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GUIDEPOSTS FOR AN INSTITUTIONAL FRAMEWORK OF CONSENSUAL DISPUTE PROCESSING

JOHN S. MURRAY*

The establishment of alternative dispute processing programs has become a growth industry in the United States.¹ The number and variety of these programs are increasing as fast as those involved with dispute processing can create procedures and organizations to put their individual ideas to the practical test.² The enthusiasm for alternatives to the judicial system³ and the resulting explosion of local programming are positive forces, assuring the successful development and testing of multiple theories and applications of alternative dispute processes. Unfortunately, they have also partially obscured

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1. See generally L. FREEDMAN WITH L. RAY, STATE LEGISLATION ON DISPUTE RESOLUTION (ABA Spec. Comm. on Alternative Means of Dispute Resolution, Monograph Ser. No. 1, 1982); SPEC. COMM. ON RESOLUTION OF MINOR DISPUTES, ABA, 1981 DISPUTE RESOLUTION PROGRAM DIRECTORY [hereinafter cited as DIRECTORY]; E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES (1977); Laue, *The Development of Community Conflict Intervention*, J. INTERGROUP REL., Summer 1981, at 3, 7-10; Sander, *1977 Report on the National Conference on Minor Disputes Resolution*.

2. The acceleration of this movement is evidenced in part by the enthusiastic response to recent conferences. For example, the National Conference on Peacemaking and Conflict Resolution sponsored by the University of Georgia Center for Continuing Education in Athens, Georgia, March 4-6, 1983 and the National Conference on Alternative Means of Family Dispute Resolution, held in Washington, D.C., June 3-5, 1982. New publications, such as the monthly *Alternatives to the High Cost of Litigation*, provide additional evidence of the expanding nature of this field.

3. Paradoxically, the judicial system, one of the best established dispute processing institutions in our society, has contributed substantially to the spectacular growth of alternatives to the normal court process. Both federal and state judges have been faced with rapidly rising dockets and little expansion in court personnel with which to handle the increased caseload. The resulting overload has prompted stirring calls by judges and lawyers alike for the diversion of disputes to alternative processing mechanisms where resolution can be effected more efficiently. As one of many examples of judicial speechmaking, see Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275-76 (1982).

the detrimental effects of such intense variety, uncertainty, and fluidity on the long-term viability of alternative dispute processing as an institution. Much research has focused upon the methodology of alternative dispute processing and on its proper application in various subject matter and constituency areas.⁴ However, there has been little analysis from an institutional perspective.⁵

The purpose of this Article is to outline a set of characteristics which can serve as initial guideposts for the eventual development of a framework for a comprehensive institution to assist disputing parties in more effectively resolving their conflicts. Consensual dispute processing appears to be at the point in its growth where it needs to be liberated from its present "alternatives" status and allowed to mature as a separate, full-fledged institution.

Section I defines the terms and assumptions which form the core of the later analysis. Section II describes the existing types of alternative dispute processing programs in the United States, with special emphasis on the institutional factors which link various programs together or separate them conceptually. Section III evaluates existing program structures to discover their inherent strengths and weaknesses.

The final section develops a set of structural characteristics which might be the basis for an effective dispute processing system. These characteristics or guideposts are central to any debate over the form of an appropriate institutional system. Such a system is a necessary goal if the creative progress of the past few decades is not to be lost for succeeding generations.

I. SOME DEFINITIONAL PROBLEMS

A. Dispute Processing

Dispute processing can be defined so as to encompass almost all human

4. See generally R. FISHER & W. URY, *GETTING TO YES* (1981); Lowenthal, *A General Theory of Negotiation: Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69 (1982); *Special Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 391 (1981). Proposals for application of the alternatives methodology, made by Professor Sander of Harvard Law School in the mid-1970's and currently being tested with ABA supervision in three metropolitan areas, are based on the assumption that an organizational pattern to these alternative programs is lacking and that such a pattern would be beneficial. See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 128-32 (1976); Ayers, "Multi-door Courthouse" for Washington, DISTRICT LAW., Mar.-Apr. 1983, at 15, col. 2.

5. Professor Sander's work on the idea of a one-stop shopping center of dispute settlement which would be coordinated out of a dispute resolution center is one of the most significant contributions. See Sander, *supra* note 4, at 130-31; see also Danzig, *Toward the Creation of a Complementary Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1019-21 (1979); Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569 (1979).

interaction.⁶ For the purposes of this Article, the term is limited to activities which have as their goal either the management of existing and expressed differences based on a past or present situation between two or more people or organizations, or the planning for avoidance or management of future conflict.⁷

These two types of conflict have often been treated quite differently by dispute processing institutions. For example, the judicial system rarely accepts cases which only involve the attempted resolution of future conflict. To be sure, the courts have always been open to declaratory relief in limited instances, and they have more recently become enmeshed in cases which require planning for future activity, particularly in cases of alleged school segregation, at-large election districts, unconscionable prison conditions, large economic interests under antitrust allegations, and industrial-environmental clashes. However, the system itself does not adapt well to the planning function.⁸ The typical court decision, once completed through appeal, if any, is recognized as final. Judicial decisions in the planning area are generally a signal for the parties to shift their dispute settlement activities from the courts to another dispute processing system, usually the political arena.

Insofar as the political system functions as a dispute processing institution, it tends to focus on the prospective resolution of continuing disputes. It frequently addresses the planned avoidance or management of potential conflict, but only rarely does it attempt to settle past conflict by retroactively adjusting the rights and responsibilities of the parties. The courts provide that latter service for society.

B. Courts/Alternatives vs. Adjudicative/Consensual

When referring to dispute resolution processes, most lawyers differentiate between the judicial process and all other alternatives. Such a distinction is appealing to the legal profession because of the essential "reverence for things judicial" which typifies much of legal education and folklore.⁹ This dichotomy does recognize the practical reality that courts provide the most uniformly ac-

6. Kidder, *The End of the Road? Problems in the Analysis of Disputes*, 15 LAW & SOC'Y REV. 717, 720-22 (1981).

7. This division reflects in part the one that Professor Eisenberg makes between dispute negotiation and rule making negotiation, Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976), but it broadens the application to include all dispute processing. The second category has been the focus of many futures books, e.g., A. TOFFLER, *FUTURE SHOCK* (1971). Professor Hilsman graphically termed this effort as an attempt to discover future conflict "crouching" in present conditions. R. HILSMAN, *THE CROUCHING FUTURE* (1975).

8. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 101-04 (1976) (contrasting problem-solving with dispute-resolving).

9. MacDonald, *Curricular Development in the 1980's: A Perspective*, 32 J. LEGAL EDUC. 569, 583 (1982).

cepted and stable mechanism currently available for achieving a final resolution of a dispute.

This characterization leads to some distortions. First, it assumes that the judicial system is the standard process, all others being subsidiary or merely "alternative." It is commonly understood that of the total number of disputes handled by lawyers, very few actually reach the point of having a complaint filed in court, and even fewer reach the hearing or trial stage. The vast majority of disputes are handled by one or more of the alternative methods, not by the courts.

Second, placing all alternative processes in one category stresses their homogeneity and thus obscures legitimate distinctions among them. Some processes which are designated as "alternative" bear considerable likeness to the judicial system and little similarity to other alternative types. For example, arbitration and administrative hearings are much closer to court adjudication than to negotiation or mediation.

Finally, equating the judicial system with the more informal alternative methods for dispute processing significantly exaggerates the institutional character of the alternatives. Other than administrative hearing boards and, in a very loose sense, neighborhood justice centers, there are few structures among the alternatives that equate with the court structure.

A more useful distinction would be based on who controls the final decision, the disputants or a third party.¹⁰ Viewed from this perspective, there are two types of processes for settling disputes: consensual processes, in which the disputants retain their individual consent to the ultimate solution; and adjudicatory processes, in which the disputants must surrender control over the end result to a third party decisionmaker.¹¹ Fact-finding, negotiation, mediation,

10. At least one commentator, in referring to the problems that develop with the present divisions in dispute processing, has suggested a possible division between bilateral and third-party dispute processing. Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: an Afterword*, 15 LAW & SOC'Y REV. 727, 736 (1981). This article would further divide third party processing into consensual and adjudicatory. Professor Trubek's bilateral category would appear to include all disputes in which the third parties present were the advisors to or agents of the disputants themselves. It is important that calling such a process bilateral not hide the presence and influence of that third person. The advisor or agent may be instrumental to the success or failure of the process by interacting as much with the disputant-client as with the other side. See Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 69-70 (1974).

11. Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards A General Model*, 7 LAW & SOC'Y REV. 667, 667 (1973) (key difference between adjudication and negotiation is "the existence or absence of a third-party adjudicator"); see also Fitzgerald & Dickens, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 LAW & SOC'Y REV. 681, 682 (1981) (two directions in research are relevant to this consideration: prelegal stages of disputing and roles of nonlegal third parties). See generally Nader, *Alternatives to the American Judicial System*,

and conciliation are examples of consensual processes; administrative hearings, arbitration, and judicial decisionmaking fall within the adjudicatory category.¹²

Although conceptually separate, the consensual and adjudicative processes are often intertwined. The duration of a dispute extends from the time of initial grievance through post-settlement implementation, and parties frequently invoke more than one process during this period. Sometimes they use two or more processes simultaneously, playing one against the other. All adjudicative processes embody elements that present opportunities for the parties to consent to a mutually agreeable settlement. Such multiple use and interaction does not destroy the legitimacy or the usefulness of analyzing the consensual processes separately from the adjudicative. In fact, these processes must be looked at separately if consensual processing is to grow to institutional status.

