

THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE

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Varieties of Dispute Processing

by

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JUDGE WALSH: We turn now to the law schools for their contributions and we're very happy this morning to have with us Professor Frank Sander of Harvard Law School. He is an alumnus of Harvard, a former lawyer in the Department of Justice, a person who has also given attention to the American Arbitration Association, and who has worked with the Federal Mediation and Conciliation Service. Professor Sander.

Last year, in an article entitled "Behind the Legal Explosion", published in the *Stanford Law Review*,¹ Professor John Barton pointed out that if federal appellate cases continued to grow for the next 40 years at the same rate at which they have grown during the last decade, then by the year 2010 we can expect to have well over one million federal appellate cases each year, requiring five thousand federal appellate judges to decide them and one thousand new volumes of the *Federal Reporter* each year to report the decisions. Since the number of cases initiated in the federal system each year is approximately ten times the number of decided appeals, one can readily extrapolate Professor Barton's projections to the trial level. And if one keeps in mind that in the State of California alone about four times as many actions are commenced each year as are commenced in the entire federal system, one begins to get some sense of the magnitude of the total problem.²

But I believe that one should view these dire predictions with a healthy skepticism. Litigation rates, like population rates, cannot be assumed to grow ineluctably, unaffected by a

* I am indebted to a number of colleagues and friends for helpful comments on earlier versions of this paper.

¹ J. Barton, *Behind the Legal Explosion*, 27 *Stan.L.Rev.* 567 (1975).

² For the federal data, see *Annual Report, Administrative Office of the U. S. Courts*; for California, see *Annual Report of the Administrative Office*, 1975, p. 82.

variety of social factors.³ Nor should it be assumed that there will be no human intervention that could dramatically affect the accuracy of Professor Barton's projections.

Thus one concern to which we ought to address ourselves here is how we might escape from the specter projected by Professor Barton. This might be accomplished in various ways. First, we can try to prevent disputes⁴ from arising in the first place through appropriate changes in the substantive law, such as the adoption of a no-fault principle for automobile injuries or the removal of a criminal sanction for certain conduct.⁵ A less obvious substantive law issue that may have a bearing on the extent of litigation that arises is whether we opt for a discretionary rule or for one that aims to fix more or less firmly the consequences that will follow upon certain facts. For example, if a statute says that marital property on divorce will be divided in the court's discretion there is likely to be far more litigation than if the rule is, as in the community property states, that such property will normally be divided 50-50. I wonder whether legislatures and law revision commissions are sufficiently aware of this aspect of their work.

Another method of minimizing disputes is through greater emphasis on preventive law.⁶ Of course lawyers have traditionally devoted a large part of their time to anticipating various eventualities and seeking, through skillful drafting and planning, to provide for them in advance. But so far this approach has been resorted to primarily by the well-to-do. I suspect that with the advent of prepaid legal services this type of practice will be utilized more widely, resulting in a probable diminution of litigation.

A second way of reducing the judicial caseload is to explore alternative ways of resolving disputes outside the courts, and it is to this topic that I wish to devote my primary attention.

³ See, e. g., A. Sarat & J. Grossman, *Litigation in The Federal Courts: A Comparative Perspective*, 9 *Law & Soc.Rev.* 321 (1975); A. Sarat & J. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 *Am.Pol.Sci.Rev.* 1200 (1975).

⁴ For present purposes I use the word "dispute" to describe a matured controversy, as distinguished, for example, from a "grievance" which may be inchoate and unexpressed.

⁵ See, generally, E. Johnson & V. Kantor, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases*, to be published by the National Center for State Courts; M. Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 *Mich.L.Rev.* 797 (1971).

⁶ See L. Brown & E. Dauer, *Preventive Law—A Synopsis of Practice and Theory*, in *The Lawyer's Handbook* (rev.ed.1975 Am. Bar. Assn.); see also the same authors' forthcoming casebook on preventive law to be published by Foundation Press.

By and large we lawyers and law teachers have been far too single-minded when it comes to dispute resolution. Of course, as pointed out earlier, good lawyers have always tried to prevent disputes from coming about, but when that was not possible, we have tended to assume that the courts are the natural and obvious dispute resolvers. In point of fact there is a rich variety of different processes, which, I would submit, singly or in combination, may provide far more "effective" conflict resolution.⁷

Let me turn now to the two questions with which I wish to concern myself:

- 1) What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?
- 2) How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?

One consequence of an answer to these questions is that we will have a better sense of what cases ought to be left in the courts for resolution, and which should be "processed"⁸ in some other way. But since this inquiry essentially addresses itself to developing the most effective method of handling disputes it should be noted in passing that one by-product may be not only to divert some matters now handled by the courts into other processes but also that it will make available those processes for grievances that are presently not being aired at all. We know very little about why some individuals complain and others do not, or about the social and psychological costs of remaining silent.⁹ It is important to realize, however, that by establishing new dispute resolution mechanisms, or improving existing ones, we may be encouraging the ventilation of grievances that are now being suppressed. Whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant) we

⁷I would suggest the following criteria for determining the effectiveness of a dispute resolution mechanism: cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important.

⁸The term "dispute processing" rather than "dispute settlement" is borrowed from W. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *Law & Soc.Rev.* 63 n. 1 (1974).

⁹The Berkeley Complaint Management Project, under the direction of Professor Laura Nader, is presently pursuing some of these questions; a book entitled "How Americans Complain" is contemplated. A similar inquiry is being undertaken by the Center for the Study of Responsive Law in Washington, D. C.

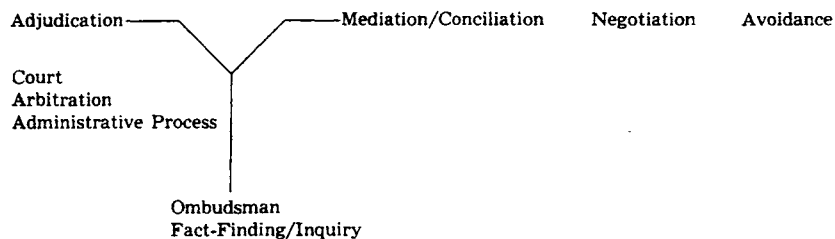
do not know. The important thing to note is that there is a clear trade-off: the price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed.

