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DISPUTE RESOLUTION: A MATRIX OF MECHANISMS

Nancy Neslund*

I. INTRODUCTION

A. *Purpose of the Article*

The purpose of this Article is to respond to the oft-repeated comment that, in spite of the massive attention various dispute resolution mechanisms have received in the last decade, theoretical research in the area has been woefully lacking.¹ This Article is not intended as a culmination of dispute resolution knowledge, but as a necessary first step, fabricating a structure of dispute resolution mechanisms on which later research, theoretical and empirical, can hang. The output of the Article is a suggested organization of the body of knowledge known as dispute resolution, or popularly—alternative dispute resolution or ADR,² into its three component parts (dispute resolution mechanisms, dispute variables and process goals) and a preliminary attempt to show how these components are correlated. This will be done through the use of both text and charts.

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1. Such comments include the following: "The legal scholars have not done very much in the way of thinking about alternative dispute resolution and how it relates to adjudication and the possible disadvantages it might pose for the system." Judicial Conference, *Recent Developments in Alternative Forms of Dispute Resolutions*, 100 F.R.D. 512, 518 (1983) [hereinafter *Recent Developments in ADR*];

"In evaluating ADR, we must isolate the different attributes of each of the various alternative dispute mechanisms and of the courts, both to make our comparisons meaningful and to understand more fully what each procedure has to offer." Raven, *Alternative Dispute Resolution: Expanding Opportunities*, ARB. J. 44, 45 (1988);

"Very little theoretical or empirical progress has been made" in developing guidelines for the systematic evaluation of cases for their ADR potential. Green, *Corporate Alternative Dispute Resolution*, 1 OHIO ST. J. ON DISP. RESOL. 203, 277 (1986);

"[W]hat we need to do is continue developing . . . a typology of legal disputes and some set of indicators and contraindicators of the types of alternative processes to which they respond." Judicial Conference, *How Lawyers and Judges Can Use Alternatives to Litigation*, 101 F.R.D. 220, 232 (1983) [hereinafter *Alternatives to Litigation*].

2. This Article takes as its subject matter the entire panorama of dispute resolution mechanisms, not just those which under some definition are classified as "alternative" dispute resolution mechanisms. The belief is that the principles derived from the study of the resolution of disputes should be equally applicable and explicative of traditional dispute resolution mechanisms, such as courts and legislatures, as of the "alternatives," such as arbitration and negotiation.

One of the problems facing anyone wishing to work in the area of dispute resolution is the difficulty of gleaning general principles or evaluating alternative processes in an area that comprises literally an infinite number of different processes. One of the assumptions of this Article is that, although there are indeed an almost endless number of potential dispute resolution mechanisms, each of these mechanisms consists of a selection, albeit unique, from only a finite number of system characteristics. Further, the assumption is that an analysis of dispute resolution in its broadest sense is possible if we can identify and catalog these system characteristics. A subset of the existing literature in the dispute resolution area begins to do just this, but without any pretense of completeness. Therefore, Part II of this Article attempts to advance these initial attempts by taking a more comprehensive approach to the problem, although it is to be expected that experienced practitioners will wish to add additional characteristics (hopefully only minor in number).

Commonly heard among dispute resolution aficionados is the phrase, "let the forum fit the fuss." Much of the literature has raised the problem of identifying, given a particular dispute or class of disputes to be resolved, a principled approach to choosing a compatible mechanism for the resolution of that dispute. Most of the "rules" for choosing are in the nature of received wisdom from practitioners who have reached certain working conclusions from their own successes and failures. Understandably in a field this new, this received wisdom can be contradictory.³ Whereas Part II looks at the "forum" half of the equation, Part III looks at the "fuss" and seeks to categorize the types of dispute-related variables that have been suggested as relevant. Loosely, they fall into two categories: characteristics of the disputants⁴ and characteristics of the underlying issue in dispute.

The meatiest section of the Article is Part IV. By far the lion's share of the present literature stops after combining aspects of Parts II and III. The contention here is that such an approach leaves out the most important consideration, the consideration that turns analyses and selections in the dispute resolution area into principled, as opposed to just practical, analyses and selections. The topic of Part

3. For example, a number of authors have opined that ADR mechanisms are inappropriate for use where disputes are over deeply-held principles or fundamental values or have significant public impact. Hatch, *Alternative Dispute Resolution in the Federal Government: A View from Congress*, 4 *TOURO L. REV.* 1, 5 (1987); Banks, *Alternative Dispute Resolution: A Return to Basics*, 61 *AUSTRALIAN L.J.* 569, 570 (1987); Green, *supra* note 1, at 279; Fine, *CPR Working Taxonomy of Alternative Legal Processes Part III*, *ALTERNATIVES TO HIGH COST OF LITIGATION*, Nov. 1983, at 5, 12. On the other hand, "many are suggesting that non-adversarial procedures are appropriate, desirable dispute resolution procedures that should be invoked with increasing frequency to resolve both the mundane and the most pressing social issues of our times." Stulberg, *Negotiation Concepts and Advocacy Skills: The ADR Challenge*, 48 *ALB. L. REV.* 719, 739 (1984).

4. Some definitions of repeated terms may be useful at this point. A "dispute" will be defined as an issue or collection of issues needing or benefiting from simultaneous solution. "Disputant" will be used to refer to an actual individual or entity with an interest in a dispute. "Party" will be used to refer to a disputant and/or a representative of a disputant. A "representative" may or may not refer to an attorney. "Attorney" will be used where that is the only type of representative referred to.

IV is process goals, goals such as efficiency, predictability, accessibility and fairness, to name only a few. To make rational evaluations and choices in the area of dispute resolution, we must look not only at the practical limitations of system characteristics and dispute variables, but also at social goals which are either enhanced or hindered by our choice of procedure.

Part V contains suggestions for the use and further development of the structure presented in the body of the Article. For example, the framework created can be used in analyzing such ADR issues as the desirability of a process in light of a specific controversy, the constitutionality of a particular process or the design of a new process. Or, alternatively, the framework created can be used to provide a focus for future theoretical and empirical research, such as testing the working conclusions drawn in this Article or drawing and testing additional conclusions drawn by the reader from the material presented. Some specific suggestions will be made.

B. Research Methodology

The bulk of dispute resolution literature has been written and published in the last decade. It seems to be expanding geometrically as time passes. The literature search done for this Article located close to 200 articles, as identified in the bibliography attached as an appendix to this Article. This is not, however, an exhaustive listing of the existing literature, even as of the date the literature search was done. Some articles which might have contributed to this work were not locally available to the author. Likewise, a number of published books that bear on this topic are not included in the bibliography. Nevertheless, the articles reviewed probably represent an acceptable cross-section of that available, based on a review of the citations contained in the publications which were available.

Existing literature largely falls into one of the following categories: (1) overviews of one or a few general categories of ADR mechanisms intended to familiarize the public and lawyers with the basics; (2) more detailed descriptions of particular ADR programs (often experimental in nature) actually in operation and accessible to the authors; (3) some empirical studies of sample ADR programs (focusing on only one type of ADR mechanism and comparing the results to information available about court adjudication) and (4) a few, more theoretically slanted articles either looking at one aspect of dispute resolution as it is manifest in a variety of mechanisms or analytically developing one alternative in greater depth or suggesting the barest beginnings of an analysis of multiple ADR methods. Nothing thus far has attempted to create a matrix of mechanisms spanning the dispute resolution continuum in any substantial degree of detail.

The raw material for the present Article is the literature identified in the bibliography.⁵ From the descriptions and observations of those manipulating the fabric of present ADR experiments, common threads were collected and assembled and the richness of multiple observers was attempted to be incorporated. The more theoretical forays into ADR were used to identify overarching themes and develop a framework with which to explain and further the theory of dispute resolution. It must be emphasized that the result is only a beginning step, but hopefully a significant one, in the development of general dispute resolution theory. The intent has been to be as comprehensive as possible, in the inclusion of the variety of available dispute resolution mechanisms (including such traditional mechanisms as legislatures, courts and administrative agencies) and the identification of system characteristics, dispute variables and process goals. The assumption is that theoretically sound conclusions about dispute resolution generally must be able to take into account and work equally well on any of the nearly infinite variety of dispute resolution processes and types of disputes which arise in modern society.

II. DISPUTE RESOLUTION MECHANISMS

A. *Description of Mechanisms Used to Illustrate the Dispute Resolution Continuum*

As previously stated, there are as a practical matter an infinite variety of dispute resolution mechanisms which could be created that run along a continuum that has legislation at one end and negotiation at the other.⁶ However, most of these mechanisms can be grouped into a manageable number of general classifications that span the length of the continuum and adequately serve to illustrate the material presented in this and later sections of this Article. The general classifications that will be used here are set forth below, with such description as seems necessary.

Legislation: In our system of government, legislation is passed only after two houses have agreed on the exact form of the legislation and either the executive approves it or it is passed over an executive veto. The decisionmakers are thus multi-tiered, interbranch, representative and politically accountable to their constituents.

5. This Article attempts a synthesis of the ideas, experiences and analyses of prior authors who have written in the broad area of dispute resolution, as well as those of this author. As such, it is frequently not possible to attribute particular components of the present Article to a specific predecessor and I will not attempt to do so. I am indeed indebted to all of those whose papers are referenced in the attached bibliography. Attribution will be made where a direct quote or a specific development or example is referenced in the text.

6. As described here, the continuum does not include a vast array of possible responses to certain disputes, such as lumping it, coin-tossing, voting, brute force and war. These mechanisms are, by and large, not systems based on principle and do not involve the intervention of a human decisionmaker.

Negotiated Legislation: This varies from traditional legislation in that a consensus bill is drafted to reflect prior negotiations among interested groups, both private and public, under the aegis of the legislature. When the draft is introduced in the legislature, it carries with it an endorsement from the groups participating in the negotiation. It has been used in both Massachusetts and Wisconsin, where the experience of the latter has been that, once introduced, such a consensus bill goes through the remainder of the legislative process without amendment.⁷

Administrative Rulemaking: The particular type of rulemaking used as illustrative here is notice-and-comment rulemaking in the form provided in the federal and most state administrative procedures acts (APAs). Following public notice of a proposed rule, the agency receives comments from interested persons, often only in written form, reviews those comments and promulgates a final rule.