C. *Meaning of Institution*

Five assumptions about the nature of an institution in our society underlie this analysis of consensual dispute processing.¹³ Individually and together, they contribute to what I see as the organizational goal in the establishment of a comprehensive dispute processing system.

Society-wide. An institution should be a cultural fact with broader existence than what it would derive from isolated, sporadic or local qualities; it should be society-wide in effect. Some obvious examples are the American judiciary and the political system. Marriage is an example of a non-government institution with a broad cultural basis.

Significant. An institution should involve significant activity within the culture, not just the routine or the insubstantial. The activity should be important, perhaps even pivotal, in the lives of citizens. Our legislative-executive process embodies this quality for the political organization of society, as the family does for personal life, and the church for moral life.

Instructional. An institution should have an instructional quality which serves to educate citizens in an acceptable method or approach. The institution

in *NO ACCESS TO LAW 6* (L. Nader ed. 1980) (complainant's perspective in viewing alternatives to the judicial system).

12. Galanter, *Why the 'Haves' come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 124, 126-29 (1974); Sander, *supra* note 4, at 114. The terminology used, consensual and adjudicatory, is descriptive of the process and does not contain the limiting language difficulties mentioned by Professor Kidder. Kidder, *supra* note 6, at 723-24; see also Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 *LAW & SOC'Y REV.* 631, 642, 647-48 (1981).

13. These assumptions are derived for the most part from a composite of the definitions of "institution." See *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* (1961).

should stand as a guide for all who participate in the activity, helping people through otherwise confusing or treacherous choices.

Positive. An institution should involve activity that contributes to the overall well-being of society. Its impact should be positive, not inconsequential or negative. Its purpose should be to improve the lives of the society's members.

Well-established. An institution should be established within the society in such a way that it is a stable influence in people's lives. The public must support the activity represented by the institution. Again, the American political system stands as an excellent example of this quality.

II. PRESENT INSTITUTIONAL PATTERNS

A. *The Legal Profession.*

It is difficult to identify institutional patterns in activities which show less structure than would normally be associated with institutional status. The problem is especially evident in the consensual dispute processing area. There are some rudimentary institutional characteristics in present consensual programs that can provide insight for the development of a more comprehensive consensual system.

The legal profession, because of the services it provides to the public, has long been considered the front line for consensual problem solving.¹⁴ Although lawyers practice by the grace of the judicial system of their respective jurisdictions, they play a significant role in the consensual processing of disputes. Their contributions in areas of fact-finding, negotiation, and settlement have probably been instrumental in helping the judicial system work as well as it does. If all cases filed in court went to trial, our judicial system would be overwhelmed.

One of the most important contributions that lawyers have made to consensual processing is in the area of contracts.¹⁵ Contractual negotiations and the final agreement are highly efficient tools in the hands of a lawyer for resolving or at least managing potential conflict before it occurs.

Such a prominent role for lawyers in consensual dispute processing does not mean that they form an institutional base for a consensual processing sys-

14. Abel, *Redirecting Social Studies of Law*, 14 LAW & SOC'Y REV. 805, 806-08 (1980). Such an assumption underlies most of the literature in dispute processing. See Eisenberg, *supra* note 7, at 637-38; Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U.L. REV. 685 (1982); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982). But see Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 542-43, 561 (1981) (lawyers and courts play a relatively minor role in most middle range disputes).

15. See L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); S. MACAULAY, *LAW AND THE BALANCE OF POWER* 202-06 (1966); Macaulay, *The Use and Nonuse of Contracts in the Manufacturing Industry*, PRAC. LAW., Nov. 1963, at 13.

tem. What has sometimes been overlooked is that, in performing these consensual functions, lawyers are carrying out the professed objectives of the courts.¹⁶ Lawyers, thoroughly trained in the judicial process, consistently approach dispute processing from the position that a court would take on the questions raised.¹⁷ The standard that a lawyer uses is what a judge would decree, which is just and equitable by definition of the judicial system itself. While such an approach does not require that an out-of-court agreement completely conform to what a court might have devised, it does call for the conscientious justification of every deviation from the court standard.¹⁸ Lawyers normally turn to the court system for institutional help in carrying out their consensual functions. There are few unifying elements to lawyers' myriad activities except as they relate to the judicial process, and those elements are primarily associated with adjudication, not consensual processing. Thus, it is difficult to characterize these activities of lawyers as a structural part of the consensual process itself.

Although the legal profession is certainly one of the most important sources of assistance to disputants in the present consensual processing nonsystem, it is not the only profession principally involved. Psychiatrists, clinical psychologists, social workers, administrative staff assistants, teachers, family counselors, clergy, and many other professionals are involved daily in consensual dispute processing. Professional pride and jealousy ought not to blind lawyers to the natural boundaries of this newly recognized field.¹⁹

B. *Consensual Functions, Applications and Structures*

1. Consensual Methodology

The first step in assessing the current state of consensual dispute processing is to differentiate the field functionally. There appears to be a relatively uniform acceptance of the following functions included in consensual dispute processing: avoidance, self-help, fact-finding, negotiation, mediation, and con-

16. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-95 (1976). It may now be beyond the capacity of existing judicial personnel to manage fairly and promptly the mounting numbers of cases on judicial dockets in almost every jurisdiction. See Burger, *Today's Challenge: Improving the Administration of Justice*, 55 N.Y. ST. B.J., Feb. 1983, at 9-11.

17. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 330 (1982).

18. See Eisenberg, *supra* note 7, at 644-46; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979); see also Special Committee on Alternative Means of Dispute Resolution, ABA, Panel Discussion Ser. 1, *Alternative Dispute Resolutions: Bane or Boon to Attorneys?* (1982) (impact of mediation on the legal profession).

19. See *Minutes of Connecticut Bar Foundation Task Force Meeting on the Future of the Law*, (Sept. 12, 1981), reprinted in 56 CONN. B.J. 82, 85-86 (1982) (lawyer's problems in defining the limits on delivery of mediation services by nonlawyers).

ciliation.²⁰ The list is in ascending order of third-party involvement and therefore may reflect the progressive steps disputants might choose as they meet failure at a lower level. The functions are separable in the sense that they are discretely definable activities, and they are nonexclusive in the sense that someone can be performing two or more of them simultaneously.

Although avoidance could be considered a form of self-help, it is highlighted here because it is often overlooked as a dispute processing option, although it is frequently used by disputants.²¹ Self-help refers to actions or omissions on the part of the disputant which are aimed at actively resolving or managing the dispute, but not those aimed at avoiding it.

At the other end of the continuum, conciliation has been purposely set apart from mediation as the last function in the consensual area. Mediation and conciliation share the element of third-party intervention with the objective of helping the disputants develop a mutually agreeable settlement.²² Conciliation goes beyond mediation by approaching its task with an established normative standard for judging the outcome. Conciliation assumes that the dispute is an abnormal condition which must be altered in a predetermined direction in order to arrive at a successful resolution.²³

Mediation supplies expert assistance without predetermined standards about the direction which settlement should take.²⁴ Conciliation is therefore a

20. Sander, *supra* note 4, at 114, 117. A commentator often selects from among these functions depending upon the direction of his or her research or theme. See, e.g., Eisenberg, *supra* note 7, at 637-38; Felstiner, *supra* note 10, at 69-70; Fitzgerald & Dickins, *supra* note 11, at 688; Laue, *supra* note 1, at 6.

21. See Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 676-82 (1975); Felstiner, *supra* note 10, at 76; Felstiner, *Avoidance as Dispute Processing: an Elaboration*, 9 LAW & SOC'Y REV. 695 (1975); Sander, *supra* note 4, at 117. See generally *Special Issue on Dispute Processing and Civil Litigation*, *supra* note 4 (cross-section of issues relating to the formation of grievances and their transference into claims and disputes).

22. These two terms are sometimes used interchangeably, and the differences between them are often ill defined. See, e.g., Laue, *Conflict Intervention*, in M. OLSEN & M. MICKLIN, HANDBOOK OF APPLIED SOCIOLOGY 74 (1981); Laue, *supra* note 1, at 6; Sander, *supra* note 4, at 115 n.14. However, the two methods are different in practice and reflect, as they should, the etymological differences in the two words. Conciliation derives from the Latin word *conciliatus* which means to bring together, unite, gain. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 471 (1961). Mediation derives from the Latin word *mediare* which means to be in the middle. *Id.* at 1402. The first presumes action aimed at uniting the parties; the second merely suggests an intermediary position, interpreting one party to the other. See Folberg, *Divorce Mediation—A Workable Alternative*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 15 (H. Davidson, L. Ray & R. Horowitz ed. 1982) [hereinafter cited as ALTERNATIVE MEANS].

