

BOSTON COLLEGE LAW REVIEW

VOLUME XXIV

MAY 1983

NUMBER 3

JUSTICIABILITY: A THEORY OF JUDICIAL PROBLEM SOLVING†*

THOMAS BARTON**

Much has been written about adjudication, almost all of it describing a thing in isolation, a detached procedure for determining legal rights and duties. This article attempts to discover something about adjudication by looking at the concept of justiciability. "Justiciability" is here defined as the many relationships between adjudicative procedures, and the problems such procedures are asked to resolve. So understood, justiciability offers an original perspective from which the workings, capacities, and limitations of adjudication can be better explored.

The article begins by creating a theoretical framework for understanding the structure of problems in general, procedures in general, and the major links between problems and procedures. The assumptions are made and developed, (1) that quite apart from their differing content, problems differ from one another in ways that can be described by eight structural variables; (2) that procedures for solving problems evolve over time in ways best suited to solving such problems; (3) that procedures can be described according to eight structural variables that are closely associated with the eight problem variables. Every problem possesses structural characteristics allowing the problem to be best resolved by a procedure employing predictable features. Conversely, every social procedure for solving problems is made up of features that cope best with problems possessing a certain predictable structure.

Once such a general framework is developed, any given procedure can be

† Copyright © 1983 Thomas Barton.

* This article is an adaptation of a dissertation submitted to the Faculty of Law, Cambridge University. I wish gratefully to acknowledge the patient, tolerant and constantly helpful assistance of my supervisor, David Fleming. The recommendations of the two examiners of the thesis, Professor W. A. Jolowicz of Trinity College, Cambridge and Professor C. M. Campbell of Queen's University, Belfast were also very useful, and have been incorporated in this version. I wish to acknowledge also three former teachers whose influence has been substantial: Rudolph Schlesinger, now of Hastings Law School; Herbert Morris of UCLA Law School, and Guido Calabresi of the Yale Law School.

** Associate Professor, West Virginia University College of Law; Ph.D. Cambridge University, 1982; J.D. Cornell Law School, 1974; B.A. Tulane University, 1971.

described and evaluated according to its relationships to the problems it is asked to solve. The remainder of the article is so devoted to describing and evaluating adjudicative procedures. Adjudication is first characterized by the eight procedure variables. Next, the ideal structure of a problem to be solved by adjudicative procedures is described. Where adjudication is asked to solve problems that possess structures that deviate from such ideal, the problem may be described as bearing a "dissonant" relationship with adjudication. Judges respond to such dissonance by refusing to hear the problem, or by somehow modifying the problem so as to conform its structure to the ideal structure, or by adapting the adjudicative procedures so as to conform with the structural demands of the problem. The validation of this theory of justiciability lies in its power to explain, and perhaps even predict, the *specific* sorts of problem modifications, or procedural adaptations, that occur when a wide diversity of problems displaying a variety of structural dissonances with the features of traditional adjudication are nonetheless accepted for resolution within the legal system.

I. A THEORY FOR AN ELUSIVE CONCEPT

A general description and explanation of justiciability has never been published, perhaps because of the "notorious difficulty" of defining the concept.¹ Stating an acceptable definition is difficult because justiciability seems as much a judicial tool as a legal doctrine. As Justice Frankfurter wrote,

Justiciability is of course not a legal concept with fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision . . . and the actual hardship to the litigants of denying them the relief sought.²

Frankfurter is correct and his statements have implications for the methodology that must be used to understand justiciability. Justiciability cannot usefully be examined solely within the confines of the legal system. The concept must be embedded within a larger theory of problem solving. This limitation in method arises from two peculiar properties possessed by justiciability. First, as the term traditionally is used, justiciability is definable only by reference to itself; and second, justiciability is unusually protean, that is, it manifests itself in many different forms.

Justiciability is, in effect, a closed system of judges regarding themselves.³

¹ Marshall, *Justiciability*, in OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 265, 269 (A.G. Guest ed. 1961).

² *Poe v. Ullman*, 367 U.S. 497, 508-09 (1960).

³ L. TRIBE, AMERICAN CONSTITUTIONAL LAW 53 (1978). Professor Lawrence Tribe has written:

Justiciability doctrine is peculiarly self-regarding. In deciding whether a case or controversy exists, . . . courts decide whether they would be acting appropriately if they

That is, "justiciability" as described by judges consists of statements by judges about the propriety of judges making statements about anything, presumably including the propriety of making statements. It is impossible to prove, using only judges' statements about the propriety of judges making statements, which statements are in fact made appropriately. No one statement can be determinative since any such statement may itself have been made inappropriately. Hence, justiciability can be fully understood *only* by adopting a perspective beyond, rather than within, the closed system. Such a perspective is attained first by employing non-legal language, avoiding such terminology as "rights," "duties," "obligations," and "causes of action."⁴ Second, the broader perspective is achieved by avoiding reference to what judges have

resolved the question which the litigants press upon them. [A description of justiciability], therefore, is in an important sense the description of an institutional psychology: an account of how the . . . courts . . . view their own role The concept of justiciability is thus not exhausted by the set of specific limitations which the Court derives from it.

Id. Tribe's final sentence, the conclusion that justiciability cannot be proven by examining what limitations judges have said to exist, follows logically from his description of justiciability as "self-regarding."

* The need to transcend legal language in discussing justiciability underlies Professor Marshall's conclusion that existing notions of justiciability are largely tautological. Marshall, *supra* note 1, at 278. He is unquestionably correct in this conclusion. The textbook answer to the meaning of "justiciability" is: a controversy respecting some "legal interest," or some "legal right," or even some "legal problem." Such answers, says Marshall, ultimately come to nothing because virtually *any* dispute can be couched in legal language. *Id.* Identification of a "legal interest" or "legal right" or "legal problem" is therefore merely a conclusion. Affixing the label "legal" to a problem is *not* a reliable criterion for what is actually justiciable. Marshall writes:

No dispute or issue is inherently justiciable or suited to judicial solution. The supposition that it might be involves the assumption that a dispute can be clearly contrasted with its method of settlement and described independently. But once an issue or contest of interests is defined it is impossible to avoid mentioning or implying at least some indication of what constitutes winning or losing (*e.g.* that the contest is not to the death or one for physical combat) and therefore indicating some limitations on procedures. Yet once the description of the issue is filled out the contrast between the issue itself and its mode of settlement crumbles.

Id. Marshall's tautological circle, therefore, is drawn as follows: An issue is justiciable if it concerns legal interests; but any issue concerns legal interests if a judge describes the issue in such terms; hence an issue is justiciable if a court hears the issue, *i.e.* those issues are justiciable that are adjudicated. Professor Summers suggests the escape from this tautology:

Undoubtedly an issue can be formulated in terms which suggest the appropriateness of a specific mode of settlement. But this same issue may also be formulated in terms suggesting other modes of settlement. . . . [Marshall's] analysis does not impair the defensibility of a thesis that some disputes are 'inherently' suited to court solution. Such analysis shows only that . . . it is *possible* to indulge in question-begging by describing an issue in, for example, 'judicial' terms, and then proclaiming that the issue is, 'by its nature' suited to judicial solution.

Summers, *Justiciability*, 26 MOD. L. REV. 530, 532 (1963).

The concept of justiciability is, for Summers, no more inherently tautological than other concepts. As both Summers and Marshall no doubt realize, Marshall's tautology is avoided if one assesses justiciability with no reference to legal language. It is for that reason that methodologically this paper proceeds by a theory that makes no reference to legal notions or legal categories.

stated or held regarding justiciability. Such an approach better develops justiciability as a tool to assess what sorts of problems are, and are not, suitable for adjudication.⁵

In addition to being self-regarding, justiciability is unusually protean. A satisfactory theory of justiciability should therefore somehow account for a wide array of judicial behavior and legal doctrine. Specifically, the theory should suggest why, and in what sort of cases, judges: (1) refuse outright to hear a particular issue; (2) "functionally refuse" to hear a case, perhaps by invoking one of the "prudential doctrines" of lack of standing, mootness, "ripeness," or advisory opinion; (3) hear a case, but employ a rule or standard that allows the court to avoid making any meaningful inquiry; (4) hear a case, but appear to modify the issue to suit their purposes; and (5) hear a case, but in doing so seem to step out of their traditional role of adjudicators. Such a diversity of phenomena can be systematically explained only at a fairly high level of abstraction. If the above practices can be seen as forming an overall pattern, then the relationships between adjudicative procedures and the problems it is asked to solve will have been described. The analysis holds many implications for whether and how judges in the future deal with certain sorts of problems. The theory also could be useful in the design of alternative dispute resolution techniques.⁶

A. *Eight Variables that Describe Problems*

Virtually no studies of social phenomena have attempted to differentiate problems according to characteristics other than the specific content of the

⁵ The distinction between justiciability as a statement of fact and justiciability as a statement of assessment, was first made by Marshall. Marshall, *supra* note 1, at 267, 268. Any descriptive approach based on finding such criteria as "cause of action," or "jurisdiction" or "legal controversy," by which cases are actually adjudicated or not adjudicated, ultimately will be rooted in categories of thought defined by the legal system. So to avoid legal language means not only to seek a new vocabulary, but also to draw evidence or information underlying the theory from extra-judicial sources.

⁶ Another advantage to the extra-judicial approach to justiciability used in this article is that a purely descriptive theory of justiciability can have little practical application. Current practice concerning which cases are heard by judges and which cases are refused may be undesirable or inefficient, and only a more detached theory can suggest directions for change. Not all resulting prescriptions, however, would necessarily be levelled at judges. The sets "issues actually adjudicated" and "issues suitable for adjudication" may diverge for several reasons, only a minor one being that the judge has mistaken the boundaries of justiciability. A more important cause of error is one identified by Marshall: that issues unsuitable for adjudication are foisted on the courts by the legislature. Marshall, *supra* note 1, 268. As a practical matter, legislatively imposed jurisdiction over specific issues can hardly be avoided.

Most commonly, however, the sets "issues actually adjudicated" and "issues suitable for adjudication" diverge because an issue, although recognized as unsuitable by the judge, is nonetheless heard because to refuse to hear the issue would in effect relegate the dispute to an alternative settlement procedure that is violent, or disruptive, or inaccurate, or grossly unfair. About such divergences not much can be said. Certainly the legal system would operate more efficiently if judges refused to transgress the boundaries of justiciability. Most would, however, ap-

problems themselves.⁷ In the prevailing sociological and psychological perspectives, all problems arguably are structurally identical.⁸ From the perspective of an institution called upon to resolve a problem, however, problems are not all alike. A variety of structural characteristics, quite apart from content, can be shown to exist.

It is crucial to a theory of justiciability that such structural variables be identified. Only by so differentiating problems can one evaluate which sorts of problems are, and are not, suitable for resolution by adjudication. By piecing together distinctions drawn by various legal scholars, this article proposes a set

plaud the willingness of the judges to decide what are almost invariably difficult cases. Any resulting inefficiency is simply a reflection of imperfect skill or imagination in the social construction of decisional procedures.

⁷ The single exception uncovered is Fuller & Myers, *Some Aspects of a Theory of Social Problems*, in 6 AM. SOC. REV. 24 (1941). The authors offer a threefold classification of social problems on the principle of different levels of relationship to social values:

At the first level we have what we may call the *physical* problem. The physical problem represents a condition which practically all people regard as a threat to their welfare, but value judgments cannot be said to cause the condition itself. This is perhaps best demonstrated by such catastrophic problems as earthquakes, hurricanes, floods, droughts, locust plagues, and so forth. That these are 'serious' problems from the standpoint of the people which they affect, we can have no doubt. However, we may raise the question whether or not they are 'social' problems, since they do not usually occur because of conflicts in the value-scheme of the culture. . . . At the second level, we have the *ameliorative* problem. Problems of this type represent conditions which people generally agree are undesirable in any instance, but they are unable to agree on programs for the amelioration of the condition. . . . Crime and delinquency fall in this category. . . . In contrast to the physical problem at the first level, the ameliorative problem is truly 'social' in the sense that it is a man-made condition. By this we mean that value judgments [such as mores of conspicuous consumption, and a belief in retributive punishment] not only help to create the condition, but to prevent its solution. . . . At the third level we have what we will call the *moral* problem. The moral problem represents a condition on which there is no unanimity of opinion throughout the society that the condition . . . is a problem and thus many people do not feel that anything should be done about it. With the moral problem, we have a basic and primary confusion in social values which goes much deeper than the questions of solution which trouble us in the ameliorative problem.

Id. at 27-80.

This is a good start but is confined to one variable, namely social values. This variable is incorporated as one of the eight structural variables set out below, but there are others yet further divorced from specific content that are equally important.

⁸ A. NEWELL & H. SIMON, *HUMAN PROBLEM SOLVING* (1972), describe problems in two general categories: the set-predicate representation and the search representation. These two representations of problems suffice for them, although they do not claim the categories are exclusive:

We need not make special provision for separate representation for each particular problem. Instead, we can define representations that cover large classes of problems . . . the *set representation* and the *search representation*. We have no guarantee that all problems can be represented in one of these two forms.

Id. at 73.

of eight variables by which problems can be described.⁹ The variables are grouped into those speaking primarily to the difficulty of the problem, to its setting, and finally to any social concerns associated with the problem. Only the two "social concerns" variables are directly related to the specific content of the problem. Each of the eight structural variables is not a binary "have-have not" property, but rather is an attribute continually changing in degree between two polar opposites. Along such continua exist infinite "mixes" of relative influence of the two opposing qualities. The eight structural variables are represented at Appendix A. The remainder of this section is an explanation and justification of each variable.

1. The "Difficulty" of the Problem

a. *Problem Variable A1: Whether the Problem is Composed of "Simple" or "Interactive" Variables*

A given problem is easier to the extent it is composed of "simple" variables, more difficult to the extent its variables are "interactive." These terms do not describe the content of a problem, but rather describe the relationship between or among the variables that comprise a problem. A "simple" problem is, for example, describing an apple. The variables making up the problem include the degrees of "redness," "crispness," "juiciness," and "ripeness." Such variables are simple because no variable influences any other variable. The degree of "redness" has no bearing on the degree of "crispness" or "juiciness." Each property could theoretically be maximized until one reaches the Platonic "apple." An "interactive" problem, in contrast, is one where trade offs exist among the variables that comprise the problem. For example, if the task were to decide how many apples to produce in a given season, the salient variables of "costs of production," "demand," "revenue," "market share," and "profits" could never all be maximized. As costs go up, for example, profits are likely to go down. Each of the variables interacts in some way with all the others, and a proper solution to the problem is an optimization that considers all the intricate connections. No variable can validly be considered in complete isolation from the others.¹⁰ All problems exist somewhere on a continuum between consisting entirely of simple variables and

⁹ Other variables could be listed, but in the interest of simplicity these eight are chosen as the most revealing.

¹⁰ One commentator has termed problems whose variables interact "polycentric" problems. M. POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 170-200 (1951). The late Lon Fuller adopted this phrase in several of his writings. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978); Fuller, *Adjudication and the Rule of Law*, 1960 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1. Polycentricity, says Fuller, is distinct from complexity. A problem may contain numerous and difficult variables, and yet the relationship among such variables may be simple. Second, polycentricity is not a matter merely of a multiplicity of affected parties; a polycentric problem can arise between two parties. *Id.* at 4.

consisting entirely of interactive variables. No matter where on the continuum a problem is found, however, it can be solved by the application of some combination of rational principles and intuition.¹¹

b. *Problem Variable A2: Whether the Decisional Criteria of the Problem are Well-Established or, Rather, are Unknown or Disputed*

Any problem is easier to the extent that the criteria for its solution are well-established. In one rather crude sense, this point is self-evident: solutions come easier where governed by precise, well-known rules. The point is also true, however, in a more subtle sense. Even where no rules specify a particular outcome, solutions come easier where two things are well-established: (1) what considerations are relevant; and (2) what weight each relevant consideration is generally given in determining the overall solution. An example might be found in creative cooking: no rules dictate particular recipes, but the good chef knows the relevant considerations of taste and appearance, and knows what weights or proportions of each ingredient are likely to achieve a pleasing result. Moreover, the chef is aware of what amount of any single ingredient is likely to result in a disastrous final product.

Where the relevant criteria for solving a problem are unclear, or the appropriate weight to be accorded each criterion is unclear, a problem necessarily becomes complex.¹² This is similar to the manner in which a problem becomes

¹¹ Among polycentric tasks, their difficulty and therefore their appropriate method of solution vary. For certain tasks, such as understanding the forces between girders of a steel bridge, the connections between variables are so well understood that all interactions can be mathematically described. For other tasks (especially "economic tasks" (Polanyi, *supra* note 10, at 173-75)) the relationships between variables are susceptible only to a series of well-informed approximations. For yet other problems, the interactions are "altogether incomputable." Such highly interactive problems cannot be solved "deliberatively," that is, through the imposition of an externally-formulated order. Rather, such extremely interactive problems can only be resolved "spontaneously," that is, by allowing any internal forces acting among the variables to play themselves out. *Id.* at 154-57, 176. See also *infra* notes 38-48 and accompanying text. Polycentric problems are not necessarily without rational solution. Rational principles can clearly guide the solving of the first sort of polycentric task mentioned above, namely the building of a steel bridge. To a perhaps less formal degree, rationality can guide the sort of solution that must proceed by well-informed hunches and approximations. Fuller, *Adjudication and the Rule of Law*, *supra* note 10, at 4.

¹² Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978). To illustrate this point, Eisenberg discusses the problem of selecting a college golf team. Choosing such a team, Eisenberg is careful to point out, is not a polycentric problem because "golf is played on an individual basis and selection of the team therefore entails little or no interaction between choices." *Id.* at 425. Nevertheless the problem is difficult. This is so for two reasons. First, because the relevant criteria are somewhat doubtful. Should one consider such factors as experience, desire, intelligence, and compatibility? Second, the problem is difficult because:

What is more important, even if all the relevant criteria could be listed, no criterion would be authoritative in the sense that it would trump other criteria, or even in the sense that it carried an objective weight in relation to others. . . . If in these cases a single criterion could be made dispositive, it would be possible to determine rights

more complex as the number of interactive variables increases. The extent to which the criteria are well established differs, however, from this first variable in that the criteria can change greatly over time as a function of both the decisional history of the particular problem and the manner in which the problem is to be settled. Any instance of "first impression" in adjudication, for example, will be at the difficult end of this variable because the decisional criteria will be relatively unknown. As precedents build, the problem will gradually move to the variable's easier end. Such movement cannot occur with respect to the first variable; the simplicity or interaction of the variables making up the problem remain constant regardless of decisional setting.¹³

c. *Problem Variable A3: Whether Decisional Information or Evidence is Based on Past, or Future Events*

It seems both important and self-evident that it is easier to solve a problem where the decisional criteria look to past events rather than future events. No doubt every sort of datum upon which a decision is based is subject to some uncertainty. Yet as flawed and interpretative as historical investigation may be, it surely is more often accurate than conclusions based on predictions.¹⁴ Future-based, and therefore more difficult, problems are of two sorts: First, those that require an unalterable present action, the accuracy of which cannot be judged until the occurrence of one or more future events. Second, there are "planning" problems that set a goal more or less extended into the future, and then attempt constantly to manipulate the environment in order that at the specified time the goal will have been met. Both sorts of problems are generally more difficult than problems which can be solved by bringing to bear historical information.

2. The "Setting" of the Problem

a. *Problem Variable B1: Whether the Relationship of the Parties is "Simplex" or "Multiplex"*

The terms "simplex" and "multiplex" have been used to describe relationships between parties.¹⁵ A "simplex" relationship between two parties is

by the application of that criterion. . . . The same might also be true if all criteria could be objectively weighed and choices were not interdependent.

Id.

¹³ The simplicity or interactiveness of a problem remains constant over time, but solving an interactive problem no doubt becomes easier as the decision-makers gain more experience coping with the problem.

¹⁴ Predictive techniques are probably furthest advanced in the area of technological forecasting. A wide variety of methods have been used to predict what innovations will be made in industry and science in the next 50 years. No one method is wholly satisfactory, and the record of prediction on such matters as population and natural resource use and availability is not good. See R. C. DORF, *TECHNOLOGY, SOCIETY AND MAN* 289-307 (1974).

¹⁵ M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN*

best exemplified by strangers joining in a discrete transaction. The sole nexus between such persons is the content of the transaction. Where a problem arises in a simplex relationship, inquiry is easily confined to what was said or done pursuant to the transaction. At the opposite pole are "multiplex" relationships, those that either involve a few ties that endure over time, or those that involve complex ties in which the persons are linked in a variety of ways. Such multiple-tie relationships may or may not endure over time, although most are quite long-standing. Multiplex relationships are typified by the relationships that exist within the nuclear family. Problems that arise in a multiplex relationship differ from those that arise in a simplex relationship in at least three respects: First, "problems" are not abnormal or unexpected occurrences in a multiplex relationship. Indeed, the role expectations that evolve in such relationships may grow from an anticipation of problems.¹⁶ Second, when a problem in a multiplex relationship comes to the attention of third parties, inquiry is not easily confined to the incidents of the immediate dispute. A valid or helpful decision normally requires a fuller knowledge of the relationship and its history. Third, whereas simplex parties can fairly easily adopt adversarial roles to solve a problem, it may be counterproductive to problem solution, or harmful to the relationship, to require multiplex disputants to become adversaries before a third party.

The relationship of the parties does not necessarily affect the difficulty of their problem or its solution. In fact, the richer bonds between multiplex parties may make finding a solution much easier than in a simplex relationship where the parties are tied by a single transaction. Yet, given the likely inadequacy of adversarial proceedings, the existence of a multiplex setting does perhaps call for the employment of different institutional techniques for problem solving, and therefore the variable is important.

b. *Problem Variable B2: Whether the Dispute is "Private" or "Public"*

The distinction between "private" and "public" disputes is important, but becoming increasingly difficult to articulate and apply. One rather formal approach¹⁷ to the distinction suggests that a "private" dispute is "defined by the absence of any initial participation by public authorities."¹⁸ A private problem may become so intense that state intervention, e.g. by the courts, is requested. Still, such a dispute remains private. Under this approach,

RHODESIA 19, 20 (1955). The substance of Gluckman's distinction has been used by others, most notably in the important article of MacNeil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974).

¹⁶ MacNeil, *supra* note 15. See also Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 5, 7 (1969).

¹⁷ Friedman, *The Functions of Trial Courts in the Modern World*, paper presented to the Conference on the Sociology of the Judicial Process, Bielefeld, Germany, 1973, quoted in AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR 6 (S. Goldman & A. Sarat, ed. 1978).

¹⁸ *Id.*

"public" disputes are those in which the State is a disputant. Public disputes therefore can be of two types: first, those initiated by the State where it is attempting to enforce laws; and second, those wherein the State is defending a challenge made to its overall authority or the propriety of one of its actions.¹⁹

Difficulty with this approach arises, however, in the specific context of Anglo-American adjudication. Many cases now being adjudicated are an amalgam of private and public interests; typically, such hybrid cases involve the application of government regulation to particular circumstances, or the attempt by one private party to constrain the activities of another based upon constitutional considerations or statutory policies.²⁰

Yet maintaining some form of distinction between public and private disputes is important. The existence and nature of State involvement may constrain the validity or effectiveness of certain institutional techniques for solving the dispute. For example, very strict standards of evidence, proof, and consistency may be considered necessary when resolving State-initiated prosecutions. Or, since State-defendant disputes often involve decisions about the proper role of the citizen vis-a-vis the State, it may be advisable to incorporate decisional techniques that use wide publicity and public participation, fluid standards of relevance, and non-final judgments. Alternatively, both such sorts of techniques for solving public disputes may be unacceptable or simply too burdensome for use in solving purely private disputes.

c. *Problem Variable B3: Whether Private Resolution of the Problem is Feasible or Infeasible*

Whether the parties could or could not feasibly resolve their problem amongst themselves is important, not so much to decide *how* an institution might best approach the problem as to decide *whether* such an institution should even attempt a solution. Most commonly the parties to a dispute have sufficient access to one another that they could, at least theoretically, resolve their differences privately. Occasionally, however, obstacles block such private resolution. Consider, for example, the case of a factory that is emitting large amounts of ash and soot, most of which falls on the properties of 1,000 surrounding homeowners. A private resolution of this pollution problem is very difficult. If according to law the factory is entitled to emit the smoke regardless of effects on neighboring landowners, the pollution will cease only if the 1,000 surrounding landowners negotiate an agreement with the factory owners whereby the factory stops polluting in exchange for the payment of compensation. The first obstacle to this private resolution is organizational: how can the 1,000 homeowners coordinate their activities? The second obstacle is economic: how are the homeowners to share the costs of compensating the factory? This prob-

¹⁹ *Id.* at 6, 7.

²⁰ Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

lem is intensified by the "free rider effect:" invariably some of the 1,000 homeowners will refuse to contribute any money, claiming it is simply not important to them to have a yard free of soot and ash. Their real strategy is to avoid contributing to the collective purchase of the factory's right to pollute. Obviously, if too many homeowners adopt this strategy, the costs to the remaining homeowners will be too high, and the purchase of the entitlement will be frustrated.²¹ Practically speaking, private resolution is infeasible in this case. To be solved, the dispute must be resolved by an outside person with sufficient power to compel payments by all of the homeowners.²²

Where private resolution is infeasible, decisional institutions may feel a special urgency to hear the dispute. Conversely, where such private resolution is feasible, the institution will erect barriers to entry to prevent strain on institutional resources.

3. The "Social Concerns" Associated with the Problem

a. *Problem Variable C1: Whether Social Consensus or Dissensus²³ Exists Regarding the Proper Outcome of the Problem*

For few problems can one identify the existence of public consensus or dissensus regarding the proper outcome. Problems that are quite narrow, or technical, or novel are generally not within the public domain as they are not widely understood and generally little debate therefore takes place. For problems that are within such public domain, consensus or dissensus can vary both by proportion of shared opinion, and by the intensity of commitment to such opinions. A high consensus as to the appropriate outcome could affect decisional institutions in at least three ways. First, the individuals making up the institution may be predisposed toward the consensus outcome. Second, a deci-

²¹ Similar obstacles would prevent a private resolution where the factory wants to pollute (because pollution controls would be very expensive or impossible), but the law gives the homeowners (through nuisance law, for example) the right to be free of such ash and soot. The private resolution of this case would entail the factory buying up the individual rights of the 1,000 homeowners. Even if the practical obstacle of approaching 1,000 persons is overcome, the factory would face the economic phenomenon of the "hold-out." As soon as any single homeowner realizes that the factory is buying up the rights of his neighbors, and realizes further that the factory cannot emit the smoke unless it buys up *all* of the 1,000 "rights," the single homeowner may well "hold-out" for an impossibly high price for his or her single right. Again, if too many homeowners behave in this way, the private resolution will be frustrated.

²² For a useful introduction to the concept of externalities and "free rider" and "hold-out" considerations, see W. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 8-15 (1979). Private resolution infeasibility also may occur because one disputing party cannot identify or deal with the persons with whom such a private resolution must be negotiated. Examples of this include disputes against unborn heirs, or against incompetents, or cases wherein a party wishes to have recognized certain rights *in rem*.

²³ "Dissensus" is here defined as disagreement within a group. The dissensus can be measured by the relative proportions of those who hold various opinions on a topic, and/or by the intensity with which such opinions are held. No attempt is made to differentiate such dimensions when general reference is made to the term.

sion contrary to the social consensus might adversely affect the prestige or perceived legitimacy of the institution. Third, if the remedy for a particular problem requires social cooperation, a decision contrary to consensus risks noncompliance, thereby rendering the institution and its decision ineffectual.

Where sharp dissensus exists as to the proper outcome of a problem, similar effects may obtain. Regardless of outcome, prestige-threatening charges of partiality may be made and remedial implementation may be difficult. Furthermore, the decisional institution is likely to feel pressure against giving a single, final judgment to such a dissensus problem. Rather, the problem is likely to be considered in fragmented form, or to recur in slightly different form with subtle nuances affecting the solutions.

In sum, social consensus or dissensus can affect an institutional decision to hear, or refusal to hear, a given problem. Social consensus or dissensus may also affect the shape of the techniques used to solve the problem, or affect the level of specificity with which institutional decisions are articulated.

b. *Problem Variable C2: Whether Private Resolution of the Problem is Socially Desirable or Undesirable*

Perhaps contrary to intuition, private resolution of disputes is not always desirable. One must inquire by what *means* such a private resolution would proceed. Sometimes a private resolution is effected by self-help, which can take forms that are highly unfair or disruptive.²⁴ Sometimes private resolution is by physical violence, rights being determined by relative might. Even where private resolution is more consensual, it may be unacceptable, as where the parties are grossly disparate in sophistication or bargaining power. Under any of these circumstances, the undesirable prospects of private resolution may pressure a decisional institution to impose its own solutions.

Private resolution is especially undesirable where a problem involves a "tragic choice."²⁵ Choices are tragic where they involve the social allocation of "goods" that entail great suffering or death. When attention is riveted on such distributions they arouse emotions of compassion, outrage, and terror.²⁶ Where a problem involves a tragic choice, the form and justification for a given institutional solution may be affected as well as the decision to hear, or not hear, the problem. Understandably, societies attempt to justify the allocation of suffering and death by referring to "humanistic values which prize life and well-being."²⁷ In fact, such allocations are made by the exigencies of cost, and the caprice of nature. Yet to admit this risks social upheaval. Tragedy befalls the humanist justification, which inexorably succumbs to fate and practicality.

²⁴ See *infra* note 524 and accompanying text.

²⁵ G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

²⁶ *Id.* at 18. For a discussion of the legal treatment of certain of these "goods," see the chapter *The Value of Life* in P. STEIN & J. SHAND, *LEGAL VALUES IN WESTERN SOCIETY* 164-83 (1974).

²⁷ G. CALABRESI & P. BOBBITT, *supra* note 25, at 18.

One example of a tragic choice is the allocation of the use of a kidney dialysis machine.²⁸ Suppose two persons require access to the kidney machine in order to survive, but the machine has the capacity to treat only one person. Suppose private resolution of this problem is perfectly feasible: the patients are both in the waiting room and the hospital agrees to allow one party to buy out the other. A private resolution is manifestly undesirable because: First, society is uncomfortable to learn what life, in this context, is worth in monetary terms. Second, society is uncomfortable in confronting the effects of the existing distribution of wealth: the poorer person presumably will lose this bidding; the question is at what point must he stop?²⁹

Problems involving tragic choices therefore inevitably are referred to institutions for decision, rather than left to private resolution. Such problems, however, place extraordinary demands on the resilience and creativity of such institutions. The allocation must be made, yet it must be made in such a manner that will "preserve the moral foundations of social collaboration. If this is successfully done, the tragic choice is transformed into an allocation which does not appear to implicate moral contradictions. Morally debasing outcomes are averted."³⁰ Hence in the special case of a problem involving a tragic choice, not only is there special pressure on institutions to decide the issues because private resolution is undesirable, but also, great care must be taken in the form and articulated justification of the decision.

4. Summary

This article proposes that the above eight variables represent the most important structural features possessed by all problems. Each such variable affects whether, or how, an institution will approach a given problem. In the next section, decisional institutions are similarly analyzed. The tools will then exist for evaluating how problems and procedures do, and do not fit together.

B. Eight Variables that Describe Procedures

Various jurisprudential and sociological works have attempted to classify decisional procedures.³¹ The classifications made by jurisprudential writers

²⁸ *Id.*

²⁹ G. Calabresi, *Another View of Torts*, lecture delivered at Cambridge University, 1980.

³⁰ G. CALABRESI & P. BOBBITT, *supra* note 25, at 18.

³¹ Synopses of such efforts are given in separate works by two legal anthropologists. See Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW AND SOC. REV. 217 (1973); Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOC'Y 86-91 (L. Nader, ed. 1969). See also L. NADER & H. TODD, *THE DISPUTING PROCESS — LAW IN TEN SOCIETIES* 1-40 (1978). Both accounts of the history of procedural taxonomy reveal a gradual evolution in precision, and also highlight the variety of concepts that have been employed as bases for classifications. Sir Henry Maine and Emile Durkheim were the earliest contributors, each grouping decisional procedures according to a single variable. Maine's famous "status versus contract" (H.S. MAINE, *ANCIENT LAW* (1950) (first published 1861)) distinction was made in the context of family law. Since his time, the distinction has been widely used in other con-

have been more descriptive than aculturally analytical. The shared opinion among such legal writers recognizes that "adjudication is only one among many methods of conflict resolution in free societies. For varying purposes we [also] resort to voting, bargaining, mediation, lotteries, and even restricted private warfare."³²

This article proposes an original classification of decisional procedures, again based on eight variables (see Appendix B). Once again, each variable is conceived as a continuum running between polar opposites. Beyond this formal similarity, however, *each of the eight procedure variables is substantively related to its correspondingly numbered problem variable. Each procedure variable is in a sense an institutional response to its problem variable counterpart. Conversely, each problem variable is in a sense a cognitive and linguistic response to its procedure variable counterpart.* In other words, between similarly numbered problem and procedures variables there exists a form of continuity:³³ a given aspect of a problem will influence the

texts. Together with Durkheim's "repressive versus restitutive" concept, E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (Simpson trans. 1947) (first published 1893), the two dyads still illustrate two alternative yet fundamental approaches. Maine distinguishes systems of family law according to the sorts of problems considered by such systems, and the relationships between the procedures and the parties. Durkheim, on the other hand, is primarily concerned with the shape of the decision, and its larger effects in society. Since their time, many variations on each approach have been devised. Social scientists like B.S. Cohn, Cohn, *Some Notes on Law and Change in North India*, 8 *ECON. DEVEL. CUL. CHANGE* 79 (1959), and Villem Aubert, Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 *J. CONFLICT RESOL.* 25 (1963), have proliferated the classificatory variables in order to account for the variety of decisional institutions that exist both cross-culturally and even within a single society. Cohn describes four variables that distinguish the English legal system from the typical Indian legal system: (1) equality in the eyes of the law; (2) status and contract; (3) importance of the decision; and (4) settlement of the case and only the case. "Norms" and "interests" are the basis of Aubert's work. Beginning with a comparative analysis of these concepts, he constructs two ideal types of decisional systems: an adjudicative model based on "norms," and a bargaining model based on "interests." Aubert's work is a major contribution. Nader suggests that her own data support Aubert. Nader, *supra* note 31, at 87.

Finally, a novel and comprehensive typology of the collective techniques by which society discharges all its functions is offered by Robert Summers. Summers, *The Technique Element in Law*, 59 *CALIF. L. REV.* 733 (1971). His five basic techniques are: the grievance-remedial, the penal, the administrative-regulative, the public-benefit conferral, and the private-arranging. These differ in primary thrust (one is reparative, one prohibitive, one regulative, one distributive, and one facilitative); and in immediate returns (compensation, crime prevention, regulatory compliance, substantive public benefit, and individual self-realization); and in their use of legal resources and extent of reliance on coercion.

³² Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 *J. PUB. L.* 339, 339 (1969).

³³ Fuller has made a similar point in the narrower context of different forms of law and the problems traditionally solved by each such form:

[L]aw and its social environment stand in a relation of reciprocal influence; any given form of law will not only act upon, but be influenced and shaped by, the established forms of interaction that constitute its social milieu.

Fuller, *supra* note 16, at 27. Fuller's next sentence shows, gratifyingly, the relevance of this article:

This means that for a given social context one form of law may be more appropriate than another, and that the attempt to force a form of law upon a social environment

evolution of a given procedure for its resolution.³⁴ Patterns of approaching problems similarly influence the ways in which new problems are articulated.³⁵

The remainder of this section first explains and attempts to justify each of the eight proposed procedures variables. The relationship between each such procedures variable and its corresponding problem variable is then briefly explored. The discussion of such relationship is necessarily evaluative, and a given sort of procedure will be deemed well-suited, or not well-suited, to a given sort of problem. To add some precision to such evaluations, the article will at various times consider three distinct dimensions of the suitability of a given procedure for a given problem: the "accuracy," the "efficiency," and the "acceptability" of the procedure.³⁶

1. The Decisional Process

a. *Procedures Variable A1: Whether the Decision is Made Deliberatively, or Spontaneously*

uncongenial to it may miscarry with damaging results.

Id. The continuity between problem and procedure is treated more generally by Lawrence Tribe in his *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CALIF. L. REV. 617 (1973). Tribe contends that social decisions reciprocally influence the decision-makers. How we as human beings define ourselves, says Tribe, depends largely on the decisions we have made. Reciprocally, future decisions are strongly influenced by what we are.

³⁴ That society evolves institutions efficiently designed for their respective tasks is an assumption shared by many current legal writers. See, e.g., Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); 2 F. A. Hayek, *LAW, LEGISLATION, AND LIBERTY* 21 (1976).

³⁵ This is the point that caused Marshall's fears of tautology. See *supra* note 4 and accompanying text. The tendency to articulate problems in categories created by procedures is also noted by Fuller, *The Forms and Limits of Adjudication*, *supra* note 31, at 367-69.

³⁶ Although the first two criteria are similar to those (i.e. "certainty" and "efficiency") used by Max Weber to evaluate aspects of bureaucracy (see Abel, *supra* note 31, at 269), all three terms are borrowed from Boyer, *Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 137-50 (1972), who used the criteria specifically to evaluate the performance of procedural systems. Although use of the terms is completely nontechnical and they are to be given their ordinary language meanings, it is nonetheless interesting to note that each of the three dimensions are related. For example, "efficiency" cannot be described without a close reference to the degree of "accuracy" desired, and without also at least a nod to "acceptability." Boyer's definition of "acceptable" is instructive:

An important, yet relatively amorphous, aspect of any decisionmaking process is that it must be acceptable—that is, perceived as legitimate—both to those who are directly affected by decisions and to the general public as well. In part, acceptability may correspond to the other criteria since, on the whole, people want the government to make decisions efficiently and accurately. Beyond this, however, considerations of acceptability raise complex questions . . . regarding the exercise of governmental power.

Id. at 146-47 [citations omitted]. The "acceptability" dimension may be read as including also Tribe's notion of the "expressiveness" of procedures. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391-93 (1971). For a more comprehensive vocabulary with which to evaluate procedures, see Professor Summers' *Evaluating and Improving Legal Processes — A Plea for 'Process Values'*, 60 CORNELL L. REV. 1 (1974).

The terms "deliberative" and "spontaneous" describe contrasting methods by which order can be achieved.³⁷ Order can be created deliberately, or intentionally, by limiting freedom and assigning people or things to a specific position in a prearranged plan.³⁸ Alternatively, order can be created spontaneously by internal forces and mutual interactions of such people or things.³⁹ Examples of deliberative orderings come easily to mind: a well-kept garden, perhaps, or a company on parade.⁴⁰ Understanding the notion of spontaneous orderings, however, requires a bit of imagination. The order is achieved non-purposively, by each unit of a system ordering itself by following internal, rather than external, forces. A natural world example of spontaneous order is the way that "the water in a jug settles down, filling the hollow of the vessel perfectly and in even density, up to the level of a horizontal plane which forms its free surface: a perfect arrangement such as no human artifice could reproduce"⁴¹

Along with spontaneous orderings in the natural world, social spontaneous orders also come to exist.⁴² A good example is the market economy, where problems of immense complexity and competing values are spontaneously sorted out by the mutual adjustments of millions of individual preference schedules.⁴³ If the pure market is functioning, optimal solutions are said to be achievable without planning or deliberation. As other examples, it has been suggested that certain intellectual orders like the common law, or the tenets of science, are spontaneous rather than deliberative.⁴⁴

Just as the continuous nature of the problem variables was stressed,⁴⁵ so also is it important to avoid conceiving of "deliberative" and "spontaneous" as binary alternatives. Perhaps in the natural world a perfectly spontaneous procedure can be described. Not so, however, in the social world. Even the most centralized, despotic decisions are subject to some compromise and mutual adjustment.⁴⁶ Moreover, as in the pure market example, within a single system each particular decision or adjustment may be consciously deliberative, even while the system as a whole displays spontaneity.

Closely related to this procedure variable is the problem variable of whether the variables of the specific problem are simple, or interactive. This particular relationship of procedure to problem is straightforward: problems

³⁷ Polanyi, *supra* note 31, at 154-56.

³⁸ *Id.* at 155.

³⁹ *Id.* at 156. Note that "spontaneously" does not here mean "immediately," but rather "non-deliberately." A spontaneous system *may* operate very quickly, or, as shall be discussed in the example of the common law, operate very slowly.

⁴⁰ *Id.* at 154, 155.

⁴¹ *Id.* at 155.

⁴² *Id.* at 115.

⁴³ *Id.* at 160-61.

⁴⁴ *Id.* at 162-65.

⁴⁵ See *supra* note 9 and accompanying text.

⁴⁶ Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021, 1026 (1964).

composed of very large numbers of interactive variables are much better suited to decisions that proceed spontaneously. This is so along all three dimensions of suitability, i.e. accuracy, efficiency, and acceptability. Problems with small numbers of variables, or those composed of simple variables, are better suited to deliberative procedures. For example, deliberative human intervention in the task of arranging molecules in a crystalline structure would require years of effort, be subject to countless errors, and indeed would probably succeed only in preventing the molecules from achieving that natural, spontaneous order that forms in a matter of seconds.⁴⁷ On the other hand, problems with fewer variables (e.g. planting a garden, building a lawnmower) are not normally well-suited to spontaneous procedures; "[w]here smaller numbers are concerned, [a planned order] is likely to show a greatly superior performance: all machinery and mechanical techniques of man demonstrates this superiority when the numbers are small enough."⁴⁸ The relationship between the complexity of the variables comprising the problem and the spontaneity or deliberateness of decision-making is quite clear. Similar relationships can and will be developed for the other problem and procedure variables.

b. *Procedures Variable A2: Whether the Process is Universalist or Particularist*

The notion of "universalist" versus "particularist" procedures is popular with social and legal theorists. The meaning of the terms, however, is subject to disagreement. Some find universality wherever decision-makers are guided by general rules or are compelled to justify their decisions doctrinally, and, conversely, find particularity wherever decision-makers judge each case to be *sui generis*.⁴⁹ Others identify universality where decisional information or criteria are based on the actions or desires of large groups (e.g. on "social utility") and particularity where decisions are based more narrowly on attributes of individual disputants (e.g. on concepts of "rights").⁵⁰ Yet others distinguish universality and particularity by examining the view taken by the decisional institutions of the disputants.⁵¹ Each of these three strands of meaning, i.e., the

⁴⁷ Polanyi, *supra* note 31, at 155-56.