Negotiated Rulemaking: In the variation used in this Article, the agency promulgating the rule assembles representatives from various interested groups to negotiate the proposed rule before it is put out for comment. The agency is represented during the negotiations, not as an interested party actively negotiating, but as a facilitator and to give feedback to the negotiators on the likely reception all or part of the negotiated proposal may receive at the agency level. The negotiated proposed rule is published as the proposed rule and the process continues as with other notice-and-comment rulemaking.

Court Adjudication: The model used here is the paradigmatic civil case which goes all the way through a trial before either a judge or a jury, with all of the attendant procedural and evidentiary rules in place and resulting in a final judgment, with the possibility of appeal.

Summary Jury Trial: This is a settlement device under the auspices of a court. Particularly where a lengthy jury trial is expected, the judge may first empanel a mock-jury, chosen from the regular veniremen, to hear the substance of the case presented by the opposing attorneys. No witnesses are presented, rather the attorneys summarize the evidence which would be presented at a full trial and then argue their case before the jury. After deliberation, the jury reports a non-binding consensus verdict which is intended to permit the parties to discover how an actual jury might decide their case, but more quickly and more cheaply than with a full-blown jury trial. The assumption is that the greatest barrier to settlement has been uncertainty as to how the case would be treated by a jury. The actual disputants, not just their attorneys, are required to attend. Following the jury verdict, the disputants and their attorneys are permitted to discuss the case with the jurors, after which settlement negotiations are reopened between the parties.

Court-Annexed Arbitration: This procedure goes under a variety of names in ADR literature, including mandatory arbitration and mandatory mediation. It is another settlement device under the auspices of a court. In an established class of cases, for example where only money damages are sought and the requested

7. Fine, *supra* note 3, at 5, 11-12; Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421, 1424-25 (1983-84).

damages fall within some predetermined ceiling, civil cases are assigned to arbitration before a court-appointed arbitrator or panel of arbitrators. The case is presented to the arbitrator by opposing counsel in a restricted time frame. There is no live testimony. The decision rendered by the arbitrators the day of the hearing is non-binding, but it becomes the judgment of the court with no right of appeal if it is accepted by the parties within a specified time period, such as 20 days. If either party rejects the arbitrator's decision, a trial de novo will be had, but sanctions will be taken against the rejecting party if they do not do materially better at trial. The sanction is often the payment of the cost of arbitration (a fairly minimal amount, such as \$200-300). The process is intended to allow the parties to have a hearing on the merits at a lower cost in time and money.

Private Judging: Often referred to as rent-a-judge, the parties may request the court to appoint a mutually acceptable private judge to hear the dispute on an expedited basis and at a time convenient to the parties, avoiding the court docket backlog. The parties pay for the judge and receive a full trial, complete with all procedural and evidentiary protections, unless the parties choose to relax them. The decision, which is rendered within a month of the hearing, is binding on the parties and becomes the judgment of the court, with all rights to review in place. Unless the decision is appealed, requiring the parties to agree upon a record for appeal, the proceedings are confidential except for the final decision, which contains at least brief findings of fact and conclusions of law.

Administrative Adjudication: "Administrative procedure was the original alternative dispute resolution technique. However, the administrative procedures [have become] increasingly institutionalized and . . . rigid and cumbersome . . ."⁸ The standard here is again agency action based on an APA. It is characterized by a hearing before a civil service hearing officer involving somewhat less rigorous rules of procedure and evidence, with the initial review by the agency head before court review can be sought. Court review is restricted under an "arbitrary, capricious, abuse of discretion or otherwise not in accordance with law" standard.⁹ The decision is of course binding unless appealed and reversed.

Arbitration: "[A]rbitration is a process in which a dispute is submitted to a third party or neutral (or sometimes a panel of three arbitrators) to hear arguments, review evidence and render a decision"¹⁰ based on principle. The rule of decision need not necessarily be the rule of law, but is what is set by the parties. The arbitrator is selected by the parties and may be a specialist in the subject area of the dispute. Although the decision to submit a dispute to arbitration is voluntary, the decision once rendered (usually within a month of the hearing) is binding. Appellate review of the decision is only on very limited grounds, such

8. Perritt, *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 PEPPERDINE L. REV. 863, 865 (1987).

9. 5 U.S.C. § 706(1)(A) (1983).

10. Cooley, *Arbitration vs. Mediation—Explaining the Differences*, 69 JUDICATURE 263, 264 (1986).

as arbitrator partiality, misconduct or failure to heed the limits on the arbitrator's power.

Med-Arb: Med-arb is the serial use of first mediation and then arbitration. The same third party acts first as a mediator and, if mediation does not result in a complete resolution of the dispute, then as an arbitrator as to any remaining issues. The advantage of this process is giving the parties an opportunity to settle their own dispute, while insuring that the process will in fact lead to a complete resolution without having the additional cost, in time and money, of educating a second neutral.

Mediation: "Mediation is a process in which an impartial intervenor assists the disputants to reach a voluntary settlement of their differences through an agreement that [frequently] defines their future behavior."¹¹ Whatever procedural or evidentiary protections exist are only those to which the parties have agreed. Although legal arguments may be made, the process is generally one of persuasion, not proof; the focus of the argument is on the disputants' interests, not their rights; and the result is usually a compromise outcome. Both the choice of mediation and the outcome are voluntary actions of the parties. The resolution is not reviewable as such, but may be enforceable under contract law.

Mini-Trials: A mini-trial is not really a trial, but rather is a structured settlement procedure. The disputants' attorneys make summary presentations of their legal proofs and arguments before a party-selected third-party neutral and principals of the disputants who have the power to settle the dispute on behalf of the disputants. Procedural and evidentiary rules are set by the parties. Following the presentations, the disputants' principals adjourn for settlement talks. If they reach an impasse, they may use the neutral in a role as facilitator or advisor. The outcome is a consensual and, usually, compromise agreement. Again, it is not appealable, but rather is enforceable to the extent it comes under contract law.

Neutral Factfinding: Neutral factfinding is generally used to resolve only a subset of complex technical, economic or scientific issues contained in a greater dispute. The neutral is a specialist in the appropriate area and is mutually selected by the parties. Rather than making a decision based on information provided by the parties, the neutral has investigatory powers to discover the information necessary to the decision. The outcome is not binding on the parties, but may be admissible as evidence if the dispute later goes to trial.

Negotiation: Negotiation has been described as the art of persuasion. It is a process by which disputants attempt to resolve their differences through compromise and without the aid of a neutral third party. It is a completely voluntary process with the desired end being consensus. It is indeed the method that resolves the lion's share of disputes in our society. It is both informal and largely unstructured.

11. *Id.* at 266.

B. Identification of Basic System Characteristics: Table 1¹²

Each of the selected dispute resolution mechanisms is an aggregate of component parts, which can be categorized and then compared and contrasted to their counterparts in the other listed dispute resolution mechanisms. Determining which attributes to include for such comparative purposes is ultimately an individual judgment call. However, an understanding of how the choices were made in this instance will allow the user to evaluate how comprehensive the assemblage is and how reliable hypotheses and conclusions drawn from the material might be. Two primary approaches were used to determine characteristics to include. The first was a sifting of the available literature (see the appendix) for qualities previous writers have found significant. The second was analyzing process goals (see Part IV) for system characteristics which would either support or hinder achieving those goals. The result of this dual process is the information contained in Table 1.¹³

The system characteristics in Table 1 are loosely ordered in related groups: the first three are preconditions for using a particular process; the next two identify restrictions on information used for decisional purposes; the following three focus on the method of presentation; the five characteristics next in order present information on third parties and the system decisionmaker; identification of the degree of government involvement and the source of the decisional law of the case come next; and, finally, the immediate process output and post-process aspects are presented.

The information is presented in table format because that is the most efficient method to provide an immediate and visual comparison of the characteristics of the fifteen chosen dispute resolution mechanisms. However, the chart is necessarily in summary form and, thus, some further explanation is required.

With regard to system preconditions, as can readily be seen, courts and court-affiliated processes are substantially restricted in the disputes that they can hear. This has particular importance for two different types of disputes (discussed more fully in Part III): polycentric disputes (disputes with complex interrelationships due to the number of disputants, positions and issues involved) and non-legal disputes not recognized by the legal system (e.g., grade disputes between teachers and students). The notice characteristic is not limited to required notice, but is

12. All four tables are printed on facing pages, in the same type size and with identical column spacings. The intent is to facilitate reproduction of the tables and vertical assembly. Readers wishing pre-assembled vertical charts containing all four tables may write to the author at P.O. Box 884, Salem, OR 97308.

13. Two technical notes to Table 1 are necessary. First, some of the processes are really hybrids, essentially composites of two separate processes used in series. The characteristics of the two pieces may be quite different. At times it is necessary to identify the characteristics of both on the chart. Where this is done, the complementary characteristics are both listed and separated by a "/", where the characteristic of the process used first appears first and the characteristic exhibited by the second process follows the "/." Second, the abbreviation "NA" is used where the characteristic under consideration is not applicable to a particular dispute resolution process.

intended to reflect the type of notice that can usually be expected. For some procedures, the notice identified raises further issues of timeliness and effectiveness.

Both of the next entries, the source of decisional information and discovery, are intended to reflect what is typical for each of the listed mechanisms. The primary interest with regard to discovery, however, is what discovery can be compelled. An entry of "complete" refers to all of the discovery regularly available in a civil suit. "Limited" indicates that available discovery is less using these procedures than in court. "Parties may reduce" recognizes that the process starts with complete discovery, but the parties may choose to reduce it. This differs from "parties set" in that this means that the parties start with a blank slate, but may choose to provide certain forms of discovery. The solo designation of "voluntary" would indicate that discovery cannot be compelled.

