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And the Whole Earth Was of One Language: A Broad View of Dispute Resolution

Henry H Perritt, *Chicago-Kent College of Law*

“AND THE WHOLE EARTH WAS OF ONE LANGUAGE”*—
A BROAD VIEW OF DISPUTE RESOLUTION

HENRY H. PERRITT, JR.†

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* *Genesis* 11:1 (King James).

† Professor of Law, Villanova University. S.B., 1966, S.M., 1970, Massachusetts Institute of Technology; J.D., 1975, Georgetown University. Member of the Bar, Virginia, Pennsylvania, District of Columbia, United States Supreme Court.

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I. INTRODUCTION

THE recent search for "Alternative Dispute Resolution" techniques is fundamentally a reassessment of civil procedure, including acceptance of the proposition that some disputes are unsuitable for judicial resolution. The most useful way to approach the subject of alternative dispute resolution — an approach followed by the Villanova Law Review in its 1984 Symposium — is to synthesize intellectual capital developed in diverse specialties: traditional civil procedure, labor relations, civil case management, community action, law and economics, and family law. Villanova Law School and the dispute resolution community are fortunate that such a distinguished group of experts agreed to share their thoughts on this important sub-

ject. This article is meant to be a conceptual "umbrella" for the excellent and more narrowly focused articles that follow it in this issue.

Because of the article's length, I offer a summary of my key conclusions now:

1. "Alternative" dispute resolution techniques should be understood as promoting out-of-court or pretrial settlement of claims and should be evaluated according to their efficacy in achieving this objective equitably. Evaluation of dispute resolution procedures requires an understanding of the dynamics of dispute settlement through negotiation.
2. Society should prefer alternatives that function as adjuncts to the court system, except for defined classes of disputes that occur within the framework of economic or social interdependence sufficient to provide incentives to resolve disputes privately.
3. When private institutions are not available, society should prefer alternatives involving changes in existing judicial procedures rather than introduction of entirely new types of governmental institutions or procedures.
4. The role of small claims courts should be enhanced rather than diminished by the creation of new, parallel institutions.

Much useful thinking and experimentation has been accomplished in recent years. Programs of arbitration and mediation have received more publicity than equally important research into disputant behavior, and proposals for changes in court rules. The student of dispute resolution should understand developments in all these areas.

A. *The Lure of Litigation*

Civil litigation is a means of involving the coercive power of the state in a private dispute. It is a way to alter bargaining power, and as such, is attractive to the weaker party in a two-party dispute. It also is a way to legitimize the exercise of superior power, and thus can be attractive to the stronger party in a two-party dispute.

I taught a seminar last Fall in Dispute Resolution. The students' papers addressed fifteen different procedures intended to resolve disputes that otherwise might have been litigated fully in the courts. Shortly before the semester started, one of my research assistants had a dispute with an automobile dealer over defects in a new car. I told him about an arbitration system sponsored by the automobile manu-

facturer through the Better Business Bureau. He attempted to utilize this arbitration procedure and was very dissatisfied with the result. He felt the Better Business Bureau, the dealer, and the manufacturer gave him the "run-around." Finally he gave up arbitration, urged the state attorney general's consumer affairs unit to investigate, and contacted an attorney to prepare for filing suit.

The research assistant made a presentation to the seminar. The students in the seminar enthusiastically suggested ways for him to bring pressure to bear against the dealer or the manufacturer. The students with litigation experience in their part-time and summer jobs and those who were taking our practical course, "Trial Practice," proposed additional counts for his civil complaint that would raise the ante in terms of damages potentially recoverable. Others urged that the research assistant take out advertisements in the local newspapers, and that he park the car in front of the dealer, with a large "lemon" sign on it.

The seminar students found the arbitration alternative unattractive because it lacked coercive power. They liked litigation because they perceived that filing a suit would bring more pressure to bear on the other side. The other alternatives considered by the students similarly emphasized coercion, but outside the procedural channels usually thought of as alternatives to litigation. The small part of the discussion that focused on arbitration concerned enforcement of arbitration awards. Considerable doubt was expressed as to whether the coercive sanctions available in the arbitration process were adequate.

It may be that these law students merely were exhibiting a bias acquired in law school that favors litigation. I doubt it. Rather, I suspect the law students were expressing an instinct shared by many American citizens: one must "sue the bastards" in order to get serious attention paid to a dispute. In the research assistant's dispute, they were right. When the potential defendants were threatened with litigation, and with prosecution by the state attorney general, the matter was settled.

Everyone has similar stories. About a year ago, I got a local department store to help me get a new television back from their repair shop only after I filed suit for \$1000 in small claims court. Justice Neely in his little book on the courts relates stories about suits filed after they proved to be the only way to get someone to talk about solving problems.¹

1. R. NEELY, *WHY COURTS DON'T WORK* (1983). Justice Neely serves on the West Virginia Supreme Court of Appeals, and was chief justice of that court in 1980. *Why Courts Don't Work* is a wide-ranging and readable popular treatise on the reasons

When citizens live and interact in communities where interdependence exists with personal acquaintances rather than with strangers, a variety of social and economic forces make it possible to resolve most disputes informally. When the sense of community is less and when interdependencies exist only with strangers, it is more likely that the power of the state must be mobilized in order to compel resolution of disputes. Under this view, the increase in litigation is a concomitant of modern urban society, and is not due to some inexplicable increase in quarrelsomeness of citizens or greed of lawyers.

B. *The Search for Litigation Alternatives*

As "suing the bastards" has become a popular means for equalizing bargaining power in private disputes, the volume of civil litigation has become troublesome. In reaction, popular calls for alternative means of resolving disputes have proliferated.

"Alternative Dispute Resolution" is fashionable today. The American Bar Association has a special committee on the subject.² A multitude of programs at the 1983 ABA convention addressed the topic. Experiments are being conducted in federal and state court systems.³ There is federal and foundation funding for other experiments. The popularity of the idea has spawned a variety of entrepreneurial efforts. "EnDispute," in Washington, D.C., concentrates on simplifying complex corporate litigation and negotiating settlements.⁴ "Judicate," in Philadelphia, offers parties to simpler suits the opportunity

why civil disputes find their way into court, the economics of settlement, and the politics of legal reform. Generally, Justice Neely explains why civil courts tend to be "stepchildren" of the law, and argues that the legal system should reverse its current priorities and give resources to the minor courts. *Id.* at 187-210.

2. The ABA Special Committee on Dispute Resolution was created out of the Pound Revisited Conference of 1976. It originally was called the Special Committee on Alternative Means of Dispute Resolution. *See ABA, Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159 (1976). The ABA held conferences in 1976 and 1977. *Id.* at 161. The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Revisited Conference") was held in St. Paul, Minnesota in April, 1976. *Id.* at 165. The National Conference on Minor Disputes Resolution was held at Columbia University School of Law on May 25-27, 1977.

3. *See, e.g., R. TOMASIC & M. FEELEY, NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* (1982) (review and analysis of small claims and minor criminal dispute resolution in "neighborhood justice center").

4. For an example of an application of EnDispute, *see Middleton, Storm Settlers: Hawaii Victims Use EnDispute*, 69 A.B.A. J. 717 (1983). The author notes that some of the approximately 30,000 insurance claims arising from Hurricane Iwa which took place in November of 1982 were settled by EnDispute without costly and lengthy litigation. *Id.* Claimants arranged either a settlement conference or mini-arbitration, the latter of which was final and binding. *Id.* Most conferences or mini-arbitrations

for arbitration before retired judges.⁵

Fashion should not obscure the fact that the subject is not new. Arbitration goes back to 1705 in Pennsylvania.⁶ The small claims court option has been a longstanding feature of the American legal landscape.⁷ Labor arbitration and other voluntary arbitration was a great movement in the 1920's.⁸ Roscoe Pound pressed for judicial reform for more than 40 years.⁹ Last and not least, the rise of the "Administrative State" was in part a reaction to shortcomings of traditional litigation.¹⁰

The search for alternatives is motivated by two complaints about traditional civil litigation. The first complaint is that the social costs of the high volume of litigation are great and that many nuisance suits are pursued.¹¹ The second complaint is that the costs to the par-

were scheduled from one and one-half to three hours, depending on the complexity, and cost between \$300 and \$650. *Id.*

5. An earlier "rent a judge" program was pioneered in California. *See* Christensen, *Private Justice: California's General Reference Procedure*, 1982 AM. B. FOUND. RESEARCH J. 79.

6. Act of 1705, ch. 150, 1 Pa. Laws (Sm. I.) 49. A statute enacted in 1810 provided for compulsory arbitration upon request of one of the litigants. Act of March 20, 1810, ch. 3219, 5 Pa. Laws (Sm. I.) 131 (current version at 42 PA. CONS. STAT. ANN. § 7362 (Purdon 1982)).

For a discussion of the history of arbitration in Pennsylvania, see Comment, *Compulsory Arbitration in Pennsylvania — Its Scope, Effect, Application and Limitations in Montgomery and Delaware Counties — A Survey and Analysis*, 2 VILL. L. REV. 529 (1957).

7. *See* Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RESEARCH J. 293.

8. For a historical perspective on the growth of labor arbitration, see R. FLEMING, *THE LABOR ARBITRATION PROCESS* (1965). The author describes how arbitration came to the hosiery industry in 1929. *Id.* at 9. During a joint meeting in 1929, unionized operators and union leaders agreed to an arbitration system involving a single impartial chairman. *Id.* at 10. Under this agreement, all difficulties which arose during the term of a contract and which could not be settled as a result of negotiation were to be submitted to the impartial chairman for final and binding settlement. *Id.*

9. *See* R. POUND, *ORGANIZATION OF COURTS* (1940). In his book, Dean Pound discussed how he had been arguing for a reorganization of the court system for decades. *Id.* at 273. While he was on the Supreme Court Commission in Nebraska from 1901 to 1903, he was bothered by the waste of judicial power and the fact that the courts were behind in their dockets. *Id.* Subsequently, he read a paper before the American Bar Association in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," in which he maintained that the court system was archaic for three reasons: (1) its multitude of courts; (2) its preservation of concurrent jurisdiction; and (3) its waste of judicial power. *Id.* (citing 29 REP. AM. B.A. 395 (1906)). In his book, Dean Pound generally urged central control of the court system to reduce delay and improve efficiency. *Id.* at 275.

10. *See* D. ROSENBLUM, *PUBLIC ADMINISTRATION AND LAW: BENCH V. BUREAU IN THE UNITED STATES* (1983). As Rosenbloom notes, "[a] main rationale for vesting what were once judicial functions in administrative agencies was the perceived advantage of such structures in terms of expertise, flexibility and speed." *Id.* at 27.

11. R. NEELY, *supra* note 1, at 170. Judge Neely describes how landlord-tenant

ties and the elapsed time before a final resolution can be obtained cause many meritorious claims to be abandoned.¹² The first complaint originates mostly with defendants and their partisans. The second complaint originates primarily with plaintiffs and their partisans.

C. *An Agenda for Policy Making is Needed*

Ironically the alternative dispute resolution explosion may become as much of a problem as the litigation explosion unless we are careful. Many states, of which Pennsylvania is an example, have only in the last 15 years or so successfully consolidated and centralized badly fragmented court systems.¹³ A proliferation of "alternative dispute resolution" (ADR) programs can restore the fragmentation. Moreover, we are not yet taking a comprehensive look at the problem; more is needed than diverse ideas for new forums operating independently under their own procedures. People have been tinkering with courts and with court substitutes for a long time and really novel ideas are hard to find. What we need to do now is to integrate the current dialogue about alternative dispute resolution theory with the practical experiences of the past. We should be asking ourselves a number of questions that have not figured prominently enough in contemporary discussions:

1. Where does lack of congruity between dispute charac-

disputes often begin as nuisance suits. *Id.* After a landlord files an eviction complaint on grounds that his tenant refuses to pay rent, a tenant will often answer by alleging that he refuses to pay rent because the premises are in disrepair. The dispute then must be scheduled for trial, and eviction may take up to a year, during which time the landlord is paid no rent, but continues to incur expenses. *Id.*

12. *Id.* at 165. Judge Neely describes this phenomenon as follows:

Unfortunately, the people who can afford to stand in line the longest are not necessarily the people who have the most urgent need to litigate, yet the egalitarian tradition prohibits the sale of one's place in line to someone with a more pressing need for court services.

Since a place in line cannot be sold or exchanged, all litigants must pay essentially the same price for use — a price that bears no relationship to the urgency of individual needs or the importance to the public of certain issues

. . . .

Id.

13. For a discussion of court consolidation efforts in several states, see Rosenbaum, Berkson & Carbon, *Implementing Court Unification: A Map for Reform*, 17 DUQ. L. REV. 419 (1978). The authors note that there are four variations of court unification efforts in various states. *Id.* at 422-24. The simplest proposal calls for only two courts, a supreme court and a trial court. *Id.* at 422. A slightly more complicated approach contains three separate courts: a supreme court; a trial court of general jurisdiction; and a trial court of limited jurisdiction. *Id.* at 423. A third model has a supreme court, an intermediate appellate court and a single trial court. *Id.* The fourth approach has a supreme court; an intermediate appellate court; a general jurisdiction trial court; and a limited jurisdiction trial court. *Id.*

teristics and the essential characteristics of traditional civil litigation lead to dissatisfaction? Are there certain categories of disputes that lend themselves to resolution by procedures other than civil adjudication in the courts?¹⁴

2. What are the benefits and shortcomings of private dispute resolution procedures? Labor arbitration, a major prototype, has existed for 60 years.¹⁵

3. What are the benefits and shortcomings of administrative adjudication as a substitute for civil lawsuits in the regular courts?¹⁶

4. What characteristics of successful ADR experiments should be incorporated into standard civil litigation procedures?

This article offers a framework within which integrated policy analysis can take place. Obviously no one essay can say anything useful about the full range of disagreements that occur in modern society. The subject of this essay is a particular subclass of disputes: private disputes likely to find their way into the courts.¹⁷

It begins with the theoretical literature on dispute resolution and then proceeds to classify dispute resolution techniques. The classification effort first distinguishes between interest and rights disputes, paying more attention to rights disputes, since these are the type usually dealt with by courts. Then dispute resolution methods are classified according to whether they are private, administrative or judicial.¹⁸

14. For a discussion of one possible category, interest disputes, see notes 102-12 and accompanying text *infra*.

15. For a discussion of arbitration and various other private dispute resolution techniques, see notes 113-78 and accompanying text *infra*.

16. For a discussion of disputes which are handled in administrative forums, see notes 179-230 and accompanying text *infra*.

17. My interest in a comprehensive treatment of dispute resolution derives from my experience with a variety of dispute resolution methods. I have litigated employment cases in federal and state courts, have sat as an arbitrator on several dozen common law tort and breach-of-contract cases in the Philadelphia Common Pleas mandatory arbitration program, was the drafter of amendments to the Regional Rail Reorganization Act that gave exclusive jurisdiction over a broad class of cases to a special federal court, and have drafted and helped negotiate a number of collective bargaining agreements that contain innovative interest and rights dispute resolution procedures.

18. The article gives little attention to another means of removing private disputes from the courts: legislative reduction in disputable issues. No-fault measures reduce the amount of litigation because they reduce the potential for disputes over fault. No-fault divorce and no-fault automobile accident compensation measures are mentioned, but not addressed in detail, because the emphasis of the article is on procedural alternatives for resolving disputes rather than means to eliminate the disputes.

This article identifies major experiments within each class. A major effort is made to explain the theoretical process through which each type of dispute resolution technique works, and to compare and contrast private dispute resolution methods with those of the same type conducted by administrative agencies and by the courts. Having suggested a classification of methods, the article then proceeds to identify major legal problems associated with adoption of one or more of these methods. It concludes with suggestions for policy changes, with specific reference to the standards developed by the ABA for trial courts.

II. THEORY OF DISPUTE RESOLUTION

Meaningful evaluation of dispute resolution alternatives should work from some theoretical conception as to how private disputes are resolved. A body of literature on the theory of dispute resolution has developed during the last two decades. Generally, the commentators working in this area have sought to explain the dynamics of negotiation and settlement of disputes, to explain how the positions of the parties may be changed by litigation, and to identify the social costs of civil litigation.

A. *Types of Disputes*

At the outset, one should distinguish between "interest disputes" and "rights disputes." The civil litigation system was designed to deal with rights disputes. Rights disputes presuppose an external principle or standard by which the claim can be settled. Interest disputes, in contrast, do not presuppose such a principle or standard. A simple negligence action or breach-of-contract claim are examples of rights disputes. Dean Hazard offers a good example of an interest dispute:

The type of dispute one gets into say, with one's friend, when you ask: Shall we go to the game or shall we stay at home and watch television? This kind of dispute requires a settlement procedure of some sort, but it is not the kind of dispute that is [suited for the courts].¹⁹

B. *Basic Processes for Resolving Disputes*

1. *Definition of Terms*

A discussion of dispute resolution theory can be enhanced by offering some definitions of basic dispute resolution procedures.

19. See *Discussion by Seminar Participants*, 8 J. LEG. STUD. 323, 330 (1979).

Negotiation is a process in which the parties to a dispute seek to resolve it themselves. Negotiation is the underlying, common process for most private disputes, and resolves about ninety percent of all civil cases filed in federal courts.²⁰ The negotiation process is unlikely to be entirely absent in any form of private dispute, though negotiations may be suspended pending resort to other dispute resolution procedures. In negotiation, a rational party will accept any offer better than his Best Alternative To a Negotiated Agreement (BATNA).²¹ Settlement of a dispute through negotiation is possible when a "zone of agreement" exists. A zone of agreement exists when the claimant's BATNA is lower than his opponent's BATNA.

The availability of dispute resolution processes other than negotiation affects the BATNA's of the parties in the underlying negotiation, and therefore may create a zone of agreement when none would exist in the absence of the processes. For example, if a party is certain of obtaining a judgment of \$10,000 in a trial, at a cost of \$4,000, his BATNA in settlement negotiations will be \$6,000. In the absence of any process for enforcing the claim (or some coercive power possessed by the claimant), the claimant's opponent's BATNA would be zero. A negotiated settlement is possible only because of the availability of a lawsuit or some other dispute resolution procedure. The availability of an enforcement process raises the opponent's BATNA above zero and, if it increases it at least to \$6,000 in the example given, a zone of agreement exists.

Most alternatives to the trial offer lower costs, or a prediction of what payoff will result from a trial. Either lower costs or better predictions affect the BATNA's in settlement negotiations.²²

Adjudication is a formal process through which parties may obtain a third party decision about their dispute according to some pre-existing standard or principle. In the adjudication process, the parties seek to influence the decision maker in their favor by the presentation of logical arguments and the submission of factual proof linked to the pre-existing standard.²³

20. Sullivan, *Achieving Better Settlements*, LITIG., Summer 1982, at 8.

21. See R. FISHER & W. URY, GETTING TO YES 101-11 (1981). The authors point out that, in order to protect themselves from ending up with a deal they should have rejected, negotiators establish in advance the worst acceptable outcome — their "bottom line." *Id.* at 102. For instance, if they were buying something, the bottom line would be the highest price they would pay, determined by the best price they could obtain outside the negotiations. *Id.* See notes 83-85 and accompanying text *infra* for a fuller explanation of the BATNA concepts.

22. For a discussion of the effect of cheaper, quicker, or production-improving procedures, see notes 232-56 and accompanying text *infra*.

23. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

Adjudication is, of course, the prototypical method of dispute resolution used by courts. It also is used by other dispute resolving institutions, such as arbitrators and administrative agencies. It is not, however, the only process other than negotiation for dispute resolution.

Arbitration is a process of dispute resolution in which a third party makes a decision. Arbitration may be more or less formal but usually it follows an adjudicatory model in which the disputing parties present their case through evidence and argument. In the pure form of arbitration, the third party decision maker is not a government official, and the decision is binding. So-called "nonbinding arbitration" is really fact finding.

Fact Finding is a process in which a third party to the dispute decides disputed facts in a nonbinding report. Fact finding usually resembles arbitration except that a fact finder's conclusions are not binding and an arbitrator's are. Fact finding does not directly resolve disputes because it is nonbinding; it can promote resolution of disputes by conditioning the expectations of the parties about what is obtainable in a binding process such as arbitration or a judicial trial. The survey results gathered in connection with a study of federal court-annexed arbitration are interesting in this respect. Counsel participating in this form of fact finding believed that settlement was promoted because the fact finding report became the focus of subsequent negotiations, or because the fact finding solution was perceived as reasonable.²⁴ Fact finding, outside the special examples of court-annexed arbitration and public employee labor relations impasses, is used infrequently in two-party disputes. It can be useful, however, especially where counsel-negotiator perceptions are sufficiently close together to provide a zone of agreement, but client perceptions are sufficiently far apart to make negotiated settlement difficult or impos-

Professor Fuller explains that the process of argument and proof implies a pre-existing standard for decision: "The litigant must . . . if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant." *Id.* at 369.

24. See A. LIND & J. SHEPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center rev. ed. 1983); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983). Nejelski and Zeldin point out that arbitration hearings generally require less time than most civil trials. Nejelski & Zeldin, *supra*, at 812-13. Civil trials require the use of the Federal Rules of Evidence and other formalities. *Id.* Scheduling difficulties often lead to continuances and other motions which can delay a trial. *Id.* at 813. While arbitrators employ the Federal Rules of Evidence as a "guide" for the admission of evidence at arbitration hearings, arbitrators often rely on stipulation and other practices which save time. *Id.* at 813-14. In fact, hearings generally take less than one day. *Id.* at 814.

sible. In order to change client perceptions about outcomes, though, the fact finding process must have characteristics that make it seem legitimate. This probably explains the attractiveness of court-annexed arbitration, and of rent-a-judge programs.

Mediation and *Conciliation* frequently are used to refer to the same process.²⁵ In this process a third party assists the disputing parties in achieving a negotiated resolution of their dispute. To simplify the discussion, the term mediation will be used to refer to both mediation and conciliation. Mediation does not follow an adjudicatory model. Instead of aiming at a decision based on evidence and argument marshalled by the parties for their positions, the mediator aims at finding a solution that serves the underlying interests of the parties. Because mediation does not rely on proofs and argument, it does not depend for its legitimacy on the existence of a standard or principle according to which the dispute is to be resolved. Accordingly, it is inherently more suitable for interest disputes than any adjudicatory process.

Mediation also is useful in rights disputes. Frequently, mediation enhances integrative bargaining.²⁶ In contrast, the adjudicatory methods of decisionmaking enforce distributive or "zero-sum" bargaining.²⁷ Eliminating the zero-sum constraint always makes settlement more likely.

Because adjudication is familiar to most lawyers and mediation is not, it is useful to elaborate on how mediation works. A mediator performs several different functions in a private dispute:²⁸

25. Some practitioners, particularly in the labor field, distinguish between mediation and conciliation. They consider mediation to be more active than conciliation and more likely to involve the third party in recommending settlement possibilities. In contrast, conciliation may be limited to a simple facilitation of communication between the parties. For a discussion of the advantages of mediation as an alternative to arbitration in the labor context, see Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 Nw. U.L. REV. 270 (1982). The author suggests that the primary role of the mediator is to assist the parties in reaching a settlement in a mutually satisfactory manner. *Id.* at 281. Since the inability to settle is sometimes caused by a failure to consider various settlement possibilities, an experienced mediator can bring about a settlement merely by bringing different options to the parties' attention. *Id.* at 285.

26. See H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 131 (1982). Integrative bargaining is a form of bargaining in which one or more outcomes exist which can benefit both parties. The mediator's role is to assist the parties in discovering these potential outcomes. *Id.*

27. See *id.* at 33. Distributive bargaining is a form of bargaining in which all the outcomes benefit one party at the expense of the other. *Id.* An example is a tort claim, in which the defendant either is or is not liable for damages. If he is, the plaintiff wins and the defendant pays. If he is not, the plaintiff loses, and bears the cost of his own loss.

28. This list of functions draws heavily on the list offered by Professor Raiffa in his explanation of how a third party can facilitate resolution of a two-party dispute. See *id.* at 108-09. The functions identified by Professor Raiffa and not mentioned in

1. He may bring the parties together. This is a brokerage role. Brokerage is unnecessary when the parties have an ongoing relation, but it may be essential when the claimant is uncertain exactly who can take action that will satisfy his claim. This function is emphasized by Action Line²⁹ and ombudsman programs.³⁰ It is performed also in the common technique of the claimant's lawyer writing a letter to the person with whom his client has a dispute.
2. Establishing an atmosphere in which negotiations can proceed. Frequently two-party negotiations cannot proceed meaningfully because of interpersonal tensions or lack of structure for substantive communication. The mediator, by serving as a neutral chairman for discussions, can reduce these barriers by helping to set the agenda for negotiations and by enforcing the rules for civilized debate. The civilizing element of this function is apparent from the transcript of a simulated mediation of a landlord-tenant dispute, in which the mediator frequently cautions, "One person speaking at a time."³¹
3. Collecting and judiciously communicating selected con-

the text relate more to acceptance of an agreement or negotiating positions by a negotiator's constituents in a labor negotiation or an international negotiation than in a simple two-party dispute. *Id.* These functions relate to holding channels of communication open while the negotiators wait for a more favorable political climate for changes in position, articulating a rationale for agreement to increase acceptability by constituents and so on. *Id.* at 109.

29. For a discussion of an ombudsman program that has incorporated an action line operation, see Ladinsky & Susmilch, *Major Findings of the Milwaukee Consumer Dispute Study*, in CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES 145, 168-69 (L. Ray ed. 1983). The authors describe how, in Wisconsin, the Governor's Ombudsman Program for the Aged and Disabled provides a means for the issuing and resolution of complaints by the elderly and disabled in long-term care facilities. *Id.* at 168. Most of the complaints that are filed with the program come through the program's state-wide, toll-free telephone line. *Id.* at 169.

30. For a discussion of recent legislation which provides for an ombudsman program, see Note, *The Department of Public Advocate — Public Interest Representation and Administrative Oversight*, 30 RUTGERS L. REV. 386 (1977). The New Jersey State Legislature created the Department of the Public Advocate (DPA) to serve the functions of ombudsman review and public interest representation. *Id.* at 386-88. The cabinet-level department consists of a Division of Public Interest Advocacy (PIA), which has the ability to represent the public interest in administrative and judicial forums, a Division of Rate Counsel (Rate Counsel), which represents consumer viewpoints in state regulatory proceedings, a Division of Citizen Complaints and Dispute Settlement, which performs mediation and ombudsman function, and many other citizen-oriented departments. *Id.* at 388-89.

31. See A.B.A. SPECIAL COMMITTEE ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? 10-20 (L. Ray ed. 1983).

fidential material.³² The function usually is performed by the technique, familiar in labor dispute mediation, of caucusing separately with the parties. By communicating information about the other party's position, the mediator can assist a party in understanding his opponent's BATNA. An accurate perception of the BATNA's on both sides is necessary to determine whether there is a potential zone of agreement and to assess how much change in position would be necessary to create a zone of agreement.

4. Helping to clarify values and derive responsible reservation prices.³³ A skillful mediator can assist the parties in bargaining over interests rather than positions, as Professors Fisher and Ury urge.³⁴ Professor Lon Fuller has pointed out that mediation commonly is directed, not toward achieving conformity to pre-existing norms, but toward the creation of the relevant norms themselves. A clear example is where a mediator assists the parties in working out the terms of a contract that defines their rights and duties toward one another. In such a case, there are no pre-existing rules or principles to guide mediation; it is the mediation process that produces the values or principles by which an acceptable settlement is measured.³⁵ This is what makes mediation more useful than adjudication in interest disputes. In both interest and rights disputes, unrealistic demands can be tempered because the mediator helps the party understand for himself the underlying interest he wants to pursue and the relationship between different positions and service to that

32. See H. RAIFFA, *supra* note 26, at 108. The author points out that, by collecting and judiciously communicating selective confidential material, a mediator can ascertain whether there is a potential zone of agreement. *Id.* at 109.

33. A party's "reservation price" is the lowest price for which he will settle. A rational negotiator sets his reservation price equal to his BATNA. See R. FISHER & W. URY, *supra* note 21, at 102.

34. *Id.* at 51-53. Bargaining over interests facilitates integrative bargaining. Frequently, parties can be assisted by a mediator in identifying new positions (demands or offers) that serve their underlying interests as well or better than their old positions and that are more acceptable to the other side.

35. See Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971). As the author suggests,

[M]ediation is always, in any event, directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the "social norms" relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another's problems.

Id. at 308.

interest. Interests can be redefined so that positions can be more flexible, or so that joint gains, or "integrative bargaining,"³⁶ can take place.

Litigation is not a separate process. It is a means of invoking the state's power to strengthen the other processes mentioned here. In the ninety percent of civil lawsuits that are settled rather than going to trial, the state's power has been invoked in a way that reinforces the negotiation, mediation or fact finding processes. The filing of a lawsuit changes BATNA's and thus may produce a zone of agreement in negotiations. Other litigation processes change expectations about judgments obtainable after trial and thus further influence BATNA's. For example, conferences presided over by a judge or a subordinate court official are a form of mediation.³⁷ Summary trial alternatives such as Judge Lambros' summary jury trial,³⁸ or the Philadelphia asbestos bench trial,³⁹ are forms of factfinding.

2. *Courts as Institutions for Resolving Civil Disputes*

Civil disputes are private and could be resolved privately. But modern states provide institutions for resolving civil disputes. The paradigm institution is a court. According to several legal philosophers, society provides civil courts to resolve disputes that might threaten social order if they cannot be resolved privately.⁴⁰ In all of

36. R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965).

37. For a discussion of the role of judges during the pretrial stage of a lawsuit, see Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). The author, who is Chief Judge for the United States District Court for the Northern District of California, states that, at a pretrial conference, he attempts to get the parties to agree on at least some issues. *Id.* at 786. He points out that, usually, the issues can be defined and limited in a short period of time. *Id.* at 787.

38. See Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1981). In a summary jury trial, the introduction of evidence is limited and witnesses are not permitted to be present during the proceeding. *Id.* Once the evidence is presented and the judge provides a brief description of the law, the jury either presents a consensus verdict or, if no consensus is reached, discloses anonymous individual juror views. *Id.* The jury's verdict is completely advisory, unless the parties choose to be bound by the verdict. *Id.* The procedure is intended to give the parties an insight into how a jury would view the case without the expenditure of time and money required for a full trial. *Id.*

39. See Lempert, *Philadelphia Court Tries to Expedite Asbestos Litigation*, *Legal Times*, Apr. 18, 1983, at 1, col. 1.

40. See S. MERMIN, *LAW AND THE LEGAL SYSTEM* (1982). In discussing the social functions of the law, the author notes that society tends to think of courts as being in the business of settling disputes. *Id.* at 5. He points out that these disputes may be between private parties, or between a private party and government units or officials. *Id.*

the answers suggested by legal philosophers, however, civil courts are treated as institutions the use of which is *optional*. There is little basis — in this part of the literature at least — for any argument that voluntary settlement of disputes outside the court system offends any constitutional rights or public policy.⁴¹ Rather, courts are provided only to handle those disputes that cannot be resolved privately and therefore threaten social order.

Professor Raz has attempted a general classification of functions of law that illustrates why courts might be socially desirable. Raz identifies four primary functions of law: (1) preventing undesirable behavior and securing desirable behavior, (2) providing facilities for private arrangements between individuals, (3) providing services and redistributing goods, and (4) settling unregulated disputes.⁴² Courts relate to all four functions.

Raz postulates three types of legal systems, within which courts would have different roles. Type A provides norms fulfilling all or some of the first three functions. It does not have norms stipulating procedures by which disputes can be settled authoritatively, i.e., it does not have courts. "Such a normative system will guide behavior, and in doing so will prevent many potential disputes. When a dispute does arise, reference to the norms will often help in reaching an agreed solution."⁴³ However, there would be no authoritative way of deciding the correct solution to disputes governed by the norms of the system, and there would be disputes which could not be solved by direct reference to the norms, either because the norms are vague or because the case is not dealt with by the norms. In other words, the

41. *Id.* Mermin states that many government administrative agencies also participate in adjudicative dispute-settling. *Id.* In fact, the author maintains that private individuals participating in labor and commercial arbitration account for a larger number of dispute settlements per year than do all of the nation's courts. *Id.*

42. J. RAZ, *THE AUTHORITY OF LAW* 169-721 (1979). Professor Raz suggests that the law of torts performs the first function of promoting desirable behavior. *Id.* at 169. He suggests that the law of contracts, negotiable instruments, private property, marriage, corporations and collective bargaining serve the second function, that of providing for private agreements. *Id.* at 169-70. Regarding the third function, Professor Raz maintains that the law fulfills it by providing health service, road construction and maintenance, sewage and rubbish clearing, by subsidizing the arts and industries, and by paying social security benefits. *Id.* at 171. Regarding the fourth function, he suggests that the laws regulating the operation of courts, tribunals and arbitrators fulfill a primary function in that they stipulate procedures for settling unregulated disputes. *Id.* at 172. He maintains that they also fulfill a secondary function by providing procedures for settling regulated disputes, i.e., cases where the law is clear and cannot be altered by the judiciary. *Id.*

43. *Id.* at 173. Professor Raz notes that disputes will always exist that cannot be settled merely by reference to the norms "either because the case is not dealt with by the norms as they exist at the time it occurs or because the norms existing at that time are vague concerning the issue in dispute." *Id.*

coercive power of the state would not be available to settle private disputes, and interest disputes would be "unregulated," in the sense that norms to guide their resolution would not exist.

A system of type B is similar to type A except that it includes authorities for settling disputes and regulating their operation. A system of type B would have courts, albeit with a strictly circumscribed role.

These authorities, however, have only power to settle questions of fact and pronounce about the correct application of existing norms to the case. Faced with cases not governed by existing norms or cases with regard to which the existing norms are vague, (i.e., interest disputes),⁴⁴ the authorities will simply decline to make any decisions.⁴⁵

A system of type C does not provide any norms guiding the behavior of ordinary people and performing any of the the first three functions. All the norms for this type of system are concerned only with defining organs for settling disputes and regulating their operation. Sometimes the norms include norms making it a duty to bring the disputes before the relevant organs. "When faced with a dispute the organ may decide it in any way it likes."⁴⁶ It does not state the reasons and is not bound to reach similar decisions in similar cases. The organs in a type C system clearly would not be adjudicatory in nature as that term is used by Professor Fuller and in this article. In this system, there could be no rights disputes, only interest disputes, but the coercive power of the state would be available to force resolution of private disputes.⁴⁷

44. See *id.* Professor Raz uses the term "unregulated" to refer to the type of disputes referred to as "interest disputes" in this paper. For a discussion of "interest disputes," see note 19 and accompanying text *supra*, and notes 102-12 and accompanying text *infra*.

45. J. RAZ, *supra* note 42, at 173. Professor Raz maintains that a Type B system has three distinctive qualities. First, a Type B system performs at least some of the first three social functions of the law. *Id.* Second, it provides for the settlement of regulated disputes. *Id.* A third quality of a Type B system, however, is that, like a Type A system, it does not provide for any means of settling disputes that are not fully regulated. *Id.* For a discussion of what Professor Raz believes to be the four social functions of the law, see note 42 and accompanying text *supra*.