⁴⁸ *Id.* at 156.

⁴⁹ Sarat and Grossman, for example, consider universalist procedures to involve both general rules and social needs, being:

more concerned with general rules or standards for future application than with the equities between two or more parties currently in dispute. Additionally, [universalist procedures] deal with the needs of broad and unnamed classes or groups rather than individuals, with "issues and symbols" rather than specific pronouncements, and with general, often imprecise, claims of deprivation or need.

Sarat & Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AMER. POL. SCI. REV. 1200, 1200 (1975).

⁵⁰ For the explication of how "rights" as a decisional standard differs from that of "social utility," see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

⁵¹ Roberto Unger, for example, discusses "universalism versus particularism" as it relates to the status of the disputants:

Liberal society tends toward universalism; it is inclined to draw people together

breadth or narrowness of rules, the nature of the justifications of the rules, and the institution's views of the disputants, can be useful, and all three strands are incorporated in the following paragraphs relating this procedure variable to its corresponding problem variable.

The universalist-particularist procedure variable is related in a variety of ways to the problem variable of whether decisional criteria are well-established or disputed. There emerges, however, a certain pattern in the interaction of the problem variable and procedure variable: Where a problem possesses well-established decisional criteria, the best procedure to judge the problem is one that is (a) universalist with respect to the use of general rules or doctrine; (b) particularist with respect to decisional evidence or information; and (c) flexible (either universalist or particularist) with respect to the treatment of disputants. Conversely, where the decisional criteria of a problem are unknown or disputed, the best procedure to judge such a problem is one that is (a) particularist with respect to general rules or doctrine, i.e. makes limited appeal to either rules or doctrine; (b) universalist with respect to decisional evidence or information, drawing broadly on general trends or probabilities rather than narrowly on particular events; and (c) again is flexible with respect to the treatment of disputants.

This pattern can be illustrated by contrasting the ways in which one properly judges two very different sorts of contests: first, a footrace; and second, an artistic competition. The decisional criterion of a footrace is simple, and very well-established. The winner is the first person to cross the finish line without interfering with others. Therefore, the most appropriate way to judge a footrace is (a) to rely heavily on the established criterion as a universal, general rule; (b) to apply such general rule by looking at the particular facts of this given footrace, and using such facts as the decisional information or evidence; and (c) to treat every participant in the race equally, except perhaps retaining the flexibility to make certain relevant categorizations, for example between male and female, or between young and old.

In contrast, the decisional criteria are relatively more disputed or unknown where the task is to judge the winner of an artistic competition, particularly a competition where radically different styles are represented. Under such circumstances the most appropriate judging procedure is one that (a) does not make appeal to general rules or doctrine, because any such appeal would be essentially arbitrary; (b) acts universally with respect to decisional information or evidence, perhaps by polling large numbers of people from a cross-section of the community on their preferences amongst the entries, or perhaps by allow-

under the rule of formal equality. Tribal society is particularistic; the subordination of the individual to the group and the rigidity of group differences suppress the acknowledgment of a common humanity in which native and foreigner alike participate.

R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 147-48 (1976).

ing smaller numbers of judges to draw upon whatever external information or expertise they may possess; and (c) is flexible with respect to how much exposure is afforded to each painting, or how much information is disseminated about each painting. Arguably, the judges should be allowed to make themselves as familiar as they choose with any or all of the artistic works.

The above conclusions about how procedures ought to vary as a function of varying certitude of decisional criteria are based on considerations of accuracy, efficiency, and acceptability. Where decisional criteria are well established, for example, it would be either inaccurate or unfair to ignore the general rules or doctrines that are created by the existence of well-established decisional criteria. Similarly, to raise as possible decisional information or evidence any matters not *particularly* related to the case at hand would be inefficient. For example, it would be inefficient in judging a foot-race to raise the issue that the "fastest" runner can never really be judged on the strength of only one race, and that hence the performances of each runner over the last five races ought to be averaged in order to declare the proper "winner." Such an inquiry would be irrelevant, and thereby wasteful, because the decisional criterion of judging a footrace has already been established. The alternative decisional criterion of the winner being declared on the basis of average performance was presumably raised in the past as a possible standard to use, but rejected.

Conversely, in the more difficult case of making judgments where decisional criteria are unknown or disputed, it would be inaccurate, arbitrary, and unfair to choose one criterion as definitive. The appropriate ways of judging such problems (e.g. making the decision represent the views of large numbers of those affected, or having a few judges who attempt to become intimately knowledgeable about the specific problem) are certainly less efficient than making an arbitrary judgment, but are arguably more accurate and almost certainly more acceptable.

The precise locating of procedures along this dimension is neither easy, nor terribly important. The significance of the examples is to demonstrate that decisional procedures do indeed differ along the continua described.

c. Procedures Variable A3: Whether the Process is Active or Reactive

Whether a given procedure is "active" or "reactive" is also important to some legal and political theorists.⁵² An "active" decision system is one that can initiate by itself the investigation and treatment of problems. A "reactive" procedure is one that depends on outside parties to identify the problem. Reactive procedures are generally limited to considering the sorts of problems that private parties perceive and pursue.⁵³ Certain problems, however, are difficult for untrained persons to detect. Where a long hiatus exists between a harm-

⁵² See, e.g., S. Goldman & A. Sarat, *supra* note 17; Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125 (1973); L. FULLER, *ANATOMY OF THE LAW* (1968); Howard, *supra* note 32.

⁵³ Sarat & Grossman, *supra* note 49, at 1200; see also Black, *supra* note 52, at 137.

causing occurrence and the manifestation of injury, reactive procedures are certainly inefficient, and the passage of time may impair accuracy of decision.⁵⁴ Attempts by the common law to deal with health problems caused by environmental pollution illustrate this point.⁵⁵ Often a plaintiff is exposed to the harmful agent years before the injury surfaces. Even where Statute of Limitations problems are overcome, evidentiary problems, particularly related to causation, can frustrate recovery. Furthermore, even if recovery is obtained, it still is possible that other injuries that occurred during the hiatus might have been prevented by an earlier edict of some more active decisional system.

The overall effectiveness of reactive procedures is limited by the necessary dependence on private initiative in pursuing claims. For example, victims of incest or rape may not report the incident, and victims of child battering, being under the parents' control, are often incapable of complaint. However, an active system may well develop such rigid and restrictive policies of problem identification that it ultimately considers a lesser diversity of problems. Moreover, reactive systems may be generally more acceptable because such procedures enhance opportunities for decisional participation by persons with restricted access to the power structures of active systems. Minority groups or others with less than average participation and influence in active systems (as in legislatures, for example) will normally fare better in reactive systems like the courts.⁵⁶

Active or reactive procedures are linked to the problem variable of whether decisional information is based on past, or future events.⁵⁷ Problems requiring analysis of future events are better suited to active procedures; problems based upon historical events are better suited to reactive procedures. This conclusion follows from two premises: first, the dependence of reactive systems on the perceptions of untrained outsiders that a problem exists; and second, that future-based problems tend either to be of a "policy" nature, or else to be relatively subtle problems affecting large numbers of people. Untrained outsiders have difficulty perceiving the underlying social patterns which give rise to future-based problems. Hence reactive systems, which depend on such untrained persons for identification and articulation of problems, are not likely to cope well with future-based problems. It is possible that a future-based problem would simply never be raised within a reactive system, or that it would be presented piecemeal or incoherently, or that the initiatives might come too late to be effective.⁵⁸ Effective, efficient dealing with future-based problems is

⁵⁴ Goldman & Sarat, *supra* note 17, at 8; Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking*, 48 S. CAL. L. REV. 371, 404 (1974).

⁵⁵ Green, *The Role of Law and Lawyers in Technology Assessment*, in M. CETRON & B. BAC-TOCHA, *TECHNOLOGY ASSESSMENT IN A DYNAMIC ENVIRONMENT* 630-31 (1973); Gelpe & Tarlock, *supra* note 54.

⁵⁶ Howard, *supra* note 32, at 346.

⁵⁷ See *supra* note 14 accompanying text.

⁵⁸ Goldman & Sarat, *supra* note 52, at 8; Black, *supra* note 52, at 137.

enhanced in an active decisional system with its more systematic, inclusive approach, its better access to predictive information, and its greater ability to manipulate the environment according to some preconceived plan. Conversely, accepting the Aristotelian notion of representation that those who feel the pinch best know how it hurts⁵⁹ leads to the general conclusion that it is more accurate and acceptable for past-based problems to be presented initially, and perhaps articulated, by those persons who have been specifically injured, even if they are not trained within the decision system. Such piecemeal problem-solving may be less efficient than the approach taken in an active system,⁶⁰ but considerations of enhanced accuracy and acceptability nonetheless may prevail over concerns about inefficiency.

2. The Relationship Between Procedures and Parties

a. *Procedures Variable B1: Whether the Process is Controlled by the Disputants or by Strangers*

In contrast to the above concern about problem identification, this variable speaks to whether the disputants, or rather strangers to the dispute, control such matters as issue formation, the presentation of proofs and arguments, and implementation of remedy.⁶¹ At the extreme end of disputant control would be a decisional system like direct negotiation between the parties. At the extreme end of stranger control would, for example, be an inter-insurance company arbitration of a controversy between policyholders. At the middle range of this variable are proceedings totally controlled by decision system personnel who are nonetheless fully acquainted with the disputants, or systems like Anglo-American adjudication which have certain procedural aspects that are clearly stranger-controlled, and yet other aspects which are clearly disputant-controlled.⁶²

The insertion of a stranger into a dispute markedly alters the character and emotional effects of attempts at resolution.⁶³ The influence of a stranger in decisional procedures goes first to the articulation of issues. To justify confidence in his or her impartiality, a stranger commonly will appeal to norms rather than to the particular interests of the disputants in characterizing the

⁵⁹ Howard, *supra* note 32, at 344. See also K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.02, at 115 (1958). Aristotle's assertion is not always true. For example, where the injury is not tangible, but rather, legally defined (as in a case of persons being deprived of some welfare benefit to which they did not know they were entitled), the best initiator is clearly someone other than the person injured. David Fleming, personal communication, 1981.

⁶⁰ Certainly in the short term, fragmented reactive decision-making is duplicative and therefore more costly. Where accuracy is greatly enhanced by such procedures, however, reactive procedures may in the long term be more, rather than less, efficient.

⁶¹ Howard, *supra* note 32, at 343.

⁶² See *infra* notes 144-49 and accompanying text.

⁶³ Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 655 (1976).

issues.⁶⁴ This is because the value of a stranger is in achieving balance and objectivity. To stress such objectivity further, the stranger is apt to use norms in a highly stylized fashion that appears to reduce the amount of discretion being employed. Norms are conceived as competing in an absolute, binary manner, rather than as clusters of guiding principles that can coexist in a variety of mixes.⁶⁵ The available options to the stranger are therefore only two, rather than many fine gradations that would require closer, and probably more personal, decisions. Norms further are conceived as "act-oriented" rather than "person-oriented"; that is, norms are seen as objectively defined by events with no consideration given to the persons whose actions are being assessed,⁶⁶ or with a similar neglect shown toward the social context in which the events occur. Each of these conceptions of the norms adopted help to insure that once the stranger chooses which norm to follow, all concerned parties will accept the outcome.

Beyond the normative characterization of issues, stranger control of proceedings affects both the form and content of proofs and arguments. The changes may seriously impair the accuracy and efficiency of dispute resolution. For example, in disputant-controlled proceedings the parties informally may agree on many of the material facts because their personal knowledge of the facts coincides.⁶⁷ Alternatively, the parties may make a settlement which takes into account an unresolved dispute over material facts.⁶⁸ Such informality and mutual accommodation is cumbersome where issues must be proven to a stranger.⁶⁹ Moreover, concerns for impartiality cause stranger-controlled proceedings to favor strict, exclusionary rules of evidence, and high standards of

⁶⁴ *Id.*; see also Aubert, *supra* note 31, at 33, 34; Eckhoff, *The Mediator, the Judge, and the Administrator in Conflict Resolution*, 10 ACTA SOCIOLOGICA 148 (1966), (reprinted in AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR 31, (S. Goldman & A. Sarat, eds. 1978)).

⁶⁵ Eisenberg, *supra* note 31, at 655; see also Aubert, *supra* note 64, at 39, 40.

⁶⁶ Eisenberg, *supra* note 31, at 656; see also Aubert, *supra* note 64, at 35; Fuller *supra* note 16, at 34.

⁶⁷ Eisenberg states:

In dispute-negotiation most factual issues can be determined by explicit or tacit agreement, since the participants in the process will have personal knowledge of most of the material facts. Where the disputants do not have personal knowledge, they can often agree on the truth of a proposition on the basis of their mutual acceptance of a relator's credibility. If agreement on a factual proposition cannot be reached, a further cluster of techniques is available. The disputants can assume the truth of a proposition provisionally, and proceed to develop and examine its implications; they can by-pass the proposition provisionally, to determine whether a settlement can be reached if its truth is left open; or they can make a settlement whose terms accommodate, in an appropriate way, conflicting versions of the proposition or doubt as to its validity. (footnote omitted).

Eisenberg, *supra* note 63, at 657.

⁶⁸ *Id.*

⁶⁹ *Id.* at 657-58; see also Aubert, *supra* note 31, at 35.

proof.⁷⁰ Impartiality may be achieved at the cost of an accurate and efficient resolution of the problem.

Whether the disputants or a stranger controls the proceedings also affects the choice of remedy. Greater flexibility in the choice of remedy is possible where disputants remain in control. In norm-based stranger-controlled proceedings the choice of remedy usually is limited to a narrow range bearing a logical relationship to the rights and duties declared.⁷¹ Alone, however, the disputants could agree on a face-saving, non-normative remedy like mutual apologies. This truncation of remedial alternatives in stranger-controlled proceedings occurs because the unfamiliarity of the stranger with all aspects of the disputants' lives makes difficult any innovative remedial decree not specifically suggested by the evidence presented.⁷²

The variable of who controls the proceedings is associated with the problem variable of simplex versus multiplex parties. Problems arising in multiplex contexts often are better suited to disputant-controlled procedures. Conversely, simplex problems are generally compatible with stranger-controlled proceedings. The first conclusion is grounded in concerns for accuracy and acceptability while the second is grounded in concerns for efficiency and acceptability.

Strangers in control of decisional procedures tend to avoid making an assessment of personal traits of the disputants by the device of narrowing disputes to questions of provable events rather than considering personal or relational qualities of the parties. This occurs for the reasons of practicality and impartiality outlined above. Where the problem to be decided arises in a multiplex setting, the stranger thus tends to stereotype the relationships of the disputants.⁷³ To do otherwise would require the stranger to make determinations about the character of the various disputants. Although convenient for the stranger, the process is reductivist and often disregards facts or norms that the disputants regard as important.⁷⁴ Beyond concerns for accuracy, the reliance by strangers on absolute, impersonal norms in deciding multiplex problems well may damage unacceptably the underlying relationships between the parties. For example, in the adjudication of marital problems the tendency of stranger-judges to reduce marriage to a set of impersonal act-oriented norms may undermine the mutual trust and confidence essential for long-term maintenance of the marriage.⁷⁵ Moreover, the efficiency and accuracy of using

⁷⁰ Eisenberg, *supra* note 63, at 658.

⁷¹ *Id.*

⁷² *Id.*; see also Freeman, *Standards of Adjudication, Judicial Law-making and Prospective Overruling*, 26 CURRENT LEGAL PROBS. 166, 175-78 (1973).

⁷³ Aubert, *supra* note 31, at 35.

⁷⁴ Eisenberg, *supra* note 63, at 657.

⁷⁵ Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305-31 (1971).

any norm-based procedure in the marital context is questionable; the shifting contingencies of marriage, such as illness, pregnancy, and loss of employment, would require any such "norms" to be riddled with exceptions.⁷⁶ For all of the above reasons, stranger-controlled procedures are ill-suited for multiplex problems.

Similar considerations lead to the opposite conclusion that simplex problems normally are better suited to stranger-controlled procedures than to disputant-controlled procedures. Parties joined by only a single transaction often lack the incentives, skills, or spirit of cooperation required to resolve their own disputes. Moreover, such parties not only may prefer that their relationship be confined and standardized by a stranger, but such objectivity also may reflect accurately their intentions and behavior.⁷⁷

One exception to the foregoing conclusions occurs where a disparity in power or knowledge exists between the disputants. In such a circumstance, even in a multiplex setting a stranger-controlled proceeding is almost invariably more acceptable and given to greater accuracy than a disputant-controlled proceeding.⁷⁸ Disputant control therefore often may be unsuitable in settings like parent-child and employer-employee.

b. *Procedures Variable B2: Whether Participation in the Proceedings is Strict and Assured, or Diffuse and Loose*⁷⁹

Under this variable "strict" participation means that participation is confined to the immediate disputants and the decision-maker.⁸⁰ "Assured" participation means that the opportunity to participate is guaranteed by right, or is at least strongly institutionalized.⁸¹ "Diffuse" participation occurs where the community is heavily involved in decision-making, either directly, or indirectly as in a legislature.⁸² "Loose" participation is unassured, unregulated, or disorganized.⁸³

The significance of this variable is best discussed by linking it immediately to the problem variable of whether a dispute is "private" or "public." For purposes of this discussion a private dispute is one in which the State is not an initial participant, and a public dispute is one in which the State is an actual

⁷⁶ *Id.*; see also Fuller, *supra* note 16, at 28.

⁷⁷ See generally Eckhoff, *supra* note 64, at 150-51. This desire for complete objectivity and stranger-judgment may, however, be rare, as suggested by Stewart Macaulay's classic study of business disputes. See Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

⁷⁸ Boyer, *supra* note 36, at 120-21.

⁷⁹ Professors Fuller and Eisenberg are the foremost developers of the "participation" variable in decisional procedures. Eisenberg, *supra* note 12; Fuller, *The Forms and Limits of Adjudication*, *supra* note 10.

⁸⁰ Eisenberg, *supra* note 12, at 431.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

party.⁸⁴ Given that distinction, public disputes are more suitable to diffuse, loose proceedings and private disputes are more suitable to strict, assured proceedings. Public disputes often are concerned with drawing the contours of the relationship between citizen and State. Such disputes are largely generic: in principle, the relationship between citizen and state is identical for most, if not all, citizens. On grounds of efficiency and accuracy, and perhaps also acceptability, therefore, such problems defining relations between citizens and the State are better considered by allowing diffuse participation by the citizenry, by hearing all the possible arguments, and by using informal means of weighing all arguments.⁸⁵

Private disputes, which are better suited to strict and assured procedures, tend to be more personal and idiosyncratic than public disputes. In such problems "accuracy" becomes more a matter of the parties' own perceptions. Hence, accuracy is better served by a strict participation procedure confined to the parties.⁸⁶ Moreover, in determining idiosyncratic problems restricted participation may enhance efficiency: a wider participation simply is not necessary to convey the relevant information, or to assure representativeness of the decision. Finally, privacy becomes important to personal disputes, and of course strict participation is more private, and therefore more acceptable.

Third party decision-makers have greater autonomy in strict participation proceedings. Consequently, the danger of partiality becomes more salient. One means of safeguarding impartiality is to "assure" participation by each party within a rigid format. Perhaps the most elaborate example of such

⁸⁴ The distinction here used is Friedman's. See *supra* notes 49-52 and accompanying text. In any society where the State makes widespread interventions in economic and social activity, Friedman's distinction is overly simplistic. This is especially so where two-way interaction between the State and its citizens is formally embodied in a Constitution. Later, this article will consider this public dispute/private dispute problem variable in the *specific* context of Anglo-American society. See *infra* notes 456-87 and accompanying text. There the article proposes alternative, and hopefully more appropriate, criteria for distinguishing between public and private disputes.

⁸⁵ Howard, *supra* note 32, at 347-59. The obvious difficulty with this conclusion is explaining the criminal law trial. In form, such trials are public disputes, since the State is a party. Criminal trials are not intuitively "generic," i.e. affecting the rights and duties of the populace in general, and they certainly are not diffuse. The explanation for this apparent anomaly is that at the level of individual prosecutions, a criminal trial is really more private than public. There virtually always exists an identifiable private victim who theoretically could prosecute the crime. Practically speaking, the victim must cooperate in order for certain offenses to be pressed. The State is the formal complainant in criminal law proceedings because the issues involved are so important to society that the State wishes to retain control over the prosecution. Although criminal trials serve, over time, to establish relationships between the citizenry and the State, each individual trial also serves to resolve, in a manner satisfactory to all, a "dispute" between discrete individuals. Consequently any type of diffuse decision-making process, however, theoretically ideal, would likely be intrusive and inefficient. Predictably, however, *general* declarations of what is and is not criminal activity normally are articulated in the diffuse public arena of the legislature.

⁸⁶ *Id.*

assuredness is the general set of procedural protections in the legal system, which assures parties the right to be represented by an advocate, to cross-examine witnesses, to hear justifications for third-party decisions, and to appeal such decisions.⁸⁷ All such participant rights restrict caprice by the judge.

Generally, "assuring" participation in a decision system has another very important consequence: the decision system is forced to be *consistent over time* in its rulings.⁸⁸ The participants must "share stable expectancies about how [the decision-maker] will act."⁸⁹ Assured participation, therefore, requires the decision-maker to be systematic and consistent in resolving problems.⁹⁰ This in turn no doubt contributes to the tendency of third-party decision-makers to appeal to norms. In order for assured participation to be meaningful, there must be sufficient tribunal consistency to permit predictability.⁹¹

c. *Procedures Variable B3: Whether the Decision System is Strongly Responsive, or Weakly Responsive, to the Parties' Proofs and Arguments*

Under this variable, a decision system is "strongly responsive" to the parties' proofs and arguments if the decision "proceeds from" and is "congruent with" such proofs and arguments.⁹² In contrast, a procedure is "weakly responsive" to the extent "the decisionmaker may base his decision solely on evidence he has himself collected, on his own experience, on his institutional preferences, and on rules neither adduced nor addressed by the parties."⁹³ Although strict participation might be thought necessarily to require strong responsiveness, and loose participation to entail weak responsiveness, "responsiveness" is in fact an independent variable.⁹⁴ For example, a "consultative process" may assure strict participation, yet only weakly respond to the posited arguments; the decision-maker is required only to consider the disputant views in good faith, make the decision for a proper reason, and then

⁸⁷ *Id.* at 349, 359.

⁸⁸ Fuller, *Adjudication and the Rule of Law*, *supra* note 10, at 5.

⁸⁹ Freeman, *supra* note 72, at 179.

⁹⁰ As Fuller states:

[the decision-maker is] confronted by a *problem of system*. The rules applied to the decision of individual controversies cannot simply be isolated exercises of . . . wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure.

FULLER, *supra* note 52, at 94.

⁹¹ This tie between assured participation and consistency is further proved by contrasting systems with loose participation. Such systems can, like the Parliament, "take 'leaps in the dark.'" There is no logical necessity for any [decision] to be related to any other." Freeman, *supra* note 72, at 179. Or as stated by Judge Friendly, "Unlike legislatures, which may properly frame pragmatic rules having no relation to strict logic, courts should render a principled decision that will apply to a great sweep of cases." Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 23 (1978).

⁹² Eisenberg, *supra* note 12, at 412-13.

⁹³ *Id.* at 414.

⁹⁴ *Id.* at 413.

explain the decision.⁹⁵ In effect, although the affected parties are before the decision-maker, and are allowed to present their views in a formal manner, the decision-maker can conceivably make his determination on some other basis. In general, a strict and assured procedure may be weakly responsive if the decision-maker is more concerned with "policy" or social utility than with restoring harmony between the litigants.⁹⁶ Conversely, a procedure using diffuse and loose participation can be strongly responsive. Indeed, it has been argued that the diffuse procedure of legislation is legitimate *only* where it is strongly responsive.⁹⁷ If it is not so responsive, the argument states, the reason for permitting the diffusion is lost.⁹⁸

Procedural responsiveness is associated with whether the problem considered can or cannot feasibly be resolved privately. Problems that cannot be solved privately are more appropriate to weakly responsive procedures; problems that can be solved privately are sometimes more suitable to strongly responsive procedures and at other times are more suitable to weakly responsive procedures. The former conclusion is made for reasons of accuracy and acceptability. The infeasibility of private resolution often will arise because such resolution requires a group of unrelated persons to act in concert, or because one party to the dispute is incompetent or unavailable.⁹⁹ Where either condition exists so as to frustrate private resolution, the condition also will impair greatly the ability of one side of the dispute (i.e. the group, the incompetent, or the absent) to participate in any other procedure for resolution. Logically, a procedure that under such conditions is strongly responsive to the proofs and arguments of the parties will disadvantage the party with impaired ability to participate.¹⁰⁰ The decision-maker acts more acceptably and accurately by being weakly responsive, i.e. by taking the initiative to discover arguments in favor of the impaired party. Alternatively, the decision-maker could remain strongly responsive but appoint a representative to argue on behalf of such impaired party.¹⁰¹

⁹⁵ *Id.* at 414. Such a consultative process is mandated, for example, under § 553 of the United States Administrative Procedures Act, 5 U.S.C. § 553 (1976). Eisenberg describes this procedure as follows:

Where section 553 applies, an agency proposing a new rule must give affected parties an opportunity to present proof (in the form of 'written data') and reasoned arguments and is obliged both to attend to those proofs and arguments and to explain its action. However, the rules it issues need not proceed from or be congruent with the participants' proofs and arguments . . . provided they have a factual basis and fall within the limits of rationality.

Id. at 415.

⁹⁶ Goldman & Sarat, *supra* note 52, at 5.

⁹⁷ Howard, *supra* note 32, at 346-48.

⁹⁸ *Id.*

⁹⁹ See *supra* note 21-22.

¹⁰⁰ This point is similar to that made *supra* at note 78 and accompanying text (where one side of the dispute is predictably much more powerful than the other, disputant-controlled proceedings are likely to be both unacceptable and inaccurate).

¹⁰¹ See *infra* notes 498-500 and accompanying text.

For problems that might feasibly be resolved privately, the more appropriate procedure is sometimes strongly responsive, sometimes weakly responsive. These conclusions follow from considering the reasons why such private resolution might fail. To say that private resolution is feasible means that face-to-face compromise is possible, or that an established market exists to determine the value of the objects in dispute. Where impasse nonetheless occurs, it normally is for one of two reasons. Either the parties have split on normative grounds¹⁰² and desire the sort of decision that declares one person "right" and the other "wrong,"¹⁰³ or compromise fails because one party simply refuses to negotiate. The first situation leads to the recommendation of a strongly responsive procedure, the second to the recommendation of a weakly responsive procedure.

Where the parties have split on normative grounds, the parties have had available procedures (like compromise) that encourage each party to minimize his or her maximum loss. Such procedures have been unavailing, so the parties turn to a third party. Most likely the parties are arguing "on principle" and desire a procedure that is strongly responsive, vindicating the arguments of one, and rejecting the arguments of the other. The outcome certainly is important in such cases, but no more so than the process of choosing one or the other of the parties' arguments. A victory on weakly responsive grounds in such cases would be rather Pyrrhic.

In the second case, a compromise fails because one party sees no advantage in negotiating a change in the status quo. Such unwillingness by one party to engage in any form of bargaining "is usually the case after a loss, whether the loss is due to an accident, to fraud or negligence, to inability, or to a crime."¹⁰⁴ Aggression is a distinct danger in such circumstances, and normally some form of third-party intervention is foisted on the parties.¹⁰⁵ Such institutionalized intervention grows out of society's need for protection, the primary example being the criminal law prosecution. Given the reasons for the intervention it is not likely the procedure would commit itself to strong party responsiveness, and indeed such is the case in criminal law: the decision need not be grounded on the arguments of either the accused or the victim. Rather, the court is free to accept the arguments of the State, as articulated by the prosecutor.

3. The Nature of the Decision

a. *Procedures Variable C1: Whether the Decision is Binary, or Graduated and Accommodative*

A "binary" decisional process is one where:

¹⁰² See Eckhoff, *supra* note 64, at 150.

¹⁰³ Eisenberg, *supra* note 63, at 654-55.

¹⁰⁴ Aubert, *supra* note 31, at 33.

¹⁰⁵ *Id.*

In reaching, and even more clearly in rationalizing outcomes, any given proposition of fact is normally found to be either true or false, . . . norms are generally treated as if only the more compelling . . . [or] dominant norm were applicable, and each disputant is generally determined to be either "right" or "wrong."¹⁰⁶

In contrast, a "graduated" or "accommodative" decision occurs where "...[i]n reaching and rationalizing outcomes, any given norm or any given factual proposition can be taken into account according to the degree of its authoritativeness and applicability (in the case of a norm) or probability (in the case of a factual proposition)."¹⁰⁷ This "binary" versus "graduated, accommodative" distinction applies, therefore, to both facts and norms. The gravamen of the distinction is that any norm, for example, can either be viewed as a hard-edged thing, competing on a mutually exclusive basis with other norms, or as a softer-edged concept that can coexist in balance and compromise with other norms.

This binary-graduated procedural distinction is associated with whether social consensus or dissensus exists on the proper outcome of a problem. Where consensus exists, a decision generally will be of binary character; where dissensus exists, the character of the decision will be more graduated and accommodative. Dissensus issues are likely to yield accommodative decisions for reasons of acceptability; an absolutist approach to problems about which serious people disagree is likely to be considered by proponents on both sides as presumptuous or unconcerned. If a system is to maintain legitimacy, the decision-maker must seek a graduated or accommodative solution.¹⁰⁸ Even where social consensus exists, it is rarely advantageous for the third-party decision-maker to side fully with one party or another; rather, prestige normally is enhanced by the third-party accommodating the contending positions. By adopting an accommodative resolution, rather than siding fully with one party, the decision-maker preserves his status as an objective outsider.¹⁰⁹

¹⁰⁶ Eisenberg, *supra* note 63, at 654.

¹⁰⁷ *Id.*

¹⁰⁸ This may not always be so. A well established institution may attempt to build a social consensus, rather than follow the dissensus. See *infra* note 155 and accompanying text.

¹⁰⁹ As Aubert writes:

One may raise the question as to whether the third party, by virtue of his position, will tend towards the opinion that there must be "some wrong on both sides." He can ally himself with one of the parties, and can therefore enforce a completely asymmetrical view of the responsibility for the conflict, but there may be reasons . . . why he should try to avoid this. If he sides fully with one of the contestants, he has brought his status as an outsider into some jeopardy. He has sacrificed his unique moral standpoint in the little group. . . . It seems that in terms of power and authority he will generally stand to gain by assuming a position somewhere between the claims of the two parties, possibly maximizing his own moral superiority the nearer the solution lies toward the golden mean. . . . The two others have presented themselves as extremists, exaggerating the importance of this or that point, or having somewhat misrepresented the facts.

Aubert, *supra* note 31, at 39.

Furthermore, a binary decision, simply because of its absoluteness, most likely is less accurate than a graduated decision.¹¹⁰ Essentially, the binary mode of decision-making is appropriate only when either a strong social consensus demands recognition,¹¹¹ or when the problem is of such importance that society demands that it be treated as though a consensus existed.¹¹² For example, binary decisions are appropriate in criminal cases since society probably would reject a system which apportioned blame between the criminal and the victim.¹¹³ A final example of this connection between social consensus-building and binary decisions is the occasional practice (as, for examples, in the school desegregation cases of the 1950's and more recently, in the Watergate tapes case) of the United States Supreme Court of refraining from separate opinions in matters in which public interest is high and the Court desires to build consensus for its decision.¹¹⁴

b. *Procedures Variable C2: Whether the Decision is Corrective or Facilitative*

This final procedure variable is closely related to the first one, namely whether the procedure is spontaneous or deliberative.¹¹⁵ Whereas the first distinction speaks more to the method of deciding, however, this "corrective versus facilitative" variable speaks to the function of the decision, the manner in which problems are perceived by all participants in the decision system, and the emotional impact on the disputants of submitting their controversy for decision.

A "corrective" procedure assumes the existence of rules or standards governing rights and duties. The aim of a corrective decision is not so much to solve a controversy, or restore relationships, or allocate resources, but rather to control behavior.¹¹⁶ In seeking to insure greater conformity to the rules, a corrective decision incidentally is educational on the meaning of such rules. A "facilitative" procedure makes no such assumptions about rules. A facilitative procedure aims to coordinate or smooth human interaction, rather than dictate particular actions. This coordination is accomplished by decisions that act like traffic laws to stabilize "interactional expectancies" so that the parties can "guide their conduct toward one another by these expectancies."¹¹⁷

¹¹⁰ In the vast majority of disputes there is actually some right and wrong on both sides. *Id.*; cf. P. STEIN & J. SHAND, *supra* note 26, at 89-95 (discussion of areas of human experience that are, largely for reasons of accuracy and acceptability, beyond the scope of law).

¹¹¹ See *infra* notes 163-64 and accompanying text.

¹¹² Aubert, *supra* note 31, at 39.

¹¹³ *Id.* This need in criminal law to come to a binary decision also may help explain an anomaly considered above, namely why, even though they are "public" disputes, criminal prosecutions are characterized by strict, assured proceedings. See *supra* note 85.

¹¹⁴ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *United States v. Nixon*, 418 U.S. 683 (1974).

¹¹⁵ See *supra* notes 37-48 and accompanying text.

¹¹⁶ Fuller, *supra* note 16, at 20.

¹¹⁷ *Id.* at 9.

The facilitative-corrective variable also influences how a decision-maker generally views problems. Facilitative procedures assume that problems and conflicts are natural incidents of any relationship. The procedure therefore seeks to minimize or prevent problems by clarifying interactional principles, and by facilitating the early perception of trouble.¹¹⁸ Corrective procedures, as the name suggests, are rectificatory or compensatory rather than preventative. This difference in attitude toward what "problems" represent affects in turn the emotional impact to the disputants of submitting a problem to a decisional procedure. Facilitative procedures tend to minimize such emotional impacts by "expressing, in a symbolic way, the expectation that trouble is a normal part of these relationships and situations."¹¹⁹ Corrective procedures often exaggerate such emotional effects. For example, corrective procedures result in "judgments" (as opposed to "decisions"), that are couched in terms of responsibility for guilt or wrongdoing.¹²⁰ Such "judgments" can "generate a state of tension and . . . drive the disputants irreconcilably apart, whatever the outcome."¹²¹

The facilitative-corrective procedures variable is associated with the problem variable of whether private resolution is socially desirable or undesirable. The relationship between these variables is inconclusive: often, for example, both types of procedure can decide a problem so as to prevent any further attempts at private resolution.

Such inconclusiveness stems from the two prerequisites for any private resolution to a problem. First, there must exist a framework of shared expectations between the disputants regarding how negotiations proceed. Second, there must be information about who owns what, or which party has what rights or duties. Negotiation is easy only where the parties know both the effects of making an agreement, and the existing distribution of the commodity in question. Private resolution, therefore, can be facilitated (or prevented) in two distinct ways: first by making the framework for negotiation more (or less) stable and predictable; and second, by giving the parties more (or less) information about their respective starting positions. For example, a corrective decision is a relatively clear announcement of respective entitlements and duties in a given situation. This information in turn facilitates future private resolutions. Similarly, a facilitative decision that improves the framework for negotiation will aid such future private resolutions. Conversely, private resolution of disputes can be prevented by sabotaging access to the negotiation framework, as by an outright prohibition against private dealings with the commodity,¹²² or

¹¹⁸ Goldman & Sarat, *supra* note 52, at 18.

¹¹⁹ *Id.*

¹²⁰ Aubert, *supra* note 31, at 36; Eisenberg, *supra* note 63, at 659.

¹²¹ Eisenberg, *supra* note 63, at 659-60; see also Mentschikoff, *The Significance of Arbitration—A Preliminary Analysis*, 17 LAW AND CONTEMP. PROBS. 698, 698 n.1 (1952).

¹²² See the discussion in Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) regarding the three basic ways (property rule, liability rule, and inalienability rule) by which society allows and disallows exchange of any given commodity.

by granting an entitlement to a person or entity incapable of bargaining (e.g. giving rights to trees). Alternatively, private resolution could be frustrated by obfuscating, or by refusing to grant, any alleged rights. Such sabotage or obfuscation conceivably could be accomplished by either a "facilitative" or a "corrective" decision system.

C. Conclusions

Admittedly there are limitations to the conclusions drawn (see summary at Appendix C) about the relationships between the problem variables and procedure variables. First, the associations are not logical correlates, following necessarily from one another. Rather, the connections are conceptually and prescriptively tied by evaluations of procedural accuracy, efficiency, and acceptability. Second, the tendencies are not statistically demonstrable. The associations are pieced together from the observations and experience of a variety of legal theorists and social scientists dealing with decisional procedures of a variety of cultures. Third, no doubt dozens of other associations could be described. Each procedure variable probably has some sort of predictable relationship with several other problem variables. For reasons of manageability, however, each procedure variable has been paired with its single most logically related problem variable. Moreover, this article suggests that these eight pairings are the most important. The article turns now to a brief discussion of how the theory can be applied, followed by the attempt to use the theory to understand the notion of "justiciability."

II. STRUCTURAL DESCRIPTION OF ANGLO-AMERICAN ADJUDICATION

The first step in analyzing justiciability in the Anglo-American legal system is to describe adjudication by the procedure variables previously developed in this article.¹²³ Then the sorts of problems most appropriate for Anglo-American adjudication can be assessed according to their procedure variable correlates. The article will focus on "traditional adjudication," a form which evolved as "a vehicle for settling disputes between private parties about private rights."¹²⁴ Traditional adjudication has been described as consisting of the following five characteristics:¹²⁵

¹²³ See *supra* notes 37-122 and accompanying text.

¹²⁴ Chayes, *supra* note 20, at 1282.

¹²⁵ The characteristics are Chayes', *Id.* at 1282, 1283. "Traditional adjudication" is contrasted by Chayes with the newer "public law litigation" where "the object of [adjudication] is the vindication of constitutional or statutory policies." *Id.* at 1284. Sharp procedural differences distinguish the two forms, and much of Chayes' analysis is devoted to explaining such differences as a function of the differing objectives of the two procedures. Chayes' distinction is extremely useful, and his model of "public law" adjudication shall be explored below. As a starting point, however, the "adjudication" here described is his "traditional adjudication," a model with which lawyers are more familiar, and a model which accords with more common notions about how litigation proceeds.

In specifying the features of "traditional adjudication," Chayes recognizes he is drawing

1. The lawsuit is *bipolar*. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.
2. Litigation is *retrospective*. The controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.
3. *Right and remedy are interdependent*. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty — in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.
4. The lawsuit is a *self-contained* episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.
5. The process is *party-initiated* and *party-controlled*. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.¹²⁶

A. *Procedure Variables and Anglo-American Adjudication: The Decisional Process*

1. Procedure Variable A1: Whether Adjudication is Spontaneous, or Deliberative

Litigation traditionally was conceived of as "a private contest between private parties with only minimal judicial intrusion."¹²⁷ "[T]he courts could be seen as an adjunct to private ordering,"¹²⁸ whose primary role was to resolve disputes which arose as private individuals autonomously tried to achieve social and economic order.¹²⁹ Viewed in such a light, the common law

a stereotype of the common law procedures (rather than equitable procedures) prevalent over the last 250 years. *Id.* at 1283 n.11. The historical validity of the model can be narrowly disputed, but such a debate, states Chayes, would miss the point; "whether the traditional conception ever conformed fully to what judges were doing in fact, it has been central to our understanding and our analysis of the legal system." *Id.* at 1283.

¹²⁶ *Id.* at 1282, 1283 [citations omitted].

¹²⁷ *Id.* at 1288.

¹²⁸ *Id.* at 1285.

¹²⁹ *Id.* at 1285, citing O. HOLMES, *THE COMMON LAW* 77 (M. Howe ed. 1963); Pound, *Do We Need a Philosophy of Law*, 5 COLUM. L. REV. 339, 344-49 (1905). Chayes explains:

Besides its inherent plausibility in the nineteenth century American setting, the traditional model of adjudication answered a number of important political and in-

is an example of spontaneous intellectual order.¹³⁰ Any particular legal decision, however, may display great deliberateness as the judge attempts to conform the outcome of the instant case with doctrine and precedent. Such deliberateness at the individual level does not impair the spontaneity of the system as a whole. Indeed, it is this very action by dozens of judges of adjusting their decisions in accordance with doctrine and precedent that causes the overall spontaneity of the common law. The common law thus operates as "a sequence of adjustments between succeeding judges, guided by a parallel interaction between the judges and the general public."¹³¹ This sequence results in the ordered growth of the common law, in which the same fundamental rules are re-applied and re-interpreted, and thus expanded into "a system of increasing scope and consistency Accordingly, the operations of a judicial system of case law is an instance of spontaneous order in society."¹³² Since individual legal decisions are deliberative while the system as a whole can display spontaneity, traditional common law adjudication can be described as somewhat more spontaneous than deliberative.

2. Procedures Variable A2: Whether Adjudication is Universalist or Particularist

A procedure may be either universalist or particularist in three distinct

tellectual needs. The conception of litigation as a private contest between private parties with only minimal judicial intrusion confirmed the general view of government powers as stringently limited. The emphasis on the appellate function, conceived as an exercise in deduction from a few embracing principles themselves induced from the data of the cases, supplied the demand of the new legal academics for an intellectual discipline comparable to that of their faculty colleagues in the sciences. . . .

Id. at 1288.

¹³⁰ See *supra* note 44 and accompanying text.