The Range of Available Alternatives

There seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society.¹⁰ Much as the police have been looked to to "solve" racial, school and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family. Not only has there been a waning of traditional dispute resolution mechanisms, but with the complexity of modern society, many new potential sources of controversy have emerged as a result of the immense growth of government at all levels,¹¹ and the rising expectations that have been created.

Quite obviously, the courts cannot continue to respond effectively to these accelerating demands. It becomes essential therefore to examine other alternatives.

The chart reproduced below attempts to depict a spectrum of some of the available processes arranged on a scale of decreasing external involvement.¹²



¹⁰ See, e. g., A. Stone, *Mental Health and Law—A System in Transition* (Dept.H.E.W.1975).

¹¹ In the federal system, the area of largest civil litigation growth has been that involving the newly expanded statutory causes of action (e. g., civil rights actions, social security claims, etc.). See, e. g., *Annual Report, Administrative Office of the U. S. Courts, 1974*, p. 390.

¹² I have selected this factor as one that seems to me rather critical, but there are obviously other aspects in which the various processes differ and which must be considered (e. g., method and cost of selection of third party, qualifications and tenure of third party, formality of proceedings, role of advocates, number of disputants, etc.). Some of these are referred to interstitially in the ensuing discussion. Another factor that is often said to play a differing part in the various processes is the relevance of norms. But see M. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 *Harv.L.Rev.* 637 (1976), suggesting that dispute settlement negotiation closely resembles adjudication in its frequent recourse to norms. See also A. Sarat & J. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 *Am.Pol.Sci.Rev.* 1200 (1975).

At the extreme left is adjudication, the one process that so instinctively comes to the legal mind that I suspect if we asked a random group of law students how a particular dispute might be resolved, they would invariably say "file a complaint in the appropriate court." Professor Lon Fuller, one of the few scholars who has devoted attention to an analysis of the adjudicatory process, has defined adjudication as "a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor."¹³ Although he places primary emphasis on process, I would like for present purposes to stress a number of other aspects—the use of a third party with coercive power, the usually "win or lose" nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties. Although mediation or conciliation¹⁴ also involves the use of a third party facilitator (and is distinguished in that regard from pure negotiation), a mediator or conciliator usually has no coercive power and the process in which he engages also differs from adjudication in the other two respects just mentioned. Professor Fuller puts this point well when he refers to "the central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."¹⁵

Of course quite a variety of procedures fit under the label of adjudication. Aside from the familiar judicial model, there is arbitration, and the administrative process. Even within any one of these, there are significant variations. Obviously there are substantial differences between the Small Claims Court and the Supreme Court. Within arbitration, too, although the version used in labor relations is generally very similar to a judicial proceeding in that there is a written opinion and an attempt to rationalize the result by reference to general principles, in some forms of commercial arbitration the judgment resembles a Solomonic pronouncement and written opinions are often not util-

¹³ L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 *Wis.L.Rev.* 1, 19. See also L. Fuller, *The Forms and Limits of Adjudication* (unpub. mimeo.). [Portions of this paper have been reprinted in *American Court Systems* 42 (S. Goldman and A. Sarat, eds. 1978) *Eds.*]

¹⁴ For present purposes the terms mediation and conciliation will be used interchangeably, although in some settings conciliation refers to the more unstructured process of facilitating communication between the parties, while mediation is reserved for a more formal process of meeting first with both parties and then with each of them separately, etc.

¹⁵ L. Fuller, *Mediation—Its Forms and Functions*, 44 *So.Cal.L.Rev.* 305, 325 (1971).

ized. Another significant variant is whether the parties have any choice in selecting the adjudicator, as they typically do in arbitration. Usually a decision rendered by a person in whose selection the parties have played some part will, all things being equal, be less subject to later criticism by the parties.

There are important distinctions, too, concerning the way in which the case came to arbitration. There may be a statute (as in New York and Pennsylvania) requiring certain types of cases to be initially submitted to arbitration (so-called compulsory arbitration). More commonly arbitration is stipulated as the exclusive dispute resolution mechanism in a contract entered into by the parties (as is true of the typical collective bargaining agreement and some modern medical care agreements). In this situation the substantive legal rules are usually also set forth in the parties' agreement, thus giving the parties control not only over the process and the adjudicator but also over the governing principles.

As is noted on the chart, if we focus on the indicated distinctions between adjudication and mediation, there are a number of familiar hybrid processes. An inquiry, for example, in many respects resembles the typical adjudication, but the inquiring officer (or fact finder as he is sometimes called) normally has no coercive power; indeed, according to Professor Fuller's definition, many inquiries would not be adjudication at all since the parties have no right to any agreed-upon form of presentation and participation.

But a fact finding proceeding may be a potent tool for inducing settlement. Particularly if the fact finder commands the respect of the parties, his independent appraisal of their respective positions will often be difficult to reject. This is especially true of the Ombudsman who normally derives his power solely from the force of his position.¹⁶ These considerations have particular applicability where there is a disparity of bargaining power between the disputants (e. g., citizen and government, consumer and manufacturer, student and university). Although there may often be a reluctance in these situations to give a third person power to render a binding decision, the weaker party may often accomplish the same result through the use of a skilled fact finder.

¹⁶ See W. Gellhorn, *When Americans Complain* (1966); P. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 *Col.L.Rev.* 845 (1975); B. Frank, *Ombudsman Survey* (A.B.A.Sec.Ad.Law). New Jersey has recently established a broad-scale Department of the Public Advocate, containing a Division of Rate Counsel, a Division of Mental Health Advocacy, a Division of Public Interest Advocacy, and a Division of Citizen Complaint and Dispute Settlement. N.J.Stat.Ann. § 52:27E (Supp.1975).

In addition to these public investigating officials, there are of course a host of private complaint processors employed by individual companies, by trade organizations or by the media.