46. J. RAZ, *supra* note 42, at 174. According to Professor Raz, when a Type C normative system settles a dispute, it does not articulate its reasons nor is it bound to reach similar decisions in similar cases. *Id.*

47. *Id.* Professor Raz suggests that a Type C system can also be described by reference to three qualities. First, it does not perform any of the first three social functions of the law, and does nothing to guide behavior in daily life; nor does it help prevent potential disputes. *Id.* Second, there are no regulated disputes under it. *Id.* Third, it possesses procedures for settling all unregulated disputes. *Id.*

Professor Raz asserts that real-world legal systems are a combination of types B and C. They provide for the settlement of both regulated and unregulated disputes, though there are certain types of unregulated disputes with which legal systems will refuse to interfere. "Many legal systems by establishing some principle of *stare decisis* transform automatically every unregulated dispute once it is brought before the courts into a regulated or at least a partially regulated one."⁴⁸ In other words, courts tend to transform interest disputes into rights disputes.

Dean Hazard suggests that a society which is interested in resolving private disputes would reject a Type A system since such systems do not have authorities for settling disputes.⁴⁹ According to Dean Hazard, a third party is often necessary to settle a private dispute. Without such a third party, the disputants often cannot negotiate to a conclusion.⁵⁰

Professor Fuller offers a roughly similar explanation of why a Type A system would not serve a modern society well.⁵¹ He maintains that, although courts may not be necessary to settle disputes in a small society with relatively simple rules, they are essential in a complex society such as ours.⁵² Since some means of resolving disputes is

48. *Id.* A significant distinction between a Type C system and a Type B system is that, in a Type C system, courts can settle unregulated disputes, whereas in a Type B jurisdiction, courts can only settle regulated disputes, that is, cases where the law is clear and cannot be altered by the judicial organ. *Id.* at 173-75. Thus, the difference between Type B and Type C is that courts have the power to "make law" in a Type C system, and they do not in a Type B system.

49. *See Discussion by Seminar Participants, supra* note 19, at 331-32 (remarks of G. Hazard). Dean Hazard provides:

With regard to adjudication, I think the question of compulsory jurisdiction is critical

The compulsion comes from some third party, whether it will be members of a private association who will use the sanction of expulsion, or the state using the sheriff's apparatus. The compulsion is exerted because the dispute has become a matter of third-party concern. The disputants can't negotiate to a conclusion; unilateral coercion seems unacceptable, at least at some point; the noise is getting loud; insecurity develops because if people are simply allowed to walk away from such situations scot-free, it encourages (or is thought to encourage) recklessness; the community is disturbed and is willing to exert effort to do something about it.

Id.

50. *Id.*

51. *See* L. FULLER, *THE MORALITY OF LAW* 55-56 (1964).

52. *Id.* As Professor Fuller maintains,

It is important to note that a system for governing human conduct by formally enacted rules does not of necessity require courts or any other institutional procedure for deciding disputes about the meaning of rules. In a small and friendly society, governed by relatively simple rules, such disputes may not arise. If they do, they may be settled by a voluntary accommodation of interests. Even if they are not so resolved, a certain number of continuing

necessary in a complex society, Professor Fuller contends that the most efficient means of fulfilling this function is through some form of judicial proceeding.⁵³

The conclusion that a modern society needs courts to address some private disputes does not, however, presuppose a particular procedural system for those courts. Neither does the existence of courts imply that all private disputes ought to be resolved judicially.

Professor Raz's types B and C system are distinguished according to whether their state-sponsored tribunals are designed to apply pre-existing norms to disputes or to deal with disputes on an *ad hoc* basis, without reference to pre-existing norms. The adjudicatory court systems in modern American society are designed primarily to apply pre-existing norms or rules of decision to disputes brought before them. In this respect, they represent a system predominantly of type B. Unregulated, or interest, disputes are handled by a finding that "no claim upon which relief can be granted" is presented. Some type C characteristics are present, of course, in that courts have power to develop new causes of action, and to expand existing ones to encompass previously unregulated disputes. Nevertheless, adjudication is designed primarily to deal with rights disputes.

controversies on the periphery may not seriously impair the efficacy of the system as a whole.

I emphasize this point because it is so often taken for granted that courts are simply a reflection of the fundamental purpose of law, which is assumed to be that of settling of disputes

. . . .

In a complex and numerous political society courts perform an essential function.

Id.

In contrast, groups of settlers heading toward the American Western Frontier banded together into communities and adopted "constitutions" and "bylaws" to be effective for the journey. The laws of these transient communities had certain common features.

The bylaws of the Green and Jersey Company, for example, provided that there be a trial at the next camping place whenever a member complained to the captain that any of the rules or regulations had been violated, or that any of the company have violated the rules of order, right and justice which are evidence to all men. Trial by jury was the rule. For certain serious offenses, the penalty was banishment.

D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 67 (1965). Banishment was a serious sanction, given that members of the community depended entirely on the association with each other for physical security during their migration.

53. See L. FULLER, *supra* note 51. Professor Fuller urges that, [n]o system of law — whether it be judge-made or legislatively enacted — can be so perfectly drafted as to leave no room for dispute. When a dispute arises concerning the meaning of a particular rule, some provision for a resolution of the dispute is necessary. The most apt way to achieve this resolution lies in some form of judicial proceeding.

Id.

C. *Characteristics of Adjudication*

The contemporary judicial system is largely adjudicatory; it functions in order to permit pre-existing rules of decision to be applied to facts as they are found to exist in the proceeding. The emphasis is on procedures that assure accuracy in finding facts. Accuracy is expensive. For some disputes, improved accuracy is worth higher cost to the parties or to society. For other disputes the need for factual accuracy is not so great as to justify the expense of the procedures designed to secure accuracy. The parties would be willing to accept a greater risk of an inaccurate decision in exchange for lower cost.

In cases involving interest disputes, suitable pre-existing rules for decision do not exist, and therefore accuracy is not a goal. The parties need to be provided a procedure that facilitates development of rules of decision that meet their needs and that each is willing to accept.

The alternative dispute resolution inquiry should begin at this point. Assuming that society needs to provide institutions for resolving private disputes, it still must decide the cost-accuracy tradeoff for the resolution of major classes of rights disputes, and to provide procedures other than adjudication to assist in resolving interest disputes.

The outer limits of the cost-accuracy tradeoff are defined by the concept of procedural due process, when the decisionmaking institution is provided by the state. The United States Supreme Court, in *Mathews v. Eldridge*,⁵⁴ held that procedural due process is flexible, involving a determination of (1) the private interest that is affected by the legal action, (2) the chance of a mistaken deprivation of such interest through the procedures used, and the potential value, if any, of additional or different procedural safeguards, and (3) the Government's interest, including the function involved and the administrative and fiscal burdens that would result from the additional or different safeguards.⁵⁵ In this cost-effectiveness formula, the first two

54. 424 U.S. 319 (1976). In *Mathews*, the respondent Eldridge received cash benefits under the disability insurance benefits program created by the 1956 amendments to title II of the Social Security Act. *Id.* at 323. In March 1972, Eldridge was given a questionnaire from the state agency which was monitoring his medical condition. *Id.* Eldridge filled out the questionnaire, maintaining that his condition had not improved. *Id.* at 323-24. After obtaining reports from Eldridge's physician and a psychiatric consultant, the state agency informed Eldridge by letter that it had determined that Eldridge's disability had ceased in May 1972. *Id.* at 324. This determination was approved by the Social Security Administration (SSA), which told Eldridge in July that his benefits would terminate after that month. *Id.*

55. *Id.* at 335. In *Mathews*, the issue was whether the provision of an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would impose too great a burden on the social security system. *Id.* at 347. The *Mathews* Court suggested that the most noticeable burden would be the higher costs resulting from the increased number of hearings and the costs of providing benefits to inelig-

criteria relate to effectiveness, and the third relates to cost.

Judge Friendly has offered a menu, from which elements of adjudicatory process can be selected:⁵⁶

1. An unbiased tribunal.
2. Notice of the proposed action and ground asserted for it.
3. An opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to have the decision based only on the evidence presented.
7. The right to counsel.
8. A requirement that the tribunal prepare a record of the evidence presented.
9. A requirement that the tribunal prepare written findings of fact and reasons for its decision.
10. Public attendance.
11. Judicial review.⁵⁷

All of these elements are present in the traditional civil jury trial. Some are absent or present in weaker form in more simplified procedures.⁵⁸ Making the cost-effectiveness tradeoff, and selecting among the items on Judge Friendly's list, are essential parts of making the choice among rights dispute resolution processes, whether the choice is made by the parties to the dispute or by designers of new dispute resolution processes.

D. *Dynamics of Party Choice*

An intrinsic characteristic of private disputes is that they may be resolved privately, if neither party wants to participate in the dispute

ble recipients pending decision. *Id.* As the Court asserted, "the ultimate additional costs in terms of administrative burden would not be insubstantial." *Id.* The *Mathews* Court concluded that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comply with due process. *Id.* at 349.

56. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

57. *Id.* at 1279-94. Judge Friendly notes that the factors which he lists as elements of a fair hearing are listed in order of priority. *Id.* at 1278. He also suggests that if an agency goes further than is constitutionally demanded with respect to one factor, this may provide ample justification for diminishing or even removing another. *Id.* at 1279.

58. For example, small claims courts and court-annexed arbitration usually dispense with elements eight and nine because of the cost of recording the proceedings and preparing a transcript, and the cost, in judge time, of written opinions.

resolution procedures provided by society. Accordingly, if one wishes to understand the frequency with which the parties will resort to third-party dispute resolution procedures and when they will abandon their disputes or revert to private settlement, one needs to understand the choices available to them. A significant amount of theoretical literature, and some empirical literature, exists on party choice.

1. *Compelling Participation*

Some choices may be foreclosed entirely for one or both parties. A central feature of litigation in the civil courts is that participation by the defendant is not voluntary. This feature has important implications for the choices available to the claimant.

Professor Posner contends that, in a purely private system of dispute resolution, the main difficulty is in compelling parties to submit themselves to the dispute resolution process, particularly when a party anticipates losing.⁵⁹ He notes that this is not a problem when a state is administering the judicial system since the force of the state can be employed to compel submission.⁶⁰ According to Posner, one sanction that often is successful in a private system of dispute resolution is expulsion from an organization.⁶¹

During the early development of English civil procedure, obtaining participation by the defendant was a major problem.⁶² To-

59. See Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); see also *Discussion by Seminar Participants*, *supra* note 19, at 323 (remarks of R. Posner at the Seminar on Private Alternatives to the Judicial Process). Professor Posner maintains that judicial services can be provided privately. *Id.* Although there may be problems, "nonetheless one can conceive of a system at private adjudication." *Id.*

60. *Id.* According to Richard Posner,

If you look at the dispute-resolution side of judicial services — as opposed to rule making — the main problem is that of getting other parties to submit themselves to the dispute-resolution process. The party who anticipates losing the case is likely to refuse to submit. Where the state is administering the judicial system, this is not a problem because the force of the state is used to compel submission. Under a purely private system, other means of inducing participation have to be relied on. An important one, both in primitive society and today, is expulsion from an organization as a sanction. And that often works.

Id.

61. See *id.*

62. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 383-85 (5th ed. 1956). Under Anglo-Saxon procedure, the plaintiff was required to make three demands directly on the defendant for satisfaction as a prerequisite to access to the courts. In the King's Court after the Norman invasion, the state became involved in summoning the defendant, but the procedure still was cumbersome. Gradually, outlawry and default judgments were developed as penalties to be imposed on defendants who failed to appear. *Id.*

day, the problem has been resolved in court procedure by the device of the default judgment,⁶³ but it remains with respect to private means of dispute resolution. Most private means of resolving disputes operate against a backdrop of interdependence between the parties that militates toward participation by both in resolving the dispute outside the courts.

The social or economic interdependence between the parties that makes private dispute resolution possible is illustrated with two examples, one relating to religious disputes, and one related to family disputes. In religious courts, excommunication is the sanction that makes it effective, and that sanction represents a serious cost to members of the religious group.⁶⁴

Professor Posner also maintains that the family provides a good illustration of private adjudication.⁶⁵ As he points out, family members are often compelled to submit to the jurisdiction of the family by the head of the family.⁶⁶ For example, in the modern family, parents often provide incentives to force their children to resolve disputes.⁶⁷

The likelihood that the claimant will be more interested than the other party in resolving, rather than abandoning, the dispute means that selection of a dispute resolution process usually is determined in part by the means available to compel participation by the reluctant party. Dean Hazard suggests that certain alternatives to adjudication may avoid this difficulty. Although adjudication may be disagreeable to one of the parties, Dean Hazard maintains that negotiation can be voluntary and private and can bring about results catered to the parties' specific needs.⁶⁸ According to Dean Hazard, another method of

63. See, e.g., FED. R. CIV. P. 55.

64. *Discussion by Seminar Participants*, *supra* note 19, at 324. Professor Posner also discusses how private adjudication is compelled in primitive settings. See *id.* In primitive societies, such as the Yurok Indians, Posner notes that there are problems of submission to the adjudicator, but they are generally solved through the threat of expulsion, which carries a lot of weight in a primitive setting. See *id.*

65. See *id.* at 336-37. Posner points out that, under Roman law, the head of the family had the power to order the death of his wife or his children. *Id.* at 337.

66. See *id.* at 337. As Professor Posner maintains:

There is a good deal of adjudication, resolution of disputes, and laying down of rules within the family. It is an informal system but it could be analyzed using essentially the same tools we use. One of the reasons that you can have feasible adjudication within a family is that there are elements of compulsion to submit to the jurisdiction of the family. The head of the family can impose costs on the other party.

Id. at 336-37.

67. *Id.* at 337. According to Professor Posner, "[e]ven in a modern family, there are sticks and carrots which the parents can use to force resolution of disputes among the children." *Id.* at 336-37.

68. See *id.* at 331-32. Regarding the process of negotiation, Dean Hazard opined:

dispute resolution is coercion, which is used when one party believes that there is no reason to use persuasion to reach an agreement.⁶⁹ Coercion as a means of compelling participation requires that interdependence between the parties exist.

In procedures that are adjuncts to court procedures, the defendant is compelled to participate — though not necessarily to accept the adjunct's result — by legal process and the possibility of a default judgment or other sanctions imposed by the court. If the case is settled in conciliation, conference or other pretrial proceeding, the settlement agreement frequently is embodied in a consent decree or judgment, in which case enforcement proceeds just as it would on a judgment or decree obtained after a traditional trial.

In private procedures, participation is either wholly voluntary or backed by the possibility of sanctions imposed in a collateral proceeding. The effectiveness of the private procedure may be affected by the speed and expense of the ultimate sanctions. For example, the Uniform Arbitration Act permits summary enforcement, by injunction, of agreements to arbitrate, and permits summary entry of judgment on an arbitration award.

2. *Values Affecting Choices Among Processes*

Once a means is found of compelling participation by the reluctant party, other values affect choice among dispute resolution

Not all forms of dispute resolution in terms of rights involve adjudication. And it may be helpful to look at the alternatives.

There is . . . negotiation. But negotiation often proceeds more effectively if conducted in a framework involving the possibility of eventual compulsion. One of the reasons people negotiate is because the alternatives are frequently disagreeable, and I happen to think adjudication is a very disagreeable process

Negotiation . . . can be private and voluntary in some sense of the term, and can yield results tailored to the parties' specific needs.

Id. at 331.

69. *See id.* at 331. Regarding the method of coercion, Dean Hazard stated:

A second method of dispute resolution is coercion, in which one party is able to arm himself sufficiently to resist all sorts of intrusions and entreaties. There are many forms of coercion. Repossession is one of them. The Mafia has other techniques; they have developed a whole system of private justice that is said to be very efficient.

Indeed, "coercion" can be said to [be] the primal dispute-resolution technique. It is used when a party sees no reason or hope to use persuasion or exchange as a basis for concord. And coercion is actually often operative in resolutions that nominally have been resolved by negotiation. The difference between coercion and negotiation may be only that in negotiation both parties think the terms of resolution are substantially fair.

Id.

processes. Professor Carrington begins with three moral premises for dispute resolution:

1. Coercion by the government should be minimized.
2. Responsibility for the exercise of public power ought to be diffused as much as possible.
3. All formal procedures are inherently undesirable.⁷⁰

These premises lead him to conclude that any procedure that enables parties to a dispute to work out their own solutions by their own initiative is inherently desirable.⁷¹

He notes that the least costly dispute resolution mechanism is simple forbearance by the party who is otherwise aggrieved.⁷² According to Carrington, there are some circumstances where the legal system should encourage people to forbear from suit because there is no means of dealing with the grievances that is not more burdensome than the grievance itself.⁷³

Professor Carrington also identifies a social value that constrains the search for litigation alternatives, assuming that forbearance or abandonment is not appropriate. Systems that follow familiar procedures are seen as more legitimate than entirely new procedures. One reason that arbitration procedure resembles formal adjudication is that adjudication is familiar and legitimate, and therefore is a way of securing mutual understanding between the parties who are agreeing to the process.⁷⁴

70. *See id.* at 333. With respect to the first moral premise, Professor Carrington maintains that "[g]overning least is governing best. We ought to use whatever kind of public power we have as sparingly as possible." *Id.* With respect to the second moral premise, Carrington asserts that the adjudicative process is best when the person who is asserting authority speaks for the community generally. *See id.* Regarding the third moral premise, Carrington suggests that all formal procedure is harmful to the persons who participate in the adjudicative process. *See id.*

71. *See id.* According to Carrington, "[p]arty-initiated devices are consensual, they are less authoritarian, and they are almost certainly cheaper from the point of view of the kind of pain and waste that is involved in any kind of official process." *See id.*

72. *See id.*

73. *See id.* As Carrington asserts:

In some circumstances it is appropriate for the legal system to encourage people to forbear pursuing any kind of grievance simply because there is no way to deal with the grievance that is not most burdensome and onerous and more distasteful than the disappointment that gave rise to the grievance.

Id.

74. *Id.* at 335. As Carrington reasons, "I suppose you could try to invent an arbitration process that was radically different from the adjudicative process. But the effect would be a transaction cost . . . associated with trying to get people to understand what that alternative process was. This would make it much more difficult." *Id.*

Another fundamental goal affecting choices among alternative processes is to provide for a way in which interest disputes — the type described by Professor Raz as “unregulated”⁷⁵ — can be resolved more satisfactorily to the parties than by judicial application of existing formal norms. This felt need supposes that the parties are better off if they can make up their own norms in the process of resolving the dispute as opposed to having an external set of norms imposed on them. This goal is served by ensuring the availability of nonadjudicatory, as well as adjudicatory, processes.

Empirical evidence on the handling of minor personal disputes shows that citizens tend to avoid the courts. Two possible reasons for this exist, which relate to the values suggested in this section. The first reason is that citizens like to avoid involving the government in their disputes, if possible. This is consistent with Professor Carrington’s premise that government coercion ought to be minimized. The second reason is that real-world disputes usually do not fit legal pigeonholes precisely. Some can be shoe-horned into recognized forms of action without too much difficulty; these are characterized as rights disputes. Other cannot be conformed to recognized forms of action at all; these are characterized as interest disputes. In both cases, however, some simplification of the real nature of the dispute is required if it is to be decided by the formal court machinery. Therefore, party satisfaction is likely to be higher if dispute resolution methods are available which permit disputes to be addressed and resolved in a flexible, private manner.

3. *Empirical Evidence on Disputant Behavior*

The limited empirical data on the universe of private disputes say that only a miniscule portion of such disputes is litigated. A study of consumer complaints was conducted from 1978 to 1982 in Milwaukee, Wisconsin.⁷⁶ These complaints were examined to see how the complainant sought to resolve them. Several different possibilities were considered, including abandonment of the claim, consultation

75. See J. RAZ, *supra* note 42, at 174. Raz maintains that, out of the three different types of normative systems which he suggests, the Type C system provides a means of settling unregulated disputes. See *id.*

76. See Ladinsky & Susmilch, *supra* note 29, at 145. This study involved the 14 dispute processing forums that the authors found in Milwaukee. *Id.* at 163. These forums are formal entities that were specifically designed by private and public agencies to handle consumer problems. *Id.* Each of these forums received consumer complaints about service and product problems, and they attempted to help the consumer if, after hearing both sides, redress was found to be justified. *Id.* Table 2 of this study lists the 14 dispute processing forums found in Milwaukee and provides basic facts about each. *Id.* at 164.

with a "broker" (an individual with perceived expertise), presentation of the claim to a private forum such as Action Line, and presentation to a government agency including small claims court and the district attorney's consumer fraud unit.⁷⁷

About twenty-three percent of the perceived problems did not result in claims.⁷⁸ Seventy percent of the problems were resolved entirely or partially,⁷⁹ but only three percent of the unresolved claims were presented to third parties for resolution.⁸⁰ Of the claims presented to third parties, most were presented in informal networks of friends and associates, directly to producers, or to forums such as insurance companies or the Better Business Bureau.⁸¹ Very few claimants presented complaints to governmental agencies, and a miniscule proportion resorted to small claims court.

4. *Incentives and Disincentives to Settle*

It is well established that fewer than ten percent of the civil lawsuits filed are resolved by a judgment entered after a trial.⁸² Most lawsuits are settled through negotiation. This fact, combined with the likelihood that a far greater number of claims are abandoned or resolved through negotiation without ever reaching the judicial system, means that an inquiry into dispute resolution must concentrate on the incentives to settle claims. Incentives to settle can be understood best by drawing on analytical models developed in the theoretical literature.

The underlying premise of virtually all the theoretical models is Professor Fisher's concept that a rational negotiating position depends upon the "Best Alternative to a Negotiated Settlement" (BATNA): no party will settle for a figure below his or her BATNA at any point in time.⁸³

77. *Id.*

78. *Id.* at 172. Ladinsky and Susmilch refer to those individuals who do not make claims despite having valid complaints as "lumpits." *Id.* While Ladinsky and Susmilch maintain that 23% of all perceived problems are "lumpits," they claim that the percentage is somewhat lower (18%) for service than for products (25%). *Id.*

79. *Id.* at 173. Ladinsky and Susmilch estimate that about three-fourths of all problems lead to claims, and most claims, approximately 70%, lead to partial or full recovery of what consumers desire. *See id.*

80. *Id.* Although 70% of all claims lead to some recovery, 27% of all claims are abandoned. *Id.* Thus, only 3% of all problems are presented to third parties for resolution. *Id.* at 173-74.

81. *Id.* at 188-91.

82. *See* H. ROSS, SETTLED OUT OF COURT (1970). The author notes that 19 out of 20 bodily injury liability claims are disposed of informally through settlement. *See id.* at 136.

83. *See* R. FISHER & W. URY, *supra* note 21, at 104. The authors note that the

Lawsuits are filed to change BATNA's. Alternative dispute resolution methods can be evaluated by using the dynamics of a lawsuit as a baseline. Once one understands how lawsuits change BATNA's, one can consider how alternative dispute resolution methods change BATNA's.

Consider the defendant's negotiating position. A necessary consequence of being a defendant is that any negotiated settlement will impose a cost on the defendant. In other words, the defendant's benefit will be negative. If we assume that the plaintiff is a stranger,⁸⁴ the defendant's BATNA when the dispute arises is zero. Therefore a rational defendant will make no positive offer and there is no zone of agreement. But if the plaintiff files suit, the defendant's BATNA changes to a nonzero (minus) quantity. If suit is filed, the plaintiff's BATNA becomes greater than zero, and the defendant's becomes less than zero. Thus the plaintiff can control the defendant's BATNA as well as his own. Whether this change in BATNA's produces a zone of agreement depends on the components of the respective BATNA's, and those components are in turn determined by the litigation process.

If suit is filed, the defendant's changed BATNA can be disaggregated into two components: (1) the economic value of a judgment in the lawsuit, and (2) the cost of defending the lawsuit. Both components have negative value to the defendant.

The plaintiff's perspective is the converse of the defendant's. If he files suit, his BATNA also may be disaggregated into two major components: (1) the economic value of a judgment, and (2) the cost of litigation. For the plaintiff, the value of the first component is positive, and the value of the second component is negative.

The economic value of a judgment obtainable in the litigation can be decomposed into a function of four variables: (1) the expected value of the judgment, (2) the variance around that expected value,⁸⁵ (3) the length of time that will elapse before judgment is entered, and

purpose of negotiating is to achieve something better than the results obtainable without settling. *See id.* Those projected results, the Best Alternative to a Negotiated Settlement (BATNA), are then measured against any proposed agreement. *Id.*

84. This assumption is necessary because a nonzero BATNA for a potential defendant may result from the costs of breaking off an advantageous commercial relationship, a strike or lockout, or exclusion from membership in an association. If the potential defendant is a stranger, these sanctions are not available against him.

85. "Variance" is a measure of uncertainty. For example, if the average jury verdict for medical malpractice is \$100,000, but about as many juries find for the defendant as award \$200,000, the uncertainty about the outcome of a trial is great. In this case the "expected value" would be \$100,000, and the variance would be high. In contrast, suppose the average verdict is \$100,000, as before, but about half the juries find for the plaintiff in the amount of \$90,000, and about half find for the plaintiff in

(4) a discount factor. In the aggregate, these variables will be referred to as the "outcome value."

The two components of party BATNA's can be explored by further elaboration of the example given above. If a plaintiff is certain of obtaining a judgment of \$10,000 in a trial that will cost \$4,000, his BATNA in settlement negotiations will be \$6,000. Of course, in the real world no claimant is *certain* of receiving a judgment of any amount; rather his BATNA is determined by his *expectations* about the judgment he will receive if he tries the case. Expectations are inherently uncertain. The availability of ADR processes alter the claimant's BATNA in two possible ways: by changing his expectations about trial judgment, and/or by changing the costs of obtaining that judgment.

For example, suppose a claimant thinks he has a ninety percent chance of obtaining a \$10,000 judgment, and a ten percent chance of obtaining a zero judgment, and that the cost of litigation will be \$4,000 in either event. His BATNA in settlement negotiations will be \$5,000 (.9 times \$10,000, minus \$4,000). Then suppose he is required to present his case in a summary jury trial, which results in a verdict of \$8,000. This well may alter his expectations about the judgment obtainable from a full-blown trial to a ninety percent probability of obtaining \$8,000 and a ten percent probability of obtaining zero. If his expectations are altered thus, his BATNA will be reduced to \$3,200 by the availability of the summary jury trial procedure. The effect of an alternative procedure that reduces costs below \$4,000 is more difficult to quantify in simple terms.

Costs of litigation can be decomposed into four variables: (1) the cost of filing suit, (2) the cost of discovery and other pretrial preparation, (3) the cost of trial, and (4) any fees imposed by the judicial system for moving from one step to another in the procedure. In most cases, the amount of attorney's fees will far exceed any other costs. The plaintiff has control, at least at the outset of the litigation, over his own litigation costs. Additionally, he can determine a "floor" for the defendant's litigation costs.

Filing a lawsuit requires the other party to address the dispute, if only by filing a responsive pleading. This costs money. Filing also confronts the other party with the potential costs of obtaining legal representation and participating in discovery. If the other party is an institution with substantial resources already committed to handling litigation, these costs may be small. If the other party is an individual

the amount of \$110,000. In this case, the expected value would be the same, but the variance would be low.

or an institution with few resources, however, these costs may be substantial. Accordingly, filing changes the BATNA of the defendant and therefore may produce a zone of agreement where none existed before suit. Any litigation alternative must be measured in part by how effectively it forces the unwilling party to address the dispute.

Once a lawsuit is filed, other litigation initiatives may be undertaken that further increase the costs to the other side. Probably the best example is discovery. Certain forms of discovery, such as depositions, are expensive for both sides. The relative cost burdens of taking a deposition may be greater for the initiating party than for the opponent. In contrast, the cost of propounding interrogatories is usually low, while the cost of answering them may be substantial. The same cost relationship obtains for production of documents. Therefore, once litigation has begun, both parties may have a rational incentive to proceed with certain types of discovery in order to increase the costs of not settling for the other side. In choosing discovery methods, they have an incentive to use procedures that have asymmetric costs.

Judicial and nonjudicial pretrial procedures affect more than costs; they also change the magnitude, and reduce the variance, of estimates about trial outcome. Understanding the interrelationships between negotiated resolution of disputes and the availability of dispute resolution institutions of different types requires a deeper understanding of two processes: the dynamics of negotiations and the characteristics of the institutions.

To resume with the quantitative hypothetical, recall that the plaintiff's BATNA after an advisory verdict had changed from \$5,000 to \$3,200. Consider the defendant's perspective. The defendant may have believed at the outset that he enjoyed a fifty percent probability of a \$1,000 award in the plaintiff's favor. If he expected litigation costs of \$500 (much lower than the plaintiff's) his BATNA would have been \$1,000, and he would not have settled for the plaintiff's BATNA of \$5,000. The advisory verdict could change the defendant's BATNA by changing his expectations about the probable jury verdict, say to the same expectations as the plaintiff's: \$7,200. Then, even if he expects his further litigation costs to remain at \$500, his BATNA will have been changed to \$7,700, and he will settle for the plaintiff's new BATNA of \$3,200.

Even if both parties' expectations about trial outcome remain disparate after the advisory verdict, however, the costs of proceeding further can produce a zone of agreement. Suppose that the plaintiff's expectations of the trial outcome are \$7,200, as before, and that the plaintiff expects the costs of further litigation to be \$2,000. Suppose

the defendant's expectations of trial outcome, after receiving the advisory verdict, are \$2,500, and that he also expects further litigation costs of \$2,000. The plaintiff's BATNA will be \$5,200, and the defendant's BATNA will be \$4,500, and there will be no settlement. Suppose however, that both parties expect further litigation costs of \$3,000. Then the plaintiff's BATNA will be \$4,200, and the defendant's BATNA will be \$5,500, and there is a zone of agreement. Accordingly, an alternative dispute resolution procedure can promote settlement by bringing the parties' estimates of trial outcome somewhat closer together when substantial costs will be incurred by both parties by litigating further. Generally, it can be shown that a zone of agreement will exist in this simple model whenever the cost of further litigation exceeds the difference between the parties' expectations about trial outcome.

5. *Attorney-Client Differences and Deadlines*

Professor Dunlop's article identifies dynamic characteristics of negotiations, two of which are especially important for exploring party preferences in relatively simple disputes: the existence of differences between negotiators and constituents, and the importance of deadlines.⁸⁶

As in the negotiations between representatives of fairly stable or continuing organizations, discussed by Professor Dunlop,⁸⁷ negotiations between attorneys may produce a zone of agreement between the attorneys but not between their clients because the clients continue to have substantially different expectations about trial outcome. The availability of an advisory verdict of some kind may be essential to close this client-to-client gap and thus permit the attorneys to settle the dispute on terms which the attorneys agree are reasonable.⁸⁸

Also, deadlines resulting from an early submission to advisory forum can stimulate settlement by forcing the parties to evaluate the strength of their positions.⁸⁹

6. *Other Literature on Party Behavior*

Gordon Tullock has made a useful conceptual contribution that aids in understanding these characteristics. He applies the principles

86. See Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421 (1984).

87. See *id.* at 1430-44.

88. *Id.* at 1430-33.

89. *Id.* at 1436-37. For a discussion of the use of early judicial intervention to promote settlement, see notes 318-26 and accompanying text *infra*.

of economic decision theory to a comprehensive model of civil litigation. In the basic Tullock model, the trial is represented as an imperfect random variable that will produce a correct decision with a probability of less than 100%, as a function of the quality of evidence presented to it.⁹⁰

In this model, the plaintiff, viewing the trial *ex ante*, will settle for any offer greater than his BATNA determined by the economic gain from trial (post-trial award less litigation costs), and will go to trial in the absence of such offer as long as his BATNA is greater than zero. If the plaintiff's BATNA is zero or negative, as it would be if the economic payoff from trial were less than litigation costs, he will abandon his claim. The defendant will settle for any figure less than his expected loss (post-trial award plus litigation costs). The defendant will defend at trial any case in which the expected loss is less than simply paying the plaintiff's demand.

The relationship between the parties' expectations about trial outcome and Tullock's model of the trial can now be explained. The parties know that trial is an imperfect process, and even if they have perfect knowledge about the information that would be presented at trial, they cannot be completely certain about trial outcome. In the real world, the parties not only face this uncertainty resulting from imperfections in the trial process, they also lack perfect knowledge about the information that will be presented at trial. Improving their knowledge about the information to be presented is, of course, one motivation for discovery. Under the Tullock model, the settlement range, and the prospects of trial, thus depend on two institutional characteristics of the litigation system and two characteristics of the particular dispute. The two institutional characteristics are (1) cost of trial, and (2) accuracy of decision making. The two dispute characteristics are (1) the nature of the available evidence, and (2) the cost of obtaining better evidence.

Higher trial costs *borne by the parties* will reduce the number of cases that go to trial, but will increase social costs. Lower trial costs will increase the number of cases that go to trial, but will reduce social costs. Improved evidence, that both parties know about, will reduce the chance of a particular case going to trial, because it reduces party uncertainty about trial outcome. These three variables, accuracy, cost and evidence quality, are not independent, however. Im-

90. G. TULLOCK, TRIALS ON TRIAL 26 (1980). The author recognizes that different cases have evidence that varies in terms of amount and quality. *See id.* He maintains that these factors affect the probability of reaching a correct decision. *See id.*

proving the quality of evidence may also increase costs.⁹¹

Discovery is a good example of a procedural device that affects more than one variable, but that also increases cost. Informal procedure (for example, relaxation of the hearsay rule) is another good example. Presumably this would reduce accuracy, but it also reduces cost.

Some reasonable assumptions can be made about the nature of the interdependence among the variables that facilitate a search for the optimal theoretical combination. One can assume a diminishing marginal return for investment of additional resources. In other words, at some point as costs of the trial are increased, for each unit increase in cost, there will be less than one unit improvement in accuracy. Likewise, at some point as costs of discovery are increased, for each unit increase in cost, there will be less than one unit improvement in evidence quality.

There is therefore always a tradeoff in selecting among processes for dispute resolution. Accuracy of decision, or of forecasts about the probable decision, can be purchased only at a price. Cheaper processes produce less accurate decisions. Cheap final decision processes may be so inaccurate that they are unacceptable to the parties or to society. Cheap nonbinding decisions, intended to facilitate settlement by improving a party's ability to project ultimate trial outcome, may be so inaccurate that they do not promote settlement.

Other commentators have offered basically similar models of the dispute resolution process.

Professor Landes⁹² identifies factors that determine the choice between pretrial settlement and a trial in an economic model of the criminal justice system. Appendix A of his article extends his model to civil cases. In this appendix he concludes that the following factors make settlement likely:

- * Both parties have similar expectations about the probability that the defendant would be found liable at trial;
- * Both parties have similar estimates of damages given that the defendant is found liable at trial;
- * Neither party has a strong preference for risk; and

91. *Id.* at 151-57.

92. See Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971). Landes maintains that in the criminal justice system, the decision to go to trial depends on the probability of conviction by trial, the severity of the criminal offense, the availability of the defendant's and prosecutor's resources, the costs of trial as opposed to settlement, and attitudes toward risk. See *id.*

* The costs of a trial to the plaintiff and defendant, including attorney's fees, court fees, and their own time exceed the cost of settlement.⁹³

The following factors make settlement before trial unlikely:

- * Dissimilar estimates of liability and damages by the plaintiff and defendant, *if* the plaintiff's estimates are higher;
- * Lower risk averseness; and
- * Lower court costs relative to settlement costs.⁹⁴

Professor Landes concludes that increased costs of access to the courts would increase the incidence of settlement. He also concludes that differences in the rate at which the plaintiff and defendant discount future damages awarded at a trial can give rise to different settlement rates as a function of delay. According to Professor Landes, the higher the plaintiff's discount rate in relation to the defendant's, the greater the plaintiff's losses and the smaller the defendant's gains from an increase in delay.⁹⁵

Cooter and Marks have developed a theoretical model of bargaining in a litigation context.⁹⁶ They predict the effect on the

93. *See id.* at 101-02. According to the author, the plaintiff will determine a settlement payment (X) that yields him the same utility as his expected utility at trial. *See id.* at 101. X is the minimum sum that the plaintiff will accept to settle. *Id.* If the payment of X by the defendant yields him a higher utility than his expected utility from a trial, a settlement will occur. *Id.* The author maintains that this follows, since one can find a payment somewhat greater than X that gives both parties a higher utility from a settlement than their expected utilities from a trial. *See id.* As the author points out, factors such as the costs of a trial, including attorney's fees, will increase the chances of settlement. *See id.*

94. *Id.* at 102.