¹³¹ POLANYI, *supra* note 10, at 162. He states:

Consider a judge sitting in court and deciding a difficult case. While pondering his decision, he refers consciously to dozens of precedents and unconsciously to many more. Before him numberless other judges have sat and decided according to statute, precedent, equity, and convenience, as he himself will have to decide now; his mind, while he analyzes the various aspects of the case, is in constant contact with theirs. And beyond the purely legal references, he senses the entire contemporary trend of opinions, the social medium as a whole. Not until he has established all these bearings of his case and responded to them in the light of his own professional conscience, will his decision acquire force of conviction and will he be ready to declare it.

The moment this point is reached and the judgment announced, the tide starts running backwards. . . . Every new decision in court gives guidance to all future judges for their decisions of cases yet unthought of.

Id.

This sense of patterned consistency emerging slowly through successive approximations and mutual adjustments is no doubt an important component of that other elusive concept, legal rationality. See also Freund, *Rationality in Judicial Decisions*, in NOMOS VII: RATIONAL DECISIONS 109 (C. J. Friedrich ed. 1964) (discussing Max Weber's complaint that Anglo-American law compromises "rationality" in favor of the practical and the expedient).

¹³² POLANYI, *supra* note 10, at 162.

ways: first, with respect to general rules or doctrine; second, with respect to decisional information or evidence; and third, with respect to the treatment of disputants.¹³³ Adjudication is universalist in its appeal to general rules or doctrine;¹³⁴ legal rules refer to "courses of action, not single actions, and to multiplicities of men, not single individuals."¹³⁵ Adjudication also, however, deals with an identified set of events, which suggests it is particularist regarding the evidence or information upon which a decision is made.¹³⁶ Finally, modern legal systems are universalist in the social assumptions made about disputants.¹³⁷ "[M]odern law consists of rules that are uniform and unvarying in their application. The incidence of these rules is territorial rather than "personal;" that is, the same rules are applicable to members of all religions, tribes, classes, castes, localities and to both sexes.¹³⁸ This universal treatment is attained at no small cost to accuracy: the law is able to preserve the idea of the equality of all citizens before the law only by deliberately excluding much of man's experience, such as the artistic and religious life, from its area of concern.¹³⁹

3. Procedures Variable A3: Whether Adjudication is Reactive or Active

It is generally acknowledged that adjudication is a reactive procedure,

¹³³ See *supra* text accompanying notes 49-51.

¹³⁴ Chayes, *supra* note 20, at 1285.

¹³⁵ Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958). Hart is supported in this latter conclusion by general consensus. Marc Galanter joins the consensus, but points out that appeal to general rules is much more pronounced in the legal systems of industrial societies than the legal systems of traditional societies:

[M]odern legal norms are universalistic. Particular instances of regulating are devised to exemplify a valid statement of general applicability, rather than to express [as in the norms of traditional societies] that which is unique and intuited.

Galanter, *The Modernization of Law in MODERNIZATION: THE DYNAMICS OF GROWTH* 153, 155 (M. Weiner, ed. 1966). In this more specific section of the article, description is confined to a model based on Anglo-American law. As Galanter points out, adjudication in a more traditional society differs from this model in several respects. *Id.*, *passim*. Galanter also cautions as follows against the too-easy belief that the generalities about legal rules in modern society are completely accurate:

Our model of modern law emphasizes its unity, uniformity, and universality. Our model pictures a machinery for the relentless imposition of prevailing central rules and procedures over all that is local and parochial and deviant. But no actual legal system is really so unified, regular, and universalistic. [In every legal system there are] sources of diversity, variety, irregularity, and particularism. . . .

Id. at 157.

¹³⁶ Chayes, *supra* note 20, at 1282. This is supported by a later passage discussing appellate level adjudication which, Chayes states, differs from trial level adjudication in that "only there [i.e. at the appellate level] did the process reach beyond the immediate parties to achieve a wider impact through the elaboration of generally applicable legal rules." *Id.* at 1285.

¹³⁷ See *supra* note 50 and accompanying text.

¹³⁸ Galanter, *supra* note 135, at 154. The differences among persons that are recognized by the law are not differences in intrinsic kind or quality, such as differences between the nobles and serfs or between Brahmans and lower castes, but differences in function, condition, and achievement in mundane pursuits. *Id.* at 154-55.

¹³⁹ STEIN & SHAND, *supra* note 26, at 90.

since it is party-initiated.¹⁴⁰ Such a reactive procedure as defined in this model can be expected most often to treat problems based on past events. Traditional lawsuits in fact are retrospective, concerning completed events.¹⁴¹ American courts are largely passive and resolve only those disputes that are brought before them.¹⁴² Such dependence on party initiative above all else limits the power of the courts.¹⁴³ Thus, traditional adjudication in all significant respects is very close to being a purely "reactive" procedure.

4. Procedures Variable B1: Whether Adjudication is Stranger-controlled, or Disputant-controlled

In contrast to the previous variable, it is unclear whether adjudication is basically stranger-controlled or disputant-controlled.¹⁴⁴ In fact, adjudication displays features of both disputant and stranger control. The parties (often acting through their attorneys whose relationships to the actual disputants can vary from intimate friend through virtual stranger) are responsible for raising issues and arguments, offering proofs, and interrogating witnesses. The judge, however, can constrain the parties' control on any such matter and the parties cannot control the final deliberations of judge or jury. Once trial has begun, no range of options for resolution is offered to either party.

The reason for the combination of stranger and disputant control of traditional adjudication arguably lies in the problem variable associated with this aspect of procedure, i.e. whether the problems typically handled by adjudication arise in the context of simplex, or multiplex relationships. Certainly traditional adjudication, being a sort of residual, last-resort decision-maker for all kinds of problems, must be equipped to handle both simplex and multiplex

¹⁴⁰ Chayes, *supra* note 20, at 1283.

¹⁴¹ *Id.* at 1282.

¹⁴² As Goldman and Sarat state plainly:

American courts do not actively seek out the disputes with which they deal. Instead it may fairly be said that our courts are passive and reactive. They wait for disputes to be brought to them.

Goldman & Sarat, *supra* note 52, at 5.

¹⁴³ Reactive procedures plus the incremental nature of litigation combine, says Howard, to give the courts "[f]ormally, . . . the shortest reach; they are the easiest to check, the most vulnerable to popular retaliation." Howard, *supra* note 32, at 355. But the qualification "formally" in the Howard quotation is obviously important. Practically, the interplay of the three branches of government is subtle; at any given time any of the branches may be preeminent. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

¹⁴⁴ Chayes, in his fifth quoted point, states explicitly that traditional adjudication is "party-controlled." See *supra* note 169 and accompanying text. Just as explicitly, however, Eisenberg states it is stranger-controlled:

While dispute-negotiation is usually controlled by the disputants themselves, and is therefore characterized by its *intimacy*, traditional adjudication is characterized by the central role given to a *stranger*. The impact of the stranger's role makes itself felt dramatically across every element of the two processes: selection and application of norms; determination of facts; choice of remedy; and, perhaps most dramatically, the emotional effect of participation. (footnotes omitted).

Eisenberg, *supra* note 63, at 655.

problems. That requirement in itself might account for the existence of elements of both disputant-control and stranger-control. The ambivalence goes deeper, however, to whether the allocations of legal rights and duties follow a simplex, transactional model, or a multiplex, relational model. On this question there exists a sharp disagreement. One view sees the design of the legal system as based on assumptions of simplex relations: "[M]odern law is transactional. Rights and obligations are apportioned as they result from *transactions* (contractual, tortious, criminal, and so on) between parties rather than aggregated in unchanging clusters that attach to persons because of determinants outside the particular transactions."¹⁴⁵ The opposite view holds that *relationships*, rather than discrete transactions, form the basis of Anglo-American law.¹⁴⁶ Support for this multiplex, relational model of traditional adjudication is found in the substantive law of such areas as landlord-tenant, partnership, domestic relations, and master-servant.¹⁴⁷ In each of these areas of law the rights, duties and liabilities of the parties are established by the relation between the parties rather than by the will of the parties.¹⁴⁸

Perhaps the two opposing views can be reconciled by saying that the common law uses as its model individual transactions that occur largely within relationships whose boundaries are legally determined. The general metaphor for how society is organized, therefore, is one of initiatives within constraints. Perhaps not surprisingly, it is just such a metaphor that could characterize the procedural mix of disputant control to stranger control in adjudication.¹⁴⁹ It

¹⁴⁵ Galanter, *supra* note 135, at 154 [emphasis added]. Although seeing rapid change in this regard, Ian MacNeil would support Galanter's opinion. Western legal systems contain a bias toward the transactional model rather than the relational model, he says, because of the reliance of such systems on "explicit rules creating explicit and monetarized rights. These are transactional techniques; the western legal system, especially the judiciary (real or quasi), uses them very heavily. . . ." MacNeil, *supra* note 15, at 741.

¹⁴⁶ Pound, writing in 1917, seems to come emphatically to this conclusion. He states: In the Romanist system the chief role is played by the conception of a legal transaction, an act intended to create legal results to which the law, carrying out the will of the actor, gives the intended effect. . . . In our law, by contrast, the central idea is rather relation. Thus, in case of agency the civilian thinks of an act, a manifestation of the will. . . . The common law lawyer, on the other hand, thinks of the relation of principal and agent and of powers, rights, duties, and liabilities, not as willed by the parties, but as incident to and involved in the relation.

Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 211-12 (1917).

¹⁴⁷ *Id.* at 212-15.

¹⁴⁸ *Id.* at 212.

¹⁴⁹ This controversy as to whether a simplex or a multiplex model of society underlies the creation of legal rules bears also on whether traditional adjudication is universalist or particularist with respect to its treatment of disputants. Pound explicitly rejects using Maine's "status to contract" evolution to describe how Anglo-American law looks upon individuals. *Id.* at 211. In most human endeavors, thinks Pound, the common law ascribes some sort of relational or status baggage. This may well be true, but it does not necessarily amount to treating people "particularly" as was done under feudal law. This distinction between archaic and modern forms of status ascription is well made by Professor Graveson: In modern society, people are not constantly burdened by the *same* ascribed characteristics regardless of the nature of their transactions. People are free to move in and out of a variety of "status" categories. R. GRAVESON, STATUS IN THE COMMON LAW (1953). See also Rehbinder, *Status, Contract, and the Welfare State*, 23

therefore is difficult to locate adjudication precisely along a continuum between stranger-control and disputant-control. Elements of both are present in almost every instance of adjudication and one is left to conclude that each is roughly of equal significance.

5. Procedures Variable B2: Whether the Participation in Adjudication is Strict and Assured, or Loose and Diffuse

Participation in traditional adjudication can be characterized as strict and assured. Participation is strict in that in a traditional lawsuit it is up to the parties to present proofs and arguments for a decision in their favor.¹⁵⁰ Only in appellate adjudication does the process reach in any manner past the immediate parties.¹⁵¹ Moreover, participation in adjudication is assured since a lawsuit is a contest between diametrically opposed parties in which each party is entitled to participate.¹⁵² Hence, traditional adjudication can easily be characterized as strict and assured rather than loose and diffuse.

6. Procedures Variable B3: Whether Adjudication is Strongly Responsive, or Weakly Responsive, to the Proofs and Arguments of the Parties

This variable is controversial. One view maintains that traditional adjudication is strongly responsive to the proofs and arguments of the parties. Under this view, a court's decision "ought to proceed from and be congruent with [the parties'] proofs and arguments."¹⁵³ A contrasting view states that the adjudicative decision is based on utilitarian rather than individualized considerations.¹⁵⁴ To the extent a decision is based on social considerations, it is weakly responsive to the individualized considerations brought forth. True, the winning party could base his or her argument on social considerations, and such arguments might be reflected in the judgment. Such congruence would be

STAN. L. REV. 941 (1971). Indeed it is the law that often creates the entry and the easy means of escape from such status categories.

¹⁵⁰ Fuller, *The Forms and Limits of Adjudication*, *supra* note 10, at 364; *see also* Fuller, *Adjudication and the Rule of Law*, *supra* note 10, at 1.

¹⁵¹ Chayes, *supra* note 20, at 1285. Again, Chayes is confining his remarks to "traditional adjudication" as opposed to "public law litigation." In the latter sort of litigation, even at the trial level the dispute ranges far beyond the immediate parties.

¹⁵² *Id.* at 1282-83. The "assuredness" of participation receives further substantiation from Robert Mnookin, who summarizes:

At the core of adjudication is the notion that government exercises authority through a process in which the persons affected can participate. (footnote omitted).

Mnookin, *Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 249 (1975).

¹⁵³ Eisenberg, *supra* note 12, at 413. "[S]trong responsiveness . . . is an independent norm which both helps define adjudication and gives a special meaning to participation through proofs and arguments. To this extent, strong responsiveness is a critical characteristic of the adjudicative process." *Id.*

¹⁵⁴ *See* discussion of Aubert's "model of adjudication," *supra* at note 31 and accompanying text.

coincidental, however, and the judgment criteria would remain exogenous to the individual considerations of that party.

In determining the extent to which the decisions of Anglo-American adjudication are based on utilitarian, social, or policy considerations rather than individual considerations, the conclusions made about the "universalist versus particularist" variable are relevant. Legal decisions are based on both universalist and particularist considerations. Every case ultimately is more or less grounded on universalist general rules or doctrine which are formulated along utilitarian grounds. Yet every case gathers individualized decisional information or evidence, thus tempering the result that might obtain on strictly utilitarian grounds.¹⁵⁵

7. Procedures Variable C1: Whether Adjudication Produces a Binary, or rather, a Graduated or Accommodative Decision

That traditional adjudication employs the binary rather than graduated decisional form is widely acknowledged but by no means uniformly applauded,¹⁵⁶ since a binary decision gives all to the successful party.¹⁵⁷ Two reasons are commonly advanced to explain the tendency toward binary decisions. The first is that the all-or-nothing decision is the necessary result of the peculiarly absolutist nature of legal rules and norms.¹⁵⁸ The second suggestion is less formal, stating that the values underlying legal rules are considered by society as crucial to its identity or endurance.¹⁵⁹ With respect to the first reason, one commentator has stated that the Anglo-American judiciary uses absolute legal rules and norms because the judiciary "is uncomfortable in the highest degree with persuasion, mediation, adjustment, compromise, etc."¹⁶⁰ Thus, it has been asserted that judges use legal norms in a highly stylized and tightly controlled fashion; where norms conflict, a judge will discard one as invalid or inapplicable and select one as determinative of the outcome of the case.¹⁶¹

¹⁵⁵ For a general and very valuable discussion of the interplay of rules, utilitarianism, and rights, see DWORKIN, *supra* note 50.

¹⁵⁶ See, e.g., the criticism in Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964). Aubert, for example, complains: "The legal solution, in common with the solution which accident, fate, or ill-will may give to a transaction, tends to ignore the minimax principle and gives all to one party." Aubert, *supra* note 31, at 28.

¹⁵⁷ See *supra* note 156.

¹⁵⁸ See *infra* note 160-62 and accompanying text.

¹⁵⁹ See *infra* note 163-64 and accompanying text.

¹⁶⁰ MacNeil, *supra* note 15, at 741-42. This position is elaborated by Eisenberg, who ultimately ties the absolute nature of legal norms to the fact that the judge is normally a stranger to the disputants. See *supra* notes 64-73 and accompanying text. MacNeil no doubt has in mind the process of litigation itself. At stages *prior* to litigation, the legal system contains many substantive rules, such as the accord and satisfaction doctrine, that promote "adjustment, compromise, etc." David Fleming, personal communication (March, 1981).

¹⁶¹ As Eisenberg states:

A further limitation on the power of legal rules to explain the binary nature of Anglo-American traditional adjudication arises from the very structure of the legal rules. While the binary form is generally used in the stating of legal decisions and legal rules, the words "do not express precise ideas, but do practically the reverse: they point to enormously complex difficulties . . . and they provide a beginning for argument and thought."¹⁶² Thus, the "absolute" nature of legal norms is fictitious. The binary nature of legal decisions cannot be explained on the basis of a model of legal thought that is radically fictitious.

The second proposed explanation for the binary tendency of legal decisions is that the values underlying legal rules are considered by society as crucial to its identity or endurance. Legal decisions touching on values closely held by society, so goes the argument, are binary in order that the values are expressed unambiguously.¹⁶³ This explanation seems convincing wherever strongly held social values are present. Many decisions, however, deal with matters that are quite mundane. The binary mode remains in place in such cases even though, as one commentator noted, the moral position of the decision-maker is enhanced by a non-binary decision close to the accommodative golden mean.¹⁶⁴ The explanation for the relentlessly binary nature of

In adjudication (or, at least, that style of adjudication prevalent in complex Western cultures) the universe and operation of norms is highly stylized and tightly controlled. Where norms conflict, a court will characteristically treat one norm as not only subordinate but totally invalid—so that a court which adopts the doctrine of contributory negligence will deny the validity of comparative negligence. Where norms collide, a court will characteristically select one as determinative of the outcome of the case and reject the other as inapplicable. . . . Finally, courts tend to treat person-oriented norms as either invalid or irrelevant—so that in the United States the socially recognized principle that brothers owe each other special obligations will typically give rise to neither a cause of action nor a defense. (footnotes omitted).

Eisenberg, *supra* note 63, at 644.

¹⁶² J. WHITE, *THE LEGAL IMAGINATION* 228 (1973). White concurs with the *formal* aspects of the Eisenberg binary, act-oriented model. Yet, says White, "There is a sense in which the very structure or syntax of the rule—the way it works—makes it a radically fictional expression." *Id.* This "fiction" of legal rules springs from four characteristics:

First, . . . the rule reduces all that can be said about an event to a "legal issue," a question framed in legal terms demanding an answer "yes" or "no"; second, it works by a process of naming or labelling that has the false appearance of being a simple and easy operation, a falsity that seriously misleads many users of legal language; third, an apparent premise of the rule is that it shall always be applied consistently, so that its terms—its labels—shall always mean exactly the same thing (and . . . this premise is unworkable if true, dishonest if not); fourth, the legal rule is usually designed to have a sort of middle degree of generality, between the specific command and the vague ideal, and this form involves constant compromise and inaccuracy.

Id. at 228-29. See also STEIN & SHAND, *supra* note 26, at 93-95.

¹⁶³ STEIN & SHAND, *supra* note 26, at 91, 92. See *supra* notes 109-14 and accompanying text. This "values" explanation is not inconsistent with the reasoning that the binary mode will emerge in a third-party procedure only where the interests of society are deeply felt.

¹⁶⁴ See *supra* note 109 and accompanying text. Aubert's explanation for the general use of the binary decision is unconvincing. He suggests the binary approach may work to increase accuracy, since the spirit of compromise is actually a *distortion* of the facts: "[T]his tendency [toward

legal decisions perhaps lies in judicial inertia, or reluctance to include in legal judgments overt discussion of the presence or absence of compelling social needs. Alternatively, it may simply be an inability of judges to transcend that rather Newtonian mentality to which all people seem susceptible — that everything simply is, or is not.¹⁶⁵

Whatever the reason, there seems little doubt that the form of traditional legal decisions is binary rather than graduated or accommodative. Substantively the matter is open to some question, since over time the language of law is susceptible to manipulation, and decisions come to mean more than one thing.¹⁶⁶ At the time the decision is made, however, the inescapable fact is that one disputant wins, and the other loses: a binary decision.

8. Procedures Variable C2: Whether Adjudication is Corrective, or Facilitative

Whether a given procedure is corrective or facilitative can be examined from several different perspectives. The three suggested in this article are: the function of the decision (is it to control or cure, rather than to enable or prevent); the dominant view of problems (are they pathological rather than expected or inherent in a given situation); and the emotional impact of submitting a decision (is it debilitating rather than merely regrettable or therapeutic).¹⁶⁷ On all three attributes, adjudication is more corrective than facilitative. Unquestionably, however, adjudication plays an important facilitative role.

The function of adjudication most often is seen as controlling or rectificatory rather than facilitative or preventative.¹⁶⁸ Problems are dominantly viewed as "breaches of duty" rather than as the process of mutual adjustment normally attendant to relationships. Also, somber assumptions are made about the state of a relationship that needs resort to adjudication. These assumptions are reflected in some aspects of adjudicative procedure, and in the emotional impact of participation. As one commentator stated, "each disputant is by posture a supplicant and by role an inferior. He must tacitly admit that he can-

compromise] may also introduce a bias, since there is no intrinsic reason why one party should not be predominantly right in his claims." Aubert, *supra* note 31, at 40. This may well be, but the bias is certainly not cured by adopting a mode of decision that *forces* one party to be declared completely right, and the other completely wrong. The binary approach is a bias in the other direction. Were Aubert correct in his "accuracy" reasoning, we should expect to see at least some graduated or accommodative decisions.

¹⁶⁵ For a discussion of how scientific thought has influenced legal thought, see L. FULLER, *LEGAL FICTIONS* (1967) ch. 3, 93-137.

¹⁶⁶ See *supra* note 162 and accompanying text.

¹⁶⁷ See *supra* notes 115-22 and accompanying text.

¹⁶⁸ This view is illustrated by Chayes' third point which states that "the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty." See *supra* note 126 and accompanying text. Plainly evident in this statement is the "guilt" mode of cognition suggested by Aubert as yet another defining feature of the corrective type of procedure. Aubert, *supra* note 31, at 36. See also *infra* note 227.

not handle his own affairs."¹⁶⁹ Moreover, the disputant must do his utmost to influence the adjudicator, while according the adjudicator great respect, if not deference.¹⁷⁰

Where the adjudication does not involve some notion of compensation for wrong, the lawsuit normally is seen by both legal and social theorists as an "instrument of social control."¹⁷¹ Much of law, however, including the law of contract, agency, marriage and divorce, property, and most rules of court procedure have little to do with social control. Rather, they "serve primarily to set the terms of men's relations with one another; they facilitate human interaction as traffic is facilitated by the laying out of roads and the installation of direction signs."¹⁷² Although not without its facilitative aspects, adjudication tends on balance to be essentially corrective.¹⁷³

B. *Problems and Their Suitability for Anglo-American Adjudication*

This section derives a profile of the sort of problem best suited for resolution by Anglo-American adjudication as described according to the eight procedure variables. Using that profile as a guide, a number of the types of problems submitted for adjudication are described, and their respective "justiciabilities" roughly charted. In the succeeding sections, several of the charted problems are discussed in greater detail.

1. The "Ideally Justiciable" Problem

The "ideally justiciable" problem is simply that problem whose eight structural variables are fully consistent with the structural attributes of adjudication established in the previous section.¹⁷⁴ Once adjudication has been structurally described, the ideally justiciable problem is easily derived by referring to the procedure-problem associations derived earlier. Inasmuch as the procedural attributes of traditional adjudication can be described and links can be made between the procedure and problem variables, it follows that a problem can be described as ideally suited to traditional adjudication. This process is not entirely mechanical, however, and there follows an explanation of the derivation of each of the ideal problem's eight attributes.

¹⁶⁹ Eisenberg, *supra* note 63, at 659.

¹⁷⁰ *Id.*

¹⁷¹ Fuller, *supra* note 16, at 20. This perspective perhaps stems in part from the traditional absolutist model of legal rules, the limitations of which have been discussed above, and in part from "the notion that the necessity for law arises entirely from man's defective moral nature. . . ." *Id.* Yet as Fuller states, much of law has nothing whatever to do with man's "moral" or "immoral" nature. *Id.*

¹⁷² *Id.*

¹⁷³ For a summary of the locations of adjudication on the continua of the eight procedure variables, see Appendix D.

¹⁷⁴ See *supra* note 173.

Adjudication is somewhat unusual among decisional procedures in that it is capable of solving *both* simple problems and interactive problems. For two reasons, however, adjudication is probably better suited to solving simple problems. First, because adjudication is reactive, the solution of an interactive problem through the common law might require a considerable period of time, often years. Second, because the optimization of variables required to resolve an interactive problem is accomplished at the system level, i.e. by the *aggregate* of cases that constitute the common law, the interactive problem can be expected to present great decisional difficulty at the individual case level. This is particularly so early in the decisional history of a given legal problem. Therefore, even though adjudication can cope with interactive problems, the adjudicatory process nonetheless is better suited to solving simple problems.

Because adjudication employs universalist rules, but looks to particularist evidence, while treating disputants universally, the process is much better suited to solving problems with decisional criteria that are undisputed or well-established. In addition, because adjudication is a reactive procedure, it is better designed for resolving problems based on past events than for resolving problems requiring prediction of future events.

Adjudication as noted has elements of both stranger-control and disputant-control.¹⁷⁵ Adjudication therefore would seem to be equally adept at solving problems arising in the context of simple, or multiplex, relationships. Although the disputant control that is allowed in adjudication is no doubt a useful adaptation for dealing with multiplex problems, on balance adjudication is better suited to simplex party problems. This is the result of the influence of another procedure variable, namely "corrective versus facilitative." Adjudication is largely corrective: as such, certain emotional effects accompany the bringing of a lawsuit. Adjudication can be highly detrimental to aspects of a multiplex relationship, such as the marital relationship, even though the relationship is not specifically part of a given lawsuit.¹⁷⁶ Adjudication passes judgment according to a "guilt" and "compensatory" mentality incompatible with the mutual trust and reciprocity needed to sustain long-term, intimate relationships.¹⁷⁷ Adjudication therefore is better suited to solving simplex party problems than multiplex party problems.

¹⁷⁵ See *supra* notes 144-49 and accompanying text.

¹⁷⁶ See *supra* notes 74-76 and accompanying text.

¹⁷⁷ This is substantiated by the finding of Goldman and Sarat:

[T]he way in which third-party remedy systems account for the emergence of trouble in a relationship also influences the way people will deal with that trouble. Those which try to settle troubles by determining whether someone violated a social norm and by assigning causal or moral responsibility will not be attractive to people who have long-standing relationships. These people will generally see greater ambivalence in the evolution and continuation of their trouble than such a settlement procedure recognizes.

Goldman & Sarat, *supra* note 52, at 19.

Since adjudication uses strict, assured participation, it is better suited to solving "private" disputes than to solving "public" disputes.¹⁷⁸ The wider interests at stake in a "public" dispute cannot be ideally accommodated with limited participation, but rather should be resolved in a more diffuse forum such as a legislature.

Since adjudication is fairly strongly responsive to the proofs and arguments of the parties, it is more suitable to resolving problems for which private resolution is "feasible" than those for which private resolution is "infeasible." Despite the strong responsiveness of adjudication, however, "infeasible" problems often are adjudicated. Where problems cannot feasibly be resolved privately, judges probably feel special pressure to hear the case: If the disputants are foreclosed from the legal system, there may be no other decisional institution to turn to, leaving the parties to a more or less arbitrary and violent form of self-help.¹⁷⁹ Moreover, the legal system often can adapt easily to hearing an "infeasible" problem, as where the court simply appoints an attorney to represent the interests of the party, who by reason of incapacity or absence would be prejudiced by a strongly responsive procedure.¹⁸⁰

Since adjudication uses the binary form of decision announcement, it is not well-suited to hear problems about which considerable social dissensus exists. Such problems are normally much better suited to graduated or accommodative decisions.¹⁸¹ Occasionally, however, a court will treat a dissensus problem in a distinctly binary fashion, hoping thereby to forge some community consensus on the issue, or to dispirit those holding the opposing view.¹⁸² In addition, adjudication is more corrective than facilitative. Either form of procedure can cope in its own way both with problems for which private resolution is desirable, and with problems for which private resolution is undesirable. Since corrective procedures are more bluntly considered "instruments of social control," such procedures can perhaps deal with "undesirable" problems more forthrightly than can facilitative procedures. Nonetheless, just as adjudication is better suited to solving simple problems than interactive problems, even though it can cope with the latter, so also is adjudication better suited to solving problems for which private resolution is desirable, even though it *can* cope (though perhaps unevenly) with problems for which private resolution is undesirable. Undesirable "tragic choice" problems pose unavoidable difficulties for adjudication because (1) such problems often come to a morally ambiguous choice between two bad alternatives; and because (2) contrary to

¹⁷⁸ See also *supra* notes 85-86 and accompanying text, regarding the exception for criminal trials. Also, the definition of "public" and "private" disputes here used is formal, and is applied only with great difficulty to the modern sort of case that Chayes refers to as "public law litigation." See *infra* notes 456-87 and accompanying text.

¹⁷⁹ See also *supra* notes 104-05, 524 and accompanying text.

¹⁸⁰ See *supra* notes 78 and 100 and accompanying text.

¹⁸¹ See *supra* notes 156-66 and accompanying text.

¹⁸² See *supra* note 114 and accompanying text.

the traditions of adjudication in which candid justifications accompany the announcement of decisions, the true reasons behind tragic choice decisions must remain clouded.¹⁸³ The ideal problem thus is reduced to one having the following attributes:¹⁸⁴ Simple content variables; Well-established decisional criteria; Past-oriented; Simplex relationship between parties; Private dispute; Private resolution feasible; Social consensus on proper outcome; and Private resolution desirable.

2. Patterns of Justiciability

Using the profile developed of the ideally justiciable problem one can construct a chart that provides a very rough, and in several respects inconclusive, guide to the justiciability of a variety of problems submitted to the Anglo-American system of adjudication (see Figure 1). The eight characteristics of the ideal problem become the columns on the chart. The rows are various problems that have been submitted for adjudication. For simplicity, there is no consideration of degree along a continuum. The structure of each problem has been assessed in a binary fashion so that every problem is considered, for example, to have completely well-established, or completely unknown, decisional criteria. This procedure is reductive, but the chart is intended simply to reveal patterns. Where the attribute of the given problem agrees with the corresponding attributes of the ideally justiciable problem, a "+" appears in the appropriate box. Where there is a disagreement, a "-" appears. If for any reason no judgment could be made (such as that the characterization depends greatly on particular circumstances, or that both poles of the variable tend to be present in every instance of the problem), a "?" appears.

Two conclusions can be drawn immediately from Figure 1: (1) the gradual deterioration of justiciability as one proceeds down the list of problems correlates highly with the increasing novelty of the problem's legal implications; and (2) many problems that depart significantly from the model of ideal justiciability are commonly heard by Anglo-American judges. The correlation between decreasing problem justiciability and increasing legal novelty is evidence that the theory is substantially accurate. Traditional legal subject matters like property, contract, tort, and criminal law score as almost perfectly justiciable.¹⁸⁵ Conversely, such legally novel issues as the regulation of scien-

¹⁸³ See *supra* notes 25-29 and accompanying text.

¹⁸⁴ A summary of the attributes of the "ideally justiciable" problem is depicted at Appendix E.

¹⁸⁵ The "?" mark in the "social consensus" box of the "Breach of Contract" action reflects the gradual deterioration, particularly in consumer contexts, of the once widely shared beliefs that people should be held to those promises made but not fully understood, and those promises made, but not made fully without duress. See generally, G. GILMORE, *THE DEATH OF CONTRACT* (1974). The "?" in the "private dispute" box of "Criminal Law" reflects the presence in every criminal trial of elements of both public and private disputes. See *supra* note 85 and accompanying text.

Figure 1
Patterns of Justiciability

Problems	Ideal Attributes							
	Simple variables	Well-established	Past events	Simplex parties	Private disputes	Private resolution feasible (nonviolent)	Social consensus	Private resolution desirable (nonviolent)
Property boundary dispute	+	+	+	+	+	+	+	+
Personal injury tort	+	+	+	+	+	+	+	+
Criminal law	+	+	+	+	?	+	+	-
Breach of contract	+	+	+	+	+	+	?	+
Nuisance	?	+	+	+	+	?	+	+
Divorce (contested)	+	+	+	-	+	+	+	+
Riparian rights	-	+	?	?	+	?	+	+
Breach of promise	+	-	+	-	+	+	-	+
Intra-denominational Church disputes	+	-	?	-	+	+	?	+
Civil commitment	+	-	?	-	?	-	+	-
Obscenity	+	-	+	+	-	-	-	-
Restrictive trade cases	-	?	?	+	?	-	+	+
Employment discrimination	?	-	+	-	?	-	-	-
Child custody	-	-	-	-	+	+	-	+
Abortion	+	-	?	+	-	-	-	-
Technology assessment	-	-	-	+	-	-	-	+
Allowance of bail	-	+	-	+	-	-	-	-
Suits to enjoin factory closures	-	-	-	-	?	+	-	+
Aesthetics regulation	-	-	?	+	?	-	-	?
Pollution	-	-	?	+	?	-	-	?
Child ungovernability	+	-	-	-	?	-	-	-
Controls on science	-	-	-	+	-	-	-	-
Criminal sentencing	-	-	?	+	-	-	-	-
Who may bear children	-	-	-	-	-	-	-	-

tific activity, or the enjoining of factory closures on grounds of "social responsibility," score very badly. The only aberrations to this correlation are criminal sentencing and the setting of bail. The criminal sentencing exception is discussed later in this article, and the allowance of bail exception is roughly analogous. These exceptions do not, for reasons that will be made clear, undermine the fairly striking correlation between decreasing problem justiciability and increasing legal novelty. The correlation means that either the theory as constructed is reasonably valid, or else the assumptions alluded to above¹⁸⁶ concerning the evolution of procedures are invalid. To review, these assumptions are first that problems, in addition to being of varying content, can differ from one another in ways that can be described structurally. Second, people constantly seek procedures for solving problems that are maximally accurate, efficient, and acceptable. Third, such maximization occurs when a specific procedure is devised that copes well with the specific structural attributes of a certain problem. Fourth, it can therefore be assumed that procedures evolve along structural lines that bear associations with the structure of problems. If such assumptions are correct, then there should be a strong correlation between the attributes of a procedure, and the attributes of the sorts of problems most commonly¹⁸⁷ or traditionally resolved by such procedures. Such correlation does emerge in the chart; hence the constructed theory can be grossly inaccurate only if the underlying assumptions are incorrect.¹⁸⁸

¹⁸⁶ See *supra* notes 33-35 and accompanying text.

¹⁸⁷ The rather depressing results of the research of Friedman and Percival are that the traditional subjects of law (contract, tort, property) are increasing rarities in the actual work of inferior courts. This counsels caution in use of the word "commonly." See Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267 (1976).

¹⁸⁸ Thomas Kuhn, of course, alerts us to another possibility: that the designer of the chart was unconsciously influenced by his own predispositions. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* (1962). This is not to be taken lightly; many of the attributes assigned to the twenty-three problems are debatable. The reader is invited to make independent assessments of the "+" and "-" and "?" features of the chart. Minor variations in the details of the chart, however, would not affect the patterns from which the claims of validity are drawn.

This study proceeded first by attempting to develop a "structural vocabulary" for problems qua problems. No particular sort of problems, for example "legal problems," acted as models. Next, the same process was followed for "procedures," again without any particular reference to "legal procedures." Third, the major interactions and associations of the problem and procedure variables were studied. The "evolutionary" relationship between a particular problem variable and a particular procedure variable was noticed. The evolutionary model was then adopted as a working hypothesis, leading to many of the associations postulated *supra* in Section B which introduces and describes the procedure variables. Once such associations are found, deriving the ideal problem structure for a given procedure is purely logical. The procedure has a given structure which works best in solving problems with a structure dictated by the associations. Problems not possessing such a structure are more or less poorly suited to be resolved by the procedure.

This theory is in no way restricted to the procedure of "adjudication." It can be used to describe the structure, and recommend the ideal sort of problem to be decided by any of a number of alternative decisional procedures, like negotiation, or the pure market, or the lottery. Alternatively, one could begin with a given problem and recommend the ideal procedure for solving it.

The second conclusion clear from Figure 1 is that many problems bearing attributes opposite from those of the ideally justiciable problem, are regularly heard by Anglo-American judges. At first blush this fact seems to contradict the evolutionary assumptions about problems and procedures. Each society, however, has available to it only a limited number of settlement procedures.¹⁸⁹ Judges therefore often must hear these "dissonant" problems because adjudication is the best available technique. Such necessity does not change the incompatibilities between such problems and adjudication. The legal system, and judges in particular, respond to the dissonance with Victorian ingenuity—sometimes changing the problem, sometimes changing themselves. *Such problem modifications or procedural adaptations often occur predictably along the exact structural variable where the incompatibility with traditional adjudication is most severe.* The remainder of this article is devoted to testing this claim; if borne out, it affords yet more striking validation of the constructed theory of justiciability.

III. TESTING THE THEORY

The structural theory of the interaction of problems and procedures developed in this article has potential application far beyond the single example of Anglo-American adjudication. Using the theory, an ideal sort of problem can be derived for any given procedure for problem-solving; conversely, for any given problem an ideal sort of problem-solving procedure can be described.¹⁹⁰ For many problems it may well be that no procedure has yet been devised that resembles the structure ideally needed to solve the problem accurately, efficiently, and acceptably.¹⁹¹

The theory was generated rationalistically rather than empirically.¹⁹² Figure 1 crudely demonstrates that the theory has some empirical validity in the context of Anglo-American adjudication. Using this same example, the second half of this article tests virtually every one of the major associations claimed to exist between a given problem variable and its counterpart procedure variable. For any given procedure variable of Anglo-American adjudication a corresponding problem attribute exists.¹⁹³ When such attribute does not appear, and in fact the opposite problem attribute is found in the problems actually being adjudicated, dissonance exists. One should then expect to see a wide array of judicial behaviors that attempt to cope with or resolve the dissonance between the procedures of adjudication and the problem that adjudication is being employed to solve.

¹⁸⁹ Fuller, *supra* note 46, at 1026.

¹⁹⁰ See *supra* note 188.

¹⁹¹ See Fuller, *supra* note 46, *passim*.

¹⁹² See *supra* note 188.

¹⁹³ See Appendix E.

Unsuitable problems often are submitted for adjudication. Sometimes, although rarely, the judge refuses to entertain the dispute.¹⁹⁴ More frequently the judge hears part or all of the case, yet adopts a substantive standard that effectively operates as a refusal to hear the case; most commonly perhaps by deferring absolutely to the discretion of an administrative agency.¹⁹⁵ Frequently, however, the judge does proceed to a judgment on the merits. In such cases, there will be pressure to modify the problem, or to adapt the procedures of adjudication, so as to resolve the dissonance between the structural attributes of the submitted problem, and the structural attributes of adjudication. Problem modifications will tend to occur that somehow convert the problem feature into its opposite. If a problem is unsuitable for adjudication as a result of being interactive rather than simple, for example, the predictable problem modification is one that will somehow treat the problem *as though* it were simple, rather than interactive. An alternative method of resolving this dissonance arising from an interactive problem is for judges to change their *procedures* from their normal form to a form that is much more spontaneous, and therefore much more able to deal with interactive problems. The features and effects of modifications and adaptations to resolve problem dissonances can be predicted by bearing in mind the associations between problem variables, and similarly numbered procedure variables. This section is devoted to predicting and describing how the legal system responds when confronted with problems that are less than perfectly justiciable as a result of their being interactive rather than simple. Succeeding sections are similarly structured for describing the effects of unsuitability for adjudication created by each of the other seven problem variables.

A. *When Adjudication Faces Interactive Problems*

Over time, the common law (as a system, i.e., as an aggregate of cases rather than one individual case)¹⁹⁶ displays "spontaneity" and thereby gains the ability to cope with interactive problems. The key to such system-level spontaneity is *stare decisis*.¹⁹⁷ Judges follow precedent, but not so closely as to foreclose a certain amount of manipulation. This manipulation results in the constant and frequent mutual adjustments that create spontaneity within a decisional system. Over time, what perhaps began as judicial hunch or instinct about the optimal balancing of the interactive variables of a given problem becomes a reservoir of close approximations for differing circumstances, each

¹⁹⁴ See, e.g., *United Kasher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc.*, 349 Mass. 595, 211 N.E.2d 332 (1965).

¹⁹⁵ See *infra* notes 205-25 and accompanying text.

¹⁹⁶ See *supra* notes 130-32 and accompanying text.

¹⁹⁷ See *supra* note 131 and accompanying text.

such prevailing approximation being the result of dozens of literal "trials and errors." What creates dissonance between traditional adjudication and interactive problems is the slowness of the common law process. Ultimately it is spontaneous; at each point in time, however, it appears deliberative.

Interactive problems are therefore more difficult to solve than are simple problems. Particularly when the previous number of adjudications on a given interactive problem is small, pressures exist on the individual judge to refuse to hear the case, or to modify the problem, or to increase the spontaneity of the legal system to cope with the problem. Examples of all three possible responses can be found in examining (a) cases where judges are asked to specify the proper siting of a highway; (b) cases where the judge is asked to declare something visually beautiful or aesthetically unacceptable; and (c) the differing approaches taken by British and American judges toward cases involving the regulation of business competition.

1. Highway Siting

Highway siting is just one example of a common type of very interactive problem. The proper routing of a highway is an optimization of many competing considerations about cost, terrain, soil conditions, preexisting uses, surrounding population density, the availability of nearby alternative routes and, as discussed in the following case, the sociological impact on the neighborhood through which the highway is to be built. Where judges are asked to hear a case that requires a decision about the proper corridor for a proposed highway, they characteristically respond either by *refusing outright* to decide the problem, or by *functionally refusing* to decide the problem through adopting a substantive standard that defers absolutely to the discretion of some administrative agency.¹⁹⁸ Such a deferral is not a mandated standard of review under any general principle of administrative law.¹⁹⁹ Rather, judges choose to adopt very loose standards of review because it is difficult for them to cope with an interactive problem like highway siting.

In *Nashville I-40 Steering Committee v. Ellington*,²⁰⁰ for example, suit was brought by an unincorporated association of citizens in North Nashville, Tennessee, seeking to enjoin state highway officials from constructing a stretch of highway through their community. The complaint alleged procedural errors in the administrative decision that resulted in the particular routing, and also alleged that "selection of the route in question was made arbitrarily or with the purpose of discriminating against the Negro or low socio-economic segments of Nashville's population."²⁰¹ The federal district court denied the injunction. The Court of Appeals for the Sixth Circuit, after holding that the adminis-

¹⁹⁸ See *infra* notes 212-23 and accompanying text.

¹⁹⁹ See *infra* note 205 and accompanying text.