23. Folberg, *supra* note 22, at 15.

24. *Id.*

more disruptive intervention from the point of view of a disputant's control over outcome, and it warrants a position on the functional chart closer to adjudication.

Consensual methodology should be clearly distinguished from the agencies, organizations or programs which exist to use it. Confusion between a function and the mechanism for providing that function creates a false notion that the individuals performing that function constitute an institutional base by their very actions, and that such an activity has the same stability, fairness, uniformity and other qualities that might be exhibited by an institution whose participants were involved in that activity. Such is not the case. Confusing the function with the delivery mechanism makes it more difficult for policy-makers on state and national levels to recognize the structural needs of current dispute processing.²⁵

2. Applications of Consensual Methodology

Various classifications can be used to describe the present experience in the application of consensual methodology to real world situations. Subject matter areas are a familiar mode of classification. The constituencies involved, defined in terms of either the nature of the disputes handled or the location or type of parties able to use the process, have become equally important in recent years.

a. *Subject Matter Areas*

Traditional legal subject matter areas are frequently used to divide the field of consensual programs. Labor-management relations has long been considered a separate area of consensual processing.²⁶ International affairs is also a recognized field for consensual decision-making.²⁷ Other subject areas have become the focus of intense activity during the past decade as the interest in consensual dispute processing has grown: family law, environmental law and criminal law are the most notable.²⁸

25. The experience of the past few years in Congress and at state legislative levels demonstrates the difficulty of sorting through possible dispute resolution programs when the terminology is not firmly understood. *See, e.g.*, Dispute Resolution Act, Pub. L. No. 96-190, 94 Stat. 17 (1980), *reprinted in* 28 U.S.C. app. 116-21 (Supp. V 1981); L. FREEDMAN WITH L. RAY, *supra* note 1.

26. Many commentators consider it unrepresentative of the field of dispute resolution as a whole. *See, e.g.*, Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 918 (1979).

27. It has also been considered distinct and unrepresentative because of the lack of an effective system of adjudication, making it dissimilar to other legal subject areas as applied domestically. *But see* R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 11-16 (1981).

28. There are additional subject areas which have also shared in consensual

Labor. The negotiation of collective bargaining agreements between labor and management is a source of considerable success for consensual dispute processing.²⁹ An entire body of common, statutory, and administrative law in the labor-management relations field has become a fixture of legal education and practice.³⁰

Substantial efforts have been made to provide some institutional support for consensual processing of labor disputes. In 1947, with the adoption of the Taft-Hartley Act, the Federal Mediation and Conciliation Service (FMCS) was established to assist parties, upon request or upon its own motion, by providing trained personnel for negotiation, mediation, and arbitration assistance.³¹ Other institutional resources, including the National Mediation Board³² and the American Arbitration Association,³³ have been developed to help prevent serious economic problems in business and commerce. The usefulness of these agencies continues to be demonstrated by their increasing caseloads year after year.

Commentators often point to the unique features of the labor-management situation in the United States which make it more amenable to consensual dispute processing than adjudication.³⁴ Nevertheless, success in the labor

processing interest, but have not been as separately focused as those mentioned. Tax law has developed considerable formal procedure surrounding the negotiation process, but its mechanism remains centralized within the federal tax enforcement bureaucracy. Product liability and consumer law have received more attention recently, both as separate courses of legal study and as processing areas, but they will be discussed in the next subsection because the constituency division fits their development more closely.

29. Getman, *supra* note 26, at 918.

30. Among the courses in the area presently offered at law schools are labor law, labor arbitration, negotiating the collective bargaining agreement, and discrimination in employment.

31. 29 U.S.C. § 172 (1976). The federal policy is clearly stated in *id.* § 173(d): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." A 1978 amendment authorized the FMCS to "encourage and support the establishment and operation of joint labor management activities" to minimize labor disputes. Pub. L. No. 95-524, § 6(c)(1), 92 Stat. 1990, 2020 (1978) (codified at 29 U.S.C. § 173(e) (Supp. V 1981)). This change is a signal that a more aggressive third-party promotion of consensual dispute processing was an approved governmental policy.

32. 45 U.S.C. § 154 (1976).

33. Unlike the FMCS and the NMB, the AAA is a private organization which has developed nationwide acceptance for commercial and labor dispute resolution. Its primary objective is the supply of arbitrators and the provision of a stable procedural framework for arbitration of private disputes, but it does offer expertise in consensual processing functions such as fact-finding, mediation and conciliation.

34. See, e.g., Getman, *supra* note 26, at 917 (legitimacy of labor unions and of the collective bargaining system are features that explain the success of consensual processes in labor law and make its experience nontransferable).

law area could be viewed as the application of inherently useful consensual methods to a fertile subject area.

International Relations. The field of international relations is the single major subject area in which consensual dispute processing is supreme.³⁵ There are no compulsory adjudicatory institutions ready to be invoked by one party against another, without the consent of both, in support of certain norms.³⁶ It is one of the few areas in which the consensual function of self-help has received substantial, if not consuming, attention from states, politicians, citizens, and researchers alike.³⁷

The absence of mandatory adjudicative forums does not mean that institutional support for consensual processing has been any more well-established or uniquely successful in the international arena than in domestic areas. There have been some successes. An entire network of international agencies, from the United Nations and its affiliated agencies through the International Monetary Fund and the Organization of American States, serve as important organizational resources promoting consensual dispute processing.³⁸ Often nations or private groups, such as the International Committee of the Red Cross, may become involved in disputes as negotiation advisors or mediators.³⁹

This progress has been recent and slow, and instances of effective major conflict resolution by an international body are rare. In this larger framework there appear to be important similarities between the international law field and the areas of domestic law. The consensual processing lessons being learned

35. It is interesting to note that at least as late as 1981 the Department of State did not provide any regular training for its foreign service officers in the art of negotiation. Int'l Com. Agency World Development Letter, Mar. 4, 1981.

36. International adjudication plays an important but subordinate role in resolving conflict. Such adjudication depends upon voluntary acceptance of its procedures by all parties. See generally M. KATZ, *THE RELEVANCE OF INTERNATIONAL ADJUDICATION* ch. 6 (1968) (variables that make an international controversy amenable to adjudication).

37. See, for example, the Geneva Conventions of 1949, which provided minimum standards of conduct toward war victims, both civilians and military, in cases of war between nation states and of certain civil wars; and the Hague Conventions of 1907, relating to the conduct of war.

38. S. CHEW, *THE THEORY AND PRACTICE OF INTERNATIONAL ORGANIZATION* 95-97 (1979). But see Clark, *Introduction* to G. CLARK & L. SOHN, *WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS* xv (3d ed. 1966) (proposed UN Charter revisions based on premise that there can be no peace without a world law uniformly applicable and capable of enforcement by a world police power).

39. The most notable recent example of such an intervention was Algeria's contribution as a mediator in the U.S.-Iranian hostage crisis of 1979-81. For an interesting account of the process, see P. SALINGER, *AMERICA HELD HOSTAGE: THE SECRET NEGOTIATIONS* (1981). Algeria's next attempt at mediation intervention, in the Iran-Iraq war, was not as successful. See *CHRISTIAN SCIENCE MONITOR*, Feb. 16, 1983, at 5, col. 1.

today in the international arena should be of great use in other subject and constituency areas, and vice versa.

Family. Consensual dispute processing in the family law area has seen enormous growth during the past decade. The legal profession has long been involved in negotiating settlements in separation and divorce cases, with the guidance of the court's procedural and evidentiary rules and state family law statutes.⁴⁰ Psychiatrists and psychologists have also been active in diagnosing and treating emotional and behavioral difficulties within the disintegrating family context.

Recently a new role, that of the professional intermediary, has been introduced as a superior method of resolving family conflict. Divorce mediation developed among lawyers and psychologists who were seeking a more problem-solving and less adversarial means for helping clients.⁴¹ The new movement has given added momentum to the family or conciliation court concept, which had been available in a few localities for some time as a court-initiated resource.⁴²

The legal profession has had difficulty in recognizing divorce mediation as a legitimate role for lawyers.⁴³ Such intermediary service is entirely consistent with the traditional education of mental health professionals, but lawyers are committed by their training and code of ethics to the basic right of an individual to a zealous advocate⁴⁴ who has no conflicting interests.⁴⁵ This commitment to dedicated personal representation is supported by the professional belief in the adversarial system of adjudicative dispute processing as the best method of securing just solutions to conflict.⁴⁶

Other institutional involvement is visible in the family law area. Religious organizations, through their clergy and counselors, have long been active in shaping choices for their members and assisting them through personal con-

40. See generally Mnookin & Kornhauser, *supra* note 18, at 985-88 (lawyers' role in divorce process).

41. Elson, *Setting Up A Private 'Mediation' Practice*, in ALTERNATIVE MEANS, *supra* note 22, at 173.

42. See McIsaac, *The Family Conciliation Court of Los Angeles County*, in ALTERNATIVE MEANS, *supra* note 22, at 131 (1982); Orlando, *Where and How—Conciliation Courts*, in *id.* at 111.