95. *See id.* at 103. Landes maintains that this, in turn, would decrease the sum acceptable to the plaintiff by a greater amount than it reduces the defendant's offer, thus making a settlement more probable. *Id.*

96. *See* Cooter & Marks, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982). Cooter and Marks describe bargaining in the shadow of the law as a game with the following traits:

(1) There is a dispute between two players, the defendant and plaintiff, over how to divide the stakes. (2) Bargaining consists in an exchange of demands and offers for dividing the stakes. (3) Settlement occurs if the plaintiff's demand does not exceed the defendant's offer. (4) Trial occurs if a settlement is not reached before the trial date. (5) The outcome of a trial is the destruction of part of the stakes (the surplus) and distribution of the remainder.

Id. at 228-29.

See generally Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982). The author notes that social efforts to promote or subsidize lawsuits, such as the availability of class actions and the establishment of small claims courts, are designed to increase private incentives to bring suit. *See id.* at 339. He also maintains that social efforts to reduce the volume of lawsuits, including the passage of statutes to circumvent the legal system (i.e., auto-

probability of settlement of changes in various parameters.

- * An increase in the urgency of resolution resulting from a higher discount rate makes settlement more likely.
- * An improvement in only one party's expectation about trial outcome makes settlement less likely.
- * An increase in the transaction costs of continuing the dispute makes settlement more likely.
- * An increase in spitefulness toward opponents makes settlement less likely.
- * Lower risk aversion makes settlement less likely.
- * An increase in the familiarity of the opponents with each other makes settlement more likely because it reduces uncertainty.⁹⁷

A recent article by Danzon and Lillard⁹⁸ applies three theoretical models to data on medical malpractice suits in all fifty states. The key theoretical prediction of their model is that the sample of cases going to verdict will be a "small atypical group in which the plaintiff's overestimate or the defendant's underestimate of the payoff at verdict is large relative to the costs of litigation."⁹⁹ Their data showed that fifty percent of the cases settled before suit was filed, forty percent settled after suit was filed but before a verdict was reached, and that less than ten percent of the cases went to verdict.¹⁰⁰ Their study conclusions generally validate the theoretical model of disputant behavior.

This literature produces no single model of dispute resolution;

mobile no-fault schemes and workers' compensation) reflect the belief that there are excessive private incentives to bring suit. *See id.*

97. Cooter & Marks, *supra* note 96, at 238. According to their first proposition, Cooter and Marks maintain that a higher discount rate makes a plaintiff more willing to settle, rather than put off resolution of the dispute until trial. *See id.* Thus, he pursues a more conciliatory strategy, and settlement is more probable. *Id.* As Cooter and Marks explain, the discount rate refers to the urgency with which the litigant would like to settle. *See id.* As they illustrate, a divorcing spouse who is eager to remarry wants to resolve the dispute quickly, so her discount rate would be high. *See id.*

98. *See* Danzon & Lillard, *Settlement out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345 (1983). In this article, the authors analyzed data from two surveys of insurance company files closed in 1974 and 1976. *See id.* at 346. Interestingly, the authors estimate that, on the average, cases settle for 74% of their potential verdict. *See id.* Moreover, the size of the settlement is usually much closer to the maximum the defendant would be willing to offer than to the minimum the plaintiff would settle for. *Id.*

99. *Id.* at 352.

100. *Id.* at 365. The authors note that, while the number of cases that go to verdict represent a small percentage of the total of cases, they are very relevant because they determine the precedents that guide future settlements and because the costs of litigation are appreciably higher. *See id.*

nor does it permit a sufficiently sophisticated set of equations to represent the tradeoffs involved in party choice. Therefore no useful attempt can be made to propose a rigorous framework for the quantitative assessment of dispute resolution processes. The theoretical literature does reveal, however, virtual unanimity on the following propositions that are useful in evaluating alternative processes.

First, the higher the costs for the next procedural step, the greater the likelihood of settlement at that point.

Second, the more accurate — and similar — the parties' perceptions of the outcome ultimately obtainable from trial, the greater the chances of settlement.¹⁰¹

All dispute resolution methods that seek to promote settlement rather than further litigation can be evaluated according to these two criteria.

III. INTEREST DISPUTES

Interest disputes are those for which there is no pre-existing rule or principles by which the dispute can be resolved.¹⁰² Traditionally, interest disputes have been thought unsuitable for resolution through litigation.¹⁰³ Rather, private negotiation or public "negotiation" as a part of the legislative process were relied upon to deal with these types of disputes.¹⁰⁴ In recent years, however, courts have become increasingly involved in addressing interest disputes. Therefore any inquiry into dispute resolution methods that seeks to divert disputes from the civil trial process must consider certain types of interest disputes.

Some types of interest disputes have been handled by the courts

101. An important impediment to negotiated settlement may be a difference of opinion between negotiator and client about what is obtainable. *See* Dunlop, *supra* note 86, at 1430-33. Improving the client's perception by a formal decision or opinion may be useful even if it does no more than validate advice that the negotiator already has given to his own client. The more official such a decision, the more legitimate, and therefore persuasive, the client is likely to find it. This factor may militate in favor of advisory opinions even when the negotiators have accurate and similar perceptions of trial outcomes.

102. *See* Fuller, *supra* note 23.

103. The common law avoided interest disputes by concluding that no "cause of action" was pleaded or proved. *See id.* at 369. The author maintains that, in order to bring a dispute before the courts, the litigant must assert some principle upon which his arguments are based. *See id.*

104. *See* Fuller, *supra* note 35, at 308. The author contends that, while the courts seek to achieve conformity to norms, mediation is designed to create the norms themselves. *See id.* For example, when a mediator assists parties in working out the terms of a contract by defining their rights and duties toward one another, he is creating rules by which the parties' conduct will be governed. *Id.*

because of a failure of other political institutions to deal with them effectively. School integration disputes are a prominent example.¹⁰⁵ Other types of interest disputes have been addressed judicially but the development of alternative institutions better suited for resolving them suggests that judicial involvement can be lessened. Environmental disputes are an example.¹⁰⁶ Other interest disputes are handled almost entirely outside judicial institutions, with the judicial resources being applied only to ensure the integrity of the nonjudicial institutions developed to handle the underlying disputes. Labor disputes are the paradigm of this class.¹⁰⁷ A final class of interest disputes are handled in administrative forums, but frequently spill over into the courts because of imperfections in the administrative institutions to deal with them effectively.¹⁰⁸

Simple interest disputes, such as Dean Hazard's dispute over whether to go to a ball game or to watch television, can be resolved without permanent machinery. More complex interest disputes, in contrast, require some institutional structure within which certain prerequisites to dispute resolution must take place. Legislatures provide one such structure that is relatively well accepted. American labor law, by institutionalizing and channeling the strike and lockout, provides another such structure that is well accepted by the parties to collective bargaining. Unfortunately, interest disputes that are not dealt with by legislatures, and that cannot be dealt with through

105. See Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U.L. REV. 39 (1977). The author asserts that, when the courts have only generalized about the evils of school segregation in their opinions, they have created some uncertainty as to what is actually condemned by the law. See *id.* at 40. According to Leubsdorf, "[t]he court must concern itself not only with objective practices, but also with their probable impact on the 'hearts and minds' of children and others" *Id.* Since school officials will often resist desegregation efforts, the remedy must be directly implemented by the courts. *Id.*

106. See Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENV'T'L L. REV. 265, 279-81 (1982). The authors point out that the Massachusetts Hazardous Waste Facility Siting Act, in which developers negotiate with potential host communities, creates a forum for confronting the concerns of local residents who oppose a proposed hazardous waste facility. See *id.* at 280. See also MASS. GEN. LAWS ANN. ch. 21D, §§ 1-19 (West 1981). Since this process is intended to minimize the harm to the community, to avoid the formation of adversary relationships, and to increase the public's confidence in the decision, the authors suggest that "it may indeed be able to eliminate the causes of local opposition." See Bacow & Milkey, *supra*, at 280. The authors also note that the Act limits the ability of local communities to exclude hazardous waste facilities without first demonstrating how such facilities involve special risks. See *id.*

107. See Dunlop, *supra* note 86.

108. See Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982). The author notes that courts frequently revise administrative policies through the process of judicial review. See *id.* at 58. As a result, the agency cannot be confident that its views of a particular administrative regulation will prevail. *Id.*

traditional collective bargaining, cannot be referred to an institutional mechanism that is at all well suited to dealing with them. The rulemaking process under the Administrative Procedure Act, and similar state statutes, provides a starting point for developing such an institutional mechanism in administrative agencies, but frequently the disputing parties have escaped this mechanism and gone to the courts, where they have succeeded to a large degree in forcing the agencies to engage in adjudication, as though they were confronted with rights disputes rather than with interest disputes.

Recently, policy makers have come to realize that adjudicatory models are not well suited for resolving interest disputes, and have turned their attention to developing other institutional and procedural models. One of the most comprehensive is Phil Harter's regulatory negotiations model.¹⁰⁹ Other models have been suggested in connection with environmental disputes.¹¹⁰ Still others, less visible because they have been developed as adjuncts to court systems at the local level, have been developed to deal with family disputes. William Kraut addresses one of these.¹¹¹

Most of these models concentrate on institutional ways to ensure the presence of the prerequisites for effective negotiation of interest disputes: (1) identifying the affected interests, (2) ensuring the adequacy of representation for these interests, (3) enforcing the duty to bargain in good faith, (4) and defining or limiting the types of pressure the parties may utilize to promote acceptance of their views.

In substance, these are the same issues that are addressed by labor law.¹¹² Efforts to provide effective institutions for resolving inter-

109. See *id.* at 113. See also Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1984). As Philip Harter asserts, "[t]he malaise of administrative law, which has marched steadily toward reliance on the judiciary to settle disputes and away from direct participation of affected parties, could be countered with a participatory negotiation process. Regulatory negotiations would provide the legitimacy currently lacking in the regulatory process." Harter, *supra* note 108, at 113.

110. See Bacow & Milkey, *supra* note 106, at 280. The authors describe how the Massachusetts Hazardous Waste Facility Siting Act not only provides for effective negotiation between developers and host communities, it requires that deadlocks between developers and host communities be submitted to an arbitrator. See *id.* See also MASS. GEN. LAWS ANN. ch. 21D, §§ 12-15 (West 1981).

111. See Kraut, *Domestic Relations Advocacy — Is There a Better Alternative?*, 29 VILL. L. REV. 1379 (1984).

112. American labor law identifies the affected interests through the principle of exclusive representation, combined with government supervised elections of bargaining representatives. It ensures adequacy of representation by permitting lawsuits for "breach of the duty of fair representation." *DelCostello v. Teamsters*, 462 U.S. 151 (1983). It enforces the duty to bargain in good faith through administrative proceedings. See 29 U.S.C. § 158(d) (1982). It defines and limits the types of economic pres-

est disputes modelled on collective bargaining also, however, must seek to replicate the strike or lockout. The theory of negotiations says that a zone of agreement, and therefore the potential for settlement, does not exist unless the parties' BATNA's are nonzero. Adjudication of rights disputes in the civil courts often provides nonzero BATNA's resulting in a zone of agreement because of the costs of litigation. In any event, the traditional adjudicatory means of resolving rights disputes leads to a final decision that will be imposed by the state absent private agreement. It is more difficult to affect BATNA's or to provide for a final decision in interest disputes because such disputes, by definition, cannot be decided by reference to pre-existing principles. Most labor disputes are resolved because the continuing cost of a strike or lockout on both sides changes BATNA's until the parties adjust their position to produce a zone of agreement. Most of the interest dispute resolution machinery developed so far to address nonlabor interest disputes depends on the unattractiveness of a resolution through adjudicatory means to produce a zone of agreement. Thus, in custody conciliation, for example, the mediator says to the parties: "If you do not work this out for yourselves, the judge will impose a solution that neither of you may like." It is appropriate to support continued efforts to refine these models and to force interest disputes to be addressed through them rather than through adjudication.

For organizational reasons, this article does not separate dispute resolution methods suitable for dealing with interest disputes from adjudicatory methods; rather, the established methods are discussed according to whether they are private, administrative, or judicial. For example, coercion, discussed in the private methods section, is used most frequently in connection with interest disputes in the labor area. Mediation, utilized privately, administratively and judicially, is as well suited for interest disputes as for rights disputes. The reader should keep in mind, in reviewing the discussion of each method, the incongruence between interest disputes and adjudicatory methods.

IV. METHODS FOR RESOLVING RIGHTS DISPUTES

Alternative methods for resolving private rights disputes can be grouped into three broad categories: those involving private means, those involving administrative agencies, and those involving specific features of judicial procedure. The following sections consider each category. Regardless of the category into which it falls, each dispute resolution method has one or more of the following goals: reduction of

sure that may be exerted by limiting recognitional picketing and secondary pressure. *See id.* § 158(b)(4),(7).

cost for producing a binding decision with an acceptable accuracy level; improving the accuracy of party expectations about trial outcome at a lower cost than continuing to litigate; or increasing the costs of continuing the dispute.

A. *Private Methods*

Certain means of dispute resolution can be utilized completely outside governmental institutions. Many of these means also can be utilized as adjuncts to the administrative or judicial processes. Their use as adjuncts is considered separately in Parts IV(B) and IV(C) below. Part IV(A) is limited to purely private processes.

Virtually all dispute resolution procedures that function outside governmental institutions depend on some kind of social interdependence between the parties to induce participation. The paradigm is labor management arbitration, in which the practical ability to inflict economic injury makes it desirable for the parties to establish their own institutions to resolve discrete disputes. Analogies exist in the family, landlord-tenant, and commercial areas.

1. *Coercion*

The most primitive way of settling civil disputes is through physical or economic coercion. Putting aside violence and other illegal methods, several permissible types of coercion exist that make settlement of a dispute likely without resort to the courts: boycotts, self-help repossession of chattels, distraint, taking children, withholding payment, and adverse publicity.¹¹³

Strikes and lockouts are a special form of boycott that are enshrined legally as the underlying method of dispute resolution in labor-management interest disputes. Section 13 of the National Labor Relations Act¹¹⁴ expressly preserves the right to strike, and the Supreme Court has said:

[N]egotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of

113. See Neely, *supra* note 1, at 112-24. Filing a lawsuit also has a coercive effect in bringing about settlement of disputes; this may be the only way for the "weaker" party to speak on reasonable terms with the more powerful.

114. 29 U.S.C. § 163 (1982). This section provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.*

completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.¹¹⁵

A substantial part of labor law concerns itself with defining the perimeters of the lawful exercise of the right to strike, to lock out, and to effect change in terms of employment. For example, economic pressure of this kind is not permitted until an "impasse" has been reached in negotiations;¹¹⁶ strike pressure may not be applied to parties too remote from the basic dispute;¹¹⁷ strike pressure may not be exerted in circumvention of statutory procedures for union recognition;¹¹⁸ and strikes may not occur over rights disputes covered by arbitration procedures in collective bargaining agreements.¹¹⁹ Strikes as an inducement to settle labor-management disputes are well accepted for

115. *NLRB v. Insurance Agents*, 361 U.S. 477, 489, 495 (1960). Permissible economic pressure by an employer was held to include lockout for the sole purpose of exerting economic pressure on a union after impasse in negotiations. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). *See also* *NLRB v. Tomco Communications*, 567 F.2d 871 (9th Cir. 1978).

116. *See* 29 U.S.C. § 158 (a)(5), (b)(3). These provisions require management and labor, respectively, to bargain collectively. There is a good faith obligation in collective bargaining. *Id.* § 158(d). Furthermore, a complete refusal to negotiate over wages, hours and conditions of employment is a violation of § 158(a)(5) even though such refusal is in good faith. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) (citing 29 U.S.C. § 158(a)(5)(1982)).

Engaging in a strike or lockout before an impasse has been held to violate these obligations under some circumstances. *But see* *Darling & Co.*, 171 N.L.R.B. 801 (1968), *aff'd sub nom.* *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969) (pre-impasse lockout permitted where employer faced with prospect of "unusual harm"). *Cf.* *NLRB v. Katz*, 369 U.S. 736 (1962) (employers may not make unilateral changes in terms and conditions of employment until an impasse has been reached).

117. 29 U.S.C. § 158(b)(4) (1982) (prohibiting the use of secondary pressure).

118. *Id.* § 158(b)(7). This section regulates recognition picketing by unions and prohibits such picketing in three circumstances:

- (1) where the NLRB has certified another union;
- (2) where a union was rejected by employees in a valid election under the NLRA within 12 preceding months; or,
- (3) where picketing continues without filing a representation petition "within a reasonable period not to exceed 30 days from commencement of such picketing."

Id. § 158(b)(7)(A)-(C).

The purpose of § 158(b)(7) is to bar "economic warfare" in representation disputes and to foster the use of the NLRB election processes. R. GORMAN, *BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING* 230-39 (1976).

119. The Supreme Court recognized that arbitration was a key element in federal policy for resolving labor disputes in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 240-41 (1970). The Court held that the Norris-La Guardia Act's anti-injunction provisions concerning strikes do not apply to disputes subject to arbitration pursuant to a collective bargaining agreement. *See id.* at 253. The Court, however, made it clear that equitable injunctive relief would only be proper if there was an arbitration agreement covering the particular dispute, the employer was ready to proceed with arbitration at the time the strike was sought to be enjoined, and all equitable prerequisites for injunctive relief had been met. *See id.* at 253-54.

two reasons. First, legal institutions may find it difficult to prevent strikes at costs acceptable in a democratic society. Second, strikes are perceived as being reasonably fair ways to resolve disputes between parties of roughly equal bargaining power.

Strikes promote settlement by reducing the BATNA's of both sides to a labor dispute. At the risk of oversimplifying things a little, one can say: "The longer the strike, the lower the BATNA." The employer's BATNA is reduced because of lost production, leading to lower revenues; labor's BATNA is reduced because of lost wages. Anyone who actually has participated in collective bargaining knows that party positions and priorities change much more substantially in the face of a strike or strike threat than they do in the face of litigation over the same type of disputes. Therefore, this form of sanctioned economic coercion is much more efficient in promoting dispute settlement than any form of civil litigation. There are, however, social costs. Most legislation curtailing the right to strike is justified on the grounds that the public cannot afford the inconvenience of work stoppages.

Another form of private coercion exists in commercial relations. The buyer of goods frequently has possession of the goods before he completes his payment obligations. If he is dissatisfied with the goods, he can exert coercive economic pressure by withholding payment. The seller has a coercive remedy of his own in some circumstances: self-help repossession under the Uniform Commercial Code (UCC).¹²⁰ Section 9-503 of the UCC permits the holder of a security interest in a chattel to retake the chattel from a defaulting debtor when such retaking can be accomplished without a "breach of the peace."¹²¹ In *Flagg Brothers v. Brooks*, the Supreme Court held in an analogous situation that self-help enforcement of warehousemen's liens by public or private sale pursuant to U.C.C. section 7-210 does not involve sufficient "state action" to trigger procedural due process protections.¹²²

The existence of this form of coercion presumably induces settlement of debtor-creditor disputes by raising the potential cost to the debtor of default, thus lowering the debtor's BATNA. Of course, bargaining power between creditors and debtors frequently is quite unequal, and the Supreme Court also has recognized this in imposing

120. U.C.C. § 9-503, 3A U.L.A. 211 (1981). Section 9-503 only applies to secured creditors under Article 9 of the U.C.C. *Id.*

121. *See id.*

122. 436 U.S. 149 (1978). The Court stated that there was no allegation of official action in the complaint, thus distinguishing *Flagg Brothers* from the line of cases following *Fuentes v. Shevin*, 407 U.S. 67 (1972). 436 U.S. at 157.

due process protections where repossession is effected with the aid of judicial process.¹²³ The creditor is not permitted to use the state to buttress his power to exercise self-help repossession even without the aid of judicial process.¹²⁴

Another traditional form of private coercion, disfavored in recent years, is the right of a landlord to "distrain" a tenant's chattels as a remedy for nonpayment of rent.¹²⁵ The distress process promotes settlement by reducing the tenant's BATNA.

Until recently, parent-initiated child abductions were a frequently used means of coercion in family disputes. In 1977, it was estimated that the number of such abductions ranged between 25,000 and 100,000 per year.¹²⁶

Other forms of coercion exist but receive less attention because they are not uniform from one jurisdiction to another. For example, the Virginia General Assembly recently authorized merchants to "boot" cars improperly parked in their parking lots.¹²⁷ The effect of

123. See *North Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

124. See, e.g., *Stone Mach. Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970) (when sheriff accompanied creditor and debtor protested repossession, a "breach of the peace" occurred in violation of UCC § 9-503).

125. See 49 AM. JUR. 2D *Landlord & Tenant* §§ 726-760 (1970) (summarizing right and opining that it is being limited in most jurisdictions). The Uniform Residential Landlord and Tenant Act abolishes distraint for rent. See UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.205(b), 7A U.L.A. 499, 552 (1978). Some courts have held that distraint is unconstitutional. See, e.g., *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971) (sections of state statute which permitted landlords to seize and sell a tenant's property under a distress warrant without an opportunity for tenant to be heard violated federal constitutional due process); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971) (seizure of household furniture pursuant to distress warrant proceeding without any prior notice or hearing requirements violated due process); *Phillips v. Guin & Hunt, Inc.*, 344 So. 2d 568 (Fla. 1977). In *Phillips*, sections of a state statute permitting distress on rent default were held to be violative of constitutional due process in that they failed to provide for a prompt hearing prior to seizure of property, and failed to require issuance of a distress writ by a judicial officer or by a clerk who independently determines if the statute was complied with. *Id.* at 572.

It is significant that the Florida statute did provide some due process protection by requiring the posting of a distress bond of twice the value of claimed property. *Id.* at 570.

126. See E. BERTIN, PENNSYLVANIA CHILD CUSTODY § 1.9, at 115 (1983). In 1977, the Uniform Child Custody Jurisdiction Act was promulgated, providing legal sanctions for this form of coercion. *Id.*, at 116. See, e.g., 42 PA. CONS. STAT. ANN. §§ 5341-5366 (Purdon 1981).

127. VA. CODE § 46.1-551 (1983). The statute provides for "booting" of trespassing vehicles as an alternative to towing. See *id.* A "boot" is a device which immobilizes a vehicle by locking a wheel and preventing its turning; the fee for removal of the boot cannot exceed \$25. *Id.*

Another obvious example of private coercion is a shutoff of utility services by the supplier when the consumer fails or refuses to pay his or her bill. Another, more personal example, is the time a commuter air carrier tried to refuse me boarding after

such measures to increase the bargaining power of the merchants so authorized is obvious.

Publicity is another form of coercion that may be effective against retailers, service establishments, and producers of consumer products. Publicity is not unrelated to the boycott, since the disputant who publicizes her dispute hopes the publicity will stimulate a boycott, and the target of the publicity fears that a boycott — or at least the same sort of economic injury — will result from the publicity. The forms of publicity that may induce settlement of a dispute are infinite in number, limited only by the consumer imagination and access to the media. One institutional mechanism for applying the publicity sanction is the "Action Line" in the local newspaper, or a similar service sponsored by television or radio stations. The literature on dispute resolution unfortunately has paid little attention to the functioning of such processes. One exception is a recent paper presented by Ms. Amy Shapiro, of the *Rocky Mountain News*.¹²⁸ She estimated that about 250 newspapers and radio or television stations have such a service.¹²⁹

Action Lines promote settlements because the possibility of unfavorable — or favorable — publicity changes the BATNA's of providers of goods and services.¹³⁰ Procedurally, Ms. Shapiro forwards consumer correspondence to the affected business, requesting a response within fourteen days.¹³¹ A follow-up letter is sent if necessary, suggesting that government agencies will be contacted or that legal

I had been checked in and given a boarding card. The carrier erroneously had boarded too many standbys. I refused to get off the airplane until the carrier either (1) summoned the police, or (2) offloaded one of the standbys. A standby was offloaded.

128. See Shapiro, *Action Lines*, in ABA SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES 509 (1983).

129. *Id.*

130. *Id.* at 510. An Action Line also may promote settlement by reducing the transaction cost of negotiations for the consumer. Action Lines reduce this transaction cost by performing a free brokerage service, one of the functions of mediation. The apparent power of the adverse publicity threat makes it more appropriate to classify Action Line as a coercive rather than a private mediatory process.

131. *Id.* at 514. The letter reads:

Action Line, the reader service column of the Rocky Mountain News in Denver, Colorado, has received the enclosed letter and/or documents.

Could you please give this matter every consideration? Although we are unable to verify every statement made in every one of the letters we receive, we believe that the fact that our reader was concerned enough to write us should merit your attention.

We would appreciate your speedy action. If you correspond directly with our reader, please send us a copy. Because of our time constraints, we must request a response within 14 days.

remedies will be recommended to the consumer if a reply is not forthcoming.¹³² Ms. Shapiro's Action Line does not attempt to evaluate the merits of a claim but, as she tells the business, "we believe that the fact that our reader was concerned enough to write us should merit your attention."¹³³

Her service pursues almost every complaint until the matter is resolved.¹³⁴ When the file is returned to the reader, information on how to sue in small claims court is provided, if that seems appropriate.¹³⁵

The availability of coercive action, or its actual use, creates a potential zone of agreement in negotiations between the parties. Coercion either increases the BATNA of the actor, as in the case of a purchaser of goods who withholds payment, or reduces the BATNA of his opponent, as in the case of the owner of an illegally parked car that is booted.

Thank you for your help. It helps us better serve the needs of our nearly one-half million readers.

Sincerely,
Amy Shapiro
Action Line
Rocky Mountain News
Box 719
Denver, Colorado 80201
(303) 892-5000 x420

enclosures (s)
As/sh

Id.

132. *Id.* at 515. The follow-up letter reads:

We contacted you on ——— regarding the enclosed inquiry received by Action Line, the reader service column of the Rocky Mountain News. Our files indicate that you did not respond. If your answer was somehow misplaced, could you please send us another copy?

If you haven't responded, we would still appreciate hearing from you. However, if we do not receive a reply within 10 business days of this letter, we will assume that you are not interested in trying to resolve this matter. We will then take other action, such as contacting government authorities and recommending that our reader seek legal remedies.

Thank you for your cooperation. We look forward to hearing from you.

Sincerely,
Amy Shapiro
Action Line
Rocky Mountain News
P.O. Box 719
Denver, CO 80201
(303) 892-5000 x420

enclosures
As/sh

Id.

133. *Id.* at 514.

134. *Id.* at 511.

135. *Id.*

2. *Private Arbitration*

Private arbitration is a matter of contract. In this form, arbitration is not strictly private; its efficacy depends on whether courts will enforce arbitration agreements and whether they will honor arbitration awards once they have been issued.¹³⁶ After early development, essentially as an adjunct to equity in England in the seventeenth century,¹³⁷ private arbitration went through a period in which it was disfavored by the courts.¹³⁸ Early in the twentieth century, however, Congress,¹³⁹ then state legislatures,¹⁴⁰ enacted statutes establishing a presumption in favor of arbitration. Currently, about twenty-six states have enacted the Uniform Arbitration Act.¹⁴¹ This statute makes arbitration agreements specifically enforceable,¹⁴² and ensures that arbitration awards are subjected to only limited review.¹⁴³

In *Southland Corp. v. Keating*,¹⁴⁴ the Supreme Court held that a state statute which invalidates private arbitration agreements violates the supremacy clause of the federal constitution.¹⁴⁵ The Court found

136. See *Faherty v. Faherty*, 97 N.J. 99, 477 A.2d 1257 (1984). In *Faherty*, the New Jersey Supreme Court decided that arbitration clauses in marital separation agreements are enforceable. After an arbitration award was entered under such a clause, the husband claimed that the courts should not defer to arbitration involving marital disputes. The court had little difficulty in concluding that agreements to arbitrate alimony disputes should be enforced. *Id.* at 108, 477 A.2d at 1261. It had more difficulty with the portion of the agreement that referred disputes over child support and custody to arbitration, because of the strong public policy in favor of courts retaining their role with respect to the *parens patriae* doctrine. This doctrine says that children's maintenance, custody-visitation, and overall best interests should be subject to the close scrutiny and supervision of the courts despite any agreements to the contrary. *Id.* at 111, 477 A.2d at 1262. Nevertheless, it permitted arbitration of these child-related disputes also, subject to "special" judicial review. *Id.* at 111, 477 A.2d at 1263.

137. See H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 3.1 (1984).

138. See *id.* See also Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation in American Law*, 93 YALE L.J. 135 (1983) (questioning conventional wisdom about the reasons for the decline of commercial arbitration in 18th century New York).

139. See United States Arbitration Act, 9 U.S.C. § 2 (1982). See also *Nuclear Installment Servs. Co. v. Nuclear Servs. Corp.*, 468 F. Supp. 1187 (E.D. Pa. 1979) (doubts resolved in favor of arbitration); *Consumer Concept, Inc. v. Mego Corp.*, 458 F. Supp. 543 (S.D.N.Y. 1978) (doubts as to parties' intent are to be resolved in favor of arbitration); *De Mart v. Moore*, 425 F. Supp. 55 (D. Fla. 1976) (federal courts to construe arbitration clauses liberally).

140. See, e.g., R.I. GEN. LAWS § 10-3-2 (1956).

141. UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1978). See, e.g., 42 PA. CONS. STAT. ANN. §§ 7301-7320 (Purdon 1982); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1974); N.Y. CIV. PRAC. R. §§ 7501-7514 (McKinney 1980).

142. See UNIF. ARBITRATION ACT § 2, 7 U.L.A. 1, 23 (1978).

143. The Act provides five limited bases for judicial vacation of an arbitration award. See *id.* § 12, 7 U.L.A. at 55.

144. 104 S. Ct. 852 (1984).

145. *Id.* at 858. To be covered by the federal act, the Court found only that the

that Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.¹⁴⁶

Labor arbitration is the most prominent form of private arbitration. Section 301 of the Labor Management Relations Act,¹⁴⁷ as interpreted in the "Steelworkers' Trilogy,"¹⁴⁸ ensures that arbitration provisions obtained in collective bargaining agreements are honored by federal and state courts.¹⁴⁹ It has been estimated that some ninety-five percent of collective bargaining agreements contain arbitration provisions.¹⁵⁰

Private arbitration is also used extensively in certain types of commercial contracts, especially those involving international trade and building construction. The use of private arbitration more generally as an alternative for civil litigation has been popularized by the "rent-a-judge" program, which began in California in 1976.¹⁵¹ This program involves an agreement between the parties to a lawsuit to refer the case to a retired judge for arbitration, under the 1872 Cali-

arbitration agreement must be part of a contract "evidencing a transaction involving commerce." *Id.* (footnote omitted).

146. *Id.*

147. 29 U.S.C. § 185 (1982). This section confers jurisdiction on federal courts to resolve labor disputes, as well as authority to "fashion a body of federal law for the enforcement of . . . collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957). Section 185 was held by the Court to reject the common law rule against enforcing arbitration agreements. *Id.* at 456. Federal law is to be developed from the "policy of our national labor laws."

148. *See* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In this trilogy, the Supreme Court fashioned significant law under § 185. In *American Manufacturing*, the Court held that a court's role in suits to compel arbitration pursuant to a collective bargaining agreement is confined to determining whether the dispute falls under the arbitration clause; it is not to adjudicate the merits or equities of a particular grievance. 363 U.S. at 568. In *Warrior & Gulf*, the Court held that arbitration clauses are to be construed liberally to encompass disputes unless "the most forceful evidence of a purpose to exclude claim from arbitration" is present, all doubts being resolved in favor of arbitration. 363 U.S. at 584-85. Finally, in *Enterprise Wheel & Car*, the Court held that the arbitrator and not the court is to interpret the collective bargaining agreement; and the arbitrator's construction is not to be overruled. 363 U.S. at 599.

149. *See* *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962) (state courts obligated to apply federal common law).

150. *See* P. PRASOW & E. PETERS, *ARBITRATION AND COLLECTIVE BARGAINING* (1983).

151. *See* Christensen, *supra* note 5, at 80.

ifornia "general reference" statute.¹⁵² The statute says nothing about the identity or qualifications of the arbitrator, but the parties have elected to utilize retired judges because of their judicial skills and possible expertise in the subject matter of cases referred to them.¹⁵³ These special characteristics increase the acceptability of the arbitral process as a substitute for the judicial process because it permits realizing some of the benefits of both.¹⁵⁴ The program has been subjected to criticism, much of which is based on unfamiliarity with the arbitration process.¹⁵⁵

Other, court sponsored, programs essentially put a gloss on private arbitration which already is permitted under general arbitration statutes. The District of Columbia Superior Court "voluntary arbitration" program is an example.¹⁵⁶ Such programs add little legal authority to the authority contained in the Uniform Arbitration Act, but have the advantage of making appropriate segments of the bar more aware of the private arbitration alternative and coordinating arbitration agreements with trial court calendar management.¹⁵⁷

Recently, private organizations, led by the American Arbitration Association (AAA),¹⁵⁸ have promoted private arbitration aggressively.

152. CAL. CIV. PROC. CODE §§ 638-645 (West 1976 & Supp. 1981). See generally Christensen, *supra* note 5, at 79-80.

153. Christensen, *supra* note 5, at 81.

154. *Id.*

155. For an example of criticism of the "rent-a-judge" program, see Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981). The note compares the California-type program with arbitration, citing articles and some older case law recognizing a distinction between reference and arbitration. See also *Carpenter v. Boomer*, 54 N.J. Super. 157, 165-68, 148 A.2d 497, 501-03 (1959); 5 AM. JUR. *Arbitration and Award* § 4 (1962). Reference is essentially a form of arbitration which is distinctly judicial in nature, though there are minor distinctions between reference and arbitration. See Note, *supra*, at 1600, 1610-13. The note finds an attractive advantage in the appealability of referee decisions. *Id.* at 1600. The note's author, however, fails to realize that arbitration is a contractual solution to disputes and the contract may very well include a provision on reviewability.

The note also proffers constitutional issues raised by the California program, including a possibility that a not-yet-recognized fifth amendment right to attend civil trials might be violated by the program. *Id.* at 1610. The note fails, however, to relate this proffered right to the fact that dispute resolution in 90% of the civil cases that do not go to trial is entirely private.

156. See D.C. SUPER. CT. CIV. ARB. R.

157. See, e.g., D.C. SUPER. CT. CIV. ARB. R. 2(a). This rule provides that the clerk shall provide the plaintiff with a form explaining the arbitration program and permitting election of the program. See also D.C. SUPER. CT. CIV. ARB. R. 7, 10. These rules permit entry of judgment on an award or trial de novo without the necessity of commencing a new action.

