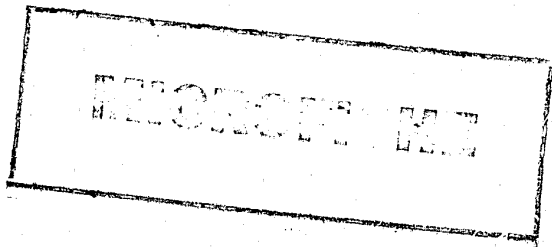


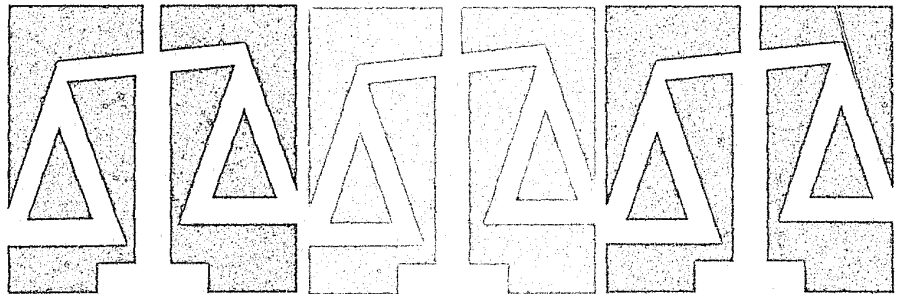


National Institute of Law Enforcement and Criminal Justice  
Law Enforcement Assistance Administration  
U. S. Department of Justice

# Preliminary Analysis of Alternative Strategies for Processing Civil Disputes



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ACQUISITIONS

**A Preliminary Analysis of  
Alternative Strategies for  
Processing Civil Disputes**

by  
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with assistance from  
Elizabeth Schwartz

September 1978



**National Institute of Law Enforcement and Criminal Justice**  
Law Enforcement Assistance Administration  
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National Institute of Law Enforcement  
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# CONTENTS

	<i>Page</i>
<b>ABSTRACT</b> .....	vi
Chapter	
I. INTRODUCTION: AN OVERVIEW OF THE PRINCIPAL PER- CEIVED DEFECTS IN THE PRESENT JUDICIAL SYSTEM .....	1
A. Methodology and Organization of Report .....	1
B. A Summary of the Principal Deficiencies of the Present Judicial System .....	2
1. Caseload overload .....	2
2. Delay .....	2
3. Inaccessibility of courts for many litigants and disputes .....	2
4. Economic cost of judicial resolution of disputes for dispu- tants and government .....	3
5. Lack of equity in the results achieved through dispute processing in the courts .....	4
6. Undesirable psychological outcomes from court processing of disputes .....	4
Notes .....	5
II. AN OVERVIEW OF THE DISPUTE RESOLUTION PROCESS .....	8
A. Some Preliminary Definitions .....	8
B. Selected Elements of the Third Party Dispute Resolution Process ...	9
1. Alternative potential sources of satisfaction .....	10
2. Types of third party intervenors .....	12
3. Alternative eligibility requirements for invocation of third party intervention on behalf of the moving party .....	13
4. Timing of eligibility determination phase .....	15
5. Characteristics of the eligibility determination phase .....	16
6. Nature of third party's intervention .....	17
C. Interrelationships Among Elements of the Third Party Dispute Res- olution Process .....	18
D. An Overview of Dispute-Processing Strategies in Civil Cases .....	19
Notes .....	20
III. THE SETTLEMENT INCENTIVE STRATEGY: MEASURES WHICH MOTIVATE DISPUTANTS TO RESOLVE DISPUTES WITHOUT THIRD PARTY INTERVENTION .....	26
A. The Role of Settlement Within the Dispute Resolution Process .....	26
B. Incidental Effects on Settlement Negotiations of Measures Designed Primarily To Achieve Other Objectives .....	26
C. Measures Which Deliberately Employ Economic Incentives Calcu- lated to Encourage Settlements .....	30
1. Measures which penalize the failure to negotiate a reasonable set- tlement or reward the negotiation of a reasonable settlement .....	30
2. The effectiveness and equity of financial incentives in support of two-party settlement of disputes .....	33
Notes .....	35