²⁰⁰ 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

²⁰¹ *Id.* at 181.

trative hearing was not invalid for lack of notice, then *refused to consider* whether the result of the particular routing would be to deprive the plaintiffs of the due process and equal protection of the law.²⁰² The court stated that absent proof of racial discrimination, the routing of highways was not a justiciable matter.²⁰³ Thus, the court held, the district court had acted properly in refusing to substitute its judgment for that of the highway officials in the routing of the highway.²⁰⁴ Neither this rather explicit limitation of judicial review nor the slightly less absolute standards adopted by the three cases that follow below are mandated under any general principle of administrative law. In fact, the proper standard of review of the sort of administrative decisions here involved is unclear and with respect to such decisions "probably no court treats all agencies alike."²⁰⁵

Many interactive problems are consigned to administrative agencies through the legislative vehicle of special sort of rules.²⁰⁶ Such rules specify to the administrative agency the relevant factors to consider in their decision, but do not deem any one factor conclusive.²⁰⁷ The rules very often will frame an interactive problem: one having many competing variables, and one for which no guidance is given on the proper optimization. Such rules can be applied only through spontaneous procedures in which the administrator considers a wide variety of decisional factors "[b]ut ultimately . . . reaches decision by an intuitive leap."²⁰⁸ Where a court must subsequently review administrative decisions made pursuant to this sort of rule, the court may choose from standards that vary widely in their closeness of scrutiny. At one extreme is a close standard of review in which the court determines all of the relevant rules and then applies those rules to the facts.²⁰⁹ At the other extreme is a standard of review in which the "court may hold that it is without power to revise the application of rules to the facts unless the application is in its opinion 'unreasonable' or 'ar-

²⁰² *Id.* at 185.

²⁰³ *Id.*

²⁰⁴ "*The minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges.*" (emphasis added) *Id.*

²⁰⁵ L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 557 (1965).

²⁰⁶ *Id.* at 556.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

[This] type of rule is perhaps the most characteristic instrument for making administrative decisions. It singles out a consideration as relevant, but provides no further rule for the application of the consideration. It therefore permits, indeed compels the administrator to resort to a whole complex of additional concepts and attitudes, official and personal, some of which he may explicitly formulate for the decision at hand, some of which he may not express, some of which he may be unaware of . . . The mind focuses attention for a period of time on a group of authoritative decisional factors . . . It is this process which I would call the exercise of "discretion" . . .

Id. at 555-56.

²⁰⁹ *Id.* at 556.

bitrary.'"²¹⁰ In other words, the reviewing court is free to adopt a very close review or to defer to the discretion of the administrators. The *Nashville I-40* court, in refusing even to *consider* the agency determination, seems to go beyond even this extreme minimal review. The contention here is that where the underlying problem is highly interactive, the courts will feel strong pressures to avoid attempting their own optimization of the variables. The *Nashville I-40* court felt just such pressures. That it could refuse to review the administrative decision in the face of a challenge at the *constitutional level*²¹¹ evidences the strength of such influences.

The *Nashville I-40* court, however, showed unusual candor in refusing to review the administrative decision. More often the court will uncomplainingly review the administrative decision on an interactive problem, yet adopt such an invincibly discretionary standard of review as to amount to a *functional* refusal by the judge to consider the challenge. Such was the case in *Citizens to Preserve Overton Park, Inc. v. Volpe*,²¹² an action to enjoin the United States Secretary of Transportation from releasing federal funds to the Highway Department of the State of Tennessee for construction of a segment of an expressway in the City of Memphis through Overton Park, a zoo and recreational area.²¹³ The plaintiffs relied in part on a federal statute that prohibits the Secretary of Transportation from approving any highway project that requires use of land from a public park: "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park"²¹⁴ Such a statute would seem to require the judiciary, in hearing a challenge to a project that does take parkland, to assess any proposed alternative with a view of determining whether such alternative is "feasible and prudent." If so found by the judge, further investigation by the Secretary would seem mandated under the statute. Presumably the plaintiffs were prepared to offer into evidence some alternative plan.²¹⁵ Nevertheless, the court first refused to require the Secretary to set out explicitly his findings concerning his conclusion that there existed no feasible and prudent alternative, and then the court granted summary judgment against the plaintiffs.²¹⁶ The court stated that the Secretary of Transportation

²¹⁰ *Id.* at 557.

²¹¹ Appellants contended "that, regardless of intent, the result of the construction of the proposed highway would be so injurious to the residents . . . as to deprive [them] . . . of due process and equal protection as a matter of law." 387 F.2d at 185.

²¹² 309 F. Supp. 1189 (W.D. Tenn. 1970), *aff'd*, 432 F.2d 1307 (6th Cir. 1970), *rev'd and remanded*, 401 U.S. 402 (1971), *on remand*, 335 F. Supp. 873 (W.D. Tenn. 1972), *supplemental hearings*, 357 F. Supp. 846 (W.D. Tenn. 1973), *rev'd sub. nom.* *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

²¹³ 309 F. Supp. at 1191.

²¹⁴ 23 U.S.C. § 138 (1966).

²¹⁵ *On remand*, plaintiffs did propose an alternative route. 335 F. Supp. at 880-81.

²¹⁶ 309 F. Supp. at 1195.

was to make determinations as to reasonable alternatives and the court was only concerned with whether such determinations were made arbitrarily and capriciously.²¹⁷

The United States Supreme Court reversed and remanded, concluding that the proper standard for judicial review in this case was not a *de novo* inquiry into feasible and prudent alternatives, but the reviewing court must "engage in a substantial inquiry . . . [which is] thorough, probing, in-depth . . ."²¹⁸ On remand, the District Court engaged in such an inquiry and concluded "that on the record the Secretary could properly have determined either that there was or that there was not a feasible and prudent alternative."²¹⁹ Neither judgment would have been "clear error" or "arbitrary or capricious."²²⁰ The routing determination was remanded to the Secretary of Transportation who responded in a written decision of January 18, 1973, that he could not approve the proposed routing through the park because "I cannot find, as the Statute requires, and as interpreted by the courts, that there are no prudent and feasible alternatives to the use of [the] parkland . . ."²²¹ This was no doubt a perfectly honest response: disproving the existence of such alternatives is virtually impossible. It would not only require finding the optimum of all interacting variables, but also would require proving that all other mixes among the variables were vastly inferior, which seems unrealistic. Nonetheless the State of Tennessee petitioned the Federal District Court for an order requiring the Secretary affirmatively to specify what is the feasible and prudent route. The District Court granted the relief.²²² The Sixth Circuit then reversed, saying "[i]f one route is disapproved, the burden is on the state to submit another proposal to the Secretary and at that time the Secretary would be required either to approve or disapprove the new proposal."²²³ If any newly-proposed route used parkland, however, presumably it would not be approved because the Secretary would be unable to prove the lack of a feasible and prudent alternative. It required years of litigation to reach this conclusion.

In a similar case,²²⁴ effective decision-making was so stymied by the various court pronouncements that the United States Congress passed special legislation exempting a proposed Texas highway from obtaining corridor ap-

²¹⁷ *Id.*

²¹⁸ 401 U.S. at 415.

²¹⁹ 335 F. Supp. at 880 [emphasis added]. The District Court undertook a plenary hearing that consumed 25 trial days, and admitted 240 exhibits into evidence. Stated Chief Judge Brown: "We believe it can fairly be said that the inquiry was substantial, thorough, probing, in-depth, searching and careful. We have also had the benefit of 287 pages of post-trial briefs." *Id.* at 878.

²²⁰ *Id.* at 881.

²²¹ 357 F. Supp. at 849.

²²² *Id.* at 852.

²²³ 494 F.2d at 1216.

²²⁴ *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway*

proval by the Secretary of Transportation.²²⁵ The unhappy truth is that such corridor decisions are irreducibly interactive, and the judiciary get involved only with the short run risk of themselves being accused of caprice. Administrative discretion becomes the standard because there is nothing else to be done.

2. Cases Involving Assessments of Aesthetics

Similar pressures against close judicial review exist where such review would entail an assessment of aesthetic worth. That such assessments constitute highly interactive problems is not to be denied.²²⁶

The following two cases illustrate how judges react when asked to make such aesthetic judgments. Both *State ex rel Stoyanoff v. Berkeley*²²⁷ and *Reid v. Architectural Board of Review*²²⁸ involved plaintiffs desiring to build unusual homes in neighborhoods dominated by traditionally styled homes.²²⁹ Both designs were denied building permits.

In *Stoyanoff*, the issue was whether the legislature had unduly delegated authority, without constraining standards, to an architectural review board.²³⁰ The *Stoyanoff* case involved an ordinance calling upon the Ladue, Missouri Architectural Board to approve such designs as conformed with surrounding structures and with appropriate standards of beauty, and to disapprove designs for "unsightly, grotesque and unsuitable structures."²³¹ The Missouri court upheld the constitutionality of this ordinance.²³² The court found justification in part on language from a previous case that gave special latitude to legislative delegations of authority "in situations and circumstances where necessity would require the vesting of discretion in the officer charged with the enforcement of an ordinance, as where it would be impossible to fix a definite rule or standard. . . ."²³³ Such "definite rules or standards" are clearly impracticable in making aesthetic assessments. On the further question in the case of whether the Ladue Board's actual decision comported with the language of the ordi-

Dep't., 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

²²⁵ Federal-Aid Highway Act of 1973, P.L. 93-87 § 154(a), 87 Stat. 276.

²²⁶ [T]he number of potential designs is infinite; the choice as to any single factor, say materials, has an impact on all other factors; and one cannot identify any nonaesthetic features that will even begin to consistently justify the application of any aesthetic concept.

Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 18-19 (1977).

²²⁷ 458 S.W.2d 305 (Mo. 1970).

²²⁸ 119 Ohio App. 67, 192 N.E.2d 74 (1963).

²²⁹ 458 S.W.2d at 307; 119 Ohio App. at 70-71, 192 N.E.2d at 77.

²³⁰ 458 S.W.2d at 311.

²³¹ 458 S.W.2d at 306.

²³² 458 S.W.2d at 311.

²³³ *Id.* [emphasis supplied], citing *State ex rel. Ludlow v. Guffey*, 306 S.W.2d 552, 557 (Mo. 1957).

nance, the court stated that it would uphold zoning decisions, such as the Board's ruling in *Stoyanoff*, "if the result is not oppressive, arbitrary, or unreasonable."²³⁴

The ordinance in the second case, *Reid*, was much more specific than that in *Stoyanoff*, requiring the employment of "proper architectural principles" to regulate "design, use of materials, finished grade lines and orientation of all new buildings."²³⁵ Mrs. Reid's architect-designed proposed home was conceded by the Board to be a "very interesting home in a different environment," but was denied a permit because its design did not conform to the character of the houses in the area.²³⁶ Design compatibility, however, was not mentioned in the ordinance as a fit subject for regulation. Nevertheless, the court approved the Board's determination, stating simply: "[T]he Board did not abuse its discretion in this matter."²³⁷

In *Reid* and *Stoyanoff*, the courts once again relied on "administrative discretion" to avoid substantive review. In other cases involving aesthetic judgments, however, courts refer to the effect on surrounding property values of allowing the proposed home to be built.²³⁸ Sometimes the appeal to property values is made in order to sustain the architectural review legislation against constitutional attack.²³⁹ At other times the discussion of property values is a resort to what might be termed the "common denominator" strategy.²⁴⁰ This is a tempting, but often misleading and reductivist, technique to overcome the problem of optimization in making aesthetic judgments.

In making aesthetic judgments, the need for optimization arises because "objective rules" of aesthetics can never be constructed.²⁴¹ The development of such objective rules is impossible because beauty cannot be fully analyzed in nonaesthetic terms like "square" or "circle;" ultimately, resort must be had to

²³⁴ *Id.* at 310.

²³⁵ 119 Ohio App. at 68, 192 N.E.2d at 76, citing CLEVELAND HEIGHTS, OHIO, CODIFIED ORDINANCES § 137.05.

²³⁶ 119 Ohio App. at 71, 192 N.E.2d at 77.

²³⁷ 119 Ohio App. at 72, 192 N.E.2d at 78.

²³⁸ See, e.g., *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955).

²³⁹ Even after Justice Douglas' opinion in *Berman v. Parker*, 348 U.S. 26 (1954), many states refuse to consider aesthetics *per se* as sufficient reason for the state's use of the police power. It is uncontroverted, however, that the use of the police power is justified under the rubric of "general welfare" where the State acts to prevent deterioration of neighborhoods. It is said that maintaining property values prevents such deterioration. Hence, aesthetics zoning is often legitimized, in jurisdictions that otherwise would not accept it, by tying aesthetics to the maintenance of property values. See generally, Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973).

²⁴⁰ Cf. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L. J. 1315, 1322-23 (1974).

²⁴¹ Williams, *supra* note 226, at 16-18, citing Sibley, *Aesthetic Concepts* in ART AND PHILOSOPHY 351 (W. Kennick ed. 1964).

such terms as "unified, balanced, integrated, lifeless" ²⁴² If the variables all could be expressed according to a common denominator, however, their optimization easily could be accomplished simply by adding together all the various positive and negative values. The weighing of one variable against another would be inherent in the expression of each variable in terms of the common denominator. Once the weighing is clear, optimization is merely a mechanical process of adding the pluses and minuses. For example, the determination of how many apples to grow in a given season depends on the interactions of such variables as "demand," "revenue," "market share," "costs of production," and also factors such as land depletion and personal effort required. ²⁴³ The optimization of these variables is extremely difficult unless one is capable of expressing each variable as a plus or minus quantity of some common denominator, like money. If indeed every variable can be so expressed, the optimization is simply a matter of drawing cost and revenue curves expressed as functions of the number of apples produced. At some point the curves should meet, and that point is the optimum. A court that attempts to validate an aesthetic judgment by referring to the effects on surrounding property values is saying that the many personal assessments of the money value of each relevant aesthetic variable can be aggregated to declare the proposed house grotesque, or unsightly, or innocuous, or even beautiful. It is not relevant here whether this technique of validation, which is common to virtually all forms of cost-benefit analysis, is valid or invalid. ²⁴⁴ Suffice it to say that there are definitional and valuation difficulties with the approach, but that the prospects of optimization it affords will nonetheless make it an attractive technique whenever decision-makers are faced with an interactive problem.

3. British and American Restrictive Trade Practices Laws

One further problem modification as well as certain procedural adaptations can be illustrated by comparing British and American approaches to the interactive problem of regulating business competition. Once again, the interactive character of most antitrust problems is clear. Some of the many relevant factors are: "the 'long-run supply and demand picture,' 'the incentive of

²⁴² Williams, *supra* note 226, at 18 n.52, citing Sibley, *supra* note 241, at 351.

²⁴³ See *supra* note 10 and accompanying text.

²⁴⁴ In the particular case of aesthetics, see Williams' criticism of Turnbull, *Aesthetics Regulation*, 7 WAKE FOREST L. REV. 230 (1971), which proposes wider use of the property value criterion as providing an "objective" determinant of aesthetic value. Williams, *supra* note 226, at 19-20. The more general debate about the use of cost-benefit analysis as a technique for solving other interactive problems (such as development versus preservation of the environment) has produced numerous books and articles. See, e.g., P. SELF, *ECONOCRATS AND THE POLICY PROCESS: THE POLITICS AND PHILOSOPHY OF COST-BENEFIT ANALYSIS* (1975); Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decision-making*, 4 HARV. ENVTL. L. REV. 191 (1980); Rosen, *Cost-Benefit Analysis, Judicial Review and the National Environmental Policy Act*, 19 JURIMETRICS J. 28 (1978); Tribe, *supra* note 33.

sellers or potential sellers to enter new markets and to improve their products or services,' 'adjustments by other companies to the actual and expected shifts in markets affected,' and 'the opportunities for innovation in products . . . [or] in methods of sale.' ''²⁴⁵ In addition to this multiplicity of relevant factors, the adversary process is often insufficient or inaccurate in revealing the degree to which these complex factors are present in a case.²⁴⁶ The main problem with antitrust litigation, therefore, "is that such [multifaceted inquiries] create confusion, magnify uncertainty, multiply the possibilities of error, and otherwise make less certain and less accurate the judicial determination of disputed issues."²⁴⁷ The judicial reaction to such conditions in the general context of restrictive trade practices differs in America and Great Britain. Each response,

²⁴⁵ Bok, *Section Seven of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 256 (1960), citing ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 123-25 (1955). Bok continues:

Further matters of possible interest are "special technologies or know how," "growth history," "changes in the opportunity for sellers to make independent decisions as to products, prices, advertising, sales methods, channels of sales, classes of customers, and business activities in which they will engage," and other matters too numerous to mention. The really striking aspect of the discussion is the lack of any suggestion as to the manner in which these factors may be applied in any given case. Thus, despite the hospitality which the discussion displayed toward the niceties of economic theory, the entire exposition was condemned by one of the most distinguished economists in matters of antitrust [E. S. Mason] as "a total failure to take advantage of an opportunity to suggest policy and clarify the law with respect to mergers"

Bok, *supra* note 245, at 256-57 (footnotes omitted) (quoting ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 125-27 (1955) and Mason, *Market Power and Business Conduct: Some Comments*, 46-2 AM. ECON. REV., Papers and Proceedings 490, 492 (1956)).

²⁴⁶ *Id.* at 291, 295. Even more striking about Bok's criticism is his analysis of the implications of the existence of such competing factors for the *actual adjudication* of merger disputes:

It is also possible that the adversary system is simply not well suited to measure the kind of factors under discussion here. Adversary litigation is probably at its best where the questions in issue are of a predominately "either-or" variety, and the problem is largely one of deciding which side is correct. In the complex statistical and theoretical jungle of a merger proceeding, few disputes actually fit this description The judge may not even have two positions to choose between, for one side will frequently expose the defects in the other's assertion without feeling any tactical need or responsibility to offer an alternative solution Quite clearly, then, the adjudicator cannot aspire under these circumstances to any real confidence as to the degree to which various relevant factors are actually present in the case at hand. This sense of uncertainty as to the facts of the case must inevitably enlarge the doubts which we have already described concerning the relative importance of the various factors that are supposed to bear upon the final result [T]here are reasons for suspecting that a consideration of all relevant factors may actually detract from the accuracy of decisions made under section 7. This danger consists in part of the possibility that errors in logic and inference will increase when larger amounts of complex data must be considered in a conceptual framework that is but partially understood.

Bok, *supra* note 245, at 291-95 (footnotes omitted).

²⁴⁷ *Id.* at 295, quoting 13 F.R.D. 62, 64 (1951) *Report of the Committee of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases*.

however, is logical under the theory of justiciability here posited. That is, each response deals with the interactive nature of antitrust problems by modifying either the problem or the adjudicative procedure. There follows first an overview of the relevant British and American statutes, and then a detailed examination of the problem modification employed by American judges, and the procedural adaptations of the British court.

Neither the British nor the American legislation on antitrust matters give much assistance to the judges. Although the statutes vary greatly in form, both amount to mere instructions to the judiciary to engage in the optimization of competition without providing substantive guidance as to the relative weights of the factors. The British legislation is called the Restrictive Trade Practices Act.²⁴⁸ The Act set up the Restrictive Trade Practices Court, whose sole function is the adjudication of alleged restrictive agreements. Yet restrictive trade practices are not in themselves condemned under the statute. The Court in every case must consider not only the effects of the alleged wrongful agreement on competition, but also must balance such harm against seven possible benefits, specified in the Act,²⁴⁹ of the anticompetitive practice. The Act gives no guidance as to the relative weights of any of these factors.²⁵⁰

In contrast, the American antitrust legislation is quite simple, specifying no such variables and requiring no such balancing of anticompetitive harms against possible wider economic or social benefits.²⁵¹ Although superficially

²⁴⁸ 4 & 5 Eliz. 2, c. 68, now amended and consolidated as the Restrictive Trade Practices Act, 1976.

²⁴⁹ As summarized in J. OLIVER, *LAW AND ECONOMICS: AN INTRODUCTION* 65 (1979), such benefits are:

1. that the agreement is necessary for the protection of the public from physical injury;
2. that a specific or substantial benefit results to the public;
3. that the agreement is necessary as a countermeasure to another's restrictions;
4. that the agreement is necessary to protect the parties against large buyers and sellers;
5. that the removal of the agreement would be likely to have a serious and persistent effect on unemployment;
6. that the abolition of the agreement would result in the reduction of the export business.

²⁵⁰ R. B. STEVENS & B. S. YAMEY, *THE RESTRICTIVE PRACTICES COURT: A STUDY OF THE JUDICIAL PROCESS AND ECONOMIC POLICY* 76 (1965). Indeed, a "tailpiece" of § 10(1) makes the task even more difficult because the Court is instructed to consider *separately* the interests of (a) the public; (b) purchasers, consumers, and users of the goods produced or sold by parties to the agreement; and (c) competitors or potential competitors of the parties to the agreement. *Id.*

²⁵¹ The most basic laws are found in §§ (1) and (2) of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), which prohibit both single-firm attempts at monopolization and interfirm agreements in restraint of trade; and in section (7) of the Clayton Act, 15 U.S.C. §§ 12-27 (1976) which forbids any corporation from acquiring all or part of another corporation "where . . . the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly;" 15 U.S.C. at § 18 (1976), and in § (5) of the Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (1976), which prohibits "unfair methods of competition," 15 U.S.C. § 45 (1976).

dissimilar, both the British and the American legislation keep intact the interactive nature of the problem. Neither statute gives relative weights to the factors to be considered. Both statutes essentially instruct the courts to engage in the balancing process respecting factors of competition, without supplying any guidance on how such balance should be struck.

The American courts often respond by employing the problem modification of creating rules which afford *conclusive weight to one particular variable*;²⁵² this "reductivist" strategy, of course, eliminates any need to engage in optimization. By specific statutory direction the British Restrictive Trade Practices Court cannot so truncate the inquiry.²⁵³ Since that Court also cannot pass off its decision to an administrative agency (as in the highway siting and aesthetics cases), it is left with resolving the partial dissonance between traditional adjudication and interactive problems by adapting its decisional procedures rather than by modifying the problem.

As suggested, American judges have often adopted a reductivist strategy in coping with interactive antitrust problems. The strategy involves selecting one factor from among the many present, and deeming such factor conclusive of the inquiry. Examples of the reductivist strategy include the creation of the "illegal per se" rules which apply to agreements to fix prices or divide markets, to concerted refusals to deal, and to tie-in arrangements.²⁵⁴ The "illegal per se" rules deem certain business activities as illegal per se "independently of any examination of their effects in the particular case or of the circumstances which led to them."²⁵⁵ The "per se" rules have the obvious intended advantages of being relatively clear and of simplifying judicial proceedings. A court must verify only that one of the "illegal per se" activities had occurred and need not weigh any other factors.²⁵⁶ Again, no contention is made that the reduc-

²⁵² See *infra* notes 254-56 and accompanying text.

²⁵³ See *supra* notes 249-50 and accompanying text.

²⁵⁴ For a general description of the "illegal per se" rules and the conditions thought necessary and sufficient for their use, see C. KAYSER & D. F. TURNER, *ANTITRUST POLICY* 142-60 (1959).

²⁵⁵ KAYSER & TURNER, *supra* note 254, at 142. The classic judicial rationale for the per se rules is stated by Justice Black in *Northern Pac. Ry. Co. v. United States*:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

356 U.S. 1, 5 (1958).

²⁵⁶ *Northern Pac.*, 356 U.S. at 5. Kaysen and Turner continue:

The gains of the per se rules in terms of administrative simplicity are great since they are relatively clear, they are self-enforcing to a much greater extent than prohibitions which depend on the evaluation of effects in complex market conditions, and they therefore lessen the volume of proceedings necessary to achieve a given level of enforcement. Any actual proceeding is relatively simple, since it involves only the identification of the illegal conduct and the proof that it occurred. The investigations into market situations and market results characteristic of other antitrust proceedings are unnecessary.

KAYSER & TURNER, *supra* note 254, at 142.

tivist strategy is necessarily improper; no doubt there are instances in which it is fully justified on the ground of judicial economy, or perhaps on the ground of producing more certainty in the law. Such a technique is a shorthand, however, with the reduction in subtlety thereby implied. Moreover, by restricting the latitude of inquiry in each individual case, the use of the "per se" rules probably inhibits the development of system-level "spontaneity." In other words, for spontaneity to be developed within a system, thereby enabling such system to solve interactive problems, the system must be capable of optimizing diverse considerations. The system can do so only if it as a system has experimented with a wide variety of alternative solutions.

The alternative to the reductivist strategy is of course a full inquiry into the interactions of the variables. Referred to as the "rule of reason," this broader investigation tends to be used in cases involving exclusive requirements contracts and vertical market divisions.²⁵⁷ The rule of reason approach preserves the interactive nature of the problem. As such, the only possible solution is one that is spontaneous. In performing the essentially non-deliberative, spontaneous rule of reason inquiry, a judge considers openly and honestly the various relevant factors and then "call[s] forth his best and most purposeful intuition. [He] must know and say what he can about each and come to some sense about the weight of each and where the balance lies; one can do no more."²⁵⁸

Because of the explicit statutory enumeration of factors that must be considered, no such choice about the breadth of approach is easily available to the British Restrictive Trade Practices Court. Moreover, the original jurisdiction of restrictive trade cases is foisted on the British Court — as a practical matter, it cannot refuse to engage in the balancing. Hence, any dissonance that exists between interactive problems and the procedures of traditional adjudication can be resolved only by way of procedural adaptation. Examination of the Restrictive Trade Practices Court procedures reveals that there has indeed been such procedural adaptation, and that it has occurred along lines predictable under this article's posited theory.

²⁵⁷ See HIRSCH, *supra* note 22, at 255-58.

²⁵⁸ L. A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 188 (1977). Sullivan states further:

The final question is whether, on balance, the restriction imposed substantially impedes competition. Where, as here, there seem to be legitimate purposes and where effects are both adverse and beneficial, the calculus of decision entails discrimination applied to rather finely shaded gradients. Let us state outright that if lawyers and judges have scanty qualifications for performing this function, economists have no better ones. With respect to any given practice applied in any given market situation, theory and empirical study may be able to suggest and perhaps validate various effects as either helpful or harmful to competition or both. But neither theoretical nor empirical material can devise a single yardstick against which to measure them; the matter must be referred to the arts rather than the sciences of judgment. Having identified purposes and effects one looks at length at each of them.

Recall that the dissonance between interactive problems and traditional adjudication stems not from the legal system's lack of spontaneity, but with its slowness in making the large number of adjustments that constitute spontaneity.²⁵⁹ Hence, the dissonance can be resolved at least partially by speeding up the process of mutual adjustment. This can be accomplished either by increasing the *frequency* of adjustments (e.g. by increasing the number of decisions made, or the number of persons making each decision) or by increasing the *latitude* of adjustment possible in each decision (e.g. by increasing the diversity of information available to the judges, or by removing any constraints on the frequency or magnitude of their deviations from one another). Because of statutory inhibitions, not much has been done with respect to increasing the frequency of adjustments. The Court cannot, for example, adopt substantive rules that require highly decentralized assessments of certain disputes; nor can the Court by itself increase its own numbers.²⁶⁰ The procedures of the Court as structured by the statute, however, allow for adaptations which result in much greater latitude for the mutual adjustments that do occur. For example, diversity of mentality among judges is assured by the requirement of section (4) of the Act. This section requires that, in addition to the appointment of traditional professional judges, there also be appointed to the Court lay judges who are "qualified by virtue of knowledge of an experience in industry, commerce, or public affairs."²⁶¹ At the first sitting of the Court in 1958, the majority of the judges were non-professionals: two were industrialists, one an accountant, and one a trade union official.²⁶² These non-lawyers are more likely to feel less restricted by the norms of traditional legal discourse. Hence the likelihood is increased that a wider variety of decisional rationales would be used, and a richer storehouse of alternatives would be accumulated with which to make decisions. This greater latitude and richer variety promotes the ability of a system to display spontaneity.

More startling innovations are found in the lack of restraint on the frequency or magnitude of possible adjustments that can be made by the Court. Judicial review of the Court's decisions, which would operate over time to standardize holdings within a consistent doctrine, is almost nonexistent. Findings of fact may not be reviewed²⁶³ and appeals on questions of law are extremely rare.²⁶⁴ Second, there can be detected a certain relaxation of the requirement that the Court justify its decisions. In an early case, for example, Mr. Justice Devlin, who was quite intent on maintaining for the Court the appearances of a traditional court of law,²⁶⁵ was forced to admit that, with respect

²⁵⁹ See *supra* notes 127-32 and accompanying text.

²⁶⁰ Only the Lord Chancellor is empowered to appoint new judges or create diverse panels of the Court. Restrictive Practices Court Act, 1976, (1976 c. 33) § 4.

²⁶¹ *Id.*

²⁶² STEVENS & YAMEY, *supra* note 277, at 3.

²⁶³ Restrictive Practices Court Act, 1976, (1976 c. 33) § 10(3).

²⁶⁴ STEVENS & YAMEY, *supra* note 250, at 133, n.2.

²⁶⁵ *Id.* at 125-35.

to assessing just one factor, the relevant extent of unemployment,

We can make no specific findings on any of these points, and can only state in general terms the sort of consideration relating to them which have influenced us in determining whether or not the words of the subparagraph apply.²⁶⁶

Where the judges are empowered to find facts, and where no appeal is possible on such findings, in effect the judges may consider any sort of information or evidence to which they are privy (which, especially for lay judges, may be considerable), even where the source is extraneous to the submissions of the case. This is an extremely important point, given that these controversies are interpreted to be very largely questions of fact rather than law.²⁶⁷

Perhaps the most remarkable adaptation, however, is in the suspension of the finality of judgments. Unique to all English law courts,²⁶⁸ the Restrictive Trade Practices Court has just such powers. Section 4 of the Act allows the Court to reopen any of its previous decisions where there is "evidence of a material change in the relevant circumstances."²⁶⁹ No judgment of the Court, therefore, is truly final.²⁷⁰ This of course increases vastly the potential latitude of mutual adjustment.²⁷¹

Anglo-American courts respond in several different manners to the dissonance created when an interactive problem is submitted for decision by the procedures of traditional adjudication; all of such responses can be predicted. They may refuse outright to consider the matter, as in *Nashville I-40*. They may functionally refuse to consider the matter, by adopting broad powers of discretion in non-judicial decision-makers, as in *Overton Park*, *Stoyanoff*, and *Reid*. They may attempt to resolve the awkwardness by fictionally converting the interactive problem into one with simple content variables, either by expressing every variable in terms of some common denominator, or by giving conclusive weight to a single variable. Finally, they may attempt to resolve the dissonance by leaving the structure of the problem intact, but then adapting the procedure variable associated with the problem variable so as to make the

²⁶⁶ *Re Yarn Spinner's Agreement*, [1959] 1 All E. R. 299, cited in STEVENS & YAMEY, *id.*, at 129-30. Conclude Stevens and Yamey respecting the "legalism" of the Court, as reflected in the admissions by Devlin:

This flexible attitude was in effect required in analyzing all the gateways. . . . [Recently] the judges, rightly it is submitted, have not in any way sought to disguise the novel activities they are required to perform, and they have willingly conceded the absence of readily available analogies on which to base a traditional legal analysis. In interpreting the Act the judges in later cases have not shied away from interpretations which leave them an obvious discretion in their application.

Id. at 129-30.

²⁶⁷ *Id.* at 133.

²⁶⁸ *Id.* at 145.

²⁶⁹ Restrictive Trade Practices Act, 1976 (1976, c. 34) § 4.

²⁷⁰ STEVENS & YAMEY, *supra* note at 144.

²⁷¹ *Re Standard Metal Window Group Agreement*, [1962] 3 All E. R. 210, cited in STEVENS & YAMEY, *id.* at 145, n.3.

procedures comport with the requirements of the problem, e.g., the British Restrictive Trade Practices Court.

B. When Adjudication Faces Problems with Unknown or Disputed Decisional Criteria

Adjudication is much better suited to solving problems where decisional criteria are well-established, rather than to solving problems where decisional criteria are unknown or disputed.²⁷² Often, however, judges attempt to hear problems for which established decisional criteria are not available. Once again the judge may adapt to this dissonance between the shape of the problem and the structure of traditional adjudication by either modifying the problem, or by adapting the procedure of adjudication.

Problem modification may take several forms. The first and probably most common possible response is not so much a modification of the problem as a *constituting* of the problem, a setting of its boundaries; that is, an attempt is made to create decisional criteria by which the problem may be solved. A second possible type of problem modification admits inability to state acceptable criteria and then "disperses" the decision-making over large numbers of people from a broad cross-section of the populace. Such dispersal means that even if the decisions that emerge remain largely arbitrary, the decisions arguably are at least more democratic.

Another set of possible responses to a lack of established decisional criteria can be grouped under the heading "procedural adaptation." Just as the appearance of an interactive problem sometimes caused an adaptation in procedure, that is, a shift towards faster spontaneity,²⁷³ so also a dissonance caused by the appearance of a problem with unknown or disputed decisional criteria can cause an adaptive shift in procedure along the variable respecting universality versus particularism. The adaptation that can occur is to decide the case using procedures that have attributes *opposite* to traditional adjudication on the three separate continua that constitute the universal-particular variable.²⁷⁴

1. Establishing Criteria for Novel Problems

The most common and straight forward judicial response to a problem that lacks criteria is to attempt to supply the criteria. This is a problem "modification" only in a loose sense. More accurately, the supplying of decisional criteria is a sort of encapsulation or segmentation of the problem so that it can be intelligibly discussed. Supplying of decisional criteria occurs most frequently where a problem is new to resolution by adjudication. Virtually no problem comes to a decisional system with ready-made decisional criteria. The distinctions that form the boundaries of the problem must be invented, discuss-

²⁷² See *supra* note 184 and accompanying text.

²⁷³ See *supra* notes 258-62 and accompanying text.

²⁷⁴ See *supra* notes 133-39 and accompanying text.

ed, then perhaps refined or rejected. Gradually, the decisional criteria of the problem reach greater consensus, even if such consensus consists only in the agreement that there exist two or more opposing but legitimate considerations.

The typical judicial reaction to novelty, therefore, is to supply defining criteria to the novel problem. As such criteria are supplied and accepted within the legal system, the profile of the problem gradually moves toward the ideally justiciable position of "well-established criteria," thus resolving the structural dissonance between the problem and the procedure of traditional adjudication. This process presents no long-term "justiciability" difficulty. Quite the contrary. It is just such process of trial and error and succeeding approximations in problem-solving that is much of the genius of the common law.

This process of supplying definitional criteria to a novel problem is perhaps illustrated by the growth of the tort cause of action referred to as "negligent infliction of emotional distress." The English history of this tort begins with *Victorian Railway Commissioners v. Coultas*.²⁷⁵ There, the Privy Council *rejected* the notion that plaintiff could recover for emotional distress (manifested by physical illness) suffered after receiving a violent shock owing to the negligence of the defendant.²⁷⁶ Significantly, it has been suggested that the very lack of judicial criteria for *delimiting* such a notion as negligent infliction of emotional distress inhibited recognition of the tort.²⁷⁷ Sir Richard Couch, in delivering the judgment of the Board, cited this lack of criteria as a major reason for refusing recovery.²⁷⁸ Granting recovery in this case, he stated, would encourage similar claims "in every case where an accident caused by negligence had given a person a serious nervous shock."²⁷⁹

The first recognition in England of the cause of action was in *Dulieu v. White*.²⁸⁰ There, defendant's negligently driven horses charged into a pub in which plaintiff worked. Although the horses did not touch her, plaintiff was so frightened that she suffered a miscarriage. Justice Kennedy rejected the *Coultas* view, holding that the defendant could be made to pay where the damage followed reasonably and naturally from the shock. Kennedy stated, however, that one defining criterion or necessary condition of recovery was that the mental shock arise "from a reasonable fear of *immediate personal injury to oneself*" rather than to a third party.²⁸¹ Kennedy's criterion lasted only until *Hambrook v. Stoke Bros.*²⁸² The plaintiff there recovered wrongful death damages when his

²⁷⁵ [1888] 13 App. Cas. 222, discussed in Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14 (1953).

²⁷⁶ [1888] 13 App. Cas. at 225-26.

²⁷⁷ *Id.* See also Goodhart, *supra* note 276, at 14.

²⁷⁸ [1888] 13 App. Cas. 222, at 225-26.

²⁷⁹ *Id.* at 225. He concluded that "[t]he difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims." *Id.* at 226.

²⁸⁰ [1901] 2 K.B. 669, discussed in Goodhart, *supra* note 276, at 16.

²⁸¹ [1901] 2 K.B. 669, at 675 [emphasis added].

²⁸² [1925] 1 K.B. 141 (C.A.), discussed in Goodhart, *supra* note 276, at 18-19.

wife died from a shock received from watching an unattended lorry careen down a hill where she knew her out-of-sight children were walking. It was held not necessary to recovery that the plaintiff fear for his or her own safety.²⁸³ Rather, the proper criterion was held to be that: "the shock resulted from what the [plaintiff] either saw or realized by her own senses, and not from something which someone told her."²⁸⁴

Meanwhile across the Atlantic, an alternative criterion known as the "zone of physical risk" was being proposed as the boundary of the tort. This criterion is illustrated by the Wisconsin case of *Waube v. Warrington*.²⁸⁵ Recovery was denied in this case to a woman who received a fatal shock after witnessing, from a nearby window, a negligent automobile driver run over her son.²⁸⁶ The court held that the harm to plaintiff was beyond the defendant's reasonable foresight.²⁸⁷ This test was accepted (at least by Justice McNair) in *King v. Phillips*,²⁸⁸ in which a mother was denied recovery for her emotional distress caused by watching, from seventy to eighty yards away, defendant's taxi negligently backing onto the tricycle of her son.²⁸⁹

Other criteria of the tort, some that contradict the "zone of physical risk" test, have now been suggested.²⁹⁰ One such suggested criterion is that proximity does not matter so long as the plaintiff is closely related to the person injured, rather than a mere bystander.²⁹¹ Another is that the psychic impact must be fairly contemporaneous with the shock.²⁹² In New York, the criterion was established that any alleged psychic harm must be evidenced by some residual physical manifestation.²⁹³ This condition was subsequently waived in cases involving the mishandling of corpses and erroneous death announcements,

²⁸³ [1925] 1 K.B. 141 (C.A.), at 152.

²⁸⁴ *Id.*

²⁸⁵ 216 Wis. 603, 258 N.W. 497 (1935), discussed in Goodhart, *supra* note 276, at 22.

²⁸⁶ 216 Wis. at 604, 258 N.W. at 497.

²⁸⁷ *Id.* at 514-15, 258 N.W. at 501.

²⁸⁸ [1952] 2 T.L.R. 277, *aff'd* [1953] 1 Q.B. 429, discussed in Goodhart, *supra* note 276, at 21. On appeal, the judgment of McNair was affirmed. But Denning, L.J. did not embrace the zone of physical risk test, arguing that the duty of care owed by defendant *varied*, depending on which sort of injury, physical or emotional, was being contemplated. [1953] 1 Q.B. at 440. And Hodson, L.J. seemed to ground his decision on the criterion stated by Kennedy, J. in *Dulieu v. White*. *Id.* at 443-44. Concludes one commentator: "It is obvious, then, that the authorities are in a state of confusion. . . ." W. ROGERS, WINFIELD AND JOLOWICZ ON TORT 124 (10th ed. 1975).

²⁸⁹ Although some question persists of the English acceptance of the "zone of physical risk" test, the most recent case, *McLoughlin v. O'Brian*, [1981] 1 All E.R. 809, seems to have adopted the test as a limitation on liability. The case was grounded on policy considerations rather than on the narrower factual ground of "foreseeability."

²⁹⁰ The criteria that follow in the text are distilled from discussions of cases in Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) and in M. FRANKLIN, *INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 233-46 (2d ed. 1979).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729 (1961).

whose facts demonstrate "an especial likelihood of genuine and serious mental distress."²⁹⁴ A relatively recent New York opinion held that no recovery could be had simply for the witnessing of destruction of property.²⁹⁵ This criterion was rejected, however, in *Hawaii*²⁹⁶ and *Washington*²⁹⁷. The Washington Supreme Court in *Hunsley v. Giard*²⁹⁸ allowed recovery to a man who suffered a heart attack when the defendant drove his automobile into the utility room of plaintiff's house.²⁹⁹ Therefore, while the boundaries of this novel tort are becoming more well defined, courts continue to seek criteria to cope with it. Over time the criteria will become established and clear.

As stated above, problems like recovery from emotional shock that exhibit disputed or unknown decisional criteria on account solely of their novelty do not present long-term justiciability difficulties. Very gradually the decisional criteria become established. Certain problems, however, present a dissonance along this variable that arguably *cannot* be sorted out by the normal process. It is on such problems that the radical problem modifications and procedural adaptations will be found. Two sorts of such problems can be identified. First, problems that cannot be solved without "judging the whole person" who stands before the court. Second, problems that cannot be solved without making unusual distinctions among people who *cannot* be brought before the court.

2. "Judging the Whole Person"

A judge must "judge the whole person" before him/her where in solving the problem the judge is expected to *change* the whole person before him/her. In other words, the "problem" in such cases is seen as the status of the person being judged, and the "solution" to the problem is seen as changing that status. Where the person being judged has been ascribed some label (such as "criminal" or "unruly child") that attaches to every part of the defendant, the judge can attempt to change the label only if he or she investigates every part of the person. Criteria can never be stated uncontrovertibly for understanding

²⁹⁴ *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 592 (1975), quoting W. PROSSER, PROSSER ON TORTS 330 (4th ed. 1971).

²⁹⁵ *Van Patten v. Buyce*, 37 A.D.2d 448, 450 326 N.Y.S.2d 197, 198-99 (1971).

²⁹⁶ *Rodrigues v. State*, 52 Hawaii 156, 171-73, 472 P.2d 509, 518-21 (1970).

²⁹⁷ *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976).