158. Lucius Root Eastman, a prominent advocate for the AAA, stated the group's philosophy:

I think voluntary arbitration is to all of us less of a procedure than it is a

Private arbitration settles disputes by a binding decision theoretically obtainable at lower cost than a judicial decision on the same dispute. It functions best, and perhaps only, when the parties are in a position of interdependence that makes both willing to participate in the arbitration process. In the absence of such interdependence, arbitration, even if it has been agreed to beforehand, is likely to require resort to litigation to compel participation. Even where judicial compulsion is necessary, however, arbitration still promises a decision of acceptable accuracy at lower cost than a judicial decision after a traditional trial.

Some doubts about cost advantages may be appropriate, however. Kritzer and Anderson compared analysis of case processing time, method of disposition, and cost in AAA arbitration, compared with the courts.¹⁵⁹ They conclude: "(1) that AAA cases are generally processed more quickly than court cases,¹⁶⁰ (2) that AAA cases are more likely to be 'decided' (rather than settled),¹⁶¹ and (3) that AAA processing is not necessarily less costly than court processing."¹⁶²

symbol of the peace on earth and goodwill toward men which exists in the hearts of all Americans in this great struggle for freedom which now encompasses the world. Many of us believe that in arbitration we have a concept that stands out in opposition to war. We believe that a science of arbitration can be equally well organized and intelligently administered and that under the banner of arbitration the scattered forces of those who strive for peace can be united. But to be effective, the concept of voluntary arbitration must be vitalized. We must organize it scientifically. We must through education and actual performance bring its potential values home to every American and through him to the world of which he is becoming so large a part.

Eastman, *Dedication to AMERICAN ARBITRATION ASSOCIATION, ARBITRATION BIBLIOGRAPHY* (1954).

The AAA is also actively engaged in encouraging arbitration to resolve international disputes. See AMERICAN ARBITRATION ASSOCIATION, *NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* (1971).

159. Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUST. SYS. J. 6 (1983). Their analysis utilized data from 1500 court cases in state and federal courts in five federal judicial districts and from 147 AAA cases in the same geographic area. *Id.* at 8.

160. In three districts (South Carolina, New Mexico, and Central California), the AAA was faster. In one district (Pennsylvania), the AAA and the federal courts showed similar case processing times. In one district (Wisconsin), the AAA was faster for contract cases but slower for tort cases. *Id.* at 14.

161. Only about five percent of court cases are fully adjudicated, compared with over 50 percent of AAA arbitration cases. *Id.* at 11. This finding suggests that arbitration is less effective than traditional litigation in inducing negotiated settlement. This would be expected if it cost less than traditional litigation. In addition, the parties to an arbitration agreement can tailor the procedures and the rules of decision to the types of disputes they anticipate, thus making an arbitration award more satisfactory than a court judgment. The greater likelihood of an arbitration award that both parties can live with also reduces the incentives for negotiated settlement.

162. *Id.* at 6. The study measured costs according to attorney fees. AAA arbitra-

Legislatures may be reluctant, however, to make all agreements to refer disputes to arbitration enforceable. Enforcement of such agreements may be appropriate for commercial disputes, but it may lead to overreaching by businesses who force consumers to sign form contracts.¹⁶³

3. *Fact Finding*

Private fact finding is less common than other private methods of dispute resolution. Some corporations have experimented in recent years with a form of private fact finding called the "mini-trial."¹⁶⁴ Those involved claim generally good results.

A fact finding procedure has the intended effect of improving the accuracy of party projections of litigation outcome. It has two advantages over discovery procedures in litigation in accomplishing this goal. It usually can be accomplished at lower cost and it focuses on the total outcome, while discovery procedures are disaggregated and thus provide less guidance as to the probable trial outcome.

4. *Mediation and Conciliation*

Mediation is perceived as superior to traditional adjudication for two reasons. It can result in settlement at less social cost than adjudication.¹⁶⁵ It also permits the parties to decide their dispute according to rules closely tailored to their needs.¹⁶⁶ Adjudication, in contrast,

tion was least expensive for small cases (averaging about \$500 per case), and most expensive for larger cases. Federal court is least expensive in the \$5,000-\$10,000 range (averaging about \$1,500 per case), and state court was least expensive for cases over \$10,000 (ranging from \$2,000 to \$4,000 per case). *Id.* at 17-18.

163. *See* R. NEELY, *supra* note 1, at 116. Justice Neely prefers the West Virginia approach, which excludes consumer arbitration from the general enforceability provisions. *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984), raises doubts about the constitutionality of such a state prohibition of arbitration. In his concurring opinion in that case, Justice Stevens expressed concern that the case would foreclose reasonable state efforts to limit the effect of arbitration agreements where one party to the agreement possessed little bargaining power. *Id.* at 863 (Stevens, J., concurring). This was the rationale for West Virginia's exclusion of consumer form contract arbitration clauses from enforceability. *See* R. NEELY, *supra* note 1, at 116. The majority opinion, however, would permit traditional equitable or legal defenses to the enforcement of arbitration agreements, though it suggests that these defenses be considered initially by the arbitrator. *See* 104 S. Ct. at 858.

164. *See* CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTES, MANAGEMENT MH-7 (Mini-Trial Handbook)(1982).

165. Abraham Lincoln perceived this when he stated: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time." *See* R. COULSON, HOW TO STAY OUT OF COURT 13 (1968); *see also id.* at 15-30 (discussing the "secret costs" of litigation).

166. *See* C. UPDEGRAFF & W. MCCOY, ARBITRATION OF LABOR DISPUTES 15-19 (1961).

results in a decision according to predispute rules of decision framed to meet societal needs in general. As noted earlier, mediation therefore is better suited than any kind of adjudication, private, judicial or administrative, to the resolution of interests disputes.

Long before alternative dispute resolution became fashionable, mediation was practiced in civil dispute resolution.¹⁶⁷ Usually this form of mediation occurred in conjunction with litigation, usually as part of pretrial conferences presided over by a judge or subordinate court official.¹⁶⁸ Other forms of mediation also have been used for a long time, but less visibly and less formally. The Milwaukee consumer dispute study makes this clear.¹⁶⁹ Mediation in conjunction with court proceedings will be discussed in the next part; this discussion will focus on purely private mediation. This is a matter of growing interest because of the realization that attorneys can function as mediators in certain types of disputes as well as advocates for only one side.¹⁷⁰

Some of the same limitations on negotiation as a dispute resolution technique apply to mediation.¹⁷¹ This is not surprising since mediation is no more than negotiation augmented with the assistance of a third party. The most basic limitation is lack of inducement for the opposing parties to participate.¹⁷² As a starting point, one can postulate that the parties will not take part unless there is some form of coercion or state power that can be brought to bear.¹⁷³ Using different nomenclature, a party will not participate in mediation unless it improves his BATNA.¹⁷⁴ It is easy to identify certain types of disputes, where the state's power has not yet been invoked, in which this criterion is met. In labor-management disputes, the alternative to a mediated settlement is a strike or lockout, with the economic costs on both sides that this may entail.¹⁷⁵ In family disputes, there is the emotional and economic harm that will result from a breakup of the marriage.¹⁷⁶ Even if the marital relation is dissolved, an incentive to

167. See Kraut, *supra* note 111, at 1380-81.

168. See notes 314-43 and accompanying text *infra*.

169. See notes 76-81 and accompanying text *supra*.

170. See Kraut, *supra* note 111, at 1382-86.

171. See notes 105-13 and accompanying text *supra*.

172. See A.B.A. SPECIAL COMMITTEE ON DISPUTE RESOLUTION, *supra* note 31, at 33-37 (remarks of lawyer-mediator Joel Edelman). For a discussion of coercion as a factor in negotiation, see notes 113-35 and accompanying text *supra*.

173. See generally P. HERMAN, BETTER SETTLEMENTS THROUGH LEVERAGE (1965).

174. *Id.* See also notes 83-85 and accompanying text *supra*.

175. See notes 114-19 and accompanying text *supra*.

176. See Kraut, *supra* note 111, at 1386-90.

mediate over child custody and child-rearing issues remains because the parties must deal with each other until the children are grown.¹⁷⁷ In certain commercial disputes, continuation of the relation between the disputing parties is desirable economically to both, and thus they have an incentive to mediate. In other types of disputes, it is difficult to see what factors would induce the parties to participate in mediation outside the court system. Usually, some form of state intervention is necessary to create a BATNA for the resisting party that is not superior to a mediated solution. However, there are underway several "neighborhood justice center" experiments that rely on mediation to solve disputes. Mr. Wahrhaftig's article identifies some of the social and psychological factors that may promote use of such centers. Data from these experiments should assist in evaluating the necessity of state intervention.¹⁷⁸

B. *Administrative Methods*

A host of administrative agencies at the federal and state levels make rules and adjudicate individual cases. For purposes of this paper, a distinction should be drawn between administrative agencies that handle claims related to benefits or rights created by the legislature, and administrative agencies that handle claims related to common law rights.¹⁷⁹ Only the latter type of agency is of interest in connection with resolution of private disputes.

The principal feature distinguishing the handling of private disputes by administrative agencies from the handling of the same disputes in the common law courts is that the state provides the resources for fact investigation, witnesses, and litigation in the administrative forum. In judicial forums, the parties bear the costs of these activities.

Beyond that distinction, administrative methods of dispute resolution are as varied as private methods or judicial methods. Some administrative arrangements, such as those employed for workers' compensation claims, are adjudicatory. Others, such as those employed for railroad employee grievances, are arbitral. Still others, such as the ones employed for race and age discrimination, are mediatory.

177. *Id.*

178. See Wahrhaftig, *Nonprofessional Conflict Resolution*, 29 VILL. L. REV. 1463 (1984). See generally R. TOMASIC & M. FEELEY, *supra* note 3.

179. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Crowell v. Benson*, 285 U.S. 22 (1932).

1. *Administrative Adjudication: Workers' Compensation*

The best known schemes of administrative adjudication arise from workers' compensation statutes, including the federal Black Lung Benefits Act.¹⁸⁰ In the typical state workers' compensation system,¹⁸¹ an injured employee files a claim initially with his employer or its insurance carrier.¹⁸² If the claim is denied, the employee then files with a state agency.¹⁸³ The agency typically refers the claim to a referee, who makes a decision through an adjudicatory process.¹⁸⁴ Appeals are permitted to an administrative board,¹⁸⁵ and ultimately to the courts.¹⁸⁶

In black lung cases, the disabled worker applies to the appropriate agency¹⁸⁷ for benefits, alleging disability caused by inhalation of coal dust. The agency, following certain statutory presumptions,¹⁸⁸ awards or disallows benefits. If the applicant is dissatisfied with the outcome, he may appeal the decision to a court, which is restricted in its review to finding whether there is substantial evidence for the determination.¹⁸⁹

180. 30 U.S.C. §§ 901-945 (1982).

181. For a detailed description of the philosophy and mechanics of state workers' compensation laws, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 80, at 530-34 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L. REV. 206 (1952).

182. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-296 (West 1958 & Supp. 1984) (voluntary agreements).

183. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-297 (West 1958 & Supp. 1984); PA. STAT. ANN. tit. 77, §§ 711, 751 (Purdon 1952 & Supp. 1984).

184. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-298 (West 1958) (provides for hearing before "commissioner" who is not bound by common law or statutory rules of evidence, but is to "make inquiry in such manner . . . as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit of this chapter"); PA. STAT. ANN. tit. 77, §§ 710, 711, 751 (Purdon 1952 & Supp. 1984) (referral to referees).

185. *See, e.g.*, PA. STAT. ANN. tit. 77, §§ 851-856 (Purdon 1952 & Supp. 1984).

186. *See, e.g.*, PA. STAT. ANN. tit. 77, § 871 (Purdon & Supp. 1984); CONN. GEN. STAT. ANN. § 31-301 (West 1958 & Supp. 1984). The Connecticut statute also provides for reservation of certain cases for the state supreme court. CONN. GEN. STAT. ANN. § 31-324 (West 1958 & Supp. 1984).

187. The federal statute requires the Secretary of Labor to set up offices and procedures to process claims in states which inadequately compensate black lung-disabled workers. Otherwise, on and after January 1, 1974, claims are to be made pursuant to the applicable state workmen's compensation law. 30 U.S.C. § 931 (1982). Consequently, both state agencies and Labor Department offices process claims.

188. *See* 30 U.S.C. § 921(c) (1982). The rebuttable presumptions listed in § 921(c) are based on duration of employment in "one or more coal mines" for periods of 10, 15, or 25 years. Section 921(c) is favorable to the ailing worker in presuming his disease arose at his places of work and that his death was due to Black Lung Disease. *Id.* For a more detailed listing of presumptions, see *id.*

189. *See* *Parker v. Director, Office of Workers' Compensation Programs*, 590

The Federal Longshoremen's and Harbor Workers' Compensation Act¹⁹⁰ and Federal Employees' Compensation Acts¹⁹¹ create similar systems. These systems replace the common law system where, in theory, the disabled worker would file a tort claim against the employer and win or lose as the evidence and tactics permitted. In practice, coal miners would never be able to prove disability caused by inhalation of dust,¹⁹² and the transaction costs effectively precluded such suits.¹⁹³

Several statutes essentially eliminate certain issues as the source of dispute, and refer disputes over other issues to administrative or arbitral forums. No-fault automobile insurance laws require motorists to carry a minimal amount of insurance to protect themselves in case of an accident, and bar plaintiffs with claims below a set statutory amount from suing. Dispute resolution techniques range from adjudicatory¹⁹⁴ to arbitral.¹⁹⁵ In major respects, no-fault auto statutes address dispute resolution by removing fault as a source of dispute.¹⁹⁶

F.2d 748 (8th Cir. 1979) (hearing officer's finding that a compensable respiratory impairment arose out of coal mine employment was held conclusive where supported by substantial evidence; a court's determination of whether substantial evidence exists is to be based on the record as a whole); *see also* *Prater v. Harris*, 620 F.2d 1074 (4th Cir. 1980). In *Prater*, a hearing officer's finding that plaintiff was not suffering from Black Lung Disease was carefully reviewed by the court. *Id.* at 1077-80. However, the court concluded its role was to determine "*whether there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.*" *Id.* at 1084 (quoting *Vintson v. Califano*, 592 F.2d 1353, 1357-58 (5th Cir. 1979)) (emphasis supplied by *Prater* court).

190. 33 U.S.C. § 901; 42 U.S.C. § 1651; 43 U.S.C. § 1333 (1982). The law is administered by the Office of Workers' Compensation of the United States Department of Labor, through deputy commissioners appointed to 16 compensation districts. Dispute claims are adjudicated by administrative law judges. The decisions of administrative law judges are subject to appeal to the Benefits Review Board in the Department of Labor and ultimately to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706 (1982).

191. 5 U.S.C. §§ 8101-8151 (1982).

192. Even after an extensive benefits program was devised, disabled miners had difficulty obtaining benefits until the current presumptions were created. *See* S. REP. NO. 743, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2305, 2307.

193. This difficulty is what led to the creation of worker's compensation programs in the early part of the century. *See* W. PROSSER, *supra* note 181, § 80, at 530.

194. *See* CONN. GEN. STAT. ANN. § 38-349 (West Supp. 1984) (administrative hearing before commissioner). Appeals from the commissioner's decisions may be made to superior court. *Id.* § 38-349(c). *See also id.* § 4-183 (no provision for arbitration).

195. *See, e.g.,* COLO. REV. STAT. § 10-4-717 (1973 & Supp. 1983) (mandatory, binding arbitration procedures between insurance companies on issues of liability and damages); N.J. Statewide Rules Governing Automobile Arbitration, 484 A.2d cxiv (1985); N.Y. INS. LAW § 675(2) (McKinney 1983) (insurers must provide opportunity for claimants to submit disputes to simplified arbitration procedures).

196. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC

Medical malpractice statutes, which proliferated in the early 1970's when insurance rates skyrocketed, vary in their procedures.¹⁹⁷ A common model requires the plaintiff to submit his medical malpractice claim to a panel of one health professional, one lawyer and one layman. Such panels, in theory, improve party understanding of trial outcome, thereby promoting settlement.¹⁹⁸ Health care review panels are administrative, because they usually are established and supervised by an administrative agency.¹⁹⁹ Functionally, however, they are means for judicial reference of cases.²⁰⁰

2. *Administrative Arbitration: Railroad Labor Relations*

One major administrative scheme for dispute resolution is arbitral in character. Labor relations agencies generally are hard to classify. As noted in the introduction to this section, the Supreme Court has drawn a distinction between administrative adjudication of "public rights" created by the legislature, and "private rights" that existed at common law.²⁰¹ Alternative dispute resolution is concerned primarily with the "private rights" half of this dichotomy. Private rights are subjected to administrative adjudication by federal labor relations agencies. The most familiar of these is the National Labor Relations Board (NLRB), but the NLRB primarily adjudicates public rights established by the National Labor Relations Act (NLRA).²⁰²

The administrative mechanism established under the Railway Labor Act (RLA)²⁰³ employs arbitration to resolve rights disputes. It is less familiar to most lawyers than the NLRA mechanism, but it reaches further into the substitution of an administrative process, for a judicial one, for the final adjudication of private common law

VICTIM 273-98 (1965); I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 1.02 (2d ed. 1981).

197. For a thorough treatment of the causes underlying the medical malpractice insurance crises, see *Documentary Supplement: Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 693 (1972). For an overview of the types of system in use, see Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322 (1977).

198. See Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 FORUM 682, 685-86 (1981). See, e.g., PA. STAT. ANN tit. 40, § 1301.308 (Purdon Supp. 1984); see also Note, *supra* note 197.

199. But see VA. CODE § 8.01-581.3 (chief justice appoints the panels).

200. For a discussion of judicial reference systems, see notes 353-467 and accompanying text *infra*.

201. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-72 (1982).

202. 29 U.S.C. §§ 141-187 (1982). One might also denominate these as "congressionally created private rights" under the *Northern Pipeline* formula.

203. 45 U.S.C. §§ 151-160 (1982).

rights. Section 3, First of the RLA²⁰⁴ establishes a National Railroad Adjustment Board (NRAB) to adjudicate disputes arising between railroad and airline employers and their employees. Section 3, Second²⁰⁵ permits unions and employers to establish private arbitration bodies to exercise the jurisdiction of the NRAB. In *Andrews v. Louisville & Nashville R.R.*,²⁰⁶ the Supreme Court held that employees covered by these provisions were not entitled to maintain actions for wrongful discharge in federal or state court. Instead, such employees must follow the grievance and arbitration procedures in the RLA.²⁰⁷

These RLA bodies function in most respects like arbitration bodies established privately under collective bargaining agreement and enforceable by virtue of section 301 of the Labor Management Relations Act.²⁰⁸ But the RLA tribunals are statutorily mandated substitutes for the courts for the adjudication of common law claims.²⁰⁹

In recent years, other statutes have been enacted that provide for arbitration of claims arising over statutorily created rights.²¹⁰ Dispute resolution through arbitration is not voluntary under these statutes. Accordingly, whether the parties would prefer traditional litigation is immaterial. The policy justification for requiring arbitration rather than traditional litigation in the courts is the need for expertise by the decisionmaker and greater speed and lower cost.

3. *Administrative Mediation: Employment Discrimination*

Some agencies use mediation and conciliation as a basic method of dispute resolution, rather than adjudication. The most prominent example of such procedures exists in the Equal Employment Opportunity Commission's (EEOC) treatment of title VII²¹¹ and Age Dis-

204. *Id.* § 153, First.

205. *Id.* § 153, Second.

206. 406 U.S. 320 (1972).

207. *Id.* at 324, 326. *But see id.* at 330-31 (Douglas, J., dissenting). Justice Douglas dissented on the grounds that the first, fourteenth and seventh amendments entitle an employee bringing a common law cause of action for wrongful discharge to an option between a jury trial or arbitration under the applicable collective bargaining agreement and labor statute. *Id.*

208. 29 U.S.C. § 181 (1982).

209. The Supreme Court's decision in *Northern Pipeline* might appear to raise questions about the constitutionality of this requirement, but such challenges have been rejected by the courts. *See Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1049 n.6 (7th Cir. 1983) (citing *Essary v. Chicago & N. Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980)), *cert. denied*, 104 S. Ct. 1000 (1984).

210. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982); Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1401 (1982).

211. 42 U.S.C. § 2000e-17 (1982).

crimination in Employment Act (ADEA) claims.²¹² Under title VII and ADEA, employees may bring suit to redress discriminatory employment actions.²¹³ Prior to bringing suit, however, the complaining employee must file a complaint with the EEOC²¹⁴ and the state agency with jurisdiction over discrimination complaints.²¹⁵ Before the EEOC will issue to the employee a right-to-sue letter,²¹⁶ it will attempt to resolve the complaint by "informal methods of conference, conciliation and persuasion."²¹⁷

Generally, if conciliation is successful, the EEOC will prepare a conciliation agreement, after which it meets with the party charged.²¹⁸ In essence, the Commission mediates the dispute between the parties, also representing its own interests in any settlement.²¹⁹ If the parties cannot agree, the complainant may sue.²²⁰

Mediation is not voluntary under these statutes; it is a prerequisite to access to the courts, and it is conducted by a federal agency. Requiring mediation is justified by the policy in favor of voluntary resolution of employment disputes.

4. *Incentives to Pursue Claims: Fees*

As noted in the introduction to this section, administrative claim forums are distinguished from private and judicial forums by providing public resources to at least one of the parties for dispute resolution. The theory of dispute resolution suggests that such free services will reduce settlement and encourage litigation.²²¹

212. 29 U.S.C. §§ 621-634 (1982).

213. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 U.S.C. § 626(c)(1) (1982).

214. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 U.S.C. § 626(d) (1982).

215. 42 U.S.C. § 2000e-5(c) (1982); 29 U.S.C. § 633(b) (1982).

216. The EEOC issues this letter to the complainant in title VII actions when conciliations efforts have failed, or when 180 days have passed from the date that the EEOC received the complaint. The EEOC will also issue the letter when it decides to dismiss the charge. 42 U.S.C. § 2000e-5(f)(1) (1982). Under ADEA, the complainant only has to wait 60 days after filing with the EEOC before suing in court, since no right-to-sue letter is necessary. 29 U.S.C. § 626(c), (d) (1982).

217. 42 U.S.C. § 2000e-5(b) (1982); 29 U.S.C. § 626(d) (1982).

218. This description of conciliation procedures is taken from B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 965 (2d ed. 1983). *See also* EEOC COMPL. MAN. (CCH) §§ 60.64.8; *Enforcement of Title VII*, 1 FED. REG. EMPLOY. SERV. (RIA) §§ 3.36-.44, §§ 3.56-.62, (1980); *Job Discrimination*, 1 FED. REG. EMPLOY. SERV. (RIA) § 5.80 (1981).

219. *See* B. SCHLEI & P. GROSSMAN, *supra* note 218, at 966.

220. The EEOC may sue, or may authorize the complainant to sue, in title VII cases. 42 U.S.C. § 2000e-5(f)(1) (1982). Under ADEA, the right to sue ends when the EEOC sues, but the complainant need wait only 60 days after filing with the EEOC before filing a civil suit. 29 U.S.C. § 626(c)(1), (d) (1982).

221. For an analysis of dispute resolution theory, see notes 19-101 and accompanying text *supra*.

One source of opposition to administrative dispute resolution methods, therefore, can arise from a perception that these methods may encourage the pursuit of claims when the social costs are so high that the claims would be better off abandoned. Accordingly, it is of interest to consider whether administrative procedures for dispute resolution could be accompanied by fees for access, which would promote private settlement.

In theory, there is no reason why an agency created to resolve disputes could not impose fees upon parties. Its justification would be to relieve some of the administrative costs of running such an agency, as well as to discourage the filing of frivolous complaints. Courts and arbitrators require parties to pay fees for the resolution of claims, and it would be no departure from precedent to permit adjudicative agencies to charge fees as well.

Due process complicates the problem, however. In *Boddie v. Connecticut*,²²² the Supreme Court struck down a state law requiring all persons filing for divorce to pay court fees of about sixty dollars.²²³ The Court held that the law violated due process.²²⁴ A similar situation arose in *Sea & Sage Audubon Society v. Planning Commission*.²²⁵ In *Sea & Sage*, an environmental group had objected to a planning commission's approval of a subdevelopment's tract maps, and wanted to appeal the action to city council. Under a city ordinance authorized by state law, the city required an "administrative appeal fee" equal to half the fee imposed on the subdeveloper.²²⁶ In subsequent litigation the Supreme Court of California did not reach the fee issue, because appellants had failed to raise the issue below.²²⁷ The dissenters would

222. 401 U.S. 371 (1971).

223. *Id.* at 372, 374.

224. *Id.* at 382-83. The Court, however, was careful to limit its holding to the facts in *Boddie*. Due process was violated because under Connecticut law, the sole means of obtaining a divorce was in state court. *Id.* at 380. Divorce was held to be so linked with the "fundamental human relationship" of marriage that a bar to the sole means of divorce to indigent citizens violated due process. *Id.* at 383. The *Boddie* holding does not preclude reasonable fees in a non-marriage/divorce context. *See id.* at 386 (Douglas, J., concurring) (the proper analysis in *Boddie* should have been under the equal protection clause); *id.* at 388 (Brennan, J., concurring) (case presented a "classic equal protection problem").

225. 34 Cal. 3d 412, 668 P.2d 664, 194 Cal. Rptr. 357 (1983).

226. By California law, planning agencies are permitted to charge reasonable fees for processing subdivision plans. *See* CAL. GOV'T. CODE § 66451.2 (West 1983). The city also chose to charge those who wish to appeal planning commission decisions a sum equal to half the fee charged the subdeveloper — in this case, the appeal fee was \$607. *Sea & Sage Audubon Soc'y v. Planning Comm'n*, 34 Cal. 3d at 415, 668 P.2d at 665, 194 Cal. Rptr. at 358.

227. But the court hinted in a lengthy footnote that the fee structure would have been found reasonable had the issue been raised properly. *See Sea & Sage*, 34 Cal. 3d at 422 n.5, 668 P.2d at 670 n.5, 194 Cal. Rptr. at 363 n.5.

have found the fee an "arbitrary and unreasonable barrier to the pursuit of administrative remedies," and would have invalidated it.²²⁸

It appears that, should an agency be created as an involuntary alternative to court adjudication, its fees would be subject to challenge in *Boddie*-like circumstances. A solution may be found in one state statute which permits waiver of the costs of appealing administrative actions.²²⁹ Such a procedure would permit appeals by indigents who could not afford to pay and yet prevent frivolous abuses of the administrative dispute resolution process.²³⁰

C. *Judicial Methods*

Except for those classes of disputes where economic or social interdependence makes participation in private dispute resolution mechanisms feasible, most disputes cannot be resolved equitably except through an administrative or court-annexed procedure. The purpose of having a civil judicial process in the first place is to enlist the coercive power of the state to force the stronger party in a bilateral dispute to participate in resolving it on terms acceptable to both parties or deemed by the society to be fair.

1. *Direct Economic Incentives to Settle*

One of the clear conclusions of the dispute resolution literature is that settlement of disputes is furthered by costs of litigation.²³¹ Any contemporary judicial system uses this fact, more or less consciously, to promote settlement short of trial.

a. Costs

The theory of dispute resolution rests on the notion that transaction costs substantially affect whether and on what terms disputes will be settled.²³² Potential plaintiffs will not sue if the transaction costs of suit are greater than the expected payoff from suing.²³³ Potential defendants are confronted with being forced to pay not only the value

228. *Id.* at 428, 668 P.2d at 674, 194 Cal. Rptr. at 367 (Mosk, J., dissenting).

229. See CONN. GEN. STAT. ANN. § 4-183(i) (West Supp. 1984) (authorizing court to waive costs of appealing administrative ruling).

230. Section 4-183(i) provides that the court may require a hearing upon the application for waivers, and its judgment is to contain a statement of the facts the court has found on the issue. *Id.*

231. See Cooter & Marks, *supra* note 96, at 238; Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58-59 (1982).

232. For a discussion of the effect of transaction costs on settlement of a dispute, see notes 82-85 and accompanying text *supra*.

233. See notes 84-85 and accompanying text *supra*.

of the claim, but also the transaction costs of defending a suit.²³⁴ Thus either party to a single dispute dislikes high costs: the plaintiff because they may deprive him of compensation for a meritorious claim; the defendant because they inflate the economic burden of a dispute even if the claim is not meritorious. In the aggregate, however, costs of litigation provide an incentive to settle. The literature demonstrates how zero transaction costs for suit would mean many more trials and fewer settlements.²³⁵

Most nonjudicial dispute resolution techniques are advocated, among other things, because their costs are lower than litigation. To the extent that these alternatives are viewed as "better" because of lower costs, society should consider reducing the costs of civil litigation, its principal institution for resolving private disputes. To the extent that costs are an important incentive to settle disputes fairly before trial, once they are in the civil litigation system, society should consider how the incidence of costs can be manipulated to promote fair settlements and fewer trials.²³⁶

Many of the devices discussed in the following sections on judicial dispute resolution methods have as one of their objectives cost reduction; others have as one of their objectives shifting the incidence of costs.²³⁷

Costs of litigation, exclusive of attorney's fees,²³⁸ are often awarded to the prevailing party in a lawsuit.²³⁹ The practice of awarding costs dates to the Statute of Gloucester,²⁴⁰ and in the United States is provided for by statute or rule of court²⁴¹ in nearly

234. *Id.*

235. *See generally* Shavell, *supra* note 231.

236. *Id.*

237. Small claims procedures are probably the most obvious example of an attempt to reduce costs. Accuracy in decision making is sacrificed in order to reduce costs. Some states have gone so far as to prohibit the appearance of attorneys in their small claims forums. *See* J. RUHNKA & S. WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 3 (1978) (eight states prohibit attorneys from appearing in their small claims tribunals). Discovery, in contrast, increases costs, while improving the parties' ability to predict accurately the outcome of a trial. For a discussion of the use of discovery, see notes 286-314 and accompanying text *infra*. Rules of civil procedure which relate to offers of settlement, both at the state and federal level, address the incidence of costs explicitly. For a discussion of these rules, see notes 258-85 and accompanying text *infra*.

238. Under the "American Rule," attorney's fees ordinarily are not among the costs that a winning party may recover. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967)).

239. *See generally* 20 AM. JUR. 2D *Costs* § 5 (1965).

240. 6 Edw. I ch. 1 (1278). This statute permitted costs to be awarded only to successful plaintiffs. *See Day v. Woodworth*, 54 U.S. (13 How.) 362, 371-72 (1852).

241. 20 AM. JUR. 2D *Costs* § 5 (1965).

every jurisdiction.²⁴² Only taxable costs are recoverable. Usually these include witness fees and mileage,²⁴³ deposition expenses,²⁴⁴ costs of obtaining documentary evidence,²⁴⁵ and fees for the services of court clerks, sheriffs and referees or masters.²⁴⁶ These types of traditionally taxable costs are usually much less than attorney's fees.²⁴⁷

Long before the end of the lawsuit, however, the magnitude of costs affects parties' decisions about how to handle their claims.²⁴⁸ Many claimants cannot afford to litigate, regardless of the merit of their claims.²⁴⁹ In considering the effect of costs on dispute resolution, it is important to note that the risk taker on the plaintiff's side frequently is the attorney. This is so because of the prevalence of contingent fee arrangements for plaintiffs,²⁵⁰ and the practice of plaintiff's counsel advancing the costs of litigation.²⁵¹ Therefore access to the courts for an impecunious plaintiff frequently is controlled by his attorney's assessment of the probability of a recovery or a settlement sufficient to cover transaction costs and to compensate the attorney for his time.²⁵²

242. See FED. R. CIV. P. 54(d). Rules similar to rule 54(d) have been adopted in many states. 20 AM. JUR. 2D *Costs* § 14 (1965).

243. In federal courts, fees above the statutory amount for expert witnesses ordinarily are not taxable unless the court calls the expert. See *Henkel v. Chicago, St. P., Minn. & O. Ry.*, 284 U.S. 444, 446 (1932); 20 AM. JUR. 2D *Costs* § 67 n.13 (1932).

244. The federal practice is to allow deposition expenses. See 20 AM. JUR. 2D *Costs* § 57 (1965). In some states, expenses for depositions taken solely for discovery purposes are not taxable absent a statute authorizing the expense. *Id.*

245. 28 U.S.C. § 1920(4) (1982) (the fees for the exemplification and copying of documents that were necessarily obtained for use at trial may be taxed as costs). See *Banks v. Seaboard Coast Line R.R.*, 62 F.R.D. 21, 22 (N.D. Ga. 1974).

246. 20 AM. JUR. 2D *Costs* § 67, at 53 (1965). For a list of the costs that ordinarily can be taxed against the losing party in a federal suit, see 28 U.S.C. § 1920 (1982). See also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980). Section 1920 includes clerk's, marshal's, and witness fees. *Id.* at 758.

247. *Delta Air Lines v. August*, 450 U.S. 346, 379 n.5 (1981) (Rehnquist, J., dissenting).

248. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 296 (1973).

249. See *Delta Air Lines*, 450 U.S. at 363-64 n.1. See Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323 (Sept. 1979).

250. The contingent fee is virtually the exclusive method of fee arrangements in personal injury cases. Comment, *Of Ethics and Economics: Contingent Percentage Fees for Legal Services*, 16 AKRON L. REV. 747, 747-48 (1983).

251. Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct provide that an attorney may advance the client the costs of the litigation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(2) (1983) (attorney may pay the court costs of an indigent client without any reimbursement). In the case of a nonindigent, the repayment of the advances for court costs may be made contingent upon the outcome of the litigation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1); see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103 (B) (1979) (such advances allowed only if the client remains ultimately liable for the expenses).

252. Shavell, *supra* note 231, at 61 n.24.

Transaction costs for litigation are determined basically by the procedure employed by the litigation system in use. Eliminating discovery, for example, would reduce transaction costs, though it also would have other effects that generally have been determined by policymakers to be sufficiently undesirable to outweigh the cost effects of eliminating it.²⁵³

Most of the existing programs discussed below affect transaction costs. Some others, not discussed separately, are concerned primarily with allocation of costs. A prominent example is the statutory award of attorney's fees.²⁵⁴ Several commentators have explored the theoretical effects of still other programs that would influence dispute resolution primarily through their effect on costs.²⁵⁵ Most of these concepts relate to the incidence of expenses for attorney's fees.²⁵⁶

b. Settlement Offers

Rule 68 of the Federal Rules of Civil Procedure deals with offers of settlement.²⁵⁷ Under the rule, if it is amended as proposed, any party to an action may serve upon any other party,²⁵⁸ at least thirty

253. See FED. R. CIV. P. 26(f) advisory committee note.

254. See The Civil Rights Act of 1964, tit. 7, 42 U.S.C. § 2000e-5(k) (1982) (court may award attorney's fees to the prevailing party); The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) (court may award attorney's fees in any civil rights action).