	<i>Page</i>
IV. THE AUTOMATIC TRANSFER STRATEGY: MEASURES WHICH REDUCE THE NEED TO DETERMINE ELIGIBILITY FOR THIRD PARTY INTERVENTION .....	38
A. Examples of Procedures Which Grant the Moving Party's Request Without a Contested Eligibility Determination .....	38
1. Measures relying solely on moral sanctions and normal civil (and criminal) penalties to discourage erroneous eligibility declarations .....	38
2. Measures relying upon systematic audits of a sample of declarations and accompanying civil and criminal penalties to discourage erroneous eligibility declarations .....	39
3. Measures relying on responding party's right to demand a hearing (after the objective is transferred) to discourage erroneous eligibility declarations .....	41
B. Factors Determining in Which Classes of Disputes These Strategies Are Appropriate .....	42
1. The relative value of the moving party's objective .....	43
2. The relative severity of the sanctions meted out for filing a fraudulent or erroneous application .....	43
3. The perceived risk the sanctions will be inflicted if a fraudulent or erroneous application is filed .....	43
4. The relative cost of the deterrence mechanism .....	43
5. The relative cost of a third party resolution of the average dispute ..	43
6. The responding party's relative capacity to absorb or distribute a heightened risk of erroneous eligibility applications .....	44
7. Evolving criteria for the selection of classes of disputes suitable for automatic transfer .....	44
Notes .....	46
V. THE ELIGIBILITY SIMPLIFICATION STRATEGY: MEASURES WHICH VARY THE ELIGIBILITY CRITERIA WHICH MUST BE SATISFIED TO JUSTIFY THIRD PARTY INTERVENTION .....	50
A. Measures Which Substitute General Fairness Standard for Detailed Eligibility Criteria .....	50
B. Measures Which Eliminate or Modify Certain Elements of Eligibility Criteria .....	51
1. The relationship between eligibility criteria and the source satisfaction as defined in chapter II .....	51
2. The relationship between eligibility criteria and the nature of the objective sought .....	52
3. The relationship between eligibility criteria and the cost of proving various elements .....	53
4. The relationship between eligibility criteria and society's goals for the dispute resolution process .....	54
Notes .....	55
VI. THE RESOURCE REDUCTION STRATEGY: MEASURES WHICH MANIPULATE THE INVESTIGATION AND DECISION-MAKING PROCESS THROUGH WHICH ELIGIBILITY FOR THIRD PARTY INTERVENTION IS DETERMINED .....	57
A. Measures Which Reduce the Amount or Cost of Resources Used in the Eligibility Determination Process .....	57
1. Measures substituting uncompensated or lesser-compensated decision-makers .....	57

	<i>Page</i>
2. Measures reducing support costs of the decision-making forum . .	60
3. Measures affecting input expenses of other participants . . . . .	60
B. Measures Which Increase the Productivity of the Eligibility Determination Process . . . . .	63
1. Examples of measures enhancing decision-making productivity . .	63
Notes . . . . .	66
VII. THE RESPONSIBILITY REALLOCATION STRATEGY: MEASURES REALLOCATING THE RESPONSIBILITIES FOR FACT INVESTIGATION, CRITERIA ASCERTAINMENT OR DECISION-MAKING . . . . .	72
A. Measures Shifting Fact Investigation, Criteria Ascertainment or Presentation Responsibilities from Disputants to the Third Party Forum .	72
B. Measures Shifting Fact Investigation, Criteria Ascertainment, and Presentation Responsibilities from One Disputant to Another . . . . .	75
C. The Effects of Reallocating the Responsibilities for Fact Investigation, Criteria Ascertainment or Presentation . . . . .	76
Notes . . . . .	77
VIII. THE COST REDISTRIBUTION STRATEGY: MEASURES MANIPULATING THE INCIDENCE OF THE EXPENSES OF FACT INVESTIGATION, CRITERIA ASCERTAINMENT OR DECISION-MAKING .	80
A. Government Absorption of Expenses of Fact Investigation, Criteria Determination, or Decision-Making . . . . .	80
B. Government-Mandated Redistribution of Expenses Among the Parties and Others Involved in the Process . . . . .	81
1. Redistribution among "classes" of disputants . . . . .	81
2. Redistribution between individual litigants . . . . .	82
3. Redistribution among classes of disputes . . . . .	83
Notes . . . . .	85

## **ABSTRACT**

This report presents an overview of the defects in the present judicial system and dispute resolution process in the United States. It reviews six strategies to improve the process: settlement incentive, automatic transfer, eligibility simplification, resource reduction, responsibility relocation, and cost redistribution. These approaches are designed to minimize the need for third-party intervention in civil disputes, to reduce caseloads, and to decrease the amount of time and money required to handle civil disputes.

# CHAPTER I. INTRODUCTION: AN OVERVIEW OF THE PRINCIPAL PERCEIVED DEFECTS IN THE PRESENT JUDICIAL SYSTEM

This document is a final report, but not of the typical variety. Though complete and self-contained, it is prepared at an interim stage of a four-year research project and thus does not purport to present the researcher's ultimate findings and recommendations. Despite this, it is not a traditional interim report either, merely describing the progress of the research. Rather an attempt is made to develop as much of the final construct as can be gleaned from the Phase One investigation.

## A. Methodology and Organization of Report

The scope of the Phase One research discussed in this report embraced the *identification* of many of the principal methods presently employed in an effort to improve the processing of *civil* disputes. The inquiry ranged to promising approaches in comparable foreign countries as well as the United States. During Phase Two of this study, certain of the more promising institutions and procedures uncovered thus far are to be evaluated and compared with the prevalent method presently used to resolve major categories of civil disputes (generally the regular courts) in the United States.