A similar relationship holds in the next category, evidentiary and procedural rules, between the designations "relaxed by parties" and "parties set" as holds between "parties may reduce" and "parties set" in the category of discovery. The designated mode of presentation only indicates the predominant mode for any given dispute resolution mechanism. For example, the predominant job of an attorney in court is to present proofs (albeit persuasively) of fact and law supporting the client's position, although in cases where the facts are not at issue and the legal issue is one of first impression, persuasion will be the primary mode of presentation. Similarly, the role played by attorneys indicated for each of the processes is an attorney's preeminent role in that process and not the only role that might be played.

In the next grouping, one must distinguish between the third party (if any) and the decisionmaker. They may or may not be the same individual, as shown by the last entry in this grouping. The characteristics of the third party are frequently, but not always, a function of the method used to choose them. For example, many judges are political appointees, but because of their life tenure they are characterized as political. Further, there may be considerable, and justified, argument that neither agency heads nor hearing officers qualify as "specialists." This needs to be kept in mind when drawing conclusions based on those characteristics. The terminology used in the category "TP role" is as follows: a decisionmaker is one who makes a binding decision to resolve the entire controversy, an evaluator is one who makes a decision only on designated issues of the greater controversy, an advisor is one who makes a non-binding decision resolving the whole dispute and a facilitator makes no decisions at all.

The next two entries are substantially self-explanatory. One simply identifies the government's role in each process, if any, and the other the source of decisional "law" used.

The entries of the last grouping require some further explanation. Quite a lot of information is contained under the heading "process output." The intent is to identify for each dispute resolution mechanism: (1) whether the outcome is a consensus decision or an assessment of rights (or, in the case of neutral fact-finding, truth), (2) the nature of the relief afforded these particular disputants (e.g.,

Table 1
Direct System Characteristics

	Legislation	Negotiated Legislation	Rulemaking	Negotiated Rule-making	Court Adjudication	Summary Jury	Court-Annexed Arbitration
Voluntary participation	Yes	Yes	Yes	Yes	Plaintiff only	No	No
Forum's jurisdiction limited by	Constitution, fed/state split	Constitution, fed/state split	Statutory delegation	Statutory delegation	Subject matter and in personam, ripeness, political, non-legal	Subject matter and in personam, ripeness, political, non-legal, non-jury	Subject matter and in personam, ripeness, political, non-legal
Notice	Indirect	Indirect, some individual	Public	Public, some individual	Individual	Individual	Individual
Source of decisional information	Unrestricted	Unrestricted, but mainly parties	Agency investigation, parties	Agency investigation, parties	Parties	Parties	Parties
Discovery available	Subpoena	Voluntary, subpoena	Subpoena	Voluntary, subpoena	Complete	Complete	Time limited
Evidentiary and procedural rules	Legislative procedure	Legislative procedure	APA	APA	Formal court rules	Relaxed	Relaxed
Presentation	Persuasion	Persuasion	Persuasion	Persuasion	Proofs	Proofs	Proofs
Attorney's role	Optional advocate	Advisor	Optional advocate	Advisor	Advocate	Advocate	Advocate
Use of TP	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Choosing TP	Elected	Elected	Political appointment	Political appointment	Political appointment/elected	Voir dire	Court-appointed
TP characteristics	Representative, political, accountable, generalist	Representative, political, accountable, generalist	Political specialist	Political specialist	Autonomous/accountable, generalist, neutral	Representative, generalist, autonomous, neutral	Generalist, autonomous, neutral
TP role	Decisionmaker	Decisionmaker	Decisionmaker	Decisionmaker	Decisionmaker	Advisor	Advisor
Decisionmaker	TP	TP	TP	TP	TP	Disputants	Disputants
Government involvement	Providing and choosing process, reviewing	Providing and choosing process, reviewing	Providing and choosing process, reviewing	Providing and choosing process, reviewing	Providing process, reviewing, enforcing	Providing and choosing process, enforcing settlement	Providing and choosing process, enforcing
Law of the case	Community values, consensus	Consensus	Rule of law	Consensus, rule of law	Rule of law	Rule of law, community values, consensus	Rule of law
Process output	Consensus, compromise, prospective, binding, precedential	Consensus, compromise, prospective, binding, precedential	Consensus, compromise, prospective, binding, precedential	Consensus, compromise, prospective, binding, precedential	Assessment of rights, winner take all, binding, precedential	Assessment of rights/consensus, compromise, creative, advisory	Assessment of rights, winner take all, non-binding but with sanctions
Confidentiality of record	Partially public	Partially public, discoverable	Public	Partially public, discoverable	Public	Use for impeachment	Use for impeachment
Review	Required, two-tier, interbranch, de novo	Required, three-tier, interbranch, de novo	Interbranch, appellate	Required de novo; then interbranch, appellate	Appellate	None (de novo trial if parties don't reach consensus)	None (de novo trial if parties don't accept award)
Standard on review	De novo	De novo	Arbitrary, capricious, abuse of discretion, unlawful	Arbitrary, capricious, abuse of discretion, unlawful	Error of fact or law	NA	NA

Table 1
Direct System Characteristics

Private Judging	Administrative Adjudication	Arbitration	Med-Arb	Mediation	Mini-Trial	Neutral Fact-finder	Negotiation
Yes	No/yes	Yes	Yes	Yes	Yes	Yes	Yes
Subject matter and in personam, ripeness, political, non-legal	Statutory delegation	Jurisdiction given by parties	Jurisdiction given by parties	Unlimited	Unlimited	Jurisdiction given by parties	Unlimited
Individual	Individual	Individual	Individual	Individual	Individual	Individual	Individual
Parties	Parties (agency may be one)	Parties	Parties	Parties	Parties	Independent investigation	Parties
Parties may reduce	Limited	Parties set	Parties set	Parties set	Parties set	Independent investigation	Voluntary
Relaxed by parties	APA, relaxed evidence rules	Relaxed by parties	Relaxed by parties	Parties set	Parties set	NA	None
Proofs	Proofs	Proofs	Persuasion, then proofs	Persuasion	Proofs, then persuasion	Proofs	Persuasion
Advocate	Advocate	Advocate	Split	Advisor	Advocate	None	Advisor
Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Court-approved	Civil service	Party selected	Party selected	Party selected	Party selected	Party selected	NA
Generalist, autonomous, neutral	Specialist, neutral	Specialist, autonomous, neutral	Specialist/generalist, autonomous, neutral	Generalist, autonomous, neutral	Generalist, autonomous, neutral	Specialist, autonomous, neutral	NA
Decisionmaker	Decisionmaker	Decisionmaker	Advisor/decisionmaker	Facilitator	Facilitator/advisor	Evaluator	NA
TP	TP	TP	Disputants/TP	Disputants	Disputants	TP	Disputants
Providing process, reviewing, enforcing	Providing and choosing process, disputant, reviewing, enforcing	Reviewing, enforcing	Perhaps reviewing, enforcing as contract or judgment	Enforcing as contract	Enforcing as contract	None	Enforcing as contract
Rule of law	Rule of law	Set by parties	Consensus/set by parties	Consensus	Consensus, rule of law	Technical knowledge	Consensus
Assessment of rights, winner take all, binding	Assessment of rights, winner take all, binding, precedential	Assessment of rights, winner take all, binding	Consensus/assessment of rights, compromise, creative, prospective, enforceable as contract	Consensus, compromise, creative, prospective, advisory	Consensus, compromise, creative, prospective, enforceable as contract	Assessment of truth, winner take all, nonbinding but use as evidence	Consensus, compromise, creative, prospective, enforceable as contract
Confidential unless appealed or enforcement sought	Public	As agreed by parties, may be discoverable	As agreed by parties, may be discoverable	As agreed by parties, may be discoverable	As agreed by parties, may be discoverable	Admissible as evidence	As agreed by parties, may be discoverable
Interbranch, appellate	Intrabranh, de novo review; then interbranch appellate	Interbranch, appellate	Med - none; Arb - interbranch, appellate	None	None	None	None
Error of fact or law	Arbitrary, capricious, abuse of discretion, unlawful	Decisionmaker partiality, misconduct, lack of authority	Med - NA; Arb - partiality, misconduct, lack of authority	NA	NA	NA	NA

winner-take-all, creative, prospective, etc.), (3) to what degree the output is binding on these parties and (4) whether the outcome has any precedential value for other potential future disputants.

Much literature has discussed or touched on the confidentiality of the record in the various proceedings. This is an area in which state law is changing and the phrase, "may be discoverable" is intended to indicate this uncertainty.¹⁴ In some states and with some procedures the content of the record may be protected from discovery and later use in court in the same spirit as settlement negotiations.

Finally, the availability and nature of review is highlighted. The review process is to be distinguished from enforcement; and both of these should be distinguished from a successive use of different dispute resolution mechanisms. If the parties do not reach a settlement following a summary jury trial, or do not accept the arbitrator's award in court-annexed arbitration, the process that follows is a trial de novo in the court that invoked these alternative processes. This trial de novo is neither an enforcement of the outcome of the prior process nor is it a review of the prior process. It is simply the use of a new and separate process.

C. Derivative System Characteristics: Table 2

The purpose of this section is to ascertain certain qualitative system attributes from the information presented in Table 1. This is a comparative assessment, indicating the relative degree each of the fifteen highlighted dispute resolution mechanisms reflects certain qualities, such as formality, adversariness, and so on. Again, one must always keep in mind that the systems being evaluated in this fashion are specific examples taken from a general category. That is, the arbitration category and the system characteristics identified as pertaining to it describe only one possible arbitration alternative. It does not, for example, describe labor arbitration under our federal labor laws. Thus, the comparative assessment of arbitration in this section may or may not accurately reflect where labor arbitration fits into the dispute resolution continuum. The intent here is twofold: (1) to provide an overview assessment of certain dispute resolution mechanisms and (2) to provide explanatory material used for these assessments so that an individual interested in a particular and specific dispute resolution mechanism (such as labor arbitration) could readily perform a parallel analysis on that procedure.

