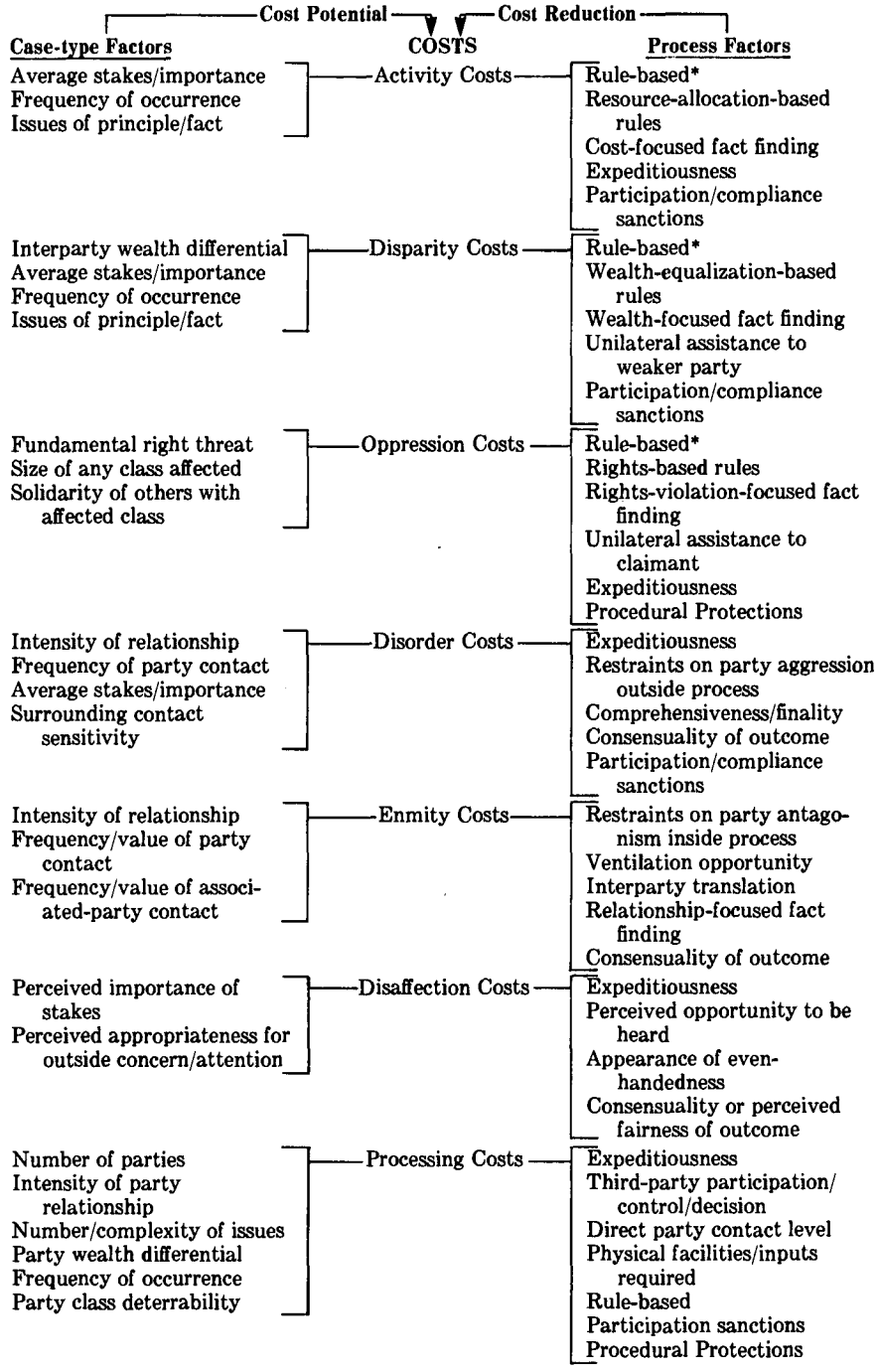
7. The actual level of *processing costs* will depend upon factors such as the extent to which the chosen process: avoids undue delay, involves or avoids third party participation, -control and -decision-making, requires special or unique physical facilities, requires written records and other physical inputs, is rule-articulating, -applying and -communicating, provides protections against procedural abuses, and involves sanctions for participation.

Again, the above is not an altogether complete specification of cost-determinative process factors, but rather, as in the earlier discussion of case-type factors, illustrates the kind of process factors that are identifiable through goal-based analysis, and thus indicates that articulation of process factors by reference to civil justice goals produces a much richer view than that of earlier, typically one-factor, analysis.

c. *Principles of process choice*

The above discussion shows that the proposed analytical approach can be used to derive a more comprehensive and systematic picture of case-type and process factors, a picture that goes well beyond the more limited and casuistic one offered by previous analysis. This picture, summarized in Figure I, is important in two ways. 1) It provides a unified view of a whole variety of case-type and process factors relevant to the full range of civil justice cost/goals, and thus avoids ignoring important goals, a major problem that results from focusing on one or a few factors alone. 2) It identifies or clarifies cost-determining factors that have previously been overlooked or poorly understood, because it derives factors not haphazardly, but

FIGURE I.



*i.e., rule-articulating, rule-applying and rule-communicating.

analytically in relation to ultimate systemic goals. As a result, this picture or model facilitates the use of process choice as a means of achieving a complex of interrelated civil justice goals. It does so because the case-type and process factors identified can be utilized together as coherent principles of process choice.

By reference to the whole range of case-type factors recognized in the model, it can be determined in any given case what costs are potentially significant, and in what degree relative to one another, without inadvertently overlooking (or erroneously dismissing) one or more costs. This comprehensive cost-potential configuration establishes the practical meaning of cost-minimization for that case—it "targets" fully and accurately the key costs to be addressed in order to bring down total costs in that type of case. At the same time, by reference to the whole range of process factors recognized in the model, it can be determined, for any dispute handling process, what costs can (and cannot) actually be reduced by that process, and in what degree relative to one another, thus establishing an accurate cost-reduction configuration for each process. Process alternatives can now be evaluated and selected logically and coherently, with due attention to the entire complex of civil justice goals, by examining how closely the cost-potential configuration presented by a given type of case is matched by the cost-reduction configuration presented by a given process. Even though a perfect match may be impossible, the result is nevertheless to use process choice purposefully to minimize total costs in each type of case, and ultimately in the system as a whole.[131]

The strongest feature of this approach is that it is linked at every point to the central concept of an interrelated complex of civil justice goals. Thus, the principles ultimately guiding the use of dispute handling alternatives as a means of civil justice reform are the goals of civil justice themselves, as translated into derivative case-

131. The approach could be viewed as a series of practical analytical steps: 1) identify the goals of civil justice and associated concrete costs; 2) identify case-type factors determinative of cost potentials for each of the cost/goals; 3) identify process factors determinative of actual realization of cost potentials for each cost/goal; 4) define classes of cases homogeneous with respect to case-type factors; 5) in each class of cases defined, establish the potential for occurrence of different civil justice costs, by reference to the presence and strength, in that class of cases, of the case-type factors associated with each cost; 6) for each class of cases defined and with cost potentials established as above, predict the effect of a given dispute handling process on the actual occurrence of each cost, by reference to the presence and strength, in that process, of the process factors associated with each cost; 7) repeat the previous step with reference to each different dispute handling process suject to consideration; and 8) for each class of cases choose that dispute handling process which presents the lowest predicted total cost level (subject to debate on non-quantifiable values).

type and process factors to facilitate analysis of specific process choice questions.

III. Applying the Approach: Past Errors and Present Insights

The test of a new model is how much more power it has than previous models to explain, predict, and guide the behavior of a system. In this connection it is instructive to look at several types of errors frequently found in analysis of dispute handling alternatives and civil justice reform under previous approaches, and observe how application of the present approach would avoid these errors and bring new understanding to decisionmakers. This will help to clarify the concrete meaning of terms used in Part II above to describe civil justice costs, goals, and, especially, case-type and process factors. It will also demonstrate how the kind of factors identified in Part II can in practice be used as coherent jurisdictional principles for process choice.

A. Avoiding Errors of Underinclusiveness by Clarifying Goal Conflicts and Process Options

The first type of error is what could be called underinclusiveness in analysis of process choice. The problem is, in terms of the analytical approach proposed here, a "step 1)" error: a failure to address all the different civil justice cost/goals relevant to process choice. This is, of course, the very error of goal omission that the cost-minimization approach is intended to avoid.

Thus, it is often proposed that disputes involving marital relations and dissolution be handled by a mediation process, especially where children are involved.[132] The assumption seems to be that the potential for enmity costs is high in such cases, and that a mediation process minimizes such costs. Without challenging either of these assumptions (for the moment), it is still possible to identify the analytical error of underinclusiveness. Even if enmity costs are quite significant in such cases, other costs may also be significant, perhaps even more so, and those costs might not be minimized by mediation. Application of the present approach helps clarify the problem. In marital disputes involving children, several case-type factors associated with the potential for enmity costs are present in high degree:

132. *See, e.g.*, Norton, *supra* note 60; Winks, *supra* note 117; Freedberg, *supra* note 117; Riskin, *supra* note 50; Fuller, *supra* note 17.

intensity of parties' past relationship, frequency of future contact, value of such contact. So the assumption of high enmity cost potential seems supportable by more careful factor analysis. However, other case-type factors, ignored by the focus on enmity costs alone, are also identifiable in significant degree in such cases: differential of wealth and earning potential between husbands and wives—associated with potential for disparity costs; frequency of future contact, intensity of feeling, sensitivity of environment—associated with potential for disorder costs; and involvement of arguably fundamental rights of parents and children—associated with potential for oppression costs. Thus, a full factor analysis of this type of case, paying heed to factors associated with the full range of civil justice costs, suggests that not only enmity costs but at least three other kinds of costs may be significant. What impact would a mediation process have on this complex of costs?

Mediation is ordinarily understood as a voluntary and consensual process in which the disputing parties are assisted in reaching a mutually acceptable settlement by a third-party, whose role is to facilitate (or even "manage") communications and discussion, but who has no decisionmaking power.[133] Another important aspect of the process, not always recognized, is the mediator's role in "interparty translation," in which he works to "reorient the parties to 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 . . . toward one another," with the result of creating "mutual respect, trust, and understanding."[134] Using a factor analysis of process, it is evident that mediation, so understood, would tend to reduce enmity costs, since voluntarity, consensuality and interparty translation are all process factors associated with minimizing actual enmity cost levels. However, it is not clear that mediation would reduce the other costs involved at all, since it seems to lack many of the relevant process

133. *See* Fuller, *supra* note 17, at 309, 318, 320; Riskin, *supra* note 50, at 29, 35-36; Sander, *supra* note 3, at 115; Winks, *supra* note 117, at 635-40; Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88-106 (1981); Norton, *supra* note 60, at 14-15; D. MCGILLIS & J. MULLEN, *supra* note 115, at 11; Pearson, *supra* note 115, at 421-22. *See also* Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 125-29 (1979); Sarat, *supra* note 21, at 353-54.

134. Fuller, *supra* note 17, at 308, 316, 325-26. *See* Pearson, *supra* note 115, at 433; McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 254-60 (1981) (both studies present evidence that mediation actually has the positive effects on the disputants' relationship that Fuller suggests). *See also* Sander, *supra* note 3, at 115; Riskin, *supra* note 50; Cavanagh & Sarat, *supra* note 3, at 400-01; McCarthy, *supra* note 115, at 36.

factors (such as rule-orientation and sanctions).[135] In sum, the divorce mediation concept makes assumptions about both the type of case and the mediation process that reflect a one-dimensional focus on enmity costs—that is, on the human relations goal. The analysis behind this concept is thus underinclusive, failing to recognize and account for both case-type and process factors determinative of other types of cost potentials and impacts. As a result, a policy of handling divorce cases (with children involved) by mediation might wind up adding to, and not minimizing, the total costs of civil justice in such cases. The final answer would of course depend upon establishing more concrete estimates of cost potentials and impacts. It might be that the initial intuitions behind the concept of divorce mediation would be borne out. However, to base policy solely on such intuitions without further study would seem unwise, precisely because of the questions raised by the more careful conceptual analysis developed here.[136]

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135. For example, both disparity and oppression costs are responsive primarily to processes involving rule orientation, and mediation might accomplish little compared to a rule oriented process. Fuller recognizes this problem generally, Fuller, *supra* note 17, at 328, while others have been particularly concerned about it in the divorce context. *See, e.g.*, Diamond & Simborg, *supra* note 74. *But see infra* notes 172-92 and accompanying text.

136. Another example of analytical underinclusiveness can be found in the notion mentioned above, *see supra* note 118 and accompanying text, that consumer-business disputes could best be handled by some type of arbitration process. Here the assumptions appear to be that consumer disputes present significant potentials for processing costs and disaffection costs, and that arbitration would minimize these costs. *See* Max, *supra* note 60, at 310-11; MacLean, *supra* note 60, at 1302, 1305-06. *See generally* Mentschikoff, *The Significance of Arbitration—a Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698 (1952); Landes & Posner, *supra* note 9, at 237-42, 245-53. Again applying a goal-based factor analysis it is evident that this "solution" may be less sound than it first appears. Consumer disputes are increasingly frequent, indicating high potential for processing costs, and are characterized by strong party perceptions that the issues involved merit outside concern and attention, a factor indicating potential for disaffection costs. Thus, the case-type assumptions of the arbitration concept are supported by factor analysis, as far as this goes. Consumer disputes, however, while generally involving small stakes, are very frequent, indicating high potential for activity costs; the wealth differential between the parties is frequently great, indicating high potential for disparity costs; and there is a high frequency of future contact of the parties with each other or with others of associated classes, indicating high potential for enmity costs. Turning to process factors, arbitration, as defined in the text, *see infra* text accompanying note 196, would arguably reduce actual processing anddisaffection costs, since its features mirror process factors associated with minimization of such costs (avoidance of delay, appearance of evenhandedness, third-party expertise without undue cost). Indeed, supporters of arbitration stress these factors. *See, e.g.*, Max, *supra* note 60; MacLean, *supra* note 60. But others question the degree to which arbitration actually involves some or all of these factors. *See, e.g.*, Kritzer & Anderson, *supra* note 60, at 17-19; Getman, *supra* note 74, at 918. Moreover, arbitration might have no impact on the other costs involved, given that it lacks many of the process factors associated with minimizing these other costs. It is not necessarily rule articulating. *See* Landes & Posner, *supra* note 9, at 237-42, 248-49; MacLean, *supra* note 60, at 1306. *But see* Fuller, *supra* note 74, at 25 & n.21; Getman, *supra* note 74, at 920. Nor is it rule

Another typical error underlying many process choice proposals is a failure to compare the effects of using different dispute handling processes, for any given set of cases. The proposals mentioned earlier not only fail to include all the relative effects—i.e., costs—in the consideration, but they also fail to consider in depth how processes other than the one advocated might perform. For example, if the argument is that arbitration is preferable for consumer disputes, the question is, preferable to what? Often, there is an implicit comparison to one possible competitor, usually the status quo process such as adjudication. Thus, "arbitration is preferable to adjudication."[137] However, what about mediation, or negotiation, or yet another possible dispute handling process? If arbitration is preferable to adjudication, is it necessarily preferable to these as well? There is no way of knowing, unless the comparison is made; and the typical analysis behind process choice proposals simply does not make all the relevant comparisons. This is a second type of analytical under-

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applying. *See* Christensen, *Private Justice: California's General Reference Procedure*, 1982 A.B. FOUND. RESEARCH J. 79, 88-89; Getman, *supra* note 74, at 930; Note, *supra* note 4, at 1600. *But see* Fuller, *supra* note 74, at 22; Mentschikoff, *supra*. It rarely involves publication or communication of decisions or rules. *See* Landes & Posner, *supra* note 9, at 248-49. Nor is it resource-allocation oriented. Thus, arbitration cannot be expected to reduce activity costs. (For this reason it is difficult to understand the interest of the "efficiency advocates" in private arbitration as an alternative to adjudication, since the switch from adjudication to arbitration would compromise most significantly the cost/goal in which they appear most interested.) Furthermore arbitration does not guarantee a mutually satisfactory outcome nor make any special efforts to reduce interparty antagonism or increase interparty understanding, so that it cannot be expected to have much if any reducing impact on enmity costs. As to disparity costs, there is some evidence that arbitration decisions often involve compromise or loss splitting, *see* Sarat, *supra* note 21, at 364. Christensen, *supra*, at 88-89; Getman, *supra* note 74, at 930; Note, *supra* note 4, at 1600, which facilitates wealth redistribution in some, but not all, situations. Since the process is neither rule articulating nor rule communicating, however, the impact on disparity costs is at best limited and equivocal. In short, as with the divorce mediation concept, previous analysis has been underinclusive, and consumer arbitration might well result in increasing rather than decreasing the overall costs of handling consumer disputes. This brief analysis of consumer disputes also suggests why consumer disputes have generated so many contradictory proposals, ranging from reliance on private negotiated agreements, to mediation, to arbitration, to adjudication, to "nonfault" consumer insurance. *See* CONSUMER DISPUTE RESOLUTION, *supra* note 10; Rubenstein, *supra* note 14, at 77-82 and proposals cited therein. As the above case-type factor analysis shows, consumer disputes involve significant potentials for many different costs, and each of the processes mentioned above could indeed minimize one or a few of these costs. However, in order to determine which process will minimize the total cost of dispute handling in consumer disputes, a more inclusive and careful analysis is necessary.

An analysis similar to the above can be applied to other familiar proposals for specific case-type/process matches, including those mentioned earlier, i.e., adjudication of cases involving individual liberties and cases like product injuries involving large sums and significant issues. *See supra* notes 119-20 and accompanying text.

137. *See, e.g.*, Max, *supra* note 60; MacLean, *supra* note 60; Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A.J. 64 (1983).

inclusiveness—failure to consider all process options. Thus previous analysis has been characterized by one or both of two types of underinclusiveness—as to relevant civil justice cost/goals, or as to process options.[138]

These are exactly the weaknesses identified earlier as characteristic of the process pluralism and cost-minimization approaches operating in isolation from one another. By contrast, the integrated approach taken here involves consistent attention to a variety of process alternatives and to the whole complex of civil justice cost/goals, and so avoids underinclusiveness as to both process options, and cost potentials and impacts.

B. Avoiding Errors of Cost Distortion by Clarifying the Sources of Cost Potentials

A second type of error found in previous analysis is the overstatement or understatement of a particular cost potential. The problem here is a "step 2)" error: a failure to identify accurately all the case-type factors generally associated with a certain civil justice cost/goal, which leads to either over- or understatement of the potential for that cost in many classes of cases. This kind of error will be significant even where underinclusiveness is not a problem, because it will lead to an inaccurate assessment of the importance of costs that *are* included in consideration. It may also be one cause of underinclusiveness because where a cost is understated, it may be regarded as insignificant and hence excluded from consideration entirely, not by inadvertence, but by (erroneous) design.

Consider the following examples of this type of error in previous analysis, and their significance in process choice proposals. A relatively simple example is the stress placed on number of parties as a case-type factor relevant to potential for processing costs. The logic behind the emphasis is that, wherever the number of parties involved is greater, any process, from negotiation to adjudication, will

138. The second type of underinclusiveness is arguably not so serious a concern, especially if the purpose of a proposal is simply to make an improvement over the status quo. Then, it is enough to compare the proposal and the status quo, for better need not mean best. However, if the goal of policy is ultimately to achieve the greatest degree possible the goals of civil justice, then it makes more sense to look for a process which is not merely better than the status quo, but the best process possible. *See* Sander, *supra* note 3, at 133; *Discussion By Seminar Participants, supra* note 9, at 349 (comments of J. Ledyard).

Finally, there is not always a specific proposal at hand to challenge the status quo, so that the question of which is better may be unasked. Even here, the aim of achieving the goals of civil justice would suggest evaluating the status quo process in relation to whatever alternatives are conceivable.

tend to take more time and be more cumbersome, and hence consume more resources, than with fewer parties involved.[139] This logic seems sound, as far as it goes. However, it does not go far enough, precisely because it overlooks another important factor: the nature and intensity of the parties' relationship. Transaction costs may be high even where only a few parties are involved in the bargaining, if those parties have a preexisting relationship that introduces distrust or suspicion into the process.[140] Thus, neighborhood, marital, or employment disputes, even with few disputants, may involve significant processing cost potential because of the intensity of the relationships involved, and greater such potential than minor accident cases that typically involve strangers. Suppose, then, a proposal to encourage negotiation (with or without assistance by party-advocates) as a way of handling neighborhood, marital and employment disputes,[141] on the ground that other high potential costs are minimized thereby (assuming this to be so) and processing cost potential is low because of the small number of parties involved. The underestimation of processing cost potential, due to overlooking the factor of relationship intensity, could lead to a process choice that winds up losing more in processing costs than it gains elsewhere.

As a second example of the error of cost understatement due to factor omission consider the discussion about the significance of size of claim or stakes. In cases involving small claims, it is observed, the amount at stake is often less than the costs of anything but a very simplified arbitration-like process—hence the argument for small claims procedures, essentially arbitral in nature, or for arbitration, or for leaving these cases to party negotiations.[142] On the other hand, it is argued that, by ignoring the factor of frequency of occurrence in many identifiable types of minor claims—like consumer disputes—the previous view understates activity cost potential, which is dependent not only on size of stakes but frequency of occurrence. In fact, it is argued, because of their frequency, consumer disputes (and perhaps other types of small claims) involve large potentials for activity costs in the aggregate; therefore despite the small amounts at stake in individual cases, an adjudicatory process is called for—rule-oriented, and resource-allocation-based—to mini-

139. *See, e.g.*, Lea & Walker, *supra* note 16, at 368-69; Fuller, *supra* note 26, at 397; *see also infra* note 219.

140. *See* Mnookin & Kornhauser, *supra* note 14, at 974-75.

141. See generally Mnookin & Kornhauser, *supra* note 14, who consider such an approach in relation to divorce and custody disputes.

142. *See* Sander, *supra* note 3, at 124; Burger, *supra* note 56, at 93; MacLean, *supra* note 60, at 1304.

mize these very significant costs.[143] Actually, whether an adjudicatory process is called for depends upon the remainder of the complex of factors and costs involved; but at least with respect to the understatement of activity costs, the second view seems to be analytically more sound.

A third instance of the error of understating cost potential is the discussion relating to enmity costs, and it deserves special note. The case-type factor generally associated with enmity cost potential is a necessarily ongoing relationship between the disputants.[144] As a result, enmity cost potential is seen as significant in neighborhood disputes, marital disputes, employment disputes, landlord-tenant disputes, and others. Indeed, this argument has been the main point behind the recent advocacy of mediation-type processes, which include several key enmity-cost-reducing process factors, for handling these and similar types of disputes.[145] Still more recently, however, it has been argued that, while the ongoing relationship factor is indeed connected to enmity cost potential, this factor is not often present in significant degree in disputes in this society; hence enmity costs are rarely significant, and process choice should be based on minimization of other more significant costs.[146] The result is usually to dismiss mediation as inappropriate after all in many of the types of cases mentioned above, and to support instead either party-based processes such as avoidance or negotiation, or more authoritative, rule-based processes.[147] The logic behind this latter, more recent view seems to be that, in this highly mobile and individualistic society (and other western, urban-industrial societies), few relationships have high value or constrained continuity. Individuals can move relatively easily from place to place, job to job, partner to partner, avoiding contact with the other party entirely and finding an adequate substitute relationship, all at little cost. Thus, the only real enmity costs are the costs of avoidance and replacement, and these are argued to be generally quite low.