There are of course a number of other dispute resolution mechanisms which one might consider. Most of these (e. g., voting, coin tossing, self-help) are not of central concern here because of their limited utility or acceptability. But one other mechanism deserves brief mention. Professor William Felstiner recently pointed out that in a "technologically complex rich society" avoidance becomes an increasingly common form of handling controversy. He describes avoidance as "withdrawal from or contraction of the dispute-producing relationship" (e. g., a child leaving home, a tenant moving to another apartment, or a businessman terminating a commercial relationship). He contends that such conduct is far more tolerable in modern society than in a "technologically simple poor society" because in the former setting the disputing individuals are far less interdependent.¹⁷ But, as was pointed out in a cogent response by Professors Danzig and Lowy, there are heavy personal and societal costs for such a method of handling conflicts,¹⁸ and this strongly argues for the development of some effective alternative mechanism. Moreover, even if we disregarded altogether the disputes that are presently being handled by avoidance—clearly an undesirable approach for the reasons indicated—we must still come to grips with the rising number of cases that do presently come to court and see whether more effective ways of resolving some of these disputes can be developed.

The preceding brief appraisal of the various primary processes is misleading in its simplicity, for of course rarely do the processes occur in isolation. Often adjudication involves an element of conciliation. Professor Stewart Macaulay describes an interesting example of such a situation in his analysis of the Wisconsin Department of Motor Vehicles' activities in monitoring the relationship between automobile franchisors and franchisees. Although the Department's only formal responsibility was whether to hold hearings with a view to possible revocation of the franchise, in fact the intervention of the Department served a mediative role by compelling each party to consider seriously the contentions of the other party, and hence led to settlement in a great number of cases.¹⁹ Similarly, as already pointed out, fact finding may very closely resemble adjudication. Moreover when we look at the way the various processes occur

¹⁷ See W. Felstiner, note 8 *supra*. Of course, as Felstiner notes, there are exceptions to this generalization. For example there may be enclaves having the characteristics of the simple society within the complex society, and sometimes overriding personal factors determine whether or not avoidance will be utilized in specific situations.

¹⁸ See R. Danzig and M. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 *Law & Soc. Rev.* 675 (1975). See also L. Nader, *Powerlessness in Zapotec and U. S. Societies* (mimeo.).

¹⁹ See S. Macaulay, *Law and the Balance of Power* (1966).

in particular institutions, there is often an elaborate interplay of the individual mechanisms. For example, a grievance under a collective bargaining agreement is usually first sought to be negotiated. If the parties cannot settle the case they go to arbitration, but the arbitrator may first seek to mediate the case. Finally there may be an attempt to review the arbitrator's decision in the courts.

Criteria

Let us now look at some criteria that may help us to determine how particular types of disputes might best be resolved.

1. Nature of Dispute

Lon Fuller has written at some length about "polycentric" problems that are not well suited to an adjudicatory approach since they are not amenable to an all-or-nothing solution. He cites the example of a testator who leaves a collection of paintings in equal parts to two museums.²⁰ Obviously here a negotiated or mediated solution that seeks to accommodate the desires of the two museums is far better than any externally imposed solution. Similar considerations may apply to other allocational tasks where no clear guidelines are provided.

At the other extreme is a highly repetitive and routinized task involving application of established principles to a large number of individual cases. Here adjudication may be appropriate, but in a form more efficient than litigation (e. g., an administrative agency). Particularly once the courts have established the basic principles in such areas, a speedier and less cumbersome procedure than litigation should be utilized.

In the field of divorce, for example, although we still cling to the myth that consent divorce is unacceptable, we are gradually coming closer and closer to that reality. Under no-fault statutes the issue typically is whether the parties have lived apart for a stipulated period or whether there has been a breakdown of the marriage. The former question is clearly one that a clerk can determine. And although an issue like breakdown appears at first to be a typically justiciable question, it has become apparent that short of conducting a very probing inquest of the marriage of the kind that would be very time consuming and that would most likely transgress one's sense of the proper limits of the state's right to intervene in the privacy of married life, there is no ready alternative but to take the word of the principal parties to the marriage. Indeed, if the parties disagree over whether the marriage has broken down, that in itself is prima

²⁰ L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 *Wis.L.Rev.* 32-33.

facie evidence of breakdown.²¹ Thus here is one sphere of litigation that could readily be relegated to a ministerial official, as has long been the case in Japan. More recently somewhat similar steps have been taken in England.

With respect to many problems, there is a need for developing a flexible mechanism that serves to sort out the large general question from the repetitive application of settled principle. I do not believe that a court is the most effective way to perform this kind of sifting task. In Sweden, in the consumer field, there is a Public Complaints Board which receives individual consumer grievances. Initially the Board performs simply a mediative function, utilizing standards set up by the relevant trade organizations. If initial settlement is impossible, the Board issues a non-binding recommendation to both parties, which often leads to subsequent settlement. Failing that, the grievant can sue in the newly established Small Claims Court. But another aspect of its activities is to seek to discern certain recurring issues and problems that should be dealt with by legislation or regulation.²²

Perhaps a word should also be said about courts undertaking some of the complex and unorthodox tasks that they have recently been called upon to undertake. Without going into the question of legitimacy, I am not persuaded that the courts have sufficient competence, resources or remedial power to run mental hospitals, schools or welfare departments. Yet where serious constitutional denials are at issue, they can hardly decline jurisdiction. This seems to me an area where one can make no headway without talking about very specific cases and exploring in detail alternative dispute resolution mechanisms. Clearly additional research needs to be done on this subject.²³

²¹ See C. Foote, R. Levy & F. Sander, *Cases and Materials on Family Law* 1101-1109 (2d ed. 1976).

²² See D. King, *Consumer Protection Experiments in Sweden* (1974). Cf. E. Steele, *The Dilemma of Consumer Fraud: Prosecute or Mediate*, 61 A.B.A.J. 1230 (1975).

The Swedish Public Complaints Board is one of five innovative dispute resolution mechanisms that is currently being studied by the Access to Justice Project, based at The Center for the Study of Comparative Procedure at the University of Florence, Italy, under the co-direction of Professor Mauro Cappelletti of that university and Professor Earl Johnson of the USC Law Center in Los Angeles. The Access to Justice Project will soon be publishing a number of documents detailing dispute resolution mechanisms in a number of countries (including the United States), as well as various theoretical studies.