The qualities used for this analysis are: the potential for absent but affected disputants to exist, the degree of formality of the process, the degree of adversariness, the degree of communication fostered among the disputants, the degree to which party power imbalances are neutralized by the chosen process, whether the process is primarily interest-based or rights-based, the degree voluntary obedience to the process output can be expected, the degree of

14. Petillon, *Recent Developments in Alternative Dispute Resolution*, 14 PEPPERDINE L. REV. 929, 933 (1987); cf. *Alternatives to Litigation*, *supra* note 1, at 233.

reviewability available and the degree of government involvement in each of the processes. The analysis presented in this section is summarized in Table 2.

To assess the relative degree that each of the dispute resolution processes reflects the qualities identified above, an analysis was made of the interplay of relevant characteristics from those contained in Table 1. The discussion which follows describes the evaluation process used with regard to each of the attributes.

Potential for Absent, but Affected, Disputants: The concern here is that affected individuals and entities will not be protected because of their absence from the process and because information from the process is not widely known or available. For example, the more widespread the notice given at the start of the process, the less likely an affected individual will not hear of the process and be able to protect his or her interests. In this light, the rulemaking processes and legislation look best, although one does have to question how effective public notice of such events really is at reaching concerned persons. Similarly, the more confidential the record is, the less likely an absent person will be able to join the process in progress or use the information in another process of their own. Here, the most public processes (traditional rulemaking, courts and administrative adjudication) come off best; negotiated legislation and rulemaking are next in line; traditional legislation follows thereafter; and all other processes are less protective.

Another relevant factor is the extent to which a particular forum's jurisdiction is restricted (so that even if an absent party hears of the dispute, they cannot join it). Courts and processes coming under court auspices do not appear favorably under this consideration.

Finally, to the extent that we are concerned with an amorphous "public" interest in the proceedings, as opposed to the existence of a particular absent individual, we may be less concerned if the participating third party can somehow be said to be representative of the public, such that third parties found representative and accountable will rate higher and those that are generalists and neutrals will be next favored.

Overall, negotiated legislation comes off best, with traditional legislation, rulemaking and negotiated rulemaking following closely thereafter. Courts come in the middle of the pack, but after administrative adjudication. One should remember in this context that, although court records are public records, most reports indicate that over 90% of civil suits filed are settled out of court before trial and therefore what is really public are unsubstantiated allegations. Alternatives coming under court auspices are notably at the very bottom of the list.

Degree of System Formality: As a positive characteristic, system formality may cut both ways. At the same time it increases the substantive consistency of results, for example, it may be a barrier to lay understanding of what is expected by the legal system and may decrease the predictability of results for any particular dispute even by legal experts. That said, even with no reference to the system characteristics depicted in Table 1, most readers will already be aware that court procedures are substantially more formal than negotiation and may even suspect that these two processes represent the ends of the formality continuum.

Table 2
Derivative System Characteristics

	Legislation	Negotiated Legislation	Rulemaking	Negotiated Rule-making	Court Adjudication	Summary Jury	Court-Annexed Arbitration
Least potential for absent disputes	Least 2	Least 1	Least 2	Least 2	Middle 4	Most 7	Most 7
Degree of formality	Middle 4	Middle 5	Middle 3	Middle 3	Most 1	Substantial 2	Substantial 2
Degree of adversariness	Middle 6	Middle 6	Middle 4	Middle 5	Most 1	Most 3	Most 2
Degree of communication	Little 4	Substantial 3	Little 4	Substantial 3	Least 7	Little 4	Least 6
Degree power imbalances neutralized	Middle 4	Middle 4	Most 2	Substantial 3	Most 1	Middle 4	Middle 4
Interest-based or rights-based	Interests	Interests	Interests	Interests	Rights	Rights	Rights
Degree of voluntary obedience	Least	Middle	Least	Middle	Most	Middle	Most
Degree of review available	Most	Most	Middle	Middle	Middle	NA	NA
Degree of government involvement	Most	Most	Most	Most	Most	Middle	Middle

Table 2
Derivative System Characteristics

Private Judging	Administrative Adjudication	Arbitration	Med-Arb	Mediation	Mini-Trial	Neutral Fact-finder	Negotiation
Most 7	Little 3	Middle 6	Middle 6	Middle 5	Middle 5	Middle 6	Middle 5
Substantial 2	Most 1	Middle 3	Least 6	Least 7	Least 6	Middle 3	Least 7
Most 2	Most 2	Most 3	Middle 4	Least 7	Middle 4	Middle 5	Least 7
Little 5	Least 7	Substantial 3	Substantial 2	Most 1	Substantial 2	Little 4	Most 1
Substantial 3	Most 2	Middle 4	Least 5	Least 6	Least 5	Most 1	Least 7
Rights	Rights	Rights	Interests	Interests	Interests	NA	Interests
Most	Most	Most	Most	Most	Most	Least	Most
Middle	Middle	Least	Least	NA	NA	NA	NA
Middle	Most	Least	Least	Least	Least	Least	Least

Criticism of court litigation on this basis has been widespread, the death of code pleading notwithstanding, with references to "arcane procedures," "inaccessible language," the "metamorphosis of individual claims into technical legal issues"¹⁵ and, in general, the highly procedural and highly structured process which litigation represents abounding. On the other hand, this attribute of litigation has also been praised, in preference to alternative procedures, for upholding the rule of law, not just "to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."¹⁶

Thus, at this point the goal is not to place a value judgment on the quality called formality, but simply to identify which procedures exhibit it and which do not. The following factors were considered in the evaluation: jurisdictional prerequisites, requirement of notice, available discovery, evidentiary and procedural rules, predominant presentation characteristic, the role played by attorneys, the identity of the decisionmaker, government involvement, source of the decisional law of the case and the type of review available. And, indeed, the processes heading the list of formality are traditional court litigation and administrative adjudication.¹⁷ At the bottom of the list are mediation and negotiation.

Degree of System Adversariness: Advocacy, and by extension adversariness, is enshrined in our system by the American Bar Association Model Code of Professional Responsibility, which is the basis for ethical rules applied to practicing attorneys in most states. Canon 7 of the Code states, "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."¹⁸ Like other aspects of our court system, it has come under a lot of fire. "For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."¹⁹

Obviously, the employment of attorneys as advocates increases the adversarial nature of a process. So too does emphasizing proofs over persuasion and giving a third party the power of a decisionmaker, especially where that decision is binding on the parties. Where the decision is based on an assessment of rights, the rule of law forms the decisional law of the case, and formal rules of evidence are employed, adversariness likewise increases. And, finally, where one party can compel the other to participate in the process, true only with respect to traditional court litigation among the processes chosen here for evaluation, it is reasonable

15. Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21 WILLAMETTE L. REV. 425, 428 (1985).

16. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

17. This point has not gone unobserved. See *supra* note 8 and accompanying text.

18. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

19. Burger, *Midyear Meeting*, Am. Bar Ass'n., 52 U.S.L.W. 2471 (Feb. 28, 1984).

to assume that the adversarial nature of the process increases. Given all this, it is not surprising that traditional litigation is the most adversarial of our processes and negotiation the least.

Degree of Communication Fostered Among the Disputants: It has been suggested that the greater the degree of direct communication among the disputants (not their attorneys), the fewer future problems will arise between these disputants. It may also be hypothesized that there is an inverse relationship between the degree of communication and the degree of adversariness in the process. After evaluating the factors likely to result in a higher degree of communication (primarily those factors over which the parties have some control in some of the processes, the roles played by both attorneys and involved third parties, and the method of presentation used), this latter hypothesis is proved true for the ends of the two continuums, but less of a predictor in the middle of them.

Degree to Which Party Power Imbalances are Neutralized During the Process: A variety of factors enters into this analysis. For example, one can assume that the stronger the role played by a third party, the less likely party power imbalances will affect the outcome. Where decisional information other than that supplied by the parties is usable, the power imbalances should be less significant. Similarly, where discovery can be compelled, the rule of law (which is theoretically neutral) is primary, and the decision is both reviewable and enforceable by the government, one would expect that power imbalances would be less significant. Not included in the analysis is the existence of formal rules of evidence and procedure (which can be used as swords, as well as shields) or the role played by attorneys, although there is some evidence that whether both disputants have attorneys is significant.²⁰ Considering only these factors, courts and neutral fact-finding neutralize power imbalances most and negotiation does so least.

This evaluation is quite limited and is far from the last word on party power imbalances. For example, much has been said regarding courts as a tool of the elite and powerful and the impact that economic strength has on litigation outcomes.²¹ Further, one might argue that whatever power imbalances exist, they will continue to exist after the process ends and the parties are once again on their own. Contra to this is the argument that if you give the disputants the tools to resolve their own disputes, and an experience of so doing, pre-existing power imbalances may be reduced even after the completion of this process.²² Finally, to the extent that the weaker party is also the legally damaged party, threat of future court suit may decrease the impact of other power imbalances.²³

20. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 275 (1986).

21. Cf. Nelson, *Alternative Dispute Resolution: A Supermart for Law Reform*, 14 N.M.L. REV. 467, 472 (1984).

22. Faulkes, *Pursuing the Best Ends by the Best Means*, 59 AUSTRALIAN L.J. 457, 462 (1985).

23. Cf. Bacigal, *An Empirical Case Study of Informal Alternative Dispute Resolution*, 4 OHIO ST. J. ON DISP. RESOL. 1 (1988); Green, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution*, 34 J. LEGAL EDUC. 245, 285 (1984).

Whether the Process is Primarily Interest-Based or Rights-Based: This category is somewhat different than the others. Some of the literature has discussed various processes as being either based on interest arguments or on arguments of right.²⁴ The factors that are considered in making this determination here are: the predominant method of presentation, the decisional law of the case, the role of attorneys in the process, the role of the third party as decision-maker or otherwise and whether the output is an assessment of rights or the result of a consensus. It should be pointed out that this dichotomy does not seem particularly useful when applied to neutral fact-finding, the *sine qua non* of which is an independent investigation of "truth" by an expert in the relevant field.