43. For a discussion of the problems that lawyers see with attorneys serving as mediators, see Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS, *supra* note 22, at 339; Gaughan, *An Essay on the Ethics of Separation and Divorce Mediation*, in *id.* at 321; and Silberman, *Professional Responsibility Problems of Divorce Mediation*, in *id.* at 239.

44. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, DR 7-101 (1981).

45. *Id.* EC 5-1, DR 5-101.

46. *Id.* EC 7-19. *But cf.* Frankel, Book Review, 43 U. CHI. L. REV. 874 (1976) ("[It] is a professional conceit . . . to suppose that all, or most, social problems can be compressed into the forms of an adversary system in which there are only two sides, one of which has to be right.").

flict. The courts have more recently moved into this area, usually by creating some form of mediation or conciliation division through which a divorce case must pass in order to receive court attention.⁴⁷ Neighborhood justice centers and local mental health centers are also providing mediation or counseling assistance for parties to family conflict, with varied results.⁴⁸

Although institutional involvement in family law lacks basic uniformity in structure, it does reflect several common themes: a highly personal orientation; an interdisciplinary approach to the use of third-party professionals, and a close link with the more formal adjudicative process.

Environment. The 1972 publication of *The Limits to Growth*⁴⁹ heralded a new worldwide public consciousness of the environmental tightrope that we as humans walk. The OPEC oil pricing adventures of 1973-81, and the resulting recognition of our energy dependence and of the limits to our fossil fuel resources, have stimulated public awareness in the United States of the delicate balance between nature and civilization.

For a long time environmental protection was the consuming avocation of only conservationists, birdwatchers and other nature lovers. Now there are groups of aggressive partisans who are involved daily in trying to influence public and private decisions that affect the environment. A substantial jump in disputes over environmental questions has been the result. The political system has given environmental partisans increased access to the courts through the adoption of significant environmental protection legislation during the past fifteen years.⁵⁰ The positive contribution of consensual processes has been largely overlooked.

The past decade has seen the creation of many private groups committed to the application of consensual methodology to environmental conflicts.⁵¹ Their objective has been to provide expert negotiation and mediation assistance in local or regional controversies in order to help resolve conflict over actions which might adversely affect the environment. Initially this effort was more of an attempt to apply consensual processing functions to a special type of dispute, but now a new doctrinal area of environmental law has emerged which gives this effort a legitimate subject matter focus.

47. See McIsaac, *supra* note 42, at 133; Orlando, *supra* note 42, at 115.

48. See DIRECTORY, *supra* note 1, for a detailed listing of community programs and the types of cases they handle.

49. D.H. MEADOWS, D.L. MEADOWS, J. RANDERS & W. BEHRENS, III, *THE LIMITS TO GROWTH* (1972). This book was a report for the Club of Rome's project on the predicament of mankind.

50. See Skillern, *Private Environmental Litigation: Some Problems and Pitfalls*, 9 ST. MARY'S L.J. 675, 675-76 (1978).

51. See, for example, the Institute for Environmental Mediation of Seattle, Washington and Madison, Wisconsin; the New England Environmental Mediation Center, Cambridge, Massachusetts. For an excellent discussion of actual mediation cases, see A. TALBOT, *ENVIRONMENTAL MEDIATION: 3 CASE STUDIES* (1981).

Reliance for consensual services and expertise in this area has been placed almost completely on nongovernmental resources and organizations.⁵² The result has been a lack of uniformly available services, an unstable funding pattern for most of the services provided, and a tendency to use ad hoc processes to resolve specific conflicts.

Criminal Activity. The increase in crime, the overburdening demands on judicial personnel, and the inadequacy of the traditional court remedy for compensating victims have forced a consideration of consensual processing in the area of criminal activity.⁵³ Consensual dispute processing, other than the judicial plea-bargaining process, has been considered alien to the protection of suspects' rights, the punishment and rehabilitation of offenders, and the protection of society. However, judges are now leading the way toward a less formal process for certain criminal defendants.⁵⁴

The local neighborhood justice center is frequently called upon to negotiate or mediate criminal disputes.⁵⁵ Some centers are structurally a part of the local prosecutor's office and accept referrals from the prosecutor and the police as a part of their normal caseload procedure.⁵⁶ Other centers stand separately but are linked to the criminal justice system by governmental funds and by close ties to police, prosecutors and judges.⁵⁷ This movement to apply consensual processing to criminal activity has also been effective in the juvenile delinquency field, where consensual functions have often been performed by court personnel specializing in counseling and probation.⁵⁸ More recently, separate community groups have been established with specific charges in the area of consensual processing of disputes involving juveniles.⁵⁹

The objective of these programs is to help negotiate or mediate between the complainant and the alleged offender so that compensation can be paid promptly, similar conduct in the future can be deterred, and judicial action can be avoided. This last goal, court diversion, is usually the primary goal for

52. See Alexander, *A Promising Try at Environmental Detente for Coal*, *FOR-TUNE*, Feb. 13, 1978, at 94 (description of the National Coal Policy Project).

53. Consensual processing in the form of plea-bargaining has always played a significant role in the criminal justice system. For the purposes of this article, plea-bargaining is not considered a legitimate part of a consensual process since it operates so firmly within the coercive atmosphere of criminal court adjudication.

54. See Sander, *supra* note 4, at 121.

55. See generally *DIRECTORY*, *supra* note 1.

56. *E.g.*, *DIRECTORY*, *supra* note 1, at 109 (Columbus, Ohio Night Prosecutor's Program); *id.* at 56 (Polk County, Iowa Neighborhood Mediation Center).

57. *E.g.*, *id.* at 31 (District of Columbia Citizen's Complaint Center); *id.* at 28 (Citizens' Dispute Center of Wilmington, Delaware); *id.* at 57 (Kenton-Campbell Pre-trial of Covington, Kentucky); *id.* at 126 (Community Release Agency in Pittsburgh, Pennsylvania).

58. E. VORENBURG, *A STATE OF THE ART SURVEY OF DISPUTE RESOLUTION PROGRAMS INVOLVING JUVENILES* (ABA Dispute Resolution Papers Ser. No. 1, 1982).

59. *Id.* at 5.

most governmental officials, especially judges and prosecutors. So far, the success of these programs appears to depend largely upon the amount of government funding and the extent of active support from government employees. Because of the special characteristics of the criminal field, the effectiveness of such programs is determined by local judges, prosecutors and police.

This dependence upon the adjudicatory and coercive arm of the state may be required by the very nature of the subject matter, but it does tend to limit the consensual processing methods and structures which might be successful. Nevertheless, consensual processing as an independent method for dispute resolution has been found to be effective in a subject area which most people would have prejudged as incompatible with consensual methodology.

Subject matter has played a significant role in the development of the structures established for consensual dispute processing. This is not surprising, given that the attorneys and judges intimately involved in developing responses to these problems over the years traditionally study and handle legal issues in subject matter divisions. Subject matter distinctions, however, do not exhaust the factors important to an institutional analysis of consensual dispute processing.

b. *Constituency Areas*

Within the past decade activists in the consensual movement have also recognized the importance of constituency, separate from function and subject matter, as a determinant in dispute processing.

This constituency approach views processing as the application of general consensual functions within a distinct disputant group, regardless of subject matter. Some examples of the constituency focus are: the effort to develop a unique processing structure for minor disputes; an experiment directed toward the resolution of major urban problems within a single metropolitan area; the establishment of consensual processing centers within local communities to handle all neighborhood-type conflict; and recent attempts to provide assistance in consensual processing to parties in major commercial disputes.

These efforts vary in form, procedure, coverage, and focus, depending largely upon the objectives of the promoters and the path of least resistance for financial and caseload support. The effect on dispute processing theory has been extraordinary. Common themes and problems have been recognized as crossing functional or subject matter boundaries, and the research being conducted on the genesis of disputes has enlightening implications for processing programs in all areas.⁶⁰

Minor Disputes. The courts and the legal profession recognized at a relatively early time that the parties to minor or small disputes, measured in terms of the magnitude of money damages in controversy, were a coherent group of

60. See generally *Special Issue on Dispute Processing and Civil Litigation*, *supra* note 4; *Articles and Notes on Dispute Resolution*, 88 *YALE L.J.* 905 (1979).

disputants who could be helped by a more informal procedure than that provided by the courts. The successful movement to establish small claims courts was an early application of this philosophy, although it continued to use as its base the adjudicatory system.⁶¹ During the 1970s the recognition of consensual processing as a separate field brought more attention to the opportunities for negotiation and mediation among parties in small cases. The zenith of this movement was reached at the ABA's 1977 National Conference on Minor Disputes Resolution.⁶²

At about this time questions were raised about the equity of relegating the poor, who are involved in the majority of small claims cases, to a more informal and "inferior" system of justice.⁶³ There were accusations of blatant self-interest by judges and lawyers in diverting the pesky minor controversies to other forums which would provide less due process protection for society's have-nots.⁶⁴ Contrary to these criticisms, recent studies have suggested that small claims courts may have been working better than originally assumed, providing speedy and inexpensive justice to litigants attempting to resolve minor disputes.⁶⁵ In the interim, however, the momentum for treating this constituency separately was reversed.