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143. *See* Nader, *supra* note 14, at 1018-19.

144. *See* Sander, *supra* note 3, at 120; Fuller, *supra* note 17, at 310; Cavanagh & Sarat, *supra* note 3, at 395-96; Abel, *supra* note 50, at 293-94; Norton, *supra* note 60, at 11-12.

145. *See* Danzig & Lowy, *supra* note 49, at 685-91, Sander, *supra* note 3, at 120-21, Riskin, *supra* note 50, at 31-32 (neighborhood disputes); Norton, *supra* note 60, Winks, *supra* note 117 (marital); Barrett & Tanner, *The FMCS Role in Age Discrimination Complaints: New Uses of Mediation*, 32 LAB. L.J. 745, 753 (1981) (employment); Ebel, *supra* note 117 (landlord and tenant).

146. *See* Felstiner, *Social Organization*, *supra* note 26, at 63; Felstiner, *Avoidance*, *supra* note 26, at 700-03.

147. *See* Felstiner, *Avoidance*, *supra* note 26; Nader, *supra* note 14.

One way of criticizing this view of enmity costs is to argue that it is simply factually wrong, as some have done.[148] However, even if one accepts the view that avoiding or replacing relational partners following a dispute involves little difficulty in most cases, the investigation is not at an end. For other case-type factors, apart from ongoing relationship, are important in determining enmity cost potential. If the parties' relationship was close or intense, the experience of the dispute itself may involve considerable emotional and psychological costs, even if the relationship can be abandoned and replaced. Second, the relationship may be one which is subject to repetition or typing, such that while the parties can abandon this relationship, they are likely to enter into other similar relationships with similar parties. Thus, a disgruntled tenant can leave his landlord, but will soon have a new one; an unsatisfied employee can leave his boss, but will soon have a new one. The residue of mistrust and hostility in the old relationship may negatively affect the new one, generating enmity costs even where the old relationship is abandoned and successfully replaced.[149] Thus the impact of a negative experience in one relationship is not limited to that relationship, but extends to others of that type. Enmity cost potential, then, may be significant even in the absence of continuation of a specific relationship, where there is repetition of a *type* of relationship. If so, minimization of enmity costs may be a significant factor, and mediation

148. Thus it is argued that avoidance and replacement costs are indeed considerable in many situations, social and personal mobility notwithstanding. Costs of relocation, reemployment, retraining, remarriage—both out-of-pocket and emotional and psychological costs—are all quite real and significant, even if such mobility is feasible and increasingly commonplace. It is a distortion of social reality, and an overstatement of changes in social structure, to dismiss such costs as insignificant. However, this response to the low-enmity-cost view has been argued persuasively elsewhere, and need not be repeated at length here. *See* Danzig & Lowy, *supra* note 49, at 676-82; Merry, *supra* note 3, at 902, 920. A further and new response is possible, however, that the low-enmity-cost view is based on an analytical error of factor omission resulting in an underestimation of enmity cost potential.

149. Danzig & Lowy, *supra* note 49, at 678-79, and even Felstiner, *Avoidance*, *supra* note 26, at 696-97, imply this argument. It is noteworthy that those taking the view that our society imposes low costs on avoiding and replacing unpleasant relationships, take this view because of their characterization of social relations as a highly mobile series of unconnected individual interactions. This being so, they should also recognize the significance, in such a context, of the individual's tendency to generalize his approach to relationships, if only to help himself cope with a highly unstructured and informationally rich situation. This generalizing tendency, negatively termed stereotyping but having a clear positive function to the individual as a form of information coding or processing, may well be greater as the relational context gets broader, more unstructured, and hence more demanding.

may be an appropriate process choice, in many cases, depending upon the relative potential for other kinds of costs.[150]

Consider as an example, consumer-business disputes. While some have proposed handling such disputes by a mediation process,[151] others criticize this idea, on a number of grounds.[152] One of the grounds of criticism is simply that enmity cost potential is not really high in these cases, since merchants and consumers can so easily end relationships and substitute new ones.[153] Of course, this is itself not always true.[154] However, assuming that new, substitute relationships can be easily found on both sides, the possibility still exists that the residue of antagonism from the dispute will spill over into the new relationships and generate costs there. Thus, the merchant on his side may do away with customer-favoring practices such as ready acceptance of returned items or acceptance of unusual identification, may adopt self-protective practices such as careful merchandise identification or store security, or may even consider predatory practices as a way of "evening the score" with consumers generally. The customer, meanwhile, may adopt similar attitudes towards merchants generally, protectively taking more time and study before making any purchase, demanding increased guarantees of product quality and maintenance, and even considering ways of taking advantage of merchants to "get even" from his side. The result, in individual situations and in the aggregate, is an environment

150. In fact, at least one study finds that the workability and positive effects of mediation, in terms of enmity cost reduction and otherwise, are certainly not limited to related-party cases. *See* McEwen & Maiman, *supra* note 134, at 251, 266-67.

151. *See* Riskin, *supra* note 50, at 31-32; D. McGILLIS & J. MULLEN, *supra* note 115, at 12-13; Rubenstein, *supra* note 14, at 78 & n.119; Maitland, *Arbitration Plan Set for Defects in G.M. Cars*, N.Y. Times, Apr. 27, 1983, at A1, col. 2; *Ford Panel For Mediation*, N.Y. Times, June 8, 1983, at D4, col. 6.

152. *See* Nader, *supra* note 14, at 1006-07; Nader & Shugart, *supra* note 14, at 74-78; Rubenstein, *supra* note 14, at 78-79 & n.119.

153. Other criticisms are that, because it is voluntary, mediation cannot secure businesses' participation, and because it is non-rule-oriented, it favors the stronger party and allows or pressures consumers to compromise legitimate rights. *See* Nader, *supra* note 14; Rubenstein, *supra* note 14. For responses to these criticisms, *see infra* notes 172-73 and accompanying text.

154. In some cases, consumers have little mobility (depending upon age, income, etc.) and merchants have little opportunity beyond a limited market (in the case of many small and neighborhood businesses). Moreover, ending an established merchant/customer relationship often entails costs for both sides. For the consumer, finding a substitute for a reliable mechanic or retail outlet is likely to be difficult and costly, as was finding a good one in the first place. For the merchant too, replacing responsible and regular customers involves significant costs. (Why these "private" costs should be a matter of public policy concern is discussed below in Part IV.)

of suspicion and hostility in which both sides pay a considerable price in self-protective or aggressive efforts.[155]

. Consequently, arguing against consumer mediation on the ground that the potential for enmity costs is not significant is simply unsound; and this unsoundness results from a failure to recognize and consider very important case-type factors determinative of enmity cost potential. Of course, it may be that mediation is not optimal in consumer disputes for other reasons. Perhaps it has inadequate impact on another cost potential even more important in these cases. This argument will be considered below.[156] Here it is enough to say that the enmity cost aspect of the argnment against consumer mediation is analytically unsound, and is one example of how an error of factor omission can result in a distorted analysis leading to unsound conclusions and perhaps unsound policy. The same point could be made in relation to other types of disputes mentioned above in which there has been disagreement over the appropriateness of mediation.[157]

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155. This could be considered a kind of strategic spending, natural under the circumstances, but with the effect that fewer resources go to the product or service and more to the transaction itself, like friction consuming energy and slowing down a moving object, in this case the consumer economy as a whole. It may be replied that the above argument is overstated. If consumer-merchant mistrust has indeed increased, there are many causes of the phenomenon, and the civil justice system is not necessarily the sole or the major responsible factor. This begs the question, however. If consumer disputes contribute to the cycle of mistrust, however it was started, then they have a potential for raising enmity costs, and they present an opportunity for avoiding such increases or even diminishing these costs.

156. *See infra* notes 172-73 and accompanying text.

157. Another example of the way in which relationship-connected case-type factors are ignored in previous analysis relates to the concept of divorce mediation as noted above. This concept stresses the use of mediation in cases where children are involved; and sometimes it is suggested that mediation is important only in connection with child-related issues, such as custody, support payments, etc. *See* Freedberg, *supra* note 117; Norton, *supra* note 60, at 11. This latter idea is strange indeed. First, "pure" property settlement issues may often interrelate with questions of support and custody as trade-offs. In addition, if the purpose of mediation of custody issues is to minimize enmity and preserve an amicable relationship between ex-spouses for the child's benefit, then what of enmity generated in the dispute over property issues? Is the parties' relationship compartmentalized, so that enmity over property issues will somehow not affect their continuing relationship as parents? Thus, the "bifurcated" semi-mediation process makes little sense from this point of view. Beyond this, however, is the larger question of marital disputes in cases where there are no children, which is becoming an increasingly large category of cases. If mediation is only appropriate for custody-related issues then, once the divorce is firmly decided upon, there is little need or use for mediation. Rather, an arbitral (or adjudicatory) process is adequate. Once again, this analysis totally ignores the factors of relationship intensity and relationship "patterning" or stereotyping. As to the first, given the intensity of the marital relationship in the first place, resolving the details of its severance through a process unconcerned with the parties' perceptions and experiences of each other's positions and needs could have considerable negative emotional impact. As to the latter, the possibility for spillover of residual enmity into new relationships, with attendant costs, is obvious. The notion that enmity cost potential is insignifi-

In all of the above examples of cost potential understatement, the source of the error is the same: a failure to identify significant factors determinative of cost potential. This factor omission is itself a result of the ultimate problem that identification of case-type factors is haphazard and descriptive, and not based upon logical, goal-related analysis.[158] This Article instead starts with goals and then logically identifies the case-type factors connected with each of the goals identified. The result is to give appropriate recognition to factors ignored and omitted in the faulty analyses described above, with correspondingly different implications for process choice.

C. Avoiding Errors of Process Distortion by Clarifying the Functional Character of Common Processes

A third type of error found in previous analysis of the "jurisdictional question" is the understatement or overstatement of actual process impact on particular cost potentials. Here, the problem is a "step 3)" error: a failure to identify accurately all the process factors tending to affect a certain civil justice cost/goal, with a resulting over- or understatement of the actual impact of different processes on given potentials for that cost in different cases. As with "step 2)" factor omission, a "step 3)" error will be significant even if the analysis is not underinclusive (i.e., includes all costs), because it will lead to an inaccurate assessment of the effectiveness of different processes in minimizing such costs. Such an error will therefore also be significant even if all cost potentials are accurately estimated (no "step 2)" factor omissions occur). In essence, this kind of error reflects a misunderstanding of the functional character of different processes, i.e., the actual effect such processes have on different civil justice cost/goals. The reason for this misunderstanding is again a tendency to define process characteristics casually and descriptively, rather than by careful and logical analysis based on the goals of the civil justice system themselves. The following subsections re-examine some common assumptions about the character and relative capacities of familiar dispute handling processes.

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cant in non-custody divorce disputes is an unsound conclusion, likely to lead to unsound policy.

158. *See supra* text accompanying notes 117-23; *see also infra* text accompanying notes 251-60.

1. ADJUDICATION

The argument for judicial handling of a type of dispute is often based on the significance of activity cost potential, the assumption being that adjudication will keep actual activity costs down. Adjudication is generally understood as involving the decision of a dispute by a neutral third party according to articulated principles of decision, and after opportunity for argumentation, which decision is binding not only on the parties but on future similarly-situated actors.[159] Thus, it appears to involve process factors including rule-articulation, -application, and -communication, and may involve resource-allocation-based rules, all factors associated with activity cost reduction. This argument has long been espoused by one group of law and economics writers in relation to various kinds of disputes,[160] and it has been taken up more recently by, for example, consumer advocates who argue that the high activity cost potential in consumer disputes warrants greater practical access to judicial processes.[161]

There are at least three problems with the argument that adjudication reduces activity costs. First, as is often pointed out by court critics, adjudication is only theoretically rule-oriented or precedential; in operation, it is often impossible to predict decisions or awards based on previous cases.[162] This unpredictability decreases the cost-reducing impact of common law adjudication on activity costs, since the articulation and use of general (predictable and consistent) resource-allocation-based rules is one process factor determinative of actual activity cost reduction. In other words, there is an exaggeration of the extent to which the real adjudication process involves this factor, and a corresponding overstatement of the effectiveness

159. *See* Fuller, *supra* note 26, at 365-71, 377; Eisenberg, *supra* note 21, at 642, 644-45.

160. *See* R. POSNER, *supra* note 31, at 179-81, 399-405, 415-17; Posner, *supra* note 30, at 32-34; Posner, *supra* note 8, at 402-06.

161. *See, e.g.*, Nader, *supra* note 14, at 1000, 1002, 1007, 1017-21; Best, *supra* note 35, at 210, 213. *See also* Kidder, *supra* note 12, at 723; Hurst, *supra* note 1, at 443-44.

162. *See* Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976) [hereinafter cited as Henderson, *Expanding Negligence*]; Henderson, *Manufacturers' Liability*, *supra* note 26, at 625-26; Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 777-80, 804-07 (1979) [hereinafter cited as Henderson, *Judicial Controversy*]; Twerski, *National Product Liability Legislation: In Search for the Best of all Possible Worlds*, 18 IDAHO L. REV. 411, 411-12 (1982).

of adjudication at reducing activity costs. If it is chosen on this basis, the result is a non-optimal process choice.[163]

A second problem with the notion that adjudication reduces activity costs relates to another process factor—communication of rules to future actors. Activity cost minimization depends upon creating proper incentives and deterrents; but no incentive or deterrent is effective unless it is communicated. The question of how the messages embodied in legal decisions actually get communicated to future actors is usually glossed over in discussions of the subject. It is assumed that somehow this communication is an inherent part of the adjudication process. In fact, this is not the case. The rule-communication function can actually be seen as being performed separately from the rule-articulation function, by separate processes, such as the risk insurance process and the legal counseling process.[164] Both of these processes gather and distribute to future actors information about adjudicated cases, and thereby communicate the incentive or deterrent to the desired ears. The effect is a kind of tandem process that includes most of the factors necessary for activity cost reduction. However, these processes do not always and automatically operate in tandem, and where they do not, there is no guarantee that activity costs will be reduced by adjudication alone.[165] Because adjudication per se is erroneously seen as includ-

163. For example, the crisis in professional malpractice cases may be at least in part a result of this kind of error. While adjudication is thought appropriate for malpractice cases because of its supposed capacity for reducing activity costs, the unpredictability of the litigation process is such that no consistent allocation based rule is articulated and communicated to future actors. *See* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 760-61 (1977); Note, *Who's Afraid of Informed Consent? An Affirmative Approach to the Medical Malpractice Crisis*, 44 BROOKLYN L. REV. 241, 245-50 (1978); Rubsamen, *Res Ipsa Loquitur in California Medical Malpractice Law—Expansion of a Doctrine to the Bursting Point*, 14 STAN. L. REV. 251, 256 (1962). As a result, both clients and practitioners are left to guess at the kind of behavior that will be expected of them, with the result that the cost of the activities involved, far from being minimized, rises to higher and higher levels. *See* Note, *The Price of Health Care Availability: The Economics of Medical Malpractice*, 11 SW. U. L. REV. 1371, 1371-73, 1376-83 (1979); Rubsamen, *supra*. Many observe that many costly medical procedures are performed today not because they are clearly worth it, but in order to reduce the possible risk of unpredictable and indeterminate liability. The impact of adjudication thus may have been to increase activity costs in this area rather than to reduce or minimize them. *See* Cousins, *Malpractice Backlash*, SAT. REV., May 1980, at 18. A similar argument may be made with respect to the operation of adjudication in the area of products liability, *see* Henderson, *Expanding Negligence*, *supra* note 162; Henderson, *Manufacturer's Liability*, *supra* note 26; Twerski, *supra* note 162, and perhaps other areas as well.

164. As to the former, *see* G. CALABRESI, *supra* note 41, at 91, 103-06, 248-49.

165. *See* G. CALABRESI, *supra* note 41. Thus, for example consider the case of an impending collision between a jogger and a kite flyer. Neither is likely to have insurance that specifically assesses and conveys information about the risks of their particular activities, because both are involved in unorganized activities for which risk information is likely to be

ing the rule-communication process factor, its impact on activity cost reduction may be overstated, with the result that it is decided to handle cases by adjudication on this unsound basis. Even if no other process can reduce activity costs, others may be better able to reduce other significant costs, and hence be better at overall cost-minimization. If the preferability of adjudication rests on its supposed minimization of actual activity costs, the distortion is obvious.

A third problem with the assumption that adjudication invariably reduces activity costs stems from oversight of another process factor—expeditiousness. As noted much earlier, activity costs include the value of all resources consumed by the activities in question taken together. One aspect of these activities is the sub-activity of repairing or otherwise coping with inevitable injuries resulting from the primary activities.[166] Assuming that compensation to the injured party will sometimes be called for as a way of minimizing total future activity costs, the degree of delay in effecting such com-

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difficult to gather and market. Nor is either likely to be under the "routine care" of a legal adviser who informs them of the risks of various proposed actions. Thus neither the jogger nor the kite flyer will have any idea that, in a similar case, a court recently decided that because each party should have been on the lookout for the other, neither could recover. In short, the message that each party should be on the lookout, even if it is an appropriate allocative rule and even if it is consistently applied, never is communicated to future actors, and activity costs remain unaffected.

The example given is just one illustration of the type of case where adjudication may not operate in tandem with the rule-communicating mechanism. There are many others, such as contractual or promissorial exchanges between individuals outside of any context where legal counsel is routinely involved. Indeed, if the true activity cost impact of adjudication were known, it might be preferable to handle many cases by a speedy and even handed arbitral process, the effect of which could be to reduce disaffection and processing costs while regarding activity costs as practically impervious. This indeed may be the intuition behind small claims procedures and the new interest in arbitration. However, a clear grasp of the process factors involved suggests that the basis for the use of such processes should be not the smallness of stakes, but rather the lack of receptivity (deterrability) of the types of parties' typically involved to decisional or rule-communicative messages. This is also an answer to those who would argue that, if communication of rules is the problem, the response should not be to abandon adjudication, but to append to it an appropriate rule-communicating mechanism, such as compulsory insurance, thus preserving the opportunity of activity cost reduction. *See* A.F. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION 421, 472-74 (1964). *See also* G. CALABRESI, *supra* note 41, at 281-83. Where possible, adjudication *cum* compulsory insurance is indeed a potentially desirable alternative to the use of an altogether non-rule-based process. However, as party receptivity becomes low, as is the case in many unorganized activities, there is a rise in the processing costs of establishing a rule-communicating mechanism to operate along with adjudication. The result is that adjudication can reduce activity costs only by being joined to an expensive rule-communicating mechanism, the cost of which vitiates the gain. *See* G. CALABRESI, *supra* note 41, at 103-07, 247-49.

166. *See* G. CALABRESI, *supra* note 41, at 27-28, 27 n.5, 43-45. *See also* Nader, *supra* note 14, at 1001 & n.17, 1018.

pensation will affect the actual level of such costs, since repair costs tend to increase when repairs are delayed. Other things being equal, a lengthy, delay-ridden process will tend to increase this aspect of activity costs. The problem of delayed compensation in the judicial process is well known, and while delay may not be an inherent feature of adjudication in theory, it is certainly a common element in practice. The result is that in many cases, the minimizing impact of adjudication on activity costs may again be overstated, simply because the delay factor, while an obvious problem of adjudication, is overlooked as it applies to activity cost reduction, because of imprecise analysis.

The need for care and rigor in analysis of the cost-reduction potentials of dispute handling processes is demonstrated further by examining the tendency to prefer adjudication to certain other processes in various situations.

a. Adjudication relative to nonfault claims compensation

Prior analysis of the effect of so-called nonfault compensation processes upon activity costs represents another example of process factor error leading to misstatement of cost impact. Compensation processes are proposed to handle certain types of disputes by expedited and routine payments to claimants upon proof of injury, without the need for an inquiry into individual conduct or a disputation between the parties.[167] The most common criticism of this type of dispute handling process is that it lacks deterrent impact, since it provides compensation regardless of the conduct of either party.[168] In the terms of the present approach, the argument is that compensation processes do not significantly reduce activity costs (and may indeed increase activity costs by encouraging careless behavior). In fact, as has been discussed in numerous analyses of the subject, nonfault compensation processes can involve considerable deterrent, and hence activity-cost-reducing, impact. The key is in the way the compensation process is framed. Most current proposals envision compensation out of a fund raised by charges levied against

167. Most often associated with cases involving accidental physical injury, *see* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973) [hereinafter cited as O'Connell, *Expanding No-Fault*], such proposals have been made concerning other areas, including, for example, consumer disputes. *See* Rosenberg, *supra* note 59; O'Connell, *No-Fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L.J. 21 (1975) [hereinafter cited as O'Connell, *No-Fault Insurance*]; Havighurst, *Medical Adversity Insurance—Has Its Time Come*, 1975 DUKE L.J. 1233.

168. *See* R. POSNER, *supra* note 31, at 155-56; Posner, *supra* note 8, at 443-44.

those involved in the kind of activities connected with the kind of injuries compensated by the fund.[169] This type of process, despite its apparently radical differences from adjudication, nevertheless involves process factors closely linked to activity cost reduction; decisions on claim coverage and levies for the fund are made on the basis of allocation-based rules, administrative or otherwise,[170] and these rules tend to be applied consistently and predictably, and are thus rules of general applicability. Equally as important, the rule is automatically and routinely communicated to future actors by the device of the periodic levy of charges or premiums, which indicate to those involved what behavior is expected of them in connection with the activity in question. Thus, given process factors including rule-articulation, rule-application, rule-communication, a carefully structured compensation process will have considerable impact on activity cost reduction. Furthermore, as noted above the expiditiousness that is characteristic of nonfault systems also works to reduce activity costs. In sum, the view that compensation processes inevitably result in high activity cost levels is as unfounded as the view that adjudication inevitably results in low activity cost levels. In this case, the distortion is one of understatement of cost impact due to omission or oversight of key process factors in analysis of nonfault compensation processes.

It is interesting to note that the same type of analytical errors with respect to process factors result in a tendency to overstate the impact of adjudication on activity costs and to understate that of compensation processes. The effect is to exaggerate the difference between the two types of process, at least with respect to activity costs. In fact, the difference may be much less significant than is generally suggested.[171]

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169. *See, e.g.*, G. CALABRESI, *supra* note 41, at 255-59, 301-03; Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Ginsburg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859,928-41 (1981).

170. The rule may be one of accident involvement rather than fault, but it is allocation based nonetheless. *See* G. CALABRESI, *supra* note 41, at 244-65, 270 n.6.

171. Indeed comparisons of the two approaches on this ground may be diverting attention from more significant differences with respect to other civil justice costs and goals. The choice between adjudication and compensation processes may rest less on the ground of activity cost reduction impact and more on other cost reduction impacts. For example, another obvious ground of comparison is their relative impact on processing costs, which has been noted in previous analysis with equivocal conclusions. *See* Posner, *supra* note 8, at 443-44. *See also* Posner, *supra* note 114, at 209. Perhaps less obvious is the question of the relative degree of impact of the two processes on disaffection and enmity costs.