Degree that Voluntary Obedience to the Process Output can be Expected: Voluntary obedience to the process output is significant when evaluating the efficiency of the system, finality and the reduction of total societal disputes. It may also indicate something about the perceived justice of the process. In general, one can probably expect a higher degree of voluntary compliance either where the decision is a result of a highly participatory process (this is largely the theory behind negotiated rulemaking and negotiated legislation) or where there is a substantial enforcement mechanism waiting in the wings. Thus, empirical research may not evidence much difference in compliance statistics following a traditional court process and following a highly participatory process like negotiation. Because a high compliance can be gained in either of two ways, three-fifths of the procedures reviewed are indicated as likely to result in a high degree of voluntary obedience. It should be noted that arbitration and med-arb scored relatively high under both sets of criteria.

Degree of Review Available: This category is not applicable to those procedures for which no review is available. For the other processes, the factors considered are the number of reviews available, the identity of the reviewing body and the standards applied on review. Legislation, both traditional and negotiated, ranked highest on this scale, while arbitration and med-arb ranked lowest (of those procedures for which any review was available).

Degree of Government Involvement: The assessment of this quality can almost be read directly from Table 1 under government involvement, but also considered here is the government's involvement in choosing the involved third party. Nevertheless, there are no surprises in this category.

III. IDENTIFICATION OF DISPUTE VARIABLES: TABLE 3

This section considers two areas: the types of claims involved in the dispute and the characteristics of and relationships among the parties. In other words, this section focuses on the "extra-legal" aspects of disputes.²⁵ Whereas system

24. Cf. Perritt, *supra* note 8, at 866.

25. Dauer, *Litigation v. Alternative Dispute Resolution—Let's Talk About It*, 17 COLO. LAW. 655, 657 (1988).

characteristics formed the first, these considerations form the second element for consideration in "letting the forum fit the fuss."

Again, the variables selected for inclusion are based on the comments and observations of various writers. They differ significantly from the material in Part II, however, in that these variables have not been identified by theory or analysis so much as by the observations of practitioners. The material contained in Table 3 is in the nature of "rules of thumb" or recommendations. The information is for guidance and testing, not for reliance. They are not hard and fast rules. The reader will notice immediately that there are many holes in the table that have yet to be filled in. Some may never be, having been included for consideration in individual cases instead of for development of a related rule. It was viewed as more important to catalog the diversity of possible variables than to reach conclusions about each included variable with regard to each of the selected dispute resolution systems.

Any attempt to use the information contained in the table to assess a particular dispute will immediately result in conflicting signals. It will be the rare dispute that will exhibit all the variables found beneficial for the use of any particular dispute mechanism. It is to be expected that the analysis of a particular controversy will frequently indicate several "better" resolution mechanisms, many "bad" mechanisms to use and no clear "winner." This supports the suggestion that "in virtually no area of life is such a one-to-one mapping of disputes onto forums found."²⁶

Much of the table is self-explanatory and will be left that way. The remainder of this section will highlight some of the issues and considerations that are perhaps not so self-explanatory.

The degree of complexity in the resolution of a particular dispute is in large part a function of the alignment of the parties and the multitude and interconnection of the issues comprising the dispute. For example, parties can be aligned one against one, one against many where the relationship between the one (e.g., the plaintiff) and each of the many (e.g., the defendants) is essentially the same, many against many where again the relationship between each plaintiff and each defendant is essentially the same (e.g., a class action suit against manufacturers of a specific drug), or many against many where, although the issues are all related, there are more than two sides and the relationships among the parties are very diverse. Recall that the working definition of "dispute" for this Article is a collection of issues which need or would benefit from simultaneous solution. An example of a dispute falling into the last category is the controversy that arose from the abandonment of two nuclear power plants under construction which were owned primarily by the Washington Public Power Supply System (WPPSS). When the plants were abandoned there were disputes (1) between various contractors and WPPSS, (2) between WPPSS and its bondholders, (3) between WPPSS and the other owners (for-profit private power companies), (4) between WPPSS and its member public power companies and (5) between ratepayers in at

26. Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 914 (1979).

Table 3
Dispute Variables

	Legislation	Negotiated Legislation	Rulemaking	Negotiated Rule-making	Court Adjudication	Summary Jury	Court-Annexed Arbitration
<i>Number of Parties</i>	Many	15 or fewer	Many	15 or fewer		2	
<i>Alignment</i>	Polycentric	Polycentric	Polycentric	Polycentric			
<i>Characteristics:</i>							
Monolithic							
Repeat player							
Happy with status quo	Yes		Yes		Yes		
Time critical	No	No	No	No	No		
Emotional							
Sensible/irrational	Irrational	Sensible	Irrational	Sensible	Irrational	Sensible	Sensible
<i>On-going relationship</i>					No	No	No
<i>Power imbalances:</i>							
Economic							
Knowledge							
Assertiveness							
Fluency							
Confidence							
Emotional					Yes		Yes
Physical					Yes		Yes
<i>Attorneys:</i>							
All/none represented		None		None			
Comparative competence and resources							
Favor/oppose use of alternatives		Favor		Favor		Favor	
<i>Dispute:</i>							
Political	Yes	Yes	Yes	Yes	No	No	No
Social controversy	Yes	Yes	Yes	Yes			
Policy	Yes	Yes	Yes	Yes			
Novel question	Yes	Yes	Yes	Yes	Yes	No	No
Fundamental values	Yes	Yes	Yes	Yes			
Constitutional	No	No	No	No	Yes		No
Civil rights					Yes		
Broad	Yes	Yes	Yes	Yes			
Complex mix of fact and law	Yes					No	
Multiple issues		Yes		Yes			
Interconnected series of issues		Yes		Yes			
Discrete					Yes	Yes	Yes
Concrete						Yes	Yes
Factual			Yes	Yes		Yes	
Principled					Yes		Yes
Highly technical							
High transaction costs compared to stakes	No	No	No	No	No	Yes	
Non-legal			No	No	No	No	No
Ripe/mature				Yes	Yes	Yes	Yes
Business					No	No	No
Personal	No	No	No	No			
Vital interest					Yes		
Long-standing							
Likelihood of consensus high		Yes		Yes	No		No
Importance of confidentiality		No		No		No	

Table 3
Dispute Variables

Private Judging	Administrative Adjudication	Arbitration	Med-Arb	Mediation	Mini-Trial	Neutral Fact- finder	Negotiation
Yes	Yes No		Yes Sensible	Yes Sensible Yes	Yes Sensible Yes	Yes	Yes Sensible Yes
Irrational		Irrational No				Yes	
		Yes Yes				Yes Yes	
Yes		Yes		No		Yes	No
Yes	Yes	Yes					
			None	None			
No							
						Maybe Maybe Yes	
No	No			No			No
No	No						
			Yes	Yes	Yes	Yes	Yes
				Yes	Yes		Yes
			Yes	Yes	Yes		Yes
Yes	Yes	Yes					
Yes	Yes	Yes				Yes	
Yes	Yes	Yes				Yes	
		Yes				Yes	
	No			Yes			Yes
No	No			Yes			Yes
Yes	Yes	Yes	Yes		Yes	Yes	
		Yes	Yes	Yes	Yes	Yes	Yes
	No				No		
		Yes					No
		No	Yes	Yes	Yes	Yes	Yes
	No						

least six different states and all of the involved power companies. Although in an ideal world all of these disputes would have been resolved in one forum by simultaneous solution, our court system would choke on such an endeavor. Instead there were multiple contractor suits, multiple bondholder suits, suits before state regulatory agencies in at least six states and suits and negotiations among the various owners. The term "polycentric" is used here to describe such multi-party, multi-sided disputes.

Even where a dispute is not polycentric, but still involves many parties, in an ideal world different issues making up the dispute may need to be treated differently from a procedural point of view. For example, common liability questions may be best resolved together, while remedy issues may be best treated on a party-by-party basis.²⁷ Such a separation of different issues for different procedures may also be beneficial where there are only two parties, such as splitting the treatment of custody and visitation issues from property settlement issues in a divorce.²⁸

This discussion brings up a related issue—the debate in the literature regarding the best forum for redressing social ills. Many observers have remarked that this is not an appropriate use of our courts. Yet there are numerous statements to the effect that political, controversial, policy and fundamental value issues should not be resolved through any of the alternative dispute resolution mechanisms. My own assumption is that the latter speakers did not have in mind the alternatives of negotiated legislation and negotiated rulemaking at the time they made such statements. Such alternatives seem particularly well suited to the resolution of such issues, an opinion which has also seen light in current literature.²⁹

The characteristics of the disputants listed toward the top of the table need to be assessed separately for each of the involved parties. A monolithic disputant is one who has "no significant internal differences among [its] constituent members."³⁰ It can readily be seen that many institutional disputants, such as environmental groups and labor unions, will not be monolithic. This complicates processes that call for consensus, but if such processes are nevertheless used the diverse needs of the constituents may be more likely met through the possibility

27. This is illustrated by the anecdotal report of the Westinghouse uranium case in the 1970s. Bacigal, *supra* note 23, at 23-24.

28. Bianchi, *Alternative Dispute Resolution: Is the Jury Still Out?*, 61 J. ST. GOV'T 174, 175 (1988).

29. The following is apropos:

Other commentators have explained that many fundamental values are particularly susceptible to resolution through consensual process: "[T]he problems around which many (and perhaps the most important) social conflicts turn have no 'right' or 'wrong' answer in any moral or even technical sense. Such conflicts are best resolved through a mechanism based not upon principle but upon pragmatic accommodation and adjustment."

Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505, 1517 n.47 (1983-84) (authored by Robert L. Sachs, Jr.) (quoting Schuck, *Litigation, Bargaining, and Regulation*, 3 REG., July-Aug. 1979, at 26, 31).