²³ See Professor Abram Chayes' forthcoming article on the new public law model of litigation, to appear in the June 1976 issue of the *Harvard Law Review*. [See Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv.L.Rev.* 1281 (1976). *Eds.*] One possible solution is for the court to utilize auxiliary mechanisms to aid its efforts. But see *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) rejecting such a solution.

2. Relationship Between Disputants

A different situation is presented when disputes arise between individuals who are in a long-term relationship than is the case with respect to an isolated dispute. In the former situation, there is more potential for having the parties, at least initially, seek to work out their own solution, for such a solution is likely to be far more acceptable (and hence durable). Thus negotiation, or if necessary, mediation, appears to be a preferable approach in the first instance. Another advantage of such an approach is that it facilitates a probing of conflicts in the underlying relationship, rather than simply dealing with each surface symptom as an isolated event.

Consider, for example, a case such as might be heard in the recently established mediation session of the Dorchester (Massachusetts) District Court. A white woman (Mrs. W.) has filed a criminal complaint for assault against her black neighbor (Mrs. B.). The facts, as they emerge at the mediation session, are that Mrs. W. has for some time gratuitously taken care of Mrs. B.'s two young children so that Mrs. B. can go to work. On the day in question one of the B. children, for the second time in a row, broke the expensive eyeglasses of one of the W. children, and had been generally out of control. Mrs. W., having reached the end of her rope, struck the child. When Mrs. B. heard about this, she marched over to Mrs. W. and hit her. Mrs. W. thereupon filed a criminal complaint.

Fortunately the Dorchester District Court, like a number of other courts around the country,²⁴ has a program under which, if the clerk or judge deems the case appropriate, and the two parties are willing, the case can be referred to a panel of three trained mediators drawn from the local community. The panel will attempt to let each of the disputants fully state her side of the story, and then, through skillful probing, will seek to elicit points of tension in the underlying relationship (here, the increasing sense of exploitation felt by Mrs. W. as an arrangement deemed temporary became long-term). Finally, the mediators will attempt to work out an agreement which seeks to alleviate the long-run tensions as well as resolve the immediate controversy (here, for example, that Mrs. B. might agree to work with

²⁴ For a comprehensive survey of these efforts, see, D. Aaronson, B. Hoff, P. Jaszi, N. Kithrie & D. Saari, *The New Justice—Alternatives to Conventional Criminal Adjudication* (Instit. for Advanced Studies in Justice, American University, Dec. 1975). See also Stulberg, *op. cit. infra* note 25, for a description and evaluation of the American Arbitration Association's somewhat comparable 4-A ("Arbitration-As-An-Alternative") project, and R. Nimmer, *Diversion: The Search for Alternative Forms of Prosecution* (Am.Bar. Found.1974).

the social service component of the mediation project to try to find some alternative child care arrangement, and that she would pay five dollars per month to reimburse Mrs. W. for the broken glasses). Such a solution (unlike the aborted criminal adjudication) would most likely be acceptable to both parties; more significantly, it would have a therapeutic effect on the long-term relationship between these two individuals because it would permit them to ventilate their feelings, and then help them to restructure their future relationship in a way that met the expectations of both parties. In addition it would teach them how they might themselves resolve future conflicts. Thus there is a strong likelihood that future disputes would be avoided, or at least minimized.

Of course, it might be suggested that a court could also induce such a settlement. But quite aside from the unlikelihood of a busy court being able to create a climate that encourages the disputants to ventilate their underlying grievances, there is a world of difference between a coerced or semi-coerced settlement of the kind that so often results in court and a voluntary agreement arrived at by the parties.

A similar approach would appear to be feasible in a number of other areas. The grievance procedure under the typical collective bargaining agreement is based on a similar premise, in that it usually provides first for attempts to settle the dispute at the lower levels, and only then calls for an adjudicatory proceeding (arbitration) at the end of the line if the prior steps do not lead to settlement. However one difficulty is that, perhaps for reasons of economy, there is usually no mediator at the lower levels. Hence, if the parties have become too entrenched in their respective positions, there is little effective communication between them, and the early stages of the grievance procedure are often simply rote steps to be gone through before getting to arbitration. And while the arbitrator can then seek to play a mediational role, as is done by some arbitrators provided the parties give their consent,²⁵ there is an obvious difficulty if the mediator-arbitrator is unsuccessful in his mediational role and then seeks to assume the role of impartial judge.²⁶ For effective mediation may require gaining confidential information from the parties which they may be reluctant to give if they know that it may be used against them in the adjudicatory phase. And even if they do give it, it may then jeopardize the arbitrator's

²⁵ See, e. g., J. Stulberg, A Civil Alternative to Criminal Prosecution, 39 Albany L.Rev. 359, 367 (1975); Exploring Alternatives to the Strike, Monthly Labor Rev., Sept. 1973, p. 33 (discussion of mediation-arbitration).

²⁶ See L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wis.L.Rev. 23-30. See also Code of Professional Responsibility for Arbitrators of Labor-Management Disputes § 2F.

sense of objectivity. In addition it will be difficult for him to take a disinterested view of the case—and even more so to *appear* to do so—after he has once expressed his views concerning a reasonable settlement.

Another long-term (at least sometimes) relationship that may be amenable to this type of dispute resolution mechanism is the family. Japan has long had a successful system of family conciliation tribunals, and although one must be necessarily wary in looking to entirely different cultures, it may well be that as our courts are beginning to play less and less of a role in divorce, as a result of the pervasive adoption of no-fault statutes, a need arises for some new flexible instrument—clearly not a court—that will concern itself with the resolution of family conflicts.

To be sure we have had a traditional aversion to judicial involvement in the going family, except where it is compelled by considerations of health or safety.²⁷ But I wonder whether that policy is not traceable to the coercive quality of the typical adjudicative intervention, rather than to a notion that the family must inevitably be left to struggle with its own internal conflicts. Of course in a sense we have developed a mediative solution for most family conflict—social work and family therapy. Still where there is a breakdown of the family as a result of death or divorce, the courts have customarily become involved and it is here that alternative dispute resolution devices—particularly mediation—need to be further explored.²⁸

In the field of corrections, an interesting new program was recently begun at the Karl Holton facility in Stockton, California by the California Youth Authority working in collaboration with the Center for Correctional Justice and the Institute of Mediation and Conflict Resolution. Instead of utilizing the usual authority-dominated grievance procedure, the drafters opted for what they called “the mediation approach.”²⁹ It consists at the first level

²⁷ See C. Foote, R. Levy & F. Sander, *Cases and Materials on Family Law*, Chapters 1A and 6B (2d ed. 1976).