With respect to enmity costs, the typical compensation process, involving bureaucratic claim determinations based on bureaucratically established rules, may afford little opportu-

b. Adjudication relative to mediation and negotiation

The activity-cost-reducing impact of adjudication has also been overstated in relation to processes other than nonfault compensation. Thus, it is commonly assumed that neither mediation nor negotiation will have any impact on activity cost reduction.[172] This assumption is grounded on the observations that in neither process are disputed issues resolved by reference to rules, resource-allocation-based or otherwise, but rather by mutual trading, persuasion and manipulation, and that in any event, the resolutions arrived at are strictly ad hoc and have no impact on future actors.[173] While the

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nity for disputant self expression. Dealing with bureaucracies is often frustrating in this respect. Moreover, the "black box" nature of the compensation process, in which premium rates and award schedules are set far from the disputant's view by faceless bureaucrats using statistical measures, may ultimately result in suspicions about evenhandedness and, further, may simply not fulfill expectations of having a day in court in which to confront one's foe. In the compensation scheme, the state replaces the injurer as the other party. This arrangement may leave unfulfilled the disputant's perceived need to deal on a one-to-one basis with a personalized adversary. In short, compensation may involve low performance on process factors such as disputant self expression, perceived fairness, and meeting disputant expectations of societal institutions. By contrast, adjudication offers more opportunity for self expression and confrontation, and provides more visible evenhandedness through more public and open investigative and deliberative proceedings. Thus, adjudication may be preferable to compensation on disaffection cost impact grounds, in cases where this cost is potentially significant. A similar argument can be made about enmity cost impact. Thus, in the ongoing controversy over adjudication versus compensation as the appropriate process in various kinds of cases, *see supra* note 167 and accompanying text, a process factor analysis helps clarify that, although there are important differences between the two processes, the most significant differences may relate not to activity costs, but to other costs such as disaffection costs. Those interested in the choice between adjudication and compensation would do well to broaden their attention from the sole issue of deterrence of resource waste to include issues such as the appearance of fairness in adjudication as opposed to bureaucratic processes, the importance of individual confrontation, and so on. For it is on such non-deterrence-related issues that the relative preferability of adjudication and compensation probably depends and should be assessed.

172. *See* Nader, *supra* note 14; Best, *Seller's Choice: Common Problems and Rare Litigation*, in CONSUMER DISPUTE RESOLUTION, *supra* note 10 at 227, 235-40 (Best's piece originally appeared in GOVERNING THROUGH COURTS (1981)). Other commentators make a similar assumption, although it is not always clear whether their assumptions relate to activity costs, disparity costs or oppression costs. *See* Riskin, *supra* note 50, at 34-35; Rubenstein, *supra* note 14, at 79; Nicolau & Cormick, *Community Disputes and the Resolution of Conflict: Another View*, 27 ARB. J. 98, 100-01 (1972); Blumrosen, *supra* note 41, at 39. Note that the same assumption could be made about arbitration, in which no specific decisional rules need be followed, and in which decisions generally have no precedental impact. *See* Christensen, *supra* note 136, at 88. Despite this, arbitration is often conceived of as a ready equivalent or substitute for adjudication, *see, e.g.*, Landes & Posner, *supra* note 9; *see also* Sander, *supra* note 3, at 114, while mediation and negotiation are seen as alternatives inappropriate for activity cost reduction.

173. *See* Fuller, *supra* note 17, at 327-29; P.H. GULLIVER, SOCIAL CONTROL IN AN AMERICAN SOCIETY 233-34, 241-42, 253, 297-301 (1963); Gulliver, *supra* note 122, at 681, 684; Riskin, *supra* note 50, at 34. Of course, negotiation or mediation may sometimes operate in tandem with adjudication. That is, the very fact that adjudication is available and accessible

focus above has been on comparative activity cost reduction, the same argument would seem to apply to adjudication vis-a-vis mediation and negotiation as regards impact on disparity and oppression cost reduction, since both of these are also linked to the process factors of rule-articulation, -application and -communication (albeit employing differently oriented rules). Indeed, objections to the use of negotiation and mediation, as opposed to adjudication, have been based on all three grounds: lesser impact on activity, disparity and oppression costs.[174] For example, such objections have been made in regard to consumer disputes, with significant activity and disparity cost potentials, and marital and discrimination disputes, with significant disparity and oppression cost potentials. Unless such cases are handled by a rule-based and rule-communicative process (using appropriately oriented rules), it is argued, rights, resources and equities may be squandered or undermined by party bargaining or manipulation based on relative power and skill and individual circumstances.[175] It is thus logical that activity/disparity/oppression costs would be reduced much more by a rule-oriented and rule-communicative process, which ensures that the decision of cases is based specifically on some choice or combination of resource savings, rights protection or wealth equalization standards, and which works so that the decision provides rule compliance incentives to other similarly situated actors. Assuming that adjudication is such a process, or is at least more closely linked than negotiation or mediation to

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may facilitate a negotiated or mediated settlement which essentially conforms to the rules and rule orientation that would operate in adjudication. This kind of "bargaining in the shadow of the law," *see* Mnookin & Korhnauser, *supra* note 14, is simply one way in which the rule-communicating character of adjudication functions to affect nonadjudicated cases or transactions. For this to occur, however, the "shadow of the law," i.e. the possibility of moving into rule-based adjudication, must be real and not fictional. Only then does the rule have any incentive or deterrent weight, whether in negotiation or in predispute individual decision processes. In the text, the contrast is between adjudication, and negotiation or mediation as independent processes, i.e., without reference to or influence of the adjudication process itself.

174. *See supra* note 172.

175. Thus, consumers bargaining with merchants in individual cases may consistently settle for resolutions that permit businesses generally to waste resources through inefficient practices. Wives in mediation with husbands may often be persuaded to accept property and alimony settlements that institutionalize disparities of wealth between women and men generally. Minorities bargaining or in mediation with employers or other discriminating institutions may usually be pressured or convinced to compromise fundamental rights in some way. *See* Nader, *supra* note 14, Macaulay, *supra* note 133, at 117, 157-58, 161, Rubenstein, *supra* note 14, at 79-81 (consumer disputes); Diamond & Simborg, *supra* note 74 (marital disputes); Nicolau & Cormick, *supra* note 172, at 107, Blumrosen, *supra* note 41 (discrimination disputes). Even if such negative results are not inevitable, cases in which the resolutions actually further resource utilization, rights protection or wealth equalization have no impact beyond that on the parties themselves.

these process factors, it would seem to be preferable on these grounds in many kinds of cases.[176]

However, once again, the matter is not as clear as proponents of adjudication suggest. To begin with, adjudication in practice often fails to be predictable (rule-applying) and rule-communicating, so that the cost reduction impact of adjudication may be overstated.[177] The real problem, however, is with the assumption that negotiation and mediation are wholly ineffectual at activity/disparity/oppression cost reduction. This assumption rests both on an understatement of the role of rule-related process factors in negotiation and mediation, and on a disregard for other process factors, related to activity/disparity/oppression cost reduction, that are essential to negotiation and especially to mediation.

As to the first, it is often wrongly perceived that negotiation and mediation are wholly non-rule-based and non-rule-communicating.[178] It is thought that the result of such processes depends not at all upon rules, but rather upon relative power positions, persuasive or manipulative skills, chance, circumstance, and other irrational factors. Moreover, as noted above, it is assumed that whatever the resolution is, it has no impact beyond the instant parties and case. In fact, recent studies and research suggest that both of these are inaccurate perceptions of how negotiation and mediation processes actually function. Thus, it has been observed in recent research that rule-formulation and -application, are often an integral part of the negotiation process. That is, rather than relying solely on power positions, negotiators articulate and utilize normative principles to argue and resolve issues.[179] Though the norms in question are not legal rules, they are nonetheless rules, and there is no reason to believe

176. Professor Fiss has argued to this effect in a recent article critical of the trend to divert cases to negotiation and other extra-judicial processes. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Note, however, that this need not mean that adjudication is always preferable. There may be cases where the potential for activity, disparity or oppression costs, relative to others, is low, so that other processes are more useful in reducing the relevant costs.

177. *See supra* text accompanying notes 164-65. One could also challenge the proposition that adjudication, as practiced in the court, is really rule-based at all, adopting the view that the judicial process is an irrational preference process disguised by various rationalizations. *See supra* text accompanying note 162. My assumption is, however, that most often the judicial process is based on some choice among criteria relating to resource utilization, wealth equalization or rights protection.

178. *See* Best, *supra* note 172, at 235-36. *See also supra* note 173 and accompanying text.

179. Eisenberg, *supra* note 21; Gulliver, *supra* note 122, at 681-84; H. ROSS, SETTLED OUT OF COURT 45-54, 98-101 (1970). Note that the process under discussion here is negotiation (or mediation) independent of any linkage with adjudicative or other more patently rule-based processes.

that party-articulated rules are less likely than judicially-articulated rules to be based on concerns for efficiency, equity, and rights. Concrete illustrations of rule utilization in negotiation are found, for example, in studies of business and consumer disputes, where there is frequent recourse to principles of fair dealing and reasonableness articulated by parties on the basis of common experience and logic.[180] This is so, by the way, even in contexts where legal rules are extant. Parties often ignore the legal rules and instead articulate and utilize their own norms in the negotiation process.[181] Whatever the source of these rules, they tend to arise (or be sought for) and to be utilized by the parties, so that power and expediency alone do not necessarily control the result of a negotiation. And what is true in this respect for negotiation almost certainly holds true to an even greater degree for mediation, where there is the additional rationalizing influence of an outside neutral party. Indeed, one reason for preferring negotiation and mediation to more irrational processes like self-help is that the former present the opportunity for appeals to reason and principle even where one's strategic position alone would carry little weight. A further observation of these studies is that the norms or rules articulated in negotiation or mediation are not necessarily limited in effect to the instant dispute. Rather, once articulated and accepted as useful and valid, they may be retained and re-utilized by one or both parties, either in further dealings with each other, or in dealings of a similar nature with others.[182] They may also be adopted by still other parties who hear of them through reports of the dispute and resolution, find them appealing, and consequently introduce them in new circles. Thus, even pure negotiation processes, and by extension mediation,[183] may be rule-based and rule-communicating to a degree previously unrecognized. If so, then the activity/disparity/oppression-cost-reducing impact of negotiation and mediation has been understated, with the result that the comparative advantage of adjudication on these grounds is probably less than generally assumed.

The second point above, that other process factors relevant to activity/disparity/oppression cost reduction have been ignored in assessing negotiation and especially mediation, also supports this conclusion. In particular, the factor of interparty translation is not

180. *See* Ross & Littlefield, *supra* note 10, at 211-12, 215; Macaulay, *supra* note 133, at 152; Eisenberg, *supra* note 21, at 662.

181. *See* Macaulay, *supra* note 133, at 118, 130-32, 140, 152; Eisenberg, *supra* note 21, at 662.

182. *See* Eisenberg, *supra* note 21, at 649-53.

183. *See* McEwen & Maiman, *supra* note 134, at 252-54.

usually viewed as relating to the reduction of these types of costs. Rather, if considered at all, it is seen as relevant to enmity cost reduction. However, evidence suggests that the process factor of interparty translation may affect not only the experience of the process (and related costs), but the outcome and outcome-related costs as well. That is, the atmosphere of mutual recognition and empathy that can be achieved in mediation and, to a lesser degree in negotiation, can produce results that go as far or further in the direction of cost reduction than those of parallel rule-based processes. Thus, studies of consumer disputes have found that, even where legal remedies were available under a supposedly consumer-oriented statute, cases were often settled by negotiation or mediation conducted without reference to the requirements of the statute, and the resolution generally gave the consumer more than his "legal rights" would have entitled him to.[184] To the extent that the legal rule was based on a concern for reducing activity or disparity costs (in the latter case, assuming the context of a consumer-business power imbalance), it is thus possible that such costs can be reduced significantly by negotiation and mediation, perhaps even as well as or better than through adjudication. A similar effect may exist (although it has not been documented) in discrimination claims, where the translation factor may operate in such a way that as much or more protection of rights can be effected through negotiation and mediation as through a more visibly rule-based process like adjudication.

The theoretical basis for predicting and explaining such results is that these processes have a potentially powerful persuasive impact. That is, the translation process factor makes colorable claims appear reasonable and acceptable to adverse parties, whereas the threat of rule-imposition without the opportunity for interparty translation has no such effect, or even the opposite effect.[185] This may be even more significant when it is recognized that the decisions of rule-based processes are rarely self-executing, so that what is formally won through rule imposition may be practically lost because of an inability to secure compliance or because even where there is formal compliance, this compliance may be accompanied by other behavior that tends to vitiate the gains from the original resolution. The former problem is frequently reported in small claims situa-

184. *See* Ross & Littlefield, *supra* note 10, at 206-13; Eisenberg, *supra* note 21, at 662. These outcomes must be seen as a result of the negotiation process per se, without reference to the threat of adjudication, because in many of the kinds of cases studied, adjudication was probably not a realistic option for the complaining party in light of the modest size of the claim.

185. *See* Eisenberg, *supra* note 21, at 642-49.

tions, including consumer disputes.[186] The latter is often encountered in discrimination disputes, among others, where a rule-based decision is complied with, but compliance is accompanied by various kinds of behavior that are formally non-actionable but undermine the gains embodied in the decision.[187] The key point with respect to compliance/avoidance is that the persuasive and legitimizing character of mediation and negotiation increase the likelihood that whatever resolution emerges from the process will be put into effect by the parties without efforts to avoid, undermine or counteract it.[188] Thus, to the extent the resolution reduces activity/disparity/oppression costs, the reduction turns out to be real and not illusory. Through ignoring the impact of the interparty translation process factor on outcome and compliance, the activity/disparity/oppression-cost-reduction impact of mediation and negotiation has been understated, leading to a distortion of the comparative preferability of adjudication on these grounds.

This discussion of compliance raises a final point concerning the comparative effectiveness of adjudication as opposed to negotiation and mediation in reducing activity/disparity/oppression costs. It is often argued that, whatever else may be said, the key advantage of adjudication is that it is a mandatory process, i.e., one in which there are sanctions to ensure both participation and compliance.[189] Whereas with negotiation and mediation, even if the processes would theoretically reduce activity/disparity/oppression costs, there is nothing to guarantee that the parties can be brought to the table to begin with, and this is perhaps especially true where disparity and oppression cost potentials are highest—i.e., where a serious power imbalance exists. Thus, all discussion of such cost reduction

186. *See, e.g.*, McEwen & Maiman, *supra* note 134, at 260-64; Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 254-55 (1975).

187. *See* Galanter, *Why The Haves*, *supra* note 12, at 137-39. Some have argued in light of such phenomena that, with respect to disparity cost reduction, i.e., the social justice goal, dispute handling is simply ineffectual as a tool for social change, since formal legal rulings and decisions can be effectively ignored or avoided by those in positions of relative power. They therefore suggest that dispute handling is simply irrelevant to disparity cost reduction. *See supra* notes 12 & 40 and accompanying text. However, this position probably overstates the ineffectiveness of rule-based processes on disparity cost reduction, and it totally ignores the potential suggested here for relationship-oriented processes like mediation and negotiation to affect such costs.

188. *See*, McEwen & Maiman, *supra* note 134, at 261-67; Pearson, *supra* note 115, at 433-34; McCarthy, *supra* note 115, at 36.

189. *See, e.g.*, Landes & Posner, *supra* note 9, at 237-38, 246-48; Merry, *supra* note 3, at 921-22; Nader, *supra* note 14, at 1019-20; Rubenstein, *supra* note 14, at 79; Cavanagh & Sarat, *supra* note 3, at 390-91; Best, *supra* note 172, at 237.

by these processes is academic and impractical. Several points can be made in relation to this issue. First, it is again easy to overstate the extent to which the process factor of participation sanctions (compliance sanctions have been discussed above) operates in adjudication as practiced in the courts. While the judicial process is ultimately compulsory, avoidance and especially delay of process are common devices for effectively escaping theoretically mandatory participation, especially in cases where disparity/oppression cost potentials are high. Moreover, cost and other barriers may limit the initiating party's access to the compulsory process in the first place, and even if these barriers are initially surmountable they may later be raised by strategic spending and maneuvering by a better-positioned opponent. Thus the supposed advantage of compulsory participation may again turn out to be illusory in many cases.[190] At the least, the tendency of previous analysis has been to overstate the impact of this factor in adjudication, and hence the relative cost reducing impact of adjudication over other processes.

At the same time, there is a tendency to understate or ignore the extent to which participation sanctions function in negotiation and mediation. While both are usually voluntary processes, so that there would seem to be no participation sanctions, in fact devices exist in both processes for securing the participation of an adverse party. If the participation sanction factor is viewed broadly rather than formally, it can be seen as operating in these processes. Thus, in mediation, the first stage of the mediator's involvement is often directed to bringing the parties to the table despite resistance on one side or the other.[191] To this end, the mediator may use a wide variety of persuasive techniques, especially clarifying to both sides (and dramatizing when necessary) the costs of non-participation. While this may sometimes be a difficult and time-consuming process, it is probably no more so than the initial delay-ridden stages of adjudication. Again, given the overstatement of the participation sanctions factor as applied to adjudication, and its understatement in relation to mediation, it is apparent that the effect is to exaggerate the comparative cost reduction advantage of adjudication.[192]

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190. *See* Rubenstein, *supra* note 14, at 66-70.

191. *See, e.g.*, Nicolau & Cormick, *supra* note 172, at 106-07; Norton, *supra* note 60, at 13-14; Riskin, *supra* note 50, at 33-34.

192. From a different perspective, the participation sanction factor can be seen as bearing more on processing cost reduction than anything else. Thus, one response to the point that access barriers and delay can vitiate the compulsory nature of adjudication is to demand reforms that guarantee access and curb delay and abuse by more regulation of the early stages of the process. *See* Rubenstein, *supra* note 14, at 79-87. The demand is to make the judicial process truly compulsory by making the participation sanctions accessible and effective. How-

In sum, more careful examination of process factors reveals that in previous analysis the cost reduction impact of adjudication has been consistently exaggerated and that of mediation/negotiation consistently understated or ignored, at least with respect to activity/disparity/oppression costs. It is not surprising that this distorted picture of relative cost reduction capability has led to the frequent conclusion that adjudication is a more desirable process. Yet this conclusion may well be misguided and wrong in many contexts. In particular, the present analysis suggests that the tendency to prefer adjudication is likely to be erroneous in those types of cases in which significant potential is present for both activity/disparity/oppression costs and enmity/disaffection costs, with the former predominating. Given previous views of the cost reduction impact of different processes, adjudication would probably seem preferable in such cases, since mediation will have little impact on activity/disparity/oppression costs and its impact on enmity costs would not compensate for its lack of impact on the former. However, given the present analysis, based on a closer understanding of the process factors associated with the different processes, and their impact on the costs in question, a different conclusion might be reached in this type of case. Even though activity/disparity/oppression cost potentials predominate, the differential in cost/reduction-impact between adjudication and mediation may not be so great as to these costs. By hypothesis, however, enmity cost potential is also significant, and in this area mediation will have far greater cost reduction impact. Thus, in terms of overall cost-minimization, mediation would appear preferable—a very different conclusion from that likely to be reached under previous analysis. Indeed the type of case described can be illustrated concretely, and the implications are very revealing.

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ever to do so has a price—increasing processing costs. Also note that, to the extent that participation "sanctions" or incentives in mediation are felt to lack effectiveness, it is possible to make them more effective. This would involve spending more effort on persuasive measures in the early stages of the process, which would also lead to an increase in processing costs. From this perspective, the comparison could be framed in terms of which processing cost investment, whether in mediation or adjudication, would provide a greater return in terms of party participation and hence cost reduction. Or, put differently, in which process are steps to secure party participation more cost effective? This in turn will be a question of not merely the time investment such steps will involve, but also the cost of the professional services involved. While no conclusion can be reached here, it is by no means clear that adjudication necessarily has the advantage on this ground. Furthermore, while voluntary participation is usually seen as an essential characteristic of the mediation process, mediation could be modified by adding the process factor of mandatory participation. This and other process modifications are discussed *infra* notes 256-60 and accompanying text.

Consider several of the types of disputes referred to throughout the preceding analysis: consumer disputes, marital disputes, and discrimination disputes. In each type, some combination of activity/disparity/oppression cost potentials is certainly significant, and probably even predominant over other cost potentials. At the same time, in each type, enmity cost potential is also very significant. Thus, according to the analytical approach offered here, mediation may be preferable in such cases—a conclusion subject of course to more careful research to confirm the cost potentials and process factor effects developed in theory here. In fact, as noted much earlier, mediation has been proposed and is currently beginning to be employed in each of these areas.[193] Yet, as also noted, its use in each area has been opposed and often blocked by critics operating on the basis of assumptions and analysis shown here to be weak and misguided.[194] And, lacking a clear theoretical and analytical response to such critics, mediation efforts have been and continue to be very vulnerable. However, the approach developed in this Article in fact articulates the kind of neutral jurisdictional principles called for in the controversy over proper "process jurisdiction" of these (and other) types of civil disputes. In this instance, these principles suggest that there is indeed a basis for preferring mediation in the types of cases mentioned, and probably in others as well, not simply on the basis of intuition or fashion, but on the basis of solid analytical theory.

2. ARBITRATION

Much of the emphasis to this point in this section on process factor errors has been on challenging the ways in which adjudication has been understood and assessed by previous analysis. This is not inappropriate, since there has sometimes been—and still is in many circles—an almost cavalier and unwarranted assumption that the adjudication process is an all-purpose dispute handling panacea.[195] However, process factor errors have not been limited to discussions of adjudication in previous analysis. Indeed, more recently, it is not adjudication but arbitration which has attracted a good deal of attention—and misunderstanding. Arbitration is generally understood as involving procedurally simplified and expedited fact finding and final decision by a neutral third party, which decision is binding

193. *See supra* notes 117, 132-36 & 145 and accompanying text.

194. *See supra* notes 145-57 & 172-77 and accompanying text.

195. *See* Fuller, *supra* note 17, at 337-39; *see also infra* text accompanying notes 220-45.

only on the parties and in the instant case and carries no formal precedential effect.[196] Arbitration has been viewed by some as almost an equivalent of, or substitute for, adjudication in many kinds of cases.[197] On the other hand, others seem to view it as the equivalent of mediation, in other types of cases.[198] Closer analysis shows that while arbitration may have many virtues, its comparative advantages in relation to both adjudication and mediation, in different kinds of cases, have probably been exaggerated.

a. Arbitration relative to adjudication

The notion of the near equivalency of arbitration to adjudication is interesting, since it has been suggested not only by lawmakers and judicial administrators desperate to unburden the courts, but also by economic analysts who might well be more sensitive to the differences actually involved.[199] In process factor terms, the argument generally includes a number of points in favor of arbitration. First, it is said to have a strong reducing impact on processing costs.[200] This is generally explained by saying that arbitration is informal and hence expeditious compared to adjudication. Actually, a number of process factors characteristic of arbitration contribute to reducing processing costs. The most important is indeed the expedited nature of the process. However, the expeditiousness is not only or necessarily due to lesser formality in the arbitration itself—which may involve submission of briefs and documents, examination and cross-examination of witnesses, and even rules of evidence and procedure[201] —but also to the absence of waiting or "dead" time between hearings and other active phases of the process. Since the parties buy and schedule the arbitrator's time directly, there is rarely the kind of costly waiting involved that is very common in the judi-

196. *See* Max, *supra* note 60, at 310-11; MacLean, *supra* note 60, at 1302, 1305-06. *See generally* Mentschikoff, *supra* note 136; Landes & Posner, *supra* note 9, at 237-42, 245-53.