255. See, e.g., Cooter & Marks, *supra* note 96; Shavell, *supra* note 231.

256. See Shavell, *supra* note 231. Professor Shavell concludes that a trial will be more attractive under the American attorney's fees rule (which does not include attorney's fees as a cost that the prevailing party may recover) than under the British rule (which does include attorney's fees as a recoverable cost) for a pessimistic litigant, because if unsuccessful it does not run the risk of having to pay the added costs of defendant's attorney's fees. *Id.* at 59-60. He concludes that a trial will be more attractive under the British rule for optimistic litigants who are risk neutral or only slightly risk averse, because the expected value of victory is higher since it will include compensation for his attorney's fees. *Id.* at 59. Extremely risk averse persons, whether optimistic or pessimistic, would prefer trial under the American rule because of its lower risk. *Id.* at 62. On the other hand, "[i]f optimism is the cause of trials [as the literature almost uniformly suggests] and if litigants are not too risk averse, then the British rule will cause more suits to be tried." Cooter & Marks, *supra* note 96, at 245 (footnote omitted). Professor Shavell suggests that the British attorney's fees rule would, in certain situations, produce fairer results and lower social costs. Shavell, *supra* note 231, at 72-73. Where the number of suits won by plaintiffs in a given area of law is only a small fraction of the suits filed in that area, the use of the British system would reduce the number of suits filed and tried in that area. *Id.* at 69-70, 72.

257. Rule 68 provides in part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.

FED. R. CIV. P. 68.

258. The present rule pertains only to "a party defending against a claim" and

days prior to the start of trial, an offer which will stand open for the full thirty days.²⁵⁹ The offer would state the amount of money or property which is being offered in settlement.²⁶⁰ If unaccepted after thirty days, or earlier if the court so authorizes, the offer is deemed withdrawn.²⁶¹ Starting with the withdrawal date, any costs which accrue to the offeror must be paid by the offeree if the judgment in the subsequent trial is not more favorable to the offeree than the offer had been.²⁶² In such occurrence, the offeree would be liable for the costs and expenses (including reasonable attorney's fees) of the offeror, and would be charged interest on the amount offered starting from the date offered.²⁶³

The court has some discretion as to the awarding of expenses and interest. The court may reduce the award if it determines such an award to be excessive, that is, out of proportion to the case.²⁶⁴ Also, if the offeree has acted reasonably or such an award would lack fairness, the court may determine the award to be unjustified and deny it entirely.²⁶⁵ If bad faith by the offeror was found by the court, through the offer of a token, or "sham" offer (so disproportionately small, relative to the amount in dispute that the offeree would most likely not accept it), no award would be granted.²⁶⁶

Substantively, the amendments add attorney's fees to the costs recoverable under the rule.²⁶⁷ In addition, to clarify the mechanics of the rule, the amendments propose that the final judgment, which would determine whether the offeree would have fared better in taking the offer, would be evaluated excluding the costs and expenses of the parties.²⁶⁸ If liability has been determined but the amount of liability has not, the rule would allow an offer to be made at this point,

therefore would not apply to offers made by the claimant to the defendant. FED. R. CIV. P. 68.

259. See *Preliminary Draft of Proposed Amendments*, 98 F.R.D. 337, 353, 361-62 (1983).

260. *Id.* at 353, 361.

261. *Id.* at 353, 362.

262. *Id.*

263. *Id.* Such interest would not be charged separately against the offeree if the interest normally would be included in the judgment rendered. *Id.* This provision is intended to deter the defendant from declining an acceptable offer because of the extra interest that may be made in delaying payment until judgment following a trial. *Id.* at 365.

264. *Id.* at 362, 366.

265. *Id.*

266. *Id.* at 362, 365-66.

267. *Id.* at 362, 365.

268. *Id.* at 362, 364.

standing open for thirty days.²⁶⁹

Federal Rule 68 originally was modeled after state civil procedure rules.²⁷⁰ The state statutes mandated the imposition of costs on a plaintiff who rejected settlement offers; state versions of Federal Rule 54(d)²⁷¹ allowed the prevailing party to recover its costs.²⁷² For example, the current Pennsylvania Rule of Civil Procedure 238 allows damages to be awarded for delay.²⁷³

Such rules encourage the settlement of claims without litigation, by providing incentives to both sides of the conflict to reach agreement. The present version of the federal rule is applicable only to offers made by one defending against a claim.²⁷⁴

The proposed amendments to Federal Rule 68 would enhance its effectiveness. If amended as proposed, it not only would apply when the offeree wins a judgment less in amount than the offer, but also would apply when the offeror wins the judgment.²⁷⁵ This approach, however, creates the potential for abuse by the defendant making a

269. *Id.* at 363.

270. *See Delta Airlines*, 450 U.S. at 356 & n.18 (1981). "Rule 68 is an outgrowth of the equitable practice of denying costs to a plaintiff 'when he sues vexatiously after refusing an offer of settlement.'" *Id.* at 356 (quoting 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001, at 56 (1973)).

271. *See* FED. R. CIV. P. 54(d). The rule provides in part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs"

272. *Preliminary Draft of Proposed Amendments*, 98 F.R.D. 337, 356-58 (1983). Most of these state offer-of-judgment rules applied, however, only to grant discretion to the trial court to shift the burden of costs when the plaintiff prevailed. *Id.* at 358 & n.21. The state provisions did not grant discretion in the trial court to allocate costs when the defendant prevailed. *Id.*

273. *See* PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. (Purdon 1983). The scope of this rule is more limited than the federal rule, applying only to actions for bodily injury, death or property damage. *Id.* Pennsylvania Rule 238 allows the court to add 10% to the compensatory judgment, computed from the date of the filing of the complaint or from one year after the accrual of the cause of action, whichever is later. *Id.* However, if at any time the defendant makes a pretrial offer equal to at least 80% of the judgment, there would be no damages for delay award for the period after the date the offer was made. *Id.*

274. *See* FED. R. CIV. P. 68; 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (1973).

275. *See Preliminary Draft of Proposed Amendments*, 98 F.R.D. 337, 367 (1983). The language in the first sentence of the second paragraph of rule 68 describing a judgment "obtained by the offeree" has been eliminated in the proposed draft. *See id.* at 362. This language had been interpreted by the Supreme Court as making rule 68 applicable only when the plaintiff had judgment entered in his favor (although for an amount less favorable than defendant's offer), and not when judgment was entered in the defendant's favor. *See Delta Air Lines*, 450 U.S. at 351. Such a construction of rule 68 would appear to create the anomalous situation where a defendant who prevails in a case is actually in a less favorable position than if the plaintiff had prevailed, albeit in an amount less than the offer. *Id.* at 353 n.12.

token offer.²⁷⁶ If the plaintiff refuses such an offer and judgment ultimately is entered for the defendant, the defendant effectively would have shifted his post-offer costs of litigation to the plaintiff, while never having made a good faith settlement offer.²⁷⁷ The proposed amendments have attempted to deal with this potential problem by giving the trial judge discretionary power to invalidate an award if he or she finds that the offeror acted in bad faith.²⁷⁸

One earlier approach to the problem of abuse by the defendant was to require that only reasonable offers cause the rule to apply.²⁷⁹ Applying rule 68 only to situations where the plaintiff obtained a judgment in his favor negates the need for this reasonableness requirement, because a sham or unrealistic offer would not serve any purpose for the defendant.²⁸⁰

The Advisory Committee considers the existing rule basically ineffective for fulfilling the basic purposes for which it was created.²⁸¹ The proposed amendments strengthen the rule by including attorney's fees as an incentive.²⁸² In a civil suit, probably the greatest motivation for settlement is money; the defendant wants to minimize the sum of litigation expenses and payment to the plaintiff; the plaintiff wants to maximize what he receives from the defendant less what the plaintiff pays for litigation expenses. Providing for an award of attorney's fees may give rule 68 the "teeth" it needs to promote settlement

276. *Preliminary Draft of Proposed Amendments*, 98 F.R.D. at 366-67.

277. *See Delta Airlines*, 450 U.S. at 353.

278. *See Preliminary Draft of Proposed Amendments*, 98 F.R.D. at 366-67. Whether the offeror has acted in bad faith is to be determined from objective factors, such as the possible merits of the claim or defense at the time of the offer and the amount of the proposed offer. *Id.* at 367.

279. *See Delta Air Lines*, 450 U.S. at 355.

280. *Id.* One commentator suggested that the applicability of the rule be restricted to judgments where the offeree secures at least some relief. Note, *Rule 68: A "New Tool" for Litigation*, 1978 DUKE L.J. 889, 895. The rule "would insure that token offers would not be made" since they would not produce an early settlement and would therefore gain the offeror nothing. *Id.* In many cases, the defendant (offeror), as prevailing party, is entitled to costs under rule 54(d). *Id.* "When the defendant (offeror) is not so entitled, he ought not to be able to employ rule 68 to override the discretion that the court would otherwise have, in order to compel the awarding of costs." *Id.* For the pertinent text of rule 54(d), see note 271 *supra*.

281. *Preliminary Draft of Proposed Amendments*, 98 F.R.D. at 363. The committee has attributed the rule's failure in part to the fact that costs, absent the inclusion of attorney's fees, are too small an incentive to parties to utilize the rule. *Id.* Further, the fact that the rule is available only to parties defending claims, rather than claimants, has hindered the rule's effectiveness, in the committee's view. *Id.*

282. *Id.* at 365. Because of the sizable amount of attorney's fees at the pretrial and trial stage, with the inclusion of attorney's fees as costs, the risk increases for the offeree if he fails to consider the proposed settlement before trial. *Id.* He may be creating more of an incentive for the offeree to arrive at settlement before the heaviest expenses of litigation. *Id.*

rather than further litigation.²⁸³

2. *Improving Party Assessment of Trial Outcome*

The second major finding of the dispute resolution literature is that settlement rather than further litigation results when the parties have accurate perceptions of probable trial outcome.²⁸⁴ A variety of procedural devices both old and new in the judicial system make use of this fact to promote settlement.

a. Discovery

Discovery is an accepted part of modern civil procedure,²⁸⁵ though it is a fairly recent addition. Before the merger of law and equity, discovery was not permitted in actions at law.²⁸⁶ Rather, a party to a legal action desiring discovery needed to file a separate bill

283. Rule 68 has been characterized as "little known and little used," but it has recently attracted greater attention in this period of increasing federal dockets. *Chesny v. Marek*, 720 F.2d 474, 475 (7th Cir. 1983)(citation omitted). In *Chesny*, the defendants made a timely rule 68 offer of \$100,000 in an action filed under § 1983. *Id.* at 476. The offer included costs then accrued and attorney's fees. *Id.* The offer was refused, and the jury subsequently awarded \$60,000. *Id.* The district judge found that the prerequisites of rule 68 were satisfied, \$60,000 being less than \$100,000. *Id.* Therefore, the court limited the statutory award of attorney's fees to \$32,000, the amount accrued up to the time of the rule 68 offer. *Id.* See 42 U.S.C. § 1988 (1982). On appeal, the court of appeals held that a rule 68 offer may include attorney's fees then accrued. 720 F.2d at 477-78. The court further held that rule 68 does not bar the award of plaintiff attorney's fees under § 1988 for postoffer attorney time. *Id.* at 478-79. The court reasoned that the legislature, in enacting § 1988, "would not have wanted its effectiveness blunted because of a little known rule of court (rule 68) promulgated almost 40 years earlier." *Id.* at 479. Therefore, the plaintiff was entitled to recover attorney's fees after the date of the offer, despite the language of rule 68. See *id.* at 480. The court observed that the proposed amendments to rule 68 would require the offeree to pay the attorney's fees of the offeror in *any* case in which the judgment was less favorable than the offer. *Id.* at 479. The court agreed with the Advisory Committee's view that "unless the offeree is penalized by being made to pay the offeror's attorney's fees, Rule 68 will never become an effective tool for inducing settlements." *Id.* at 479-80 (citation omitted). Nevertheless, it noted that the rule's existing provision on costs "creates an incentive for the defendant to make a reasonable offer and that once such an offer is on the table the plaintiff has a big incentive to accept it and thereby avoid the expenses and uncertainty of a trial." *Id.* at 480. Cootner and Marks conclude that a compromise rule similar to the proposed rule 68, which is akin the current British rule, would reduce the incidence of trial and increase the likelihood of settlement. Cootner & Marks, *supra* note 96, at 245-46.

284. See text accompanying note 101 *supra*; Lambros & Shunk, *supra* note 38, at 43.

285. "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings." *Hickman v. Taylor*, 329 U.S. 495, 500-501 (1947) (footnote omitted).

286. See 4 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26.03 (2d ed. 1984) (federal practice before adoption of federal rules). Many states permitted pretrial discov-

in equity.²⁸⁷ Since the promulgation of the Federal Rules of Civil Procedure in 1938, however, discovery as a regular pretrial procedure gradually has been accepted in most American jurisdictions.²⁸⁸

Five methods of discovery commonly are provided: interrogatories,²⁸⁹ depositions,²⁹⁰ requests for production of documents,²⁹¹ orders for physical or mental examination,²⁹² and requests for admissions.²⁹³ Sanctions may be imposed for failure to participate, ranging from imposition of costs to adverse judicial determination of the merits.²⁹⁴ Protective orders may be obtained from the court when discovery threatens undue inconvenience or other recognized legal interests.²⁹⁵

Discovery influences the resolution of civil disputes in three major ways. First, it increases the amount of information available to a party about the strength of his opponent's position.²⁹⁶ In this manner, it permits the parties more accurately to assess the probable outcome of a trial.²⁹⁷ The majority of the theoretical and empirical literature concludes that a more accurate assessment of trial outcome makes pretrial settlement more likely.²⁹⁸ Second, it can form the basis for

ery before the federal rules were adopted. *Id.*; FED. R. CIV. P. 26(a) committee note, reprinted in 4 J. MOORE, *supra*, ¶ 26.01[2] (citing state statutes permitting discovery).

287. See 4 J. MOORE, *supra* note 286, ¶ 26.03[1]; Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 866 (1933).

288. 23 AM. JUR. 2D *Depositions and Discovery* § 2 (1983). For a list of states adopting all or a substantial part of the Federal Rules of Civil Procedure, see AM. JUR. 2D *Desk Book* 408 (1979). See, e.g., 42 PA. CONS. STAT. ANN. preceding explanatory note on discovery and depositions (Purdon Supp. 1984); PA. R. CIV. P. 4001 (new Pennsylvania discovery rules modelled closely on federal rules).

289. See FED. R. CIV. P. 33. Interrogatories are written questions presented to an opposing party which that party is required to answer under oath. *Id.*

290. See FED. R. CIV. P. 30 (oral depositions); FED. R. CIV. P. 31 (depositions on written questions). Depositions usually are oral examinations conducted by counsel under oath in the presence of a stenographer. See FED. R. CIV. P. 30(c). Depositions may also be conducted by written questions submitted by counsel. See FED. R. CIV. P. 31. Nonparties as well as parties may be examined in depositions. FED. R. CIV. P. 30(a). Nonparties may be required to participate in depositions by means of a routine subpoena. *Id.*

291. See FED. R. CIV. P. 34.

292. See FED. R. CIV. P. 35.

293. See FED. R. CIV. P. 36. Requests for admission are written statements of legally material facts or opinions to which the recipient must agree or disagree. *Id.* For a discussion of this rule, see generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371 (1962).

294. See FED. R. CIV. P. 37.

295. See FED. R. CIV. P. 26(c).

296. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298 (1978); Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 114-16 (1962).

297. Sunderland, *Improving the Administration of Justice*, 167 ANNALS 60, 76 (1933).

298. Brazil, *supra* note 296, at 1302. The majority of commentators have concluded that the lack of information on both sides is a key ingredient in the decision to

pretrial resolution of the dispute through summary judgment, when discovery demonstrates an absence of disputed issues of material fact.²⁹⁹ Third, discovery imposes additional, sometimes substantial, costs on the other side.³⁰⁰ This increases the transaction costs of litigating the claim.

The cost-increasing effect of discovery may make pretrial settlement of a claim more likely, but one must remember that discovery increases transaction costs on both sides.³⁰¹ Some forms of discovery are more or less symmetrical in their cost impact on the plaintiff and defendant. Depositions are an example. Both sides must pay counsel to prepare for and to attend the deposition. Other forms are significantly asymmetrical in their cost impact. Interrogatories are an example. Plaintiff's counsel who specializes in a particular type of case is likely to have standard form interrogatories which can be sent to the defendant at minimal marginal cost.³⁰² The defendant, on the other hand, must respond to the interrogatories with facts unique to the particular case. Sometimes the cost of ascertaining these facts and preparing responses can be substantial. Thus interrogatories are a form of discovery that permits the plaintiff to increase transaction costs on the other side without a commensurate increase in plaintiff costs. Generally, the literature suggests that the increased transaction costs makes pretrial settlement more likely.³⁰³ Thus the availability of

gamble by going to trial. *Id.* Since discovery enables the parties to gain a more realistic view of the outcome, there is a greater incentive to settle so as to avoid unnecessary expense. *Id.* But see Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480, 489-90 (1967). This commentator notes:

[P]erhaps the most important factor in the making of settlements is the fear of unknown evidence in the possession of one's opponent. . . . [T]he mutual fear of . . . unknown factors creates a greater desire to settle than is present if each party already knows exactly what the other side's evidence will be and has had an opportunity to prepare his case accordingly.

Id.

299. See FED. R. CIV. P. 56(c) (allowing summary judgment to be based on discovery results); W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 24 (1968). But see VA. CODE § 8.01-420 (1984) (summary judgment not to be based on deposition unless both parties consent).

300. W. GLASER, *supra* note 299, at 172-77. Predictably, discovery costs are a function of the amount of money at stake in the litigation. *Id.* at 172. Discovery costs are especially high in antitrust and patent cases. *Id.*

301. See notes 84-85 and accompanying text *supra*.

302. Shroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 478.

303. See W. GLASER, *supra* note 299. Discovery is most useful as a tool to encourage a settlement when the party requesting discovery is affluent and the other party has limited financial resources. *Id.* at 182, 184. For a discussion of discovery as a tool to procure a settlement, see Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1150-53 (1951).

discovery probably means that more suits, once filed, settle than would be tried if discovery were not permitted.

On the other hand, substantial time is required for discovery. Extensive discovery also certainly will delay the trial date, and may delay the commencement of serious settlement negotiations.³⁰⁴ Moreover, discovery increases the total cost of judicial dispute resolution and thus may make the judicial machinery practically unsuitable for certain smaller claims.³⁰⁵

304. For recent criticisms of the federal discovery rules, see Brazil, *Civil Discovery: Lawyer's Views of its Effectiveness, Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 789; Brazil, *supra* note 296; FED. R. CIV. P. 26 advisory committee note for proposed changes. A recent survey conducted from a sampling of Chicago litigators revealed that 20% of the litigators reacted positively to the rules of discovery, while 33% reacted negatively. The remaining 47% displayed mixed emotions. Brazil, *supra*, at 795.

The great majority of the group that reacted positively to the discovery rules handles small litigation, representing individual clients and often involving tort claims. On the other hand, the 33% who reacted negatively represented large clients of corporations and were frequently involved in antitrust suits. *Id.* at 799-801.

A separate survey revealed that with respect to "small cases" (median range of \$24,000 or less), 31% of the litigators reacted positively while 23% reacted negatively. Conversely, in dealing with large cases of over one million dollars only 7% of the litigators reacted positively while 43% reacted negatively. *Id.* at 803.

The survey also revealed a marked distinction in reactions depending on whether the litigator was representing the plaintiff or the defendant. 30% of the litigators who represented plaintiffs reacted positively while 27% reacted negatively. On the other hand, only 20% of litigators who represent defendants reacted positively while 34% reacted negatively. *Id.* at 804.

The most frequently mentioned discovery problems are broken down as follows: 71% of responses stated that the negative impact of the rules was due to the role or attitudes of judges or magistrates. Evasive responses, withholding information, or noncompliance was the second major grievance of the litigators while overdiscovery, delay and cost followed in succession. *Id.* at 824-25.

Most scholars agree that the reform of discovery rules can take one of two forms. One alternative is to require judges to supervise the discovery process on a case by case basis, producing the tailored results but at a certain cost to the judicial system. Brazil, *supra* note 296, at 1353-58. However, this alternative also saves some of the current high cost of "adversary jockeying," and may also save costs through the court's encouragement of early settlements. *Id.* at 1357-58. Another alternative would be to place overall limitations on the scope of discovery, resulting in unfairness in some cases and still requiring judicial involvement. So far, the Supreme Court has adopted the first measure. *See* Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 999 (1980) (Powell, J., dissenting).

305. One study concluded that discovery is used in only 50% of the cases filed in United States District Court. *See* Levy, *Discovery — Use and Abuse, Myth and Reality*, 17 FORUM 465, 467 (1981-1982). In April of 1980, the United States Supreme Court promulgated a set of amendments to the Federal Rules of Civil Procedure, which took effect August 2, 1980. *See* Amendments to Federal Rules of Civil Procedure, 446 U.S. 995 (1980).

Justices Powell, Rehnquist and Stewart dissented because the proposed amendments did not reflect the degree of change necessary to make the Rules of Discovery more efficient. *Id.* at 1000 (Powell, J., dissenting). As Justice Powell stated: "I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes

California recently completed an experiment with limitations on discovery, and simplification of discovery procedure. Under the program, begun in 1978,³⁰⁶ cases involving less than \$25,000 were handled under simplified procedures in municipal and superior courts in three geographic areas.³⁰⁷ Simplified pleadings did not produce the desired results. Limitations on pretrial motions were unsuccessful. Significant limitations on discovery, however, reduced the cost of discovery by an estimated fifty percent, and the overall cost of litigation by an estimated fifteen to twenty percent.³⁰⁸ Fifty-eight percent of

will delay for years the adoption of genuinely effective reforms." *Id.* In adopting the amendments, the Judicial Conference rejected two specific proposals. Porter, *Discovery Abuse: Interrogatories, Sanctions, and Two Proposals to the Federal Rules Which Were Not Adopted*, 17 FORUM 482, 483, 488-89 (1981-1982). The first proposal would have curtailed the scope of discovery by altering rule 26 to permit discovery only of matters relevant to the issues raised by the claims or defenses of the parties, rather than by broader discovery relevant to the subject matter of the suit, as the rule now provides. *Id.* at 488. The second proposal would have curtailed the use of discovery by amending rule 33 to limit the number of interrogatories of each party to 30. *Id.* at 486.

There are two major areas of discontent concerning the Rules of Discovery. One challenged premise is that the discovery practice is "to be accorded a broad and liberal treatment." *See Hickman v. Taylor*, 329 U.S. 495 (1947). In *Hickman*, the Court rejected the "fishing expedition" argument as a limitation on discovery. *Id.* at 507. Of late, however, some commentators have argued that in order to curtail abuse, it is necessary to develop a more limited scope to discovery. *See Porter, supra*, at 489 (arguing that it is necessary to move away from the limitless "subject matter" standard of the federal rules and towards more of a focus on the "claims" and "defenses" in order to help alleviate burdensome and unduly expensive discovery requests).

Another challenged premise is that discovery only requires judicial attention in exceptional cases because lawyers will practice it under a rule of reason, reinforced by mutual self-interest in avoiding the waste of their time or the waste of a client's money that results when unnecessary pursuit or resistance in the discovery occurs.

Many judges and commentators have believed that common sense on the part of the litigants will result in decisions not to abuse the discovery process. *See, e.g., Becker, Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 277 (1978). Recently, however, it has been argued that the litigants, when left on their own, have abused the discovery process, seeking irrelevant information resulting in an unnecessary expenditure of time. Porter, *supra*, at 482-83.

On the other hand, it has been argued that amendments to the federal rules which would narrow the scope of discovery would:

1. eliminate notice pleading;
2. be inefficient in the face of the rule permitting liberal amendments to pleading; and
3. prompt a new round of litigation as to the meanings employed by the amendments.

See Schroeder & Frank, supra note 302, at 481.

306. *See* JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT, at 15-17 (1983). The program was authorized by a pilot project of the California legislature. *See* CAL. CIV. PROC. CODE §§ 1823-1833.2 (West 1983).

307. CAL. R. CT. 1701-51 (1978) (repealed 1983). These rules implemented the experiments in the Fresno County and Los Angeles Municipal Courts and the Torrance Branch of the Los Angeles Superior Court and the Fresno Superior Court.

308. *See* JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 15-16 (1983).

attorneys in an interview sample favored continuing with the program, with modifications.³⁰⁹ At the conclusion of the experiment, legislation was proposed to make certain features permanent: limitations on discovery,³¹⁰ mandatory utilization of a "case questionnaire,"³¹¹ and simplified trial procedures.³¹² Some of the recommendations were adopted by the California legislature in 1983, and made applicable to all except small claims cases in municipal and justice courts statewide.³¹³

b. Pretrial Conferences: Judicial Mediation

Judicially annexed mediation is hardly a new concept. It occurs every time a judge tries to settle a case. This section summarizes the prevalence of the practice and some judicial observations on its dynamics. It also identifies some programs that seek to enhance the process by more formal means. Finally, it offers some thoughts on how this form of dispute resolution can be improved.

In fiscal year 1981, 172,942 civil cases were filed in the federal courts.³¹⁴ Of these cases, 24.1% were resolved with no court action, and 35.3% were resolved after court action but before pretrial conference, 34% were resolved after pretrial conferences, 3.9% were resolved after a nonjury trial, and 2.7% were resolved after a jury trial.³¹⁵ These figures show the significance of the pretrial conference as a settlement-inducing procedure.

On the other hand, the elapsed time was nearly as great for cases disposed of at or after the pretrial conference as for cases that were

309. *Id.* at 16.

310. *Id.* at 17. Under the recommendation, each party would be permitted to propound, as to each adversary, its choice of either a combination of 25 interrogatories, requests for admission, or requests to produce or identify documents or things, or one deposition. *Id.*

311. *Id.* at 17. Under the recommendation each party would be required to complete a standard form with its initial pleading. *Id.* The form would supply essential information normally developed by interrogatories, such as names and addresses of witnesses, a list of relevant documents, a statement of the nature and amount of damages, and information on insurance coverage, injuries and treating physicians. *Id.*

312. *Id.* at 17. The principal proposals for simplification permitted use of declarations instead of live testimony in certain circumstances. *Id.*

313. CAL. CIV. PROC. CODE §§ 90-100 (West 1983). The Act made two principal changes in the recommendations. *Id.* §§ 93-94. First, discovery is less restricted. Each party may propound, as to each adversary, a combination of 35 interrogatories, requests for admission, requests to produce or identify documents or things, and may take one deposition. *Id.* § 94. Second, the plaintiff is given the option whether or not to use the case questionnaire. *Id.* § 93. See JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 17 (1983).

314. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT ANNUAL REPORT OF THE DIRECTOR A-26 (1981).

315. *Id.*

tried. Twenty months elapsed, on average, for cases tried.³¹⁶ Nineteen months elapsed, on average, for cases resolved before trial but at or after the pretrial conference. The ninetieth percentile elapsed time was forty-eight and sixty-three months, respectively. In contrast, cases resolved by court action before the pretrial conference were resolved in a median time of eight months, with a ninetieth percentile figure of thirty-two months, and cases resolved without court action were resolved in a median time of five months, with a ninetieth percentile figure of thirty-eight months.³¹⁷ Thus the empirical data do not indicate that pretrial conferences expedite resolution of disputes.

The Federal Judicial Center has published comments by federal trial judges on the judge's role in the settlement process. Judge Frederick B. Lacey³¹⁸ has recommended a routine procedure under which a standard form is sent to counsel after an answer is filed in a case.³¹⁹ The form would contain dates for pretrial and status conferences and for the date of trial. According to the judge, this minimizes lost time between the time an answer is filed and the date the case is ready for trial, and enhances settlement.³²⁰

In terms of the personal role of the judge in promoting settlement, Judge Lacey suggested that the first prerequisite of a successful settlement conference is that the judge be firm about the trial date.³²¹ He has further suggested that the cases most difficult to settle are those in which there is a disparity in counsel's skill, experience, and knowledge of the case.³²² In such circumstances, Judge Lacey has suggested that the judge should discuss his perception of the strong and weak point of each case.³²³ According to Judge Lacey, "[o]nce the

316. *Id.* at A-30.

317. *Id.*

318. United States District Judge, District of New Jersey.

319. F. LACEY, THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS 10 (1977) (federal judicial center education and training series) [hereinafter cited as FEDERAL JUDICIAL CENTER STUDY].

320. *Id.* at 11. According to Judge Lacey, the greatest of incentives to settle is the trial date. *Id.* The setting of a deadline for trial requires the attorneys to give added attention to the case, which leads to earlier preparation and discussions between counsel. *Id.*

321. Some of Judge Lacey's suggestions would work effectively, if at all, only in a system with individual calendars. See generally Solomon, *Caseflow Management in the Trial Court*, 2 A.B.A. COMMISSION STANDARDS JUD. AD. SUPPORT STUD. 1 (1973). Under the individual calendar system, the same judge presides over all motions and pretrial and settlement conferences in a particular case, and will preside over the trial if there is one. *Id.* at 8. Therefore each judge is able to act independently in the management of his caseload. *Id.*

322. FEDERAL JUDICIAL CENTER STUDY, *supra* note 319, at 14-15.

323. *Id.* at 15. Of course, a prerequisite to such discussion is that the judge himself have a thorough understanding of the law and facts of the dispute. *Id.*

bubble of counsel's unfounded optimism is exploded by a judge's knowledgeable and penetrating questions, a settlement results."³²⁴

Judge Lacey has stressed early intervention by the judge. Recognizing that some institutional parties will not settle until after certain discovery has been completed, he nevertheless has urged judicial administrative steps to ensure that a minimum of discovery is completed promptly and that settlement conferences occur regularly.³²⁵

Judge Lacey then suggests several methods for dealing with the situation in which the major disagreement is not over facts but over value.³²⁶

The method suggested by Judge Lacey consumes substantial judicial time. But, as he points out, it consumes substantially less time than a nonjury trial. As Judge Lacey stated, "even a relatively simple nonjury trial will require many hours of posttrial reflection by you in arriving at your decision and in writing your opinion or findings of fact and conclusions of law pursuant to rule 52(a)."³²⁷

The recent revisions to Federal Rule of Civil Procedure 16 are consistent with these suggestions.³²⁸ Rule 16 now permits a discretionary preliminary pretrial conference in which "facilitating the settle-

324. *Id.* at 15.

325. *Id.* at 16-17. When parties are not ready to settle at a particular conference, Judge Lacey has urged that the judge identify exactly what additional information is required or what steps are to be taken and then schedule another settlement conference after those actions can be taken. *Id.* at 17-18.

He has given the following advice about the method to be used in settlement conferences:

Encourage counsel to talk about the strength of their cases and the weaknesses of the opposition. At the outset listen, and give each side equal time. Then and only then should you ask questions. Having studied the file, you will know what questions to ask. Require clear, frank responses. Along the way, be alert to admitted and stipulated matters. The smaller the area in dispute, the better chance you have of bringing the parties together. Whittle down the controversy to its hard core. Then there can be intelligent analysis rather than emotional response. Settlement conferences involve much more than having the judge simply get two figures from the litigants and then split the difference After . . . I have a good picture of the case . . . I develop areas of agreement on the facts and law (which if settlement fails then, can be later incorporated in a stipulation).

Id. at 19-20.

326. For instance, Judge Lacey suggests that the judge, after conferring individually with the opposing counsel, present a "ballpark" figure for settlement. *Id.* at 21-22. Both attorneys are then requested to discuss the proposed figure with their clients and then report back to the judge. *Id.* at 22.

327. *Id.* at 23. Other judges have offered more detailed suggestions on formulas to narrow the differences between the parties on a dollar figure for settlement. H. WILL, R. MERHIGE & A. RUBIN, *THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS* 25-30 (1977) (federal judicial center education and training series).

328. *See* FED. R. CIV. P. 16.

ment of the case" is expressly listed as an objective.³²⁹ In addition, the new rule 16 requires the issuance of a scheduling order no later than 120 days after filing of the complaint.³³⁰ Such a scheduling order is to limit the time for filing motions and for completion of discovery.³³¹

Despite the obvious potential of pretrial conferences and other forms of judicial intervention to promote settlement, allocation of additional judicial resources to the pretrial process can be counter productive. A 1982 RAND study analyzes government expenditures for processing tort cases.³³² Costs for the jury trial ranged from a low of \$3,064 for non-auto negligence cases in Florida to a high of \$12,035 for airplane personal injury cases in federal court.³³³ Costs of a non-jury trial ranged from a low of \$2,484 for a Federal Employers' Liability Act (FELA)³³⁴ case in federal court to a high of \$10,642 for a tort-to-the-land case in federal court.³³⁵ Costs of one motion hearing ranged from a low of \$60 for an auto negligence case in Florida to a high of \$1,299 for the assault, libel, and slander category in federal court.³³⁶ Costs for one conference ranged from a low of \$105 for automobile negligence in Florida to a high of \$649 for the assault, libel, and slander category in federal court.³³⁷

These figures make it appear advantageous, from a cost standpoint, to allocate additional judicial resources to motion hearings and conferences, if that would have the effect of reducing time required for jury or nonjury trials by promoting settlement or summary resolution. Analyzing the costs in a different manner, however, raises doubts about the soundness of this approach. Average expenditure per case suggests that conferences can be more expensive than trials. For example, the expenditure per case for conferences was about \$125 in California, while the cost per case for a nonjury trial was \$37-

329. *Id.* 16(a)(5).

330. *Id.* 16(b)(5).

331. *Id.* 16(b)(2), (3).

332. J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM — COURT EXPENDITURES FOR PROCESSING TORTS CASES (1982). The authors began with categories of case-related time expenditure of judges in state courts in California, Florida and Washington, and for the United States District Courts nationwide. *Id.* at xi-xii. They combined these figures with government expenditures for judges, including both the direct salary and fringe benefits for the judge, and for supporting services, such as staff and office space. *Id.* at xii. The result was a cost figure for each major activity associated with litigation of tort cases in the jurisdictions studied. *Id.* at xvii.

333. *Id.* at xvi.

334. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982).

335. J. KAKALIK & A. ROBYN, *supra* note 332, at xvi.

336. *Id.*

337. *Id.*

64.³³⁸ Similarly, in federal court, the cost per case for conferences in FELA cases was \$405, compared with a cost per case of FELA trials of \$47. In many other categories, the cost per case for conferences was higher than the cost per case for nonjury trials.³³⁹ Even with respect to jury trials, the figures are close enough to suggest caution in promoting more conferences in an effort to reduce trials.³⁴⁰

The problem of burdening judges with pretrial conferences and other forms of mediation can be addressed by designating other persons to perform this function. A variety of methods have been tried. The most prominent is the system of assigning magistrates to perform pretrial conference duties in the federal courts.³⁴¹ Other systems have been utilized in the state courts.³⁴²

338. *Id.* at xvii.

339. *Id.*

340. *Id.* Pretrial procedures can also result in "overregulation." See FED. R. CIV. P. 16 advisory committee note; Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475, 477 (1974). Another criticism voiced of the pretrial conference is its merely ceremonial or ritualistic use on some occasions. See *McCargo v. Hedrick*, 545 F.2d 393, 400 (4th Cir. 1976). Its use when the attorneys attending the conference are not trying the case or do not have authority to enter into binding stipulations is of little value. FED. R. CIV. P. 16(b) advisory committee note.

341. Rule 16(b) allows magistrates to conduct pretrial conferences when authorized by district court rule. See FED. R. CIV. P. 16(b). While the drafters of the rule have noted a preference for the judge to preside over the pretrial conference, the drafters acknowledge the imposition on the judicial schedule which this would involve. FED. R. CIV. P. 16(b) advisory committee note.

342. One example is North Dakota's Boards of Conciliation. See Skeen, *Minor Dispute Resolution in North Dakota*, 57 N.D.L. REV. 163, 165 (1981). Under a statute in effect from 1895 to 1921, either party could request that a civil action, once filed, be referred to an elected Board of Conciliation for the jurisdiction. *Id.* at 165 n.5 (citing 1895 Laws of N.D. ch. 22 (codified at 1913 Compiled Laws of N.D., §§ 9187-92) (repealed 1921)). The Board conducted a hearing and was required to persuade the parties to settle the matter amicably. *Id.* at 165.