²⁸ See, e. g., S. Roberts, *A Family Matter*, 38 *Mod.L.Rev.* 700 (1975), discussing an English case in which various sums were contributed by a man, his brother and his parents towards the purchase of a common household. After they had lived there for 13 years, the mother died, leaving her estate to her sons in equal shares. A dispute then arose between the two brothers as to their respective shares. The writer opines that formal adjudication does not appear to be the best way to settle this kind of dispute.

²⁹ See J. M. Keating, *Arbitration of Inmate Grievances*, 30 *Arb.J.* 177 (1975). For a discussion of some other models in this setting, see Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 *Yale L.J.* 726 (1972). See also J. M. Keating, V. McArthur, M. Lewis, K. Sebelius and L. Singer, *Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions* (Center for Correctional Justice, Washington, D. C., 1975); *Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions* (Center for Correctional Justice, Washington, D. C.).

of a five person committee, one of whom (a middle management official) acts as Chairman, the other four being voting members—two inmates and two staff members. Review of the decision—or of the opposing views in case there is a tie—by the director of the facility or his delegate is then provided for, and finally recourse can be had to an outside independent three-person review board set up under the auspices of the American Arbitration Association. The decision of this board is only advisory, but the director of the facility must promptly indicate whether he will comply with it, and if not, to state his reasons for not doing so. Thus while the ultimate power of decision remains in the person in charge, aggrieved individuals are given maximum opportunity first to air their views freely in a mediational context and then, if that fails, to have their views presented for evaluation by a disinterested outsider.

Initial experience under this process is revealing. In contradistinction to the polarization that might have been expected at the initial level where two inmates are pitted against two officials, in only 10 out of the first 212 cases did the first step grievance committee result in a 2-2 tie. In all other cases a majority decision resulted. Moreover recent research suggests that the presence of a viable grievance mechanism is a significant factor in preventing prison riots.³⁰

Such an internalized grievance procedure, with limited last resort recourse to outside agencies, would appear to hold great promise for many disputes within an ongoing institution, such as a school, a welfare department, or a housing development. In view of the multifaceted nature of this type of grievance process, one might hope that if a case following such a procedure subsequently came to court, the court would give great, if not conclusive, weight to the prior determinations.³¹

3. Amount in Dispute

Although, generally speaking, we have acted to date in a fairly hit-or-miss fashion in determining what problems should be resolved by a particular dispute resolution mechanism, amount in controversy has been an item consistently looked to to determine the amount of process that is "due". The Small Claims Court movement has taken as its premise that small cases are simple cases and that therefore a pared-down judicial procedure

³⁰ See R. Wilsnack, *Explaining Collective Violence in Prisons: Problems and Possibilities*, to be published in A. Cohen, G. Cole and R. Bailey, *Prison Violence*.

³¹ See *United Steel Workers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

was what was called for. Next to the juvenile court, there has probably been no legal institution that was more ballyhooed as a great legal innovation. Yet the evidence now seems overwhelming that the Small Claims Court has failed its original purpose; that the individuals for whom it was designed have turned out to be its victims.³² Small wonder when one considers the lack of rational connection between amount in controversy and appropriate process. Quite obviously a small case may be complex, just as a large case may be simple. The need, according to a persuasive recent study, is for a preliminary investigative-conciliational stage (which could well be administered by a lay individual or paraprofessional) with ultimate recourse to the court. This individual could readily screen out those cases which need not take a court's time (e. g., where there is no dispute about liability but the defendant has no funds), and preserve the adjudicatory process for those cases where the issues have been properly joined and there is a genuine dispute of fact or law. Obviously such a screening mechanism is not limited in its utility to the Small Claims Court.³³

4. Cost

There is a dearth of reliable data comparing the costs of different dispute resolution processes. Undoubtedly this is due in part to the difficulty of determining what are the appropriate ingredients of such a computation. It may be relatively easy to determine the costs of an ad hoc arbitration (though even there one must deal with such intangibles as the costs connected with the selection of the arbitrator(s)). But determining the comparable cost of a court proceeding would appear to pose very difficult issues of cost accounting.³⁴ Even more difficult to calculate are the intangible "costs" of inadequate (in the sense of incomplete and unsatisfactory) dispute resolution. Still, until better data become available one can probably proceed safely on the assumption that costs rise as procedural formalities increase.

³² B. Ingvevsson & P. Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 *Law & Soc.Rev.* 219 (1975).

³³ A somewhat similar function is performed by law students as part of the Night Prosecutor Program in Columbus, Ohio. See *Citizen Dispute Settlement (LEAA 1975)*.

³⁴ A rudimentary beginning towards cost comparisons was provided in the evaluation report of the Philadelphia 4-A ("Arbitration-As-An-Alternative") project. See note 24 *supra*. The evaluators found a "direct" cost of \$83.60 per project case as compared with a "direct" cost of \$141 for each court case. But, as the evaluators note, there are many questions about such a comparison. To begin with, the figures depend upon the volume of cases, and with respect to court cases assume an average rather than a marginal cost allocation. And there is no attempt to control for the possibly differing complexity of the two classes of cases. See B. Anno and B. Hoff, *Refunding Evaluation Report on the Municipal Court of Philadelphia's 4-A Project*, Blackstone Associates, Washington, D. C., Feb. 25, 1975.

The lack of adequate cost data is particularly unfortunate with respect to essentially comparable processes, such as litigation and arbitration. Assuming for the moment that arbitration would produce results as acceptable as litigation—a premise that is even more difficult to verify—would cost considerations³⁵ justify the transfer (at least in the first instance) of entire categories of civil litigation to arbitration, as has been done in some jurisdictions for cases involving less than a set amount of money? One difficulty in this connection is that we have always considered access to the courts as an essential right of citizenship for which no significant charge should be imposed, while the parties generally bear the cost of arbitration. Thus although I believe, on the basis of my own arbitration experience, that that process is, by and large, as effective as and cheaper than litigation, lawyers tend not to make extensive use of it (outside of special areas such as labor and commercial law), in part because it is always cheaper for the clients to have society rather than the litigants pay the judges.³⁶ Perhaps if arbitration is to be made compulsory in certain types of cases because we believe it to be more efficient, then it should follow that society should assume the costs, unless that would defeat the goal of using costs to discourage appeals.³⁷ I will have more to say about this subject later.