Although the use of the term has almost died out, the minor dispute philosophy survives in the neighborhood justice movement. Consensual processing assistance at the local level is an attempt to provide some organizational support for disputants who do not have large money amounts at issue. Such parties have often avoided the court system because the costs in time, effort and expense of invoking that process exceed the total amount of financial relief sought. Frequently, a neighborhood center may offer the only effective access for processing the dispute; the only other alternatives available would be avoidance or self-help.

Although neighborhood justice implies the provision of services to everyone within a local geographic area no matter what the dispute, in truth the local centers do target the minor dispute constituencies. These centers do not attempt to assist in conflicts which normally wind up in lawyers' offices or the court system. If they became too active in processing the paying disputes, they would most likely shatter their own public support, which usually depends

61. See J. RUHNKA & S. WELLER, WITH J. MARTIN, *SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 1* (1978).

62. See Sander, *supra* note 1.

63. Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 *LAW & SOC'Y REV.* 219, 255, 262 (1975).

64. Auerbach, *Burger's Golden Calf: A Proposal for Law Without Justice?*, *NEW REPUBLIC*, Mar. 3, 1982, at 9. *But see* Stanley, *Minor Dispute Resolution*, 68 *A.B.A. J.* 62, 64 (1982).

65. S. WELLER & J. RUHNKA, *PRACTICAL OBSERVATIONS ON THE SMALL CLAIMS COURT* 43 (1979); J. RUHNKA & S. WELLER WITH J. MARTIN, *supra* note 61, at 189-90.

upon the volunteer mediation services, discretionary referrals, and verbal support of local lawyers and judges.

Major Disputes. Some disputants, mainly large national and international corporations, have begun to look elsewhere for more speedy justice because of the almost universal problem of overcrowded court dockets and the resulting delays. This move has been encouraged by the high cost of legal counsel and the need in many complex cases for a more technically educated decision-maker.

The issues in most of these cases are highly technical. Formal court presentation would take years to prepare and cost millions of dollars in attorney fees, lost employee time, and delayed business opportunities. Rather than accept these penalties, some disputants have turned to a new minitrial system.⁶⁶

The minitrial takes on the appearance of adjudication in form, but remains consensual in fact. Typically, the parties come together to hear their attorneys argue the issues in front of an impartial expert, usually a retired judge. After this presentation the parties work toward a settlement of the issues on their own. Failing settlement within a reasonable time, the expert presents a nonbinding decision, thereby providing the parties with a third-party opinion as to either an equitable solution or the likely outcome of a court trial.

This major dispute constituency is much different from the constituency in the minor dispute area. The parties are usually wealthy corporations, experienced in legal processing and well represented by legal talent. Self-financing appears to be available for a consensual processing system which can meet the needs of this constituency. Several new private firms are currently providing these services for a fee.⁶⁷

Some parties to major national and international disputes have not chosen the minitrial method. This may be due in part to the fact that no recognized institution exists to provide a legitimate forum for consensual processing, and in part to the governmental nature of many of the disputants at the national and international levels. Current minitrial procedures and techniques are especially adapted to corporate needs and economic issues.

66. *'Managing' Company Lawsuits to Stay Out of Court*, BUS. WK., Aug. 23, 1982, at 54, 60. Another concept that has received some attention, especially in the highly scientific area of environmental pollution, is the creation of a science court, but to date no specific programs have been recommended or established. CHRISTIAN SCIENCE MONITOR, Mar. 23, 1983, at 7, col. 1. These proposals contrast with the rent-a-judge or private court programs operational in several states (California, Nebraska, New York, Oregon and Rhode Island), which are state-authorized private adjudication forums where decisions are binding and appealable.

67. One such successful private business is Endispute, with main offices in Washington, D.C. and branches in a number of other major cities across the country. Waxman, *Moving the Apart Together: Alternatives to Litigation*, DISTRICT LAW., Mar.-Apr. 1983, at 54-56; BUS. WK., *supra* note 66, at 60.

Other Constituencies. In recent years there has been an attempt to target the application of consensual processing to some rather unique constituencies.

(a) *Religious.* An organized effort has been mounted to develop a consensual processing mechanism for disputes among members of similar religious groups. The Christian Conciliation Service (CCS) is one product of this effort.⁶⁸ Despite its name, CCS does not limit its services to one consensual function, although its objectives give an overriding emphasis to conciliation.⁶⁹ Its services are not limited to either minor or major disputes, nor to disputes in specific subject areas, (e.g., family law) which have traditionally been amenable to religious counseling. The target constituency is simply the members of Christian religious denominations, no matter what their dispute.

The methodology used by CCS contains all the functions of consensual processing, but it looks to church doctrine as the main standard for guidance in settlement. The stated purposes stress the application of Christian teachings, especially forgiveness and reconciliation, in the attempt to resolve disputes among church members. CCS does offer arbitration services if the consensual assistance fails, and in this respect bears some similarity to the ecclesiastical courts of earlier centuries.⁷⁰

Religious programs have an advantage over other private systems because they have an already established institutional base, the organized churches, and are therefore able to reach their targeted constituency effectively for financial support and caseload.

(b) *Urban.* As a metropolitan area plans its future, local leaders try in their overall strategy to accommodate investment decisions by governments, businesses, and individuals alike. In some urban areas a concerted effort is made to manage or avoid future conflict by negotiating far-sighted plans at the outset.

Recently the Kettering Foundation funded mediation efforts within three urban centers in the United States.⁷¹ The aim was to pull together the government decisionmakers from the local, state, and federal agencies involved in urban investment strategy, combine them with representatives of the community leadership, and develop an agreed-upon investment strategy through con-

68. L. BUZZARD & L. ECK, TELL IT TO THE CHURCH 40-46, 91-92 (1982). There are many similar programs, some more formal than others, working within the Catholic church, most protestant denominations, the Jewish faith, and in most other organized world religions.

69. L. BUZZARD, J. BUZZARD & L. ECK, READINESS FOR RECONCILIATION (1982).

70. See Comment, *Rabbinical Courts: Modern Day Solomons*, 6 COLUM. J.L. & SOC. PROBS. 49 (1970) (history, present operation, and influence of rabbinical courts).

71. MEDIATION AND NEW FEDERALISM, PROCEEDINGS OF A ROUNDTABLE ON THE NEGOTIATED INVESTMENT STRATEGY, July 8, 1981 (Charles F. Kettering Foundation 1981).

sensual processing assistance.⁷² It was soon recognized that local business and commercial leaders were also needed at the table. Agreements were formed and communication channels developed, but the long term results from this experiment are far from clear.⁷³

This "negotiated investment strategy" (NIS) designated the metropolitan community as a single constituency and employed consensual processing functions which might be helpful to the resolution of potential future conflict. Any dispute which might relate to the growth or investment decisions of the community as a whole was considered by these ad hoc projects; no arbitrary subject matter limitations were imposed.

The NIS project is one of the few examples of a successful, organized yet ad hoc approach to supplying consensual assistance for the management or avoidance of potential community disputes.

(c) *Consumer*. Many industry-wide groups and some large corporations have established complaint processing systems in order to maintain good customer relations.⁷⁴ Although most provide some consensual functions, usually fact-finding and some mediation, they often rely upon arbitration as the primary method of dispute resolution. The targeted constituency is normally quite narrow, such as complaining purchasers of certain products (e.g., automobiles, furniture) or to all products of a certain company, but the coverage is usually coextensive with the marketing area for the products or company involved. Consumers have a reasonable chance of having their disputes settled fairly once they get into the system, although questions have recently been raised about how widely known and impartial these programs are.⁷⁵

(d) *Governmental*. Many states and some federal government agencies have established ombudsman offices or a similar grievance system to provide citizens with a consensual process for resolving their disputes with the government.⁷⁶ The constituency is large, encompassing all parties with disputes involving government activities at the level in question. The methodology provided normally emphasizes fact-finding, but sometimes includes all other consensual functions.

Since its beginnings in Scandinavia almost two hundred years ago, the ombudsman idea has had remarkable success.⁷⁷ Because these offices have been established by governments with tax support, they have exhibited a sta-

72. *Id.*

73. *Id.*

74. See Sander, *supra* note 1, at app. 43 (survey of the types of programs).

75. See generally Nader, *supra* note 11, at 29-30.

76. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *supra* note 1, at 58-65; Sander, *supra* note 1, at 22, app. 60. See generally W. GELLHORN, WHEN AMERICANS COMPLAIN (1966); F. STACEY, OMBUDSMEN COMPARED (1978); K. WEEKS, OMBUDSMEN AROUND THE WORLD (1973).

77. See E. JOHNSON, V. KANTOR & E. SCHWARTZ, *supra* note 1, at 58; F. STACEY, *supra* note 76, at 227-30.

bility, uniformity, and professional quality that is often lacking in other, less government-oriented mechanisms.

3. Structural Forms

Efforts at consensual dispute processing have followed definite structural patterns. Perhaps one of the most useful distinctions is based on the degree of governmental control.