²⁹⁸ *Id.*

²⁹⁹ *Id.* *Hunsley* suggests yet another boundary: There is no recovery unless the reaction sustained is that of "a normally constituted person, absent defendant's knowledge of some peculiar characteristic or condition of plaintiff. In other words, was plaintiff's reaction that of a reasonable man? . . . This principle goes to the standard of liability, not the extent of recovery once liability is established." *Id.* at 436, 553 P.2d at 1103 (emphasis added) (citations omitted).

The latest British case is *McLoughlin v. O'Brian*, [1981] 1 All E.R. 809, discussed *supra* at note 289, in which the zone of injury tests seem to have been adopted on grounds of policy, rather than on grounds of foreseeability. *Id.* A mother was denied recovery for nervous shock suffered upon being informed hours after an accident that her daughter had been killed, and upon seeing the injuries to her husband while he lay in the hospital. *Id.* at 812.

completely any given individual. Hence, cases that require such understanding never will be subject to "well-established criteria." Unlike the "novel problem" example,³⁰⁰ the structural profile of the problem of "rehabilitating" a criminal or "saving" an ungovernable child will remain disputed or unknown. Moreover, unless the rehabilitative ideal is abandoned, there seems little in the way of possible problem modification that would satisfactorily resolve the dissonance. Hence, some procedural adaptation might be expected.

According to the theory of this article, such adaptation should occur along the procedure variable associated with the problem variable that causes the dissonance; in this instance, "universalism versus particularism." Indeed, the judicial adaptations to cases requiring "judging of a whole person" can be described by the terms of that variable. Traditional adjudication is universalist in its appeal to general rules or doctrine, particularist in its use of decisional information and evidence, and universalist in its social assumptions about disputants.³⁰¹ In contrast, the very personal inquiry required in dealing with criminals and ungovernable children allows only limited appeal to rules or doctrine, accepts a wide, fluid standard for what constitutes relevant evidence in the inquiry, and adopts certain inegalitarian assumptions. In short, the procedural adaptation is to reverse completely the traditional structure of adjudication along the universalist and particularist variable. The discussion that follows demonstrates this shift for the problem of both criminal sentencing and child ungovernability, and traces the cause of the shift to the unusual task required of the judge: to change the status of the person before him.

American judges have great discretion in imposing criminal sentences.³⁰² To further rehabilitative goals, a judge

is expected to "individualize" the sentence he imposes to suit the character, social history, and potential for recidivism of the offender before him. Yet, because of the general absence in our system of meaningful procedures for the appellate review of sentences, he is denied standards by which to determine any particular sentence or by which to learn what decisions his fellow judges have reached in similar situations.³⁰³

The judge must personalize the proceedings where the "solution" to criminality is thought to be rehabilitation; but such required individualization precludes the establishment of decisional criteria. The problem of what to do about "ungovernable" or "unruly" children who engage in noncriminal misbehavior is equally difficult. Two leading commentators have concluded that the "legal supervision of [this] parent-child relationship cannot be undertaken consistent

³⁰⁰ See *supra* notes 275-99 and accompanying text.

³⁰¹ See *supra* notes 133-99 and accompanying text.

³⁰² See Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361, 1362 (1975).

³⁰³ *Id.* at 1362-63 (footnotes omitted).

with the rule of law."³⁰⁴ This is because the conceived solution to ungovernability "extend[s] official concern beyond discrete misbehavior to the condition of the whole child."³⁰⁵ The judge's goal is to "save [the child] from a downward career"³⁰⁶ rather than to punish the child.³⁰⁷ The result is a lack of standards similar to that in criminal sentencing.³⁰⁸ The aims of rehabilitation and salvation require procedural adaptations that reverse the field of the universalist and particularist variable. First, "judging the whole person" virtually precludes an appeal to general rules or doctrine. *Each case is considered on its own, with extraordinary nonappealable discretion put in the judge, who need not articulate the reasons for his/her decision.*³⁰⁹ "Sentencing judges are thus left free to formulate and apply their own personal theories of punishment. They are allowed to impose their beliefs, biases, prejudices or reactions to particular defendants within the very wide margins afforded by our present statutory range of sentences."³¹⁰ Although less formally institutionalized, this same wide discretion characterizes the judge's role under the vague ungovernability statutes. The very vagueness and lack of rules or doctrine in ungovernability statutes is the means of granting broad discretion to the judge,³¹¹ for "[w]ho can deter-

³⁰⁴ Katz & Teitlebaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law in BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT* 202 (L. Teitlebaum & A. Gough eds. 1977).

³⁰⁵ *Id.* at 207 [emphasis added].

³⁰⁶ Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

³⁰⁷ Commonwealth v. Fisher, 213 Pa. 48, 50, 62 A. 198, 198-99 (1905).

³⁰⁸ One researcher states: "[A] general survey of ungovernability processing reveals that the court's assessments are frequently inaccurate. . . . The inaccuracies in assessment are evident in the illogical patterns of decisions concerning which cases to adjust, whom to detain, which cases are serious enough to merit formal adjudication, and what dispositions are appropriate." Note, *Ungovernability: the Unjustifiable Jurisdiction*, 83 YALE L. J. 1383, 1397 (1974).

³⁰⁹ As stated in P. O'DONNELL, M. CHURGIN, & D. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977):

Judges who sentence criminals do so virtually without legal guidance or control. . . . [This] is evident in Title 18 of the United States Code, which contains most of the federal criminal statutes and penalties. Bereft of sentencing standards for judges, this chaotic patchwork of penalties authorized by individual statutes, enacted at different times and having no relationship to each other, has established a bizarre range of penalties for an enormous variety of criminal activities. Meaningful legislative standards for trial judges exercising initial sentencing discretion are non-existent. For example, a judge is advised in Section 3651 of Title 18 that he may suspend the sentence and impose probation "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." Not even the most rudimentary requirements of due process of law apply at sentencing. . . . Reasons for sentences are not required, nor is the information on which the judge may be relying necessarily disclosed to the accused or his counsel for correction or rebuttal. Putting it bluntly, there is no requirement that the sentence have any rational basis whatsoever. . . . Nor is there any appeal from the discretion of the sentencing judge or any procedure to correct sentencing abuses. (footnotes omitted).

Id. at 1-3.

³¹⁰ *Id.* at 3 (footnote omitted).

³¹¹ In a commentary on Persons in Need of Supervision (PINS) statutes, Katz and Teitlebaum find a causal link between the characteristic vagueness of the statutory concepts, and the flexibility needed to vest wide discretion in the judge:

mine with specificity which child is 'ungovernable,' . . . or which juvenile is 'habitually beyond the control of his or her parents?' ³¹²

In addition to the lack of an appeal to general rules or doctrine, the standards for what constitutes relevant evidence in the criminal sentencing and child ungovernability inquiries is much less particularist than in traditional adjudications. In criminal sentencing, judges receive information about the offender through the "presentencing report" usually prepared by a probation officer. The scope of such a report is virtually unlimited, encompassing "[t]he subject's homelife, childhood, educational and employment history, political and religious attitudes, and sexual experiences. . . ." ³¹³ Moreover, the presentencing report is of lasting significance, affecting subsequent decisions such as parole. ³¹⁴

Particularity of evidence and decisional information is similarly abandoned in adjudicating whether a child is ungovernable. Ungovernability statutes provide no standards for what information the judge is to consider in making decisions. ³¹⁵ In the absence of such standards, the judge relies on "per-

PINS jurisdiction embodies a set of fundamental conceptual contradictions, which it seeks to resolve through the mediating device of general standards. On the one hand, PINS laws attempt to apply the rule of law to a relationship of status. . . . On the other, it reflects a desire to do substantive justice without abandoning the formal requirements of legal justice. Broad, imprecise legislative standards were introduced in an effort to mediate these contradictions. . . . [T]he "vagueness" of the PINS statutes cannot be considered accidental. . . . [A] rule prohibiting a person from behaving so "as to injure or endanger the health or morals of himself or others" can guide neither the conduct of citizens nor of officials.

Katz & Teitlebaum, *supra* note 304, at 209. This functional use of the vague labels of "ungovernability" to grant wide discretion to the judge while maintaining the appearances of the rule of law has been noted by other writers: "Most statutes authorizing jurisdiction over unruly children and noncriminal misbehavior are exceedingly vague in wording and overbroad in scope." Ketcham, *Why Jurisdiction Over Status Offenders Should be Eliminated from Juvenile Courts*, 57 B.U.L. REV. 645, 657 (1977).

³¹² Ketcham, *supra* note 311, at 657.

³¹³ Coffee, *supra* note 302, at 1370.

While the degree of standardization varies, probation manuals typically recommend at a minimum that the report contain a separate section dealing with each of the following categories: prior record, family history, social adjustment, education, marital status, personality traits, attitudes toward probation, and physical and mental health.

Id. at 1370 n.27 (citations omitted). Coffee summarizes the criticism of this very broad inquiry: "[T]he goal of individualization based on an understanding of the whole person is largely beyond the realistic capabilities of the criminal justice system and often in direct conflict with the goal of treating similar offenders similarly." *Id.* at 1368.

³¹⁴ Coffee states:

The key document both at [the sentencing] stage and at the later parole stage is the pre-sentence report. Its recommendations are generally followed by the sentencing judge and the extent and scope of its investigation of the defendant overshadow subsequent inquiries at the parole or custodial classification stages. . . . [M]isinformation that enters the pre-sentence report is likely to have a multiple impact on the offender's future. (footnotes omitted).

Id. at 1369-70.

³¹⁵ In ungovernability cases a judge is given problems far more delicate and com-

sonal feelings and predilections,"³¹⁶ the often vindictive and vague statements by parents (e.g. "He is such a liar, his mind is bad and he needs to be put away")³¹⁷ and court personnel who supply information similar in nature to that collected in criminal pre-sentence reports.³¹⁸ The judge's reliance on such evidence constitutes a much less particularist approach to evidence than that used in traditional adjudication.

The final procedural adaptation that occurs in these "judging the whole person" cases is that the universalist social assumptions of traditional adjudication break down in favor of more particular notions of what sort of person is more, and less, valuable to society. Both the sentencing process and ungovernability dispositions import some decidedly inegalitarian criteria. For example, the information in the criminal presentencing report often is assessed by the "case attribute" approach in which the pre-sentence investigator is asked to describe the offender in "vivid, flesh-and-blood" terms.³¹⁹ Such a process is highly subjective, however, and cultural prejudice creeps in; "[i]f the offender attends church, he is assumed to be a safe risk; if he lives with a woman to whom he is not legally wed, he is assumed to be amoral and a higher risk."³²⁰ If the pre-sentence report is assessed by the alternative "categoric risk" approach,³²¹ however, the results heavily disfavor the poor and Black. This approach considers factors such as level of education and consistency of employment which are irrelevant to personal culpability and tend to distinguish the poor and the Black from the rich and the white.³²²

Similar discriminatory effects surface in child ungovernability cases. Sometimes the particularity is a favoring of certain behaviors typified in the middle class.³²³ Or, the breakdown in universalist assumptions may be on grounds of intelligence: "Data in New York makes it apparent that those [labelled "ungovernable"] are overwhelmingly those with lower I.Q.'s; judges are willing to give a brighter youth a break on the theory that he 'might really become something.'"³²⁴ Or, the particularity may occur on racial grounds or

plex and far less subject to judicial solution than those in most areas of law. He must accurately assess a parent-child conflict and determine what kind of "help" the child involved may need. To permit the judge to understand and cope with problems of such intricacy, the statute gives him vast discretion with respect to what information he is to consider relevant and it sets no standards for decisionmaking in order to avoid compromising this task. (footnotes omitted).

Note, 83 YALE L. J., *supra* note 308, at 1403.

³¹⁶ *Id.* at 1404.

³¹⁷ *Id.* at 1396.

³¹⁸ *Id.* at 1404-05.

³¹⁹ Coffee, *supra* note 302, at 1399-1400.

³²⁰ *Id.* at 1400 (footnote omitted).

³²¹ *Id.* at 1405.

³²² *Id.* at 1407-08.

³²³ Note, 83 YALE L. J., *supra* note 308, at 1404. Indeed, it has been suggested that the founders of the American juvenile court system deliberately chose to penalize behavior that was largely attributable to lower class and immigrant children. A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 139 (1977).

³²⁴ 83 YALE L. J., *supra* note 308, at 1404 note 131.

along gender lines. In fact, it has been well-documented that "the weight of non-criminal jurisdiction falls most heavily on poor and nonwhite children" and on young girls.³²⁵

Problems requiring the judgment of "the whole person" simply confound a decisional system that requires well-established decisional criteria. In response, the system adapts by reversing its normal assumptions about the universality of people and society. The system does not appeal to general rules or doctrine. Limitations on what evidence shall be heard are similarly abandoned. Finally, and most unfortunately, discriminatory decisions are often made on the basis of assumptions about the value of an individual to society. Each of these adaptations is made along the particularist-universalist procedure variable in response to the lack of clear decisional criteria found in "judging the whole person" problems.

3. Making Distinctions Between and Among Persons

Along with "judging the whole person" problems, a second type of problem also defies establishment of decisional criteria: where proper solution requires sharp distinctions and judgments to be made among people who are *not before the court*. Personalized inquiries may be appropriate, yet such inquiries are by definition impossible since the person to be inquired of is not to be found. Since the procedural adaptations described above are therefore unavailable as techniques for resolving the dissonance, judges can be expected to resort to a strategy this article labels "dispersal." That is, making the decision-making more democratic by spreading out decisional responsibility among the entire population affected. Obscenity cases illustrate this sort of problem, and the features of the dispersal strategy.

The "problem" of obscenity is how human sexuality should be portrayed and viewed.³²⁶ The proper solution to this problem rests on a recognition that the appropriateness or offensiveness of such portrayals varies enormously depending on the nature of the person viewing the portrayal, and the social *context* of the portrayal.³²⁷ The criteria of obscenity consequently remain disputed

³²⁵ Sussman, *Judicial Control Over Noncriminal Misbehavior*, 52 N.Y.U. L. REV. 1051, 1054-55 (1977), states:

[A] disproportionately heavy—and perhaps unconstitutional—burden [falls] on young girls. The inexact and vague definitions in PINS statutes vest an inordinate amount of discretion in the hands of parents and the judiciary, who often follow a double moral standard, punishing girls for behavior that would be overlooked in boys. Although there is no evidence to suggest that young girls are more in need of supervision or treatment than young boys, customary fears of sexual promiscuity, pregnancy, and illegitimacy, as well as outmoded perceptions of women as the less stable sex, result in their presence in juvenile courts . . . pursuant to the PINS jurisdiction, in numbers far greater than their male counterparts. (footnotes omitted).

³²⁶ TRIBE, *supra* note 3, at 662. See generally F. SCHAUER, *THE LAW OF OBSCENITY* (1976); CENSORSHIP AND FREEDOM OF EXPRESSION: ESSAYS ON OBSCENITY AND THE LAW (H. Clor ed. 1971).

³²⁷ See *infra* notes 331 and 333 and accompanying text.

and unknown. Attempt after attempt to establish decisional boundaries for this concept have failed because proper judgment of a particular book or film as a whole can be made only if the psychology of each viewer, and the context of each instance in which the allegedly obscene material is viewed, can be judged. Since that is impossible, judges often attempt to modify the problem by seeking some uniform vision of the portrayal of sexuality in general;³²⁸ continual efforts have been made to promulgate regulation employing some uniform criterion. The efforts have failed because there always arose instances in which, given the nature of the viewer and the context of viewing, the regulation was simply inappropriate.³²⁹ This has led to the adoption of the dispersal strategy in which the attempt to state uniform criteria is abandoned in favor of more local, more representative regulation. This strategy differs from the procedural adaptation of speeding up system spontaneity.³³⁰ Spontaneous solutions are inhibited under the dispersal strategy because consistency is demanded only at the local level: the elegant, close mutual adjustments of *stare decisis* that cause spontaneous solutions to emerge are largely eliminated. In the place of established principles for decision, the dispersal strategy substitutes policy, formulated locally and usually by a more socially representative body, namely the jury. The dispersal strategy is not a procedural adaptation, because the structure of adjudication in such cases is not significantly altered. It is also not quite a problem modification, because the problem is not formally altered or simplified. Rather, the dispersal strategy is a tacit admission that the problem is not a "legal" one, but rather a "political" one, and that the legal system is insufficiently flexible to resolve this dissonance.

The problem of obscenity is one whose decisional criteria remain disputed and unknown. This much has been admitted by numerous academics and judges. As one Supreme Court justice has stated, "although we have assumed that obscenity does exist and that we 'know it when [we] see it' . . . , we are manifestly unable to describe it in advance"³³¹ Given the lack of estab-

³²⁸ *TRIBE*, *supra* note 3, at 661-62.

³²⁹ *See infra* note 339 and accompanying text.

³³⁰ *See supra* notes 260-71 and accompanying text.

³³¹ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., joined by Stewart and Marshall, J.J., dissenting), *cited in* *TRIBE*, *supra* note 3, at 669. Describing the Court's efforts, Brennan states:

No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. . . . [T]he vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas . . . can reduce the vagueness to a tolerable level. . . . Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. . . . Added to [this] is the further complication that the obscenity of any particular item may de-

lished standards for obscenity, even-handed enforcement of obscenity law is virtually impossible.³³² This elusiveness of criteria stems, as Chief Justice Warren suggested, from the fact that obscenity is a function of the circumstances of its dissemination.³³³ Ironically, the Court traditionally avoided in its standards any distinction (except for minors³³⁴) among people likely to be exposed to the allegedly obscene material. The famous *Roth*³³⁵ test overturned the use of the English *Hicklin*³³⁶ standard of tendency to "corrupt those whose minds are open to such immoral influences."³³⁷ The *Roth* test was as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."³³⁸ This standard, which attempted to state a uniform criterion of "obscenity" irrespective of type of person viewing or context of portrayal, was a step in the wrong direction.³³⁹ Eventually *Roth* fell to the currently-used dispersal strategy as stated in *Miller v. California*,³⁴⁰ under which obscenity was henceforth to be judged according to local community standards. Under the *Miller* test "each jury, in each town and city, may thus be a law unto itself, applying what might represent not any widely-shared sense of value but merely an average of local extremes."³⁴¹ The *Miller* standard has been described as "intolerably vague"

pend upon nuances of presentation and the context of its dissemination.

Id. at 73, 83-84.

³³² As stated recently by Justice Stevens:

[T]he present constitutional standards, both substantive and procedural (How, for example, can an appellate court intelligently determine whether a jury has properly identified the relevant community standards?), which apply to these [obscenity] prosecutions are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility.

Marks v. United States, 430 U.S. 188, 197 (1978) (Stevens, J., concurring in part and dissenting in part), cited in *TRIBE*, *supra* note 3, at 669.

³³³ *Roth v. United States*, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring).

³³⁴ See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

³³⁵ *Roth v. United States*, 354 U.S. 476 (1957).

³³⁶ *Regina v. Hicklin* [1868] 3 Q.B. 360.

³³⁷ *Id.* at 371. This test remains in use in England, although it is to be interpreted according to current standards (*R. v. Martin Secker Warburg Ltd.* [1954] 2 All E.R. 683). See generally 11 *HALSBURY'S LAWS OF ENGLAND*. 1022 (4th ed. 1976).

³³⁸ 354 U.S. at 489.

³³⁹ The pressures on the *Roth* "average person, general community standards" test are well depicted by the case of *Mishkin v. New York*, 383 U.S. 502 (1966), as reported by *Tribe*:

Mishkin may be seen as illustrating the lack of a principled foundation for the Court's obscenity decisions. The defendant in that case had contended that publications depicting deviant sexual practices could not satisfy the "prurient appeal" test of the then-governing *Roth* decision because they did not excite prurient thoughts in *Roth*'s "average person": "instead of stimulating the erotic," he argued, "they disgust and sicken." 383 U.S. at 508. The Court rejected the argument, modifying the *Roth* definition to permit suppression of erotica exciting only to the deviant. The *Roth* average person was replaced by the deviant person in cases where material appealing to the deviant was at stake.

TRIBE, *supra* note 3, at 663 n.50.

³⁴⁰ 413 U.S. 15 (1973).

³⁴¹ *TRIBE*, *supra* note 3, at 664-65 [citations omitted]. He states further:

States remain free to adopt communitywide, statewide, or nationwide standards of

and as leading to "grossly disparate treatment of similar offenders."³⁴² This undoubtedly is true, and reflects that the standard is no longer a "legal" one, but rather is a matter of local policy. Fragmenting the problem of obscenity along geographical lines moves no closer to the real solution, which is to distinguish particular persons and contexts for which the material is unacceptable. That is a job beyond the practicality of adjudication; the only remaining alternative is that taken: to decide cases *ad hoc* but in a fashion that at least imports a measure of representativeness. Hence the *Miller* standard allows "each jury . . . to be a law unto itself." The jury can make distinctions between people that, if clearly articulated, would offend egalitarian ideals. The dispersal strategy employs the jury as an irresponsible political agency³⁴³ to accomplish *sub silentio* what for traditional adjudication would be the impossible job of articulating obscenity criteria based on classifications of people and contexts not before the court.

This section examined the response of judges to problems that are dissonant with adjudication by reason of the non-existence of clear decisional criteria. Such dissonance most commonly appears where the problem is novel to adjudication. In such cases adjudication slowly provides the needed criteria; this is not strictly a problem modification. More difficult dissonances exist where the problem requires "judging the whole person" appearing before the judge, or where the problem requires the judge to make distinctions among people who cannot be brought before the court. Such dissonances appear to cause the judge to adapt the procedures of adjudication: in the former situation, by changing the nature of adjudicative information and changing the social assumptions about disputants; in the latter situation by shifting effective decision-making from the judge to a body that is representative of the population.

prurience and patent offensiveness—subject to continuing supervision by the Court to assure that juries do not go too far. Prurient appeal may be defined in terms of the target audience, with more protective standards for children than for adults, and with attention to whatever special groups a book or film might be designed to stimulate. In close cases, it may be made decisive that "the purveyor's sole emphasis [is] on the sexually provocative aspects of his publications." Neither expert testimony on community standards nor instructions on precisely what "community" to consider are constitutionally required. . . .

Id. at 663-65.

³⁴² *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part).

³⁴³ The term "irresponsible agency" is coined by Calabresi and Bobbitt:

What we shall call the responsible agency is a typically American mode of decentralizing political decisions. The jury, is one of its aspects, is the prototype of this variant. . . . The responsible agency generally has three features: It is representative, decentralized, and it gives no reasons for its decisions. Its representative quality is supposed to give effect to what society views as relevant differences among individuals. Because the agency is decentralized, it is able to make individuated decisions. And giving no reason, it avoids, or at least mitigates, the conflict between the wish to recognize differences and the desire to affirm egalitarianism in all its forms.

CALABRESI AND BOBBITT, *supra* note 25, at 57.

In the section that follows, dissonance arising by reason of a problem being based on the future rather than the past is resolved either by a problem modification, or yet another form of procedural adaptation.

C. *When Adjudication Faces Future-Based Problems*

As a reactive rather than active procedure, traditional adjudication is well-suited to problems that arise out of past events.³⁴⁴ Future-based problems pose difficulties for adjudication, and judges hear such problems with reluctance. Future-based problems can be classified into two types: (1) "predictive" problems, which are those requiring an immediate decision but where the wisdom or efficacy of such decision is conditioned on uncontrollable future events; and (2) "planning" problems, which require the commitment or supervision of resources toward some task or goal. Such problems are future-based because the solutions depend on predictions of the consequences of intervention.³⁴⁵ When judges hear "predictive" problems, they tend to resolve the dissonance between the future-based problem and the procedure of traditional adjudication by modifying the problem so as to treat it as past-based. When judges hear "planning" problems, they tend to resolve the dissonance by adapting their procedures to become more active than reactive. Each of these adaptations will be explained more fully below.

1. "Predictive" Problems

Predictive problems most commonly are presented to the judiciary in the context of requests for "technology assessments," i.e. disputes about the environmental or health impact of some proposed or ongoing activity. Such problems are future-based because a decision either to permit the activity, or to enjoin or regulate it, is necessarily grounded in determining not only current effects, but the risks of future effects. The ultimate wisdom of many such decisions can be judged only by the hindsight of future generations. A reactive system of decision-making such as traditional adjudication lacks the informational resources to deal properly with predictive problems. Moreover, the incremental decision-making of adjudication inhibits a comprehensive and coherent treatment of such problems. Judges normally have before them in a given case only limited aspects of a given predictive problem and therefore, are inherently limited in their ability to dispose of the problem. When heard by judges, predictive problems tend to be converted into more familiar and less demanding past-based problems. Such conversions are achieved procedurally by the manipulation of burden of proof standards, and substantively by the discounting of future costs.³⁴⁶

³⁴⁴ See *supra* notes 140-43 and accompanying text.

³⁴⁵ F. HAYEK, *THE ROAD TO SERFDOM* 34-87 (1944).

³⁴⁶ Both the procedural and the substantive devices for converting a future-based problem into a past-based problem are rather subtle, and their operations are described in only a few recent articles. See, e.g., Rodgers, *supra* note 244; Vig, *Environmental Decision Making in the Lower*

In establishing procedural devices for adjudicating predictive problems, three alternative models are said to be used by the United States Congress and courts to address the problem of uncertain environmental and health effects of certain proposed activities: the "free market" model, the "regulation-market failure" model, and the "state of the art" model.³⁴⁷ The models differ in which party bears the burdens of persuasion, and production of evidence. In the "free market" model, a presumption exists in favor of allowing unregulated market forces to operate as a means of determining whether risks of harm are outweighed by the benefits of engaging in the activity. Heavy burdens of production and persuasion are placed on those who would regulate the activity.³⁴⁸ A lack of information can defeat the regulator; even where information about potential injuries can be produced, the regulator will lose if the risk of injury is not proved by a "preponderance of the evidence."³⁴⁹ This requirement is crucial because much information about *potential* injuries is inherently probabilistic, speculative, or unavailable.³⁵⁰ By placing very high standards of production or persuasion on the regulator, what in reality is a dispute about *risks* is transformed to an issue of whether the regulator can conclusively prove some future *injury*, almost necessarily by coming forward with proof about injuries that have occurred in the past.³⁵¹

Courts: The Reserve Mining Case, in ENERGY AND ENVIRONMENTAL ISSUES: THE MAKING AND IMPLEMENTATION OF PUBLIC POLICY 75-98 (M. Steinman, ed. 1978); Yellin, *Judicial Review and Nuclear Power: Assessing the Risks of Environmental Catastrophe*, 45 GEO WASH. L. REV. 969 (1977); Gelpe & Tarlock, *supra* note 54; L. TRIBE, CHANNELING TECHNOLOGY THROUGH LAW 47-61 (1973).

³⁴⁷ Rogers, *supra* note 244, at 219-25. Rodgers points out that the Administrative Procedures Act does not mandate in these circumstances which party to a dispute, proposed actor or regulator, has the burden of proof. Concluding his discussion on this point, he states that "[t]he Congress, then, and the courts in plumbing a subject often addressed only by implication, have a *free hand* in addressing the burdens of uncertainty that influence the outcome of formal decision-making." *Id.* at 219.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Gelpe and Tarlock described the difficulties, for example, of predicting environmental effects. Gelpe & Tarlock, *supra* note 54, at 407-12. The difficulties are "attributable to the uniqueness of each [ecological] system, thresholds, and interactions that are synergistic." *Id.* at 408. To summarize these difficulties: (1) The "uniqueness" of each ecological system "means that it is difficult to predict the characteristics of one system based solely on the characteristics of another. To some extent each system requires individual study." *Id.* (2) "Threshold" problems in prediction arise when one factor (x) in a system causes a qualitative or quantitative change in a second factor (y), but only at certain threshold levels of X. "If such a system is examined when X is at a sub-threshold level, it would not be possible to identify the relationship between X and Y. They appear to be independent. Yet the action of X on Y may be an important part of a full description of the system." *Id.* at 401.

(3) "Synergistic" interactions can be found at either the systems level, or at the component level. At the systems level, "[t]he characteristics of a forest are different than the additive sum of the characteristics of all the trees, shrubs, etc. Therefore, even if one knew all about trees and shrubs, one could not fully predict what a forest would be like. Separate descriptive studies at each level are necessary." *Id.* at 410. Similarly, at the component level, "the effect of two factors acting together in an ecosystem may be greater or less than the sum of the effects of the factors operating separately." *Id.* at 410.

³⁵¹ *See id.* at 412.

This transformation is well illustrated in the often cited case of *Reserve Mining Co. v. Environmental Protection Agency*.³⁵² A Federal District Court had enjoined the dumping of taconite tailings into Lake Superior, from which the water supply of Duluth, Minnesota is drawn.³⁵³ On appeal, the Eighth Circuit concluded that a health risk from the asbestos fibres in taconite had been proven, entailing possibly severe injuries to the public.³⁵⁴ Nonetheless the injunction was stayed.³⁵⁵ For an injunction to lie, said the court, a proven risk was insufficient; there must be proof of an imminent *injury*. The court stated: "Although we are sympathetic to the uncertainties . . . , we are a court of law, governed by rules of proof, and unknowns may not be substituted for proof of a demonstrable hazard to the public health."³⁵⁶ Such a conclusion is not mandated.³⁵⁷ By shifting the burdens of production and persuasion from the regulators to the actors, the opposite results obtain: no action with potentially adverse environmental consequences could be taken except upon proof of its safety. There is nothing inherent to a "court of law, governed by rules of proof," that precludes taking action on the strength of proof of risks of future injury. What is true, and what lies behind the court's conclusion, is that a court has great difficulty dealing with predictive problems and probabilistic evidence.

This is demonstrated by the fact that sometimes courts in fact do behave in precisely opposite fashion to that which the *Reserve Mining* court claimed is the inherent nature of the court. This occurs where a court adopts the "regulation-market failure" model of dealing with predictive problems.³⁵⁸ Under this model the burdens of proof are simply reversed.³⁵⁹ The regulator's *prima facie*

³⁵² 498 F.2d 1073 (8th Cir. 1974).

³⁵³ 380 F. Supp. 11 (D. Minn. 1974).

³⁵⁴ 514 F.2d 492, 520, 536 (1975).

³⁵⁵ 498 F.2d at 1086.

³⁵⁶ *Id.* at 1084. The Court explained this conclusion as follows:

[A]lthough Reserve's discharges represent a possible medical *danger*, they have not in this case been proven to amount to a health *hazard*. The discharges may or may not result in detrimental health effects, but, for the present, that is simply unknown. The relevant legal question is thus, what manner of judicial cognizance may be taken of the unknown.

We do not think that a bare risk of the unknown can amount to proof in this case. Plaintiffs have failed to prove that a demonstrable health hazard exists. This failure, we hasten to add, is not reflective of any weakness which it is within their power to cure, but rather, given the current state of medical and scientific knowledge, plaintiffs' case is based only on medical hypothesis and is simply *beyond proof*. . . . If we are correct in our conclusion that evidence does not exist in the record on which to find Reserve's discharges to be unsafe, the district court's determination to resolve all doubts in favor of health safety represents a legislative policy judgment, not a judicial one. . . .

Id. at 1083-84 (emphasis added).

³⁵⁷ See *supra* note 347. See also Gelpo & Tarlock, *supra* note 346, at 415-16.

³⁵⁸ Rodgers, *supra* note 244, at 224, 225.

³⁵⁹ The model and its application is described as follows by Rodgers:

This model is the converse of the free market model in that it also takes seriously the data needs of formal decisionmaking, except that the burden of overcoming uncer-

showing of a *risk* to human health is determinative unless the proposing actor can rebut the presumption with conclusive evidence of either the falsity of the risk, or of the gaining of overwhelming future benefits by allowing the activity.³⁶⁰ Once again, given the inherent uncertainty of information in this sort of predictive problem, the operation of the burdens of production and persuasion serve to foreclose a balanced inquiry about future risks and benefits. Once again the case is made to turn on evidence of existing effects drawn from past experience, not on purely predictive evidence of future effects. In the free market model, virtually conclusive weight is given to the present benefits of the activity, and the costs of regulating it. In the regulation-market failure model, virtually conclusive weight is accorded the present costs of the activity (in the form of provable risks). The two models taken together demonstrate the alternative problem modifications used by judges when faced with the inherent awkwardness of a predictive problem.

It is only on those rare occasions that courts use the "state of the art" model that a balanced investigation of future costs and benefits is undertaken. This model embraces "a standard of proof [i.e. burden of persuasion] that tolerates uncertainty, and thus seeks pragmatically the best decision for the moment. It anticipates a decision with data already known, requiring only that agencies use the best available evidence in reaching judgments."³⁶¹ Under this model the burden of production of evidence is also assigned pragmatically, "with the party possessing information being the one expected to produce it."³⁶²

Even under a model free of debate-confining presumptions, pressure exists to discount future consequences in favor of consequences that might be proved by referring to past experience. Sometimes, as illustrated by the court's opinion in *Reserve Mining*,³⁶³ this takes the form of reluctance to accord the status of "evidence" to proofs that are admittedly probabilistic. At other times, the discounting of the future is the indirect result of an oversimplified analysis of the notion of a future "risk." This tends to occur where the court faces a predictive problem, like the permitting or enjoining of a nuclear power plant, involving a very low probability of harm, but where such harm would be

tainties rests upon the proponent of the proposed activity. The standard is set high because the possible severe health consequences of approval, presumptively at least, are not offset by disruption of current economic interests. The party who proposes to introduce a new technology into the market must establish the safety of the initiative under a high standard of proof. The paradigms of the model are provisions of the drug and pesticide laws, which require proponents to develop extensive data to establish the safety of a product before it will be allowed on the market. The model was proposed, but eventually abandoned, during the vigorous debate that attended enactment of the Toxic Substances Control Act of 1976.

Id. at 224, 225.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 222, 223.

³⁶² *Id.* at 223.

³⁶³ See *supra* note 356 and accompanying text.

catastrophic.³⁶⁴ For such problems, courts tend to equate the notion of future "costs" or "risks" with the probability of harm occurring. For example, "nuclear risk analyses have adopted the . . . rule that probabilities are *determinative* of risk."³⁶⁵ A more accurate appraisal, however, would be to apply the traditional negligence standard for determining risk, namely that risk is the product of probability times consequences.³⁶⁶ It is not even unknown in the law to determine risk *solely* on the basis of consequences, with virtually no legal weight accorded to "the degree of precautionary care [or] the remoteness of the possibility of catastrophe."³⁶⁷ Such a rule is applied in determining liability for "abnormally dangerous" or "ultrahazardous" activities.³⁶⁸ Where a problem with a low probability of occurrence but with potentially drastic consequences is judged by risk standards that fail to consider consequences, the effect is to discount future costs unjustifiably in favor of present benefits. The risk rule that has been applied in such cases can be explained as a problem modification to relieve the dissonance of considering future-based problems. Probabilities of harm from the operation of nuclear power plants can be based largely on past safety records, and on descriptions of reactor safeguards; hence, it is according to such criteria that analysis proceeds, regardless of how unrepresentative that may be of the full extent of the problem.

In summary, the judicial reluctance to base adjudicative decisions on future-based evidence causes distortion in the articulation, and often the resolution, of a predictive problem. Courts avoid the necessity of actually making the prediction by casting the burdens of production and persuasion in such a manner that one party is precluded from establishing its version of the likely future. Where this is not possible, and courts actually undertake to make a decision based on a prediction of the future, courts are likely to avoid making a complete analysis by considering only the likelihood of a given event occurring in the future, and not its possible consequences. Each of these adaptations, by virtue of diminishing the predictive element, serves to make the dispute resolution procedure more "reactive" than "active."

2. "Planning" Problems

"Planning" problems are entirely distinct from predictive problems, and they evoke a different judicial response. Whereas decisions on predictive problems are conditioned on uncontrollable future events, decisions on planning problems assume the future can be manipulated to comport with the decision.

³⁶⁴ Yellin, *supra* note 346, *passim*.

³⁶⁵ *Id.* at 986 [emphasis added].

³⁶⁶ This is known as the "Learned Hand Formula" and is articulated in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Yellin, *supra* note 346, at 982. Traditional tort cases are not predictive problems. The events appertaining to the judicial decision in normal tort cases are historical, not future-based in the sense here used.

³⁶⁷ Yellin, *supra* note 346, at 984.

³⁶⁸ *Id.* at 983.

Planning decisions are interventionist and are instrumental in performing some task, or achieving some goal. Planning is "laying down how the resources of society should be 'consciously directed' to serve particular ends in a definite way."³⁶⁹ Such decisions, to be effective, cannot leave the future to chance. If the decision is indeed to be instrumental in reaching some goal or state of affairs, then necessarily the decisionmaker must "foresee the incidence of its actions."³⁷⁰ Hence, planning decisions are inescapably future-based.

Not all decisions that are instrumental toward meeting a goal, however, are truly future-based "planning" decisions in the sense here meant.³⁷¹ A true "planning" decision is one that is instrumental in achieving some goal that does *not* contemplate the optimally efficient allocation of resources.³⁷² A "planning" decision contemplates committing resources in a manner different from the allocation that would obtain "... if decisions were made about the use of resources on the basis of whether the marginal loss of preserving them exceeds the marginal amount people are willing to pay for their preservation."³⁷³ Suppose, for example, an agency is entrusted with supervision of airline flights³⁷⁴ between London and New York. Suppose also there exists sufficient demand and airline capacity to support twenty flights daily. The agency faces both a first-order, and a second-order, determination:³⁷⁵ The first-order decision is how many flights to allow, the second-order decision is how to allocate the flying rights among contending airlines. Suppose that in order to advance some goal like currency protection, or income redistribution, or simply paternalism,³⁷⁶ the agency decides to allow only ten flights per day. This is a true "planning" decision, a commitment of social resources on grounds that do not seek optimally efficient use of resources. Suppose in making the second order allocation among the airlines the agency lets out the rights for competitive bidding, except that it prohibits two airlines from bidding because of chronic past unreliability and flight cancellations. This agency decision is *not* a true "plan-

³⁶⁹ HAYEK, *supra* note 345, at 35.

³⁷⁰ *Id.* at 76.

³⁷¹ TRIBE, *supra* note 346, at 53-56.

³⁷² Many legal decisions are "instrumental" toward the goal of efficient allocation of resources, and therefore are not "planning" decisions. The form of a legal decision is not dispositive of whether or not it is a response to a planning problem. Tribe suggests three distinct forms in which an efficient, and therefore "non-planning," result might be achieved in the prevention, say, of pollution: (1) the issuing of a specific directive abating the pollution, *id.* at 53; (2) "modifying market incentives," for example by correcting market imperfections so as to establish prior "rights" to clean air, or to pollute, which can then be exchanged privately to optimize resources, *id.* at 54-56; and (3) "changing the decision-making structures," for example by requiring "the merger of an upstream polluter ... with a downstream user, thereby internalizing automatically a number of formerly external costs." *Id.* at 56.

³⁷³ *Id.* at 57.

³⁷⁴ The example is broadly taken from Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227, 1232-34 (1966).

³⁷⁵ The terms "first order determination" and "second order determination" and their meanings were coined by Calabresi and Bobbitt. See CALABRESI & BOBBITT, *supra* note 25, at 19.

³⁷⁶ TRIBE, *supra* note 346, at 57-58.

ning" decision; rather, the agency is attempting to correct an imperfection in the market method of seeking optimal allocation of resources. If instead the method of making the second-order determination is to grant an exclusive license to the national airline so as to protect its market, that is a true planning decision.

Legal decisions correcting market failures, as in the initial second-order determination considered above, are common³⁷⁷ and present no great dissonance with the procedure of traditional adjudication. Where judges are faced, however, with the need to make true planning decisions exemplified by the above first-order decision, they tend to adapt their procedures in various ways, especially towards making adjudication more "active" than "reactive."

The traditional judiciary very rarely face planning problems, and hence this argument must be from analogy to administrative agencies. Planning problems commonly are assigned to such agencies, which often are required to deal with such problems in a more or less "adjudicatory" fashion. The awkwardness of solving planning problems with reactive procedures creates some procedural adaptations.³⁷⁸ The deciding agency uses numerous criteria in making a decision.³⁷⁹ The parties therefore present evidence on every conceivable issue, since they have no idea which issue may be dispositive of the decision.³⁸⁰ For the same reason, the agency likely will admit any evidence offered, and the record of the proceedings therefore could be enormous.³⁸¹ "It is the limitless and unfenced range of the agency's probable basis of decision that lies at the root of the procedure problem."³⁸² The problem, in other words, is that once efficiency is abandoned as the criterion for allocating resources to some regulatory task, the decision-makers are left with a value choice in finding an alternative distributional criterion. Commonly, nothing in the pertinent

³⁷⁷ See *supra* note 372; See also *infra* note 386 and accompanying text.

³⁷⁸ [W]hat works [procedurally] for regulation does not and cannot work for allocation and planning. Adjudication procedure is made ridiculous when it is enlisted in an attempt to "prove" planning by evidence. . . . The parties have no way of knowing in advance which criteria will be stressed in a given case and for all that the parties know, new criteria may be introduced. Accordingly, the prudent lawyer must seek to introduce evidence bearing on every imaginable issue that the agency might consider. The lawyer would be rash indeed if he omitted some point, no matter how farfetched, for the agency might later fix upon this as the pivot of its choice. For the same reason, the hearing examiner is reluctant to exclude any evidence. It is unlikely that he can be criticized or reversed for admitting evidence, but if he leaves a gap in the record over the objections of a party he invites trouble. Everything conspires to expand the size of the record and virtually no counter-force is at work to limit evidence. This condition seems inevitable if the decision cannot really be placed upon a basis of objective choice. Since it is tacitly recognized that the agency will be making policy as it goes along there can be no limit to the relevance of evidence.