197. *See* Landes & Posner, *supra* note 9, at 246-50; Fuller, *supra* note 26, at 391-93; Fuller, *supra* note 74, at 18, 20, 30; Getman, *supra* note 74, at 932. *See supra* notes 136 & 172.

198. *See* Sarat, *supra* note 21, at 352-55; Maitland, *supra* note 151.

199. *See* Landes & Posner, *supra* note 9, at 245-50; Davis, *Public and Private Characteristics of a Legal Process: A Comment*, 8 J. LEGAL STUD. 285, 286-90 (1979). *See also supra* notes 136 & 172.

200. *See, e.g.*, MacLean, *supra* note 60, at 1302, 1304. *But see* Getman, *supra* note 74, at 918; Kritzer & Anderson, *supra* note 60, at 12-19; Pearson, *supra* note 115, at 435-36.

201. *See* Getman, *supra* note 74, at 918-22; Mentschikoff, *supra* note 136, at 706-07; Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 864-65 (1961); Landes & Posner, *supra* note 9, at 252.

cial process.[202] Thus, factor analysis confirms the processing cost advantage of arbitration over adjudication, while also clarifying the nature of that advantage.

The second point in favor of arbitration is disaffection cost reduction. That is, where disputants become dissatisfied with the cost and delay of an official system of adjudication and therefore begin to react negatively to the legitimacy of the official institution, arbitration provides an alternative that quells the dissatisfaction. The factor of expeditiousness as linked to disaffection cost reduction is probably the most significant feature of arbitration in this respect, although the neutral and expert character of the third-party intervenor also probably contributes.

The third point proferred to support arbitration, and the most questionable, is the presumed impact of arbitration on activity (and by extension, disparity and oppression) cost reduction. As noted earlier, in many cases where adjudication is advocated, its preferability is attributed largely to its purported effect, as a rule-based and -communicating process, on activity/disparity/oppression cost reduction. The assumption that arbitration can function as a (cheaper) substitute for adjudication must then rest on the view that arbitration is just as effective as adjudication (or nearly so) in reducing these costs. This point seems the weakest and least supportable under clear process factor analysis. To begin with, arbitration need not be, and in fact may seldom be, a rule-based process.[203]

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202. *See* Getman, *supra* note 74, at 926; Christensen, *supra* note 136, at 87; MacLean, *supra* note 60, at 1304-05. Beyond the difference in waiting time, arbitration typically involves low overhead because the physical facilities are ordinary offices and there is less, if any, need for staffs of administrative and security personnel. *See* Mentschikoff, *supra* note 136, at 864. Finally, due to different training and specialization costs, the arbitrator's services are frequently, although not always, less costly than the equivalent amount or time value of judicial services. *See* Christensen, *supra* note 136, at 87; MacLean, *supra* note 60, at 1304. From another perspective, because arbitration allows for a relatively elastic supply of the critical resource—neutral decisionmakers—the effect is not only to keep down the cost of their services, but to further the expeditiousness of the system by avoiding blockages and back-ups due to inadequate numbers of service providers, while expeditiousness in turn allows for reduction of other processing costs.

203. Parties may often rely on the arbitrator's sense of what is fair and just in the individual case, rather than specify any general set of decision rules to be applied. Nor is the arbitrator ordinarily bound to apply any set of rules (legal or otherwise) in the absence of the parties' direction to do so. *See* Christensen, *supra* note 136, at 88. And since no arbitrator is bound by his own or other arbitrators' prior decisions, no clear set of decision rules developed by arbitrators exists. *See id.*; Landes & Posner, *supra* note 9, at 237-42, 248-49. But see Getman, *supra* note 74, at 920, and Fuller, *supra* note 74, at 25-26 & n.21, for a contrary view, which may, however, be limited essentially to the labor arbitration area. Even if the parties specify that certain decision rules will apply, arbitrators' decisions are generally nonreviewable as to substance. *See* Note, *supra* note 4, at 1600. Therefore, even if arbitrators did apply these rules, there might be numerous different (and inconsistent) interpretations by different

Rather, arbitration often functions without reference to consistent decision rules of any kind. Thus, to the extent that the reduction of activity/disparity/oppression costs depends upon the application of appropriately-oriented decision rules in individual cases, arbitration may be quite unreliable in reducing such costs, especially in relation to adjudication, where the requirement of using articulated and consistent decision rules is at least theoretically much stronger.

Beyond this, and equally as important, arbitration is not a rule-communicating process. That is, even assuming that arbitrators do formulate and utilize given decision rules, these rules are simply not communicated to non-parties in any effective way and therefore cannot readily influence future behavior, thus rendering arbitration incapable of signifIcantly reducing activity/disparity/oppression costs. In the context of private arbitration, it has been noted by recent advocates of arbitration as a substitute for adjudication that this problem is an inherent effect of the incentives operating on a private arbitrator.[204] Indeed, whether arbitration is conceptualized and considered as a privately- or a publicly-administered process,[205] it cannot be expected to have a reducing impact on activity/disparity/oppression costs, comparable in degree to that of adjudication.[206]

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arbitrators without harmonization and control by any "higher court." Thus, the original rules might wind up changed, distorted, or multiplied. More commonly, the rules will simply be ignored. Even where directed to apply specific rules, arbitrators often tend to decide cases by "splitting it down the middle," or some other more sophisticated form of compromise. *See* Christensen, *supra* note 136, at 88-89; Getman, *supra* note 74, at 930; Sarat, *supra* note 21, at 364. *But see* Mentschikoff, *supra* note 136.

204. *See* Landes & Posner, *supra* note 9, at 238-40, 248-49. To the extent the arbitrator follows a certain set of rules and makes them known, he decreases his business, since those who would stand to lose under bis rules would never agree to use his services. The effect goes even further, for even if the party likely to lose could be persuaded to cboose a certain arbitrator, once the arbitrator's rules were clear and known, a settlement would be likely, which would again obviate the need for the arbitrator's services. Private arbitrators therefore have an incentive to conceal their decision rules or to operate without consistent decision rules at all, relying instead upon their aura of fairness and professionalism, and their ability to fashion decisions that do not consistently favor or disfavor one class of parties, to attract business.

205. If the problem of market incentives is removed by making the arbitrator a public or quasi public official, as in certain kinds of compulsory or court attached arbitration, *see, e.g.*, Broderick, *supra* note 137; Thompson, *S.B. 1362, California's Mandatory Arbitration Statute*, 3 GLENDALE L. REV. 55 (1979); Brenner, *supra* note 115, at 30, the lack of rule communication (and rule utilization) is still a problem. For the essence of such compulsory arbitration as a distinct process is to operate as a fact finding procedure directed to expeditious disposition of cases, in which routine appeals, reasoned written decisions, and even tbe consistent search for and application of rules are neither essential nor desirable. Indeed these features would be inconsistent, for they would merely transform arbitration into a process indistinguishable from adjudication in the first place.

206. Indeed, given what has been said above concerning the rule orientation and hence activity/disparity/oppression cost reducing impact of negotiation and mediation, *see*

Thus, previous analysis has been misleading (or misled) by advocating arbitration as a substitute for adjudication.[207] For in those cases where activity/disparity/oppression cost potentials are high, arbitration—even with its reducing impact on processing and disaffection costs—may not be nearly as effective at overall cost reduction as adjudication. Thus, rather than a substitute, arbitration should be seen as a distinct process alternative to adjudication, more appropriate than adjudication in those cases where activity/disparity/oppression cost potentials are low, and where processing and disaffection cost potentials are high. Integrating this discussion of process factors with case-type factor analysis, it can be seen, for example, that with a type of case that involves numerous or important questions of principle as opposed to mere questions of fact (whether simple or complex), adjudication is likely to be more appropriate for overall cost reduction than arbitration, and vice-versa. This conclusion may seem too obvious to have merited such lengthy analysis; but it has not been obvious to many who have proposed, and are using, arbitration as a way of removing cases from the courts without consideration of the issues, and potential problems, discussed here. As a result, cases involving significant questions of law may go to arbitration because parties and administrators are anxious to save time (and hence processing and disaffection costs), although this very likely results in an overall increase in societal costs due to higher than necessary levels of activity/disparity/oppression costs.[208] On the other hand, routine cases involving purely factual issues may continue to clog the courts, where the parties' expectations are only fulfilled by full-dress adjudication and administrators are unable or unwilling to justify refusing entrance to such cases, although the result is an increase in processing and disaffection costs for the system as a whole, with no offsetting gain in activity/disparity/oppression cost reduction in these types of cases.

Thus, as noted at various earlier points, the casual choice of process alternatives without any guiding principles is more likely to lead to loss than to gain. The point is not that cases should not be

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supra notes 172-94, arbitration would not seem markedly different from those processes, at least on this score.

207. Surprisingly, this is as true of economic analysts as of others, or even more so. For the idea that arbitration is "private adjudication" has caught the market oriented economists' fancy. *See* Landes & Posner, *supra* note 9; Davis, *supra* note 199. This has apparently and ironically induced them to overlook the issue of activity cost reduction, the very issue which corresponds to the resource allocation goal closest to the economists' analytical heart.

208. *See* Note, *supra* note 4, at 1610-13; Christensen, *supra* note 136, at 96-100. Although both of these articles discuss this problem with respect to judicial reference procedures, their conclusions apply with even more force to the effect of arbitration on such costs.

channelled from adjudication to arbitration. The point is that it should be the right cases, for the right reasons: that is, cases with low potential for adjudication-sensitive costs, and high potential for arbitration-sensitive costs. Otherwise the effect of the redirection of cases, while superficially beneficial, is ultimately counterproductive.[209]

b. Arbitration relative to mediation

Just as some have inaccurately portrayed arbitration as a preferable substitute for adjudication, others seem to see it as serving much the same function as mediation. In part, this may simply be a function of a casualness of understanding or expression that tends to confuse and use interchangeably the two terms and concepts.[210] On the other hand, arbitration is sometimes advocated instead of mediation because arbitration is viewed as a more inclusive process combining the advantages of both.[211] The second type of view generally emphasizes the relative informality of the arbitration process—usually by comparison to adjudication. Arbitration's informality is seen as giving it an advantage not only in reducing time-related costs such as processing costs and disaffection costs. The assumption seems to be that the less formal atmosphere of arbitration somehow also has

209. It may be suggested that, if on activity/disparity/oppression cost reduction grounds, arbitration is no more advantageous vis-a-vis adjudication than negotiation or mediation would be, then arbitration may also be no more preferable than mediation or negotiation for handling routine cases. All three processes may be equally preferable to adjudication in such cases. Or, indeed, since arbitration involves neutral third party services, negotiation at least may actually be preferable to arbitration in routine cases, on processing cost reduction grounds. This may be one reason why, in Posner's conception of the dispute handling process universe, there are two possibilities—adjudication and negotiation. *See* Posner, *supra* note 8, at 417. However, there are good reasons to believe that in many cases, third party involvement may actually decrease processing costs more than negotiation. *See infra* note 219. *See also* Lea & Walker, *supra* note 16. Furthermore, arbitration may do more to satisfy party expectations of third-party assistance and intervention than negotiation, and may hence reduce disaffection costs more. *See infra* notes 212-15 and accompanying text.

210. *See* Solomon & Richards, *Towards a New Mode of Conflict Resolution in Civil Matters*, 27 DE PAUL L. REV. 1, 24 (1977); Nowak, *The Effect of Proposals to Modify Litigation Process: Litigation vs. Non-Judicial Dispute Processing*, 43 KY. BENCH & B., July 1979, at 40, 41; Jenkins, *Today's Law Students, Tomorrow's Robots*, 10 STUD. LAW, Sept. 1981, at 6, 25; Denenberg, *Third Party to a Quarrel*, THE DIAL, Nov. 1981, at 44; Maitland, *supra* note 151. *Compare, Ford Panel for Mediation*, N.Y. Times, June 8, 1983, at D4 *with* Plunkett, *Still Mad? See Ford Board*, Daily News, June 8, 1983, at 32 ("warranty disputes settled by an independent arbitration panel").

211. *See, e.g.*, Max, *supra* note 60, at 311; MacLean, *supra* note 60, at 1308-09; Brenner, *supra* note 115. *See also* Sarat, *supra* note 21, at 353-55. This imprecision, whether of understanding or articulation, indeed reflects the lack of sharp analysis that has often characterized discussions of alternative dispute handling. Unfortunately, the result may often be inappropriate process choices, with attendant costs.

the effect of avoiding further alienation between the parties and even facilitating their mutual recognition and reconciliation.[212] More important, the assumption seems to be that, again by virtue of its informality, arbitration does this as well, or nearly as well, as mediation. In the terms of the present analysis, informality is seen as a process factor determinative of reduction in enmity costs—indeed as the most significant such factor, such that other process factors uniquely associated with mediation do not produce significantly greater enmity cost reduction. Upon closer analysis of process factors, the weakness of this view will be evident.

First, as to the enmity-cost-reducing impact of informality in arbitration, it must be clarified what is meant by "informality". In fact, the term is used as a catch-all to refer to a number of features typical of arbitration to one degree or another, including: relaxed rules of evidence and procedure, unofficial and private location of proceedings, and active involvement of the arbitrator in conduct of the proceedings—including questioning of witnesses, clarifying of issues, requesting additional evidence, etc.[213] It is possible to see how informality, so understood, could have the effect of reducing enmity costs, especially vis-a-vis a process such as adjudication on the adversary model. Thus, to the extent that evidentiary and procedural objections and contentions are done away with by relaxing rigid rules, and to the extent it is the arbitrator rather than the parties (or party-advocates) who not only referees, but conducts the questioning, the likelihood of increases in hostility in the process are lessened because there are fewer opportunities for direct party confrontation. It seems quite likely that the cross-examination and evidentiary/procedural objection elements characteristic of more formal adjudication processes may contribute significantly to solidifying or intensifying party enmity. Thus, attenuating these elements, even if not entirely eliminating them, probably has significant reducing impact on enmity costs. Interestingly, another process characteristic of arbitration, only indirectly related to informality, probably also has a reducing impact on enmity costs—its expeditiousness. That is, since arbitration typically processes a case more quickly than adjudication—due in part to lesser formality and in part, as noted above, to lack of waiting time—there is simply less opportunity for parties to have dispute-related contacts at all, and hence less opportunity for hostility to be generated by such contacts. The key point to note,

212. *See* Max, *supra* note 60, at 311; Cavanagh & Sarat, *supra* note 3, at 395.

213. *See* Mentschikoff, *supra* note 201, at 864-65; Mentschikoff, *supra* note 136, at 705-07.

about both the informality and time-connected impacts of arbitration on enmity costs, is that both essentially involve reduction of enmity costs through party "insulation"—i.e., by eliminating or limiting the direct and hostile contacts between parties during the dispute handling process. This helps to clarify why, although arbitration may have enmity-cost-reduction advantages over adjudication, it is by no means necessarily equal, much less superior, to mediation on this score.

It is clear that the enmity-cost-reduction impact of arbitration is related to what was described earlier as the process factor of in-process restraints on antagonism—through limiting the number and tone or intensity of party contacts during the process. However, as the earlier discussion noted, other process factors also affect enmity cost reduction, some of them probably to a much greater degree than the restraint factor. Probably the most important of these is the interparty translation factor, i.e., the extent to which the process allows and facilitates each party's recognition and understanding of, and sympathy with, the other party's position. While this effect may be achieved to some degree merely by contact between the parties in an aggression-neutralized atmosphere, it is much more likely to be achieved, and achieved in greater degree, by process elements consciously adapted to this end—such as the adoption of a translating and reconciliatory function by the neutral third-party. Even while arbitrators take an active role in conducting the proceedings, this role rarely[214] includes the function of interparty translation,[215] which is at the heart of the mediation process, as noted earlier.[216] In large part, this is because by doing so—for example explaining to one party the rationale and justice behind the position of the other in order to evoke recognition and sympathy—the arbitrator might appear to be favoring one side over the other.[217] An impression of unfairness is especially likely to arise from this because the arbitrator is the one who will ultimately decide the outcome. The result would be to give rise to disaffection costs vitiating any gains in enmity cost reduction. Thus, as noted, arbitration rarely involves the process factor of interparty translation.

In mediation, by contrast, interparty translation is at the heart of the process. Nor is there any conflict (or at least so great a conflict) with perceptions of fairness, since the mediator is clearly and

214. *See infra* note 261 and accompanying text.

215. *See, e.g.*, Mentschikoff, *supra* note 201, at 865.

216. *See supra* note 134 and accompanying text.

217. *See* Fuller, *supra* note 74, at 23-27; Fuller, *supra* note 26, at 406; Sander, *supra* note 3, at 122; Sarat, *supra* note 21, at 354.

openly behaving in the same way to both sides, and since in any event the parties need not fear an imposed outcome. Note that mediation typically also incorporates the enmity-cost-related aggression-restraint factor found in arbitration. Thus, despite the usually even greater informality of the process, the mediator can and does structure the agenda in discussions, monitor and control the flow and tone of communication, and even insulate the parties where appropriate by acting as a go-between to avoid direct party contact or to explore sensitive issues privately with each side.[218] In short, whatever the case with arbitration vis-a-vis adjudication, mediation is characterized by more, and more important, enmity-cost-reducing process factors than is arbitration.

From the point of view of enmity cost reduction then, even if arbitration is superior to adjudication, it is neither superior to, nor even the equal of, mediation. Casual analysis seizes on the false issue of the "informality" of arbitration, and assumes it has found a factor as closely related to enmity cost reduction as to processing cost reduction. In fact, as shown here, the operative factor in this context is not "informality" at all, but aggression-restraint and interparty translation, to only one of which "informality" may, depending upon its practical meaning, be related. It is not arbitration, but mediation, that generally involves both these factors in major degree. Thus, in cases where enmity cost potentials are high in relation to others (e.g., routine consumer disputes, employment and other discrimination disputes, marital disputes, and many others) the channelling of such cases to arbitration because of its expeditiousness and informality may be counterproductive in terms of overall cost-minimization, since this process will have comparatively little impact on reduction of the enmity costs highly significant in these cases. A clear analysis of alternative processes, based on process factors derived from and relating to civil justice goals, clarifies the differences between arbitration and mediation and how these differences are perhaps most relevant precisely in high enmity-cost-potential cases.[219]

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218. *See* Fuller, *supra* note 17, at 309, 318; Riskin, *supra* note 50, at 35-36; Winks, *supra* note 117, at 635-40; Norton, *supra* note 60, at 14-15; McCarthy, *supra* note 115, at 33-34; Stulberg, *supra* note 133, at 88-106.

219. Another important example of process distortion involves the exaggeration of the relative preferability of negotiation on processing-cost-reduction grounds. Where processing cost reduction is important, it is sometimes assumed that negotiation will reduce such costs, more than any process involving participation of a neutral third-party, *see, e.g.*, Mnookin & Korhnauser, *supra* note 14, at 956, 971-72, 974-75, because third-party services add to processing costs, especially where the third-parties are trained professionals. Indeed Posner sees negotiation as the major alternative to adjudication, attractive precisely because

D. Patterns of Process Distortion

Two general patterns of error run through previous analysis of dispute handling alternatives and civil justice reform: process bias and process confusion. This Section examines these patterns of process distortion.

1. PATTERNS OF PROCESS BIAS

From the discussion above, it is possible to identify patterns in the errors of previous analysis, which might be called patterns of process bias—i.e., patterns suggesting societal or public policy biases about different dispute handling processes.[220] Two such patterns are: a consistent bias in favor of use of adjudication and a consistent bias against use of mediation. These patterns are evident in the different types of error discussed above.

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of the lesser "direct" costs of negotiated settlements. R. POSNER, *supra* note 31, at 434-35; Posner, *supra* note 8, at 417. However, the matter is not so simple.

Third-party involvement is one process factor affecting processing costs; but negotiation itself very often involves parties other than the disputants, e.g., counselors and professional advocates for each side whose services add to processing costs. Negotiation by paid party-advocates may well keep down processing costs better than adjudication, but it is not necessarily preferable to mediation or arbitration. Paid party advocates may sometimes intentionally prolong negotiations for their own benefit (in convenience or otherwise) rather than in the client's interest, especially in conditions of imperfect competition and regulation. At other times, even earnest and sincere negotiation by party advocates may be protracted due to entrenched positions, conflicting information, strategic maneuvering, or other stumbling blocks to bargaining. Thus, processing costs of party advocate negotiation may often be considerable, even if they are less than those of adjudication. By comparison, mediation may reduce processing cost levels below those of negotiation, despite the addition of costs for neutral third-party services. The participation of the neutral third-party in a facilitative role expedites resolution and reduces the amount of service time for all third-party participants, advocates and neutral alike. Thus, even though another party is added, total third-party service costs are minimized, because of the time factor, another obvious process factor, but one whose interaction with factors such as third-party participation is nevertheless often omitted from discussion. One of the bright points of Lea & Walker's analysis is that they discuss this point quite clearly. *See* Lea & Walker, *supra* note 16, at 369-70.

A similar argument can be made, with respect to arbitration, that despite the added cost of neutral third-party services, arbitration, by focusing issues, and especially by providing a means to break an impasse, can expedite the dispute handling process and result in greater processing cost reduction than direct negotiation. In sum, the tendency of earlier analysis is, by oversimplifying the issue, to overstate the processing-cost-reduction advantage of negotiation across the board and to understate, or ignore, the analogous impact of mediation or arbitration in appropriate cases, thus distorting the comparison of the processes in favor of negotiation. In practical terms, the result is to argue for leaving certain cases to the negotiation process on processing cost grounds, although it could well be that mediation or arbitration in those cases would have greater impact on processing cost minimization.

220. To use the term bias implies, and intentionally so, that the preferences or aversions referred to have no basis in sound analysis, and this is what the above sections have demonstrated.

As to the first, it was shown[221] that, through errors of cost distortion and underinclusiveness, adjudication is often made to appear preferable because of the kinds of cost potentials involved, where this may in fact not be the case. Thus, in cases where activity/disparity/oppression cost potentials (presumed to be responsive to adjudication) are significant, such as in product injury, consumer, or discrimination disputes, these are emphasized while other potentially significant costs (much less responsive to adjudication), such as disaffection, disorder, and enmity costs, are ignored. Thus, adjudication is made to appear preferable in these types of cases, but only on the basis of an incomplete picture of potential costs. Were all costs considered, other processes might well be recognized as preferable to adjudication, instead of vice versa. Further in the analysis[222] it was shown that, even where all costs are considered and process comparisons are made, it is nevertheless often made to appear, through errors of process distortion, that adjudication is preferable because it has a clear superiority in capacity to reduce activity (and disparity/oppression) costs, although closer examination shows this not to be the case. Thus, the capacity of adjudication to reduce such costs has been exaggerated through overstatement of the extent to which it involves the process factors of rule-articulation, -application, and -communication, and participation and compliance sanctions, and through disregard of the effect of the process factor of expeditiousness on activity cost reduction. The distorting effect of this exaggeration on preference for adjudication relative to other processes is multiplied, when there is added the tendency, also described, to understate the activity-cost-reducing capacity of processes such as nonfault compensation, negotiation and mediation. Thus, given both types of analytical errors, the result is a consistent and unfounded preference for adjudication in relation to other processes—a positive process bias.