This statute was replaced by one requiring the judges to establish conciliation boards. *Id.* (citing 1921 Laws of N.D. ch. 38 § 1 (codified at 1921 Compiled Laws of N.D., §§ 9192(a)(1)-(15) (Supp. 1925)) (repealed 1943)). Civil claims involving sums below \$200 could not be filed with the court unless a certificate also was filed demonstrating unsuccessful reference to conciliation. *Id.* at 166. The requirement of attempted conciliation prior to filing a lawsuit was held to comport with the requirements of due process. See *Klein v. Hutton*, 49 N.D. 248, 191 N.W. 485 (1922).

A careful study of mediation in Maine small claims courts showed that defendants are nearly twice as likely to comply fully with mediated outcomes as with judgments imposed by the court after adjudication. McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC. REV. 11 (1984). The authors suggest that the improvement in compliance is due largely to a higher degree of psychological commitment resulting from consensual settlements, as compared with authoritative judgments. *Id.*

The Philadelphia Municipal Court offers the litigants in small-claims and landlord-tenant disputes the opportunity to participate in mediation rather than traditional trial. Law students and graduate students in social work serve as volunteer mediators. Impressionistic evidence says the program is quite successful. The author is a member of the advisory council for part of this mediation program.

In family disputes, especially those involving child custody, there is growing acceptance of the practice of automatically referring such cases for conciliation or mediation before the judicial process proceeds.³⁴³

c. Advisory Opinions: Judicial Fact Finding

An obvious way to improve the accuracy of party projections about the potential outcome of a trial is to simulate the trial. Many methods for doing this occur under judicial reference, where an institution other than the regular court institutions simulate the trial.³⁴⁴ Two major programs directly involve court institutions.

The first is the summary jury trial program established in the United States District Court for the Northern District of Ohio. In this program, counsel are required to present one-hour summaries of their evidence to an advisory jury selected from the regular jury panel.³⁴⁵ The parties retain their right to try the case in the usual manner afterward.³⁴⁶ The program seems to promote settlement at a cost lower than the cost of having the case fully tried before a regular jury.

The other major program was established by the Philadelphia Common Pleas Court for the large volume of asbestos cases.³⁴⁷ Such cases must be tried to one of several designated judges,³⁴⁸ who issue advisory opinions.³⁴⁹ The program is intended to promote settlement by giving the parties a better idea of what they might recover at trial.³⁵⁰ It is hoped that cost savings will result because the designated judges become familiar with the issues in this class of cases and thus are able to supervise the presentation of evidence to make the process

343. See Kraut, *supra* note 111.

344. For a discussion of these methods, see notes 353-467 and accompanying text *infra*.

345. Lambros & Shunk, *supra* note 38, at 46-47.

346. See Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1984).

347. In 1982, 1,850 asbestos-related cases were pending in Philadelphia, with approximately 75 new cases being filed each month. *Pittsburgh Corning Corp. v. Bradley*, 499 Pa. 291, 296, 453 A.2d 314, 315 (1982). Because of the long latency period of asbestos-related diseases, the number is likely to remain substantial. *Id.* at 294, 453 A.2d at 315; Schwartz & Means, *The Need for Federal Product Liability and Toxic Tort Legislation: A Current Assessment*, 28 VILL. L. REV. 1088, 1099 n.46 (1983).

348. PHILA. C.P. LOCAL RULE 203; *Pittsburgh Corning*, 499 Pa. at 294, 453 A.2d at 315.

349. Subsequent to the nonjury trial any party is free to demand a de novo trial by jury. PHILA. C.P. LOCAL RULE 203; *Pittsburgh Corning*, 499 Pa. at 294-95, 453 A.2d at 315.

350. As of 1982, very few such cases had settled, in part because of the large number of defendants in each asbestos suit. *Pittsburgh Corning*, 499 Pa. at 297 & n.4, 453 A.2d at 317 & n.4.

more efficient.³⁵¹ It is not clear how successful the program is. The defense bar has major complaints, and the appeal rate seems high.³⁵²

d. References: Court-Annexed Fact Finding

Greater use of mandatory pretrial fact finding requires personnel to perform the fact finding function. Judges can perform pretrial fact finding functions, and more judge positions can be authorized legislatively, but there are values in conserving the dignity associated with the judicial office. Accordingly, most judicial systems rely on nonjudicial personnel or "parajudges" to conduct fact finding. Three types of systems using such personnel are in wide use: reference to masters or referees, reference to arbitration, and reference to screening panels.

(i) Masters and referees

As far back as the reign of King Henry VIII,³⁵³ courts utilized the services of masters to sort out the facts of complex cases.³⁵⁴ The practice crossed the Atlantic with the American colonists,³⁵⁵ becoming well-established in the federal judiciary.³⁵⁶ In 1938, with the approval of the Rules of Civil Procedure, the federal practice was codified in rule 53, permitting judges to refer cases to masters in certain circumstances.³⁵⁷

Since the adoption of the federal rules, the question of when masters properly may be used has been addressed several times by the Supreme Court. The most celebrated case is *LaBuy v. Howes Leather Co.*³⁵⁸

351. *See id.*

352. As of 1982, of the fewer than 25 cases tried to verdict, all had been by jury. *Id.* at 294, 453 A.2d at 315.

353. Kaufman, *Master in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 452 n.1 (1958).

354. Justice Brandeis described the master's job as follows: to take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon; these are among the purposes for which such aids to the judges have been appointed. *Ex parte Peterson*, 253 U.S. 300, 313 (1920) (citing *Kimberly v. Arms*, 129 U.S. 512, 523 (1889)).

355. *See* Kaufman, *supra* note 353, at 452; Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1322 (1975).

356. *See* Kaufman, *supra* note 353, at 454 n.12. The Federal Equity Rules, used long before the Federal Rules of Civil Procedure were promulgated, provided for reference to masters. *See* Fed. Eq. R. XXIX, 20 U.S. (7 Wheat.) xvii, xx (1822); Fed. Eq. R. 59-68, 226 U.S. 631, 666-69 (1912). Reference also was the means used under early state systems to effect commercial arbitration. *See* Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L. J. 135 (1983).

357. *See* FED. R. CIV. P. 53.

358. 352 U.S. 249 (1957).

In *LaBuy*, a district court judge who had heard numerous pre-trial motions in two complex antitrust cases referred both cases to a master shortly before trial.³⁵⁹ He had been told by one attorney that his case probably would take six weeks to try, and, citing a crowded docket, referred them over the objections of counsel.³⁶⁰ The Seventh Circuit granted the attorneys' application for a writ of mandamus, and the Supreme Court affirmed.³⁶¹

The court agreed with the Seventh Circuit that the orders "were an abuse of the petitioner's power under Rule 53(b)."³⁶² The court noted that while the record did not show to what extent references were made, it would be dangerous to approve referrals for reasons of court workload, increased numbers of suits and lengthy trials. "If such were the test," the majority explained, "present congestion would make references the rule rather than the exception."³⁶³ The decision has been described as condemning the reference of ordinary matters to masters as the abdication of judicial function.³⁶⁴

Criticism of the use of masters is as old as the practice. English commentators attacked the commonplace reference of cases to masters as costly and time-consuming,³⁶⁵ and the chancery abandoned the use of masters in 1852 as a result of the difficulties and abuses arising from the practice.³⁶⁶ The federal use of masters has been criticized on the grounds that judges abdicate their authority when referring matters to masters,³⁶⁷ that the extra cost is a hardship to the

359. *Id.* at 250-54.

360. *Id.* Opinions vary on the validity of the referral. See Silberman, *supra* note 355, at 1326 n.168.

361. 352 U.S. at 254-60.

362. *Id.* at 256.

363. *Id.* at 259.

364. See Silberman, *supra* note 355, at 1327.

365. See Kaufman, *supra* note 353, at 452 n.4. At common law, masters earned their livings by exacting fees from litigants, and thus scheduled more meetings, each costing the litigant a fee, than were necessary. One commentator described the process as follows:

The procedure before the masters was almost inconceivably dilatory. For every attendance at a master's law office a warrant must be taken out, and a fee paid. Each attendance was only for an hour; and though, if all the parties were friendly, two or three successive hours might be arranged, this was seldom possible owing to the engagements of the master. If the parties were not friendly the hour would never be exceeded; and the business might be infinitely protracted by failure to attend to or to attend punctually.

9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 360-61 (1926)(footnotes omitted). Professor Holdsworth devotes six pages of his well known treatise to the various evils of referring matters to masters. *Id.* at 360-65.

366. See Kaufman, *supra* note 353, at 452 n.4.

367. This is a common complaint. See *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972).

parties,³⁶⁸ and that it is pointless to refer complex matters to those with little expertise and time.³⁶⁹

The Federal Magistrates Act,³⁷⁰ enacted in 1968, superseded the federal system of commissioners by authorizing the appointment of magistrates to aid district court judges in various matters.³⁷¹ The legislation specifically authorized judges to assign magistrates to serve as special masters, pursuant to the Federal Rules of Civil Procedure.³⁷²

This legislation, which permitted judges to refer actions to qualified persons³⁷³ at small cost to the parties,³⁷⁴ gave rise to cases criticizing the new ways in which courts attempted to lighten their caseloads. In *IPO, Inc. v. McMillen*,³⁷⁵ the Seventh Circuit issued a writ of mandamus requiring a district court to vacate its reference of a case to a magistrate. The petitioners objected to reference of their motion to dismiss to a magistrate. The court of appeals agreed that a magistrate had no power to decide motions to dismiss or motions for summary judgment, "both of which involve ultimate decision-making."³⁷⁶ The court explained that the district court did not have authority to delegate such decision making power, and in doing so, had abdicated its judicial function.³⁷⁷

In *Ingram v. Richardson*,³⁷⁸ the Sixth Circuit was harshly critical of a district court's referral of all Social Security appeals to a magistrate.³⁷⁹ The court said that while dockets may be crowded,

368. See Kaufman, *supra* note 353, at 453, 461.

369. See *La Buy*, 352 U.S. at 253 n.5, 259.

370. 28 U.S.C. §§ 604, 631-639 (1982); and 18 U.S.C. §§ 3060, 3401-34 (1982).

371. 28 U.S.C. § 631 (1982).

372. *Id.* § 636(b)(2).

373. Section 631(b) restricts appointments to those who have been a "member in good standing of the bar of the highest court of the State in which he will serve." *Id.* § 631(b). The original bill placed no experience restraints on appointees, but amendments in 1976 required magistrates to have been bar members for at least five years. *Id.* § 631(b)(1). The magistrate is to be selected "pursuant to standards and procedures promulgated by the Judicial Conference of the United States." *Id.* § 631(b)(5).

374. Since magistrates are provided with office space and clerical aid at government expense, presumably costs to the parties would be less than under a traditional master. See Silberman, *supra* note 355, at 1328.

375. 460 F.2d 348 (7th Cir. 1972).

376. *Id.* at 359.

377. *Id.*

378. 471 F.2d 1268 (6th Cir. 1972).

379. *Id.* at 1270. The court said: "Appellant has raised no question in this Court as to the propriety of the reference to the Magistrate, but we conceive it to be our duty to notice and pass upon obvious irregularities appearing on the face of the record." *Id.* In its first footnote the court explained

that no order of reference appears in the appendix; it must have been made verbally. A formal order of reference should have been made to authorize

"[r]eference of cases to magistrates, however, is not the proper solution [to] the problem."³⁸⁰ The duty of the district court in Social Security appeals was to determine whether the Secretary's decision was supported by substantial evidence, the court stated, implying that the district court should be able to deal with such cases quickly.³⁸¹ There was "no good reason" that Social Security cases should be "shunted in favor of other civil actions."³⁸² The court said the litigant would be required to disprove the magistrate's findings of fact, as well as the Secretary's, upon appeal, and that to do so would be burdensome.³⁸³

Although the court of appeals' decision in *Ingram* boded ill for the widespread use of magistrates in adjudicating civil matters, reinvigorating the special master by way of the Federal Magistrates Act is quite feasible in light of the Supreme Court's decision in *Mathews v. Weber*.³⁸⁴ In *Mathews*, the Secretary of Health, Education and Welfare challenged a district court rule referring all Social Security appeals to a magistrate.³⁸⁵ The magistrate was directed to conduct hearings as appropriate, and to prepare a written proposed order or decision, with proposed findings of fact and conclusions of law.³⁸⁶

The Court upheld the referral, holding that the preliminary review function of the magistrate was one of the "additional duties" authorized under the Act.³⁸⁷ The action taken by the magistrate was not that of a special master, the Court stated, and thus was not forbidden under the holding of *LaBuy*.³⁸⁸ The Court endorsed the role of the magistrate in assisting the district court, stating that the magistrate's review of the record helped narrow the dispute to arguments supportable by the record.³⁸⁹

The decision approves the apparent blending of the traditional role of master and of the statutorily created magistrate. Consequently, *Mathews v. Weber*, combined with the statutorily defined du-

the Magistrate to act, and so as to afford the litigants an opportunity to object to the reference. A Magistrate is not an Article III court.

Id. at 1270 n.1.

380. *Id.* at 1271.

381. *Id.* at 1271-72. The court explained that "these cases (Social Security appeals) could be briefed, argued and decided long before other civil cases are at issue particularly where discovery or other protracted proceedings are conducted." *Id.*

382. *Id.* at 1272.

383. *Id.* at 1271.

384. 423 U.S. 261 (1976).

385. *Id.* at 264 n.1.

386. *Id.* at 263-64.

387. *Id.* at 272.

388. *Id.* at 275.

389. *Id.* at 271.

ties of magistrates,³⁹⁰ will permit magistrates to shoulder a large amount of routine pretrial work formerly borne by district court judges.

The original statute was amended in 1976 and 1979,³⁹¹ substantially increasing the magistrate's authority to handle "virtually any pretrial matter in the district courts."³⁹² The Judicial Conference of the United States, which was charged in the 1979 amendments with studying the magistrate system,³⁹³ concluded that the scheme was working well, and suggested minor changes in procedure,³⁹⁴ selection requirements,³⁹⁵ and sentencing authority.³⁹⁶ One commentator has suggested that Congress should codify *Weber* by stating expressly that pretrial references are not subject to the master's restrictions of rule 53(b), and should expressly authorize disposition of matters by magistrates, subject to appeal to an article III district court judge.³⁹⁷

Magistrates have substantially increased the number of cases that a judge can process. In 1981, judges handled an average of 345

390. For a discussion of these duties, see notes 372-73 and accompanying text *supra*. The statute permits magistrates to act in criminal cases, especially prisoners' rights, as well as in civil matters. See 28 U.S.C. § 636(b) (1982). Magistrates were heavily utilized for procedural and discovery motions (43,691 cases in 1980-81), pretrial conferences (23,109 cases in 1980-81), and postindictment arraignments (18,981 cases in 1980-81). JUDICIAL CONFERENCE OF THE UNITED STATES, THE FEDERAL MAGISTRATES SYSTEM 13-14 (1981) [hereinafter cited as FEDERAL MAGISTRATES SYSTEM].

391. See Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified at 18 U.S.C. § 3401, 28 U.S.C. §§ 604, 631-636, 1915 (1982)); United States Magistrates—Jurisdiction, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636 (1982)).

392. See FEDERAL MAGISTRATES SYSTEM, *supra* note 390, at 5.

393. *Id.* at iii.

394. *Id.* at iii-v. The report recommends that the language read by the clerk of court in advising litigants of a magistrate's availability to try a case be made clearer. *Id.* at 50. Under the statute's language, some courts were reluctant to authorize magistrates to try cases because it could have been construed to *require* a court to accede to litigant demands for a magistrate in lieu of a judge. *Id.*

395. *Id.* at iii-v. The statute requires that magistrates be members of the bar of the highest court of the state in which they will sit for five years. *Id.* at 39. The suggested change would allow attorneys of five years' membership in any highest court's bar to become magistrates, as long as they were *now* a member of the bar of the state's highest court. *Id.*

396. *Id.* at iii-v. For instance, magistrates were restricted in sentencing under the 1979 amendments, being unable to place juveniles on probation for longer than six months for petty offenses. *Id.* at 55. The Judicial Conference recommended longer probation sentencing capacity, eliminating the disparity in sentencing power between judges and magistrates for youth offenders, and repealing the statute's conditional release requirements. The Conference made numerous other minor recommendations for the magistrate's authority in criminal cases. *Id.*

397. See Silberman, *supra* note 355, at 1346. Professor Silberman also recommended changes in postconviction motion jurisdiction that were adopted in the 1979 amendments. *Id.* at 1349; see 28 U.S.C. § 636(b)(1)(B) (1982).

civil cases each, while in 1970, before the magistrates were established, judges disposed of 201 cases each.³⁹⁸ In 1981, 127 magistrates disposed of 1,933 civil cases under their authority to adjudicate with the consent of the litigants, with 600 cases tried.³⁹⁹ About one-fourth were personal injury or other tort suits.⁴⁰⁰

The statute authorizing magistrates to try cases with the consent of the litigants⁴⁰¹ was enacted in 1979. Of the 168 magistrates certified to try cases, 127 exercised that jurisdiction in 1981.⁴⁰² Recently, a three-judge panel of the Ninth Circuit Court of Appeals held it unconstitutional for magistrates to try cases even with the consent of the litigants. The slip opinion was withdrawn, however, a few months after it was announced, and the court granted rehearing en banc and reversed the panel decision.⁴⁰³

The panel had described the magistrate's authority, finding that under the statute,⁴⁰⁴ a magistrate's judgment in a consented-to-trial could be appealed, because it was final and an ultimate decision.⁴⁰⁵ Thus, the magistrate was exercising the powers of an article III judge without article III protections; the exercise could not be saved by the consent of the parties, since the requirement that article III judges try cases was jurisdictional and could not be waived.⁴⁰⁶ According to the panel, appellate review could not save the exercise of judicial power.⁴⁰⁷

Various commentators have suggested that, even with consent of the litigants, magistrates cannot constitutionally try cases.⁴⁰⁸ How-

398. See FEDERAL MAGISTRATES SYSTEM, *supra* note 390, at 18.

399. *Id.* at 16.

400. *Id.* 156 of the 611 cases were tort cases. Civil rights suits accounted for 124 of the 611, and there were 106 contract disputes adjudicated. *Id.*

401. 28 U.S.C. § 636(c)(1) (1982).

402. See FEDERAL MAGISTRATES SYSTEM, *supra* note 390.

403. *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983), *rev'd*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 100 (1984). The Ninth Circuit sitting en banc held that the Federal Magistrates Act allowing magistrates to enter final judgments with consent of the parties was constitutional.

404. 28 U.S.C. § 636(c)(3) (1982).

405. *Pacemaker*, 712 F.2d at 1311.

406. *Id.* at 1312. The panel cited criminal law cases from the Supreme Court to support its argument that article III judges were necessary parts of the framework of government. It rejected the analogy to arbitration agreements entered into by consent, stating that arbitrators could not enforce judgments but magistrates could. By using magistrates, the parties were "invoking the judicial system." *Id.* at 1311.

407. *Id.* at 1313 (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

408. See Comment, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrates Act*, 80 COLUM. L. REV. 560, 592-96 (1980); Comment, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1047-61 (1979).

ever, the Third, as well as the Ninth Circuits have rejected such arguments.⁴⁰⁹

As previously noted, the masters system became well-established in the state courts after arriving with the colonists.⁴¹⁰ The system still exists today, with some states patterning their references on the federal model,⁴¹¹ and others using a variety of practices.⁴¹²

One state system, the Massachusetts system of "auditors,"⁴¹³ received attention in the 1950's and early 1960's as an antidote to shortcomings in civil litigation. In 1956, trial delay in that commonwealth's superior court exceeded two years in ten of fourteen counties,⁴¹⁴ and was four years in one county.⁴¹⁵ The designation of members of the bar as "auditors" to try cases referred to them by the

409. *See Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1983) (en banc), *cert. denied*, 105 S. Ct. 100 (1984); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983). *See also* Note, *The Constitutionality of the Magistrate System After the Northern Pipeline Decision*, 29 VILL. L. REV. 1201 (1984).

410. *See Bryant, The Office of Master in Chancery: Colonial Development*, 40 A.B.A. J. 595 (1954).

411. *See, e.g.*, N.Y. CIV. PRAC. R. § 4317 (McKinney 1963). The New York rule provides as follows:

(a) Upon consent of the parties. The parties may stipulate that any issue shall be determined by a referee. Upon the filing of the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named therein

(b) Without consent of the parties. On motion of any party or on its own initiative, the court may order a referee to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law.

Id. See also N. J. CIV. PRAC. R. 4:41-5. This rule provides as follows:

(b) In an action to be tried without a jury the court shall accept the master's findings of fact unless contrary to the weight of the evidence

(c) In an action to be tried by a jury the findings of the master upon the issues submitted to him are admissible and the evidence taken before him may be read to the jury, subject to the ruling of the court upon objections to the report of the evidence.

Id.

412. *See* Note, *supra* note 155, at 1594 (table classifying state reference systems).

413. Terminology for those who act as parajudges varies from state to state. *See* 66 AM. JUR. 2D *References* § 16, at 492; FED. R. CIV. P. 53(a) ("Master" includes referee, auditor, examiner, commissioner and assessor). The Massachusetts system was recreated under statutory authority in 1956 to alleviate severe court congestion. The 1975 revisions were nearly identical to the federal language of rule 53, but in 1982 the language was substantially changed. *See* MASS. R. CIV. P. 53, *reprinted in* MASS. GEN. LAWS ANN. ch. 43A, R. 53 (West Supp. 1983). The notes following the 1975 revisions state that the differences between the federal language and the state rule were intended to continue state practice; the notes to the 1982 revisions explain how superior court rules are merged into the 1975 revisions. *Id.*

414. *See* Rosenberg & Chanin, *Auditors in Massachusetts as Antidotes for Delayed Civil Courts*, 110 U. PA. L. REV. 27, 28 n. 3 (1961).

415. *Id.* n.2.

courts led to a dramatic reduction in delay, with only one county reporting delay of one year or more⁴¹⁶ by late 1959.

The courts in the Massachusetts system designate qualified lawyers⁴¹⁷ to hear cases. Any action may be referred,⁴¹⁸ and referral is effected by an order directing the lawyer to hear and report on specified matters at a specified time.⁴¹⁹ The auditor receives "competent proof under courtroom rules of evidence and passes on its credibility and weight."⁴²⁰ If the parties consent, the findings of fact may be made unimpeachable; but most of the referrals provide for nonfinal findings.⁴²¹ The case will be retried in court upon the insistence of one or both parties, but the auditor's report is admissible and becomes prima facie evidence.⁴²² The introduction of the report has been held not to violate the right to a jury trial.⁴²³

The alternative state systems of removing certain cases from traditional courts in the first hearing have at their core the saving of judge time.⁴²⁴ By the calculations of one study, the Massachusetts system saved one-third of a judge-year in the county court that was evaluated.⁴²⁵

(ii) Court annexed arbitration

One of the most successful dispute resolution alternatives is court

416. *Id.* n.4.

417. See Reardon, *Civil Docket Congestion — A Massachusetts Answer*, 39 B.U.L. REV. 297, 309 (1959). (The author was Chief Justice of the Superior Court of Massachusetts at the time of the study.) The Massachusetts Supreme Judicial Court solicited local bar associations for the names of attorneys thought capable of handling cases. The names were screened by the court's Committee on Procedures and forwarded to the presiding justices of the counties. The presiding judge made the references. *Id.*

418. Rosenberg & Chanin, *supra* note 414, at 31.

419. *Id.*

420. *Id.*

421. *Id.* This rule was altered in 1975 and 1982. *Id.* at 32. The findings have evidentiary weight if opposed by evidence and have conclusive weight if no evidence is introduced in opposition. *Id.* Other evidence may come in if the court permits, or if the parties have reserved those issues for additional evidence. *Id.* at 33. This rule has been changed to permit the report to be read to the jury only.

422. *Id.* at 32.

423. See Baldassare v. Crown Furniture Co., 349 Mass. 183, 189-90, 207 N.E.2d 268, 273 (1965).

424. See Clark, *Parajudges and the Administration of Justice*, 24 VAND. L. REV. 1167 (1971).

425. See Rosenberg & Chanin, *supra* note 414, at 40. The authors carefully explain how they came to their conclusions, comparing cases *likely* to have gone to trial with cases that actually did go to trial to get their final figures. The researchers also evaluated potential time-saving stemming from the nature of trials based on auditors' reports, but found no savings. *Id.* at 42-43.

annexed arbitration.⁴²⁶ It is hardly a new idea, having been provided for by the Pennsylvania legislature in 1951,⁴²⁷ and recommended for adoption by the federal courts in 1959.⁴²⁸ By 1977, it was estimated that at least ten states had some form of court annexed arbitration.⁴²⁹

In the typical program, all civil cases demanding damages below a certain threshold value are required to be submitted to "arbitration" before they can be tried. Arbitrators are usually members of the local bar, appointed by the court, and sitting in panels of three. The parties try their case before the arbitrators under the usual rules of civil procedure, although certain exceptions to the hearsay rule may be prescribed to facilitate introduction of routine documents and of written summaries of expert testimony.

Success, as measured by appeal rates,⁴³⁰ varies with programs of this sort. The program in the Philadelphia Court of Common Pleas is highly successful, with an appeal rate of less than ten percent.⁴³¹ Appeal rates elsewhere in Pennsylvania are somewhat higher, but still low.⁴³² A federal district court program in the same city is less successful, with appeal rates ranging to sixty-one percent.⁴³³ Programs in

426. The name "arbitration" is somewhat misleading because the result is not binding; "fact finding" would be a more accurate description.

427. 1951 Pa. Laws 590 (1952) (current version at 42 PA. CONS. STAT. ANN. § 7361 (Purdon 1982)).

428. See Nejelski & Zeldin, *supra* note 24, at 797, 911.

429. *Id.* at 796 (citing *The Court Annexed Arbitration Act of 1978: Hearings on S.2253 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 95th Cong. 2d Sess. 21 (1978) (statement of Attorney General Bell)).

430. Regardless of how small the costs of such programs, or how quickly they work, if the appeal rate is high, they merely add to the cost and delay of civil litigation. See ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO TRIAL COURTS § 2.74 comments, at 134 (1976) (characterizing concern that the opportunity for de novo trial after an arbitration award would invite multiple trials, thereby exacerbating the court congestion problem) [hereinafter cited as ABA STANDARDS]. An arbitration program with a high appeal rate also might result in increased total costs for the court system. See D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR 62-66 (1981) [hereinafter cited as D. HENSLER]. For a set of equations that relate appeal rates to total cost, see note 447 *infra*.

431. See Doty, *Philadelphia's Compulsory Arbitration System*, 29 VILL. L. REV. 1449 (1984).

432. The 1982 appeal rate in Montgomery County was 26.4%, and 26.0% in Delaware County. COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA, 1982 ANNUAL REPORT 5.

433. See Nejelski & Zeldin, *supra* note 24, at 814, 820. According to their study, 838 cases involved arbitration awards, and 508 of these cases were appealed after an award. This produces the 61% figures. As Nejelski and Zeldin point out however, of the 508 cases appealed, only 72, or 14.9% actually resulted in a trial de novo. *Id.* at 814. The Federal Judicial Center studied all three experiments in the federal courts and found an appeal rate of about 60%. See A. LIND & J. SHEPARD, *supra* note 24, at xiii.

California have much higher appeal rates.⁴³⁴

Three characteristics of the Philadelphia Common Pleas Court program are worth mentioning, because they may explain the success of that program. First, cases are automatically scheduled for an arbitration hearing on the date that the complaint is filed.⁴³⁵ This hearing date is set no more than 240 days from the filing date.⁴³⁶ This ensures the parties of a speedy determination and puts pressure on counsel to move initial discovery along.⁴³⁷ Second, arbitration hearings are scheduled centrally and held in a court facility, reducing the logistical complexity of the hearing process.⁴³⁸ Third, if a party wishes to appeal, he or she must pay the cost of arbitration (about \$200) before the appeal will be filed.⁴³⁹

It should be noted, however, that the large difference between the California and Philadelphia Common Pleas appeal rates cannot be explained entirely by imposition of cost burdens for appeals from arbitration awards. The California system also imposes costs on the appealing party if that party does not obtain a judgment in the de novo trial more favorable than the arbitration award.⁴⁴⁰ These costs, unlike the appeal fees in Pennsylvania, are not imposed as a threshold requirement before an appeal can be filed. This may explain some of the difference. Also, in California, when an arbitration case is appealed, the case resumes its former position on the trial list;⁴⁴¹ in Philadelphia, an appeal from an arbitration award "goes to the end of the line." Thus delay is used as an incentive to accept the arbitration award in Philadelphia, but not in California.

Lawyer resistance to mandatory arbitration has been strong in some jurisdictions. In the District of Columbia, the Board of Governors of the local bar rejected a 1979 committee recommendation that

434. See D. HENSLER, *supra* note 432, at 32. About 38% of arbitration awards were appealed for a trial de novo during the program's first year. Only a small percentage of these appeals actually went to trial; however, the appeal rate has been rising. In the third year of the program, 50% of the awards in the larger courts were appealed. JUDICIAL COUNCIL OF CALIFORNIA, 1983 ANNUAL REPORT 73. Despite the high appeal rate, the program is credited with reducing court congestion, and the judicial council has recommended legislation to increase the jurisdictional limit from \$15,000 to \$25,000 for the entire state. See D. HENSLER, *supra* note 430 at 33-34.

435. See PHILADELPHIA C. P. CT. CIV. R. 180 IV.

436. See Doty, *supra* note 431, at 1457.

437. *Id.* at 1457 & n.49. The efficacy of deadlines in promoting negotiated settlements is well recognized. See Dunlop, *supra* note 86, at 1436-37.

438. PHILADELPHIA C. P. CT. CIV. R. 180 III(A).

439. PHILADELPHIA C. P. CT. CIV. R. 180 Rule VIII(A)(2).

440. See CAL. CIV. PROC. CODE § 1141:21 (West Supp. 1984).

441. See CAL. CIV. & CRIM. R. § 1616 (West 1981).

the Philadelphia plan be adopted.⁴⁴² Instead, an experimental voluntary arbitration program was adopted, which adds little to the legal framework for arbitration already existing under the Uniform Arbitration Act. The voluntary program has been a failure, measured by the number of cases handled.⁴⁴³ In Connecticut federal courts, an experimental program with mandatory arbitration was abandoned, reportedly because of bar opposition.⁴⁴⁴

The Judicial Conference study of the three federal court experiments resulted in some data on the effect of the arbitration process on case handling by attorneys. In the cases referred to arbitration that settled before the hearing, forty-five percent of the counsel believed the arbitration program had no effect on the case. Thirty-seven percent thought that the expedited discovery required by the arbitration timetable resulted in earlier settlement than would have occurred in the absence of the arbitration program. In cases terminated by arbitration award (where no appeal was filed), fifty-two percent of counsel said that counsel and client viewed the award as "reasonable."

442. In the District of Columbia in 1979, at the suggestion of Chief Judge H. Carl Moultrie, the Bar Association created the Superior Court Arbitration Committee to study the feasibility of implementing mandatory arbitration. The report was issued to the Board of Governors on May 1, 1979, which favored a mandatory arbitration plan for the District. Waxman, *Moving The Apart Together, Alternatives to Litigation*, DISTRICT LAW., Mar.-Apr. 1983, at 29, 56. Two members of the committee disagreed with the report, expressing concern that mandatory arbitration would have a negative impact on litigants from the lower and middle classes. Opposition was based on the perception that mandatory arbitration would give a relative advantage to collection agencies and other high volume plaintiffs, at the expense of poor litigants. See Report of the Superior Court Arbitration Committee to the Board of Governors of the District of Columbia Unified Bar, app. 4, at 12 (May 1, 1979). With opposing views on the committee and a lack of support from the bar, the Board of Governors did not endorse mandatory arbitration. In 1980, the District's Judicial Conference decided in favor of voluntary arbitration. Waxman, *supra*, at 57. Judge Gladys Kessler of the Superior Court announced a new court-sponsored arbitration plan on February 15, 1982. *Id.*

443. During 1982, the new voluntary arbitration plan was not effectively used as an alternative to trial. Only six cases went to arbitration within the eleven remaining months of the year. Each year the district has between 15,000 and 16,000 civil cases. Since the initiation of the new voluntary arbitration plan in February of 1982, only fifteen cases have gone to arbitration. As of publication date, three of the fifteen total cases are pending. Interview with Thomas Hammond, Chief Deputy Clerk, Civil Division, D.C. Superior Court (Jan. 25, 1984). Recent efforts to improve the acceptability of the program involve enlisting more prominent attorneys to serve as arbitrators and greater publicity. After five years of voluntary arbitration in one form or another, Chief Judge Moultrie is again requesting the District's Bar to consider the possibility of mandatory arbitration. Waxman, *supra* note 442, at 58.

444. See D. CONN. R. CIV. P. 28, reprinted in A. LIND & J. SHEPARD, *supra* note 24, at 99-106 (remarks of Judge Warren W. Eginton before 1983 ABA Annual Meeting). See generally A. LIND & J. SHEPARD, *supra* note 24. After abandoning court-annexed arbitration, the District of Connecticut adopted Local Rule 11, which expanded pretrial procedures aimed at promoting settlement.

Thirty-nine percent thought they might do better at trial but found the risks and cost of further litigation greater than the advantages of appeal. Twelve percent attributed acceptance to the delay that would be involved if an appeal were filed. In cases settled after an arbitration hearing, sixty-seven percent of counsel thought "the arbitration hearing was a useful disclosure of the strengths and weaknesses of the case, and as such was of significant assistance in reaching settlement." Twenty-two percent found the arbitration award a reasonable valuation of the case, which "became the focus around which a settlement was reached."⁴⁴⁵

The federal study led the authors to conclude that the arbitration programs reduced the time from filing to disposition primarily by increasing the rate of settlement before arbitration hearing. It appears that court-annexed arbitration can serve as an effective deadline for case preparation, substituting for trial not as a forum for case resolution but as a stimulus to settlement. They suggested that attention also be given the role of arbitration in promoting post-hearing settlement. "Effectiveness of the arbitration procedure might be enhanced if the role of arbitrators were not limited to the fact-finding and judgment function of judge or jury, but included advising counsel on the strengths and weaknesses of the case in order to maximize the possibility that they can achieve an acceptable compromise in appropriate cases."⁴⁴⁶

These and other factors can be evaluated quantitatively to assess the cost-effectiveness of court-annexed arbitration.⁴⁴⁷

445. See A. LIND & J. SHEPARD, *supra* note 24, at 66-68 (table of counsel questionnaire responses).

446. See *id.* at 75-94.

447. As an example of useful quantitative analysis, consider the following simplified model of court-annexed arbitration.