30. Dunlop, *supra* note 7, at 1427.

of creative resolution packages. Institutions also tend to be "repeat players" in dispute resolution processes, with a variety of attendant advantages adhering to them. These advantages may be present in non-litigation modes of dispute resolution, as well as in traditional litigation settings. It is an open issue whether such a power disparity (as well as others) is or can be neutralized simply by preserving or improving access to courts where some other alternative is used as the primary resolution mechanism.³¹

The disputant characteristic "emotional" is intended to raise the issue of whether there is a significant emotional component in the dispute. The more consensual, interest-based resolution mechanisms are proffered as more likely to truly resolve the fundamental issues of such disputes. On the other hand, the entry "Sensible/irrational" is meant to identify situations where one or more parties are intractable, leaving little hope for a consensual resolution.

All attorneys are not created equal, either in competence or in resources available to "zealously represent" their clients. This is a factor that should be taken into consideration, as well as, according to some observers,³² whether opposing counsel is opposed to the use of alternatives to traditional court litigation. Finally, whether attorneys as advocates or representatives (as opposed to advisors) should be used at all should be considered. Certainly, if one party is so represented, the others may be disadvantaged by not being similarly represented. However, representation may be more of a hindrance than a help in some processes due to the attorneys' inability to explain feelings of their principals or respond fully to non-monetary requests.³³

A final comment should be made with regard to the last two entries on Table 3. Both are properly classified as derivative characteristics. In any given case, the evaluator should look at a number of other listed factors before determining where the dispute or a disputant falls.

IV. PROCESS GOALS: TABLE 4

A. Introduction

There exists in the literature numerous and very elegant and persuasive descriptions of the horrors of litigation, of the apocalypse that calls itself ADR, of the wonders brought by the rule of law and our traditional court system, and of the idyllic perfection of the alternatives. The examples cited are, of course, the best and the worst of each. The thesis of this section departs from these traditions. It has been aptly stated by Professor Cover: each institution "provides a distinctive response to problems that other institutions with their different mix

31. Green, *supra* note 1, at 281-85.

32. Alfani, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 216, 219 (1989).

33. Faulkes, *supra* note 22, at 458.

of functions might address quite differently."³⁴ Thus, we need to analyze the functions played or furthered by each of our models. Stated another way, much of the literature that accepts the use of ADR at least under some circumstances has been concerned primarily with the pairing of dispute variables with the system characteristics of various dispute resolution mechanisms. That approach is insufficient. The recommendation here is that such pairing, choosing and evaluating should be done only in light of the process goals enhanced, or indeed discarded, by the particular process.

No one mechanism is the only means of achieving any particular goal. Indeed, societal institutions totally separate from any dispute resolution mechanism may advance (or impede) some of the identified goals. Further, every mechanism advances multiple goals simultaneously. Some mechanisms advance certain goals more than alternative mechanisms do; certain mechanisms are counterproductive to certain goals. No one mechanism advances, let alone achieves, all process goals. It is the obligation of every society to continually reevaluate the relative importance of the various goals in light of changing circumstances and make any advantageous changes in the institutions that further those goals.

B. Discussion

This section considers what process goals are furthered by which dispute resolution mechanisms or, perhaps more accurately, whether the system characteristics of individual dispute resolution processes make it more or less probable these process goals will be furthered. The reader should keep in mind throughout that the discussion is of goals and whether they are furthered, not whether they are achieved.

A summary of the material discussed here appears on Table 4. It is not complete, nor is it offered as "truth." It is offered for consideration, refinement and argument. Further, where a particular dispute resolution mechanism is not marked as furthering a particular goal, it does not follow that it does not further it at all or that it may actually hinder the accomplishment of such a goal. Rather, it indicates that other mechanisms are more likely to promote that particular attribute.

Perhaps all would agree that all of our dispute resolution mechanisms do or should have as goals both substantive justice and procedural fairness. (All would certainly not agree as to the meaning of either substantive justice or procedural fairness.) Perhaps we could further agree that the reduction of overall societal disputes and of future disputes between particular disputants are also universal process goals. Assuming such agreement, these goals are not themselves charted, but rather their component parts are depicted on Table 4. These four goals represent four of the five overall goals discussed in this part. (Substantive justice has been further subdivided, for purposes of the table, into social justice and

34. Cover, *supra* note 26, at 912.

individual justice.) The fifth major goal is truth. As will be discussed below, truth may not be a goal in many of the systems under discussion.

The discussion which follows will be split into these five categories. It should be pointed out that there are considerable overlaps and interrelationships among these topics that cannot be fully explored through the organization chosen for this section.

Substantive Justice: The discussion of justice is split into the two categories previously noted, social justice and individual justice. Neither category will take into account justice as perceived by the participants and disclosed in various surveys. It does seem appropriate, however, to say a few words in that regard given that it has been a significant component of what empirical research does exist in the area of ADR. Most of the comments of perceived justice involve subjective questions addressed to users of a particular system, without any attempt or ability to assess other systems that might have been used instead. In general, participants of various alternatives have given positive, if not exactly rave, reviews of the systems used.³⁵ Nevertheless, the traditional court process is not without its admirers.³⁶

Much of the literature has addressed issues of justice in the context of evaluating dispute resolution techniques. Oft repeated phrases include, ironically enough, both "second-class justice" and "rich man's justice." Both refer to alternatives to traditional court adjudication. Although these allegations and their rebuttals are worth pursuing in their own right, they do not provide a good focus for the purpose at hand. Instead, what this section attempts is to identify certain characteristics that may further the overall goal of justice and determine which of the highlighted dispute resolution mechanisms exhibit such characteristics.

With regard to social justice, the following factors are considered: substantive consistency, a societal cost-benefit analysis, the enforcement and fulfillment of societal norms, openness and progressiveness. The most difficult criteria to address in this list is the cost-benefit analysis. Volumes could (and probably will) be written on this subject alone. A complete analysis would probably subsume every other category on Table 4, perhaps particularly the overall reduction of the size and number of disputes in society. For example, any respectable cost-benefit analysis would have to consider how the dispute resolution mechanism is being used, i.e., for what type of disputes. The high cost of litigation might well be justified on a societal basis for suits addressing civil rights issues, but not for suits among family members over their respective shares of an inheritance. The table does not attempt to make this type of judgment. It looks

35. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 222 (1989); Hatch, *supra* note 3, at 3; Green, *supra* note 1, at 268; Hensler, *supra* note 20, at 276.

36. Lambros, *The Alternatives Movement: Rekindling America's Creative Spirit*, 1 OHIO ST. J. ON DISP. RESOL. 3, 4 (1985) ("Today our system is challenged by the unprecedented volume of litigation. This increase in filings should be viewed as a challenge rather than as a problem. People are now bringing their disputes into the open, seeking expert assistance with resolution. This positive development reflects a public trust in America's legal system and a public confidence that the system can consistently resolve controversies in a fair, equitable, and efficient manner.").

Table 4
Process Goals

	Legislation	Negotiated Legislation	Rulemaking	Negotiated Rule- making	Court Adjudication	Summary Jury	Court-Annexed Arbitration
<i>Social justice:</i>							
Consistency	X	X	X	X	X		X
Predictability						X	X
Reduction of meritless grievances			X	X	X		
Support norms	X	X	X	X	X		
Openness		X	X	X	X		
<i>Individual justice:</i>							
Progressive	X	X		X		X	
Creativity	X	X		X		X	
Protection of individual rights					X		
Timely						X	X
Low Cost						X	X
Humane	X	X	X	X			
<i>Fairness:</i>							
Impartial TP					X	X	X
Hearing		X		X			
Participatory	X	X	X	X		X	X
Access to court						X	X
<i>Truth</i>					X	X	X
<i>Reduction of social disputes:</i>							
Development/ articulation of norms	X	X	X	X	X		
Internalizes norms	X	X	X	X		X	
Peacefulness							
Individual empowerment							
Obedience		X		X		X	X
Aggregate solution	X	X	X	X			
<i>Reduction of future disputes of these parties:</i>							
Cooperativeness	X	X		X			
Communication		X		X		X	
Finality					X	X	X
Legitimacy	X	X			X		

Table 4
Process Goals

Private Judging	Administrative Adjudication	Arbitration	Med-Arb	Mediation	Mini-Trial	Neutral Fact- Finder	Negotiation
X	X	X					
X	X						
X	X					X	
	X						
			X	X	X	X	X
			X	X	X	X	X
X							
X		X	X	X	X		X
X			X	X	X	X	X
		X	X	X	X	X	X
X	X	X	X	X	X	X	
		X	X	X			
	X		X	X	X		X
X				X	X	X	X
	X	X				X	
	X						
			X	X	X		X
			X	X			X
			X	X	X		X
			X	X	X		X
X	X		X	X	X		X
		X				X	

instead only at factors that are characteristic of the various dispute resolution mechanisms, regardless of the type of dispute submitted for resolution. Further, factors listed elsewhere on the table are not duplicated here. Thus, the two considerations addressed here, predictability and the reduction of meritless grievances, are at best only the tip of the iceberg.

Predictability is the characteristic that gives guidance to present and future disputants. Some of the alternatives undertaken under court auspices have as a rationale permitting the litigants to get a better idea what result would pertain following a full trial. Predictability increases where the results are comprehensible. Substantive consistency also plays a role, but the information contained under that heading is not duplicated here. The risks and uncertainties associated with winner-take-all results decrease predictability. Other factors that may affect predictability include the use of a proof-based presentation, the use of a third-party specialist and the formality of the proceeding. However, to the extent that the ultimate outcome is based on technical rules instead of the merits, predictability is decreased. For this reason, traditional litigation does not score well. (It is assumed, although not proved, that alternatives under a court's auspices are more likely to result in a decision on the merits.)

Such factors as those which follow were considered in the analysis of whether a particular dispute resolution mechanism is likely to reduce the number of meritless grievances: limits on the forum's jurisdiction, presentation by way of proofs, the availability of discovery, use of specialists, the existence of a third-party decisionmaker, the existence of a public record and the availability of a substantive review.

Quite a number of the mechanisms further substantive consistency if one considers such consistency as upheld by such characteristics as use of the rule of law, assessment of rights, the setting of precedent and the degree of available review based on the review standards used.