The second pattern, disfavoring mediation, is also evident in the different types of errors discussed above. Thus it was shown how cost distortion errors lead to an understatement of the significance of enmity cost potential, resulting in the effective omission of such costs from consideration, in many types of cases.[223] Casual utilization of some of the case-type factors involved (e.g., frequency and value of party contacts), and failure to recognize others at all (e.g.,

221. *See supra* note 136. *See also supra* notes 144-57 and accompanying text, where the same type of error is described in relation to the understatement (leading to omission from consideration) of enmity costs in different kinds of cases.

222. *See supra* notes 160-92 and accompanying text.

223. *See supra* notes 144-57 and accompanying text.

frequency and value of associated-party contacts), have made it appear that enmity cost potential is low or absent in many types of cases where, in fact, this potential may be considerable. One can describe the pattern as a systematic undervaluation of the importance of preserving various types of social relationships, in dispute handling as well as otherwise. To the extent that mediation and its associated process factors are particularly effective in preserving social relations and reducing enmity costs, the effect of this pattern is to depreciate the value of mediation generally, since it is incorrectly made to seem that enmity-cost-reduction capability is irrelevant in most cases.

Still further in the analysis, it was shown[224] that process distortion errors also worked against mediation, in two ways. First, exaggeration of activity/disparity/oppression-cost-reducing process factors in analysis of adjudication, mentioned above, was combined with failure to recognize the presence and operation of such factors in mediation—including rule-articulation, -application and -communication, participation and compliance sanctions, as well as the factor of interparty translation as linked to reduction of these costs. The resulting distortion of the relative preferability of adjudication and mediation unduly disfavored mediation, especially in cases where activity cost potential predominates over (or coexists with) significant enmity cost potential. Second, exaggeration or mistaken identification of enmity-cost-reducing process factors in arbitration were accompanied by failure to understand clearly the extent to which those factors impacting most powerfully on enmity costs—notably the factor of interparty translation—operate in mediation almost uniquely. The resulting distortion of the relative preferability of arbitration and mediation also unduly disfavored mediation, especially in cases where disaffection and processing cost potential coexist with enmity cost potential. Thus, with all three types of errors, the result is a consistent and unfounded depreciation of the relevance and impact of mediation, in relation to other processes—a negative process bias.

The effect of these patterns of process bias on dispute handling policy and practice may be quite considerable. Thus, despite cries of frustration and incapacity from all quarters of the official system of adjudication—including both judicial and administrative tribunals—the adjudicative process still dominates the field, and is seen as virtually indispensable by advocates of almost every type of dis-

224. *See supra* notes 160-66, 172-92 & 210-18 and accompanying text.

puted interest.[225] Consumer advocates claim that there is no justice for consumers without access to law, i.e., adjudication;[226] antidiscrimination advocates say that only adjudication can protect and vindicate human rights;[227] advocates of injury victims continue to pursue ways of blocking the institution of nonfault claims compensation, and ways of circumventing existing nonfault procedures to

225. *See generally* Fuller, *supra* note 17, at 337-39; Cahn & Cahn, *supra* note 1, at 1008. The dominance of adjudication in the dispute handling field may seem questionable in light of the growing body of data suggesting that, in terms of the numbers of disputes that could be brought to the courts, only a tiny fraction reaches the stage where judicial proceedings are even commenced. *See* Galanter, *supra* note 4, at 11-32; Hurst, *supra* note 1, at 424, 428-30; Miller & Sarat, *supra* note 26, at 546; Ladinsky & Susmilch, *supra* note 10, at 188-202. In fact, these data alone do not tell the whole story. For even if only a tiny fraction of cases ever get brought to court, much less adjudicated, adjudication may still be thought central to the dispute handling system as a whole. Thus, to the extent it is seen as the only process wherein adversaries can be compelled to participate and submit to desired rules, it is perceived as the key to any effective means of dispute handling. According to this view, one must have ultimate (and real, not theoretical) access to court, in order to effectively use any other dispute handling process outside of court. *See* Nader, *supra* note 14. To use the terms of the debate, one can only "bargain in the shadow of the Law," *see* Mnookin & Kornhauser, *supra* note 14, if one has ultimate access to the law itself when necessary, so that "no access to law," *see* NO ACCESS TO LAW (L. Nader ed. 1980), effectively means no access to bargaining as well—or any other process, for that matter. Thus, even if adjudication is little used, its accessibility is crucial, and far more important than any questions regarding alternative processes. In short, adjudication is still viewed by many as dominating the landscape.

This view may be most natural to legal professionals, but it has probably extended to the general population as well. Some commentators note that lawyers occupy a central role as "gatekeepers" to the dispute bandling system, and hence a central role in decisions on how to handle disputes generally. *See* Felstiner, Abel & Sarat, *supra* note 26, at 645. In effect, lawyers are "for most people . . . the initial consultants on dispute processing. . . ." Riskin, *supra* note 50, at 42. Given lawyers' probable predilection to adopt the above view of the role of adjudication in the dispute handling system, as well as specific evidence that they view adjudication and related adversary processes as preferable to conciliatory processes, *see, e.g.*, Sarat, *supra* note 21, at 361; Riskin, *supra* note 50, at 43-51; Winks, *supra* note 117, at 620-33; Hurst, *supra* note 1, at 423, 433, lawyers probably help to create a wider public conception of adjudication as primary, and mediation and others as marginal processes.

The belief that access to adjudication is necessary for effective dispute handling may help to explain what some researchers see as a very low rate of pursuing grievances altogether in the U.S. *See* Miller & Sarat, *supra* note 26; Felstiner, Abel & Sarat, *supra* note 26. These writers argue that the greatest proportion of potential disputes are never pursued at all by the aggrieved party, and suggest reasons relating to negative attitudes toward conflict in general. An alternative explanation may be that, many individuals simply give up and "lump it" rather than pursue available alternative processes because they are indoctrinated with the view that access to adjudication is crucial, and recognize that it is out of reach in their cases. Thus, the perceived primacy of adjudication may discourage pursuit of alternative processes, even though, such processes may in fact be viable entirely without regard to whether the "shadow" of the adjudication process is lurking in the background. *See supra* notes 172-92 and accompanying text.

226. *See, e.g.*, Nader, *supra* note 14, at 1000, 1019-20; Rubenstein, *supra* note 14, at 77-82.

227. *See, e.g.*, Higginbotham, *supra* note 41.

regain access to adjudication.[228] Even where the pressures of administration have forced the courts and administrative tribunals to divest themselves of jurisdiction and to divert, refer or abandon cases to other processes, these processes most often either resemble adjudication themselves or are "attached processes"—i.e., operate under the direct or indirect influence of, or with the possibility of recourse to, the adjudication process.[229] The argument indeed is that without the possibility or threat of adjudication lurking in the background, no other dispute handling process can hope to have much effect.[230] All of this of course has considerable significance for the allocation of resources among different dispute handling processes. In the dispute handling "sector", private and public resources, and cases, almost certainly flow to the adjudication process (and attached or dependent processes) in far greater measure than to any other process, and without regard to whether there is any coherent analytical reason to consider adjudication preferable to other processes to such a degree and in all such cases. This, in turn, probably has a self-perpetuating effect, in that the investment in adjudication creates a momentum that continues to attract cases and resources to adjudication as "the only game in town."[231] In short, the process bias for adjudication is self-reinforcing, and has created what Professor Galanter calls the "centripetal" conception of the civil justice system, with the adjudication process viewed as the all-important hub of the system from which all else radiates and around which all else revolves.[232]

Professor Galanter predicts the demise of the centripetal system and its replacement by a "centrifugal" one in which process diversity (and balance) will be the hallmark.[233] Perhaps it will be so, but not unless coherent process analysis replaces process bias. The reaction to the recent upsurge of interest in the mediation process demonstrates the point. Increased interest in mediation as a process alternative in various kinds of cases has been met by steady, and

228. *See, e.g.*, Walters, *Workmen's Compensation: A New Approach to an Old System*, 3 CAL. LAW., Feb. 1983, at 40.

229. *See* McGillis, *supra* note 21, at 258-59; Pearson, *supra* note 115, at 423; McCarthy, *supra* note 115, at 37 (about 90% of the mediation programs in the U.S. are part of or closely tied to formal court institutions). *See also* Brenner, *supra* note 115. In most of the programs described in Brenner's article, one or both parties has the right to an appeal or trial de novo in court.

230. *See* Nader, *supra* note 14; Mnookin & Korhnauser, *supra* note 14; Best, *supra* note 172. *See also supra* note 225.

231. *See* Abel, *supra* note 50, at 298-99.

232. Galanter, *supra* note 5, at 169 and *passim*. *See supra* note 225.

233. Galanter, *supra* note 5. *See also* McGillis, *supra* note 21, at 265-66.

indeed growing, indifference, antipathy, and misunderstanding. Mediation is said to be ineffective in securing participation, to be irrelevant or indeed inappropriate for the enforcement of rights, to be potentially abusive and compromising of rights, and to be unnecessary and valueless in all but a very few types of cases.[234] All of these criticisms, as shown in this study, lack firm analytical bases and hence can be explained only as manifestations of a consistent process bias against mediation. However, to lack basis is not to lack effect, and the result of such bias is that support for mediation has begun to falter even before it has become established in the first place. Even some of those who initially supported it have joined its detractors.[235] It may be too early for the criticisms to have taken full effect on policy and practice, but one can predict that, unless there is a change in the pattern of process bias against mediation, the tendency will be for mediation to remain, in perception and actuality, a marginal process at best, despite its potential advantages in many situations.[236]

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234. *See, e.g.*, Cavanagh & Sarat, *supra* note 3, at 391; Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); Rubenstein, *supra* note 14, at 78-79 & n.119; Nader, *supra* note 14; Diamond & Simborg, *supra* note 74; Blumrosen, *supra* note 41; Nowak, *supra* note 210, at 41-42; Miller & Sarat, *supra* note 26, at 526-27 & n.2.

235. *Compare* Abel, *supra* note 50, at 295-97 *with* Abel, *Redirecting Social Studies*, *supra* note 12, at 814. *Compare* Nader & Singer, *Dispute Resolution in the Future: What are the Choices*, 51 CAL. ST. B.J. 281, 285 (1976) *with* Nader, *supra* note 14, at 999-1000. *Compare* Sarat, *supra* note 21, at 369 *with* Miller & Sarat, *supra* note 26, at 526-27 & n.2. *See also* Freedman & Anderson, *Divorce Mediation's Strengths*, 3 CAL. LAW., July 1983, at 37, 38.

236. Some may argue that the concern about anti-mediation bias is overstated, since such bias is certainly waning now if not already gone. Indeed, there has been a flood of recent articles supporting mediation in a variety of contexts. *See, e.g.*, Riskin, *supra* note 50; Winks, *supra* note 117; Freedman & Anderson, *supra* note 235; Ebel, *supra* note 117; McGillis, *supra* note 117; Barrett & Tanner, *supra* note 145; McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49 (1981); Rich, *An Experiment with Judicial Mediation*, 66 A.B.A.J. 530 (1980); Pick, *The Go-Between: Mediators at Neighborhood Justice Centers*, 8 STUD. LAW., March 1980, at 38; Reynolds & Tonry, *Professional Mediation Services for Prisoner's Complaints*, 67 A.B.A.J. 294 (1981); McEwen & Maiman, *supra* note 134. Beyond this interest in the literature, scores of projects, as well as individuals, offering mediation services, have arisen in recent years. *See supra* note 115. See also Winks, *supra* note 117, at 634-40, and Norton, *supra* note 60, where the authors discuss individual delivery of mediation services by legal and mental health professionals. Finally, the mediation process is increasingly finding official acceptance within law school curricula. *See* Riskin, *Mediation in the Law Schools*, 34 J. LEGAL EDUC. 259 (1984).

Nevertheless, there are a number of reasons to believe that anti-mediation bias is a persistent and significant phenomenon. First, a surge of interest in mediation in the literature does not signify a similar surge of interest in practice. Many of the pieces on mediation are, in effect, promotional pieces written by individuals involved in mediation themselves or "showcasing" projects to which the authors may be sympathetic. This is not to say the articles in question are without substance. Nevertheless, the positive view of mediation they take may not be widely shared by practitioners, nor by the public generally. There is indeed recognition of the prevailing ambivalence toward mediation even in the pro-mediation literature itself.

If the above patterns in analysis, policy and practice are indeed the result of process bias favoring adjudication and disfavoring mediation, serious questions are raised concerning the sources of these biases.[237] Why indeed should such biases exist? While the subject is worthy of deeper discussion by itself, a number of thoughts can be mentioned here that may help in understanding and correcting the biases described above. The first point is that the biases may arise in part from both the self-interest and the professional socialization of the legal profession itself, the group that dominates both discussion and policymaking concerning dispute handling alternatives and

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See, e.g., Riskin, *supra* note 50; Winks, *supra* note 117. Furthermore, the rise in pro-mediation commentary has evoked a steady response in the literature, questioning and often criticizing the use of mediation. *See supra* note 234. *See also* R. ABEL, *supra* note 115; Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (R. Tomasic & M. Feeley eds. 1982); Cole, Hanson & Silbert, *Mediation: Is it an Effective Alternative to Adjudication in Resolving Prisoner Complaints?* 65 JUDICATURE 481 (1982); Miller & Sarat, *supra* note 26; Felstiner & Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 L. & HUM. BEHAV. 223 (1978). Thus, the interest in mediation has met with considerable skepticism and resistance, which is one sign that the attitudes discussed in the text are far from vanished.

Also, the significance of the growing number of mediation programs and services, must be viewed in context, and with a grain of salt. First, a few hundred new mediation programs, often with trickling caseloads, *see* Pearson, *supra* note 115, at 426-38; barely make a ripple in comparison to the enormous volume of cases still flowing to the courts, *see id.* at 427, 437-38, much less to the still greater volume of cases handled by more unstructured and informal elements in the dispute handling system. *See* Ladinsky & Susmilch, *supra* note 10, at 185-202; Hurst, *supra* note 1, at 428-30; Miller & Sarat, *supra* note 26, at 546. Indeed, some researchers suggest that the difficulty experienced by nonmandatory mediation programs in attracting more than a minimal flow of cases is due precisely to skeptical or negative attitudes on the part of dispute handling professionals and the public at large. *See* Pearson, *supra* note 115, at 428.

Second, the growth of interest in and experimentation with mediation is part of a general fascination with potential devices to clear cases out of the overburdened court system. As such, it is not necessarily mediation itself, or its unique process characteristics, that attracts interest or support, but rather the potential it offers to divert cases away from the courts. Indeed, this suggests a final point, that in the rush to use alternative processes to help ease court congestion, projects may be utilizing processes that involve mediation in name only, whereas key features such as interparty translation are in practice given short shrift. *See* Riskin, *supra* note 50, at 41-42, 51. Such projects cannot really be said to reflect a swing toward favoring mediation.

In short, neither the surge of literature nor the rise of experimental programs contradicts the continued existence, among professionals and the general public, of unfounded skepticism about and resistance to the use of mediation. As to law schools' attention to the mediation process, it is still too early to say whether the subject will be given a significant place in the curriculum or "marginalized" as some fear. H. Lesnick, Paper presented to the American Association of Law Schools Workshop on Alternative Dispute Resolution 3-4 (Oct. 9, 1982) (on file with the WISCONSIN LAW REVIEW).

237. Of course, one might first ask whether the bias is the cause of the analytical errors described, or rather the result. Although this may sound like a chicken and egg question, it seems on reflection more likely that the bias is cause, not effect, and this in turn has some interesting, perhaps troubling, implications for scholarship.

civil justice reform. Thus, it might appear counterproductive for lawyers to advocate utilization of processes other than (or unattached to) adjudication, the process in which their skills and services are most necessary and most highly valued, and which is most completely lawyer-dominated.[238]

To this factor of self-interest is joined the factor of professional socialization, i.e., the habits of thinking and assumptions which legal training inculcates in lawyers. Among the most significant of these in the present context are the belief in the importance of "thinking like a lawyer," the concept of legal rights, and the ethic of aggressive representation of the client's interest.[239] In effect, these elements from the attitudinal socialization of the legal profession combine with the simple self-interest of the profession to produce strong support for adjudication and great suspicion about mediation. These attitudes are naturally expressed in discussions of civil justice reform—expressed even by those who write from sociological, economic or other points of view, since they usually also write as lawyers trained and socialized in institutions of legal education.

Another source of the pattern of pro-adjudication, anti-mediation process bias may lie in two attitudinal factors common in the society generally, which at first appear mutually inconsistent, but

238. *See* Riskin, *supra* note 50, at 48-49. Although lawyers are involved in arbitration, specific legal skills may seem somewhat less important, and the involvement of nonlawyers in powerful roles is greater than in adjudication. In mediation, it is even more likely to appear that the lawyer's function and power are significantly diminished. Indeed, much of the training in legal analysis on which legal education concentrates could be thought irrelevant to a mediation process. In fact, general skills of advocacy and argumentation are no doubt valuable in all of these processes. Nevertheless, greater use of processes like mediation, that place less emphasis on legal analysis, opens the door to non-lawyer professionals and laymen and thus increases competition for dispute handling business. This is especially so because there are skills other than advocacy and argumentation that are important in mediation, skills in which lawyers may have little training and little facility. *But see id.* at 52-54.

239. The first operates to persuade lawyers that there is a special and superior way of analyzing problems that only those trained in legal methods know how to employ. The effect is to engender mistrust and almost disdain for any process in which lawyers, and their superior method of analysis, are not centrally involved. The second factor, the concept of legal rights, encourages the assumption that there is an abstract, objective and discoverable set of rights and duties that governs almost every situation which should be the basis of any resolution. *See id.* at 43-48. The effect is to engender mistrust for any process that appears to operate through compromise or even expediency, rather than on principle. The third factor, the ethic of aggressive representation ultimately expressed in the adversary process, fosters the belief that the best way to handle a dispute is through a contentious process in which each side plays its hardest to win, and that it is not only unnecessary and counterproductive, but probably disloyal and unethical, to consider and respond with empathy to an adverse party's position. *See* Winks, *supra* note 117, at 620-33. The effect, especially taken together with the legal rights attitude, is to engender great suspicion about any process that seems to encourage, as it were, appeasement of and fraternization with the enemy and hence compromise of principles and loyalties.

which may operate in tandem to encourage the bias: belief in the need for the exercise of authority to resolve problems, and assertiveness to the point of rigidity about individual rights. The latter derives from a cherished and widely held philosophical and political value, asserting the importance of the individual as the basic social unit and the source of societal legitimacy, the measure of all things, such that individual self-fulfillment (for all individuals in the society) is indeed the ultimate goal of the social enterprise itself.[240] Indeed, despite their differences, advocates of the resource allocation, social justice and fundamental rights goals all share this value base to a great degree.[241] Thus, an attitude of assertiveness about individual rights, as a means of effectuating individual self-fulfillment, is fostered by very different points of view that hold this value in common.[242]

The second attitude—belief in the need for authority to resolve conflicts, might at first seem inconsistent with the attitude stressing individual rights, since recognition of outside or higher authority is an apparent limitation on individual self-determination. In fact, need for authority is a corollary of individual rights assertion. For where different individuals vigorously assert conflicting rights, resolution of the issue may well be perceived as requiring the exercise of an authority superior to any of the individuals. At least in the context of disputes between individuals, this exercise of authority is therefore not inconsistent with, but instrumental to the vindication of individual rights. In other words, where assertion of individual rights is expected and perceived as highly valuable, existence of an

240. *See* Riskin, *supra* note 50, at 30, 42, 47; Rubenstein, *supra* note 14; R. DWORKIN, *supra* note 41, at 198-99, *see also id.* at at vii-xiii, 146, 184-205; Kidder, *supra* note 12, at 719-20; Summers, *supra* note 21, at 23-24; *"Restructuring of America"—When, Where, How and Why*, 93 U.S. NEWS & WORLD REP., Dec. 27, 1982-Jan. 3, 1983, at 49, 50 (interview with John Naisbitt).

241. The foundation of resource allocation theory is the assumption of consumer sovereignty, and the notion that the market economy is a tool for achieving social decisions by aggregating individual decisions. The individual—every individual—remains the basis of the system. *See* R. DORFMAN, THE PRICE SYSTEM 1-10 (1964). The social justice view rejects many aspects of market theory, but shares its position on individual rights. Social justice also stresses the importance of individual opportunity, self determination and fulfillment, and differs only over the need for corrective nonmarket action to remove barriers that in practice deny such opportunity to certain individuals, as individuals or as members of a particular group. If social justice places more emphasis on group and collective action, it is largely because such action is seen as a necessary means of vindicating individual rights, and not because the collectivity is necessarily seen as having a value per se superior to the individual.

242. An example of widespread support for this attitude is the growth of so-called "rights consciousness" that has affected both the criminal and civil justice systems. *See supra* notes 1-4 and accompanying text.

authoritative decisionmaking body will also be expected and seen as necessary.[243]

This complex of attitudes toward individual rights and the need for authoritative intervenors probably has considerable impact on attitudes towards adjudication and mediation. Adjudication promises both a "rights" focus and an authoritative decision. Mediation on the other hand, seems to pose the potential for ignoring or compromising individual rights in favor of reconciliation or expediency, and would appear to lack the necessary authoritativeness even if it were to take individual rights seriously.[244] In fact, the analysis above shows that this picture is not at all accurate. Even if individual self-fulfillment through the effectuation of individual rights is accepted as a supreme value, it is not necessarily true that adjudication is the best method of furthering individual rights in all situations. Indeed, as discussed above, there is evidence to the contrary. A persuasive and emphathetic process like mediation can sometimes do as much or more to further individual rights than an adversary and authoritative process like adjudication. It is only the unfounded bias against mediation, and not any real necessity of rights effectuation, that explains this lack of insight. Furthermore, even if adjudication were to be considered superior for vindicating individual rights, the assumption that the individual rights value and associated goals represent a supreme concern is itself a questionable position, as will be discussed at greater length below.[245] Suffice it to say here that mediation is clearly superior at furthering other goals and values, which may sometimes be more important than individual rights. Thus, while it is possible to explain and identify the sources of the patterns, this does not change the fact that the indiscriminate preference for adjudication and aversion to mediation can only be seen as patterns of process bias.

2. THE PATTERN OF PROCESS CONFUSION

On a simpler level, and without regard to whether any "process bias" is reflected in the analytical errors described above, these same analytical errors form a different kind of pattern in discussion of dis-

243. Of course, there may be independent reasons for the preference of authoritative institutions, in cultural or social influences.

244. *See, e.g.*, Rubenstein, *supra* note 14, at 77-82; Diamond & Simborg, supra note 74. Note that these views of the relative advantages of adjudication and mediation vis-a-vis individual rights assertion are themselves of questionable soundness, as shown by the analysis of Part III. The point is that, even if not accurate, they probably correspond to the assumptions commonly made about the two processes, and hence help to reinforce the process bias.