Reich, *supra* note 374, at 1241.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

statute informs such a choice other than that it be in the "public interest."³⁸³ This vagueness results in the formless "trials" described above, and in an institutionalized arbitrariness of decisions utterly inconsistent with the Rule of Law, since "the use of the government's coercive powers will no longer be limited and determined by preestablished rules."³⁸⁴

Furthermore, a decisional system assigned to achieve a certain goal cannot remain procedurally reactive, waiting for fortuitous cases to come its way. Not so much can be left to chance. Bureaucratic pressures to implement particular results will result in either the convening of hearings regardless of whether a normal "case or controversy" presents itself for determination, or perhaps in a careful screening of cases for selective hearing. Preservation of traditional reactive methods of obtaining cases will be seen as inefficient, or stifling of change, or even dangerous.³⁸⁵

As suggested, planning problems very rarely arise in the common law. This is perhaps because the solutions to such problems entail declarations of prior "rights" of an unusual sort. The "rights" normally declared by the common law create entitlements in things under circumstances where the market has for some reason failed.³⁸⁶ Once legal entitlements are created, they may be exchanged freely so as to achieve efficient allocation of resources. But in "planning decisions" as defined in this article, efficient allocation is not the goal. Such decisions are consciously an instrument toward some other distributive goal grounded in the value choices of the decision-maker. Any "rights" declared as part of a planning decision must, therefore, necessarily be both "noneconomic" and "inalienable."³⁸⁷ Examples of precedents of such decisions are "the constitutional prohibition against slavery, the distribution of non-negotiable food stamps, the statutory prohibition against the use of heroin, [and] the criminal proscription of killing or mutilating a person even with his consent."³⁸⁸ Notably, it is probably only the latter decision that emerged from the procedural setting of traditional adjudication.

Nonetheless, there have been instances of judges hearing planning problems, most often in declaring rights pursuant to the Due Process and Equal Protection Clauses of the Constitution.³⁸⁹ Even here, of course, the value

³⁸³ *Id.* at 1238-40; *accord*, HAYEK, *supra* note 345 at 57.

³⁸⁴ HAYEK, *supra* note 345, at 82.

³⁸⁵ *Cf.* Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125 (1973).

³⁸⁶ *See, e.g.*, the discussion analyzing all of tort law in this manner, in Calabresi & Melamed, *supra* note 122, *passim*.

³⁸⁷ TRIBE, *supra* note 346, at 58. *See also* Calabresi & Melamed, *supra* note 122.

³⁸⁸ TRIBE, *supra* note 346 at 58.

³⁸⁹ *See, e.g.*, the fairly recent recognition that handicapped children have a right to publicly supported education suited to their needs. To the defense by one local Board of Education of insufficient funds for such purposes, the court in *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) stated:

Constitutional rights must be afforded citizens despite the greater expense involved. . . . If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be

choices underlying the "noneconomic" commitment of social resources toward some goal (e.g. "equality") are not pulled out of thin air — the Constitution does provide the general directions for society. A purer "planning" decision, arguably, would occur if, for example, a court were to declare that citizens possess inalienable rights to proper nutrition or adequate housing. In one very recent and interesting case in Ohio, the common law was put to the test whether it would decide a planning problem by ordering an uneconomic factory to remain open.³⁹⁰ Both the Federal District Court judge and the Sixth Circuit Court of Appeals³⁹¹ agonized over their decisions, yet ultimately declined to recognize inalienable rights in workers, and in a town, to the continued operation of the factories that gave jobs and life to the community.³⁹² The case involved the contemplated closure of two steel mills in Youngstown, Ohio. Because of the devastating economic effects of such a departure on the people of Youngstown,³⁹³ the worker's trade union, the local Congressman, and the Attorney General of Ohio brought suit to enjoin the closure of the factories. They alleged, among other things, a "community property" claim inhering in the town and the workers collectively (and thereby inalienably), in the continued operation of the plants.³⁹⁴ In a pretrial hearing the District Judge stated that "[I]t seems to me that a property right *has* arisen from this lengthy, long-established relationship between United States Steel, . . . the community in Youngstown, [and] the people . . . in having given and devoted their lives to this industry."³⁹⁵ In his formal opinion, however, the Judge balked: "Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation."³⁹⁶ The Sixth Circuit agreed both that there ought to be some form of right, but that the common law is simply not able to recognize it in the face of economic reality.³⁹⁷ While sympathizing with the people of Youngstown, the Court stressed the lack of any case or statute authorizing the court to enjoin the closure of unprofitable factories.³⁹⁸ This article submits that the key here is not, as the court claims, lack of authority. The common law often recognizes new rights. The *particular* right suggested by the problem facing the court was, however, qualitatively different. The problem did not call merely for declara-

expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.

Id. at 876. (citation omitted).

³⁹⁰ Local 1330, United Steel Workers of America v. United States Steel Corporation, 631 F.2d 1264 (6th Cir. 1980).

³⁹¹ 492 F. Supp. 1, 10 (N.D. Ohio 1980); 631 F.2d at 1280.

³⁹² 492 F. Supp. at 12; 631 F.2d at 1280.

³⁹³ 631 F.2d at 1265.

³⁹⁴ *Id.* at 1280.

³⁹⁵ *Id.* at 1280 (emphasis added).

³⁹⁶ 492 F. Supp. at 10.

³⁹⁷ 631 F.2d at 1280-81.

³⁹⁸ *Id.*

tion of an exchangeable entitlement. Rather, it called for creation of a right toward achievement of a particular distributive goal. Stating baldly such a value choice, and facing the fearsomely complex and frequent resource allocation decisions required to implement such choice was more than the court, equipped with reactive rather than active techniques, was willing to shoulder.

Planning problems therefore require courts to abandon traditional reactive procedures in favor of active procedures. Such a shift is so fundamental, however, that decisions on such matters usually are made by administrative agencies possessing loose standards of evidence and participation. As with predictive problems, planning problems starkly present value choices. For reasons of structure and therefore perhaps also of legitimacy, the judicial system avoids or closely manipulates such issues.

This section has suggested that when judges face problems that are dissonant because they are future-based rather than past-based, the judge either subtly modifies the problem so as to base his or her decision on historical information, or else the proceedings become formless and policy-centered, lacking that narrowness of purpose that normally characterizes adjudication.

D. *When Adjudication Faces Multiplex Problems*

Procedural control of traditional adjudication is divided about equally between the disputants themselves, and the stranger-judge.³⁹⁹ Such a procedural attribute may lead to the prediction that judges deal equally well with multiplex problems (the problem feature closely related to disputant-controlled procedures) and simplex problems (the problem feature closely related to stranger-controlled proceedings), and that no dissonance between problem and procedure could arise out of this variable. Earlier in this article, however, it was concluded that adjudication is indeed better suited to simplex, rather than multiplex problems.⁴⁰⁰ Multiplex problems, in fact, sometimes create dissonance of a profound sort. Perhaps more than any other problem feature, multiplex dissonance will cause courts straightforwardly to refuse to hear the case on grounds of nonjusticiability. Where multiplex problems are heard, often the decision amounts to no more than a functional refusal to consider the issues in the case. A variety of devices can be employed to achieve this functional refusal, including denial of the existence of a cause of action, invocation of an immunity doctrine, or the embracing of an absolute affirmative defense. These functional refusals to consider the case will be collectively labelled the "exclusionary response." A third possible type of decision in response to a multiplex problem is the "supervisory response" in which the judges hear the case on its merits, but ultimately allow the disputants to determine the outcome of the problem according to their own procedures, employing their own

³⁹⁹ See *supra* notes 144-49 and accompanying text.

⁴⁰⁰ See *supra* notes 176-77 and accompanying text.

substantive criteria. This judicial response is a procedural adaptation in which the dissonance is attempted to be resolved by shifting the procedures of traditional adjudication well over to "disputant control." This adaptation serves to harmonize the procedures with the multiplex structure of the problem. A fourth possible response is to convert the multiplex problem into a simplex problem. This is accomplished where the judge standardizes the relationships underlying the problem. This response will be termed the "role-assumption" response. A final possible response is again procedurally adaptive. The judge attempts to move away from the "stranger-control" pole, not by giving greater control to the disputants, as in the third response, but rather by the judge attempting to end his "stranger" role by becoming "intimate" with the parties and their relationship.

Multiplex problems typically are in two situations: family relationships, such as between spouses or between parent and child, and voluntary association relationships, for instance those between church and parishioner or club and member. Examples of the five above-described judicial responses are drawn from both sorts of multiplex settings.

1. The First Response: Outright Refusal to Hear the Case

Explicit refusals to decide cases on grounds of nonjusticiability are more than occasionally found in disputes arising from religion-based relationships, particularly where making a decision would require judges to inform themselves about, and interpret, theology. Ecclesiastical decision-making and the Rule of Law sometimes are stated in such cases to be utterly incompatible, and therefore religious disputes are held inappropriate for judicial resolution. One recent Supreme Court case, *Serbian Orthodox Diocese v. Milivojevic*,⁴⁰¹ was concerned with which of two religious factions was entitled to control the property and assets of an Eastern Orthodox Diocese.⁴⁰² The answer lay in that church's teachings about hierarchy within the church. The matter was thought to be essentially theological; hence, a majority of the Supreme Court refused to get involved. Stated Justice Brennan for the majority:

[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria . . . [Civil judges obviously *do not have the competence* of ecclesiastical tribunals in applying the "law" that governs ecclesiastical disputes.] . . . Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.⁴⁰³

⁴⁰¹ 426 U.S. 696 (1976).

⁴⁰² *Id.* at 698.

⁴⁰³ 426 U.S. at 714, 715 and note 8 (emphasis added).

The same attitude is reflected in many state court opinions. For example, in *United Kosher Butchers Association v. Associated Synagogues of Greater Boston, Inc.*,⁴⁰⁴ plaintiffs claimed that defendants had acted in restraint of trade, and with intentional interference to plaintiff's contractual relations, by arbitrarily refusing to grant "kosher" certification to plaintiff's meats and poultry. In refusing to hear the merits of the case, the Supreme Judicial Court of Massachusetts held that "[T]his court is not qualified to decide and therefore must *refuse to consider* an issue which is so exclusively one of religious practice and conscience . . ."⁴⁰⁵ Whether courts are in any sense absolutely incapable of hearing such disputes is not clear. Rather, courts realize the difficulty of dealing with the many and varied relationships involved, and consequently decline to hear the case.

2. The "Exclusionary Response"

Where judges are not so candid in their reluctance to decide a multiplex problem, they may resort to the "exclusionary response" in which the judge declines to hear the case by invoking some unreflective yet dispositive legal device. Examples are the various intrafamily immunities in tort law, and the refusal to enforce intraspousal agreements that attempt to regulate the incidents of an ongoing marriage.

The intrafamily immunity doctrine in tort, although slowly breaking down, remains in place with respect to alleged duties arising from within the family relationship. The parental immunity rule best illuminates this trend.⁴⁰⁶ In America the rule was first specifically recognized in *Hewlett v. George*,⁴⁰⁷ a case that precluded a minor daughter's suit against her mother for wrongful commitment to an insane asylum. The court based its decision on family peace and public policy concerns, and on the parent-child relationship: the parent's duty to care for and control the child and the child's "reciprocal obligation to aid and comfort and obey."⁴⁰⁸ However primitive the model of the parent-child relationship, it was sufficiently appealing to judges (arguably as an exclusionary device) that the immunity rule came to be accepted for actions in

⁴⁰⁴ 349 Mass. 595, 211 N.E.2d 332 (1965).

⁴⁰⁵ *Id.* at 599, 211 N.E.2d at 334, 335 (emphasis added). The Court continued: "[T]he preparation of kosher foods has traditionally been under the exclusive control of the rabbis. . . . Thus, such foods are by their very nature subjected to some restraints. Indeed, as was stated by a New York court: 'In the very nature of things, Kasruth must be a monopoly in the hands of those best qualified to administer it. By definition and tradition those persons are the rabbis, and their decree is final.'" (citations omitted).

Id. at 509, 211 N.E.2d at 334-35. Judges exhibit great flexibility in coping with dissonance. Outright refusals to consider multiplex problems occur, as above, where the issue arises in a dense, highly valued, and perhaps unorthodox social setting. See also *Moustakis v. Hellenic Orthodox Soc.*, 261 Mass. 462, 159 N.E. 453 (1928).

⁴⁰⁶ See generally McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-60 (1930); *Gibson v. Gibson*, 92 Cal. Rptr. 288, 479 P.2d 648 (1971).

⁴⁰⁷ 68 Miss. 703, 9 So. 885 (1891).

⁴⁰⁸ *Id.* at 711, 9 So. at 887.

negligence as well as for actions alleging intentional torts by the parent.⁴⁰⁹ With the spread of liability insurance, the immunity rule has tended to break down, but only as respects "suits between parents and children which would previously have been actionable between the parties absent the family relationship."⁴¹⁰ As to duties said to exist because of the family relationship such as the parental duty to provide the child with food, housing, medical services and other care, the immunity rule still applies.⁴¹¹ The simple application of this immunity rule is a functional refusal to hear a case that would require the court to interpose itself awkwardly between family members.

Judges use analogous devices to deny enforcement to intraspousal contracts governing the marital relationship. One leading case here is *Balfour v. Balfour*⁴¹² in the English Court of Appeal. Before departing his wife and England to resume a government post in Ceylon, the defendant husband orally undertook to give thirty pounds per month to his wife "in consideration of her agreeing to support herself without calling upon him for further maintenance."⁴¹³ Duke, L.J. and Warrington, L.J. held the agreement unenforceable because it was the husband's preexisting duty to support his wife, and therefore the alleged contract lacked consideration.⁴¹⁴ Atkin, L.J. concurred; but, recognizing that often there is indeed consideration present in these sorts of agreements, he refused enforcement on a much broader ground. He stated that agreements such as that in *Balfour* were outside the realm of contract law since the consideration involved was "that natural love and affection which counts for so little in these cold Courts."⁴¹⁵ The courts thus had no dominion over such promises. Unlike the *Balfour* case, the American case of *Miller v.*

⁴⁰⁹ See *Gibson v. Gibson*, 92 Cal. Rptr. 288, 479 P.2d 648 (1971).

⁴¹⁰ *Holodook v. Spencer*, 36 N.Y.2d 35, 44, 364 N.Y.S.2d 859, 866, 324 N.E.2d 338, 342 (1974).

⁴¹¹ For example, in a recent Wisconsin Supreme Court case generally overturning parental immunity, two areas remained protected from judicial intrusion: "(1) Where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Goller v. White*, 20 Wis.2d 402, 413, 122 N.W.2d 193, 198 (1963). The doctrine of parental authority, which gives immunity to a parent from what would otherwise be assault or battery charges, remains in force in England. W. ROGERS, WINFIELD AND JOLOWICZ ON TORT 654 (11th ed. 1979). It is, according to Rogers, assumed to exist by the Children and Young Persons Act 1933 (17 Statutes 435), § 1(7). I found no English case articulating any such distinction as in *Holodook* or *Goller*.

⁴¹² [1919] 2 K.B. 571 (C.A.).

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 574-78.

⁴¹⁵ *Id.* at 579. *Balfour* is still recognized in England. If the spouses are living together at the time the contract is made, a presumption exists that they do *not* intend to be legally bound. *Gould v. Gould*, [1969] 3 All E.R. 728, [1970] 1 Q.B. 275. On the other hand, the presumption does not hold where the spouses have separated at the time the contract is made; according to P. BROMLEY, FAMILY LAW 146 (1976), in such circumstances the intention of the parties to make a legal relationship is a question of fact to be inferred from all the circumstances. *Merritt v. Merritt*, [1970] 2 All E.R. 760. Indeed, Lord Denning, M.R., here felt that in such circumstances a presumption should exist that the parties *did* intend to be bound. *Id.* at 762.

*Miller*⁴¹⁶ involved a *written* agreement between husband and wife. Each party promised the other to "behave respectfully and fairly treat the other."⁴¹⁷ In addition, in exchange for Mrs. Miller keeping her home in a comfortable and reasonably good condition, Mr. Miller was to provide her with necessary expenses, and, "[to] pay Mrs. Miller, for her individual use, two hundred dollars per year."⁴¹⁸ When Mr. Miller failed to pay, his wife sued in breach of contract. The Iowa Supreme Court invoked the preexisting duty rule to deny recovery, then added that public policy precluded inquiry into husband-wife disputes "pertaining so directly and exclusively to the home, and its value as such . . . [S]uch inquiries in public would strike at the very foundations of domestic life and happiness."⁴¹⁹ Here again by applying this substantive doctrine the court effectively refused to intervene in an intra-family dispute.

The exclusionary response is virtually an outright refusal to hear a case. By basing the refusal in substantive doctrine, however, the court creates a less strong precedent to be overcome in the event that future courts do wish to hear similar cases.

3. The "Supervisory Response"

The third possible judicial response to multiplex problems is the "supervisory response." Here, the problem is not unrestrictedly thrown back to the disputants to resolve as they might; rather, the problem is thrown back with a specific judicial direction that the disputants shall resolve the matter according to the disputants' established procedures. This procedurally adaptive response is a method by which the problem is virtually guaranteed to be resolved without violence, but also with the disputants in complete control of both the procedures and the substance of the ultimate decisions. It is not an uncommon response, but more often is used when the dispute is between members of a voluntary association, rather than a family. Justices Rehnquist and Stevens dissented in the *Serbian Orthodox Diocese* case, for example, in favor of an approach that would have decided the controversy by examining the procedures mandated under the church's *own* constitution and penal code.⁴²⁰ Such an approach, asserted Rehnquist, is the normal response a court might take "to decide a similar dispute among the members of any other voluntary association."⁴²¹ Indeed, in *Mitchell v. Albanian Orthodox Diocese in America, Inc., et al.*,⁴²² on facts similar to those in *Serbian Orthodox Diocese*, the Massachusetts Supreme Judicial Court adopted just such a supervisory response. The trial judge had examined the Diocesan by-laws, and the facts surrounding the appointment of

⁴¹⁶ 78 Iowa 177, 35 N.W. 464 (1887) *aff'd on reh'g.*, 78 Iowa 177, 42 N.W. 641 (1889).

⁴¹⁷ 78 Iowa at 180, 42 N.W. at 641.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 182-83, 42 N.W. at 642.

⁴²⁰ 426 U.S. at 726-27.

⁴²¹ *Id.* at 726.

⁴²² 355 Mass. 278, 244 N.E.2d 276 (1969).

a particular bishop.⁴²³ The trial judge then issued a decree that both determined who were qualified members of the Diocese and also ordered the church council to hold a meeting so that a new bishop could be elected according to the church rules.⁴²⁴ The decree was affirmed on appeal, with the high court holding that the dispute was not "one of church law, . . . but one of contract law . . . We only interpret the by-laws of a Massachusetts corporation which constitute a contract between the members and the Diocese."⁴²⁵ The key to this supervisory response is that the multiplex nature of the problem remains intact, to be resolved by disputants' procedures, using such substantive criteria as they choose. The judicial role is confined to insuring procedural regularity within the relationship.

The supervisory response is not readily available in family multiplex cases, however, because families do not have formally constituted decisional structures. Moreover, under certain circumstances (especially where the disputants are grossly disparate in knowledge or power, as in the parent-child relationship),⁴²⁶ it would be unfair, or even dangerous, to relegate the ultimate solution to the disputants. In such circumstances stranger control, rather than disputant control, is more appropriate: the problem should thus be taken out of the hands of the disputants. In such cases the multiplex dissonance must be directly confronted. Judges may respond by attempting to "simplify" or objectify the multiplex relationship through role assumptions,⁴²⁷ or they may respond by attempting to become intimately knowledgeable about the multiplex relationship.⁴²⁸ As will be seen, neither response is fully satisfactory.

4. The "Role-Assumptions" Response

Any family multiplex relationship can be simplified through-role assumptions.⁴²⁹ For example, the father is often assumed to be more capable of, and therefore entitled to discretionary powers over, the disbursement of family in-

⁴²³ *Id.* at 280-88, 244 N.E.2d at 277-78.

⁴²⁴ *Id.* at 279, 244 N.E.2d at 277.

⁴²⁵ *Id.* at 282, 244 N.E.2d at 279. (citations omitted).

⁴²⁶ See *supra* note 78 and accompanying text.

⁴²⁷ See *infra* notes 429-40 and accompanying text.

⁴²⁸ See *infra* notes 441-55 and accompanying text.

⁴²⁹ The following is a summary of what is meant by "role-assumption" as it pertains to law:

Role is a basic concept of sociology. We understand role as the sum of all rules of conduct imposed by society on the holder of a certain social position. Rules of conduct attach to a social position, and role becomes the point of intersection between individual and society. A role represents a normative generalization. The human being is seen not as a unique entity, but as one among many holders of the same position. He is seen not as the individual person, but as the employer, the salesman, or the habitual criminal who confronts us as an object of law. From society's point of view, however, the role represents a subset of the individual's personality, since the role does not comprise the total human being but only a partial aspect.

Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 951 (1971).

come (beyond the minimal levels of support required by law).⁴³⁰ Importing such an assumption into the judicial mentality works well as a device to determine the outcome of, or exclude from court entirely, all sorts of intrafamily financial disputes. The device, however, is obviously simplistic and perhaps often works unfairness. The assumption may have been valid in an era when women were generally less well educated than men. This assumption would now seem extremely doubtful. Nevertheless, the courts cling to it tenaciously.

Child custody cases provide a perhaps more striking example of role assumptions guiding court decisions. Here the historical variability of the assumptions and the weight accorded them demonstrates the lack of any empirical foundation for those assumptions. For example, in the early nineteenth century the father was conclusively presumed to deserve custody of his child.⁴³¹ The English case of *The King v. De Manneville*⁴³² shows the operation of a nearly "owner-object" role assumed to exist between a father and his children. The affidavits showed that the wife had separated herself shortly after marriage because of ill treatment by her husband.⁴³³ Nevertheless a child was born of the marriage, and was only eight months old when the defendant father forcibly took the child from the mother and "carried it away almost naked in an open carriage in inclement weather."⁴³⁴ The father, nonetheless, was awarded custody since he was "the person entitled by law to the custody of his child."⁴³⁵ In America, by contrast, although some early state statutes expressed a preference for the father, no such absolute paternity preference took hold in America.⁴³⁶ In the twentieth century, in fact, most courts came to adopt the opposite role assumption, strongly preferring the mother in custody suits. By 1912 a New York court stated: "[T]he child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give."⁴³⁷ This maternal preference rule was advanced both by amended state

⁴³⁰ See, e.g., *Austin v. Austin*, 282 A.D. 493, 124 N.Y.S.2d 900 (1953) and *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953). In both cases wives unsuccessfully attempted to secure regular household monies from their tight-fisted husbands. Both attempt failed, the courts relying on a role model of husbands' fiscal discretion. The *Austin* court lectured: "Instead of litigating the issues between them in court at the cost of time, expense, and harassment to both, the parties, still living together as man and wife, should recall the solemn vows and promises mutually made and amicably compose relatively trivial differences." 282 A.D. at 494, 124 N.Y.S. 2d at 902. Said the *McGuire* court: "The living standards of a family are a matter of concern to the household, and not for the courts to determine. . . ." 157 Neb. at 238, 59 N.W.2d at 342.

⁴³¹ Mnookin, *Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW CONTEMP. PROBS. 226, 234 (1975).

⁴³² 102 Eng. Rep. 1054 (K.B. 1804).

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 1055. The paternity preference rule in England was overturned by statute in 1925. Section 1 of the Guardian of Infants Act, 1925 stated that neither the father nor the mother should be regarded as having a custody claim superior to the other. This Act has now been superseded by the Guardianship of Minors Act, 1971 (41 Statutes 761), with no substantive change to this provision. P. BROMLEY, *FAMILY LAW* (1976) at 307. See also *infra* note 428.

⁴³⁶ Mnookin, *supra* note 431, at 234.

⁴³⁷ *Ullman v. Ullman*, 151 A.D. 419, 424-425, 135 N.Y.S. 1080, 1083 (1912).

statutes and by judicially-constructed exceptions.⁴³⁸ Perhaps the growing awareness of the arbitrary nature of such assumptions has led to the ongoing abandonment of the maternity preference rule in favor of the "best interests of the child" standard.⁴³⁹ Particularly in custody proceedings incident to divorce, this standard is now overwhelmingly dominant among the states and in England.⁴⁴⁰ Its application illustrates the final judicial response to multiplex problems, i.e. the "intimacy response."

5. The "Intimacy Response"

In this response, the dissonance between multiplex problems and stranger-controlled proceedings is attempted to be resolved by the judge abandoning his "stranger" posture. To accomplish this, the judge seeks to become intimately familiar with as many as possible of the subtle links of the relationship: psychological, economic, medical, and educational. The approach is subject, however, to the same criticisms made above⁴⁴¹ to the radical "individuation" approach taken in criminal sentencing and child ungovernability cases. Rather than attempting, as in the individuation approach, to judge "the whole person," in the "intimacy" response the judge attempts to ignore role stereotypes and assess "the whole relationship."

Leading family law commentators have questioned the efficacy, fairness, and wisdom of the intimacy response. One commentator, for example, writes that an attempt to understand the "best interests of the child" often reduces in practice to "the court . . . surrendering its jurisdiction" to the social welfare agencies,⁴⁴² which at times operate to protect their own authority, rather than protect the child or the parent.⁴⁴³ Under this view, the true arbiters are the "experts," that is, the social worker or child psychiatrist.⁴⁴⁴ For example, in one seemingly bizarre case a father's visitation rights were terminated because a psychiatrist testified that the father showered on the child "too much attention, love, and affection, and in that way he set up an invidious comparison which made the mother look bad."⁴⁴⁵ The major reason for this result, states one commentator, "is that the process was not truly an adversarial one . . . The impartiality of most experts also is in doubt."⁴⁴⁶ Though the judge's

⁴³⁸ Mnookin, *supra* note 431, at 235.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 236. In England the Guardianship of Minors Act, 1971 (41 Statutes 761) states that the welfare of the child is to be regarded as the first and paramount consideration in a custody determination. In *J. v. C.*, [1969] 1 All E.R. 788 (H.L.); [1970] A.C. 668 this principle was said to apply regardless of whether the dispute is between the parents, or between one or both parents and a stranger. BROMLEY, *supra* note 435, at 311.

⁴⁴¹ See *supra* notes 301-25 and accompanying text.

⁴⁴² Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of 'The Best Interests of the Child' Doctrine*, in *THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY* 244, 244 (A. E. Wilkerson, ed. 1973).

⁴⁴³ See, e.g., In re Jewish Child Care Association, 5 N.Y.2d 222, 183 N.Y.S. 65, 156 N.E.2d 700 (1959), described in Katz, *supra* note 430, at 252-53.

⁴⁴⁴ Foster, "Trial of Custody Issues and Alternatives to the Adversary Process," in *THE CHILD AND THE COURTS* 55 (I. Baxter and M. Eberts, eds. 1978).

⁴⁴⁵ *Id.* at 56.

⁴⁴⁶ *Id.* at 57.

reliance on experts diminishes the adversarial nature of the proceedings, this reliance is a way for the judge to gain intimate knowledge of the relationship. It has been suggested that the adversarial nature of the proceeding could be restored by appointing a lawyer to "speak for the child."⁴⁴⁷ The lawyer would examine the child's educational, personal and health needs and then reach a decision as to the child's best interests.⁴⁴⁸ Under the suggested model, however, "[t]he advocate should have free rein to introduce into evidence any medical, psychological, psychiatric, or juvenile-probation-department reports about the child or his parents . . ."⁴⁴⁹ Thus, the suggested model leads back to an attempt at intimacy, and back also to the experts. This approach is not likely to fare any better than the judicial intimacy response. The difficulties are inherent in the nature of the problem, and the nature of adjudication. Adopting a true adversarial form of adjudication may make the dissonance worse. Where either the levels of hostility or the power differential between the parties in a multiplex problem reach a certain threshold, the stranger-judge must intervene. The structural demands posed by such problems, however, simply may be beyond the adaptative capabilities of adjudication. The judge either must simplify the problem to manageable levels, thus risking accuracy and fairness; or he must attempt to become an intimate, at the risk of abandoning the rule of law, thereby compromising acceptability. When a judge decides a custody case under the best-interests principle, he is "[n]ot applying law or legal rules at all, but is exercising administrative discretion. . . ."⁴⁵⁰

Similar perils attend an attempt to apply the intimacy response to voluntary association multiplex problems. Judges normally steer clear, but there has been an occasional judicial incursion into the affairs of private clubs, and churches.⁴⁵¹ The results can be disastrous, as shown by the judicial floundering in *Free Church of Scotland v. Overtoun*,⁴⁵² a case with issues similar to those presented in the *Serbian Orthodox Diocese*,⁴⁵³ and *Mitchell*⁴⁵⁴ cases. The *Free Church of Scotland* dispute stemmed from the Act of Union of 1900 between the Free Church and the United Presbyterian Church. Rather than merely super-

⁴⁴⁷ Coyne, *Who Will Speak for the Child?* in A. E. Wilkerson, *supra* note 430, 193, at 210.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ Fuller, *Interaction Between Law and Its Social Context* 11 (unbound class material for Sociology of Law, Summer 1971, Univ. of California, Berkeley) (unpublished), *quoted in* Mnookin, *supra* note 431, at 255. Fuller continues:

The statutory admonitions to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as an instruction to the manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state.

Id. Or, as stated succinctly by Mnookin: "The [custody dispute] trial judge has broad discretion, but the question asked often has no meaningful answer." Mnookin, *supra* note 431, at 262.

⁴⁵¹ See, e.g., *Young v. Ladies' Imperial Club Ltd.*, [1920] 2 K.B. 523, *reversing* [1920] 1 K.B. 81; *Baird v. Wells*, [1890] 44 Ch. D. 661; and *Dawkins v. Antrobus*, [1881] 17 Ch. D. 615, all *cited in* Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

⁴⁵² [1904] A.C. 515.

⁴⁵³ See *supra* notes 401-02 and accompanying text.

⁴⁵⁴ See *supra* notes 422-25 and accompanying text.

vise the churches' own procedures, the House of Lords "spent 112 pages, with arguments by counsel of 97 pages and appendices of documents occupying 41 pages, to reach a decision which was so unsatisfactory that it had to be overridden by an Act of Parliament (5 Edw. VII, c.12 (1905))."⁴⁵⁵ The intimacy response is probably a sincere effort by judges to overcome the "stranger" aspects of their role. Given the methods by which courts receive decisional information, however, the response will most often fail.

The interaction of multiplex and simplex problems with disputant and stranger control of procedures is complex, but rewardingly examined. Traditional adjudication contains much disputant control, perhaps in response to the many multiplex problems that, for want of a better alternative, are resolved in the courts. Yet for all their familiarity with multiplex problems, judges have yet to find a consistent method by which to accommodate such problems within the structure of adjudication. Perhaps the most satisfactory response is the third one, the "supervisory response" in which violence is averted but the dispute turned back for resolution within the relationship. The response is not feasible, however, in most family settings. Moreover, it can sometimes lead to final outcomes that, although procedurally regular, are oppressive. In resolving such cases, what sadly is lacking for the judges is a middle ground between simplistic role assumptions, and the unfathomable intimacy of the underlying relationship.

E. *When Adjudication Faces Public Disputes*

Experience informs us that some distinction exists between "private" disputes and "public" disputes. In civil law systems the distinction is sharply drawn, "public law" being identifiable by a body of rules wholly autonomous from private law, and normally entailing a separate administrative jurisdiction.⁴⁵⁶ In the common law system, the distinction between public and private is imprecise and tentative,⁴⁵⁷ and different definitions of public versus private disputes have been proposed by commentators.⁴⁵⁸ Earlier discussion of this

⁴⁵⁵ Chafee, *supra* note 451, at 1024. Chafee further criticizes:

In the course of the argument Haldane charged one of the law lords with anthropomorphism in his interpretation of predestination, and the Lord Chancellor in his opinion felt obliged to quote two passages of original Greek from the Councils of Constantinople and the Synod of Jerusalem in order to show the attitude of the Arminians.

Id.

⁴⁵⁶ Vedel, *DROIT ADMINISTRATIF* 57, 58 (5th ed., 1973), cited in Harlow, "Public" and "Private" Law: *Definition without Distinction*, 43 MOD. L. REV. 241, 241 (1980).

⁴⁵⁷ Harlow, *supra* note 456, at 241. As Harlow stated:

When in England we talk about "public law," we all know roughly what we are talking about. . . . We do not need to define the term more precisely because, although we may sense in the common law a latent distinction between the "public" and the "private," we do not use these terms as classificatory terms of art in the same way, for example, as we use the terms "contract," "tort," and "crime." Nor do legal consequences usually flow from the distinction.

⁴⁵⁸ Friedman constructed a rather formalistic definition of public and private disputes. A

concept concluded⁴⁵⁹ that private disputes are more accurately, efficiently, and acceptably resolved through strict, assured procedures; public disputes are better resolved through loose, diffuse procedures.⁴⁶⁰ Predictably, when a public dispute is adjudicated, judges will either somehow convert the problem to a "private" one, or modify adjudicative procedures to become more loose and diffuse. There is only limited latitude in this area for problem modification, for reasons that will become clear. Hence, the adjudication of public disputes results in procedural adaptations that are more loose and/or diffuse.

A less formalistic approach to the distinction between public and private disputes is required for full understanding of the difficulty of adjudicating public disputes. Certainly the notion is linked to the relationship between the State and private persons. This article proposes a definition of public versus private disputes which is based on three possible levels at which two parties can relate, and the differing types of norm used to govern each level of relationship.

Parties can relate to one another: (a) "universally," invoking act-based norms; (b) "categorically," invoking group-based norms, or (c) "particularly," using person-based norms. The distinction between act-based norms and person-based norms has been discussed above.⁴⁶¹ Briefly, an act-based norm is a standard for legal judgment based on "the consequences of specific

private dispute is one where there is no initial participation by public authorities; public disputes are those in which the State is a disputant, either plaintiff or defendant. *See supra* discussion at text accompanying notes 17-20. Although there are certain difficulties with Friedman's definitions, the definitions sufficed (1) to identify the opposing poles of the public-private problem variable; and (2) to establish the following relationships with the loose, diffuse-strict, assured procedure variable: generally, private disputes are more accurately, efficiently, and acceptably resolved through strict, assured procedures; public disputes are better resolved through loose, diffuse procedures.

Professor Chayes posits an alternative set of boundaries for public, and private, disputes. Private disputes are those arising out of the social and economic arrangements constructed by autonomous, private actions. It is toward the resolution of such disputes that traditional adjudication is designed. Chayes' new model of litigation, "public law litigation," reflects and relates to a regulatory system where these [social and economic] arrangements are the product of positive enactment. . . . [E]nforcement and application of law is necessarily implementation of regulatory policy. Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process. Chayes, *supra* note 20, at 1304.

Chayes then describes in an excellent and comprehensive fashion the procedural adaptations that occur when such regulatory public disputes are adjudicated. Chayes' definition of a public dispute, however, is both a bit too broad and a bit too narrow. Much of commercial contract law and tort law, for example, now is "positively enacted." No doubt economic and social arrangements are heavily influenced by the existence of such statutes. Yet clearly not all of such cases are "public law litigation." Professor Chayes undoubtedly does not intend such breadth. Yet in another sense, Chayes is too narrow: judges will react in an even more extreme fashion than that described by Chayes where they attempt to hear another variety of public dispute (see *infra* discussion of cases based on "particular interactions" at notes 464-69 and accompanying text) that has nothing to do with positive regulation.

⁴⁵⁹ *See supra* notes 84-85 and accompanying text.

⁴⁶⁰ *See supra* note 86 and accompanying text.

⁴⁶¹ *See supra* notes 65-66, 135, 145, 160-62 and accompanying text. *See generally* Fuller, "Two Principles of Human Association," 11 NOMOS (VOLUNTARY ASSOCIATIONS) 3, 17-19 (1969); Fuller, *supra* note 16, at 34-36.

acts or failures to act.”⁴⁶² A person-based norm, on the other hand, is a standard for legal judgment requiring a “general appraisal of the qualities or dispositions of the person” involved.⁴⁶³ A “group-based” norm, finally, is a standard for legal judgment that requires classifications of persons. As stated, parties relate in each of these three ways.

1. “Universal” Interactions

Where the parties are private persons, the law will enforce only their universal dealings based on act-norms. Private interactions of a categorical nature remain either non-legal, or they may indeed be illegal, as where people discriminate against one another along categories defined by race, or gender. Private interactions of a “particular” nature also remain non-legal: One private person’s assessments of another’s competence or character or stability or piety will not be made the basis of legally-enforceable rights and duties. Categorical and particular interactions of private persons are beyond the pale of law, although the group-based or person-based norms by which the interactions proceed may well be enforceable by such non-legal methods of social control as religion, custom, fashion, and taste. Since, however, the *State* can interact *only* through the medium of law, the categorical and particular interactions between State and private person, if any occur, *must* be enforceable at law. “*Public disputes*” are those legal disputes that arise out of the categorical, or particular interactions of the State and private persons.

Hence, “private” disputes are those legal disputes that arise out of universal, act-based norm, interactions. It does not matter whether the interaction is between private persons exclusively, or between private persons and the State. Where the interaction is universal, any legally recognized dispute arising therefrom is “private.” Examples of universal interactions between private persons are commonplace. Any private contract, for example, is a universal interaction: any legal judgment arising out of the breach of such contract will treat the contracting parties universally (or, as is sometimes said, “objectively”) examining *only* their respective *behaviors*.⁴⁶⁴ That is all that is considered relevant. One party’s greater wealth or knowledge, or good or bad intentions, does not matter, at least up to the threshold of fraud or duress. And even those affirmative defenses are based on the conduct of the parties, not on their statuses or the structure of their market positions. Similarly, judgments about tortious liability between private parties are based on the respective conducts of the par-

⁴⁶² Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 329 (1971).

⁴⁶³ *Id.*

⁴⁶⁴ Presumption of universality among private persons are, of course, quickly breaking down in contract law and tort law. The universal act-based norm is being replaced gradually by group-norms (e.g. “consumer,” “merchant,” “manufacturer,” “employee,” etc.) where legal consequences follow not solely from one’s behavior, but also from the group of which one is a member. See generally Kahn-Freund, *A Note on Status and Contract in British Labor Law*, in O. KAHN-FREUND, *SELECTED WRITINGS* 78-87 (1978); Reich, *The New Property*, 73 YALE L. J. 733 (1964); Rehinder, *supra* note 429; GILMORE, *supra* note 185.

ties, assuming both parties to be standardized, "reasonable" people. Special clumsiness gives rise to no special excuse, nor does superior agility or intelligence entail special obligations towards others.⁴⁶⁵ Such contract and tort disputes are "private disputes," even though obviously the State can breach contracts, and commit torts, and be held liable just as though the State were another standardized, objectively-considered, private person. Where the State so interacts, any ensuing dispute remains "private." The criminal law is also a universal interaction between the State and private persons. All persons are deemed equivalent under the criminal law, save for the insane and children. Criminal law is definitely based on act-norms. Even "premeditation" and "special intent" crimes are act-based: acting through especial malice is just an especial form of conduct, it is not a quality or attribute of the criminal. Hence criminal law trials are "private disputes," even though the State is a party. The same reasoning leads to the conclusion that most constitutional litigation is "private." Interaction between private persons and the State under the constitution is *universal*, even though the particular facts may be idiosyncratic.⁴⁶⁶

"Private disputes" are better solved by strict, assured procedures, such as exist in traditional adjudication. Universal interactions are crisply defined by behaviors. Expanding the inquiry to permit loose, diffuse participation would serve no purpose. Private disputes therefore are easily compatible with traditional adjudication. "Public disputes," on the other hand, arise out of categorical, or particular, interactions between the State and private persons. Both of these two types of public disputes are dissonant with traditional adjudication. Each of the two sorts of problem, however, is grounded in a different sort of norm, and judicial response in hearing such problems varies accordingly. Because the dissonance is embedded deeply in the structure of the norms of the interaction, judicial conversion of a public dispute into a private one is difficult. Rather, the dissonance is resolved through a variety of procedural adaptations.

2. "Categorical" Interactions

Categorical interactions that give rise to the first sort of "public dispute" are exemplified by the regulation of economic activity, and by affirmative

⁴⁶⁵ The general statement about the standardization of people in tort law should be qualified (1) by the changes described *supra* in note 464; and (2) by the fact that if people hold themselves out as having special abilities or knowledge, tort law will often judge them by those higher standards. *E.g.* physicians are judged by the standard of the "reasonable physician," and not by the standard of the "reasonable man." David Fleming, personal communication, 1981.

⁴⁶⁶ Disputes defining the boundaries of citizen-State interaction are normally better solved through loose, diffuse procedures. (See *supra* text accompanying notes 79-91). This would suggest that most Constitutional litigation, although a "private dispute" by the definition here posited, should be loose and diffuse. Arguably, litigation at the Supreme Court level in the United States is indeed fairly loose and diffuse, given the frequency with which *amicus curiae* briefs are filed, and given the extensive academic and journalistic commentary on the decisions of the Court.

measures by the State to improve the social position of particular groups. Such interactions are grounded in group norms. In the case of regulation, particular sectors of the economy (e.g. common carriers, radio and television broadcasters, and utilities) are identified as belonging to a relevant category. Regulations are then promulgated that apply universally within the target group. The conduct of a particular company is irrelevant to whether state action will be brought to bear on it. Mere structural or productive similarity to others warrants inclusion in the regulated group. The same sort of group norm governs state efforts at affirmative action. The identifying criterion for membership in the group benefitted by the regulation is not conduct, or the actual experiencing of discrimination. Rather, it is skin color or gender. Similarly, the identifying criterion for membership in the group burdened by the regulation is not conduct, i.e. past acts of discrimination, but rather position in the economy like "employer" or "educational institution."