Government Agency. The most typical structure for a consensual dispute processing program is direct governmental control. Family conciliation courts, the Federal Mediation and Conciliation Service, many neighborhood justice centers, criminal court diversion projects, small claims courts, and ombudsmen are all examples of consensual programs operated from a government agency base.⁷⁸

There is wide flexibility in the nature of the control among the various governmental programs. For example, the Polk County (Iowa) Neighborhood Mediation Center is attached to the County Attorney's office;⁷⁹ the Montgomery County (Maryland) Office of Consumer Affairs, which handles a wide range of consumer disputes, is supported by county and local block grant funding;⁸⁰ the Bristol County Probate and Family Court Mediation Service (Massachusetts) is a court-operated project with its funding source in the state government budget;⁸¹ the Citizen's Dispute Settlement Program of Dade County (Florida) is sponsored by the local judicial circuit administrative office through county general revenue funds;⁸² the Family Conciliation Court of Los Angeles County, an ongoing mediation/conciliation service for over forty years, is organized as a part of the Family Law Department of the Superior Court of Los Angeles County;⁸³ and ombudsman's offices in many states, although variously attached to the executive, legislative or judicial branches, are state agencies with funding and supervision provided in the usual governmental manner.⁸⁴

Direct government control and funding have brought stability to these programs. Once they are established, political constituencies develop to support them and fight off unfavorable change, or perhaps favorable change, depending upon one's perspective. The governmental supervision has frequently been, and continues to be, provided by local court systems or district prosecutors.

78. Of the 141 programs listed in the 1981 Program Directory, 71 can be identified as government agencies. Of the 70 remaining programs, 34 are funded primarily by the federal government.

79. DIRECTORY, *supra* note 1, at 56.

80. *Id.* at 62.

81. *Id.* at 69.

82. *Id.* at 41.

83. McIsaac, *supra* note 42, at 131.

84. See references cited *supra* note 76.

Control by the judicial system is a limiting force in the development of broad consensual programs. Standards applied to these programs are normally formulated in relation to the goals of the courts. Effectiveness is often defined either as a high rate of cases diverted from court review or as quick response to police and prosecutor referrals, though the needs of disputants may in reality be quite different. The expectations of personnel and participants alike continue to be set by the accepted judicial standard. Fairness is defined in terms of adversarial due process. Each deviation from what a court might provide must be justified by proper legal analysis. Court supervision reinforces the notion that a consensual process has legitimacy only as it relates to, enhances, or is otherwise dependent upon the traditional adjudication system.

Private Nonprofit Organization. The past decade has seen increasing numbers of consensual programs established as private nonprofit organizations. For the most part, these have been concentrated within local communities and targeted at specific subject areas. Many have developed a flexible financial and volunteer support network, but much of the early and continuing funding has come from government grants.⁸⁵ A few groups do survive primarily on private foundation money and other nongovernmental resources.⁸⁶

The activity and productivity of these groups is affected significantly by the nature of the financial support. All too often an organization which is dependent upon foundation or other private contributions must allocate a substantial portion of its professional resources to retaining continued funding. Agencies with governmental funding must also be attentive to their funding sources, but their efforts are directed more toward justifying existing expenditures in public benefit terms than toward a continuous search for and communication with willing contributors.

Private Business. During the past decade there have been efforts to develop businesses offering third-party fact-finding, negotiation, mediation and conciliation services separate from the legal profession itself. The most notable results have been related to the divorce mediation subject area and the major dispute constituency.⁸⁷ In no sense has private business made a broad institutional impact, but it is interesting that professionals, primarily lawyers, psychologists, businessmen and retired judges, have experimented with the idea that some consumers can and will pay for consensual assistance. This growing interest in a more prompt, less costly, and less adversarial processing system should continue to encourage private firms to offer their services to well-

85. See generally DIRECTORY, *supra* note 1.

86. For example, the Institute for Environmental Mediation of Seattle, Washington and Madison, Wisconsin continues to provide assistance in these limited functional and subject matter areas with the financial support of numerous private foundations. The Conflict Clinic has just been organized, separate from but associated with Harvard Law School, with the objective of providing active third party consensual services to parties involved in domestic and international conflicts of public importance.

87. See Elson, *supra* note 41, at 174-77.

financed parties of relatively equal bargaining power, but probably only to the extent that these parties perceive that they cannot receive efficient and effective processing by the courts or another appropriate governmental agency.

Ad Hoc. There have been several attempts to structure consensual programs on an ad hoc basis, sometimes with the aim of encouraging replication by government or other financially stable organizations. The coal environmental project of the late 1970's was relatively successful in bringing industry representatives and environmental groups together on a national basis in order to work toward a resolution of differences.⁸⁸ The Kettering Foundation's "negotiated investment strategy" effort was intended to encourage other similar experiments.⁸⁹ Efforts are made continuously on the international scene to intervene in major controversies in an attempt to bring the parties to a prompt and nonviolent resolution of conflict.⁹⁰ For the most part, these international mediation efforts are one-shot projects by individuals or nations and not the primary task of an existing international organization.⁹¹

These ad hoc programs have often had an important immediate impact on the people and issues involved, but they have not resulted in permanent changes in the structure of dispute processing. Flexibility and innovation are the principal advantages of such ad hoc projects; instability and localized impact are the major drawbacks.

III. EVALUATION OF CURRENT PATTERNS

Recent experience has demonstrated that the need for consensual processing assistance is substantial and almost universal. The current proliferation of individual programs is the attempt to meet this need in most subject matter areas and for many varied constituencies. It would appear that areas or constituencies not served up to now have been left out less from a lack of perceived need for, or appropriateness of, consensual methodology than because of a lack of organized or energetic sponsorship.

If this universal need for consensual processing exists, why has there been no demand for a society-wide solution? Perhaps one answer can be found in the nature of the institutional environment in which we find ourselves as consensual processing is being rediscovered.⁹² The courts and the political system

88. See Alexander, *supra* note 52, at 95.

89. See MEDIATION AND NEW FEDERALISM, *supra* note 71.

90. In the late spring 1982, the United States tried and failed to intervene as a mediator in the Great Britain-Argentina conflict over the Falkland/Malvinas Islands dispute.

91. The United Nations has often tried to serve in a mediating capacity, most recently with regard to the USSR intervention in Afghanistan. Its efforts have frequently been ineffective. There are plans under way to establish a private Foundation for International Conciliation which may provide a more workable organization for consensual intervention in international disputes.

92. As civilization has progressed within cultures and countries, the trend has

are the two traditional governmental dispute processing institutions.⁹³ Both are primarily adjudicative in nature, and the personnel of each are intensely jealous of their powers and jurisdictions. Most consensual programs have been started by or with the support of these major institutions, and are closely supervised by them. Consensual processing programs are intended by those adjudicative institutions to be truly supportive and subsidiary alternatives, not independent, equally valid means for resolving conflict.

Another answer may lie in the exuberance with which proponents have devised the existing variety of programs. The sheer number and variety of structures has diverted attention from consideration of the consensual area as a whole. Similarity in need and solution has been lost in the outpouring of effort and detail at the service-provision level.

There are major strengths and weaknesses in the current pattern of consensual processing. Its main strengths rest on the easy access it assures to the target constituency and on the ease with which one can enter the field as a third-party participant, e.g., a fact finder, negotiator, or mediator. Any person or small group in almost any community can either process a complaint as a disputant through a local consensual program if one exists, or develop a separate program as a third-party provider to supply consensual dispute processing services. Because of this intensely local character, the programs reflect more closely the needs and resources of the local people and community than would a more comprehensive nationwide program imposed from the top. Current consensual programming places a premium on flexibility. Precedent is not necessarily a determining force for establishing programs or settling particular disputes.

Another strength of the current pattern is the broad acceptance of responsibility by private individuals and organizations. Local citizens, businesses and private foundations have shouldered a responsibility for the provision to the public of conflict resolution alternatives which might otherwise have been left unprovided, or the demand for which more likely would have prompted persistent calls for government action. Concentrated governmental involvement has

been toward more formal adjudicatory institutions for dispute resolution. *See generally* Gulliver, *supra* note 11. Professor Felstiner has suggested that this phenomenon may be due in part to the lower cost of the adjudication alternatives in more complex environments. Felstiner, *supra* note 10, at 84-85.

93. For an interesting application of consensual processing to administrative rulemaking, see Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *GEO. L.J.* 1 (1982). The public educational system is another governmental institution which performs some dispute resolution functions, but its primary objective of educating young people normally takes precedence over all other functions. There are other traditional institutions which are not governmental, such as the family, churches, and business organizations. These latter groups continue to serve as dispute resolving institutions, but have not had the supervisory or controlling relationship with consensual programs that the courts and the political system have, primarily because they are consensual systems themselves.

often meant an end to rapid creative effort, and at the present stage it might have frozen development of consensual theory and application at an immature and inefficient level.

There are substantial disadvantages which attach to this intense variety and flexibility. First, the lack of uniformity imposes great obstacles to public understanding and acceptance. Today's mobile family lacks the opportunity to learn one process of consensual dispute resolution and invoke that process whenever and wherever the need arises.