245. *See infra* Part V.D.

pute handling alternatives and civil justice reform, which might be called a pattern of process confusion. That is, there are many misconceptions about the nature and effects of various commonly used dispute handling processes. These misconceptions are of two basic types: 1) misconceptions about the salient features of a given process, and 2) misconceptions about which of these features are significant in terms of affecting different civil justice cost-reduction goals. The result is confusion and error about what different processes can actually be expected to do to achieve the goals of civil justice, and, as a result, a source of distortion in process choice decisions. Simply put, how can such decisions be sound if they are based on misconceptions of what the process alternatives actually involve and what their effects are likely to be?

Consider again some examples, from the earlier discussion, of the two types of misconception noted above. As to the first, it was noted that adjudication is often assumed to involve rule-application and rule-communication. In fact, it may often operate without the latter characteristic and sometimes without the former as well.[246] Similarly, it is frequently assumed that arbitration involves rule-application and rule-communication, whereas in practice it frequently if not generally involves neither.[247] Also as noted above, the degree to which each of these two processes involves the factor of sanctions for adverse party participation or compliance is also exaggerated. Misconceptions about these processes produce unrealistic expectations and predictions of their capacity for activity/disparity/oppression cost reduction. Other such misconceptions of actual process character were noted above, as for example: the misconception that arbitration's lack of procedural formality promotes interparty translation, the misconception that mediation and negotiation totally lack both rule-orientation and sanctions for participation and compliance, the misconception that mediation lacks formal direction and order, the misconception that nonfault compensation lacks rule-orientation and -communication, and so on.[248]

As to the second type of misconception—concerning the significance of a process characteristic in terms of cost-reduction impact—one example above concerned the factor of informality in the arbitration process as affecting enmity cost reduction.[249] In fact, informality is likely to have little if any impact on reducing enmity costs,

246. *See supra* notes 159-66 and accompanying text.
247. *See supra* notes 199-209 and accompanying text.
248. *See supra* notes 112-18, 168-70 & 178-92 and accompanying text.
249. *See supra* text accompanying notes 212-18.

despite an apparent misconception to the contrary, since it is active interparty translation and not mere informality that most reduces such costs.[250]

In effect, all of the "process distortion" errors discussed in Section C above can be seen as arising from one of the kinds of misconceptions described here. Whether or not these misconceptions are seen as causing or reflecting "process bias," they certainly open the door to unsound decisionmaking as to jurisdictional, process choice questions. Thus, the pattern of process confusion is no less problematic, even if it may be less invidious, than that of process bias. In practical terms, the consequence is that process choices may be wrong simply because it is not clear what process is actually being chosen or what effects the process will actually have. There are numerous examples of such consequences in the discussion of Section C above.[251]

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250. Another, slightly different, example of this type of misconception was noted in relation to the affect of a lack of third-party participation on processing costs in negotiation and other processes. *See supra* note 219. It was noted there that, although the absence of third-parties in negotiation sometimes reduces processing costs, when parties are numerous or highly intransigent, it may have the opposite effect. Thus, limitations on participation of third-parties (or party advocates) will not always have the effect of reducing processing costs, despite misconceptions to the contrary.

251. To give one further illustration here, consider the suggestion made (and widely accepted) that cases involving minor claims should be dealt with by "informal" procedures and institutions. *See* Burger, *supra* note 56, at 93-94; Yngvesson & Hennessey, *supra* note 186, at 221-27, 262-65. What is meant here by "informality," what process meets this description, and why is it seen as desirable? If reduction of superficial formalities is meant, for the sake of expeditiousness and hence processing cost reduction, this might make sense in cases with low stakes. However, reduced formalities may disappoint expectations in many cases, and hence raise disaffection costs. Moreover, reduced formality may result in reduced informational accuracy, and thus raise activity costs. One argument against small claims is that the outcomes often fail to achieve allocational or distributional aims. *See* Yngvesson & Hennessey, *supra* note 186, at 228-56; Cavanagh & Sarat, *supra* note 3, at 388-92; Nader & Singer, *supra* note 235, at 283-84; Rubenstein, *supra* note 14, at 79-81. See also Macaulay, *supra* note 133, at 157-58, for a discussion of a similar problem in mediation settlements achieved outside of small claims courts. On the other hand, if "informality" is taken to mean a more relaxed flow of procedure, to make parties more comfortable and decrease enmity and disaffection costs, and if mediation involves this type of thing, then it might appear sensible to append mediation to small claims procedures. In fact, this is a frequently proposed and increasingly accepted practice. *See, e.g.*, Yngvesson & Hennessey, *supra* note 186, at 262-65; Sarat, *supra* note 21, at 353-55. However, mediation involves not only procedural flexibility, but also interparty translation and consensuality of outcome (both to reduce enmity costs). Therefore routinely joining mediation to small claims procedures poses two problems. First, if the mediation process employed is authentic, i.e., really does involve translation and consensuality factors, it may be a waste of time in many small claims cases with low potential for enmity costs. Instead it may increase disaffection, activity and disparity costs by involving undue time and energy in the parties' eyes and by failing to resolve conflicting claims on resource allocation or distributional bases. On the other hand, if the "mediation" process used is really no more than a free-wheeling forced settlement or arbitration process designed to eliminate the need for external formalities and rule orientation, and thus expedite case processing and reduce court congestion, then

When one steps back for a moment to reflect on this pattern of process confusion, it is quite astonishing. Despite years of debate about the civil justice system and its constituent processes, there is widespread confusion about the actual nature, and the capacities and effects, of the most familiar processes in the system. Is it any wonder that sound answers to process choice questions have been hard to find? Some reasons for this pattern of process confusion can be suggested, which can in turn provide an understanding of how the pattern can be broken and the confusion clarifled.

On one level, the pattern of process confusion can be attributed to an unduly casual attitude toward process terminology and definition. In discussions of process alternatives, it is often thought adequate to rattle off a list of process names—adjudication, arbitration, mediation, negotiation—without too much concern for specifying what each process entails, what the significant differentiating factors are, and why and when they will be important. It seems to be assumed that many of these terms, and their differences, are matters of common knowledge. Yet the terms are not always understood clearly even by those using them. This casualness involves not only failure to understand clearly the features of a given process, but often the failure to distinguish (accurately or otherwise) between two different processes. Thus, for example, despite the very significant differences of the processes involved, "arbitration" and "mediation" are often used as synonyms. Nor is this lack of clarity attributable to any lack of information, empirical or theoretical, about process characteristics and distinctions. Indeed, there is a rich literature on the subject, ranging from practitioner analysis, to anthropological and sociological observations, to jurisprudential treatments.[252] The problem is not the lack of information, but rather the

enmity and disorder costs (as well as activity and disparity costs) may continue to be high in a subset of small claims cases despite so-called mediation which in fact fails to involve process factors likely to reduce such costs. *See* Riskin, *supra* note 50, at 41-42, 51; Sarat, *supra* note 21, at 354. Finally, as just implied, "informality" may mean doing away with certain protective process features in order to simplify dispute handling and reduce processing and perhaps disaffection costs. This is involved in small claims procedures which, for example, often bar the use of professional advocates. *See* D. GOULD, NATIONAL INSTITUTE FOR CONSUMER JUSTICE: STAFF STUDIES ON SMALL CLAIMS COURTS 179-204 (1972). Critics point out, and rightly so, that simply because the stakes are small does not mean that fundamental rights may not be involved, so that informality of this kind in small claims procedures may involve an increase of oppression costs in some subset of cases. *See* Rubenstein, *supra* note 14, at 79-81. Thus, misconceptions about process, e.g., small claims procedures and mediation, and process factors, such as informality, lead not towards but away from precise and clear analysis, and result in process choices that may well fail to further the complex of goals involved.

252. *See, e.g.*, Max, *supra* note 60, MacLean, *supra* note 60, Norton, *supra* note 60, Nicolau and Cormick, *supra* note 172 (practitioner); Gulliver, *supra* note 122, Nader & Todd,

willingness of many to ignore it in favor of a superficial and casual approach to terminology and concepts that ultimately creates confusion about what different process options entail.

On a second level, the pattern of process confusion can be attributed to the essentially descriptive character of much process commentary. That is, even where there is a sensitivity to process distinctions, there is a tendency to focus on the wrong distinctions—wrong in the sense that they are irrelevant to the issue of process choice. The reason is that the method of identifying distinctions is random and descriptive, rather than focused by an analytically significant reference point such as goals. It consists of observing different processes and noting obvious differences (and similarities) between them. Thus, it is observed that: adjudication, arbitration and mediation all involve neutral third-party participation, whereas negotiation does not; adjudication is highly formal, whereas arbitration, mediation and negotiation are not; arbitration, mediation and negotiation are voluntary, whereas adjudication is not. These are all valid process distinctions; the question is, do they matter to questions of process choice? The answer may well be that they do not, or do so only indirectly, through reflecting other, more significant process factors.[253] Because the distinctions are derived from haphazard observation, rather than logical, goal-based analysis, their relevance to process choice is by no means certain—indeed, it is fortuitous. Nevertheless, these distinctions are easier to find and make, and once made, they pose two dangers. First, they are perceived as effectively defining the processes in question—i.e., they are seen as the identifying features of a process, so that other, often more important, features are obscured or ignored and the process is simply not clearly understood. Thus, to describe mediation as a voluntary, consensual, informal, third-party process, says nothing of one of its most important features—the interparty translation factor. To describe arbitration as a voluntary, informal, binding third-party decisional process, says nothing of some of its most important features—expeditiousness and third-party substantive expertise. Second, the misconception is created that the descriptively-derived features actually produce the cost-reduction effects associated with the given process, whereas those effects may in fact rest upon another feature

Introduction: The Disputing Process, in THE DISPUTING PROCESS—LAW IN TEN SOCIETIES 1 (L. Nader & H. Todd ed. 1978) (anthropological); Sarat, *supra* note 21, Macaulay, *supra* note 133, Galanter, *Why the Haves*, *supra* note 12 (sociological); Fuller, *supra* note 17, Fuller, *supra* note 74, Fuller *supra* note 26; Cavanagh & Sarat, *supra* note 3, Eisenberg, *supra* note 21 (jurisprudential).

253. *See supra* note 251; *see also supra* notes 212-18 and accompanying text.

obscured by the descriptive focus. For example, some commentators focus on "informality" as a process factor observable in various processes, including mediation.[254] Having labelled this as a primary feature of the process, they may erroneously assume that it is "informality" that reduces enmity costs in mediation, whereas in fact it is interparty translation. The result is to encourage the use of informal procedures to reduce enmity costs, although informality without interparty translation may not reduce (and may even increase) such costs.

In sum, it is an intellectual casualness—even laziness—on two levels that underlies the pattern of process confusion and its negative consequences. This pattern may therefore be even more reprehensible than that of process bias. After all, perhaps the legal professionals who dominate the civil justice reform debate can be forgiven their professional self-interest and mindset and their belief in a highly respected ideology of individual rights—suggested earlier as reasons for that pattern. But is it acceptable that professional legal thinkers—self-proclaimed experts in rigorous analysis and applied logic—should forget about such tools and instead rely on casual labelling and superficial drawing of distinctions in evaluating the processes which comprise the civil justice system itself?

E. The Potential for Process Clarity and Creativity

The patterns of process bias and confusion described in Section D are, in large measure, the result of allowing the debate on dispute handling alternatives and civil justice reform to proceed without any rigorous analytical framework grounded in a coherent conceptual theory of the system. Without such a framework, the debate has often been conducted with intellectual casualness and has as a result been clouded by misconception and unclarity. Such confusion has, in turn, allowed free reign to biases arising from the self-interest, preconceptions and ideology of the participants. If the problem is stated in this way, the remedy appears clear, or at least the first step thereof: subject the debate and discussion to the clarifying discipline of such a theoretically coherent analytical framework. And indeed, this is the purpose of the approach developed here.

This Article's theory of the civil justice system as a pluralistic set of process alternatives utilized to meet a complex of interrelated goals, provides a base from which process definition and evaluation

254. *See, e.g.*, Nader & Singer, *supra* note 235, at 311; Sarat, *supra* note 21, at 353-55; Cavanagh & Sarat, *supra* note 3, at 400.

can proceed analytically. The method of process definition and distinction is not random observation and description. It is rather logical analysis to identify the process factors relevant to each of a full range of cost-reduction goals. Existing processes can then be analyzed as to which goal-related process factors they possess, and can be utilized accordingly. In this way, the types of misconceptions underlying the process confusion of previous analysis are automatically clarified. Process definitions and distinctions are sharpened by forcing attention to all goal-related process characteristics. Irrelevant, descriptively-derived process factors drop by the wayside or are clarified in terms of other, goal-related factors. And the impact of specific process factors is also automatically clarified. The results of this clarification, in terms of new insights into process choice questions, speak for themselves in Sections A-C above and need not be repeated here. However, it should be plain that these insights help to dispel or at least identify many of the misconceptions that form part of the pattern of process confusion, and thus facilitate reconsideration, if not rejection, of patterns of process bias.

More generally, the approach here suggests and facilitates redefinition of dispute handling processes across the board. Thus, with adjudication, or arbitration, or any familiar process, the process in question can be understood in terms of a cluster of specific process characteristics linked to one or more civil justice goals. Put differently, the process is defined and identified functionally in terms of its capacity for effectuating these goals. A more precise and useful language of process definition is the result.[255]

As an important corollary, the goal-oriented, functional approach to process definition suggests that the familiar dispute handling processes are in fact not fundamental units, but rather arrangements of more basic components—the various goal-related process factors. The fact that these processes have taken on a relatively stable and recognizable form, and have maintained this form over time and in a variety of uses, certainly suggests that the arrangement of components embodied in these processes must further some important goals. Nevertheless, the "component view" of process suggests that these arrangements are neither sacrosanct nor unalterable themselves, nor exhaustive of the potential range of processes that could be constructed from basic process components.

255. This is not to say that all elements of previous, descriptive process definitions become obsolete or irrelevant, for certainly many elements of such definitions have analytical as well as descriptive validity. However, a goal oriented definitional language will weed out irrelevant factors and ensure inclusion of relevant, but nonobvious factors, and will lead to more accurate and careful conceptions of what different processes entail and accomplish.

Thus, this Article's component view of process builds upon process clarity to provide a sound theoretical basis for reforming existing processes and developing new ones through what might be called "process creativity."

Consider some of the possibilities for such creativity. First, recall from Section C above the discussion of the role of participation sanctions as a process factor in reducing activity/disparity/oppression costs, and the questions thus raised about the relative capacity of mediation or other "voluntary" processes to reduce such costs. It is generally assumed that compulsory participation is necessarily a feature of adjudication, and necessarily not a feature of these other processes. Apart from whether or not this is true in practice[256] it misses a significant point. A process can be adjudicative in many respects without being compulsory. Thus arbitration could be seen as a kind of voluntary adjudication[257] —i.e., it is a process with some, but not all, of the same process components as adjudication, and in particular without the additional component of compulsory participation. Of course, arbitration can also be made compulsory, in which case it will resemble adjudication even more closely. Going further along these lines, it is just as possible to conceive of other processes—mediation, for example—being modified to incorporate the component factor of compulsory participation. To the extent that the lack of participation sanctions prevents mediation from effectuating activity/disparity/oppression cost reduction, this step could open the way to such cost reduction through mediation, while continuing to allow for the usual effects of mediation on enmity and processing cost reduction, for example.[258] Whether and in what

256. *See supra* notes 189-92 and accompanying text.

257. Indeed, this is the conception behind the view, taken by some, of arbitration as "private adjudication." *See* Landes & Posner, *supra* note 9. Although a different view of the process was suggested earlier in this article, *see supra* notes 203-09 and accompanying text, some commentators do argue that arbitration, like adjudication, is characterized by rule oriented process factors. *See* Mentschikoff, *supra* note 136; Fuller, *supra* note 74, at 22, 25-26 & n.21.

258. The same kind of process factor modification could be directed to problems of compliance sanctions. Thus, if arbitration is more effective in inducing compliance because arbitration awards are usually enforceable by expedited procedures in court, similar status could be accorded to written settlements accomplished through mediation or even certain kinds of negotiation, while other aspects of those processes would remain the same. In fact, such modifications have been tried both for participation and compliance sanctions in mediation. For example, one program involves a semi-mandatory mediation process, in which settlements are routinely incorporated in court judgments. *See* McEwen & Maiman, *supra* note 134. *See also* Pearson, *supra* note 115, at 426-29 (describing mediation with compulsory participation and noting that such compulsion does not operate as an obstacle to the mediation process itself, once begun); Freedberg, *supra* note 117 (describing mandatory mediation of custody issues in divorce cases).

cases such process modification would be justified will depend upon the combination of cost potentials present in different cases.[259] The point is that the analysis begins to suggest a principled methodology not only for choosing among existing processes, but for going further and "tailoring" processes to the different cost potentials presented by different types of cases.

This kind of creative process tailoring has been introduced in a variety of contexts already, whether by linking existing processes into "stepped processes" or combining elements from different processes to form composite or new ones.[260] What does the analysis

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259. Thus, where activity/disparity/oppression cost potentials are low, little might be gained from mandatory participation as an additional factor in mediation.

260. Thus, courts handling divorce and custody matters commonly use mediation (sometimes as a mandatory process) as a process step precedent to adjudication. *See* Freedberg, *supra* note 117. A similar combination has been applied in small claims cases in some jurisdictions. *See* McEwen & Maiman, *supra* note 134; McGillis, *supra* note 21, at 254-55. Linked processes are also employed in labor disputes, especially in the public sector, where use of a kind of "process ladder" beginning with negotiation and proceeding through mediation to fact-finding, and sometimes to arbitration is not uncommon. *See* Phillips, *Impasse Resolution in Public Sector Collective Bargaining: The Need to Reevaluate Options*, 28 DRAKE L. REV. 547 (1979); H. TANIMOTO, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING (1981); *Alternative Impasse Procedures in the Public Sector*, MIDWEST MONITOR, Nov.-Dec. 1980 at 1. The use of mediation and arbitration specifically, in sequence, called med-arb, has long been used by some in the collective bargaining field. *See* Fuller, *supra* note 74, at 23-27; *Alternative Impasse Procedures in the Public Sector*, *supra*, at 2-3. Interestingly, this process combination is widely used in new alternative dispute resolution programs: for family and divorce disputes, see, e.g., Herrman, McKenry & Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17 (1979); for consumer disputes, see, e.g., Brenner, *supra* note 115; McGillis, *supra* note 21, at 257; for neighborhood disputes, see, e.g., Stulberg, *supra* note 26; D. MCGILLIS & J. MULLEN, *supra* note 115, at 65-69; and for small claims, see Sarat, *supra* note 21. Still another example might be the use of "special masters" in courts, as a way of linking separate fact finding and adjudication processes. *See, e.g.*, Berger, *Away from the Courthouse and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). For examples of the composite approach to process creativity, recall mention above of the use of compulsory arbitration, adding the component of participation sanctions to the otherwise voluntary arbitration process. *See supra* note 205. Another example is the addition to the adjudication process of a more active role for the judge outside of decisionmaking, both in controlling or managing the process and in playing some role in interparty translation, both of which are process components more often associated with mediation. This approach is identifiable in the approach of Western European judicial procedure, variously described as "inquisitorial", "colloquial" or "conferential." *See* Homburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFFALO L. REV. 9 (1970); Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409 (1960); Kaplan, Von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443 (1958). However, it is also noticeable in the practice of some federal courts in the U.S., described by one commentator as a "managerial" judicial procedure. *See* Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). *See also* Galanter, Palen & Thomas, *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699 (1979); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). A final example of a composite process is the "mini-trial", wherein a trial-like adversary proceeding is conducted before the decisionmaking authorities of the disputing parties themselves, joined

here have to add? First, the analytical approach here provides a good tool for the use of those already interested, by force of necessity, in process creativity and design. The factor analysis developed herein can help in assuring that efforts in process creativity are effective. Thus, where it is desired to "tailor" a process for a given class of cases, application of the analysis developed here can be useful in matching the chosen process components to the cost-reduction goal potentials of the class of cases involved, so that the tailored process indeed "fits."

More important, the analysis here, by developing the idea of defining goal-related process characteristics, provides a theoretical justification for process creativity. It shows that creative combination of process elements is not only a necessary expedient, but a sound and logical policy for the optimal achievement of civil justice goals. This is important, since process creativity is not always accepted as legitimate, precisely because it introduces variation from and mixture of the "pure" versions of the familiar and accepted dispute handling processes. Some view these pure processes as best left to function unaltered and independent of one another, and see in process creativity the potential danger of weakening rather than strengthening the achievements of the pure processes. For instance, in the labor area, it has been argued that "med-arb"—a "linked process" joining an initial mediation phase to and preceding arbitration[261] —weakens both of its components by making the mediator too powerful for the parties to feel at ease with, and making the arbitrator assume a role in which his neutrality may be compromised.[262] Similarly, in the case of an active or "managerial" judicial role as a process modification on adjudication,[263] the claim is that not only will judicial neutrality be compromised, but procedural protections important to parties' fundamental rights may be threatened, by managerial or translation activity by judges.[264] Fearful of such negative results, critics are perhaps rightfully suspicious of process creativity, especially where it appears to be a tool of convenience or ex-

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by a neutral advisor/moderator who may be asked after the presentation for his opinion on how a court would decide the case. The executives themselves then "decide the case" in what is essentially a negotiated settlement based on this presentation, thus joining in a very creative way elements from processes as superficially disparate as negotiation and adjudication. *See* Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A. L. REV. 493 (1978); Green, *Growth of the Minitrial*, 9 LITIGATION 12, Fall 1982.

261. *See supra* note 260.

262. *See* Fuller, *supra* note 74, at 23-27, 39-40; Fuller, *supra* note 26, at 406-07; Sander, *supra* note 3, at 121-22; Sarat, *supra* note 21, at 354.

263. *See supra* note 260.

264. *See* Resnik, *supra* note 260, at 424-31.

pediency. The present approach can help to legitimize and lend support to sound experiments in process creativity by demonstrating that it rests on a solid theoretical basis rooted in goal furtherance, and by using goal-oriented analysis to show how the hybrid or composite processes further specific goals and do not unduly threaten others in given classes of cases. Furthermore, to the extent that antipathy to process creativity rests not on any policy or goal concerns, but essentially on a simple loyalty to the traditional processes per se, the goal-based analytical approach stresses that particular processes are not values per se, but rather tools to be used in furthering different goals. Thus, when such processes fail to further goals, creative development of process modifications, not maintenance of traditional processes at all costs, is the sensible approach.

Thus, both in establishing process clarity and supporting process creativity, the theoretically-based and consistently goal-related analytical approach developed and tested in this Article is the kind of approach needed to overcome the patterns of process bias and confusion that have for too long clouded the debate on dispute handling alternatives and civil justice reform.