5. Speed

The deficiency of sophisticated data concerning the costs of different dispute resolution processes also extends to the factor of speed. Although it is generally assumed³⁸—rightly, I believe—that arbitration is speedier than litigation, I am not aware of any studies that have reached such a conclusion on the basis of a controlled experiment that seeks to take account of such factors as the possibly differing complexity of the two classes of cases, the greater diversity of “judges” in the arbitration group, and the possibly greater cooperation of the litigants in the arbitration setting.

³⁵ Other conceivable objections to such a proposal (*e. g.*, denial of the right to a jury trial) are considered below.

³⁶ Several Boston lawyers have told me this when I asked them why they did not use arbitration to a greater extent in connection with separation agreements.

³⁷ This appears to be the practice in Pennsylvania. See National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice Resource Materials, pp. 91-93. [The reference is to Schulman, “Compulsory Arbitration in Pennsylvania,” in J. Chadbourn, et al., *Cases and Materials on Civil Procedure 1006* (2d ed. 1974), reprinted in the resource materials distributed to Conference participants. *Eds.*]

³⁸ See, *e. g.*, the Blackstone Associates report, note 34 *supra*, indicating disposition of 88% of project cases in an average time of 49 days, whereas that was the shortest time in which the court disposed of any case. See also Resource Materials, note 37 *supra*.

Implications

1. At one time perhaps the courts were the principal public dispute processors. But that time is long gone. With the development of administrative law, the delegation of certain problems to specialized bodies for initial resolution has become a commonplace. Within the judicial sphere, too, we have developed specialized courts to handle family problems and tax problems, among others.

These were essentially *substantive* diversions, that is, resort to agencies having substantive expertise. Perhaps the time is now ripe for greater resort to an alternate primary *process*. As I have indicated earlier, such a step would be particularly appropriate in situations involving disputing individuals who are engaged in a long-term relationship. The process ought to consist initially of a mediational phase, and then, if necessary, of an adjudicative one.³⁹ Problems that would appear to be particularly amenable to such a two-stage process are disputes between neighbors, family members, supplier and distributor, landlord and tenant.⁴⁰ Where there is an authority relationship between the parties (such as exists between prisoner and warden or school and student) special problems may be presented, but, as indicated earlier, such relationships, too, are, with some adjustments, amenable to a sequential mediation-adjudication solution.⁴¹

Receptivity to such an alternate primary process imposes special obligations on the Bar. Although we know relatively little about the participation of lawyers in conciliational processes, it is possible that there will be a lesser role for lawyers in this new world. Perhaps this simply calls for more diverse training in the law schools, but in the first instance it also poses a test to the

³⁹ In some past experiments, such as the 4-A project, the initial phase is denominated arbitration. But conciliation always represents an important initial step in that operation, *see, e. g.*, Stulberg, *op. cit. supra* note 25, and the question then becomes whether the mediation and arbitration should be performed by the same person. I have earlier indicated my doubts about such a coalescence of functions. In addition, the use of separate personnel, though perhaps more expensive and time-consuming, makes possible the use of individuals with different backgrounds and orientations in the two processes.

⁴⁰ For some other examples, *see* L. Nader and L. Singer, *Law in the Future—What Are the Choices?* Paper prepared for Conference Sponsored by California Bar, Sept. 12, 1975.

⁴¹ Conversely where the relationship is one of pure bargaining, but it is desired to have limited adjudicative intervention in case agreement cannot be reached, the final offer arbitration device sometimes utilized in public sector employment is available. *See, e. g.*, Massachusetts Acts, 1973, ch. 1078. Under this process the arbitrator is limited in his decision to a choice between the last offer of the two parties. The obvious purpose is to engender good faith bargaining. *See, e. g.*, *Industrial Relations*, Oct. 1975, for a number of articles seeking to evaluate the practice.

Bar of its capacity to support innovative experimentation despite a temporary adverse economic impact for the profession.⁴²

As regards the nature of the adjudicative tribunal, we should give strong consideration to greater use of arbitration, particularly where we are dealing with specialized issues or issues whose confines have been fairly well chartered out by a contract between the parties, by governing legislation or by prior court decision.⁴³

2. Although others more competent will be addressing themselves more directly to criminal adjudication, I am impressed by the experimental work that has been undertaken under the auspices of the Law Enforcement Assistance Administration (LEAA) to divert certain types of minor criminal offenses (e. g., ones like the case earlier described between Mrs. B. and Mrs. W.) to a mediational proceeding. Such a process readily fits under the general rubric described in the immediately preceding section; but it can also be seen in the larger context of a movement towards a community "moot", offering informal and supportive services to community members.⁴⁴ Such institutions of course have a rich anthropological heritage.⁴⁵ Whether, in our alienated and divisive society, these institutions are hopelessly out of place, or whether they represent the last hope of a regained sense of community, remains to be seen.⁴⁶

⁴² This assertion is based on the assumption that some of this new mediational work will displace work previously done by lawyers. But, as pointed out earlier, much of it may simply substitute for what is now being handled by avoidance.

⁴³ Compare H. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, to be published in the 28th Proceedings of the National Academy of Arbitrators by B.N.A., suggesting an uncertain command by labor arbitrators of the federal law of employment discrimination. See also D. Feller, *The Impact of External Law Upon Labor Arbitration*, paper delivered at National Conference on the Future of Labor Arbitration in America, to be published by the American Arbitration Association.

⁴⁴ See R. Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 *Stanf.L.Rev.* 1 (1973); Comment, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 *Am.L.Rev.* 1253 (1975); J. Jaffe, *So Sue Me! The Story of a Community Court* (1972).