The enforcement and fulfillment of societal norms—our political, cultural and social values—is often cited as a benefit of our court system. Indeed, some seem almost to mourn the loss of litigation as morality plays in the wake of more widespread use of ADR. However, a substantial proportion of litigation cases have no real moral component. The question is often closer to who is going to bear an unexpected loss. After considering the use of an unrestricted source of decisional information, an accountable third party, and a third party as a decisionmaker, as well as the existence of a substantive review of the result, courts did indeed rank well, although not quite as well as either form of legislation and only equally with either form of rulemaking.

The openness of the system tends to give us confidence that social justice is being met, as well as itself helping to insure that that is true. There is a question of the propriety of state enforcement of results that are not based on open or public processes. Essentially this category is a summation of the system characteristic of confidentiality. Whether a dispute resolution can be considered progressive depends largely on to what degree it can adjust to changing circumstances. Resolution mechanisms that permit creative solutions and are not

hidebound by elaborate rules and those that seek input from a wide variety of sources are probably best. Courts fare poorly under this criteria.

Overall, negotiated rulemaking seems to further the goal of social justice more than any of the other mechanisms and none of the alternatives reviewed are completely deficient in this respect.

The next aspect of substantive justice is individual justice, that is, how well each system addresses the actual situation of the parties before it. Again, this category has been decomposed into a number of components: creativity (the parallel to substantive consistency in the social justice analysis), establishment and protection of individual rights, a cost-benefit analysis from the disputants' perspective, maximizing joint gains and humaneness.

The characteristic of creativity has been much remarked upon in the literature. For example,

it is not the sole purpose of ADR to achieve faster and cheaper resolutions of disputes. In addition to all of these good things, the purpose of ADR is also to achieve "better" resolutions of disputes—or at least to generate a wider range of possible *solutions* (not just *decisions*) for any given problem.³⁷

The point here is a system's ability to respond to the unique needs and situations of the individuals actually before it. Equal treatment does not necessarily result in the greatest justice to the individual because no two disputants are ever precisely similarly situated. Thus, the rule of law, while a good indication of social justice, is only a second-best solution from an individual disputant's standpoint. We have rules that attempt to provide justice in the greatest number of cases, but the development of equity testifies to tension between the establishment of rules and individual justice. (At this point, most of our equity principles have also been reduced to "rules" of general application.) This room for creative solution can also be viewed from another perspective, that is, the ability to maximize joint gains. Through the use of creative (and non-monetary) solutions, one side may benefit substantially more than the other side is hurt as a result of the form reparations take.³⁸ (A good example is where a defendant supplier "pays" a judgment with goods, where the payment is assessed "at cost" on the defendant's books, but the plaintiff purchaser "receives" value based on the market price of the goods.) As can be seen from the table, creativity is very closely related to the progressiveness goal under social justice.

Individual justice is also closely connected to the establishment and protection of individual rights. Systems that are based on an assessment of rights, that develop principles of individual rights, that provide a substantive review for violations of those rights and that use autonomous decisionmakers are more likely to protect individual rights. Courts are the clear winners in this category.

37. Dauer, *supra* note 25, at 656 (emphasis in original).

38. For specific examples, see Bacigal, *supra* note 23, at 24 n.102.

Individual disputant cost-benefit analyses are almost as problematical as societal cost-benefit analyses. On the table, the cost-benefit analysis is represented by two categories, timeliness and low cost. Again, these factors only scratch the surface of what is undoubtedly relevant to a well done analysis. And again, factors that appear elsewhere on the table, such as the reduction of future disputes between these same parties, are not included here. Because the most often repeated rationale for ADR mechanisms is their efficiency in terms of cost and time, these factors have received more consideration (including more empirical study) than any others on the table. The empirical research to date is conflicting and the interpretation of the results is hotly debated, but some of the anecdotes of "success" in this area make delightful reading.³⁹ Nevertheless, some judgments have been made based on the information available.⁴⁰

Anyone that has watched a close friend or acquaintance get dragged into a lawsuit knows that court litigation can bring with it a tremendous level of emotional pain and trauma. The humaneness of the process used therefore is a significant component of individual justice. It is related to the degree of informality of the system, its cooperative as opposed to adversarial nature, and the degree of communication fostered between the parties. Not surprisingly, the non-court alternatives come off well in this category.

Again, in the area of individual justice, none of the dispute resolution mechanisms is totally deficient, but courts clearly do not fair well against the more disputant-controlled forms of dispute resolution.

Procedural Fairness: This category has been broken into three component parts: procedural protections, participatory governance and accessibility to the court system. The first category, procedural protection, in turn is broken down into (1) having a hearing at which (2) an impartial third party presides. Noticeably absent is procedural protection through the provision of evidentiary and procedural rules. Such a consideration was deliberately omitted because of the

39. My personal favorite is a story told by one of TRW's then-attorneys of the patent infringement action brought against TRW by Telecredit. He relates, "[T]hings had gotten so bad that there was a major disagreement about whether coffee would be provided to the other side while they inspected documents at one side's plant." Solution was ultimately reached by the use of a mini-trial. "This six million dollar lawsuit that had consumed a half a million dollars in legal fees over three years was settled within thirty minutes after these two days of presentations to the great satisfaction of both sides." *Recent Developments in ADR*, *supra* note 1, at 514-16 (description related by Eric D. Green, later a professor of law at Boston University).

40. Cf. Alfini, *supra* note 32, at 222, 229-30, 232; Broderick, *supra* note 35, at 219, 222; Bacigal, *supra* note 23, at 3; Bianchi, *supra* note 28, at 175; Hatch, *supra* note 3, at 2; Bedikian, *Overview of Alternative Dispute Resolution Techniques*, 1986 MICH. B.J. 876; Green, *supra* note 1, at 246, 267, 270; Daynard, *Redress by a Licensing Authority: Settling Home Improvement Disputes in New York City*, 1985 J. DISP. RESOL. 89, 109-11; Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 32, 34 n.32 (1985); Cook, *A Quest for Justice: Effective and Efficient Alternative Dispute Resolution Processes*, 4 DET. C.L. REV. 1129, 1132, 1134, 1136 (1983); McKay, *Developments in "Alternative" Dispute Resolution: An Overview*, 115 F.R.D. 361, 364 (1986); Judicial Conference, *Alternative Dispute Resolution*, 111 F.R.D. 193, 198-99, 203 (1985); *Recent Developments in ADR*, *supra* note 1, at 521.

controversy over whether such rules as they are manifest in the present system provide for procedural fairness or rather allow those who would lose on the merits to escape because of technicalities. "[G]iven a fair hearing and an impartial decisionmaker, they preferred a timely, informal process to more formal proceedings that entailed both high cost and delay."⁴¹ Or again, "most individual litigants have a simple definition of what constitutes a fair dispute resolution process: they want an opportunity to have their cases heard and decided by an impartial third party."⁴²

Another aspect of this evaluation is also likely to elicit some objection: that is the definition of having a hearing. As used here it refers to whether the disputant has an opportunity to tell his or her side of the story, not whether he or she "had their day in court."⁴³ According to one study:

[T]here are telling differences between those who entered mediation and those who stayed in the court. In the Brooklyn study, 94% of the victims who mediated felt they had an opportunity to tell their story; only 65% of those who went through the judicial process had the same reaction. . . . And the defendants' reactions? Proportionately over twice as many of those who mediated as those who went to trial in court felt they had an opportunity to express their side of events—90% to 40%.⁴⁴

Participatory governance is a democratic notion. It suggests that it is more fair if those who are to be affected by a decision have more input into the process. The factors that would indicate that here are: likelihood of notice, the source of the decisional information, representative third parties, a disputant decisionmaker, consensus as the basis of the decision reached and procedures with the least potential for absent, but affected disputants.

Finally, accessibility to court is considered. It should be noted that the existence of some of the alternatives to court may increase access to courts for other disputants (or even for those for whom the alternative does not result in a complete resolution of the dispute) if any significant reduction in judicial backlog can be achieved by the existence of the alternatives. Along this line there has been the suggestion that some courts are looking to alternatives "in an effort to satisfy their constitutional mandate."⁴⁵ In alternatives under the auspices of a court, the lurking judicial power may also be used to equalize negotiating power between the parties, thereby resulting in a fairer settlement process than might

41. Levin & Golash, *supra* note 40, at 35.

42. *Id.* at 35 n.44 (quoting D. HENSLEY, REFORMING THE CIVIL LITIGATION PROCESS: HOW COURT ARBITRATION MAY HELP 8-9 (1984)).

43. Izbiky & Savage, *ADR: Explanations, Examples and Effective Use*, 18 COLO. LAW. 843, 848 (1989); Harrington & Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 726, 728 (1988); Faulkes, *supra* note 22, at 458.

44. Cooke, *Mediation: A Boon or a Bust?*, 28 N.Y.L. SCH. L. REV. 3, 22-23 (1983).

45. Cook, *supra* note 40, at 1131.

occur away from a court.⁴⁶ On the other hand, some of these same programs have been criticized for their mandatory nature as reducing access to court.⁴⁷ This criticism has less force as long as access to court is not precluded.

On the admittedly controversial scales used here, mediation is the heavy-weight and courts appear lightweight by comparison.

Truth: This category may exhibit the greatest dissonance between goal and reality. In theory truth should be a concern of rights disputes more than interests disputes. Systems that are looking for truth should adopt proof, not persuasion, as the method of presentation; they should have a neutral third-party decision-maker; they should allow full discovery; and they should provide for substantive review on the merits. This sounds like our court system. And yet there is considerable controversy over whether the extreme adversariness in our courts substantially defeats this goal of truth.⁴⁸ In that case, the system most likely to actually result in truth is our neutral fact-finder. In keeping with the rest of the table, however, what will be recorded is the goal, not the reality.