Second, funding for consensual programs has been highly unstable, with perhaps the only stabilizing force the involvement of government at one level or another. Governmental support has usually entailed supervisory control from the adjudicative or coercive element of the dispute processing system, which then has imposed its own objectives and procedures on what otherwise should have been a fully consensual process.

Third, once a disputant activates a system of dispute processing, certain choices are automatically made, depending upon the type of mechanism invoked. Disputants may be reluctant to activate a consensual program which has little uniformity, stability or legitimacy unless there are no other alternatives available. Because of these uncertainties, disputants may not understand the nature of the choices they have made by contacting the particular consensual program.

Finally, disputants may be unwilling to submit to a system which bears the more adjudicative imprint of the courts or the criminal prosecutor. Because the program is ostensibly consensual, the disputant retains the power to withdraw at any time, though sometimes not without rather immediate unfavorable consequences for not reaching an agreement. Since some of these self-styled consensual programs have a latent adjudicative nature, the disputant could often be surprised to find that this promised retention of control was more apparent than real.

While creativity and flexibility may be proper and necessary for the successful development of consensual programs at this stage, serious structural weaknesses in present programming are already recognizable. They include: the confusing array of programs, procedures and forums; unstable funding patterns; a heavy dependence upon the adversarial norm through the legal profession and judicial system; and a lack of permanence. Some of these problems could be overcome through careful planning. To provide a basis for such planning, guidelines should be formulated for the development of a more comprehensive institutional framework of consensual dispute processing which could balance and complement the existing judicial and political systems.

IV. GUIDEPPOSTS FOR AN INSTITUTIONAL FRAMEWORK

A. *Guiding Principles*

The purpose of the following discussion is not to develop the clear outlines

of a unified consensual dispute processing system in the United States. Our current experience in consensual processing defies unification, and any attempt to devise such a structure would be premature.

It is not too early to formulate some general characteristics which might be keys to an effective consensual structure. The specifications for this structure must be based upon the fundamental elements of an institution: society-wide; significant; instructional; positive; and well-established. The seven principles outlined below, and the two considerations discussed in the following subsection, form an initial set of guidelines for this consensual structure. They have been developed from a review of the present variety in consensual processing programs and of the important institutional factors in traditional adjudication processes.⁹⁴

Stability. Most of the consensual programs that are currently prospering are those with strong governmental ties. This circumstance is not coincidental; it is built squarely upon the benefits provided by that governmental support, benefits which are reflected most in programs established as governmental agencies. Continuity is an obvious benefit, especially because the system will be handling disputes which may take time to develop and resolve. Consistency in financial support and low turnover in personnel are other advantages to a strong governmental link and may be crucial to the success of an institution devoted to processing disputes. Early and long-lasting legitimacy can also be the natural effect of government status, and this legitimacy is often difficult to achieve through private means.⁹⁵

The nature of government requires a relatively public process for establishing any new system for handling disputes. Such a public birth for a consensual process could be the means for providing widespread knowledge about the system and for generating broad participation. Wide public acceptance and support, a further benefit of governmental authority, would lead naturally to beneficial visibility and prestige for those involved with such a system.

94. The eight goals of labor arbitration as an alternative means of dispute resolution were also helpful in developing these characteristics. Getman, *supra* note 26, at 916. Although referring to the international arena, Professor Fisher has identified some principles of an effective mechanism that can be easily related to the domestic area:

The critical point is for a statesman to understand the function of an impartial mechanism and why it is to the interests of the state to use one. It is not essential that the institution be judicial, or that it have mandatory jurisdiction to resolve a dispute in a binding manner, or that its decision be accepted by other parties to the controversy, although all those features are desirable. What is essential is that the mechanism be legitimate, be visibly independent of manipulation or coercion by the contending parties, be 'fair,' deal with problems in small enough segments so that not too much is involved in any one determination, and that such determinations be formulated in a decisive manner.

R. FISHER, POINTS OF CHOICE 85-86 (1978).

95. *See id.* at 824-26 (importance of legitimacy to the legal system).

There are disadvantages inherent in the provision of comprehensive consensual services by a governmental agency. General bureaucratic forces, such as inflexibility, unresponsiveness, lack of accountability, and lack of imagination, head the list. Excessive reliance on uniformity and continuity, and potential conflict of interest and credibility problems when a governmental agency is a disputing party are additional difficulties. None of these disadvantages appears to be insurmountable, especially in light of the substantial benefits of governmental sponsorship.

Few think it surprising that the government is expected to provide, virtually free of charge to the user, an adjudication process for dispute resolution. Yet, there is no expectation that the same government should provide a less restrictive or more consensual process to assist its citizens in settling their disputes.⁹⁶ Perhaps a new constitutional principle has grown within our society. Each member may now have a fundamental right of access to a peaceful means of conflict resolution. If our government provides any dispute processing means, such as a court system, perhaps it has a duty to provide the least restrictive means for accomplishing that goal.⁹⁷ Once the existence and limits of such a right and the nature of the term "least restrictive" as applied to this area are defined, this argument could be a powerful stimulus to the implementation of a comprehensive governmental system for consensual processing.

Basic Uniformity. All the various consensual processes should have a common philosophical base. Any mechanism offering consensual processing should provide similar functional assistance for similar types of disputes and similar parties, regardless of geographic location. As with the court systems, procedural terminology or the details of governance need not be identical, but a basic uniformity is necessary to develop a truly society-wide institution.

Uniformity promotes other valuable elements that support a strong consensual dispute processing structure. To be a useful and respected method for dispute processing, these consensual programs must be well known by the public. In our highly mobile society, the present lack of uniformity among consensual programs serves as an obstacle to broad public participation.

Open Access. A society-wide institution must have a physical presence throughout society. It cannot be limited only to the most populous states, cities, or counties, or to the areas where local residents are aggressive enough to establish their own special programs. Like our courts and political system, a

96. It is usually assumed that any focus on alternatives to judicial dispute resolution will not necessarily involve the state in the provision of these services. See, e.g., Abel, *supra* note 14, at 813.

97. See U.S. COMMISSION ON PROPOSALS FOR THE NATIONAL ACADEMY OF PEACE AND CONFLICT RESOLUTION, TO ESTABLISH THE UNITED STATES ACADEMY OF PEACE 65 (1981): "While recognizing the variety of meanings the word 'peace' may evoke, the Commission suggests that peace itself may be a fundamental right, calling for us to apply 'least restrictive' or 'minimally intrusive' principles in devising means for its pursuit."

consensual processing system must be universally available to permit all potential users to have physical access to the forum.

The concept of open access includes the absence of jurisdictional limitation as well as the requirement of physical availability. The nature of consensual processing is inclusive rather than exclusive. Access should be open to all regardless of the subject matter, the nature of the party or constituency, or the type of dispute.⁹⁸ Since there is no way for a disputant to be bound by any third-party decision within the consensual process itself, there is little reason to foreclose the use of the system to any particular type of disputant or dispute. The goal of fair results can be protected in part by the provision of effective services by consensual system personnel and in part by a measure of individual responsibility which should be expected of members of any democratic society.

The demands of a specific subject matter may require a high level of expertise from those providing the consensual assistance. Considerations of proper venue or convenient forum, to use adjudicative terms, may therefore be appropriate in determining which disputes will be handled by which organizations or programs. For example, the expertise needed for complex commercial cases or for international conflicts would require a regional or national setting because of the limitations of demand and resources. Expertise in other areas, such as landlord-tenant, consumer or family disputes, may need to be provided on a more local basis such as at the county, city, or neighborhood level. Consensual processing assistance would still be available to all parties under similar guidelines, no matter where they resided.

Balance of Formal/Informal Procedure. Several considerations are important for the development of the procedural aspects of a consensual process. First, the existence of any structure presumes a certain degree of formality. Set procedures for intake, investigation, and handling of disputes lend clarity to the process and would not be antithetical to the consensual concept. There must be this commitment to a recognized system of procedure, even if the procedures incorporate a substantial element of informality or flexibility, in order for disputants to have notice of the ground rules of the process which they are invoking. Without some known procedure, the system's legitimacy and continuity would be endangered.

Second, the extent to which a consensual process balances formal procedures with the informality of the consensual functions will determine the degree of its public acceptance and use. The courts have highly developed formal procedures because of the adjudicatory nature of the court process. These procedures must insure fairness to each disputant within the process, since there is no escape from an adverse final decision. Fairness is likewise an important element of a consensual system and provides a sound rationale for a certain

98. By "type of dispute," I mean whether the dispute concerns present or past events, or whether it is a planning exercise in the future. See note 7 and accompanying text *supra*.

amount of formal procedure, but the fact that no final decision can be imposed on the parties by the system itself remains an important guarantee of fairness.

Finally, a consensual process should offer the parties flexibility and scope for creativity—the freedom to improvise and innovate in procedure and in solutions. This is a principal difference between consensual and adjudicatory processing, and it must not be lost through over-formalization.