⁴⁵ See, e. g., *Law in Culture and Society* (L. Nader ed. 1969); J. Gibbs, *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes*, 33 *Africa* 1 (1963), reprinted in *Rough Justice: Perspectives on Lower Criminal Courts* (J. Robertson ed. 1974).

⁴⁶ For an optimistic answer to this question, see D. Smith, *Book Review*, 87 *Harv.L.Rev.* 1874 (1974). It is interesting to note that with the notable exception of the Jewish Community Board, whose work is the subject of the cited review, and a few other institutions, most of the experiments to date have involved alternatives to the criminal courts. Is this the result of some conceptual notion, or, as I suspect, because, like the reputed response of Willie Sutton, the famed bank robber when asked why he robbed banks, "that's where the money is"?

3. While the mediation-arbitration model earlier referred to is one useful format for processing certain types of cases, another device that bears further utilization is what might be called the screening-adjudication model. I have already made reference to this in connection with the discussion of Small Claims Courts, and in a sense it might be argued that what I am describing is but another name for pretrial. But, as indicated earlier, there is a considerable difference between a judicial suggestion that the case ought to be settled for \$X, and a quick preliminary "costing out" or "screening out" by a separate body.⁴⁷

One interesting example is the Massachusetts statute recently enacted for medical malpractice cases,⁴⁸ under which the plaintiff must first go before a three-person Board made up of a doctor, lawyer and trial judge. If the Board finds that the case does not have prima facie merit the plaintiff must put up a bond for the defendant's costs before he can go forward in court. Whether this statute has its intended effect may well turn on the adequacy of the bond, which normally is specified at the figure of \$2000.⁴⁹ Perhaps we need to give much more serious consideration to whether we should not go much further in taxing the loser with the full costs, including attorneys' fees.⁵⁰ Of course this is a complex question, and one needs to be careful to avoid giving a litigant a free ride on the system without barring legitimate claims of financial grounds. But it seems fairly clear that we have not yet hit the optimal note in making the system more cost-responsive, so that a litigant will carefully weigh whether he should go onto to the next phase of the dispute processing system.

⁴⁷ See V. Aubert, Courts and Conflict Resolution, 11 J. Conflict Resolution 40, 44 (1967), suggesting that failure realistically to appraise a legal claim is one major reason for taking it to court rather than settling it. Other reasons given are irrational behavior on the part of litigants (e. g., undue pride or stubbornness) or the indivisibility of the claim in issue (e. g., child custody).

⁴⁸ Massachusetts Laws, 1975, ch. 362.

⁴⁹ There may also be serious question about the constitutionality of this provision, because of the participation of lay individuals in an essentially judicial function and the possible prejudice that may result from an apparently highly informal and abbreviated preliminary proceeding. See also the discussion of the right to jury trial *infra*.

⁵⁰ For a thoughtful and modest proposal along these lines see P. Mause, Winner Takes All: A Re-examination of the Indemnity System, 56 Iowa L. Rev. 26 (1967). Once litigation involves a substantial economic cost for the loser, it is possible to create effective incentives for the settlement of cases. Such a system is presently in effect in England. It permits the defendant at any time to "pay into court" a proposed settlement sum; if the plaintiff refuses the offer and fails to recover more after trial, he forfeits his costs from the point of the offer into court. See M. Zander, Payment Into Court, New Law Journal, July 1975, p. 638. Some American states have similar provisions, but with costs not encompassing attorneys' fees, they do not have much bite. The English system of self-evaluation by the defendant may be compared with the Michigan Mediation system discussed in the text, *infra*. The Michigan System seems fairer but more costly since it calls for an independent evaluation of the plaintiff's claim.

Another interesting experiment along these lines is the so-called Michigan Mediation System.⁵¹ Here a three-person panel made up of a member of the plaintiff's Bar (selected by the Bar association), a member of the defendant's Bar, and a trial judge sit together as a panel for a period of two weeks to hear primarily tort cases in which the liability is acknowledged but there is dispute about the damages. The panel first reads such documentary evidence as there is and then discusses each case with the lawyers for the parties for about half an hour; no oral evidence is allowed. The Board then indicates what it believes the case is worth. If the case is not settled for this sum, then the plaintiff must receive at least 110% of this sum in order to avoid being taxed for the costs of trial (at a stipulated sum set so as to include a figure for attorneys' fees); the defendant must pay a similar fee if he does not settle and the recovery is more than 90% of the amount set by the mediation panel.

This approach, though promising, was criticized by the Chairman of the recently established Litigation Management and Economics Committee of the A.B.A. Section of Litigation on the ground that it comes too late in the process, after "considerable pre-trial and discovery expense has already been incurred." He suggests instead a program of mandatory arbitration for certain classes of cases, such as those involving claims of \$25,000 or less. To avoid an overly rigid application of arbitration to cases for which another dispute resolving mechanism might be more suitable, he proposes that the mandatory feature would be waived upon a showing that another process would offer a more "fair and efficient adjudication of the controversy." "Conversely, arbitration could be required in those cases exceeding the jurisdictional limit of mandatory arbitration upon a showing that arbitration would be a more fair and efficient method of resolving the controversy."⁵² This is an innovative and promising suggestion that deserves careful study.

4. What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes), according to some of the criteria previously mentioned. Conceivably such allocation might be accomplished for a par-

⁵¹ S. Miller, *Mediation in Michigan*, 56 *Judicature* 290 (1973).

⁵² See R. Olson, *An Examination of the Judicial Process: A Discussion of Modifications and Alternatives to Our System of Dispute Resolution*, to be published in the Summer 1976 issue of *Litigation*, the journal of the A.B.A. Section of Litigation. The concept of "more fair and efficient adjudication of the controversy" is borrowed from Federal Rule 23(b).