Reduction of Overall Number and Size of Societal Disputes: On one side, the argument exists that every time we add another form of dispute resolution to our package of usable mechanisms, the number or size of disputes system-wide should reduce. The argument is that the more we increase accessibility to any forum, the more disputes can be handled expeditiously before they grow into monster disputes or before they become chronic problems. But this argument alone does not distinguish among resolution mechanisms, i.e., the existence of any given mechanism helps fulfill this goal. On the other side of this argument is the theory that the more forums available, the more disputes will be brought; that demand will expand to fit the supply. Again, this side of the argument does not distinguish among resolution mechanisms. Considerations that may distinguish among the processes are the extent that they (1) develop and articulate norms, (2) promote the internalization of norms, (3) promote peacefulness within the society, (4) promote individual empowerment for resolving one's own problems, (5) engender obedience to the result reached and (6) create aggregate solutions. These are the factors addressed in this section.

The systems that develop and articulate societal norms are those that promote the reasoned elaboration of normative principles, i.e., the rule of law. While other

46. Cf. Bacigal, *supra* note 23, at 25.

47. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984).

48. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U.L. REV. 591, 600 (1988).

The problem is eloquently stated in Nelson, *supra* note 21, at 470:

It is a mistake to assume that truth will emerge from two highly partisan arguments, mutually exaggerating the strengths and understating the weaknesses of their respective positions. Furthermore, our rules of professional conduct permit conduct that *prima facie* impedes a search for the truth. For example, it is proper professional conduct to:

1. cross-examine for the purpose of discrediting testimony of a witness known to be telling the truth;
2. exploit an opponent's evidence known to be false; and
3. fail to introduce or advise the opponent of material adverse evidence.

systems may apply and support existing societal norms, the only systems under consideration that develop and articulate such norms are the courts, the legislature and administrative agencies. The output of these systems have precedential value.

Systems that promote the internalization of norms also reduce societal disputes because they create citizens who are more apt to accept and act on normative values. Such systems reduce anti-social behavior, encourage a higher level of citizenship, "broaden the commitment of most to the rule of law, [and] increase voluntary law abidingness."⁴⁹ What systems have this ameliorative effect? Those that are voluntary and participatory. While all of the systems considered support this goal at some level, Table 4 indicates those that do it particularly well.

The aspect of peacefulness considered here is the aspect that permits and promotes the venting of the emotional side of a dispute, allowing the disputants to get on with other things.

Individual empowerment focuses on the existence of widespread individual dispute resolution competence. The notion is that early use of self-help forms of dispute resolution will decrease not only the demand pressure on institutionalized mechanisms, but the magnitude and number of societal disputes. More than one article has speculated on the value of educating the general populace in self-help forms of dispute resolution, perhaps through the public school system.⁵⁰

What will be the consequences of a public skilled in dealing creatively with conflicts? Will universities and law schools be ready when these students enter their classrooms? Will community violence, particularly juvenile crime, decrease? Will suits cease to be the answer? Will lawyers change their style or go out of style? Will the foundations of our legal system be challenged? Will people who feel confident in handling their personal and community disputes in a non-adversarial manner demand that governments solve international disputes without violence? We do not know the answers to these questions, but the impact of teaching dispute resolution skills to children certainly will be profound.⁵¹

The more disputes are characterized as rights disputes, as opposed to interests disputes, the more necessary a third-party decisionmaker becomes and, thus, the less likely that self-help will be successful. As one writer stated, "Lawyers tend to assume that a client's legal rights are more important than any other inter-

49. *Id.* at 481; Davis & Porter, *Dispute Resolution: The Fourth "R"*, 1985 J. DISP. RESOL. 121, 125-26.

50. Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 PEPPERDINE L. REV. 777, 779 (1987); Davis & Porter, *supra* note 49, at 122; Cooke, *Introduction, Symposium on Alternatives to Litigation*, 48 ALB. L. REV. 569, 570 (1984).

51. Davis & Porter, *supra* note 49, at 122.

est."⁵² It should be pointed out that many, if not most, disputes may be treated either as rights or as interests disputes; there is nothing inherent in the substance of most disputes that require they be treated one way or the other. Thus, to the extent that we choose to characterize a particular dispute as a rights dispute, we impede individual empowerment. Systems that require a dispute to be ripe or mature before it will be addressed through that requirement support individual empowerment by giving the disputants an opportunity to address the problem without the use of the forum. Another important factor is the degree of system informality. We cannot expect the lay public to master intricate procedural arrangements, for example.

The goal of obedience to the process output has an obvious relationship to the overall reduction of societal disputes. "[B]y actively involving the disputants in shaping the agreement and binding them personally to make the agreement work, the parties become psychologically bound to respect the terms of their resolution."⁵³ Thus, participatory systems are more likely to result in obedience, as are those which employ the disputants themselves as decisionmakers.

Finally, it stands to reason that where the output of a system provides an aggregate solution, reduction of societal disputes should follow. In our society the only mechanisms designed to do this are those of legislation and administrative rulemaking.

The aggregation of these factors indicates that the systems best designed to reduce overall social conflict are negotiated legislation, negotiated rulemaking, med-arb, mediation and negotiation. Notably, private judging, administrative adjudication, arbitration and neutral fact-finding seem to have little impact on the attainment of this goal.

Reduction of Future Disputes Among These Parties: There is a very close relationship between this goal and some of the factors discussed previously. Nevertheless it seems useful to state this as a separate goal in its own right. The factors considered here are the degree of cooperativeness among the parties, the degree of communication, finality and legitimacy. Cooperation is really the reverse of adversariness and is thus easy to chart at this point. The degree of communication among the disputants themselves also varies from system to system. Some mechanisms require the presence of the principals, such as the mini-trial. In contrast, attorneys representing their clients in a traditional court battle frequently expressly instruct their clients not to talk to the other side. Again, the more participatory processes foster communication among the disputants.

"If people are able to participate in devising a solution to a problem they face, they are not likely to bring suit later."⁵⁴ Thus, consensus agreements and disputant decisionmakers are likely to advance the goal of finality. On the other side, however, the availability of enforcement and the degree of formality of the

52. Stulberg, *supra* note 3, at 737.

53. Cooke, *supra* note 44, at 12.

54. Fine, *supra* note 3, at 6.

process may also advance the goal. As a practical matter, the perceived justice and fairness of the solution should have a significant impact. According to one study, disputants are two times more likely to comply with a mediated agreement than with a court judgment.⁵⁵ On this scale, the summary jury trial comes off quite well.

Legitimacy is concerned with the need to justify the process outcome to one's constituents. Litigation outcomes in our society are apparently considered legitimate from this point of view.⁵⁶ The suggestion has been raised, and might have some validity, that any method of dispute resolution accepted and used by lawyers will be viewed as legitimate.⁵⁷ This, of course, does not particularly advance our analysis here. Legitimacy is enhanced by processes that can be said to invoke democratic principles by choosing third parties who are representative, either of the populace or of the disputants, particularly where those third parties are also the decisionmaker.

Under these criteria, the processes most likely to reduce future conflict among these disputants are negotiated legislation, med-arb, mediation, the mini-trial and negotiation. The only process which seems not particularly to further this goal is traditional rulemaking.

V. CONCLUSION

The purpose of this analysis is that it be used. Apart from its utility as a classroom tool, this section attempts to suggest some other ways in which it may prove useful.

As a beginning, it should suggest research topics, both theoretical and empirical, in such areas as: how well process goals are actually met by the various dispute resolution mechanisms and how the various mechanisms, recognizing both their system characteristics and their process goals, can be most compatibly matched to the characteristics of the disputants and the underlying dispute in specific instances. Any work in this area should recognize that there is unlikely to be just one appropriate forum for any given dispute.⁵⁸

This analysis may also help in the reevaluation of our "tried and true" methods of dispute resolution—legislatures, courts and administrative agencies—from the broader perspective of dispute resolution generally, recognizing that all of these mechanisms are interrelated and have common elements. For example, the strengths and weaknesses of traditional court litigation can be reevaluated in light of other available mechanisms and in light of our current social milieu, both nationally and internationally. Also intriguing are fresh looks

55. Izbiky & Savage, *supra* note 43, at 844.

56. Dauer, *supra* note 25, at 656.

57. Murray, *Lawyers and Alternative Dispute Resolution Success*, 14 PEPPERDINE L. REV. 781, 782 (1987).

58. "Perhaps the message ADR brings to lawyers is best captured by a Chinese proverb: 'There are seventeen solutions to every problem.'" Izbiky & Savage, *supra* note 43, at 856.

at the traditional wisdom surrounding our "fourth" branch of government, administrative agencies, such as the standards for substantive delegation and the required components for a due process hearing.

Disputants are not the only ones concerned with identifying appropriate forums. Legislatures are more and more concerned with how to react to the alternatives proposed and in creating, facilitating and authorizing new processes. Courts may also be involved in similar endeavors to the extent that they create alternatives by court rule. Courts will have to address as well the issues raised by parties before them who are contending either that a particular alternative cannot be used or that an agreement to use such an alternative should be enforceable. In all of these activities the decisionmaker should be evaluating the offered process in its entirety, expressly considering all of a particular system's characteristics and goals, as well as the characteristics of the disputants and the underlying dispute.

Finally, everyone involved in dispute resolution should begin considering the complete dispute resolution package that should be offered to our citizens. Historically, the mix of processes has changed. The present increase in our use of our court system has at times been attributed in part to the breakdown in historical informal resolution mechanisms such as church and family.⁵⁹ This breakdown itself has been attributed to the growing diversity of our population, our mobility and the lack of many common values. And yet we grow more dependent on our fellow man and more interdependent with the rest of the world. In all this diversity, we nevertheless have to find ways to resolve the inevitable conflicts, both at home and worldwide, peacefully. As was stated in a Department of Justice publication in 1984, "[W]ith increasing awareness that 'we are all in this world together,' traditional win-lose, adversarial processes may be personally and socially less satisfactory than more participative, collaborative problem solving that reconciles the interests of all involved parties."⁶⁰

59. Cooke, *supra* note 44, at 3 n.1.

60. U.S. Dept. of Justice, *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy 8 (Jan. 1984).

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