IV. A Role For Both Private and Public Decisionmakers

The thrust of the approach developed here is that the conscious exercise of process choice according to goal-derived jurisdictional principles is a theoretically sound and practical strategy for furthering the goals of civil justice. At this juncture, the time has come to ask, by whom is this choice to be exercised? In particular, can individual decisionmaking by private disputants be relied upon for such conscious and principled process choice? Or is some level of public intervention and decisionmaking likely to be required? This has been a major point on which commentators have disagreed.[265]

In fact, both private and public decisionmaking must play a part in process choice, for reasons that are rooted in economic theories of market processes and their limitations.[266] Some have, of

265. Some have explicitly or implicitly taken the position that private decisionmaking alone is not only adequate, but an optimal means of making process choice decisions. *See* Lea & Walker, *supra* note 16, at 376-78; Posner, *supra* note 8, at 417-29; Gould, *The Economics of Legal Conflicts*, 2 J. Legal Stud. 279 (1973); Trubek, *supra* note 5, at 486; Sarat, *supra* note 21; Hurst, *supra* note 1, at 439-41. *See also* Miller & Sarat, *supra* note 26; Felstiner, Abel & Sarat, *supra* note 26; Merry, *supra* note 3. Others assume the totally contrary position that only public decisionmaking can assure optimal process choice. *See, e.g.*, Sander, *supra* note 3, at 130-31.

266. Nevertheless, it should be emphasized that the approach developed here is a useful tool even in purely private decisionmaking on process choice. Consider a large producer

course, espoused leaving process choices to individual dispute handling consumers, who would spend their dollars in a "dispute handling market" made up of different process alternatives.[267] If this market view is adopted, and if process choice information tools such as the model here are useful to consumers in this market, then part of the market will be a demand for the information itself. In short, both information tools and process alternatives can be left to private decision in a theoretical dispute handling market. This is an appealing, but disingenuous and ultimately misleading conception. The reasons for this are essentially threefold.

The first reason stems from the nature of the private decision process. The dispute handling consumer seeks the process choice that will minimize all types of dispute handling costs. But whose costs? The answer is clear—his own. That is, his criteria for an optimal process is one that minimizes the sum of any costs that he himself might have to bear—and it is therefore about these costs alone that he will be interested in having information. Yet, the costs associated with different civil justice goals do not always fall solely on the parties to the dispute themselves. Activity costs resulting from a decision not to seek adjudication of a dispute (and thereby generate and communicate a rule inducing proper resource allocation through accident avoidance measures) will almost certainly fall on a stranger to the initial case when he is injured in a future avoidable accident. Enmity costs resulting from a decision not to seek mediation of a dispute (and thereby accomplish mutual understanding and acknowledgement between the parties) may well fall at least partly on strangers to the initial case when they enter into dealings with the

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of consumer goods. Such a party inevitably becomes involved in a variety of disputes, with a variety of other parties: disputes with individual consumers over product quality and performance; disputes with other businesses over materials, production, distribution and other arrangements; disputes with concerned land owners over facility siting and development; disputes with agencies over compliance with regulations of various kinds. In each case, the producer is faced with the decision as to which of several dispute handling processes to use (or seek to use, depending upon the adverse party's position). How does he make that decision? At least theoretically, he is likely to do so based on the expected cost consequences, including all types of costs, of different process choices, taking as his choice the least-overall-cost alternative. Therefore, in his decision process, he needs as much information as possible on alternative process costs. And this is precisely what the model here offers him—information on process costs in different contexts, or at least a model for generating predictions about such costs. Indeed, there is a growing recognition in the private sector of the usefulness of such process decision tools, to the extent that a market is developing for "process counselling" to assist corporate decisionmakers on questions of process choice. *See* Pollack, *The Alternate Route*, AM. LAW., Sept. 1983, at 20, col. 1.

267. *See supra* note 265 and accompanying text. This notion was raised much earlier in this Article, in comments discussing the concept of the civil justice system as a market for dispute handling services of all kinds. *See supra* note 25.

original parties and are faced with suspicion and hostility due to class association with the adverse party. Disorder costs resulting from a decision not to seek some form of prompt and final handling of a dispute may obviously fall in part on strangers to the initial case who happen to be in the zone of danger when the dispute escalates into violence. In similar fashion, all of the costs of dispute handling may fall in significant part on parties external to the dispute itself and hence to the process choice decisions of the original parties to the dispute. In the terms of economic theory, these are external or social costs of dispute handling, and it is in the nature of real world markets—whether for dispute handling or for transportation—that private decisionmaking does not and cannot take cognizance of these costs absent public intervention.[268] The result of purely private decisionmaking on process choice, then, will frequently be process choice decisions that, while they minimize private costs, leave total (private and social or external) costs at unnecessarily high levels.[269] The alternative in terms of public involvement in process

268. *See* H. KOPLIN, MICROECONOMIC ANALYSIS: WELFARE AND EFFICIENCY IN PRIVATE AND PUBLIC SECTORS 249-55 (1971); E. MORGAN, THE ECONOMICS OF PUBLIC POLICY 60-70 (1972); R. MILLWARD, PUBLIC EXPENDITURE ECONOMICS: AN INTRODUCTORY APPLICATION OF WELFARE ECONOMICS 130-140 (1971). *See generally* Bush, *supra* note 25, at 206-13. Nor should it be at all surprising that dispute handling involves significant external or social costs, as has indeed been argued at length by this author elsewhere. *See* Bush, *supra* note 25, at 213-220. After all, the starting point for the analysis here was the observation that the civil justice or dispute handling system is called upon to further different social goals. It must be expected that failure to accomplish social goals will generate social, i.e., nonprivate costs, costs that fall upon individuals who did not act individually to cause them and cannot act individually to avoid them.

269. Again in economic terms, in the presence of significant external costs, private market processes of individual decision are unlikely (if not indeed unable) to lead to a social optimum, which is the very goal of the market mechanism in the first place. *See id.* at 206-13. Thus exclusive reliance on the private market in the area of process choice makes little sense, by the terms of market theory itself. In addition, as is implicit in the above discussion, even if private decisionmakers are interested in cost information relative to process choice, their interest will be limited to information on private costs, so that private demand is unlikely to generate information tools relevant to social costs.

It is interesting to note that the strongest proponents of the private market approach to process choice information and decision are, as might be expected, the law and economics writers such as Posner. *See* Posner, *supra* note 8, at 417-29; Gould, *supra* note 265; Lea & Walker, *supra* note 16. They essentially ignore the external cost phenomenon, or acknowledge it by suggesting that it is the justification for public support of the court system, *see, e.g.*, Landes and Posner, *supra* note 9, at 238-42, thus missing the point that every other process in the system also has external, social effects. This lack of attention by such writers to the external cost phenomenon in dispute handling is ironic. Posner for example, relies heavily on the same or related concepts of market failure to justify the common law judicial system as a substitute for the market social choice process in many areas. Thus in analyzing tort law, Posner's justification for the public intervention represented by the common law liability system is that market processes fail in accident situations due to the presence of high transaction costs. *See* Posner, *supra* note 30, at 36-38; R. POSNER, *supra* note 31, at 34-39, 44-52. In fact,

choice information tools and decisions will be discussed below. First, however, it is important to note a few more reasons why private decisionmaking alone is unlikely to be adequate.

Even in the many cases where most or all of the costs of dispute handling are private costs to the parties themselves, purely private-market process decisions will often be inadequate. Even where costs are private in nature, they may not always be considered or considered accurately by private decisionmakers. Like potential victims who systematically underestimate their likelihood of accident involvement and hence under-insure,[270] disputants probably systematically undervalue various dispute handling costs because they are difficult to estimate, extend far into the future, and may be thought to be avoidable even if in reality they are not. The result is a tendency to underconsume the processes that will reduce such costs. Thus, spouses at the time of divorce may be too involved to recognize, accurately estimate, or accept the real possibility of enmity costs, even assuming these costs will fall primarily on the parties themselves in future dealings over children of the marriage. As a result, they may see little value in choosing a mediation process to avoid or reduce such costs, especially when to do so would be to incur immediately processing costs (including time and emotional costs of participation in mediation) that might appear quite considerable.[271]

Even assuming that private consumers always could and did evaluate all private costs accurately, and that private costs alone were involved, a third problem casts doubt upon the viability of purely private decisionmaking on process choice. Namely, the "market" context in which such choice is likely to be exercised has itself been distorted by prior public interventions. That is, if the

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the high-transaction-cost accident situation can be seen as an example of external costs, *see* G. CALABRESI, *supra* note 41, at 135-50, or conversely, the external cost problem can be seen as one of high transaction costs, *see* Bush, *supra* note 25, at 211-12. Either way, the problem is essentially the inability of market processes to function effectively in such circumstances, thus making it worthwhile to consider using other social choice mechanisms, usually involving collective or public action. Posner and others see this clearly enough in analyzing the common law itself, but seem blind to the same point when analyzing the dispute handling system as a whole.

270. *See* G. CALABRESI, *supra* note 41, at 55-58.

271. In economic terms, the problem can be described as one of imperfect information, or prohibitively high information costs, a market imperfection which can lead, as with external costs, to a failure of private markets to function effectively. This problem cannot be solved simply by providing this information to private consumers through information tools like the model developed here. Private actors are frequently incapable of appreciating the significance of such information, and thus unlikely to seriously consider it (much less to pay for it), because of their lack of emotional distance from the situation. *See id.*

market model applies, the private consumer of dispute handling is supposed to be exercising his choice among different processes that compete for his business on an equal footing. The best, or least-cost, process then gets his business "honestly," reflecting accurately the fact that it represents the best, least-cost, case-type/process match in the circumstances. However, in the real dispute handling market, private choice is inevitably influenced by a variety of public interventions (e.g., subsidies, penalties, regulation), generally favoring adjudicative processes.[272]

Thus, private process choices alone cannot be relied upon to achieve optimal results, because frequently significant external or social costs are ignored in private decisions, certain private costs themselves are frequently unrecognized or undervalued in private decisions, and private decisions themselves are distorted by prior public interventions in the marketplace. So, if the goals of civil justice are to be furthered by conscious and principled process choice, public decisionmaking must play a role both in the making of such choices and in the development and use of relevant information and decision tools, such as the model developed in this Article. This kind of public role—indeed public leadership—in civil justice reform would not be an unwarranted intrusion on private decisionmaking; it would and must be the legitimate acceptance of a clear responsibility for matters of societal concern, matters that will otherwise be ignored, or resolved by and for the benefit of special and limited interests.

To say that public authorities must play a role in questions of process choice, however, does not say what that role should be, how it should be exercised, nor that public involvement wholly excludes a role for private decisionmaking. While the question of the nature of

272. As noted above, a heavy public subsidy flows to the adjudication process, in effect reducing the privately borne share of the administrative costs of the process and thus giving it a relative cost advantage over other processes. *See* Landes & Posner, *supra* note 9, at 240-41; *Discussion by Seminar Participants, supra* note 9, at 351 (comments of N. Komesar); Sander, *supra* note 3, at 126. Furthermore, legal practitioners, forming a publicly created artificial monopoly protected by harsh anticompetitive rules, have naturally taken advantage of their protected position to encourage consumers to believe that legal relief through (or under the threat of) adjudication is by far the best process for all types of disputes, thus creating a distorted view of the relative cost reduction capacities of adjudication and related processes. Finally, these same protective rules have been used consistently to create barriers to providers of potentially competitive processes, through prosecutions for unauthorized practice of law, selective enforcement of legal ethics provisions, and so forth. *See* Abel, *Socializing the Legal Profession, supra* note 12, at 11; Riskin, *supra* note 50, at 42-49; Winks, *supra* note 117, at 625-33; Cavanagh and Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L. J. 104, 106-16 (1976); Rhode, *Policing Lay Practice*, 3 CAL. LAW., Aug. 1983, at 17.

the public role, and the relationship between public and private decisionmaking on process choice, is a subject requiring separate treatment at length, some suggestions may be made here. First, perhaps the strongest case for public action is in the research, development, and application of information and decision tools like the model sketched in this Article.[273] Second, beyond initiating serious research and development of process choice information tools, a further, relatively non-interventionist public involvement would be to commence deregulation of the dispute handling market to the greatest degree possible, in order to allow private decisionmaking to operate in a less constricted and distorted context.[274]

However, even perfect information and complete deregulation of the market for dispute handling would not meet the need for public involvement in process choice, precisely because, as explained above, even in a purely competitive and undistorted market, private process choices are unlikely to be socially optimal due to the significance of noncognizable private and, especially, social or external costs. Thus, suppose in an undistorted market, a disputant would choose arbitration because it is for him the best, least-private-cost process; yet his case involves major issues of principle that suggest a high potential for activity costs such that adjudication appears the best, least-total (social and private) -cost process. If the goal is optimal process choice, then some public action is necessary to compel or induce the disputant to choose adjudication. In short, public action is necessary to "distort" the private market decision, because the private decision itself is distorted by virtue of its failure to recognize social costs. The public action is thus really not distorting, but "corrective," like prescription lenses on a pair of myopic eyes. The lenses

273. The kind of investment necessary in developing such tools, is unlikely to be attractive to any private funding source or entrepreneur, especially because much of the information pertains to social costs not of specific concern (and hence not marketable) to individual dispute handling consumers. Unless public support is directed here, then the information tools which are the very foundation of the process choice approach would continue to be unavailable. Moreover, the necessarily broad scale of such an enterprise, may be best suited to a public undertaking, especially because many potential sources of information are already under public administration. Finally, an enterprise engaged in gathering information of social significance and suggesting how to apply it to process choice decisions probably ought to be publicly accountable for its work.

274. For example, there could be more sensitive policies on enforcement of legal practice regulations, limiting prosecution to cases involving obvious violations instead of using prosecution indiscriminately (or purposely) to discourage practitioners of alternative processes such as mediation. Deregulation at the local or state level obviously raises issues concerning what level of public involvement, i.e., federal, state or local, is generally appropriate in matters of process choice. See infra note 279 for discussion of this issue.

distort what the eyes see, which is itself already distorted, back into a clear picture.[275]

Perhaps the key question is how this "correctively distorting" public involvement should be conducted. Should there be a super-agency which simply classifies each dispute and channels it to the proper process, regardless of party choice, i.e., a total public take-over of the process choice decision? Or is there an alternative in which individual choice continues to play a role in a publicly-corrected decision context? While some commentators seem to have adopted the former view as their scenario,[276] it seems that the latter—as described below—would be preferable, for a few reasons.

Suppose that, through more refined versions of models like the one roughly developed here, information on predicted costs (private and social) of using various processes could be generated for any given dispute, based on the case-type characteristics of the dispute. Suppose also that the parties involved are aware of the private costs of various processes, including the market prices charged for the direct services involved in such processes. Now, assuming that the information from the model indicates different levels of expected social costs associated with the use of different processes, can the parties be informed of these costs and led to give them appropriate weight in their private process choice decisions? The answer is certainly yes, and by means that are commonplace in the kind of mixed economy that exists in this and most present-day democratic societies. These means include taxes, penalties, subsidies, rebates and other forms of indirect inducements or penalties attached to the exercise of otherwise free and private choices. Thus, assuming that, in a certain type of case, the choice of adjudication would involve very significant social costs (including, e.g., enmity, disorder and disaffection costs), then an appropriately scheduled surcharge could be placed on the price of the adjudication process (either on court fees, or lawyers' fees, etc.), the effect of which would be to ensure that the

275. Market loyalists and libertarians will cry foul at this rejection of individual choice. Yet individual choice in market theory is not purely an end in itself, but a means to the end of optimal social welfare, which it is assumed under pure market conditions will be the result of aggregating individual choices. Where, as here, market imperfections prevent individual choice from functioning as a good tool for social choice, its retention must rest on the assumption that preservation of individual choice outweighs social welfare. Many would disagree with this. Moreover, the imperfect functioning of the market can itself be seen as a deprivation of individual choice. That is, in a case of market failure, the question is not whether or not to abridge individual choice, but whether its abridgement, which is inevitable one way or another, is greater at the hands of the imperfect market or the public intervention. To be even more specific, the question is whether the marginal abridgement of public intervention over imperfect market, if any, outweighs the social welfare gains to be had by public intervention.

276. *See* Sander, *supra* note 3, at 130-31; Johnson, *supra* note 16, at 203-10.

disputants' choice of adjudication—while still open—would take account of these social costs. The same effect can be achieved by providing subsidies or rebates to reduce the market price (or even by charging a negative price, i.e., paying a premium) for utilizing a process which it is predicted will involve a very low level of social costs compared to other processes, but whose private costs and market price may be relatively high.

Thus, the public role in this approach would be to apply information tools to generate information on the relative private and social costs of different processes, and then to establish and administer a system of direct or indirect incentives and penalties that transforms this information into part of the private decision on process choice. In the final analysis, however, it would be the individual disputant who makes the process choice decision. Therefore, if the individual's preference for a given process is such that the process appears optimal to him despite corrective incentives or penalties reflecting social costs for that and other processes, the individual is free to, and probably will, choose that privately optimal process. All of this represents no radical approach. The current system of public taxation, for example, is deeply involved in and committed to such an approach. By such indirect means, prices are lowered for such activities as education, investment, homeowning, support of charity, and raised for such activities as driving, smoking, renting, and so on. All these activities ultimately remain a matter of individual and private choice. However, public pressure is applied (positively or negatively) to see that this private choice gives due weight to social and public concerns.[277] A similar approach makes sense in the area of dispute handling where, as discussed above, social goals and costs are so frequently and significantly at issue.[278]

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277. This pressure may take different forms, from direct subsidies or penalties, to indirect incentives or disincentives. *See* Bush, *supra* note 25, at 236-40.

278. There is sound support in economic theory, as applied to law, for this linked public and private decisionmaking approach as opposed to a pure public administrative approach. Under the latter approach, public "screening agencies" would simply mandate process choices in all cases after having performed cost projections. Of course, one reason for preferring the incentive approach is that it preserves a significant degree of individual choice. Another equally important, if less obvious, reason is as follows. Because public or collective decisionmaking operates based on projections and estimates rather than actual knowledge of economic impact on individuals, it inherently has the potential for error. Indeed, this is precisely why economic theory prefers the market as a decision tool. The market obviates such errors, where it functions perfectly: each actor gets what he pays for, which is presumably what he wants; and in the aggregate, society thus gets exactly what it wants. However, when the market fails to function, collective choice is better than no choice, even if it does involve potential for error. Furthermore, this potential for collective error can be minimized by structuring the collective action in such a way that individuals are not foreclosed from overriding

Further discussion on the specifics of establishing and administering such a system of process choice decisionmaking is beyond the scope of this Article.[279] One final point that does deserve mention, however, concerns the costs of the kinds of public involvement described above. There is no question that public involvement in process choice will probably involve considerable research and administration costs. The development and empirical testing of models like the one sketched here, the actual utilization of such models to esti-

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the collective decision if they want to badly enough, i.e., if they are willing to pay the price (by incurring penalties or giving up incentives). For example, no matter how high the tax break for investment, an individual is free to ignore it and consume 100% of his disposable income. Indeed the operation of the common law liability system as a whole represents such a coupling of public and private decisionmaking, wherein a collective determination is made that conduct is unduly costly in social terms, and yet such conduct is not strictly prohibited, but is allowed if the actor is willing to pay the price in damages. Because the original collective decision is open to question, the individual override operates as a check on accuracy. *See* G. CALABRESI, *supra* note 41, at 68-73, 108-09, 114-19; Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's "Cost's"*, 80 YALE L.J. 647, 652-53 (1971); Calabresi & Melamed, *supra* note 30, at 1097 n.19, 1118-21; Calabresi, *supra* note 70, at 660-62, 669-71; R. POSNER, *supra* note 31, at 44-51. (It is again remarkable and ironic that writers like Posner fail to see the appropriateness of the public incentive/private decision approach in relation to process choice, when it forms the very basis for their interpretation of much of the common law liability system, as referred to here. Despite the obvious analogy, their assumption continues to be that process choice is appropriate for purely private decisionmaking.) If the collective decision were known to be 100% accurate, there would be no basis for second guessing, and outright absolute prohibition would be appropriate. However, in the process choice area, it is only too clear that, even with the best information tools, there will always be room for error in collective decisions about the best process choice in given circumstances. Therefore a system of mandatory process "channelling" by public agency decision is inappropriate not simply because it reduces individual choice but because it could well institutionalize erroneous collective decisions.

279. Some such specifics have been discussed by this author elsewhere. *See* Bush, *supra* note 25, at 231-40, 247-50. One question is the appropriate role for different levels of government in the public aspect of process choice. Without going into detail, it is worth suggesting that the informational aspect of public involvement, i.e., research and development of information models and data, and use of these to generate cost parameters and predictions in different cases, probably ought to be a federal undertaking. Both the conceptual tools and base data necessary represent a kind of capital investment that would be of common utility and applicability, so that it would be repetitive and unduly costly for separate jurisdictions to undertake this task. On the other hand, the administrative and implementation aspect of public involvement, i.e., analysis of process cost predictions and design and administration of appropriate process choice incentives and penalties, is a task that can appropriately be shared by different levels of government through a more decentralized approach. The effects of process choice may differ in different contexts so that incentives may also need to be different to be effective. On the other hand, despite differences in context, some process choice effects may be relatively uniform and widespread, so that some incentives can be established and applied more or less across the board. Such a configuration of public sharing of power is a common feature, for example, of the tax administration system. Many tax incentives and disincentives are quite local in their source and effect, others are more uniform as in federal tax provisions, and many appear at several different levels, reflecting the fact that the activities targeted by such provisions have effects from the local level on up, of various degrees of magnitude and intensity. *See id.* at 231-34.

mate process choice costs in countless different types of disputes, the design of appropriate incentive mechanisms and their administrative implementation will all require the expenditure of resources. However, this is no reason to abandon the enterprise. On the contrary, the whole purpose of rationalizing process choice in accordance with civil justice goals is ultimately to save society's resources, and if a relatively modest expenditure on decision tools can bring a much greater return in reduced costs of dispute handling due to improved process choice, then in simple terms it is a good investment. It is difficult to believe that it would turn out otherwise in actuality, in this area where there is presently so little considered and careful analysis, and where so much is left to chance, confusion and narrow self-interest, at the expense of social costs.[280]

Thus, the model and approach developed in this Article represent a feasible and valuable—indeed a vital—tool for using process choice as a means of furthering civil justice goals. And it is a tool for both private and public decisionmakers, both of whom have necessary and justifiable roles to play in a coherent system of decisionmaking on process choice.

V. Conclusions and Implications: The Fruits of a Goal-Oriented Analysis

The necessity to link specific process evaluation through rigorous analysis to the origin point of well-articulated goals, cannot be overemphasized. To the extent the present analysis has been able to delineate with new insight the distinctions among alternative dispute handling processes and their impacts in different types of cases, this is itself the result of having begun to articulate and study pro-

280. It is clear that there will be some areas where, even if it is predicted that relative social costs seem to warrant an incentive for a given process, the costs of structuring and administering that incentive would outweigh the gains to be had from the use of the process in question. However, as long as the model of costs developed here were expanded to include the costs of corrective public action themselves (either as an aspect of processing costs, or as a separate cost component) the model itself would reject the theoretically ideal process as unduly costly in practice. As to the costs of research and development of the information tools themselves, it is harder to make this same argument, because until some workable set of tools is in place, it cannot be known for sure that developing the tools was "worth it," given their costs and the savings likely to be had through their use. And yet, again, given the current situation in which social costs are considered so haphazardly, if not completely ignored, it is difficult to believe that the result of this investment in information and analysis would be anything other than a tremendous gain to society. This is especially true because the gains or savings from such an investment are continuing ones, captured each time disputes arise and process choice decisions are made, whereas the investment is relatively fixed and limited, even if it may require updating from time to time.

cess and case-type factors in relation to the goals of civil justice themselves. Thus, the difficult foundational analysis of the earlier parts of this Article was an indispensible prerequisite to, and the ultimate source of, the more concrete and topical analysis of the later parts.