Confidentiality. The hope for consensual dispute settlement often rests on the degree of confidentiality, or lack of publicity, maintained during the negotiation or mediation process.⁹⁹ Distortions in information released to the public frequently occur and provide an almost insurmountable obstacle to consensual processing. Even accurate public communication can so disturb the disputing parties or their constituencies that the success of negotiations is seriously compromised.

Confidentiality during the process of negotiating or mediating an agreement is a critical requirement for a consensual system. The agreement which might result from the consensual process could be publicly available at the discretion of the parties or as dictated by the nature of the enforcement process.

Impartiality. One of the primary ingredients of effective consensual processing is trust. This trust is usually based on many objective factors, including past experience with promises kept and the checks and balances built into the resulting agreement. It does not involve blind faith. A consensual system would be required to build or protect the trust necessary for the agreement of disputing parties.

Impartiality is a necessary element of organizational third-party participation in such trust-building. The disputants will have difficulty developing the experience or the checks and balances if they are skeptical of the objectivity of the fact finder, negotiator, or mediator.

Impartiality is not simply a label that can be attached to an institution. It must be earned by those working within it. The initial years of experience are crucial to its development. Any institution which demonstrates such characteristics as confidentiality and independence will have an excellent chance of establishing quickly a reputation for impartiality.

Independence. A common feature of almost all present consensual programs is a lack of independence from other powerful institutions in society. Although some interdependence is a fact of life within our complex dispute

99. Seclusion from the press and commitment to confidentiality are often credited for the success of the 1977 Camp David accords between Egypt and Israel. Confidentiality is usually viewed as a prerequisite to consensual processing in the interpersonal setting, and as a legal problem under the current status of evidentiary rules in most jurisdictions. Comeau, *Procedural Controls in Public Sector Domestic Relations Mediation*, in *ALTERNATIVE MEANS*, *supra* note 22, at 79, 87-93; Elson, *supra* note 41, at 180.

processing structure, the extent of the present dependence upon the court system imposes an unhealthy constraint on the proper development of consensual processing.

Relative independence from the supervision of other dispute processing systems is a prerequisite for the full growth of a consensual institution. Courts and political institutions have disparate objectives and priorities which should not exert a controlling influence on the decisions within a consensual process. If adjudicative systems continue to shape the consensual system, the latter will remain as an "alternative" to adjudication for so long as adjudication personnel decide it to be worthwhile. Self-interest has a way of limiting the scope of inquiry, insight, and innovation.

Independence should take several forms. First, it should involve a degree of financial independence consistent with our democratic process. Within government, the courts have been subjected to a political budgetary process and have prospered. A consensual system could receive similar treatment, whether as a part of government or as a private institution.

Second, although it must continue to be accountable collectively for making a positive contribution toward the resolution of conflict in society, it must not be required to resolve any particular dispute. The people operating the consensual process must not be forced to have a personal and professional stake in the outcome of any particular case, even though they have a stake in a positive success rate over time. Pressure for settlement imposes demands on the participants that are inappropriate in the consensual process, and would thereby defeat the primary benefit of the nonadjudicative functions. The consensual process is not meant to be the final point on a dispute processing continuum. The adjudication system exists to provide mandatory resolution of conflict. There must be no such expectations of the consensual system.

Finally, the establishment of an independent consensual process should not obscure the interrelationship that must exist between such a process and the other systems for settling disputes within society. A consensual dispute processing institution should be a part of a comprehensive and phased system of settlement assistance made available to disputants. It should not replace other systems already established, but should serve as a separate and complementary system.¹⁰⁰ It is critical to the formation of a new system that it not pose a threat to the positive elements of the traditional systems. Independence does not mean complete freedom to usurp the functions of other dispute processing systems. The interaction of the many different systems may assure continued constructive criticism and creative competition. Independence contains within it the necessity of interdependence.

100. Consensual patterns within the court process and the political system can exist side-by-side with a consensual processing institution. Such an institution should also be able to coexist with the other private consensual programs in effect now.

B. *Special Considerations*

Two factors of great significance remain after recognition of the seven guiding principles discussed above. The two additional considerations, personnel and accountability, receive separate attention because their operational nature differs significantly from the seven structural principles. Despite this separate treatment they remain critically important to the development of a viable consensual system.

Personnel. One of the limiting elements within the judicial system is personnel. The legal community is the only professional access route to the courts, both for disputants (with only minor exceptions, such as in small claims courts) and for persons wanting to be selected as judges. The nature of legal education and law practice reinforces the adversarial or competitive base for dispute processing in the courts. Court hearings and appeals are the norm, and the court-made standard is what all settlement options are measured by.

This specialization may be satisfactory to the courts, but it has little place in a consensual system. There is no reason why qualified practitioners from many professional fields, including law, medicine, psychiatry, psychology, education, engineering, and business, cannot share the caseload, the access to the process, and the responsibility of providing consensual assistance. The only requirement might be certification in a professional specialty authorizing the holder to work with members of the public. The boundaries of that specialty would define what the professional could do for an individual disputant or for all the parties to a dispute.

Personnel training in consensual methods is vital to the credibility and success of a consensual system, but that training must not be narrowly defined. The principal objective of the system is to provide the parties with assistance in the consensual processing functions of fact-finding, negotiation, mediation and conciliation. The training which is crucial is that which helps parties through these consensual functions. Law is only one helpful guide. Psychology and commercial or educational relations are among many other areas of professional training which may be relevant to the consensual process. A team approach to helping the disputing parties could be an even more productive method.

Flexibility in determining personnel needs is the best means for achieving a successful consensual institution, although some special certification procedure might be needed to ensure that negotiators and mediators have adequate experience and interest in consensual processing.

Accountability. If consensual processing is viewed as a least restrictive method of handling disputes, accountability becomes a critical consideration. The public wants and deserves to have its dispute processing institutions account for the operation of what could be termed a public trust. A credible method of accountability is all the more important since the institution will need to maintain strict confidentiality.

The consensual nature of the system provides at least an element of ac-

countability. The adjudicatory systems for dispute processing will still remain, and disputants will invoke the consensual process only by choice. Poor performance will surely reduce the number of people willing to take their disputes to that system. This alone is not a sufficient check on the performance of the system. There is often too big a gap between an institution's actual performance and the public's perception of that performance to rely completely on such a voluntary system of accountability.

Present consensual programs have established various objective methods of accounting for and justifying time and money spent. The normal method, especially among court-based programs, is to provide statistics showing rates of diversion of cases away from the courts resulting from settlement by negotiation or mediation assistance.¹⁰¹ Court diversion statistics are particularly interesting to judges seeking relief from crowded dockets. Other statistical standards should be developed to provide a more consensual stamp. The annual or biennial reporting of caseload statistics and outcomes may provide an appropriate level of public accountability for performance.

Accountability also implies some method for evaluating personnel. A consensual processing system by its very nature would be heavily labor intensive. Procedures for hiring, promoting, and firing employee and volunteer personnel would need to be established in order to promote public responsiveness as well as professional career enhancement. This would not require complete uniformity system-wide, just as there is not uniformity among the states for court personnel, but there should be a commonly accepted standard of personnel selection which would promote the credibility and legitimacy of the system.

V. CONCLUSION

The present systems of dispute processing have traditionally been classified into two major groups: the court process and all other alternatives. Before a proper balance can be established among all the alternative processes, the field must be divided along different lines. The division most useful to participants would appear to be based upon whether the disputant or a third party controls the outcome. Such a division would categorize the field of dispute processing into consensual and adjudicatory patterns.

Consensual processing in the United States is marked by great interest and exuberant activity. The variety of programs is extensive and appears to be expanding as people with interests in this area implement their individual ideas on the local level. Existing programs are often categorized according to the consensual methodology which they use, the subject matter handled, the type of constituency served, or the organizational form taken. This enthusiasm has obscured the fact that little attention has been paid to the development of

101. Such reporting also demonstrates the limitations that occur when the adjudicatory system controls or supervises consensual programs. A primary goal of court diversion is inconsistent with a fully functioning consensual system.

ideas for a more comprehensive application of consensual processing.

In designing a comprehensive system, the guiding characteristics should be in accord with the social and cultural setting within which it must operate.¹⁰² These guiding principles should include: stability, basic uniformity, open access, a balance between formal and informal procedure, confidentiality, impartiality, and independence. Special consideration should also be given to the problems of personnel and accountability in order to avoid substantial difficulty in the operation of the system.

A comprehensive consensual dispute processing institution would promote prompt and creative settlement of conflict in our modern industrial society. It may in fact be the constitutionally required, least restrictive means of dispute resolution. At present the United States has only the rudiments of such a consensual system. The instability and lack of uniformity in the present patterns are serious obstacles to improvement. Our consensual nonsystem, dominated as it is by the judiciary and the legal profession, may have difficulty rising to full development without a substantial commitment to independent research and experimentation in the organizational aspects of consensual processing.

I have carefully avoided a description of an ideal consensual institution. Such an ideal may not exist. This Article has outlined some essential characteristics which any comprehensive consensual institution should embody if it is to succeed. The development of a particular institutional framework awaits further research and discussion by interested observers from all professions.

102. Nader, *supra* note 11, at 46.