Mr. Olson's Committee is presently undertaking a nationwide survey, through interviews with judges, court administrators and experienced practitioners, of innovative approaches to reducing the time and expense of litigation as well as of promising alternative dispute resolution mechanisms.

ticular class of cases at the outset by the legislature; that in effect is what was done by the Massachusetts legislature for malpractice cases. Alternatively one might envision by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a Center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7

Of one thing we can be certain: once such an eclectic method of dispute resolution is accepted there will be ample opportunity for everyone to play a part. Thus a court might decide of its own to refer a certain type of problem to a more suitable tribunal.⁵³ Or a legislature might, in framing certain substantive rights, build in an appropriate dispute resolution process.⁵⁴ Institutions such as prisons, schools, or mental hospitals also could get into the act by establishing indigenous dispute resolution processes. Here the grievance mechanism contained in the typical collective bargaining agreement stands as an enduring example of a successful model. Finally, once these patterns begin to take hold, the law schools, too, should shift from their preoccupation with the judicial process and begin to expose students to the broad range of dispute resolution processes.⁵⁵

⁵³ See, e. g., *Kamm v. California City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) (trial court in land fraud class action was justified in dismissing class action on basis of agreement that defendant would utilize arbitration to process potential multiple claims against it). But cf. *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (improper for district court to order creation of program by City of Philadelphia Police Dept. for processing recurring complaints of police misconduct).

⁵⁴ Consider, for example, the provision of the Magnuson-Moss Warranty Act which requires the FTC to promulgate rules establishing procedures for informal dispute settlement mechanisms which must be exhausted before any lawsuit can be commenced under the Act. See Public Law 93-637, 88 Stat. 2183, and the implementing regulations adopted by the FTC, 40 Fed.Reg. 60190 (Dec. 31, 1975). Compare the suggestion that each statute creating substantive rights contain a judicial impact statement.

⁵⁵ This presents an excellent opportunity for law students who seek to do creative field work, e. g., by helping a telephone company to set up a grievance mechanism, or studying the operation of the local ombudsman.

5. I would be less than candid if I were to leave this idyllic picture without at least brief reference to some of the substantial impediments to reform in this area. To begin with there is always the deadening drag of status quoism. But I have reference to more specific problems. First, particularly in the criminal field, cries of "denial of due process" will undoubtedly be heard if an informal mediational process is sought to be substituted for the strict protections of the adversary process.⁵⁶ In response to this objection it must be asserted candidly that many thoughtful commentators appear agreed that we may have overjudicialized the system, with concomitant adverse effects on its efficiency as well as its accessibility to powerless litigants.⁵⁷ This is not the place to explore that difficult issue, but we clearly need to address ourselves more fully to that question.

A related concern is the one that will be voiced by Judge Higginbotham concerning the need to retain the courts as the ultimate agency capable of effectively protecting the rights of the disadvantaged. This is a legitimate concern which I believe to be consistent with the goals I have advocated. I am not maintaining that cases asserting novel constitutional claims ought to be diverted to mediation or arbitration. On the contrary, the goal is to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.

Finally, we are robbed of much-needed flexibility by the constitutional requirement of jury trial. For present purposes this normally means that cases initially referred to binding arbitration (or some other nonjudicial process) must have the consent of both parties or else that a *de novo* trial must be permitted. Obviously we can live with such restrictions and still achieve considerable constructive change, especially if, as in Pennsylvania, the price of the *de novo* appeal from arbitration is to require the appellant to assume the cost of the arbitration. But one is bound to wonder whether, as an original matter, the requirement of jury trial still makes sense in the run-of-the-mill civil case, particularly if one keeps in mind the attendant increase in cost and time.⁵⁸ In view of the desperate state of some of our civil calendars, it seems to me that the burden of persuasion should shift to those who maintain that the high costs are justified by unique advantages afforded by jury trials. Here again we must try to shun the endless abstract discussions of pros and

⁵⁶ Cf. L. Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 *Civ.Rights-Civ.Lib.L.Rev.* 48 (1976).

⁵⁷ See E. Johnson and V. Kantor, *op. cit. supra* note 5, Chapter VI. See also H. Friendly, "Some Kind of Hearing", 123 *U.Pa.L.Rev.* 1267 (1975).

⁵⁸ See, e. g., M. Redish, *Seventh Amendment Right to Jury Trial: A Study of the Irrationality of Rational Decision Making*, 70 *Nw.L.Rev.* 486 (1975).

cons, and seek instead to explore whether there are specific types of cases in which juries make more or less sense, so that we might opt ultimately for a constitutional amendment that would give greater flexibility to the legislature on this question.

Conclusion

It seems appropriate to end this fragmentary appraisal on a modest note. There are no panaceas; only promising avenues to explore. And there is so much we do not know. Among other things, we need far better data than are presently available in many states on what is in fact going on in the courts so that we can develop some sophisticated notion of where the main trouble spots are and what types of cases are prime candidates for alternative resolution.⁵⁹ We need more evaluation of the comparative efficacy and cost of different dispute resolution mechanisms. And we need more data on the role played by some of the key individuals in the process (e. g., lawyers). Do they exacerbate the adversary aspects of the case and drag out the proceedings (as many family law clients believe), or do they serve to control otherwise overly litigious clients (as trial lawyers often assert)? What is the optimal state of a country's grievance machinery so that festering grievances can be readily ventilated without unduly flooding the system and creating unreasonable expectations of relief?

Above all, however, we need to accumulate and disseminate the presently available learning concerning promising alternative resolution mechanisms, and encourage continued experimentation and research. In this connection we must continue to forge links with those from other disciplines who share our concerns. Their differing orientation and background often give them a novel perspective on the legal system.

I would like to close with a final suggestion. In preparing for this conference I encountered a number of compendious tomes embodying the proceedings of similar prior gatherings. I was struck with the recurring nature of many of the issues we are discussing, and wondered how we might avoid the unhappy fate that seems to have befallen many of the ideas thrown out at some of these earlier meetings. No doubt the organizers of this conference feel confident that we are more determined to avoid a similar fate, and for all I know, looking about at this impressive aggregation of concerned and able citizens, they are right. Still, it seems to me that at the conclusion of this meeting the organizers of this conference might designate a small group of dedicated individuals who would take it upon themselves to monitor the progress of some of the promising ideas that will be cast

⁵⁹ Apart from deficiencies in particular states, interstate comparisons are particularly hampered by the lack of comparability among the data.

adrift here. Perhaps this group might even issue a Pound Conference Impact Statement at periodic intervals to remind us of our accomplishments as well as our remaining goals. In this way we may all be able to continue to contribute to the solutions of the many grave problems that presently beset the courts and that presumably brought us here.