The State clearly does interact with private persons in this categorical fashion. For the interaction to be effective, it must be enforceable in the courts. Problems based on such group norms are dissonant, however, with traditional adjudication.⁴⁶⁷ Judges and the legal system generally have learned to adapt to this form of public dispute by making extensive changes in the procedures of adjudication.⁴⁶⁸ For example, the most predictable procedural adaptation to the dissonance created by a "public dispute" problem occurs along the associated procedure variable of "strict, assured" versus "diffuse, loose" participation. This adaptation results in the liberalization of the joinder rules, the pleading rules, and the standing rules,⁴⁶⁹ all of which operate under the traditional adjudication model to confine the inquiry strictly to the parties. In the adjudication of a public dispute, however, "[t]he party structure is not rigidly bilateral but sprawling and amorphous."⁴⁷⁰ The emergence of the class action is a further adaptation to the fact that the underlying norms speak for, and to, groups.⁴⁷¹ Class action provisions diffuse the litigation by allowing all persons within the group to influence the decision. Concerns frequently expressed by judges and commentators that the group actually before the court be truly representative of the various interests in the controversy are concerns for the diminished assuredness of participation that occurs whenever the strictness of the proceeding is relaxed.⁴⁷² "The emergence of the group as the real subject or object of the litigation not only transforms the party problem, but raises far-reaching new questions"⁴⁷³ about *how* loosely the adjudication ought to be

⁴⁶⁷ See *supra* text and accompanying notes 464-65.

⁴⁶⁸ See *infra* notes 469-74 and accompanying text.

⁴⁶⁹ Chayes, *supra* note 20, at 1289-91.

⁴⁷⁰ *Id.* at 1302.

⁴⁷¹ *Id.* at 1291-92.

⁴⁷² *Id.* at 1291, 1310-13.

⁴⁷³ *Id.* at 1291.

organized, and about how, *within the relevant group*, strictness and assuredness can be maintained. The procedural adaptation, in other words, should go only so far towards diffuseness and looseness as is required to cope with the group-based norms of the lawsuit. An adaptation that goes beyond the structural demands posed by the problem would be equally unsuitable in terms of accuracy and acceptability.⁴⁷⁴

The law will thus enforce categorical interactions between the State and private persons, even though such interactions solely between private persons would *not* be enforced. Such enforceable categorical interactions are exemplified by economic regulations and affirmative action programs. Problems arising from such interactions pose dissonance for traditional adjudication primarily because they are based on unfamiliar group norms.⁴⁷⁵ The legal system has responded to this dissonance with extensive procedural adaptations. The success of this effort is disputed, but the procedural changes are consonant with the demands posed by the structure of this type of public dispute.⁴⁷⁶

3. "Particular" Interactions

The second sort of "public dispute" occurs where the law must enforce an interaction between the State and a private person that is particular, based on personal norms. A particular interaction is the opposite of a universal interaction. It is concerned with what a person is, rather than what act he/she has done. Whereas the act-based norm of a universal interaction is objective, perhaps even quantifiable, excluding all variables beyond observable conduct, the person-based norms seek informed subjectivity based on considering as many variables or attributes as possible.⁴⁷⁷ Particular interactions occur constantly in everyday living: private persons continually judge one another in terms of overall moral, social, or spiritual worth. Observable behavior only partially informs such judgments. The law will never enforce these sorts of par-

⁴⁷⁴ *Id.* at 1296. Chayes describes other features of the new procedures adopted by the public law litigation model. Such other procedural adaptations operate indirectly to reduce the strictness and assuredness of the proceedings. Primarily, however, the other devices are responding to other problem variables that correlate with being a group-norm based public dispute. For example, Chayes mentions that the typical public law problem is *future-based*. *Id.* at 1296. This problem feature, he notes, causes judges to take a much more active, rather than reactive, role in fact-finding. *Id.* at 1297-98. He states that "[t]he fact inquiry is not historical and adjudicative but predictive and legislative. . . . The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court." *Id.* at 1302. Just such procedural adaptations are predictable under the theory of this article where a judge attempts to hear a future-based problem. See *supra* notes 344-97 and accompanying text.

⁴⁷⁵ Problems arising from such interactions also pose dissonance for traditional adjudication because they tend to possess other dissonance-producing features, such as being future-based. See *supra* note 474.

⁴⁷⁶ Chayes is optimistic that the adaptations are suitable to the problems. Chayes, *supra* note 20, at 1313.

⁴⁷⁷ Cf. *supra* notes 160-62 and accompanying text. Galanter, *supra* note 135 at 155, and Eisenberg, *supra* note 63, at 640-46 suggest that person-based norms actually *prevail* in non-Western tribal systems.

ticular judgments where made by or between private persons. Occasionally, however, the State also finds itself compelled to engage in such particular interactions. Here again, if such actions are to be effective they must be enforceable in court. This article already has discussed three examples of such interactions, and how judges respond to them. The examples are the criminal sentencing process where rehabilitation is a goal,⁴⁷⁸ child ungovernability determinations,⁴⁷⁹ and child custody determinations based on the "best interests of the child" standard.⁴⁸⁰ Civil commitment proceedings are perhaps another example.⁴⁸¹

This article has shown that enforcing such particular interactions is so foreign to our courts that they take refuge behind extremely vague standards that afford often unreviewable discretion to the judge.⁴⁸² Additionally, there may be unjustified abdication of fact-finding in favor of experts.⁴⁸³ The effect of court-appointed masters and experts, and of judicial notice of social welfare and probation reports, is to loosen the proceedings. They are loosened not by expanding the number of parties, as occurs in the "categorical" type of public dispute, but rather are loosened by opening for examination every facet of the parties' lives. One function of pleadings in Anglo-American adjudication is to protect the privacy of the parties and safeguard against judicial bias arising from some past behavior or trait of a party that is unrelated to the matter at hand. There can be no such protection where the courts are attempting to adjudicate person-norm interactions. Indeed, particular instances of this sort of abuse have been cited in the examples discussed above, particularly respecting probation department and social welfare agency reports.⁴⁸⁴ A subtler danger may be that particular interactions between the State and private persons are unconsciously enforced in ways that disfavor the poor, the uneducated, the unorthodox, and those comprising minority groups.⁴⁸⁵

These difficulties with the completely unconfined inquiries of particular interactions are made worse by the fact that the various judicial responses operate to reduce assuredness of participation. To be sure, the parties before the court retain their rights to present proofs and cross-examine witnesses. For-

⁴⁷⁸ See *supra* notes 302-10 and accompanying text.

⁴⁷⁹ See *supra* notes 311-25 and accompanying text.

⁴⁸⁰ See *supra* notes 440-50 and accompanying text. The State involvement in such cases is sometimes strong, as in custody proceedings based on parental neglect or abuse, but also is sometimes weak, as where the custody proceeding is pursuant to a divorce. Mnookin, *supra* note 431, *passim*. The latter case may be an exception to the rule that the law will not enforce private party particular interactions.

⁴⁸¹ See generally Elkins, *Legal Representation of the Mentally Ill*, 82 W. VA. L. REV. 157 (1979); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978); Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

⁴⁸² See *supra* notes 302-10 and accompanying text.

⁴⁸³ See *supra* notes 442-49 and accompanying text.

⁴⁸⁴ See *supra* notes 313-14 and accompanying text.

⁴⁸⁵ See *supra* notes 320-25 and accompanying text.

mally, assuredness is unaffected in person-norm based inquiries. Substantively, however, assuredness is severely impaired by the vague standards and the over-reliance on experts. It is the essence of such inquiries that they are *unprincipled*. They neither appeal to precedent nor make precedent. Where the final determination is a matter of judicial discretion, the parties can never fully know what is and is not relevant or persuasive. In that sense their participation is not "assured," i.e. protected by the institution. Participation cannot proceed in a vacuum;⁴⁸⁶ the participants must share stable expectations about how the decision maker will act,⁴⁸⁷ and what notions inform his/her judgment.

This is not, however, to criticize judges. They here face a type of dispute highly dissonant with their accustomed procedures. They respond with adaptations that, according to the theory of this article, are in the correct direction. If the process is unsatisfactory it is not for want of sincere efforts by judges. It is perhaps more to be regretted that there remain instances where particular interactions between the State, and private persons, must somehow be enforced.

Dissonances created by the attempt to adjudicate public disputes result in a variety of procedural adaptations. Where the public dispute involves categorical norms, the adaptations serve to make the proceedings more diffuse and loose. In the relatively rare circumstances in which the State interacts with a citizen on a "particular" basis, the adaptations become more extreme—disputant privacy becomes threatened, and the decisions lack principled consistency.

F. *When Adjudication Faces Problems Where Private Resolution is Infeasible or Undesirable*

Dissonances created where the judiciary faces problems that cannot feasibly or desirably be resolved privately are best analyzed together. Because this section is very detailed, first a summary is provided of the relevant variables and their associations. Thereafter, a number of predictions of judicial reactions to the various dissonances are presented. Finally, a more detailed examination is made of the adjudication of infeasible and undesirable problems.

The problem variable "feasible-infeasible private resolution" is associated with the procedure variable "strong-weak responsiveness." Adjudication as noted is basically strongly responsive to the proofs and arguments presented by the parties,⁴⁸⁸ and copes more easily with problems for which private resolution is feasible.⁴⁸⁹ Hence dissonance exists where there is presented for adjudication a problem for which private resolution is infeasible.

The problem variable "desirable-undesirable private resolution" is associated with the procedure variable "corrective-facilitative." Adjudication is basically a corrective procedure, although most decisions are incidentally facili-

⁴⁸⁶ Fuller, *Adjudication and the Rule of Law*, *supra* note 10, at 5.

⁴⁸⁷ Freeman, *supra* note 72, at 179.

⁴⁸⁸ See *supra* notes 153-55, 178-83 and accompanying text.

⁴⁸⁹ See *supra* notes 179-80 and accompanying text.

tative of human interaction,⁴⁹⁰ and it copes more easily with problems for which private resolution is desirable.⁴⁹¹ Hence dissonance exists where there is presented for adjudication a problem for which private resolution is undesirable.

Logically, there are four possible types of problems that form the conjunction of the two problem variables here considered. The four possible types are feasible-desirable, infeasible-desirable, feasible-undesirable, and infeasible-undesirable. The theory developed in this article can be used to make predictions of the judicial response to each of the four sorts of problems.

First, feasible-desirable problems present no dissonance with traditional adjudicative procedures. Such problems can be decided without recourse to problem modifications. Similarly, no procedural adaptations are required: adjudication can remain strongly responsive, and retain its usual mixture of corrective and facilitative functions.

Second, infeasible-desirable problems present a dissonance with the procedures of traditional adjudication. The expected judicial modifications to the problem somehow should convert the problem from "infeasible" to "feasible;" alternatively, the expected procedural adaptation would shift the adjudication away from the "strongly responsive" pole to the "weakly responsive" pole. That is, the procedural adaptation should seek to allow for greater flexibility and less emphasis upon the proofs and arguments of the parties.

The third set of problems, feasible-undesirable problems, present a dissonance different from that created in infeasible-desirable problems. Feasible-undesirable problems are dissonant along the "desirability of private resolution" continuum. The expected judicial modifications to the problem somehow should convert the problem from "undesirable" to "desirable." Normally an alternative judicial response would be a procedural adaptation along the associated procedure variable. Here, such a procedural shift would be toward the "facilitative" pole, away from the "corrective" pole. But if the problem cannot be modified to one for which private resolution is desirable, it would be counter-productive for the judge to facilitate such private interaction. Hence if the problem modification to "desirable" is impossible, it is more likely that the decision would follow the only remaining path and somehow convert the problem from one that is feasible to one that is *infeasible*. Such a conversion prevents the problem from being privately resolved, which by definition is undesirable. This rather ironic result is the reason why these problem variables are considered together.

Finally, infeasible-undesirable problems present dissonance along the "feasibility of private resolution" and "desirability of private resolution" variables. Consistent with the analysis immediately above, it makes sense for judges either to modify *both* problem variables (so as to convert the problem in-

⁴⁹⁰ See *supra* notes 167-72 and accompanying text.

⁴⁹¹ See *supra* text accompanying notes 182-83.

to one that is feasible and desirable) or to decide in such a manner as to preserve or strengthen the "infeasibility" aspect of the problem. Nothing good is achieved by a successful modification of only one aspect of the problem. Achieving only a feasible-undesirable outcome is *worse* than doing nothing at all, because (as in feasible-undesirable problems) it increases the chances that undesirable private negotiations will occur. Similarly, there is little purpose in achieving only an infeasible-desirable result.

The actual results when adjudication faces these four categories of infeasible or undesirable problems are strikingly similar to the above predictions. There follows a closer examination of each of the above four problem types, and the various judicial modifications and adaptations to such problems.

1. Feasible-desirable Problems

As suggested, feasible-desirable problems present no structural dissonance to traditional adjudication. Such problems are typified by disputes over ownership of property, or over enforceability of contracts. Where such disputes arise, the parties could feasibly resolve the matter amongst themselves, and society normally has no reason to prevent such private resolution (the conditions giving rise to "infeasibility" and "undesirability" are considered below).⁴⁹² Where the parties have not so accommodated this sort of dispute, it is either because one or both parties is ignorant of his or her respective rights or duties (hereafter referred to as "entitlements"), or it is because one or both parties is seeking the expressive imprimatur of a court decision. In either case, the decision of the court can be strongly responsive — can proceed from and be congruent with the arguments of the parties. The social interest is basically in solving the matter peaceably, not in solving it with a particular outcome. There is no need to make any special reference to some social, or utilitarian, criterion. The decisional criteria may safely be formulated by the parties themselves. Similarly, adjudication can play its traditional role of "correcting" the parties by clearly announcing specific entitlements, which announcement not only resolves the immediate problem, but also facilitates the future private interactions of these parties and all others similarly situated. For example, once ownership of a chattel is established by court decision, the parties may privately negotiate a purchase and sale of the object between themselves. Prior to the court decision, such a transfer obviously would have been more difficult. Similarly in the contract example, any definitive judicial interpretation of a disputed clause will facilitate adjustments or modifications in future dealings.

2. Infeasible-desirable Problems

Feasibility of private resolution first begins to shade into infeasible private resolution where a loss occurs, as through negligence, fraud or crime, such that

⁴⁹² See *infra* text accompanying notes 495-97, 522-23.

the liable party has nothing to gain by negotiation.⁴⁹³ It was suggested⁴⁹⁴ that in dealing with such cases, judges become more weakly responsive out of a desire to ensure the protection of society against the higher likelihood of aggression. This section suggests other situations in which private resolution is infeasible and describes an alternative judicial response to infeasibility. This response is to attempt to modify the problem so as to make private resolution more feasible.

There are two distinct conditions that lead to the infeasibility of private resolutions. The first is where one or more parties is under a legal incapacity that bars the party from making a binding private agreement. Examples of such legal incapacities include being a minor, or being insane. The second condition leading to infeasibility of private resolution is where for some reason the transaction costs of making an agreement are very high. Examples of high transaction costs include high information costs, as where one or both parties are ignorant of their respective entitlements, but discovering such entitlements would entail prohibitively large attorney fees or litigation expenses. Another sort of high transaction cost arises where there are "free rider" or "holdout" problems that bar private resolution.⁴⁹⁵ Cases where a loss has occurred also fit in this category, especially losses due to accidents. Where accidents have occurred, it is obviously infeasible for all prospective victims to negotiate *ex ante* with all prospective injurers a compensatory price for all potential injuries.⁴⁹⁶ And after the loss has occurred, not only does the injurer have no incentive to negotiate, but also the victim is not likely to accept in settlement such sums as the injurer might have been willing to accept, prior to the actual occurrence of the accident.⁴⁹⁷

In coping with infeasibility caused by a legal incapacity, courts tend to make the procedural adaptation of appointing someone to participate in court on behalf of the incapacitated person. If need be, a permanent guardian can be selected to carry out legal transactions for such a person. Such an appointment clearly facilitates future interactions by legal incompetents, preventing the occurrence of additional problems that are "infeasible." In coping with infeasibility caused by high transaction costs, courts tend to convert the problem into one that is feasible, by any or all of three methods: first, by supplying information about entitlements; second, by defining objectively the worth of such entitlements; third, by granting to one party the right to assume the entitlement of another upon payment of an objectively determined value. Such

⁴⁹³ Aubert, *supra* note 31, at 33.

⁴⁹⁴ See *supra* note 105 and accompanying text.

⁴⁹⁵ See *supra* notes 21-22 and accompanying text.

⁴⁹⁶ Calabresi & Melamed, *supra* note 122, at 1108-09. Generally, the reasoning throughout this chapter is heavily indebted to this excellent article.

⁴⁹⁷ *Id.* at 1109.

methods can thus resolve infeasibilities based on, respectively, high information costs; lack of incentives to negotiate after a loss; and structural obstacles to private resolution such as the free-rider and holdout problems.

a. *Legal Incompetency*

The procedural device of appointing a guardian to represent the interests of a legal incompetent is familiar. To resolve the immediate difficulty of adjudicating where such a person is brought before the court, the judge will respond weakly to such person's arguments by appointing what in England is called the official solitor,⁴⁹⁸ and what in America is called a guardian-ad-litem.⁴⁹⁹ It is one of the simplest and most effective procedural adaptations to dissonance. After the appointment, the judge can resume the strong responsiveness of traditional adjudication.⁵⁰⁰ As suggested, the appointment by the court of a permanent guardian is a variant on the above procedural adaptation. A permanent appointment is merely more prospective or preventative in coping with infeasibility caused by legal incapacity.

b. *High Transaction Costs*

Coping with infeasibility caused by high transaction costs requires greater subtlety and is usually less successful. It involves the gradually increasing intervention by the court into the framework of private interactions. Ideally, the intervention should be only so intrusive as is needed to solve the particular cause of the infeasibility. Since private resolutions of this type of problem are *desirable*, the court should not preempt such resolutions; rather, it should intervene so as to facilitate them. The first such intervention is the announcement of respective entitlements, enforced only by what Calabresi and Melamed call a "property rule."⁵⁰¹ The court does not declare a particular value to the entitlement. Once an entitlement is announced to exist in favor of some party, such party may freely transfer the entitlement at a mutually agreed price. Conversely, no one has the right to deprive the holder of his or her entitlement on payment of any price *except* that which is mutually agreed upon. As described with respect to feasible-desirable problems,⁵⁰² the announcement of entitlements suffices to

⁴⁹⁸ See generally, 10 HALSBURY'S LAW OF ENGLAND 950 (4th ed. 1975).

⁴⁹⁹ See generally, E. K. Solender, *Guardian-ad-litem: a Valuable Representative or an Illusory Safeguard?* 7 TEX. TECH L. REV. 619 (1976).

⁵⁰⁰ An alternative theoretical possibility would be for no representative to be appointed, and the judge to play a weakly responsive role in favor of the incapacitated person. Such compensation could be "active," with the judge supplying information and arguments on behalf of the weaker party, or it could be "passive," with the judge silently easing the burdens of proof in favor of such party. In comparison with the adaptation actually made, these possibilities are decidedly less acceptable because they in effect require the judge to compromise his or her objective role. The theoretical possibilities are also likely to be less efficient and less accurate, because the judge is not trained to be an adversary.

⁵⁰¹ Calabresi & Melamed, *supra* note 122, at 1092.

⁵⁰² See *supra* note 492 and accompanying text.

modify a problem whose private resolution is infeasible by reason of ignorance of one's entitlements, their transferability, and their worth, into a problem that is feasible for private resolution.⁵⁰³

The court intervenes one step further where, in order to solve an infeasibility problem, the court must declare some specific value for the announced entitlement. Since price is probably the most important feature of any bargain, this sort of intervention in which the court sets prices on entitlements is inevitably restrictive to private resolutions. The intervention is justified, however, in any case where absent the intervention the parties would be even *more* incapable of negotiating. Such is the case whenever a "loss," broadly defined, has occurred. The judicial implication of "reasonable" terms into a contract is perhaps the best example of this type of intervention. Suppose the parties have entered into an agreement with the intention of making a binding contract, but have inadvertently omitted the price. Under two distinct circumstances, one party will lose completely the incentive to negotiate a price. The first is if the

⁵⁰³ Regretfully, obtaining even such minimal intervention as the declaration of entitlements can be very expensive, and it may well be just such costs that makes such a problem "infeasible." From this standpoint it is difficult to understand the traditional judicial doctrine of "advisory opinion" under which the courts often refuse to hear cases until an actual injury has occurred. No doubt the doctrine grew up as a response to fears both for judicial legitimacy and administration. For a thoughtful discussion of this issue, see Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U.L. REV. 807, 822 (1977). Brilmayer notes that were it not for "ripeness" doctrines, the notion of *res judicata* would break down. *Id.* at 823. However, the importance for *private* resolutions of having available some relatively cheap mechanism for obtaining authoritative declarations of entitlements has led to the fast-spreading use of statutorily-created declaratory relief provisions. See, e.g., Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1976 & Supp. III 1979). As stated as early as 1949:

With few exceptions, judicial intervention has traditionally been limited to existing or highly imminent ruptures in social and economic relationships. Modern declaratory relief, however, extends the scope of court protection in advance of harm, seeking to forestall rather than merely repair damage. The need for such added protection stems from the fact that in a complex society doubt of the law or uncertainty concerning facts may in itself produce significant economic, administrative, or social detriment. The declaratory judgment is usually the exclusive remedy where an individual is uncertain of his right to alter existing relationships over another's objection; in this way, the risk of a "leap into the dark" is obviated. Similarly, if one is threatened by prejudicial action or adverse claim, he may obtain a declaration that the defendant has no right to alter existing relationships, thus eliminating the risk of harassment or damage.

Developments in the Law—Declaratory Judgments—1941-1949, 62 HARV. L. REV. 787, 789 (1949). In England the common law has been fairly liberal toward declaratory relief since the Court of Chancery in 1852 (15 & 16 Vict. c. 86 (1852), sec. 50) was empowered to make binding declarations of right without granting consequential relief. According to 1 HALSBURY'S LAWS OF ENGLAND (4th ed. 1973):

It is . . . sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may be given, and the court is authorized to make binding declarations of right whether any consequential relief is or could be claimed or not There is a general power to make a declaration whether there be a cause of action or not

Id. at 171, ¶ 185.

market suddenly shifts, making the transaction highly unprofitable for one party at the previously prevailing price. The second circumstance is if one party has substantially performed. There has in a sense been a "loss" in both cases, making one or the other party have nothing to gain by negotiating the omitted price term. In such circumstances, the courts sometimes have declared an objective "reasonable" price to be inserted into the contract. Cases illustrating the latter "substantial performance" circumstance are fairly common;⁵⁰⁴ cases illustrating the former "market shift" circumstance more rare.⁵⁰⁵ Moreover, it is this sort of intervention by courts that typifies tort law. A loss has occurred, and, because no incentives to negotiation exist, the courts intervene by declaring an objective value for the infringed entitlement.⁵⁰⁶

This sort of *post hoc* declaration of entitlements facilitates interaction in contract because parties know the courts will prevent injustices from befalling them due to their negotiating carelessness. Tort law facilitates interaction because if parties were required to negotiate *ex ante* with all prospective victims before undertaking any dangerous activity, prohibitive transaction costs would force the curtailment of "many activities that might, in fact, be worth having."⁵⁰⁷ Moreover, the knowledge that courts in fact will intervene with objectively determined values is an incentive to negotiate and thus makes feasible the private resolution of disputes.⁵⁰⁸

The final step a court may take toward modifying infeasibility caused by transaction costs is designed to overcome such structural obstacles to private resolution as the "free-rider" and "holdout" problems. In this intervention, the court grants to one party the *right* to appropriate the entitlement of another, upon payment of an objectively determined price. This intervention differs

⁵⁰⁴ A. CORBIN, 1 CORBIN ON CONTRACTS 93 (1963). Cases invoking the "frustration doctrine" are by analogy illustrations of judicial interventions in the price term of contracts due to market shifts.

⁵⁰⁵ Corbin states:

The court will be more ready to find that the apparently incomplete agreement was in fact complete and required the payment and acceptance of a "reasonable" price or a performance on "reasonable" terms, in case the parties have already rendered some substantial performance or have taken other material action in reliance upon their existing expressions of agreement. . . .

Id., at 93, 94.

⁵⁰⁶ Calabresi & Melamed, *supra* note 122, at 1108-10. Calabresi and Melamed describe such interventions as "liability rules" which they define as follows: "Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule." *Id.* at 1092. This connotes, however, that the tortfeasor has a *right* to injure, so long as he is willing to pay compensation. A better Hohfeldian category to describe the tortfeasor is that he has a "power." As discussed *infra* at text accompanying note 509, a potential victim surely could enjoin an imminent injury; hence the tortfeasor does not have a "right." Use of the term "liability rule" is for that reason avoided in this article.

⁵⁰⁷ *Id.* at 1109.

⁵⁰⁸ As stated by Calabresi and Melamed: "[W]here negotiations after an accident *do* occur—for instance pretrial settlements—it is largely because the alternative is the collective valuation of the damages." *Id.* (emphasis added).

qualitatively from the one described immediately above in that there, the paying party was being held "liable." The paying party might be said to have a power to commit the tort, for example, but would never be said to have an enforceable "right" to injure another upon payment of compensation. The prospective victim of a tort could normally seek an injunction against imminent injury by the prospective tortfeasor.⁵⁰⁹ Not so, however, where the court intervenes in this third way. Such interventions are illustrated by nuisance cases where the court refuses to grant an injunction against the nuisance, and by the doctrine of eminent domain.⁵¹⁰

The well known and often-cited case of *Boomer v. Atlantic Cement Co. Inc.*,⁵¹¹ decided by the New York Court of Appeals, is one illustration of this third type of intervention. Defendant operated a large cement plant that emitted dirt, smoke, and vibration.⁵¹² The surrounding land owners brought an action to enjoin its operation.⁵¹³ The trial court specifically found that the cement plant constituted a nuisance,⁵¹⁴ but the court ordered no injunction.⁵¹⁵ Rather, in the face of much precedent to the contrary, the plant was allowed to escape an injunction upon condition of its payment of judicially determined damages to the neighboring landowners.⁵¹⁶ In the face of substantial New York precedent to the contrary⁵¹⁷ the Court of Appeals affirmed the decision denying the injunction.⁵¹⁸ The facts show an instance of structural obstacles to private resolution. Notwithstanding that plaintiffs were substantially damaged, such damage was "relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which the plaintiffs seek."⁵¹⁹ To shut down the plant would therefore be an inefficient use of resources: it would be "cheaper" for the cement plant simply to pay off the injured neighboring landowners. Such a private resolution would not occur, however, because presumably there existed a "holdout" obstacle to the resolution. That is, one or more of the neighboring landowners would calculate that they could receive more compensation if they held out against settlement until all their neighbors' entitlements had been purchased, thus inflating the compensation beyond what the cement plant was willing to pay. Hence the court intervened by in effect granting to the cement company the *right* to purchase the plaintiffs' entitlements to be free of nuisance, even where such landowners were not willing to sell such entitlements.⁵²⁰

⁵⁰⁹ See *supra* note 506.

⁵¹⁰ Both examples are suggested by Calabresi and Melamed, *supra* note 122, 1105-08.

⁵¹¹ 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970), discussed *id.*

⁵¹² *Id.* at 222, 309 N.Y.S.2d at 314, 257 N.E.2d at 871.

⁵¹³ *Id.*

⁵¹⁴ 55 Misc.2d 1023, 1024, 287 N.Y.S.2d 112, 113-14 (1967).

⁵¹⁵ *Id.* at 1024, 309 N.Y.S.2d at 114.

⁵¹⁶ *Id.* at 1025-26, 309 N.Y.S.2d at 114-16.

⁵¹⁷ 26 N.Y.2d at 223, 224, 309 N.Y.S.2d at 315, 316, 257 N.E.2d at 872.

⁵¹⁸ *Id.* at 228, 309 N.Y.S.2d at 319, 257 N.E.2d at 875.

⁵¹⁹ 257 N.E.2d at 872.

⁵²⁰ 26 N.Y.2d at 223, 309 N.Y.S.2d at 315. The second half of the *Boomer* opinion con-

The doctrine of eminent domain exists to resolve the same sort of obstacles to private resolution.⁵²¹ If society is not given the right to purchase, at an objectively set price, the entitlement of even an unwilling private person, holdout problems would prevent the building of most public works projects. If, on the other hand, "society can remove from the market the valuation of each tract of land, decide the value collectively, and impose it, then the holdout problem is gone."⁵²² The court thus will have succeeded, although in a rather more intrusive way, of converting a problem where resolution was infeasible to a problem with a feasible solution.

3. Feasible-Undesirable Problems

Adjudication may be made difficult where private resolution of a problem is undesirable, and it would be expected that the court make efforts to convert the "undesirable" feature to "desirable." Failing that, however, the court should not adopt the normal procedural alternative of a shift on the associated procedure variable. That is because here, such a shift would be from "corrective" to "facilitative" procedures. Since private resolution of the problem is irredeemably undesirable, however, facilitating private interaction would be counter-productive. Hence the alternative course is to sabotage private resolution by making the problem "infeasible" rather than "feasible."

There are four possible reasons why a private resolution of a dispute may be undesirable. First, the private resolution might predictably be violent; second, one of the parties to the resolution may not be in a position to choose the resolution which is best for him/her; third, the private resolution may entail burdens or costs for unrelated third parties; and fourth, the private resolution may come to some solution that society deems morally offensive. Under all four circumstances a private resolution between the disputing parties is feasible. In the third and fourth circumstances, however, there are third parties who are directly affected by the private resolutions. Since the affected third parties frequently cannot be part of the direct negotiations between the disputing parties, such private resolutions are considered to be "infeasible," and discussion of such problems is deferred until the next section.⁵²³ Hence this section will con-

cerned calculation of damages, i.e. the reasonable price for the purchase of plaintiffs' entitlements. Contrast *Boomer* with the recent English case of *Laws v. Florinplace, Ltd.*, [1981] 1 All E.R. 659, in which Vinelott, J. granted an interlocutory injunction in favor of neighboring dwellers against the continued operation of a shop selling pornographic magazines and books. Notwithstanding defendant's arguments that no nuisance was as yet proved, and that loss of profits subsequently difficult to measure would result from an interlocutory injunction, the shop was shut down. It is impossible to say that *Boomer* is wrong and *Florinplace* is right. The two cases represent widely divergent views on the relative importance of economics, and, for want of a better phrase, social concerns.

⁵²¹ Calabresi & Melamed, *supra* note 122, at 1106-07.

⁵²² *Id.* at 1107.

⁵²³ See *infra* notes 539-53 and accompanying text.

sider two sorts of feasible, yet undesirable problems: those where private resolution is likely to cause violence, and those where one party to the private resolution is unlikely to negotiate a solution to his or her best advantage.

a. *Violent Resolutions*

Little discussion is required of the first problem. It is relatively easy for the courts to resolve this dissonance by modifying the problem from one that is "undesirable" to one that is "desirable." Violence is likely to occur where the court refuses to hear a dispute for which there exists no other viable method of resolution. In such circumstances the parties turn by default to self-help. Often some custom, or reciprocal family obligation, or even the need to preserve future dealings softens the method by which self-help proceeds. In the absence of these mitigating circumstances, self-help ranges from the disruption of midnight automobile repossessions to physical intimidation. In general, self-help is unpredictable and a remedy highly disfavored by the legal system.⁵²⁴ Its avoidance is accomplished by the court agreeing to hear the case on its merits. Once the court announces the respective entitlements, private resolution by peaceable means is enhanced, indeed becomes desirable, in the ways discussed above.

b. *Unfair Resolutions*

The second sort of feasible-undesirable problem is more difficult. It illustrates "true paternalism,"⁵²⁵ and arises where society has some reason to believe that the resolution that would emerge from private negotiation of a dispute would be unfairly disadvantageous to one party. It may be, for example, that one party is in a grossly inferior bargaining position, or it may be that one party lacks understanding of what is desirable for him or her. The ideal solution would be to modify the problem into one for which private resolution is desirable by correcting the imbalance of bargaining strength, or by educating the ignorant party about what is best for him or her. Such solutions are not unknown to the common law, but they seem to emerge more readily from active decision systems like the legislature. One could argue, for example, that consumer protection legislation like the English Unfair Contract Terms Act, 1977 and Fair Trading Act, 1973⁵²⁶ and certain provisions of the Uniform Commercial Code, and other statutes,⁵²⁷ attempt both to redress the bargain-

⁵²⁴ See F. H. LAWSON, REMEDIES OF ENGLISH LAW 25 (2nd ed. 1980) ("one of the most significant themes in history has been a persistent and continuous attempt by political societies to suppress self-help and substitute for it judicial processes").

⁵²⁵ Calabresi & Melamed, *supra* note 122, at 1113-14.

⁵²⁶ See generally G. H. TREITEL, THE LAW OF CONTRACT 179-96 (5th ed. 1979).

⁵²⁷ See generally R. STARR & R. DONIN, DOING BUSINESS IN THE UNITED STATES—AN EXECUTIVE'S GUIDE ch. 9 (1979).

ing positions of merchant-lenders and consumers-borrowers, and to educate the latter group or provide the mechanisms whereby they might educate themselves. What is notable about all such regulations is that they attach unavoidably to the relevant transactions. These regulations are entitlements that are granted to the consumer, borrower, or farmer, and are protected by "inalienability." Inalienability rules are virtually the opposite of property rules; to a partial or full extent their "transfer is not permitted between a willing buyer and a willing seller."⁵²⁸

In this sort of regulation, the solution of modifying the problem to make it *desirable* for private resolution tends to merge with a modification of the problem that, perhaps ironically, makes the problem at least partially *infeasible* of private resolution. The total effect is to permit, and even make desirable, private interaction; but only within a rigid negotiating framework, the terms of which have been unalterably removed from private negotiation. For most of the above regulation, the terms that are specified for the parties are quite detailed and specific. Such regulation can also be extremely general, in an attempt to limit in ill-defined ways the possibility that one party to a resolution might be unacceptably disadvantaged. The "unconscionability" provisions of the Uniform Commercial Code,⁵²⁹ for example, create an unavoidable framework designed to prevent the enforcement of private resolutions that reflect undesirable bargaining conditions.⁵³⁰

In contrast to these legislative efforts, the more reactive procedure of common law deals in an *ad hoc*, uncategorical fashion with private resolutions made undesirable by a severe imbalance in bargaining conditions. It has always been possible in Anglo-American adjudication to strike down or modify private agreements, but this normally occurs by the court invoking its "equitable powers," which creates far weaker precedent. For example, in the 1948 case of *Campbell Soup Co. v. Wante et al.*,⁵³¹ the defendants were Pennsylvania farmers who signed a form contract to grow carrots for Campbell Soup Company, at twenty-three to thirty dollars per ton.⁵³² After the harvest, the market shot up to ninety dollars per ton, and the defendant refused to deliver.⁵³³ Plaintiff sought specific performance, which was denied at the trial level on grounds of adequacy of legal remedy.⁵³⁴ The Circuit Court of Appeals affirmed, but not on that ground. The appellate court reviewed the entire agreement, and concluded that the agreement, while not illegal, was too one-sided and inequitable to the defendants to be enforced in the courts.⁵³⁵

⁵²⁸ Calabresi & Melamed, *supra* note 122, at 1092.

⁵²⁹ U.C.C. § 2-302 (1962).

⁵³⁰ For a discussion of U.C.C. § 2-302 as introducing a notion of "procedural unconscionability," see Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

⁵³¹ 172 F.2d 80 (3rd Cir. 1948).

⁵³² *Id.* at 81.

⁵³³ *Id.*

⁵³⁴ 75 F. Supp. 952 (E.D. Pa. 1948).

⁵³⁵ 172 F.2d at 83.

In addition to occasional refusals to enforce contracts that show an "overall imbalance," common law courts also sometimes regulate *particular* features of private interactions, such as disclaimers from tort liability.⁵³⁶ In some cases such disclaimers have been said to be totally unenforceable;⁵³⁷ in other cases the clauses have been allowed to operate only where the court could be sure that sufficient attention had been called to it.⁵³⁸ There has not developed in the courts, however, the sort of categorical, systematic problem modifications undertaken by the legislatures to resolve this type of feasible, yet undesirable problem.

4. Infeasible-Undesirable Problems

The analysis of infeasible-undesirable problems is similar to that stated for feasible-undesirable problems.⁵³⁹ Here, private resolution is both infeasible and undesirable. A successful modification would convert both problem features so as to achieve feasibility and desirability of private resolution. Failing that, the likely judicial reaction is to reinforce the "infeasibility" feature through the setting of entitlements protected by inalienability rules. Any intermediate solutions are counterproductive. If the "undesirability" feature cannot be converted, a court would be unwise to adopt a solution that moves across the associated procedures variable from "corrective" to "facilitative." Similarly it would be unwise in such a case to make a problem modification from "infeasible" to "feasible." If private resolution is irresolvably undesirable, it is better to deal with the problem in such a fashion as to inhibit

⁵³⁶ The common law has not settled on a consistent rule regarding disclaimers from negligence. As recently as 1961 the New York Court of Appeals held unanimously in *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 220 N.Y.S.2d 962, 177 N.E.2d 925 (1961) that negligence disclaimers can be upheld like any other freely bargained contract term. Discussing this case, Franklin in *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966) states:

Yet, the state of the law is by no means clear. There are cases in which courts have ruled that disclaimers against negligence liability were "against public policy" and would not be enforced—an antipathy to disclaimers that belies the placid, almost inevitable, tone of the New York approach.

Id. at 1005, (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90-91 (1955) and *Norway v. Root*, 58 Wash. 2d 96, 361 P.2d 162 (1961) (dictum)). Accord W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 656 (4th ed. 1971). The law is similarly fluid in England. *Rutter v. Palmer*, [1922] 2 K.B. 87, announced clear support for the operation of such clauses. Since then, the clauses have been continually more narrowly confined and closely scrutinized. A. G. GUEST, *ANSON'S LAW OF CONTRACT* 160-63 (25th ed. 1979). Accord TREITEL, *supra* note 526, at 152-96.

⁵³⁷ See *supra* note 536 and cases cited therein.

⁵³⁸ See, e.g., *Hollier v. Rambler Motors (A.M.C.) Ltd.*, [1972] 2 Q.B. 71, in which the plaintiff had twice signed defendant car repairer's work form on which a disclaimer had appeared. *Id.* at 75. On the third occasion, plaintiff merely telephoned defendant to arrange repair of plaintiff's car. *Id.* at 74. The car was damaged on defendant's premises by a fire caused by defendant's negligence. *Id.* at 74-75. The Court of Appeal refused to apply the exemption clause, on two grounds: first, that there was insufficient course of dealing to import the clause into the oral contract; *id.* at 75-78; second, that the language of the exemption clause did not specifically and unequivocally cover negligence. *Id.* at 78-82. See also GUEST, *supra* note 536, at 162-63.

⁵³⁹ See *supra* notes 524-38 and accompanying text.

such private resolution. There is also little point in converting the undesirable feature if the infeasible feature cannot also be converted or dealt with by some procedural adaptation.

Two sorts of problems were suggested above⁵⁴⁰ as illustrating those for which private resolutions were infeasible or undesirable. They were, first, problems whereby the resolution adopted would create costs or burdens for some third party who cannot join the negotiations; and second, problems whereby the resolution adopted is offensive to generally held moral values. In both cases the infeasibility does not refer to the disputants themselves, but rather to the infeasibility of their being joined by, or taking account of, the third parties who are more than usually affected by the disputants' private resolution. In both cases the "undesirable" feature derives from this inability of the third parties to affect the negotiations. Hence if the infeasibility cannot be overcome the problem will remain "undesirable." The infeasibility described by these two sorts of problem is extremely difficult to overcome by any of the methods discussed above in the context of problems where private resolution is desirable but infeasible.⁵⁴¹ Hence the infeasibility, and therefore also the undesirability also cannot be resolved. In dealing with these infeasible-undesirable problems, courts tend to respond by reinforcing infeasibility by stating entitlements that are protected by inalienability rules.

a. *Private Resolutions that Create External Costs*

The sort of private resolutions that create costs or burdens on parties who cannot join the negotiations are typified by contracts that restrain trade. The basic American antitrust statutes and British Restrictive Trade Practices statutes⁵⁴² in substance amount to little more than instructions to courts to engage in the process of optimizing the various goals underlying the regulation of competition. This the courts do by a variety of simplifying techniques and problem modifications. The decisions of both British and American courts have in common, however, that the entitlements they announce are protected by rules of inalienability. That is, the decisions are regulatory, giving to non-disputant competitors and the consuming public certain entitlements that cannot be waived, modified, or transferred. This is the common form of such decisions because it is utterly impractical, for example, to give to competitors or the public a right to be free from fixed prices, yet protect such a right only by a property rule. If the right is "stolen" by two companies agreeing to fix prices, the conversion cannot practicably be remedied by private actions.⁵⁴³ It is con-

⁵⁴⁰ See *supra* note 523 and accompanying text.

⁵⁴¹ See *supra* notes 493-522 and accompanying text. Such methods are unsatisfactory in resolving problems that are both infeasible and undesirable of private solution, because they were directed at *permitting* a private transaction to proceed. In infeasible-undesirable problems the difficulty is that the solutions impose externalities of one sort or another on third parties.

⁵⁴² See *supra* notes 248-51 and accompanying text.

⁵⁴³ Calabresi & Melamed, *supra* note 122, at 1112 and note 42.

ceivable a court could enforce such a right by an intervention similar to eminent domain in which conspiring companies could elect to buy off the right by paying any objectively determined value. In a sense this is what happens in the private enforcement cases brought under the antitrust laws.⁵⁴⁴ The fact that plaintiffs in private enforcement cases are entitled to treble damages, however,⁵⁴⁵ demonstrates that the legislators do *not* consider antitrust cases to be ones that can be made "desirable" for private resolution simply by providing entitlement-takers a mechanism for paying their way. Prohibitions against price-fixing, attempts to create monopolies, etc. are announced by courts in such a fashion as to leave no room for private negotiations. Because it is impossible to overcome the infeasibility of having all affected parties included in the negotiations, private resolution remains undesirable, leading to court decisions that make such resolutions impossible as a matter of law.