Let:

N = total cases filed

S = total cases settling before trial

s = percent of cases filed that settle before trial ($s=S/N$)

t = cost per case to try

r = cost per case to arbitrate

a = percent of arbitrated cases appealed for trial de novo

The cost of the system without arbitration can be expressed as:

$$CP = t(N-S)$$

The cost of a revised system, in which arbitration is mandatory in every case, and no cases settle prior to arbitration, can be expressed as:

$$CA = rN + taN$$

The breakeven point is where the cost of the arbitration system exactly equals the cost of the system without arbitration, i.e.:

$$CP = CA$$

$$rN + taN = t(N-S), \text{ or}$$

$$rN + taN = tN - tS$$

(iii) Screening panels

About twenty states have responded to the growth in medical malpractice cases by establishing some form of pretrial screening of those cases.⁴⁴⁸ Some systems function through administrative agencies, with judicial review of their decisions.⁴⁴⁹ Others are functionally indistinguishable from court-annexed arbitration, discussed in the preceding section.⁴⁵⁰ Some provide for judicial reference of medical malpractice cases to screening panels.⁴⁵¹ In the last category of systems, the panel issues a nonbinding opinion as to the merits of the plaintiff's case, which opinion may be introduced as evidence at trial.⁴⁵²

A good example is the Arizona system. Under that system, complaints in medical malpractice actions are to be referred to screening panels chaired by judges, with attorneys and physicians or hospital representatives as members.⁴⁵³ The reference requirement is waivable, if the plaintiff agrees to remit any verdict or judgment in excess of \$50,000.⁴⁵⁴ The original statute was modified to conform to a state supreme court decision invalidating a requirement that a plaintiff wishing to proceed to trial despite an adverse panel decision post a \$2000 bond to cover defense costs and expert witness fees.⁴⁵⁵ The revised statute permits a plaintiff who is unsuccessful before the panel

Dividing through by N, yields:

$$r + ta = t - t(S/N)$$

Substituting s for S/N yields:

$$r + ta = t - ts$$

Subtracting ta from both sides yields:

$$r = t(1-s-a)$$

dividing through by t yields:

$$r/t = 1 - s - a$$

This expression for the economic breakeven point says that a compulsory arbitration program will be economically beneficial only if the appeal rate is lower than the settlement rate. Otherwise, the ratio of per-case arbitration costs to per-case trial cost must be negative to satisfy the breakeven condition.

Obviously this model can be made more useful and realistic by adding variables for the settlement rate after the arbitration program is introduced and by adding other variables to consider the possibility of funding for an arbitration program (which would permit a negative r/t ratio).

448. See Sakayan, *supra* note 198, at 686 & n.17.

449. *Id.*

450. See notes 426-47 and accompanying text *supra*.

451. See Sakayan, *supra* note 198, at 686.

452. *Id.*

453. See ARIZ. REV. STAT. ANN. § 12-567 (Supp. 1983-1984).

454. See *id.* § 12-567(a).

455. See *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (en banc) (declaring provisions of Medical Malpractice Act requiring posting of bond by non-prevailing party unconstitutional as violation of state privileges and immunities clause).

to proceed to trial without any special burden.⁴⁵⁶ If a case proceeds to trial, the conclusion of the panel may be admitted into evidence and the jury must be instructed that the panel conclusion "shall not be binding but shall be accorded such weight as they choose to give it."⁴⁵⁷ If the panel finds for the plaintiff, it is required to assist the plaintiff in obtaining expert medical testimony for any subsequent trial of the plaintiff's claim.⁴⁵⁸ Proceedings before the panels are to be conducted according to traditional rules of procedure, including normal discovery, except that the total amount of oral testimony in any one case is limited to eight hours.⁴⁵⁹

Other systems contain variations on this model. For example, the Massachusetts system⁴⁶⁰ requires medical malpractice suits to be submitted to three-person screening panels. The panel, rather than hearing evidence, considers an offer of proof by the plaintiff. If the panel finds that the offer does not make out a *prima facie* case, the plaintiff may proceed with the suit only by paying a bond of \$2000.⁴⁶¹ The Rhode Island system, found unconstitutional in 1983,⁴⁶² permitted the presiding judge to decide, on the basis of the complaint, whether the evidence warranted continuing to trial. An adverse ruling at this stage meant dismissal of claim with prejudice.⁴⁶³ The Virginia system⁴⁶⁴ provides for submission to the screening panel only upon request of one of the parties. The finding of the panel not only is admissible as evidence in a subsequent trial, but the panel members

456. *See* ARIZ. REV. STAT. ANN. § 12-567(H) (Supp. 1983-84), *amended by* 1982 Ariz. Sess. Laws, ch. 224, § 1.

457. *See id.* § 12-567(K), *amended by* 1982 Ariz. Sess. Laws, § 1.

458. *See id.* § 12-567(I), *amended by* 1982 Ariz. Sess. Laws § 1.

459. *See id.* § 12-567(D). Under the rules promulgated by the Arizona Supreme Court, certain discovery is automatic, and unusually short time limits are set for certain prehearing steps. *See* ARIZ. UNIF. R. FOR MEDICAL LIAB. REV. PANELS IN SUPER. CT. 1-6, *reprinted in* ARIZ. REV. STAT. ANN. vol. 17A (Supp. 1983-1984).

460. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1983-1984).

461. *See* *Beeler v. Downey*, 387 Mass. 609, 442 N.E. 2d 19 (1982) (panel findings, because based on nonadversary hearing, not admissible before jury; otherwise constitutional). The Ohio system makes the findings of the panel admissible in the subsequent trial only if the trial judge approves the findings as not clearly erroneous. *See* OHIO REV. CODE ANN. § 2711.21(c)(1) (Page 1981). *See also* *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981) (Brown, J., dissenting) (finding system constitutional under equal protection and jury trial tests).

462. *See* *Boucher v. Sayeed*, — R.I. —, 459 A.2d 87 (1983) (reenacted Medical Malpractice Reform Act of 1976 unconstitutional on equal protection grounds; Act may also have been unconstitutional as infringement of right to jury trial). An earlier Rhode Island system required reference to a three-person panel, and resembled the Arizona system as amended.

463. *See* R.I. GEN. LAWS. § 10-19-4 (Supp. 1983).

464. VA. CODE § 8.01-581.1 to -581.12 (1984).

may be called as expert witnesses.⁴⁶⁵

Early evidence suggests that the screening panel process produces a high settlement rate, though the settlement figures used in support of this conclusion seem to be of the same order of magnitude as the general pretrial settlement rate for all cases.⁴⁶⁶

A number of constitutional challenges to special treatment of malpractice cases have succeeded.⁴⁶⁷ Thus, the viability of this reference procedure only for one category of civil disputes is in doubt.

3. *Summary Judicial Decisions*

One obvious, but relatively little utilized, way to make judicial dispute resolution more efficient is to permit final decisions to be made at lower transaction cost than would be involved in a full blown trial.⁴⁶⁸ Such methods sacrifice a measure of accuracy in exchange for reducing costs.

a. *Summary Judgment*

The summary judgment procedure is a well-accepted method of obtaining summary judicial decision at a time that truncates transaction costs of litigating. The procedure originated in English legal procedure, where it was confined to certain kinds of actions, such as those involving bills or notes.⁴⁶⁹ It was designed to spare the plaintiff the burden of proving at trial the validity of the obligation evidenced by such presumptively valid instruments.⁴⁷⁰ It was adopted in a few American states in this limited form.⁴⁷¹ The 1938 Federal Rules of Civil Procedure adopted a considerably expanded form of the rule, making it available to both defendants and plaintiffs in all kinds of actions. Since then, most states have adopted similar broad summary judgment rules.⁴⁷²

A 1977 study of the rule in the federal courts suggests that its principal use is by defendants to dispose of cases in which the facts do

465. *See* *Di Antonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287 (4th Cir. 1980) (Virginia's screening system does not violate equal protection or separation of powers).

466. *See* Sakayan, *supra* note 198, at 687.

467. *See* notes 517-45 & 561-71 and accompanying text *infra*.

468. *See* Nejelski, *The Small Claims and Access to Justice, Dispute Resolution: Trends and Issues*, 20 ALBERTA L. REV. 314 (1982).

469. *See* McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEG. STUD. 427, 429 (1977).

470. *Id.*

471. *Id.*

472. *Id.* at 430.

not warrant a trial.⁴⁷³ Defendant summary judgment motions are successful in seventy-four percent of the cases in which they are filed. The evidentiary materials submitted with the motions considered in the 1977 study suggests that its use permits savings in discovery costs as well as trial costs.⁴⁷⁴

b. Small Claims Courts

The movement toward alternative dispute resolution procedures is motivated by two somewhat conflicting convictions. The first is that the judicial machinery is becoming congested with many claims that do not belong there. The other is that the costs of access to the formal judicial machinery are so high that many meritorious claims are abandoned rather than being resolved justly. These two conflicting convictions also lay behind a longstanding American interest in small claims courts, as has been pointed out in a recent study.⁴⁷⁵

Small claims courts have been established for various reasons. One of the most important contemporary reasons is to afford a limited means of state intervention to permit private disputes without large social policy consequences to be resolved rather than abandoned.⁴⁷⁶

All but eight states had a small claims procedure as of 1977.⁴⁷⁷ Jurisdictional limits ranged from \$1000 in Texas to \$3000 in Indiana.⁴⁷⁸ Simplified procedures typify these forums.⁴⁷⁹ Pretrial procedural steps are minimal. The rules of evidence are relaxed.⁴⁸⁰ Attorneys are not required and sometimes positively discouraged.⁴⁸¹ Costs are reduced by eliminating the jury and by relying on service

473. *Id.* at 441-42.

474. *Id.* at 443 (table 7).

475. *See* Steele, *supra* note 7.

476. *Id.* at 364. Steele discussed the merits of small claims courts as follows: Efficient processing of such microsocial disputes has often meant making the minimal change in the strategic balance between the parties which will force the claim below the threshold of taking action and thus cause the case not to be pressed further, as contrasted with the time-consuming and inefficient process of full exploration and deliberation on factual and legal interests and issues.

Id.

477. *See* J. RUHNKA, EXECUTIVE SUMMARY: HOUSING JUSTICE IN SMALL CLAIMS COURTS 7 (1979); J. RUHNKA & S. WELLER, *supra* note 237, at 2.

478. *See* IND. CODE ANN. §§ 11.6-4-2 to .6-4-3 (West Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 2460a, § 2 (Vernon Supp. 1984).

479. J. RUHNKA & S. WELLER, *supra* note 237, at 93-122.

480. *Id.* at 137.

481. *Id.* at 10-12 (table 1.2). Six of the fifteen courts studied prohibited attorneys in the small claims trial. *Id.*

by mail.⁴⁸² The clerk's role is enlarged to assist parties without attorneys in presenting their claims.⁴⁸³ Appeals are permitted, but often on terms or at a cost intended to reduce one of the historic problems with justice of the peace courts: a rate of appeal that was so high that the original forum became meaningless.⁴⁸⁴

Pennsylvania has a relatively modern system of small claims courts known as magisterial courts.⁴⁸⁵ In 1982, there were 553 of these courts.⁴⁸⁶ Approximately sixty-four percent of the business of these courts involves traffic citations.⁴⁸⁷ About twenty-five percent involves other criminal matters.⁴⁸⁸ Eleven percent of the courts' business involves civil complaints.⁴⁸⁹

In 1982, the Pennsylvania Magisterial Court system handled 191,892 civil complaints filed, and disposed of 188,616 civil cases.⁴⁹⁰ About twenty-five percent of the cases went to trial; eighteen percent were settled; three percent were closed because of no service; and almost forty-eight percent were resolved through default judgments.⁴⁹¹

District magistrates need not be attorneys, but they must complete a training course and pass a qualifying examination before taking office. They also must participate in one week of continuing education each year.

District magistrates have concurrent jurisdiction with the courts of common pleas over claims for up to \$4000. An "appeal" exists as a *de novo* trial, as though the case never was filed in district justice court.⁴⁹² Statistics on appeal rates are not readily available, but the rates appear to be roughly comparable to the appeal rates from court-

482. *Id.* at 113.

483. *Id.* at 101. *See also* Steele, *supra* note 7, at 330-33.

484. *See* Steele, *supra* note 7, at 332-33. *See also* J. RUHNKA & S. WELLER, *supra* note 237, at 155. For example, Pennsylvania imposes costs on a party who appeals a district justice judgment and does not obtain a more favorable judgment. *See* PA. R. DIST. JUSTICES 206(B).

485. On May 4, 1984, the Pennsylvania Supreme Court entered an order that changed the name of the district justices to district magistrates, and redesignated their courts "magisterial courts." Order of the Supreme Court of Pennsylvania, May 24, 1984, Re: Amendment of Pennsylvania Rule of Judicial Administration No. 102 (reprinted in 476 A.2d Adv. Sh. #3, at CVIII).

486. ADMINISTRATIVE OFFICE OF THE PENNSYLVANIA COURTS, 1982 ANNUAL REPORT 56. Pennsylvania, by constructing its minor courts around the old justice of the peace system, preserved the convenience associated with geographically dispersed courts.

487. *Id.*

488. *See id.* at 58 (table 14).

489. *Id.*

490. *Id.* at 66 (table 22).

491. *Id.*

492. *See* PA. R. DIST. JUSTICES 1007(A).

annexed arbitration.⁴⁹³

Virginia reformed its minor courts so as to eliminate justices of the peace in a way that made the minor court system costly for minor disputes. In Virginia, a system of general district courts is provided for, with one such court in each city or county. Civil jurisdiction in these courts is exclusive over claims for up to \$1000, and concurrent jurisdiction with the circuit court exists for claims up to \$7000.⁴⁹⁴ Cases involving claims for more than \$1000 filed in district court may be removed to the circuit court.⁴⁹⁵ Informal procedure is contemplated but attorneys usually are involved. Appeal from the judgment of a general district court judge may be taken as of right to a court of record by filing a notice within ten days after entry of judgment.⁴⁹⁶ Appeals may be perfected only by filing a performance bond and paying the costs of the appeal in advance.⁴⁹⁷ Appeals are tried de novo by the circuit court.⁴⁹⁸

Florida, like some other states, reformed its minor courts so as to eliminate justices of the peace but to preserve features that make the new forums reasonably satisfactory for resolution of minor claims. In Florida, the minor courts have been centralized,⁴⁹⁹ but lay judges are permitted in small counties.⁵⁰⁰ Informal procedure is provided for,⁵⁰¹ and participation without attorneys is encouraged by protecting pro se litigants from discovery.⁵⁰²

Current suggestions for reform address the same issues that led to the basic structural characteristics of these courts in the first place.⁵⁰³

493. Statistics from the Prothonotary's Office in Montgomery County for 1982 show that 23% of the civil cases tried before district justices were appealed to the common pleas court. This represents 6.5% of the total civil cases disposed of at the district justice level in that county.

494. VA. CODE § 16.1-77(1) (1982).

495. *Id.* § 16.1-92. See *Autry v. Bryan*, 224 Va. 451, 297 S.E.2d 690 (1982) (applying Virginia removal provision).

496. VA. CODE § 16.1-106 (1982). See *Norfolk & W.R. Co. v. Clark*, 92 Va. 118, 22 S.E. 867 (1895) (analysis of predecessor section).

497. VA. CODE § 16.1-107 (1982).

498. *Id.* § 16-1.113. See *Leisge v. Leisge*, 223 Va. 688, 292 S.E.2d 352 (1982). But see *K-B Corp. v. Gallagher*, 218 Va. 381, 237 S.E.2d 183 (1977) (only claims ruled upon by district court may be considered in appeal); *Godlewski v. Gray*, 221 Va. 1092, 277 S.E.2d 213 (1981) (establishing 30 day limit for filing appeal bond).

499. FLA. STAT. ANN. § 34.01 (West Supp. 1984)

500. *Id.* § 34.021.

501. FLA. R. SUMM. P. 7.140. See *Stauber, Small Claims Courts in Florida: An Empirical Study*, 54 FLA. B.J. 130, 133 (1980).

502. FLA. R. SUMM. P. 7.020.

503. See *Steele, supra* note 7 at 354-55; J. RUHNKA & S. WELLER, *supra* note 337, at 189. Justice Neely has suggested a variety of procedures, including scheduling followups and telephone interviews of witnesses to make the process more convenient and to reduce the problem of continuances. See R. NEELY, *supra* note 1, at 206.

One type of reform that seems new is the suggestion that small claims court hours be set so that unrepresented litigants need not lose time from work in order to appear, and that the courts sit in neighborhood locations rather than at a central courthouse to make them more accessible. In some states, small claims courts are staffed by judges who are not lawyers. This is sometimes perceived as reducing respect for the courts and as increasing the appeal rate. Some commentators, however, believe that the use of nonlawyers as small claims court judges is a good idea.⁵⁰⁴ An obvious continuing problem with small claims courts is controlling the appeal rate.⁵⁰⁵

V. LEGAL PROBLEMS

Several legal impediments exist to compulsory use of methods of dispute resolution other than the jury trial. Considerable litigation over these impediments has occurred in recent years, especially over programs that single out one category of civil disputes for special handling.

A. *Equal Protection in Compulsory Dispute Resolution Procedures*

If disputing parties are required to use nontraditional dispute resolution procedures, the procedures must meet constitutional requirements, including the seventh amendment right to a jury trial (for claims otherwise cognizable in federal court) and the fourteenth amendment right to equal protection.⁵⁰⁶ For the purposes of this sec-

504. See R. NEELY, *supra* note 1, at 199. Justice Neely points out that the skills needed in an effective small claims court are human skills, not legal skills. *Id.* at 201.

505. The question of appeals from small claims courts concerned Roscoe Pound in 1940. See generally R. POUND, *supra* note 9. The appeal question is addressed by the ABA standards for trial courts. See notes 602-05 and accompanying text *infra*. See also Nejelski, *supra* note 468.

506. Whether Congress could establish a federal scheme of mandatory administrative adjudication of private disputes is open to question. The Supreme Court expounded on Congressional ability to create "legislative courts":

The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." In contrast, "the liability of one individual to another under the law as defined," is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70 (1982) (emphasis added) (footnotes and citations omitted). However, such a scheme possibly could succeed if the administrative action were not final, and parties could invoke de novo review of the federal courts, much as state courts hear medical malpractice suits de novo after parties go through a screening panel. See, e.g., E.D. PA. R. 8 (requirement of arbitration for certain cases, with right of trial de novo). See also Schweiker v.

tion, only the equal protection questions will be discussed. The right to jury trial is discussed in the next section.

The fourteenth amendment's requirement that no state deny its citizens the equal protection of the laws has grown to be a major means of attacking alternative dispute resolution methods.⁵⁰⁷ Well-drafted equal protection challenges have been able to strike down schemes requiring one class of litigants to go first to one forum before taking their complaint to courts. Cases where litigants were denied the right to go to court at all have also been invalidated on equal protection grounds.⁵⁰⁸

Generally, equal protection challenges to such programs have focused on the legislative division of litigants into two classes: those required to utilize such procedures, and those not so required. Courts generally use the rational relationship test to examine such statutes, rather than the compelling state interest/fundamental interest test.⁵⁰⁹

No-fault auto insurance has been challenged numerous times, and has sometimes been upheld and sometimes struck down. The Supreme Court of Kansas, in *Manzanares v. Bell*,⁵¹⁰ upheld a statute against a claim that its threshold amount for recovery for nonpecuniary damages violated equal protection. The court held the differentiation was "reasonably related to problems that affect the public welfare," and bore a rational relationship to a proper legislative objective — prompt compensation for accidental injuries.⁵¹¹

Other states have used this rationale as well to uphold statutes against equal protection attacks based on the differentiation between classes of motor vehicle tort victims.⁵¹² But some state courts have

McClure, 456 U.S. 188 (1982) (procedure utilized by Department of Health and Human Services using private insurance carriers to decide whether certain Medicare claims were payable without right of review not violative of due process).

507. For cases concerning equal protection challenges to no-fault auto insurance statutes, see notes 512-16 and accompanying text *infra*. For a discussion of the case law concerning equal protection challenges to medical malpractice claims statutes, see notes 517-45 and accompanying text *infra*. For a discussion of the case law generally rejecting equal protection challenges to workers' compensation statutes, see notes 546-52 and accompanying text *infra*.

508. See, e.g., *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (invalidating state no-fault insurance law), *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (invalidating state medical malpractice statute).

509. See J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW ch. 16, §I(C) (2d ed. 1983) (describing different standards used for judging equal protection)[hereinafter cited as NOWAK].

510. 214 Kan. 589, 522 P.2d 1291 (1974).

511. *Id.* at 611, 522 P.2d at 1309.

512. See, e.g., *Bushnell v. Sapp*, 194 Colo. 273, 571 P.2d 1100 (1977) (legislative requirement that injured parties must reach a threshold for pain and suffering in order to recover is rationally related to government's goal of eliminating minor

rejected no-fault for a variety of reasons. In *Kluger v. White*,⁵¹³ the Florida Supreme Court overturned a law abolishing tort claims for auto accidents, holding that the law failed to provide a reasonable alternative when abolishing the cause of action.⁵¹⁴ The law did not require motorists to carry property damage insurance. In Illinois, the supreme court struck down the state's no-fault law because it did not require coverage for commercial vehicles.⁵¹⁵ The court held the law invalidly treated plaintiffs injured by private vehicles differently than those injured by commercial vehicles, since those injured by commercial vehicles were subject to a statutory limit on recovery while not protected by compulsory insurance, whereas those injured by private vehicles had the protection of a statutory provision requiring private owners to purchase compulsory insurance.⁵¹⁶

Medical malpractice claims statutes have had a difficult time in the courts,⁵¹⁷ having been invalidated on a number of grounds. For instance, the basic legislative division of plaintiffs into medical malpractice and nonmedical malpractice was upheld by the Arizona Supreme Court in *Eastin v. Broomfield*⁵¹⁸ in 1977. The court found the different treatment accorded the two classes was rationally related to a legitimate legislative purpose,⁵¹⁹ citing the rising cost of malpractice insurance and the increasing number of cases. The law, said the court, provided a system "whereby the meritorious claims could be separated from the frivolous ones prior to trial."⁵²⁰ Likewise, the Florida Supreme Court upheld the two-class scheme in *Carter v. Sparkman*.⁵²¹ The court found the statute burdensome for the parties, but within the limits of equal protection.⁵²² It noted the legislative find-

claims for pain and suffering); *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971) (legislature has employed criteria rationally related to seriousness of injury in general, and thereby to seriousness of pain and suffering).

513. 281 So. 2d 1 (Fla. 1973).

514. *Id.* at 4.

515. *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

516. *Id.* at 488, 283 N.E.2d at 479. The court found that "to the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of [the state constitution]." *Id.* (quoting *Harvey v. Clyde Park Dist.*, 32 Ill. 2d 60, 203 N.E.2d 573 (1965)).

517. See Redish, *Legislative Response to the Medical Malpractice Insurance Crises: Constitutional Implications*, 55 TEX. L. REV. 759 (1977).

518. 116 Ariz. 576, 570 P.2d 744 (1977).

519. *Id.* at 583, 570 P.2d at 751.

520. *Id.*

521. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

522. *Id.* at 805. The statute provided for the submission of malpractice claims to "an appropriate medical liability mediation panel before th[e] claim may be filed in any court in th[e] state." FLA. STAT. ANN. § 768.44, *repealed by* 1983 FLA. LAWS 214, § 15 (West Supp. 1984). It permitted the panel's determination to be admitted into

ings in the field of medical malpractice, and found that the police power justified such measures for the public welfare.⁵²³ Nevertheless, the Florida program was later invalidated on other grounds, and it was subsequently repealed.⁵²⁴

The New Hampshire Supreme Court, in *Carson v. Maurer*,⁵²⁵ invalidated the state's medical malpractice scheme in an equal protection attack. The court decided the test to use was whether the classification of plaintiffs bore a "fair and substantial relation" to the legislative goal,⁵²⁶ and found the law unfairly burdened malpractice plaintiffs in all but one of its sections.⁵²⁷ Similarly, the Illinois Supreme Court overturned the state's scheme in *Wright v. Central DuPage Hospital Association*,⁵²⁸ holding that the law's restraint on recoveries for malpractice plaintiffs was a "special law" in violation of the state constitution.⁵²⁹ The court also found the law's failure to regulate claims arising under policies written before the act became effective violated equal protection.⁵³⁰

In contrast, the Louisiana Supreme Court upheld a restriction on recovery in *Everett v. Goldman*,⁵³¹ holding that the law's proscription of *ad damnum* clauses merely prevented a plaintiff "from praying in his pleadings for a specified sum of money, usually vastly inflated."⁵³² The enactment was "rationally related to an appropriate governmental interest, the guarantee of continued health care services for our citizens at reasonable cost."⁵³³ The court also upheld the law's voluntary nature, which permitted those claiming against nonstate plan

evidence at trial if both plaintiff and defendant participated in the mediation, but was silent on admissibility if only the plaintiff participated. *Id.*

523. *See Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980); 1983 FLA. LAWS 214, § 15.

524. *Carter*, 335 So. 2d at 806. The *Everett* court, which stated that there was no fundamental right or suspect classification present, found the provisions were a reasonable response to the malpractice problem. *See Everett v. Goldman*, 359 So. 2d 1256, 1266 (La. 1978). The Florida Supreme Court later held the scheme violated due process. *See Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980).

525. 120 N.H. 925, 424 A.2d 825 (1980).

526. *Id.* at 932-33, 424 A.2d at 831.

527. The court found the section granting defendants the privilege to not give expert opinion testimony against themselves valid, but invalidated the entire statute. *Carson*, 120 N.H. at 935, 946, 424 A.2d at 832, 839.

528. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

529. *Id.* at 331, 347 N.E.2d at 743. The Illinois constitutional prohibition of a "special law" is similar to the equal protection clause. *See Turkington, Equal Protection of the Laws in Illinois*, 25 DE PAUL L. REV. 385 (1976). *See also Howlett*, 51 Ill. 2d at 488, 283 N.E.2d at 479.

530. *Wright*, 63 Ill. 2d at 331, 347 N.E.2d at 744. *See also Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

531. 359 So. 2d 1256 (La. 1978).

532. *Id.* at 1266.

533. *Id.*

health care providers unlimited recovery, while limiting those claiming against plan participants to a \$500,000 recovery.⁵³⁴

The courts' tests for equal protection violations vary slightly, but appear to have a common core of federal case law. In *Manzanares v. Bell*,⁵³⁵ the Kansas Supreme Court cited *Williamson v. Lee Optical*⁵³⁶ and *Reed v. Reed*⁵³⁷ in laying out its test of "whether such differentiation is reasonably related to the public purpose sought to be accomplished."⁵³⁸ The Louisiana Supreme Court cited *Chicago Police Department v. Mosely*⁵³⁹ in declaring its test of "whether the discriminatory treatment is supported by any rational basis reasonably related to the governmental interest sought to be advanced by it."⁵⁴⁰ The New Hampshire Supreme Court chose the intermediate scrutiny test of *Lalli v. Lalli*⁵⁴¹ and *Reed v. Reed*.⁵⁴² The classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."⁵⁴³ The Idaho Supreme Court utilized a "means-focus" test in *Jones v. State Board of Medicine*,⁵⁴⁴ directing a lower court to make factual findings in order to determine "whether the legislative means substantially furthers some specifically identifiable legislative end."⁵⁴⁵

Although workers' compensation statutes have been attacked on equal protection grounds, courts consistently have upheld their validity.⁵⁴⁶ For instance, in *Miller v. Hoyle*,⁵⁴⁷ the intermediate appellate court of Louisiana held that the state's requirement that public employees be restricted to workers' compensation remedies while permitting private employees to elect coverage did not violate equal

534. *Id.* The court's description of the act earlier in the opinion, however, seemed to indicate that *no* damages in excess of \$500,000 could be recovered. *Id.* at 1262. The health care providers, if they signed up with a state plan requiring insurance of at least \$100,000, were statutorily protected from claims in excess of \$500,000. *Id.*

535. 214 Kan. 589, 522 P.2d 1291 (1974).

536. 348 U.S. 483 (1955).

537. 404 U.S. 71 (1971).

538. *Manzanares*, 214 Kan. at 610, 522 P.2d at 1308.

539. 408 U.S. 92 (1972).

540. *Goldman*, 359 So. 2d at 1266.

541. 439 U.S. 259 (1978).

542. 404 U.S. 71 (1971).

543. *Maurer*, 120 N.H. at 932-33, 424 A.2d at 831 (1980)(emphasis supplied by court).

544. 97 Idaho 859, 555 P.2d 399, *cert. denied*, 431 U.S. 914 (1976).

545. *Id.* at 867, 555 P.2d at 407. A discussion of the development of the "means-focus" test with relation to medical malpractice cases can be found in Redish, *supra* note 517.

546. See A. LARSON, 2A WORKMEN'S COMPENSATION LAW § 65.20 (1983).

547. 328 So. 2d 757 (La. App. 1976).

protection. The court found that the differing treatment was "rationally designed to further legitimate state interests."⁵⁴⁸ In an early case, the Supreme Court of Rhode Island found the state's law excluding certain workers from the scope of coverage comported with equal protection.⁵⁴⁹ The court stated that there was a "substantial difference" between covered and noncovered employees, and found the classification reasonable.⁵⁵⁰ Of course, what courts view as "reasonable" changes over the years, as shown by the Michigan Supreme Court in *Gutierrez v. Glaser Crandell Co.*⁵⁵¹ The court found the law exempting agricultural workers from the scope of coverage violative of equal protection, and remanded a claim to the compensation board.⁵⁵²

B. *Right to Jury Trial*

A major constitutional obstacle to removing private disputes from the courts for adjudication is the guarantee of a trial by jury found in the seventh amendment to the Federal Constitution⁵⁵³ and in forty-eight of the fifty state constitutions.⁵⁵⁴ Many state workers' compensation statutes, no-fault insurance schemes, and medical malpractice screening laws have been attacked on the grounds that they abridge or deny the right to a jury trial, with varying results.

For instance, some courts have held that the right to a jury trial exists only when a common law cause of action exists, and that legislative abolition of the cause of action makes the lack of jury trial constitutional.⁵⁵⁵ In *Gentile v. Altermatt*,⁵⁵⁶ the Supreme Court of

548. *Id.* at 761. The court found that the state requirement encouraged private employers to use the system to cover their employees and simplified agency administration. *Id.*

549. *Sayles v. Foley*, 38 R.I. 484, 494, 96 A. 340, 345 (1916).

550. *Id.* at 492, 96 A. at 344.

551. 388 Mich. 654, 202 N.W.2d 786 (1972).

552. One justice found the law "clearly discriminatory," without writing clearly his reasons for so finding. *Id.* at 688, 202 N.W.2d at 791 (Adams, J.). Another found the law would be valid only if a compelling state interest existed, since the persons affected were of minority racial groups. *Id.* at 674, 202 N.W.2d at 794 (Kavanaugh, C.J.).

553. U.S. CONST. amend. VII. The seventh amendment provides as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" *Id.* See Stanley, *The Resolution of Minor Disputes and the Seventh Amendment*, 60 MARQ. L. REV. 963 (1977) (suggesting flexible interpretation of seventh amendment and similar state provisions, possibly even encompassing a 3-5 member arbitration panel within the word "jury"). Mr. Stanley was president of the ABA from 1976-77.

554. Colorado and Louisiana do not guarantee the right to a jury trial in civil cases. See DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, app., *Alternative to Litigation, II: The Constitutionality of Arbitration Statutes* 318 (1973).

555. See Redish, *supra* note 517, at 797.

Connecticut held that while the right to jury trial could not be curtailed for those seeking to redress legal injury, it was within the power of the legislature to define legal injury.⁵⁵⁷ The court then noted that, while the constitution barred abolition of rights existing at the time the constitution was adopted, it permitted the legislature to provide for "reasonable alternatives to the enforcement of such rights."⁵⁵⁸ The court found the no-fault provisions a reasonable means of redress, citing federal and state investigation of the auto insurance problem and the state legislature's "detailed cost-benefit analysis" of the statute in question.⁵⁵⁹ The court breezed through the plaintiff's basic objection, saying that the right to jury trial in a cause of action could not be abridged, except if the cause were abolished or limited in duration.⁵⁶⁰

Other courts have held that required pretrial arbitration in medical malpractice claims significantly infringes on the right to a jury trial.⁵⁶¹ In *Simon v. St. Elizabeth Medical Center*,⁵⁶² an Ohio court found a statutory provision permitting the arbitrators' findings to be submitted to the jury to be an infringement of the right to jury trial.⁵⁶³ The court held the arbitrators' findings would reduce the strength and persuasiveness of a party's case, noting that juries traditionally accord added weight to the testimony of experts.⁵⁶⁴

The Arizona Supreme Court disagreed, however, upholding a statute similar to that of Ohio in *Eastin v. Broomfield*.⁵⁶⁵ The jury remained "the final arbiter of the issues raised and the facts presented,"⁵⁶⁶ the court said. The court considered the medical liabil-

556. 169 Conn. 267, 363 A.2d 1 (1975), *app. dismissed*, 423 U.S. 1041 (1976). *See also* Grand Trunk W. R. Co. v. Industrial Comm'n, 291 Ill. 167, 125 N.E. 748 (1919) (legislative abolition of common-law cause of action for work-related injuries also abolishes right to jury trial for same).

557. 169 Conn. at 285, 363 A.2d at 11.

558. *Id.* at 286, 363 A.2d at 12. The court cited a Florida Supreme Court case as an example of a finding that the legislature could restrict common-law rights when it provided for reasonable alternatives for redress. *Id.* (citing *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)).

559. *Id.* at 290, 363 A.2d at 13.

560. *Id.* at 298-99, 363 A.2d at 17.

561. The Pennsylvania Supreme Court found the administrative delays in the pretrial screening program burdened the right so much as to make it practically unavailable. *Mattos v. Thompson*, 191 Pa. 385, 421 A.2d 190 (1980). The court hastened to reassure the legislature that "arbitration is still a viable alternative that can be effective in many areas." *Id.* at 397, 421 A.2d at 196.

562. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

563. *Id.* at 168, 355 N.E.2d at 908.

564. *Id.* The court also mentioned that arbitration would create added pressure and expense for the party losing at arbitration, for that party then would be required at trial to persuade the jury of the incorrectness of the arbitrator's findings. *Id.*

565. 166 Ariz. 576, 570 P.2d 744 (1977).

566. *Id.* at 580, 570 P.2d at 748.

ity review panel's decision, which could be admitted into evidence at trial, as merely evidence "which the jury may reject or accept as the case may be."⁵⁶⁷ The court distinguished the Ohio statute as permitting individual arbitrators to be called, stating that to do so would bolster the panel's findings.⁵⁶⁸

The Massachusetts Supreme Judicial Court, in *Paro v. Longwood Hospital*,⁵⁶⁹ held that the state's medical malpractice law, requiring the plaintiff to post a \$2,000 bond in order to obtain a trial de novo after a screening procedure, did not abridge the right to a jury trial. "The right to a jury trial is not absolute,"⁵⁷⁰ the court stated, calling the bond requirement a "limited obstruction" not impairing the substance of the jury trial right.⁵⁷¹

Mandatory arbitration of wrongful dismissal claims under the Railway Labor Act has been held not to infringe the right to a jury trial.⁵⁷²

C. Delegation

Another potential legal impediment to employing new methods for dispute resolution is the prohibition on delegating governmental power to persons or institutions not subjected to traditional political constraints. Sometimes the delegation concern is expressed in separation of powers terms.⁵⁷³ The delegation doctrine probably represents the major obstacle to creation of new administrative agency procedures for the resolution of interest disputes, because of the legacy of the *Schechter* case.⁵⁷⁴

567. *Id.*

568. *Id.* at 581, 570 P.2d at 749.

569. 373 Mass. 645, 369 N.E.2d 985 (1977).

570. *Id.* at 654, 369 N.E.2d at 991.

571. *Id.* at 655, 369 N.E.2d at 991.