Nevertheless, the question may still be asked, do the approach and the tools for the principled exercise of process choice really need to be so complex? Isn't there really a simpler—and cheaper—way of answering questions of process choice? Obviously, the answer implied here is that there is not. However, the question deserves an explanation of why this is so, and such an explanation also offers an opportunity for some final remarks that clarify what have emerged as the central themes of this analysis of dispute handling alternatives and the goals of civil justice.

A. Complexity or Simplicity?

The short explanation is that the complexity of the model of process choice developed here is a necessary response to the multidimensional nature of the civil justice system and its goals. Thus, if one views the civil justice system as having a multiplicity of social goals and sees the handling of a dispute as inevitably affecting these goals, one is inevitably led into complexities when confronting the issue of process choice.[281] In fact, it could be said that the approach

281. The point can be made more graphic by sketching very briefly the series of questions that led to the conceptual model developed in this Article. The specific question that recurs in much of the debate over civil justice reform is, what to do with a specific kind of dispute, i.e., by what process to handle it? The answer to this question ordinarily implies some type of reform to make the chosen process more "accessible" for disputants with this kind of case. Given this initial question then, concerning what is the best way to handle a specific type of dispute, one is immediately forced to recognize that the answer depends on what is to be accomplished. Thus there is a second question: what is to be accomplished, what is the goal (are the goals) to be achieved in handling this kind of dispute? This in turn gives rise to another, more general question: what different goals are there that might be achieved by handling this and other kinds of disputes? For it is only by identifying all of these possible goals that one can be sure of not having overlooked an important goal in the instant case. This question, again, raises another: which of the various goals identified really matter in the kind of case at hand, and to what degree in relation to one another? Most challengingly, another question follows: by what sound, practical and principled means can this be ascertained? Now, assuming all these questions concerning the goals presented in the instant case are answered, another set of questions remains. Given the various goals presented by this and other kinds of disputes, which of various available or conceivable dispute handling processes can help achieve these goals? Which process will help to achieve which goal, and in what degree relative to other processes? Finally, again, by what sound, practical and principled means can this be ascertained? Is it possible to omit any of the above questions, and still answer the original question in a sound and legitimate way? The answer is no. Any omission or simplification must come at the expense of failing to consider some potentially important goals, or process options,

developed here is a fairly straightforward way of seeking answers to the very complicated questions involved. Even if it is thought complex, however, the point here is that this is an inevitable consequence of analyzing a multidimensional problem.[282]

Perhaps the best response to questions raised about the complexity of the approach taken here is to say that as a matter of fact this approach is in its essence very simple. It is founded and built on the simplest and most fundamental of concepts: the ultimate importance of *goals* in forming, evaluating and reforming any system or course of action. It is constructed from the simplest, most basic elements of the civil justice system—its goals, without an understanding of and without reference to which, no solutions to process choice or jurisdictional questions can make sense. The "simple" approach that ignores or slights these basics only appears "simple;" in fact, it inevitably leads to confusion and error, and winds up with far more complicated and convoluted consequences precisely because of its false simplicity. By contrast, the approach here begins with the fundament of goals of the system, and develops an understanding of both disputes and dispute handling processes in terms of these goals—so that the ultimate match between case and process is always consistent with the very basis of the system. With such an approach, there is a reference point and a standard for evaluation and reform, instead of its being conducted in a vacuum with no standards or on a carousel of constantly shifting ones. In short, the complexity of the approach here derives from its simplicity—i.e., its focus on the basic element of civil justice goals—and far from being a flaw, this is its greatest virtue. That this is so can be seen from a

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or else at the expense of failing to understand accurately how cases, goals and process options are interrelated. Answering the above questions, step by step, and with an effort to relate the answers to the insights of previous analysis from the civil justice reform debate, gave rise to the analytical approach developed and presented in this Article, including the cost-minimization approach, the focus on process choice as the key variable, and the delineation and analysis of goal-derived case-type and process factors.

282. It may be true that simpler and less demanding approaches, some of which have been noted at different points in the analysis here, yield process choice answers more quickly and with less information costs. As a matter of fact, cost has never been expressly offered as a reason for not using the kind of comprehensive approach presented here. Rather, the reason for a simpler approach seems to have been a lack of rigor and a lack of attention to the underlying question of multiple goals, coupled with a desire to find solutions quickly. The quick fix, however, often is more costly in the long run—and even the short run. Furthermore, the model and analysis developed here, although they appear complex as expressed in prose terms, seem to form very much the kind of approach that could be implemented using appropriate computer modelling techniques, in which the representation of problems involving multiple and interrelated variables is quite common. In short, it would make little sense to cling to oversimplified analysis when the essence of the question of civil justice reform demands a more comprehensive approach, and when such approaches can indeed be developed and implemented.

summary of the various advantages that flow from the goal-oriented approach.

B. Process Understanding: Clarity and Creativity.

The first advantage flowing from the goal-oriented approach as developed in this Article is that it leads to a clearer understanding of the character and function of existing dispute handling processes, the distinctions among them, and their relative capacities for achieving different effects. This is possible because of the process factor analysis that is utilized, which is itself based on the derivation of significant process factors in direct relation to civil justice goals themselves. The result of this greater process knowledge is the opportunity to use process choice more effectively as a way of furthering civil justice goals. Furthermore, the present approach helps to structure a component view of process that gives support to the idea of process creativity and provides principles to guide and legitimate efforts in this direction. Again, the effect is to increase the potential for furthering civil justice goals; and again, the source of the insight is the process factor analysis based on civil justice goals. Thus, as to both process clarity and process creativity, it is precisely the consistent and rigorous linking of the analysis to civil justice goals at the conceptual level that results in a model capable of helping to achieve these goals better at a practical level.

C. Process Balance

A second advantage of a goal-based analysis, and a by-product of the process clarity and creativity facilitated by such analysis, is that almost inevitably such an approach will tend to introduce more balance into the civil justice system. As discussed earlier in Part III, there is a tendency at present for the civil justice system to be dominated by a few processes. Whether this is due to process "bias" or merely momentum and lack of clear analysis, the result is a "centripetal" or unimodal system in which tremendous pressures are created on the hub of the system—essentially adjudication and related processes. This concentration of the load of the system on one process, this lack of balance, apart from neglecting other and possibly more effective processes in many cases, creates severe strain on the over-burdened center, a point over which there is little argument and much concern. Nevertheless, without coherent alternatives, the force of momentum continues to support this systemic imbalance; and an imbalanced system, like a machine in which one part is subjected to undue stress, must inevitably break down or break apart.

The approach developed here—by clarifying the importance of a whole range of civil justice goals, the inevitable incapacity of any single process to further these goals in all or even most cases, and the relative and often misunderstood capacities of alternative processes to further different goals in varying degrees—provides a coherent basis for a more balanced system. As suggested earlier, the intuition, common sense and administrative desperation behind the "alternative dispute resolution" movement find in the present analysis both solid theoretical support and justification and, more important, principles for developing process options and moving towards a more balanced system. The result of the approach developed here, implemented by the kind of public informational and incentive measures discussed in Part IV, would almost certainly be greater variegation of dispute handling activity, greater process balance, less likelihood of over-loading any particular part of the system, and as an important result, greater information and a greater range of process options for individual disputants. Once again, the ultimate source of these advantages is the initial and consistent focus maintained by this analytical approach on the goals of civil justice themselves.

D. Value Balance

The notion of increased "process balance" for the civil justice system suggests a third advantage of the present approach, which might be called increased "value balance" for the system. Recall the suggestion in Part III that one of the reasons behind pro-adjudication and anti-mediation process bias is the tremendous value placed by the surrounding legal and political culture upon individual rights and individual self-fulfillment, a value arguably underlying several of the goals of civil justice.[283] From this standpoint, one could argue that the pattern of preference for adjudication and aversion to mediation is not a bias at all, but a justifiable preference for a genuinely more appropriate process. That is, individual self-fulfillment is the highest value: whether this is called a political attitude, a value judgment or a fact, it is in any event a foundation stone of this culture and society. Therefore the preference for adjudication over mediation stems from the fact that adjudication is necessary to effectuate the supreme value of individual self-fulfillment and this preference is hence totally justifiable.

283. *See supra* notes 225-44 and accompanying text.

In fact, this type of position, far from justifying the process bias or imbalance discussed above, represents a kind of "value imbalance" parallel to (and perhaps underlying) such process imbalance. It involves an undue concentration on a certain value to the neglect of others. Just as process imbalance threatens the health of the system, so does value imbalance, and at an even deeper level. Also, just as with process imbalance, the goal-orientation of the analysis developed here offers an antidote to such value imbalance. Before explaining how this is so, however, it is necessary to clarify how the individual-rights-fulfillment focus constitutes value imbalance.[284]

First, even if individual self-fulfillment is accepted as the ultimate value, it cannot be pursued effectively in a vacuum, and without regard to other values. Lack of a satisfactory climate of human relations operates as a limit or obstacle to individual fulfillment. Thus, even the individual rights advocate ought to see the value of building or preserving a climate of satisfactory human relations in which individual rights can be genuinely enjoyed.

More to the point, it is simply not so clear that individual self-fulfillment is the supreme value, regardless of its dominant position in the set of values held by this society (and held for a relatively brief time in the larger historical perspective). Indeed, the starting point of this study was the description of a variety of social goals, at least some of which are based on values other than individual fulfillment. And it was demonstrated analytically, further on, that these latter goals—and thus the different values underlying them—were of considerable if not primary importance in many cases. Thus, the human relations goal, while it may be based in part on the value of individual self-fulfillment for which it is instrumentally necessary in some degree, has separate and independent bases.

One such basis lies in the value of treating others decently. The ethical principal of "loving one's neighbor as oneself" indicates that a positive value is ascribed to establishing, conducting and preserving decent relationships and interactions with others. Of course, it is

284. *See generally*, in relation to the following discussion, Riskin, *supra* note 50, at 30, 42, 47, 56-57; Kidder, *supra* note 12, at 719-20; Fuller, *supra* note 74, at 41-42; Danzig & Lowy, *supra* note 49, at 682-91; Macaulay, *supra* note 133, at 155; Cavanagh & Sarat, *supra* note 3, at 376, 401, 414-15. While each of the above authors has recognized, to one degree or another, the problem of value imbalance, and the overemphasis on the individual self-fulfillment value, none has discussed how this and competing values are linked to different civil justice goals, and hence how they may affect process decisions and overall process balance. Nor has the discussion been very precise about what the competing values actually are, so that it is not always clear what alternative value focus is suggested, much less what are its process implications. For an interesting parallel discussion in the field of developmental psychology, see C. GILLIGAN, IN A DIFFERENT VOICE (1981).

possible to see this value as merely instrumental to, or an aspect of, a supreme value of individual self-fulfillment.[285] In fact, however, the value of relationship goes further. Relationships are often maintained and pursued even where one or both of the parties to the relationship must make various kinds of sacrifices.[286] What is involved in such cases is not individual self-fulfillment at all, as it is ordinarily understood, but what could be called other-fulfillment. The aim and experience of the self-sacrificing party is to facilitate fulfillment for the other party, in which fulfillment the self-sacrificing party has pleasure only indirectly or else through a powerful empathy. Thus, at least in part, the value of relationship goes beyond that of individual self-fulfillment and is tied to the very powerful concept of the individual's potential for self-transcendence.

Self-transcendence, rather than self-fulfillment, also informs another value underlying the human relations goal (and several others): the value of preserving, strengthening and "fulfilling" the collectivity or community of which each individual is a part. Community or collectivity fulfillment, like relationship, may sometimes

285. Thus, as noted above, a certain climate of human relations is necessary to attaining and enjoying individual self-fulfillment, so that treating others decently may simply be a way of ensuring one's own self-satisfaction. Alternatively, it is possible to see relationships as one of the types of resources or "goods" which individuals try, through individual rights, to secure and possess to the greatest possible degree. That is, decent relationships are valuable, like anything else, because they are rare and because they contribute to greater individual self-fulfillment. In fact, neither of these views captures the essence of the value of a relationship, nor the degree to which this value, if it is not wholly distinct from individual self-fulfillment, nevertheless adds a unique dimension to that value.

Human beings are social beings. Thus, even if it were assumed that some degree of attention to human relationships is not necessary as an external condition of individual self-fulfillment, such relationships would probably nevertheless be considered valuable for the pleasure they bring in themselves, through the process of relationship. Therefore attention to relationships is not merely a condition of individual self-fulfillment but a part of it. This suggests a dimension to individual self-fulfillment that is often not emphasized. For the satisfactions of relationship are not dependent on a given level of material, intellectual or other resources. Indeed, relationship satisfactions may in some ways be greatest in situations of poverty or deprivation as to other resources. Thus, if individual self-fulfillment is seen in terms of individual growth and development, the value of relationship at least emphasizes a different area of growth and development than those usually associated with individual rights advocacy. In particular, it suggests that there is more to individual self-fulfillment than self-directed individual self-development, in terms of material accumulation, intellectual exploration, or otherwise. Rather, individual self-fulfillment includes other-directed activity to develop relationships and thus fulfill the essential social aspect of the nature of the individual.

286. From one perspective, it is true, this can simply be interpreted as an instance of fulfillment of what might be called the relational dimension in preference to fulfillment of other dimensions of self. It should be noted that the conflict and choice between dimensions of self-fulfillment inherent in this characterization confirm the idea suggested above, that even if included in the value of individual self-fulfillment, the value of relationship is a distinct dimension of this value.

require individual self-fulfillment and individual rights to take a back seat. Indeed it may even demand individual self-sacrifice or abnegation. This is true not only at the grand level of preservation of the society against outside threats; it is equally true on the level of fulfilling societal potential from within.[287] This kind of value framework is also quite deeply rooted in this society. Within families, sublimation of individual desires in favor of collectivity survival or progress has been seen as valuable, even if questioned in recent times. The sacrifice of individual self-fulfillment in order to advance communal or associational aims probably characterizes the social history of every ethnic sub-group in this society. Indeed, even in the unlikely context of the business organization, self-sacrifice for collectivity fulfillment is probably not uncommon. Of course, one can characterize all such self-transcending behavior as actually self-fulfilling, but such a characterization is circular and reductionist. The point is that, in many spheres, the value of individual self-fulfillment is held secondary or at least not superior to the value of community or collectivity fulfillment.[288]

Thus, relationship and community are, at least, co-equal values with individual self-fulfillment and individual rights, so that consistently to give greater weight and deference to the latter would constitute value imbalance as defined above. The pattern of preference for adjudication over mediation represents not only an instance of process bias and imbalance, but also, and ultimately, an instance of value imbalance. It represents process imbalance, because adjudication is often preferred without question even in cases where the human relations goal is important, despite the fact that mediation better serves the values of relationship and community underlying the human relations goal.[289] It represents value imbalance, because

287. To take an example, the argument on affirmative action and reverse discrimination is usually framed in terms of individual rights and individual self-fulfillment. The question is whose rights should be vindicated and whose compromised, so that social justice questions are raised. However, it is possible to view the issue in terms of collectivity fulfillment, the question being whether the potential for a stronger society, arguably attainable only through fuller participation of and greater contributions from excluded groups, justifies curtailment of individual rights upon whichever side is necessary.

288. *See* Riskin, *supra* note 50, at 56-57. Indeed, there is a tendency to forget that the slogan of the political movement that most strongly symbolized the ideology of individual rights was "liberty, equality, *and* fraternity," with the collectivity thus placed at least on a par with the individual. As a matter of fact, the emphasis on fraternity also suggests the value of relationship, as discussed above.

289. Mediation directs attention to relationships and facilitates the individual's appreciation of and empathy for others' unique and common problems and legitimate needs. It thus serves the values underlying the human relations goals both indirectly, by preserving or improving the climate of human relations, and directly, by accustoming individuals to see

the ultimate justification for preferring adjudication in such cases lies precisely in the single-minded focus on individual rights and self-fulfillment, to the neglect or exclusion of equally important values such as relationship and community that underlie the human relations goal. This latter form of imbalance is clearly a deeper and therefore more serious kind of systemic imbalance; it may indeed underlie the former. None of this is meant to suggest that the value of individual rights is not vitally important. However, it co-exists with other values, such as those of relationship and community, that are at least equally important. As with the goals of civil justice, the values underlying them often conflict and require balancing. A healthy system requires balance, not one-dimensional focus on one element, be it process, goal or value. In relation to the values of rights and relationships, individual and community, the civil justice system is arguably beset by a significant imbalance at present, an elevation of rights over relationships, individual over community. This may be a reflection of value imbalances in the larger society; it is nonetheless a serious problem for the health of the civil justice system.

The goal-oriented analysis developed here offers one way to begin to address this problem of value imbalance. By focusing attention on the multiple goals of civil justice, and perhaps especially by expressing these goals in terms of concrete social consequences and as part of an overall framework in which all are interrelated, the analysis makes it very difficult to neglect or ignore, or on the other hand, to inflate or enshrine, any single goal and hence any single underlying value—for a focus on goals invites and facilitates identification and clarification of the values underlying them. The approach makes clear that undue solicitude for one value usually comes at the expense of an even greater neglect of some other, and hence an overall impoverishment in the quality of the system and the society. Of course, the re-balancing of values is a concern that goes far beyond the confines of the civil justice system. Nevertheless, the approach to civil justice reform developed here is helpful as part of that re-balancing. For instance, the analysis promotes recognition of the fact that the rights/relationship, individual/community value imbalance is a real and significant problem, with the practical consequences, among many others to be sure, of process bias and

their particular needs as less than supreme, by comparison to both others' and community needs. Again, it is interesting to speculate what might have been the difference in various "reverse discrimination" cases, had the process employed been mutually educational mediation, rather than adversary adjudication.

imbalance in the civil justice system. This recognition and concretization of the value imbalance problem is itself an important first step towards restoring value balance. Moreover, at least in some measure, the analysis can help in restoring this balance in one sector of social activity, the civil justice system, by providing tools for consciously structuring process choice options so as to give due weight to the human relations goal in appropriate cases and encourage the use of existing and potential processes that further it. Thus, the approach developed here not only provides tools for evaluation of process choice questions, but raises, and provides tools for addressing, questions about the values which lie at the very foundation of the civil justice system.

E. Curing Disease or Furthering Health: An Old Analogy and a New Perspective

A final advantage of the goal orientation of this Article's analysis relates to the conception it engenders of the civil justice system as a whole and the phenomenon of civil disputes with which this system is concerned.

There is a recognized analogy between law and medicine. According to this analogy, a dispute is a wound or disease in the social fabric or body politic parallel to a physical wound or disease in the physical body. A judge (or lawyer, or other type of dispute handler) performs the task of healing the rupture in the social fabric, just as the doctor performs that of healing the physical illness. While this analogy has received new visibility of late,[290] it is hardly of recent vintage. In a twelfth-century commentary on judicial ethics for rabbinical courts, this analogy is used by Rabbi Moses Maimonides—who was renowned as both a jurist and a physician. Interestingly, he uses it to suggest that, like a good doctor who first attempts to heal through nutrition and natural remedies and only resorts to drugs and harsh measures when natural means fail, a judge should first attempt to resolve a claim through compromise and mediation, and only turn to the strict letter of the law when this milder and preferable means fails.[291]

290. *See* Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38, 38-39.

291. *See* MAIMONIDES' INTRODUCTION TO THE TALMUD 122-23 (Judaica Press 1975). If one follows the analogy through, it suggests that, just as a doctor uses different types of treatments (diet, exercise, drugs, surgery) in different types of cases—and indeed the medical profession includes different types of healers using different methods of treatment—so a judge or lawyer should be ready to use (or refer a disputant to) different processes appropriate to different cases, and indeed different types of dispute handlers who use different processes to treat or handle disputes should be available. The law and medicine analogy suggests just the

The analogy of law to medicine, and dispute to disease, seems to ascribe a negative connotation to the phenomenon of a dispute. Like a disease, a dispute is generally seen as an unfortunate and destructive event (or set of events) to be avoided or suppressed if possible, or if not, to be cured and removed. Just as illness is the enemy of the body, a symptom of ill-being and a dysfunction, a dispute is the enemy of the body politic. In fact, the goal-oriented analysis suggests a quite different view. As noted in the discussion of the goals of civil justice in Part II, these general social goals can properly be called goals of civil justice precisely because the occurrence of a dispute presents a unique opportunity for furthering each of these goals. Whether or not this opportunity is exploited to full advantage will depend on the careful and principled exercise of process choice, i.e., on the treatment of the dispute. Where treatment is wisely and appropriately applied, a dispute presents an opportunity for improvement, not disruption, of societal health, for construction and not destruction. As such, disputes are moments of opportunity. They are not enemies, but friends of the body politic, offering openings for improvement that might otherwise be lost. This positive conception of dispute as social opportunity, and process as the means of taking full advantage of the opportunity, is inherent in the approach presented here, and this is so precisely because the analysis is based on the notion that the civil justice system has goals and exists to further them, and that it is in relation to this fundamental orientation that all further analysis must take place.[292]

It is crucial to note, however, that the positive conception of dispute as social opportunity is inextricably linked to the notion of appropriate treatment of the dispute. Where treatment is haphazard, arbitrary, ill-founded, the opportunity is lost. Indeed, in such a situation, the constructive potential of the dispute may degenerate

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kind of process variety and case/process matching viewed by this Article as the best means of furthering civil justice goals.

292. The positive conception of dispute and conflict is gaining increasing recognition. *See, e.g.*, Felstiner & Williams, *supra* note 236; Miller & Sarat, *supra* note 26; Felstiner, Abel & Sarat, *supra* note 26; Nicolau & Cormick, *supra* note 172. As to the analogy between law and medicine, it need not be abandoned in taking this view. For even though the common view is that medicine views illness as a destructive and negative phenomenon, this is only one perspective. Another and an increasingly respected view in medical thought is that disease is itself a positive natural phenomenon, a way in which the body signals that it is trying to eliminate impurities, stress and dysfunction, and thus strengthen its condition and capacity. *See, e.g.*, J.H. TILDEN, TOXEMIA: THE BASIC CAUSE OF DISEASE 13, 42 and *passim* (1974); H.G. BIELER, FOOD IS YOUR BEST MEDICINE 40-50 (1965); H.E. KIRSCHNER, NATURE'S SEVEN DOCTORS 11 (1962). Illness is thus also, in this view, a moment of opportunity for improved health, the realization of which depends upon proper treatment, i.e., treatment that assists the body in fully revealing the problem and then in strengthening itself as required.

into a destructive result. In this sense, both the negative and positive conceptions of the dispute phenomenon are valid, in that the dispute signals a point of vulnerability at which the level of goal attainment can go either way.

Thus, the conception of disputes and dispute handling that emerges from the goal-oriented analysis stresses most emphatically that the constructive aspect of disputes can be realized, and the goals of civil justice thereby furthered, only when questions of process choice are addressed and answered consciously, clearly and responsibly—i.e., according to consistent principles based on the very goals which such choices can so profoundly affect, both for good and for ill. Formulating and applying suitable analytical tools for this task is an essential part of the responsibility of the legal profession, and all those who are associated with the larger civil justice system. The present analysis offers some initial steps toward the development of such tools—jurisdictional principles for process choice—and thus, ultimately, toward the achievement in increasingly greater degree of the goals of civil justice.