A more difficult case than the antitrust example occurs where one person is allowed to sell his land to another, a polluter, thus injuring his neighbor by lowering the value of his neighbor's land.⁵⁴⁶ Some commentators⁵⁴⁷ dismiss dealing with this example by means other than an inalienability rule largely because there are many possible affected neighbors, thus leading to the difficulties described in the antitrust example.⁵⁴⁸ If there is indeed only one neighbor it would seem an easy modification to *both* the infeasibility and the undesirable problem features simply to give the neighbor a property entitlement to intervene in the transaction as a "third-party sufferer" analogous to a "third-party beneficiary." It is curious that such a concept has not been articulated. If the polluter's actions rise to the level of nuisance, the neighbor has that remedy. There are many cases, however, in which a third party suffers distinct injury that is not recognizable as nuisance. Perhaps such third parties have been protected in such cases by seeking an injunction and showing the likelihood of imminent irreparable injury. Yet, as noted,⁵⁴⁹ dealing with matters in equity rather than law creates weaker precedent. A generally recognized

⁵⁴⁴ See *infra* note 545 and accompanying text.

⁵⁴⁵ See § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). Note also that § 16 of the Clayton Act, 15 U.S.C. § 26 (1976), authorizes private suits seeking injunctive relief. About private enforcement of antitrust violations, Sullivan states:

Most private actions are treble damage cases, though the number of suits for injunctive relief is increasing. Private actions may be brought for virtually any antitrust offense. There are cases challenging vertical restraints. There are also many important cases brought by competitors and by customers challenging horizontal restraints. Suits by major firms are becoming increasingly common, as are class actions. Damage awards and settlement sums have often been substantial. (footnotes omitted).

SULLIVAN, *supra* note 258, at 769-70.

⁵⁴⁶ As stated by Calabresi & Melamed: "if Taney were allowed to sell his land to Chase, a polluter, he would injure his neighbor Marshall by lowering the value of Marshall's land." Calabresi & Melamed, *supra* note 122, at 1111.

⁵⁴⁷ *Id.*

⁵⁴⁸ See *supra* notes 543-44 and accompanying text.

⁵⁴⁹ See *supra* notes 529-35 and accompanying text.

right protecting third-party sufferers perhaps would facilitate private interactions toward greater fairness and more efficient distribution of resources. Where, then, problems are of a sort that their private resolution creates external costs of a monetary nature, courts resort to State regulation of the problem, thereby foreclosing the ability of the parties to effect a private solution. The problem that follows, whereby private resolution is morally offensive to unrelated third parties, is a specialized case illustrating the same principles, and the same solutions.

b. *Private Resolutions that are Morally Offensive*

The second type of infeasible-undesirable problem arises where the terms reached by private resolution are offensive to widely-held moral values as where, for example, one wishes to sell one's self into slavery.⁵⁵⁰ The infeasibility again arises from the large numbers of affected persons (those who find slavery repugnant) who cannot intervene practically in the negotiations. Yet because of free rider problems and high information costs,⁵⁵¹ private resolution is and will remain infeasible. The only remaining alternative⁵⁵² is for the State to prohibit such transactions altogether by resorting to rules of inalienability: people will be granted inalienable rights in their freedom and continued existence.⁵⁵³

5. Summary

The predictions of how courts react to problems that are either infeasible or undesirable, or both, cannot be made without considering both the feasibility and desirability of private resolution variables in tandem. If the variables were considered separately, the framework would yield some false predictions. For example, it would predict that where an undesirable problem feature could not be modified, the courts should attempt a procedural adaptation toward greater facilitation, and less correction. In fact, the court in such a case should seek to minimize facilitation. This contradiction was anticipated earlier in this article, where it was concluded that no firm associations could be drawn between the problem and procedure variables.⁵⁵⁴ The difficulty is that corrective procedures and facilitative procedures are not opposites in the same sense as the other paired procedural qualities. Increasing the clarity of entitlements through a strongly corrective procedure may very well further facilitate private interaction with respect to such entitlements.⁵⁵⁵ On the other hand it may not. The confounding variable is whether the entitlement is accompanied by a prop-

⁵⁵⁰ Calabresi & Melamed, *supra* note 122, at 1111.

⁵⁵¹ *Id.* at 1112.

⁵⁵² *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ See *supra* note 122 and accompanying text.

⁵⁵⁵ See *supra* note 492 and accompanying text.

erty rule, whether it is objectively valued, whether any party is given the right to buy it, and whether its transfer or modification is prohibited.⁵⁵⁶ This variable provides the bridge between the variables of desirability and feasibility of private resolutions that permits predictions to be made of judicial reactions that are both more narrowly accurate and, one hopes, more generally illuminating about justiciability.

G. *When Adjudication Faces Problems About Which Social Disagreement Exists*

Disagreement in the community regarding the proper outcome of a problem is the one type of dissonance that has been widely debated by legal commentators. Since Professor Bickel's extolling of the "passive virtues,"⁵⁵⁷ much attention has been paid to such issues as the "political question doctrine," "standing," "mootness," and "ripeness."⁵⁵⁸ Most analyses, however, are set in the context of American Constitutional Law. Although this section discusses in part these various prudential doctrines, and refers to certain Supreme Court decisions, the perspective is to view such doctrines as only a small part of the many strategies of problem modification and procedural adaptation that collectively comprise "justiciability."

The options available to judges in facing problems that involve social disagreement are by now familiar. They may refuse outright to hear the case, as occurs when the "political question doctrine" is invoked. They may functionally refuse to hear an issue, either through the delay-producing procedural devices of "standing," "mootness," or "ripeness," or by deciding the case on narrow procedural grounds and thus not facing the issue squarely. They may hear the case on its merits but attempt to convert the problem somehow into one for which there exists a social consensus. Or, finally, they may hear the case on its merits but adapt the procedures of adjudication, particularly toward making a more "graduated, accommodative" decision rather than the traditional "binary" decision.⁵⁵⁹ These responses will be generally discussed in the contexts of three problems about which social disagreement exists: the death

⁵⁵⁶ See generally Calabresi and Melamed, *supra* note 122.

⁵⁵⁷ Bickel, *supra* note 143 at 111-98; Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

⁵⁵⁸ See, e.g., J. RADCLIFFE, *THE CASE-OR-CONTROVERSY PROVISION* (1978); Albert, *Justiciability and the Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement*, 93 HARV. L. REV. 297 (1979); Brilmayer, *supra* note 482; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L. J. 597 (1976); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L. J. 1363 (1973); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517 (1966); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

⁵⁵⁹ See *supra* notes 106-14 and accompanying text describing the associations between the "consensus-dissensus" problem variable and the "binary-graduated, accommodative" procedure variable.

penalty, race relations, and abortion. As might be expected, judges resort to several of the responses in dealing with these problems. But unexpectedly, we shall see that judges also attempt, with varying success, to rule in the face of dissensus, hoping thereby to force social movement toward a position that they define.

1. The Death Penalty

In England, debate concerning the death penalty has largely been confined to Parliament. Capital punishment was abolished in 1965 for the crime of murder,⁵⁶⁰ and is retained only for treason⁵⁶¹ and certain forms of piracy.⁵⁶² In the United States, however, the prohibition of the Eighth Amendment of the Constitution against "cruel and unusual punishment" has provided the federal courts with jurisdiction over the permissibility of the death penalty. Judicial treatment of the issue has included reluctance, delay, evasive modifications, and inconsistency, the cumulative effect of which has been to avoid announcing an absolute, binary decision on the matter. This, of course, is predictable where courts face problems on issues where social disagreement exists.

The Supreme Court at least three times refused to grant certiorari in cases claiming that the death penalty constitutes cruel and unusual punishment.⁵⁶³ It first heard arguments on the issue in 1969, in *Boykin v. Alabama*.⁵⁶⁴ There, Boykin, a black, faced execution for committing robbery. Although the substantive issue of the constitutionality of the penalty was extensively briefed and argued,⁵⁶⁵ the Court reversed the conviction on the procedural ground that the defendant did not fully understand the implications of making his guilty plea, even though defendant never alleged the plea had been made involuntarily or under duress.⁵⁶⁶ The Court held that the trial judge must "canvass . . . the matter with the defendant."⁵⁶⁷ This case illustrates a common response in dealing with Eighth Amendment problems: to avoid a direct substantive holding by focusing on procedure. This accomplishes three things: first, it prevents the punishment from being imposed on the individual defendant; second, the tighter the procedural requirements the fewer persons will be subjected to the questionable punishment; third, it allows time for public opinion

⁵⁶⁰ See generally, 11 HALSBURY'S LAWS OF ENGLAND para. 493 (4th ed. 1976).

⁵⁶¹ Treason Act 1814, 54 Geo. 3, ch. 146, § 1.

⁵⁶² Piracy Act 1837, 7 Will. 4 & 1 Vict., ch. 88, § 2.

⁵⁶³ *Alvarez v. Nebraska*, 393 U.S. 823 (1968); *Craig v. Florida*, 383 U.S. 959 (1966); *Swain v. Alabama*, 382 U.S. 944 (1965). Refusal to grant certiorari is, of course, commonplace and discretionary with the Court. Refusal in no way constitutes an opinion the case is "non-justiciable."

⁵⁶⁴ 395 U.S. 238 (1969).

⁵⁶⁵ Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1798 (1970).

⁵⁶⁶ 395 U.S. at 246, 249.

⁵⁶⁷ Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 182 (1969).

to come to a consensus on the offensiveness or legitimacy of the punishment. This "procedural response" to the death penalty issue is noted by former Justice Goldberg, joining in an article with Professor Dershowitz:

The Supreme Court's failure to decide the constitutionality of the death penalty is not accidental. . . . Some tension has arisen between the Court's preference for procedural reform and its apparently growing aversion to the death penalty itself. . . . The result has been extraordinarily stringent requirements of procedural fairness in capital prosecutions.⁵⁶⁸

This avoidance technique frustrates many judges: some who would do more, some who dislike the subterfuge. In *Witherspoon v. Illinois*,⁵⁶⁹ for example, a state law that would have allowed prosecutors to exclude persons from acting as sentencing jurors if they admitted to conscientious scruples against imposing the death penalty was declared unconstitutional. The dissenting opinions illustrate the judicial frustration, but also the hard decisions to be made by a court where it faces dissensus problems. Said Justice White:

If the Court can offer no better constitutional grounds for today's decision than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision about appropriate penalties to branches of government whose members, selected by popular vote, have an authority not extended to this Court.⁵⁷⁰

And, with similar candor but suggesting the opposite solution, Justice Black stated:

With all due deference it seems to me that one might much more appropriately charge that this Court has today written the law in such a way that the States are being forced to try their murder cases with biased juries. If this Court is to hold capital punishment unconstitutional, I think it should do so forthrightly. . . .⁵⁷¹

During the 1970's, the Court did become somewhat more forthright, with more of the Justices reaching the issue of capital punishment on its merits. The opinions equivocate, however, and within the space of six years seem to make a theoretical full circle. The landmark decision came in 1972, in *Furman v. Georgia*.⁵⁷² This case has been described by one commentator as a "jurisprudential debacle,"⁵⁷³ consisting of nine separate opinions resting on at least three distinct rationales. Justices Brennan and Marshall considered the death penalty *per se* cruel and unusual; Douglas, Stewart, and White concurred

⁵⁶⁸ Goldberg & Dershowitz, *supra* note 565, at 1798, 1799.

⁵⁶⁹ 391 U.S. 510 (1968), discussed in Goldberg and Dershowitz, *supra* note 565, at 1799, note 117.

⁵⁷⁰ 391 U.S. at 542, *quoted in part* in Goldberg & Dershowitz, *supra* note 565, at 1800.

⁵⁷¹ 391 U.S. 532, *quoted in part* in Goldberg & Dershowitz, *supra* note 565, at 1800.

⁵⁷² 408 U.S. 238 (1972).

⁵⁷³ Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 998 (1978).

in the result overturning the instant death sentence but on the more "limited grounds that the death penalty was unconstitutional because it was applied in a sporadic, capricious, arbitrary, or unfairly discriminating way."⁵⁷⁴ In dissent, Justices Burger, Powell, Blackmun, and Rehnquist would in principle have allowed petitioners to be executed, but all "by and large . . . skirted the substantive issue"⁵⁷⁵ by deferring on federalism grounds to the judgments of the state legislatures.⁵⁷⁶ Chief Justice Burger took direct issue with the prevailing plurality opinions of Douglas, Stewart and White, arguing that jury sentencing is not unconstitutionally capricious: the death penalty is rare, stated the Chief Justice, not because juries are arbitrary or discriminatory, but because they show mercy to all but the most reprehensible criminal.⁵⁷⁷ *Furman* in retrospect turned on a somewhat wider issue, namely who is to decide to execute criminals. Should it be the jury, with their unappealable discretion and unpatterned results, or should it be the state legislatures, through their deliberations of which crimes deserve such punishment. Even *Furman*, then, was essentially a procedural case. It did not say squarely that executions are cruel and unusual. Rather, it overturned the instant death sentence because too much discretion had been left to juries, and the criteria of death was unconstitutionally hidden.⁵⁷⁸ This would to the uninitiated seem an unlikely rationale by which to decide the cruelty of punishment. At least one commentator explained the *Furman* holding explicitly in terms of the Court reaching a decision that accommodated the perceived split in public opinion.⁵⁷⁹ Indeed, Justices Brennan and Marshall referred directly in their holdings to what they saw as an emerging consensus against the death penalty. Evidence was for them manifested in three sources: "the [un]willingness of legislatures to authorize capital punishment, of juries to impose it, and of the general public to support it."⁵⁸⁰ According to Sarat and Vidmar, the overt references in *Furman* to public

⁵⁷⁴ Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1245 (1974).

⁵⁷⁵ Radin, *supra* note 573, at 998.

⁵⁷⁶ *Id.*

⁵⁷⁷ 408 U.S. at 387-89 (Burger, C.J., dissenting).

⁵⁷⁸ The *Furman* majority, despite their disparate rationales for invalidating the death penalty, shared at least one major premise: the unfettered discretion of sentencing juries produced anomalous results. In their view, the few cases in which the death penalty was imposed could not be distinguished on any acceptable basis from the many in which the defendant's life was spared.

Note, *The Supreme Court, 1977 Term, Death Penalty*, 92 HARV. L. REV. 57, 105 (1978) (footnote omitted).

⁵⁷⁹ Arbitrariness was a compelling argument in *Furman* because the Court perceived that the infrequency and capriciousness of executions demonstrated society's rejection of the death penalty. Under those circumstances, the Court could not countenance what appeared to be the pointless execution of a few. Moreover, the Court's analysis permitted it to endorse the emergent consensus against capital punishment without outlawing the death penalty directly.

Id. at 107 (footnote omitted).

⁵⁸⁰ Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 174 (footnote omitted).

opinion polls on the underlying issue are part of a wider "normative" approach to the standards by which Eighth Amendment cases should be judged. According to the normative approach, judges look to such polls as ultimate justifying criteria.⁵⁸¹ We need not defend or even demonstrate the general existence of such a "judgment by plebescite" method of Constitutional adjudication. It is enough for our purposes to note that most of the *Furman* opinions made some sort of effort to justify their holding with prevailing public sentiment, even though evaluations of such sentiment varied widely. Such references show the Justices to be at least aware of the widespread disagreement in public opinion. The contention here is that such awareness compels an approach that is more graduated and accommodative, that is, more cautious about the articulation of a clear judicial position.⁵⁸²

This hesitancy is best proved in the latest major case, *Lockett v. Ohio*.⁵⁸³ The effect of *Lockett* is to go full circle from the pre-*Furman* division of responsibility between jury and state legislature. *Furman* struck down a death sentence because the then-prevailing practice of allowing sentencing juries unfettered discretion to consider any mitigating circumstances resulted in the imposition of capital punishment in a way that defied rational explanation or consistent pattern. Unrestrained jury discretion was equated with caprice, and disallowed. This led many states to enact statutes that either called for a mandatory death sentence for certain crimes, or else confined the factors that could be considered by the jury in passing sentence. In 1976, *Woodson v. North Carolina*⁵⁸⁴ and *Roberts v. Louisiana*⁵⁸⁵ invalidated the mandatory provisions; *Gregg v. Georgia*,⁵⁸⁶ *Jurek v. Texas*,⁵⁸⁷ and *Proffitt v. Florida*⁵⁸⁸ upheld the guided discretion statutes. But even this seeming compromise between the role of the legislature and sentencing jury could not hold. In *Lockett*,⁵⁸⁹ a guided discretion statute stated that those convicted of felony-murders must receive a death sentence *except* where the trial judge found the existence of one of three mitigating circumstances:

- (1) that the victim induced or facilitated the murder;

⁵⁸¹ *Id.* 173-75.

⁵⁸² As Radin has stated:

[I]n the cases challenging the constitutionality of the death penalty a surprising observation can be made. Not only have certain Justices adopted different adjudicatory attitudes from one case to the next without appearing to notice it, but the attitudes expressed or implied in the various opinions have often been so disparate as to range from one end of the spectrum to the other, from the rhetoric of extreme activism to that of extreme deference.

Radin, *supra* note 573, at 1002.

⁵⁸³ 438 U.S. 586 (1978).

⁵⁸⁴ 428 U.S. 280 (1976).

⁵⁸⁵ 428 U.S. 325 (1976).

⁵⁸⁶ 428 U.S. 153 (1976).

⁵⁸⁷ 428 U.S. 262 (1976).

⁵⁸⁸ 428 U.S. 242 (1976).

⁵⁸⁹ As analyzed in Note, 92 HARV. L. REV. 99, *supra* note 578, at 100-01.

- (2) that the offender acted under duress, coercion, or strong provocation; or
- (3) that the offense was primarily the product of psychosis or mental deficiency insufficient to constitute legal insanity.⁵⁹⁰

Since the judge did not find any such mitigation to be present in the case, he sentenced the defendant to die.⁵⁹¹ The Supreme Court reversed the conviction, holding the statute violative of the Eighth Amendment because it "impermissibly prevented the trial sentencer from giving weight to mitigating factors other than those specified in the law."⁵⁹² In other words, the quality of mercy must not be strained; the sentencer must be allowed full discretion to consider any factor.

Clearly, then, we have arrived back at the pre-*Furman* position. In his dissent to *Lockett*, Justice Rehnquist wrote that the case may either be "seminal" or "the third false start in . . . the past six years."⁵⁹³ If the predictions of judicial response to problems involving widespread and intense social disagreement are correct, it is the latter.

2. Race Relations and Abortion

It is an unworthy subject of investigation that never produces surprise. The American judicial treatment of the final two examples, race relations and abortion, are nothing if not surprising. Perhaps for that reason they make fitting final examples of the richness and complexity of "justiciability."

Given the intense and widespread social disagreement about proper outcome, one would expect to find in the judicial opinions dealing with these problems all manner of evasive, modifying, and adaptive responses. Instead the courts have dealt with the matters relatively forthrightly. To be sure, the prudential doctrines are occasionally invoked to prevent argument on certain aspects of the problems, or to prevent argument by certain persons.⁵⁹⁴ On the

⁵⁹⁰ OHIO REV. CODE ANN., §§ 2929.03-2929.04 (B) (1975).

⁵⁹¹ 438 U.S. at 594.

⁵⁹² Note, 92 HARV. L. REV. 99, *supra* note 578, at 101, citing 438 U.S. at 604-05.

⁵⁹³ 438 U.S. at 632.

⁵⁹⁴ See Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972) who described the pre-Roe v. Wade "standing" issue as follows:

The lawyer handling a suit challenging an abortion statute will argue that his plaintiffs have standing under conventional notions, in an attempt to disguise the public nature of the suit. The courts have responded in a similar vein by finding standing when any personal interest can be shown. The "standard plan" in these suits is to include as plaintiffs a physician, a pregnant woman desiring an abortion, a woman seeking to avoid pregnancy, and other concerned professionals. In most cases standing has not been a problem, at least for the treating physician and his patient.

Id. at 498 (footnote omitted).

Sedler does note, however, *Planned Parenthood Ass'n v. Nelson*, 327 F. Supp. 1290 (D. Ariz. 1971), in which a complaint by a physician, married couples, and the Planned Parenthood Association was dismissed for lack of a case or controversy, failure to show "irreparable injury," and failure to exhaust state remedies. Sedler also notes *Doe v. Randall*, 314 F. Supp. 32 (D.

whole, however, the courts have neither refused to hear the cases nor tampered with the problems. Nor can it be said that the opinions have avoided clearly stated, binary results: both *Brown v. Board of Education*⁵⁹⁵ and *Roe v. Wade*,⁵⁹⁶ the landmark abortion case, leave little doubt about their implications. As suggested above,⁵⁹⁷ an institution will sometimes announce decisions on problems about which such disagreement exists in an exaggerated binary fashion in hopes of forging consensus through their decision, or in hopes at least of discouraging the opposition. Both race relations and abortion may well be illustrative of this "leadership" response to these problems.

If one accepts this suggestion, one is immediately struck by a seeming anomaly. *Brown* and its progeny are widely hailed as great judicial decisions;⁵⁹⁸ *Roe v. Wade*, on the other hand, is severely criticised by even those who support

Minn. 1970), *aff'd sub. nom.* *Hodgson v. Randall*, 402 U.S. 967 (1971), which was held not to be justiciable because the physician who had performed an abortion had not been prosecuted, and the mere threat of prosecution did not constitute an "actual controversy." Sedler, *supra* note 594, at 498 note 119.

Roe v. Wade, 410 U.S. 113 (1973), itself is interesting from the perspective of the prudential doctrines. The Court overlooked the fact that a pregnant plaintiff's case was technically mooted because at the time of argument she was not pregnant. As Monaghan complains:

But the Court then held that a married couple regularly having intercourse lacked any "standing." The attempted distinction between the two situations on Article III grounds seems without rationality. Perhaps the Court might have properly dismissed the married couple petition for want of ripeness, but certainly not for lack of standing. The confusion between ripeness and standing becomes even more pronounced once the Court's discussion of the "standing" of clergy, nurses and social workers to challenge abortion statutes is examined.

Monaghan, *supra* note 558, at 1381.

As for race relations, Sedler summarizes that "[t]he courts have liberally interpreted standing requirements in cases involving claims of racial discrimination." Sedler, *supra* note 594 at 499. However, in *Brown v. Lutz*, 316 F. Supp. 1096 (E.D. La. 1970), and *Hadnott v. City of Prattville*, 309 F. Supp. 967 (M.D. Ala. 1970), "blacks who were not personally affected by the alleged discrimination were held to lack standing." Sedler, *supra* note 594 at 500. Moreover, standing has been important to exclusionary zoning cases in which the link to racial discrimination is indirect. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).

⁵⁹⁵ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁵⁹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁹⁷ See *supra* note 114 and accompanying text.

⁵⁹⁸ The discussion of *Brown* is so voluminous as to defy citation. For some recent commentary on the past and future of this issue, see, e.g., Baker, *Counting Preferences in Collective Choice Situations*, 25 U.C.L.A. L. REV. 381 (1978); Bindman, *The Law and Racial Discrimination: Third Thoughts*, 3 BRIT. J. L. SOC. 110 (1976); Calabresi, *Bakke as Pseudo-tragedy*, 28 CATH. U. L. REV. 427 (1979); Dixon, *The Supreme Court and Equality: Legislative Classification, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494 (1977); Fiss, *The Fate of An Idea Whose Time has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation—a Critique*, 65 CORNELL L. REV. 1 (1979); Lustgarten, *The New Meaning of Discrimination*, 1978 PUB. L. 178; Neuborne, *Observation on Weber [United Steelworkers v. Weber]*, 99 Sup. Ct. 2721], 54 N.Y.U.L. REV. 546 (1979); Posner, *The Bakke Case and the Future of 'Affirmative Action'*, 67 CALIF. L. REV. 171 (1979); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977).

liberalized abortion.⁵⁹⁹ By contrasting in each of these cases the nature of the disagreement, the timing of judicial involvement, and the sort of arguments made in the respective opinions, perhaps something can be learned about when judiciary leadership is appropriate, and when, on the other hand, the judiciary should respond in a more evasive or accommodative manner.

In the case of pre-*Brown* race relations it is fair to say that the social disagreement had led to a political stalemate. First, opinions on the question were obviously split along regional lines.⁶⁰⁰ In a federal system this means that relegating the matter to local control will simply maintain the status quo. At the national level, the legislature was similarly split into warring camps of sufficient strength that there could be little hoped for resolution.⁶⁰¹ The executive (President Eisenhower) kept a stony silence on the issue. As a result, there was nowhere for this problem to go but the judiciary. In contrast, the political debate in the year just prior to *Roe v. Wade* would give rise to the belief that a consensus was emerging in favor of relaxing the restrictions upon abortion.⁶⁰²

⁵⁹⁹ See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221 (1973).

⁶⁰⁰ As reported in Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377 (1954), just prior to *Brown* eighteen jurisdictions (virtually all of the Southern and "border" states) made segregated schools mandatory by statute or judicial opinion. *Id.* at 378, n.3.

⁶⁰¹ One commentator describes the reaction to *Brown* as follows:

To white southerners the decision on Black Monday [the day of the Supreme Court decision] was received by most with deep resentment or bitter anger, by some with quiet resignation, and by very few with rejoicing. Most southern editorial writers vowed an eternal fight to preserve the southern way of life and prevent the mongrelization of the races. Segregationist organizations flourished: moribund Ku Klux Klan Klaverns gained new life and White Citizens' Councils mushroomed. Opposition leaders were encouraged by strong statements of southern Congressmen vowing to fight to the finish for segregation, and by the deafening silence from the White House, where President Eisenhower refused to make any public comment on the Supreme Court decision, and was rumored to be personally opposed to school integration. . . . [D]espite the growth and viability of the civil rights movement, if implementation of school integration was to occur, *it was clear that it would have to be accomplished through the federal judiciary*, the weakest of the three governmental branches, since Congress was controlled by southern committee chairmen and paralyzed by threats of southern filibusters, while the President remained silently aloof.

Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW CONTEMP. PROBS. 7 (1975) (footnote omitted, emphasis added).

⁶⁰² In 1973 political forces were still vigorously debating abortion. Most states had prohibited abortions, except to save a woman's life, since the nineteenth century, but a movement was afoot to relax that restriction. In the five years immediately preceding *Roe*, thirteen states had revised their statutes to resemble the Model Penal Code's provisions, which allowed abortions not only if the pregnancy threatened the woman's life, but also if it would gravely impair her physical or mental health, if it resulted from rape or incest, or if the child would be born with grave physical or mental defects. Four states had removed all restrictions on the permissible reasons

The effect of *Roe*, of course, was to preempt most such debate. Those frustrated by the decision mounted a campaign for the only remaining political remedy, namely a Constitutional Amendment that would overrule the Court. Abortion also played a controversial role in the 1976 Presidential Elections.⁶⁰³

Richard Morgan makes another point about the judicial intervention in *Roe* that can be sharply contrasted with *Brown*. He states that the *Roe* Court disregarded the axiom of judicial review that:

even after a dispute reaches the judicial system, the Supreme Court should still hesitate to hear a specific case until lower courts have "aged" the dispute by articulating the best arguments on both sides and discarding the unpersuasive or irrelevant.⁶⁰⁴

In other words, by reaching early for the issue, the Court did not then have available that series of approximations that the slow spontaneity of adjudication provides. As Morgan describes the lower court experience with the abortion issue:

Between 1970 and 1972, a flurry of constitutional challenges hit the courts, but of the seventeen courts that decided right-of-privacy claims, twelve were three-judge district courts whose judgments allowed direct appeal to the Supreme Court. Thus, when the Court had *Roe* before it and looked, as the axiom has it, to the lower-court deliberations, it found not one federal decision that had received intermediate appellate consideration, and only four decisions of state supreme courts, none of which offered particularly illuminating analysis.

In general, three years is hardly time enough for the judicial system to evolve sound analysis for most constitutional issues, and for so emotionally charged an issue as abortion, three years was very little time indeed. The Court could justifiably have let the dispute simmer longer in the lower courts.⁶⁰⁵

Racial desegregation, on the other hand, had simmered in the federal courts since the 1896 dictum in *Plessy v. Ferguson*⁶⁰⁶ had approved of "separate but equal" schools.⁶⁰⁷ Judicial supervision of this requirement of equal facili-

for seeking an abortion before a pregnancy passed specified lengths.

Morgan, *supra* note 599, at 1726 (footnotes omitted).

⁶⁰³ See Vinovskis, *Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior*, 77 MICH. L. REV. 1750 (1979).

⁶⁰⁴ Morgan, *supra* note 599, at 1725 (footnote omitted).

⁶⁰⁵ *Id.* at 1728-29.

⁶⁰⁶ 163 U.S. 537 (1896).

⁶⁰⁷ *Plessy* itself concerned segregated railcar accommodations. In validating a Louisiana statute requiring such segregated facilities, the Court stated:

The most common instance of this [segregation] is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

163 U.S. at 544.

ties began slowly, but a watershed was reached in 1938 in *Missouri ex rel Gaines v. Canada*.⁶⁰⁸ There, the Court ordered Missouri to provide, within its boundaries, "facilities for [the legal education of Negroes] substantially equal to those which the State there afforded for persons of the white race."⁶⁰⁹ On the eve of the *Brown* decision, it required an Appendix of six pages of small print for Leflar and Davis to categorize the lower Federal court and State court cases that had considered the issue of segregated educational facilities.⁶¹⁰

Finally, one might contrast the quality of the arguments used in the opinions. *Roe* is widely viewed as resorting to "substantive due process," which has become a euphemism for unprincipled judicial second-guessing of the legislatures.⁶¹¹ *Roe v. Wade* holds⁶¹² that during the first trimester of pregnancy the State may interfere with abortions in no way except to require that they be performed by a physician;⁶¹³ during the second trimester, the State may regulate, but not prohibit, abortions toward the goal of protecting maternal health;⁶¹⁴ during the final trimester the State may prohibit abortions *except* when an abortion would be necessary to protect maternal health.⁶¹⁵ The reasoning is that as the fetus matures, the State's interest in protecting the fetus grows, as does the State interest in protecting maternal health, which becomes increasingly endangered the later in pregnancy an abortion is allowed.⁶¹⁶ Weighed against such interests is the right of the woman's privacy,⁶¹⁷ which is not a right specifically mentioned in the Constitution. About this as a justification for the Court's tripartite holding, Ely states:

What is unusual about *Roe* is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it is fair to say, than the present Court accords the freedom of the press explicitly guaranteed by the First Amendment. What is frightening about *Roe* is that this superprotected right is not inferable from the language of the Constitution Nor is it explainable in terms of the unusual political impotence of the group. . . .⁶¹⁸

Harry Wellington is equally offended by the unmeasured nature of the Court's argument:

⁶⁰⁸ 305 U.S. 337 (1938).

⁶⁰⁹ 305 U.S. at 351.

⁶¹⁰ Leflar and Davis, *supra* note 600, at 430-35.

⁶¹¹ Epstein, *supra* note 599, *passim*; Tribe, *supra* note 599, at 7.

⁶¹² As summarized in Ely, *supra* note 599, at 921.

⁶¹³ 410 U.S. at 163, 165.

⁶¹⁴ *Id.* at 163.

⁶¹⁵ *Id.* at 163-64.

⁶¹⁶ *Id.* at 162-63.

⁶¹⁷ *Id.* at 152-53.

⁶¹⁸ Ely, *supra* note 599 at 935-36 (footnotes omitted).

Eisenstadt v. Baird [405 U.S. 438 (1972)] set the stage for *Roe v. Wade*. . . . A sense of concern with appropriate limits is lacking . . . in *Eisenstadt*; the analytical struggle with the problem, abandoned or begged; the momentum for an overbroad, because it is under-analyzed, due process, set in motion. *Roe* soon followed.⁶¹⁹

Wellington continues:

I am bound to say . . . that even if I am wrong as to the appropriate scope of judicial review, even if review of health matters should be searching, the Court has failed to make its case. Search as one may, he will not discover why a woman's liberty is constitutionally impaired if her safety is improved or her consent assured. She may be inconvenienced somewhat, but surely that is not the issue. Liberty cannot mean instantaneous gratification. Even the First Amendment grants no such right.⁶²⁰

Tribe is no more charitable: "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."⁶²¹

In *Brown*, much has been made of footnote eleven of the opinion that referred generally to the research of Gunnar Myrdal and others regarding the psychological effects of segregation. Judge John Minor Wisdom, however, disputes that such appeal to sociology was in any way crucial to the opinion, and disputes the idea that the Court was merely "legislating social goals into the law."⁶²² Similarly, even while guardedly criticizing the specific rationale chosen by the Court, Professor Wechsler wrote in 1959:

I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial

⁶¹⁹ Wellington, *supra* note 599, at 297-98.

⁶²⁰ *Id.* at 302 (footnote omitted).

⁶²¹ Tribe, *supra* note 599, at 7, *quoted in* Morgan, *supra* note 599, at 1724, n.5.

⁶²² Wisdom states:

Whatever effect the Court gave to the social science testimony, unarticulated in the opinion, *Brown* was the product of irresistible social and political forces . . . "an idea whose time had come." But the opinion broke no new ground in judicial methodology. The Court rested its decision on the content of the fourteenth amendment in the context of the time, confident that it was interpreting the Constitution as a living document for all times. Had there been no social data in the record, no footnote eleven, Chief Justice Warren, backed by all the Court, would still have been able, (1) to start with the premise, as he did, that "we cannot turn the clock back," but "must consider public education in the light of its full development and its present place in American life;" (2) to argue in a traditional judicial manner, as he did, by analogy from *Sweatt* and *McLaurin*, that "intangible considerations" apply with "added force to children in grade and high school;" and (3) to conclude that "separate but equal" is "inherently unequal."

Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 LAW & CONTEMP. PROBS. 134, 141-42 (1975) (footnotes omitted).

segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.⁶²³

In sum, *Brown* seems to have attracted a greater consensus of approval than *Roe*.

Certainly there are contrasts between *Roe* and *Brown* regarding the existence of decisional alternatives, judicial experience with the arguments, and the depth of the underlying cultural principles. It would be tempting, therefore, to conclude that *Roe* was a mistake, that the court should have adopted an approach more predictable under this paper's framework of justiciability. But in fairness much more time has elapsed since *Brown*, and much progress has been made in healing the social disagreement. The role played by *Brown* in such process is yet debated, and so it may be too early to judge the Court's response in *Roe*. Problems involving strong social disagreement present to the courts perhaps the most difficult dissonance with traditional adjudications. In addition to questions of whether and how a court might intervene, there are painful questions of when. In large part the prudential doctrines allow flexibility on this issue, as do certain of the evasive problem modifications. By the ensuing delay the problem may well be made less dissonant, or the courts may devise an acceptable accommodation. If not, the courts must like all of us make their leap into the dark.

CONCLUSION

It is difficult to do justice to this topic. The article has tried to examine adjudication using a method and perspective that could as well be used to examine the legislature, or the marketplace, or the family. This urge was born of a notion that all those social institutions have in common that they confront problems, and cope as best they can. Few problems are resolved exclusively within a single institution. This suggests that at least some choice exists as to the means by which society defines and attempts to resolve problems. For such a choice to be informed, much less implemented, there must be a common vocabulary by which problems and procedures are discussed and evaluated. The eight problem variables and procedure variables attempt one step toward that end. The variables and their interactions create a complex but hopefully refined and manageable vocabulary for discussing problems and procedures of every sort.

In devising the framework of problem and procedure variables, some compromises were made. Additional variables could be described, and additional associations exist among those variables that are discussed. The strong correlations found between ideal justiciability and the problems most often heard in adjudication are heartening, for they show that the framework is not

⁶²³ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

grossly inaccurate. The exceptions to the correlation, namely criminal sentencing and the setting of bail, serve further to prove the theory: they are in fact problems with which both judges and commentators (not to mention prisoners) chronically feel discomfort.

The second half of this article demonstrates both the vast structural range of problems that are submitted for adjudication, and the ingenuity with which judges resolve the various dissonances presented by such problems. The degree to which specific judicial responses can be predicted and explained within the analytical framework of the problem and procedure variables provides validation to many of the details of the theory.

A dialogue could now begin comparing and contrasting adjudication with non-legal methods of problem-solving, or with dispute resolution techniques such as mediation, arbitration, negotiation, and the emerging mini-trial. The result could be recommendations on the sorts of problems best suited to be resolved by each technique. Such recommendations cannot be made solely from the discussion in this article. However unsuitable a problem is for adjudication, it does not necessarily follow that the problem should be refused by judges as non-justiciable. To make such a conclusion one must know the consequences of such a refusal: the prospects that some alternative decisional institution will deal with the problem more accurately, efficiently, and acceptably, or, less happily, that the problem will be resolved by violence or with lasting unnecessary injury to one of the parties. Such questions are of immense importance; hopefully their resolution can be assisted through the analysis here provided.

Before sending our problems to alternative decision systems, however, a final word about the procedure with which we are most familiar. Adjudication is indeed our court of last resort. It acquires its immense prestige in large part from its general availability when other decision systems fail. Whatever may be the shortcomings of judges and their procedures as a residual decision system, adjudication remains for the most part rational, consistent, principled, and fair. That it does not perfectly solve all problems is to be expected. Rather what is astonishing is that it adapts so well to problems to which it is ill-suited.

APPENDIX A
*Eight Structural Variables
By Which Problems Can Be Described*

A. *The "Difficulty" of the Problem*

1. The problem is composed of "simple" variables	The problem is composed of "interactive" variables
2. Decisional criteria for the problem are well established	Decisional criteria for the problem are unknown or disputed
3. Decisional information or evidence about the problem is based solely on past events	Decisional information or evidence about the problem is based on predictions of future events.

B. The "Setting" of the Problem

- | | |
|--|--|
| 1. The relationship of the parties is "simplex" | The relationship of the parties is "multiplex" |
| 2. The dispute is "private" | The dispute is "public" |
| 3. Private resolution of the problem is infeasible | Private resolution of the problem is feasible |

C. The "Social Concerns" Associated with the Problem

- | | |
|--|--|
| 1. High social consensus exists on the proper outcome of the problem | Social dissensus exists on the proper outcome of the problem |
| 2. Private resolution of the matter is highly undesirable | Private resolution of the matter is highly desirable |

APPENDIX B
*Eight Variables Useful in
 Differentiating Among Procedures*

A. The Decisional Process

- | | |
|---|-----------------------------------|
| 1. The decision is made spontaneously | The decision is made deliberately |
| 2. The process is universalist | The process is particularist |
| 3. The process is reactive | The process is active |

B. The Relationship between the Procedures and the Parties

- | | |
|---|--|
| 1. The proceedings are controlled by strangers | The proceedings are controlled by the disputants |
| 2. Participation in the proceedings is strict and assured | Participation in the proceedings is loose and diffuse |
| 3. The decisionmaking is strongly responsive to the parties' proofs and arguments | The decisionmaking is weakly responsive to the parties' proofs and arguments |

C. The Nature of the Decision Reached

- | | |
|-------------------------------------|--|
| 1. The decision is binary | The decision is graduated or accommodative |
| 2. The decision is corrective | The decision is facilitative |

APPENDIX C

*A Summary of the Major Associations of
Procedures and Problem Variables*

-
- A1: "Deliberative" procedures are suitable for "simple" problems. "Spontaneous" procedures are capable of resolving either "simple" or "interactive" problems.
-
- A2: Procedures employing "universalist" rules, but "particularist" evidence are best suited to problems whose decisional criteria are "well-established." Procedures employing "particularist" rules but "universalist" evidence are best suited to problems whose decisional criteria are "disputed" or "unknown." The associations between problem criteria and the treatment of disputants are not strong. There may be a tendency, however, for "universalist treatment" of disputants to be associated with "well-established" problem criteria, and "particularist treatment" of disputants to be associated with "disputed" or "unknown" problem criteria.
-
- A3: "Active" procedures are better suited to solving problems that require analysis of "future" events. "Reactive" procedures are better suited to problems based on "past" events.
-
- B1: "Stranger-controlled" proceedings are suitable to problems arising in the context of "simplex" party relationships. "Disputant controlled" proceedings are better suited to "multiplex" party problems, except where the parties are very unequal in power or knowledge.
-
- B2: "Strict, assured" procedures are associated with "private" disputes; "diffuse, loose" procedures are associated with "public" disputes.
-
- B3: "Weakly responsive" procedures are more suitable to problems for which private resolution is "infeasible," but also to certain problems for which private resolution is "feasible." "Strongly responsive" procedures are more suitable to resolving certain problems for which private resolution is "feasible."
-
- C1: "Binary" decisions are associated with "social consensus" problems; Procedures employing "graduated" or "accommodative" decisions are more suited to "social dissensus" problems.
-
- C2: No generalization can be made between procedures that are "facilitative" or "corrective" and whether or not private resolution of a problem is "desirable" or "undesirable."
-

APPENDIX D

*A Graphical Representation of the Structural Profile
of Traditional Anglo-American Adjudication*

-
- A1: Spontaneous _____*_____ Deliberative
-
- A2: (a) Appeal to General Rules or Doctrine
Universalist _____*_____ Particularist
(b) Decisional Information or Evidence
Universalist _____*_____ Particularist
(c) Social Assumptions about Disputants
Universalist _____*_____ Particularist
-
- A3: Reactive _____*_____ Active
-

B1:		
Stranger control _____ *		Disputant control _____
B2:		
Strict, Assured participation _____ *		Diffuse, Loose participation _____
B3:		
Strongly responsive _____ *		Weakly responsive _____
C1:		
Binary decision _____ *		Graduated, Accommodative decision _____
C2:		
Corrective _____ *		Facilitative _____

APPENDIX E
*A Profile of the Structural Characteristics
of the "Ideally Justiciable" Problem*

A1:		
Simple content variables _____ *		Interactive content variables _____
A2:		
Well-established decisional criteria _____ *		Disputed or Unknown decisional criteria _____
A3:		
Past-oriented _____ *		Future-oriented _____
B1:		
Simplex relationships _____ *		Multiplex relationships _____
B2:		
Private disputes _____ *		Public disputes _____
B3:		
Private resolution feasible _____ *		Private resolution infeasible _____
C1:		
Social consensus on proper outcome _____ *		Social dissensus on proper outcome _____
C2:		
Private resolution desirable _____ *		Private resolution undesirable _____