572. See *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1049 n.6 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984) (citing *Essary v. Chicago & N.W. Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980)).

573. *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 420 (9th Cir. 1978), *aff'd*, 103 S. Ct. 2764 (1983) (statutory one-house veto violates separation of powers doctrine "because it is a prohibited legislative intrusion upon the executive and judicial branches"). See *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 448 (D.C. Cir. 1982) (one-house legislative veto contravenes separation of powers principle by authorizing legislature to share powers properly exercised by other two branches); *Pierce v. Parratt*, 666 F.2d 1205, 1206-07 (8th Cir. 1981) (Nebraska habitual criminal statute does not violate separation of powers doctrine since it neither gives the prosecutor the power to sentence nor delegates legislative power of defining criminal conduct to prosecutor).

574. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In *Schechter*, the United States Supreme Court invalidated § 3 of the National Industrial Recovery Act (NIRA) as an unconstitutional delegation of legislative power to the President of the United States. *Id.* at 542. The Court found that Congress could not

In addition, delegation constrains the diversion of cases from the courts to noncourts for final resolution under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁵⁷⁵ This problem is avoided in most judicial reference schemes by providing for judicial review after the initial decision. On the other hand, the Supreme Court has approved the diversion of relatively minor administrative claims involving public rights to arbitration.⁵⁷⁶ Generally, private disputes may be referred to nonjudicial bodies for resolution only where there is a provision for adequate judicial review of the initial decision.⁵⁷⁷

D. *Procedural Due Process*

Challenges to compulsory dispute resolution procedures not made on equal protection, deprivation of jury trial, or delegation grounds, conceivably could be made on the grounds that the procedures followed do not comport with constitutional guarantees of procedural due process.⁵⁷⁸ It is reasonably clear that a right to bring a lawsuit is a property right protected against deprivation without due process.⁵⁷⁹ Accordingly, the argument would be that requiring a plaintiff to assert a tort or breach of contract claim in an alternative forum with simplified adjudicatory procedures violates procedural process.⁵⁸⁰ An unsuccessful defendant, of course, would assert that en-

delegate legislative authority to the President of the United States to "exercise unfettered discretion" in approving and adopting trade codes to benefit the nation's industries. *Id.* at 538 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). The Court concluded that the NIRA's broad delegation of authority left the President's discretion "virtually unfettered." *Id.* at 542.

575. 458 U.S. 50, *stayed*, 103 S. Ct. 200 (1982); *United States v. Marathon Pipe Line Co.*, 103 S. Ct. 200 (1982). In *Northern Pipeline*, the United States Supreme Court decided that article III precluded Congress from establishing legislative courts having jurisdiction over all matters arising under the bankruptcy laws. 458 U.S. at 76.

576. *Northern Pipeline*, 458 U.S. at 70. The Supreme Court noted that controversies involving public rights may be removed from article III courts and delegated to legislative courts or administrative agencies for their determination. *Id.* (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977); *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932)). Private rights disputes, on the other hand, remain within the sole jurisdiction of the "historically recognized judicial power." *Id.*

577. *Northern Pipeline*, 458 U.S. at 69 n.23.

578. See notes 579-82 and accompanying text *infra*.

579. See *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("right of access to courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"). *Accord* *Mitchum v. Purvis*, 650 F.2d 647, 648 (5th Cir. 1981).

580. This argument has been raised by some litigants but has not been addressed by the courts. See *Association of Investment Brokers v. Securities and Exchange Comm'n*, 676 F.2d 857, 862 n.14 (D.C. Cir. 1982) (since association did not have standing to challenge commission's revision of personnel form, allegation that

forcing a judgment rendered in an alternative procedure would deprive him of property without due process of law.⁵⁸¹ Assuming that state courts interpret state due process guarantees similarly to the way federal guarantees were interpreted in *Mathews v. Eldridge*,⁵⁸² substantial flexibility should be available for innovative procedures. The marginal increase in accuracy resulting from the use of more formal procedures should be assessed in light of the stakes involved.

VI. PROPOSALS & CONCLUSION

A. *General Principles*

Alternative dispute resolution has been under discussion for at least a century in the United States. The body of knowledge respecting the theory of dispute resolution and the empirical results of particular alternatives has been enhanced by the recent movement. Constructive public policy now requires permanent implementation of some of the features derived from this discussion and knowledge. Recognition of several principles should enhance the policy result.

First, "alternatives" to the traditional trial function by promoting pretrial settlement. The mystery and complexity of ADR analysis can be reduced by understanding that court-annexed "mediation" and "arbitration" are not new ideas, but are merely new names for roles long performed by judges attempting to promote settlement and by parajudge personnel enlisted through a reference process to engage in fact finding. The attractiveness of the alternatives should be measured by (1) their efficacy in promoting settlement (2) on terms not disadvantageous to the party with weaker bargaining power. The second criterion is derived from the essential purpose of the civil judicial

compulsory arbitration is a denial of due process never addressed); *Kuenzer v. Local 507 Int'l Bhd. of Teamsters*, 66 Ohio St. 2d 201, 204, 420 N.E.2d 1009, 1011 (1981) (argument on appeal that compulsory arbitration provision violates due process foreclosed where not raised below). *But see* *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 407 (1967) (Black, J., dissenting) (suggests possibility that compulsory arbitration without jury trial and right to appeal may be a denial of due process).

581. For a discussion of what types of rights and benefits the Supreme Court has considered to be property, see generally NOWAK, *supra* note 509, at 546-53; H. PERITT, *supra* note 137, § 6.9 (property interests in the public employment context).

582. 424 U.S. 319 (1976). In *Mathews*, the Supreme Court enunciated three factors to be considered and balanced in determining what procedural protections are required for any specific interest: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

system to equalize bargaining power. Without the second criterion, this bargaining equalization function would be lost.

Second, preference should be accorded those alternatives that function as adjuncts to the court system, except for defined classes of disputes that occur within the framework of an economic or social interdependence sufficient to provide incentives to resolve disputes privately. These classes are limited in number, probably to (1) labor-management disputes, where the parties continue in the collective bargaining relationship; (2) marital disputes, where the parties will continue to deal with each other over questions of child rearing; (3) commercial disputes involving a continuing relationship; and (4) landlord-tenant disputes where the tenancy is likely to continue. All other disputes need the coercive power of the court to force participation because the parties are strangers to each other or because at least one nonstranger party can avoid dispute settlement by walking away from the dispute.

Third, preference should be accorded to changes in existing judicial procedures rather than introduction of entirely new types of procedural alternatives.⁵⁸³ New procedural alternatives require

583. The American Bar Association Action Commission to Reduce Court Costs and Delay (1984) described a series of experiments involving changes in civil procedure and case handling, without resort to alternative dispute resolution techniques:

The Commission's experimentation combined two parallel efforts: delay reduction through judicial control over the pace of litigation and cost reduction through procedural simplification.

Our primary test site was in Kentucky, where combined judicial control and simplification rules were put into effect in late 1980. As a result of the new procedures, the average time from filing to disposition has been reduced from sixteen months to five months, cases involve less discovery and fewer motions, and attorneys spend less time on each case.

We looked at variations of this basic program in Vermont, Colorado, and California and found that without both judicial control *and* procedural simplification, programs did not accomplish as dramatic results. Judicial control alone may increase discovery and motion activity. Simplification alone will not reduce delay. In addition, procedures left entirely to attorneys' choice will likely be underutilized.

Interviews with lawyers and judges found no perceptions that the quality of the litigation process had been adversely affected by the limitations and deadlines

The Commission decided to experiment modestly with an old and familiar technology — the telephone. . . .

In 1981 telephone conferencing was introduced in several trial courts in Colorado and New Jersey. Its almost immediate success confirmed its expansive potential.

The range of matters that proved feasible for handling by telephone was wide in both civil and criminal cases: all types of non-evidentiary motions, pretrial and settlement conferences, arraignments, criminal pretrial motions, bail settings.

Both attorneys and judges found it equally satisfactory to do business

additional overhead, present the potential for collateral attack of decisions or settlements in other forums, and increase potential delay before a resolution is obtained. Familiar procedures, in contrast, promote bar acceptance and enhance the perceived legitimacy of decisions rendered hereunder. When a class of disputes can be identified that does not lend itself to handling within a reformed civil judicial system, consideration should be given to establishing an administrative agency to replace the trial function, with limited judicial review of the trial outcome. New forms of administrative adjudication can be developed that avoid shifting the entire cost burden of litigation to the public sector.

Fourth, additional fact finding procedures should be established primarily within the framework of the traditional master/referee concept, rather than through entirely new institutions. The only exception should be court-annexed arbitration, which really is a type of reference with a special name. "Arbitration," by that name, already enjoys a measure of acceptance and identification within the legal community that can be built upon.

Fifth, the role of small claims courts should be enhanced rather than reduced by the creation of new, parallel institutions. The ways to strengthen the small claims process are obvious: creation of disincentives to seek trial de novo and the geographic dispersion of court locations to make them more accessible.

Sixth, more attention needs to be given to the role of discovery in a simplified dispute resolution procedure. Too many of the popular ADR experiments ignore discovery and permit it to take place in parallel with the ADR process. One basic approach is to permit discovery to begin the ADR procedure. Under this approach, discovery

by telephone as in person. Judges found it gave them additional scheduling flexibility.

Careful attention to detail in allocating responsibility for initiating and conducting the actual telephone hearing was essential to its success

Bar cooperation is indispensable to the success of delay reduction efforts. The bench and bar should involve each other in new programs from the start. Our experience also demonstrates that active judicial participation and encouragement of new programs is a high visibility factor in their acceptance by the bar.

ABA ACTION COMMISSION TO REDUCE COSTS AND DELAY, FINAL REPORT vii-x (1984).

Another example is the Cook County Illinois Pretrial Mediation Division of the local court system. In an oral presentation, before the annual meeting of the ABA, the presiding judge of the division summarized the success of that system. Judge Machor stated that all cases stating a claim for money damages in excess of \$15,000 are required to go through mediation. He noted that the system has produced a 58% settlement rate. Oral presentation of Presiding Judge Machor, Cook County Pretrial Mediation Division, before the Annual Meeting of the ABA (August 6, 1984).

management should be integrated to a greater degree with the ADR procedure, and the fruits of discovery should be used more explicitly by the ADR body. Another basic approach is to recognize that many ADR procedures serve a discovery function, and that there is no reason to incur the costs of two discovery procedures simultaneously. Under this approach, typified by the small claims procedure, no discovery would be permitted until *after* a party elects to appeal from the outcome of a preliminary ADR procedure.

B. *ABA Standards for Civil Trial Courts*

In 1976, the American Bar Association published standards for trial courts.⁵⁸⁴ The standards development project was the third in a series sponsored by the Department of Justice and private foundations.⁵⁸⁵ The report reflected comments from the bench, the bar, and the public.⁵⁸⁶ Of the forty-eight standards contained in the report, about a dozen are of particular interest in connection with the subject of alternative dispute resolution. Each of these will be summarized and commented upon in this section.

1. *Procedure in Civil Cases*

Standard 2.02 proposed the merger of law and equity, simplified pleadings, liberal joinder of claims and parties, discovery, and summary judgment, an approach substantially similar to that taken by the Federal Rules of Civil Procedure.⁵⁸⁷

2. *Caseflow Management*

Standards 2.50-2.56 proposed active management by the court of the flow of cases.⁵⁸⁸ The comments identify the disadvantages of relying on the bar to control the pace at which cases are handled, through devices such as: "notice[s] of issue," "certificate[s] of readiness," and

584. See ABA STANDARDS, *supra* note 430.

585. The first report in the series, *Standards Relating to Court Organization*, was published in 1974 after approval by the House of Delegates of the American Bar Association. *Id.* at preface. The second report issued was *Standards Relating to Appellate Courts*. *Id.* The three-part project was funded by the Law Enforcement Assistance Administration of the Department of Justice, the American Bar Endowment, and the Ford Foundation. *Id.*

586. *Id.*

587. *Id.* § 2.02.

588. *Id.* § 2.50 ("Caseflow Management: General Principle"); § 2.51 ("Caseflow Management Program"); § 2.52 ("Standards of Timely Disposition"); § 2.53 ("Identifying and Managing Protracted Cases"); § 2.54 ("Managing Potentially Disruptive Cases"); § 2.55 ("Managing 'Short Cause' Dockets"); § 2.56 ("Firm Enforcement").

"request[s] for setting."⁵⁸⁹ On the other hand, the comments discourage overuse of hearings and conferences to the point that judges, counsel, and parties spend undue time waiting.⁵⁹⁰ Other comments point out that there are advantages and disadvantages to individual and master calendaring systems, rather than evidence that either is inevitably superior. They noted that the calendaring and case assignment system should meet the particular needs of the court, and pointed out that a hybrid system may be desirable.⁵⁹¹ In any event, caseflow management should be under the "continuous supervisory direction of the presiding judge"⁵⁹² Standard 2.52 proposes the following standards for disposition of civil cases: thirty days from filing for cases using summary hearing procedures, such as small claims; forty-five days for cases involving child custody, or support of dependants; and six months for other cases unless they involve exceptionally complicated discovery, stabilization of injury in personal injury cases, or settlement of financial affairs in probate cases.⁵⁹³ Standard 2.56 calls for firm and uniform enforcement of caseflow management procedures, by providing for request for, and grants of, continuances and reporting them to the presiding judge.⁵⁹⁴ This standard recognizes the importance of deadlines in promoting negotiated settlement.⁵⁹⁵

3. *Specialized Procedures*

Standards 2.70-2.78 propose specialized procedures for handling classes of cases. Five of these relate to involuntary commitment, juvenile matters, traffic violations, arrests for inebriation, and probate matters.⁵⁹⁶ Three others relate to subjects frequently addressed under the heading of alternative dispute resolution.⁵⁹⁷

Standard 2.71 proposes special handling of disputes concerning family relationships. Independent investigation by the court of facts, promotion of conciliation, and referral to counselling all are encouraged.⁵⁹⁸ The standard itself is framed in terms of judicial atti-

589. *Id.* § 2.50 commentary at 84.

590. *Id.*

591. *Id.* § 2.51 commentary at 89-90.

592. *Id.* § 2.51 commentary at 90.

593. The comments propose that, where injury stabilization in a personal injury case seems necessary, suspension of the progress of a case be deliberately arranged by the court, for a fixed time period. *Id.* § 2.50 commentary at 85.

594. *Id.* § 2.56.

595. *Id.* § 2.56 commentary at 101-02.

596. *Id.* §§ 2.72, 2.78, 2.76, 2.77, 2.73, respectively.

597. See notes 598-607 and accompanying text *infra*.

598. ABA STANDARDS, *supra* note 430, § 2.71(b)-(a).

tudes. The comments suggest particular institutional arrangements, including provision of mediation in divorce, custody and visitation, child support and alimony disputes; and availability of judicial and nonjudicial staff to hear and make preliminary fact determinations and to perform counselling.⁵⁹⁹ This standard recognizes that adjudicatory techniques are ill-suited for dealing with interest disputes arising from domestic relationships.

Standard 2.74 proposes that “[c]ivil cases in which the amount in controversy is substantial enough to make assistance of counsel advisable, but sufficiently modest that litigation cost is a major factor in prosecuting or defending them, should be subject to determination by procedures that reduce costs and expedite final disposition.”⁶⁰⁰ The standard suggests a bracket for the amount in controversy, ranging from \$2500 as a minimum, to \$10,000, or some higher figure, as a maximum. All cases within this bracket would be handled under a special procedure, which would include limitations on discovery and one or more of the following procedures for determination:

Nonjury trial before a designated judge or judges;

Trial by a judicial officer, subject to a right to a *de novo* jury trial;

Nonbinding mediation by stipulation;

Arbitration by a panel of three attorneys, subject to *de novo* jury trial;

Expedited presentation of evidence through written expert testimony, eliminating the requirement of authentication of previously disclosed documents, more liberal allowance of leading questions, and establishment of non-controversial matters by recital of counsel;

No appellate review, except on issues of law of substantial precedential importance, either certified by the trial judge, or as to which leave is granted by the appellate court.⁶⁰¹

The comments suggest measures to discourage requests for *de novo* trial by imposing a requirement that the costs of arbitration be paid as a precondition to a trial *de novo*⁶⁰² if the trial *de novo* does not result in a judgment ten percent more favorable than the first-

599. *Id.* § 2.71 commentary at 116-20.

600. *Id.* § 2.74

601. *Id.* § 2.74(b).

602. *Id.* § 2.74 commentary at 133. This is the system employed in the Philadelphia Common Pleas Arbitration program.

step decision.⁶⁰³ This standard encompasses both court-annexed arbitration⁶⁰⁴ and innovations like the California "Economic Litigation" initiative.⁶⁰⁵

Section 2.75 proposes a mandatory procedure for small claims (those below \$1000), involving simple forms for statements of claim, assistance of court staff in preparation of documents, and trial before a judicial officer involving relaxed procedure and without regard for the formal rules of evidence. The standard also suggests provisions for holding trials in evening hours or on Saturdays. Appellate review would not be permitted, consistent with constitutional rights to jury trials, except on questions of law certified by the trial officer, or as to which leave to appeal is granted by the appellate court.⁶⁰⁶ This standard goes a bit further than most contemporary small claims procedures, especially in restricting appeals.⁶⁰⁷

C. *Specific Recommendations*

The dispute resolution policy dialogue is being made more complex by a failure to address general issues and by a tendency to concentrate on specific types of dispute resolution procedures as though each represents a unique way to deal with disputes.

The dialogue can be improved by classifying disputes into four major categories and considering which of the various private, administrative, and judicial resolution methods are well suited to dealing with them.

The first category includes interest rather than rights disputes. It must be recognized that these disputes are not addressed satisfactorily by an adjudicatory process, and more needs to be done to channel interest disputes into institutions that can promote resolution. Generally speaking, a mediation approach is the most suitable method, although there are instances in which legalized coercion is preferable.⁶⁰⁸ When the disputing parties' relationship is characterized by economic or social interdependence, as in labor-management relations,

603. *Id.* This system is employed in the Detroit mediation program, and in the Philadelphia federal court arbitration program.

604. For a discussion of court annexed arbitration, see notes 426-47 and accompanying text *supra*.

605. For a discussion of California's Economic Litigation Initiative, see notes 306-13 and accompanying text *supra*.

606. ABA STANDARDS, *supra* note 430, § 2.75.

607. For a discussion of small claims procedures, see notes 475-505 and accompanying text *supra*.

608. For a discussion of mediation as a method of dispute resolution, see notes 165-78 and accompanying text *supra*.

For a discussion of coercion as a method of dispute resolution, its application to

family relations, or continuing business relations, three basic possibilities exist. The first, and most desirable, is for the parties themselves to establish by contract a dispute resolution procedure involving an escalating series of steps, proceeding from negotiation, through mediation, to fact finding, and possibly to arbitration. Many examples exist in collective bargaining agreements, and these can be applied with little modification to the other categories of disputes. The second possibility, where interdependence is low, thereby making agreement on private dispute resolution methods unlikely in advance before specific disputes arise, is to ensure that administrative or court-annexed procedures exist to deal with these disputes in an appropriate manner. Efforts to do this are relatively new, but Mr. Harter's negotiated rule making,⁶⁰⁹ the Massachusetts siting statute,⁶¹⁰ and court-annexed conciliation for family disputes⁶¹¹ are promising innovations. Each of these methods is better than adjudication, and each permits party representatives to be identified where necessary,⁶¹² the fairness of representation to be policed, and good faith bargaining to be encouraged.⁶¹³

The second major category involves rights disputes between parties with substantial economic or social interdependence. Examples include labor and management administration of an existing collective bargaining agreement, administration of long-term commercial contracts involving continuing performance, administration of judicial decrees or agreements related to child custody and visitation, and employment or workplace-injury disputes involving a single employer.⁶¹⁴ Additionally, sufficient interdependence may exist, at least in small communities, between institutional defendants and groups of personal injury plaintiffs' attorneys to permit the establishment of permanent arbitration arrangements that could be offered as an option to individual plaintiffs when a claim arises. In each of these cases, costs and delays can be reduced, and procedures designed for the optimum handling of the type of claim if the parties agree in advance to private arbitration of claims that arise between them.

The Uniform Arbitration Act provides sufficient statutory au-

different types of disputes and the advantages and disadvantages of its use, see notes 113-35 and accompanying text *supra*.

609. See Harter, *supra* note 108, at 52-57.

610. See MASS. GEN. LAWS ANN. ch. 21D, § 15 (West 1981 & 1984-1985 Supp.).

611. See Kraut, *supra* note 111.

612. See notes 610-12 *supra*.

613. See MASS. GEN. LAWS ANN. ch. 21D, § 15 (West 1981) (arbitration in good faith); Harter, *supra* note 108, at 73-74 (negotiation in good faith); Kraut, *supra* note 111, at 1386-90 (conciliation in good faith).

614. See generally H. PERRITT, *supra* note 137.

thority for the enforcement of such agreements, though statutory or judicial modification of existing law may be required to permit workplace injury claims to be arbitrated rather than handled in governmental forums.⁶¹⁵ In addition, more thought needs to be given to the potential problem raised by Justice Neely. Increased popularity of private arbitration may lead to contracts of adhesion⁶¹⁶ that unfairly require consumers to arbitrate claims against the other party to the contract on unfavorable terms. Of course a doctrine can be developed that permits relief from such agreements when the adversely affected party can show lack of knowing and intelligent waiver of his rights to access to the courts.⁶¹⁷

Government can do little else that is useful with respect to the second category of disputes. Funding for private programs tends to distort operation of the market for dispute resolution services. I believe that entrepreneurial initiative by enterprises like the AAA, End-Dispute and Judicate will publicize adequately the availability of private services and that their use will spread.

The third and fourth categories include the residue of claims that for one reason or another do not warrant the full-blown features of modern civil procedure. The difference between the categories is the size of the claim. The third category includes "small claims." The fourth category includes claims of "medium size." I see no principled

615. For a discussion of the administrative adjudications under state workmen's compensation statutes, see notes 180-200 and accompanying text *supra*.

616. An adhesion contract is generally defined as a "[s]tandardized contract form offered to consumers of goods and services on essentially a take it or leave it basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." BLACK'S LAW DICTIONARY 38 (rev. 5th ed. 1979). It can be distinguished as a contract in which the weaker party has no real choice as to the contract's terms. *Id.*

The California courts have led the way for other jurisdictions to hold arbitration clauses unenforceable as part of a contract of adhesion. Two California courts have found arbitration clauses to be unenforceable provisions in a contract of adhesion where the arbitrator was associated with one of the contracting parties. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981) (per curiam); *Hope v. Superior Court*, 122 Cal. App. 3d 147, 175 Cal. Rptr. 851 (1981), *cert. denied*, 456 U.S. 910 (1982). The courts in *Scissor-Tail* and *Hope* reasoned that the arbitrator was presumptively biased in favor of one party. *Id.*

See generally Note, *Graham v. Scissor-Tail, Inc.: Unconscionability of Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014 (1982).

617. This may be similar to the exception to the duty to read rule in contract cases. Where one party can show that the contract is unconscionable under the circumstances, the party trying to enforce the contract has the burden of proving that a given provision was explained to the party and that the latter understood and agreed to such provision. *See* J. CALIMARI & J. PERILLO, *CONTRACTS* 336-43 (2d ed. 1977). If the party seeking to enforce the contract cannot meet his burden of proof, then the provision may be unenforceable. *Id.* at 336-37.

reason why society need elect judicial as opposed to administrative methods for resolving such claims. Modern administrative law really distinguishes very little between administrative and judicial procedure except in the nomenclature used. The discussion addressing the third and fourth categories focuses on judicial methods, but the suggestions could be applied to administrative procedure with few modifications.

In essence, the choice between administrative and judicial dispute resolution methods should be made on two grounds. First, a large volume of similar claims, where the legal and factual issues are similar, can be adjudicated more efficiently in specialized forums. Administrative forums traditionally are more specialized than judicial forums. The second ground for choosing an administrative forum relates to the question of who bears the cost of prosecuting a claim. Traditionally, the claimant faces lower transaction costs for pursuing a claim in an administrative forum than in a judicial one. This is so because society provides more resources to the administrative agencies than to the courts and permits the decision makers to engage in an inquisitorial, as opposed to an adversarial, mode of finding facts. Choosing the administrative option raises a number of risks. The first is that lower transaction costs lead to more claims being presented. The second is that administrative agencies tend to take on a life of their own and seek more jurisdiction. On balance, it is unlikely that any very aggressive moves will be made to establish new administrative dispute resolution institutions mainly because of conservatism in the plaintiffs' bar and current public hostility to growth in government. This suggests that attention be focused on judicial dispute resolution methods.

Judicial methods for handling disputes that do not fall into the first or second category should be different, depending on the size of the dispute. This creates the third and fourth categories.

The third category of disputes involves what has come to be known as "small claims." These are claims in which the social or party costs are too great⁶¹⁸ relative to the size of the claim to permit them to be resolved through a method that requires attorney participation. Dispensing with the need for attorneys implies certain procedural characteristics that generally are represented by small claims

618. The American Bar Association has defined "small claims" cases as those "in which the amount in controversy is so small that the parties would not ordinarily employ counsel." ABA STANDARDS, *supra* note 430, § 275. For a discussion of small claims courts and their use in the United States, see notes 475-505 and accompanying text *supra*.

court procedures. The ABA Standards⁶¹⁹ represent a useful baseline from which to evaluate such procedures, and the 1977 national study of small claims courts⁶²⁰ includes additional useful reform proposals. In particular, attention should be given to greater use of evening and weekend hours for court operation,⁶²¹ and to the problem of appeals.⁶²²

If state constitutional provisions inhibit direct limitations on the right to a *de novo* jury trial, statutory changes or rule modification should be made to permit appellate review of an electronically produced "record,"⁶²³ or to permit the decision of the small claims tribunal to be introduced as evidence before the jury in a subsequent *de novo* trial.⁶²⁴

Questions also continue to exist regarding the identity and qualifications of small claims tribunal decision makers. Good results apparently are obtained with the use of lawyer-arbitrators to supplement small claims court judges,⁶²⁵ and impressionistic evidence suggests that the absence of a law degree is not necessarily a serious

619. Section 2.75 proposes a special procedure for use in small claims courts. ABA STANDARDS, *supra* note 430, § 2.75.

620. J. RUHNKA & S. WELLER, *supra* note 237.

621. Both the ABA Standards and the National Center Study propose adding evening and weekend hours for small claims trials in order to eliminate plaintiffs' absences from work and thereby reduce the costs to individuals of litigating in small claims courts. ABA STANDARDS, *supra* note 430, § 2.75(f), J. RUHNKA & S. WELLER, *supra* note 237, at 194-95.

622. Most states which have small claims courts also provide either for a review of the decision by a trial *de novo* or a review of the record. J. RUHNKA & S. WELLER, *supra* note 237, at 159. The 1977 study discusses the relative advantages and disadvantages of these two types of appellate review. *Id.* at 155-61. Several courts, however, try to limit appeal to keep the small claims process simple and inexpensive for all participants. *Id.* at 160. The ABA has suggested that appellate review should only be allowed where "questions of law certified by the trial judge as being of general significance" are concerned or where leave is granted by the appellate court. ABA STANDARDS, *supra* note 430, § 2.75(g).

623. The 1977 study recommended the Wyoming procedure, in which the cassette recording of the small claims trial was sent to the district court when a party appealed. J. RUHNKA & S. WELLER, *supra* note 237, at 160. The authors explained the procedure followed in Wyoming as follows:

The reviewing court listened to the recording of the trial, checked the pleadings and summons, the list of witnesses testifying, and any exhibits. If the district court felt the trial and decision was sound, the parties and court were notified. If they found problems, then a trial *de novo* was granted.

Id.

624. See note 505 *supra*. For a discussion of the use of recorded records on appeal, see J. RUHNKA & S. WELLER, *supra* note 237, at 159-60.

625. Lawyer-arbitrators try small claims cases in Minneapolis, Manhattan and Harlem. See J. RUHNKA & S. WELLER, *supra* note 237, at 143. On the whole, the National Center found these attorneys competent and effective in working out agreeable settlements between the parties. *Id.* at 144. For a discussion of the alternatives to the use of judges at small claims trials, see *id.* at 143-47.

impediment to effective performance of judge duties.⁶²⁶ The dollar threshold is problematic for disputes in the third category. Typical limits are in the \$2000 range,⁶²⁷ and this seems sensible, in light of average attorney costs of \$500 and upwards.⁶²⁸ A lower threshold would give the parties an incentive to refer to more complex dispute resolution methods when their claims involved disproportionate attorney's fees. A high threshold, however, might force litigants to refer major disputes to a procedure that is too simplified for their needs. In either case, the result is undesirable.

The fourth category of disputes includes "civil cases in which the amount in controversy is substantial enough to make assistance of counsel advisable, but sufficiently modest that litigation cost is a major factor in prosecuting or defending them."⁶²⁹ The ABA standards provide a good starting point for dealing with these types of claims. In particular, some form of judicial reference is attractive. The Philadelphia common pleas arbitration model works well. In jurisdictions where this model is not attractive, some form of reference to screening panels or "parajudges" would be appropriate.

Two open issues still need to be addressed respecting the handling of fourth category disputes: appeals and discovery. Appeals can frustrate the cost and the time saving objectives of specialized dispute resolution methods for fourth category disputes. The rate of appeal for de novo trial is low in Philadelphia Common Pleas Court, but it is high in the Eastern District of Pennsylvania and in the California arbitration system. If the problem of state constitutional guarantees of jury trial can be avoided, one way to deal with the appeal problem is to generate a low-cost electronic record of the reference proceeding and to limit appeals to a review of the record for manifest legal error or factual decisions unsupported by the evidence. If jury trial guarantees are a problem, then statutory or rule changes should be made to permit introduction of the initial decision into evidence before the jury in a subsequent de novo trial.

The literature does not identify discovery as a particular problem in the use of reference alternatives.⁶³⁰ Nevertheless, permitting

626. *Id.* at 144.

627. The ABA's procedure for small claims is intended to cover cases where the amount in controversy is between \$0 and \$1000. ABA STANDARDS, *supra* note 430, § 2.75. For a compilation of claim limits in jurisdictions around the country, see J. RUHNKA & S. WELLER, *supra* note 237, at 201-13 (app. A).

628. Where no fee-charging attorney was employed, the costs to most litigants was less than \$25 per case. J. RUHNKA & S. WELLER, *supra* note 237, at 91.

629. ABA STANDARDS, *supra* note 430, § 2.74. For a discussion of standard 2.74, see notes 601-04 and accompanying text *supra*.

630. In the cases on which I have sat as an arbitrator in the Philadelphia Com-

ordinary discovery in this category of claims poses the threat that cost burdens and delay can be increased at the initiative of one of the parties in a manner compatible with the basic objective of a specialized procedure for this category of cases. Accordingly, more attention needs to be given to the amount and scope of discovery that should be permitted in advance of the reference hearing. One possibility is to prohibit depositions, which are the most expensive form of discovery ordinarily used in this category of disputes, and to limit the number of interrogatories that could be exchanged. The recent California experiment suggests that such limitations can have substantial cost reducing effects.⁶³¹ Collateral proceedings to compel discovery could be avoided by permitting the drawing of adverse inferences at the reference hearing against the party declining to cooperate in discovery.

Whether or not any of these recommendations is adopted, judicial reform is underway. More purposeful use of pretrial conferences, and greater use of consensual arbitration and mediation and of reference on an ad hoc basis is desirable. These are contemplated by the recent changes in the Federal Rules of Civil Procedure, which undoubtedly will be copied by the state court systems, as appropriate.

D. *Politics and Practicality of Change*

The history of Anglo-American dispute resolution institutions should not lead anyone to suppose that a neat package of proposals will be accepted in any jurisdiction, supplanting existing institutional arrangements. Rather, it is likely that new institutions and procedures will be superimposed on old ones, filling the interstices sometimes and overlapping sometimes. This form of development has much to recommend it in terms of acceptability and perceived legitimacy.

Self-interest is likely to further some changes and to inhibit others. Justice Neely has made some astute observations about the politics of judicial reform.⁶³² It is not an issue that captures the public imagination because most citizens do not anticipate becoming involved in civil litigation.⁶³³ This lack of public involvement magnifies the influence of interest groups that are interested in dispute resolu-

mon Pleas mandatory arbitration program, relatively little discovery had been attempted before the arbitration hearing. In more than half the cases, there had been no discovery at all. In about a third of the cases, a few interrogatories had been served and answered.

631. For a discussion of the California experiment, see notes 306-13 and accompanying text *supra*.

632. See R. NEELY, *supra* note 1.

633. *Id.*

tion: the bench, the bar, and institutional defendants such as insurance companies. The direction and pace of change can be anticipated to some degree by considering the probable position of each of these groups on the major recommendations set forth above.

Movement away from adjudicatory processes for dealing with interest disputes does not diminish the influence or earning power of any of these groups. The bench, at least, may favor getting judges out of the business of dealing with complex interest disputes with ill-suited procedures. On the other hand, it is difficult to identify any group likely to give energetic support for broad-based reform of interest dispute resolution procedures, except perhaps in the administrative area, where the Administrative Conference already has given limited endorsement to the negotiated rulemaking idea.⁶³⁴ Outside of federal administrative law, what is likely is piecemeal experimentation, with special procedures for plant and hazardous waste disposal siting disputes, as has already occurred in Massachusetts.

New private procedures for resolving rights disputes between interdependent parties can benefit from momentum that already has developed because of promotion by the AAA, EnDispute, Judicate and other private groups. The bar can be expected to support, or at least not to oppose, such measures, once it becomes sufficiently clear that legal representation will be required for participation in these procedures. In addition, these procedures may enjoy a measure of support from the bench because of the growing practice of using retired judges as decision makers. Institutional defendants are likely to support innovation in this area because of the lower cost and greater convenience of specialized, party-designed dispute resolution procedures.

Change is likely to come slowly respecting the third category of disputes — those that ought to be resolved in small claims forums.⁶³⁵ The bar is unlikely to take much interest in promoting procedures that do not require lawyers, and the bench generally is more interested in reforming the courts of general jurisdiction. Nevertheless, as long as the dispute resolution dialogue gives attention to this category of dispute, change in this area may occur as a collateral result of change in other areas.

Substantial change already is occurring with respect to the

634. See Harter, *supra* note 108. The Harter article was premised on a report prepared for the Administrative Conference of the United States. *Id.* at 1. Based on the report, the conference recommended "Procedures for Negotiated Rulemaking." *Id.* (citing Recommendation No. 82-4, 47 Fed. Reg. 30,701-10 (1982)).

635. For a discussion of the small claims courts and their functional problems, see notes 475-505 and 620-30 and accompanying text *supra*.

fourth category of disputes. The Federal Rules of Civil Procedure have been amended,⁶³⁶ and considerable experimentation is going on with court-annexed arbitration and mediation, as the other symposium papers demonstrate. There is little reason that any of the major groups should oppose changes in this area. The greatest risk is that of intellectual confusion resulting in poorly designed and implemented and excessively promoted mechanisms that will fail. It is desirable for everyone to be as precise as possible about the goals of new programs and the types of disputes with which they are intended to deal.

I hope this article has made a modest contribution toward promoting clarity of analysis.

636. *See* FED. R. CIV. P. 26(a)(amended 1983)(amended to reduce excessive discovery); 26(b)(amended to give court authority to reduce amount of discovery); 26(g)(certification requirement added to impose on attorney duty to engage in only responsible pretrial discovery).