Three methods were employed to identify the specific mechanisms discussed in this report. First, the Program staff conducted an extensive literature search, consulting indexes to domestic and foreign sources and obtaining computer searches.<sup>1</sup> Secondly, we reviewed the reports prepared by experts from over a dozen industrial countries for the Access to Justice Project of the Centro Studi di Diritto Processuale Comparato, University of Florence, Italy.<sup>2</sup> And thirdly, during a European field trip, which focused primarily on strategies for processing *criminal* cases,<sup>3</sup> some information was gathered about strategies for civil cases as well. (The strategies for criminal cases are described in another report prepared by Program staff.<sup>4</sup>) Our inquiry was extensive and yielded many interesting institutions and procedures. But we are not foolhardy enough to claim the research was exhaustive or that the specific measures discussed in this report constitute a comprehensive list. Given the time and resource constraints, it would have been difficult to

compile a complete compendium even for one jurisdiction.

Since evaluation awaits the next phase, this report merely attempts to introduce the fundamental strategies for improving the processing of civil disputes and to identify the more significant policy issues raised by these strategies. Conceivably, the report could have been organized around descriptions of discrete institutions and programs uncovered through our research, arranged alphabetically or by type. However, an examination of those institutions and programs revealed they seldom embodied a single strategy. Rather, each institution or program combined two or more underlying approaches. Thus, our analysis took us to another, deeper level—to the fundamental strategies themselves. The bulk of this report is devoted to a discussion of these basic approaches and, as a consequence, a single institution or program sometimes appears more than once as an illustration of different strategies implemented in its operation.

Our preliminary analysis also carried us to another realization: the need to develop a new conceptual framework. The traditional language of the judicial process simply was inadequate to comprehend the variety of dispute-processing mechanisms which we found and sought to describe. The usual categories seemed to limit discussion and stifle imagination. Accordingly, we have attempted to begin, at least, a reconstruction of the dispute resolution process as a necessary prelude to a proper consideration of the alternative strategies for improving performance.

This report also differs in another respect from a more orthodox treatment of our research into dispute-processing strategies in civil cases. Rather than confining discussion to already-functioning institutions, we often followed the underlying principles to uncover new possibilities, that is, approaches that might be worthy of experimentation, or at least further exploration. The possible contours of some of these speculative measures are outlined along with the descriptions of existing mechanisms.



The remainder of this chapter will consider the perceived problems with the regular courts which have motivated most of the institutions and procedures discussed in this report. Chapter II presents an overview of the dispute resolution process which emphasizes those parts which appear susceptible to deliberate manipulation. Based on terminology and concepts introduced in Chapter II, the remaining chapters of the report discuss six general strategies for improving performance most of which theoretically could be employed within the regular court system as well as in alternative institutions. These six basic approaches are termed the settlement incentive strategy, the automatic transfer strategy, the eligibility simplification strategy, the resource reduction strategy, the responsibility reallocation strategy, and the cost redistribution strategy.

Though this is a final report, the Program staff does not consider the typology of dispute-processing strategies presented herein to be set in concrete. As we delve deeper into the evaluation of specific institutions, it is not unlikely that new insights will lead to a reconceptualization of the entire process or at least to substantial refinements of the current framework and the discovery of new categories. The author of this report already has revised his thinking once. In a report on developments in the United States prepared for the National Center for State Courts, he presented a more primitive analysis of the options.<sup>5</sup> We think the present report embodies a more useful framework, but hope and expect that further research will lead to a better understanding of the process and other fundamental revisions in the basic conceptual structure.

As a group, the strategies identified during Phase One research can be expected to respond to several perceived defects in the regular court system rather than a single problem. Some of these strategies only address one of the deficiencies, others may be more broadly-gauged in their effects. The discussion of the various means of improving the dispute resolution system will be more meaningful if we first briefly outline the more significant of the problems in the present judicial system.

## **B. A Summary of the Principal Deficiencies of the Present Judicial System**

Though there is a considerable overlap among categories, most criticisms of the present judicial system (and thus the primary motives for reform) appear to cluster under six headings: Caseload overload; delay; inaccessibility for many litigants and disputes; cost to litigants and government; lack of equity in results; and undesirable psychological side-effects from the process.

1. *Caseload overload.* This is less a real defect in the judicial system than a powerful motivation for change of

some kind. True, the effects of overload can be extraordinarily deleterious. With more disputes to resolve than resources to dispose of them, a backlog soon builds up and long delays become inevitable.<sup>6</sup> Moreover, the pressures to expedite decision often lead to cursory treatment of each individual dispute and the appearance and reality of "mass-production justice."<sup>7</sup> Nevertheless, overload may merely indicate a shortage of judicial resources rather than any shortcoming in the judicial process. Hence, the proper remedy may be more judges rather than any of the fundamental reforms discussed in this report.<sup>8</sup>

Because of real world constraints, however, such as the unwillingness of legislatures to appropriate more funds for the courts, the judicial overload phenomenon often translates into pressure for new approaches rather than new money. In this context, any measure which tends to reduce the number of cases filed in the courts, as by diverting disputes to non-judicial tribunals, is seen as a remedy for the overload malady. The prescriptions also include alternative forums or procedures which shorten the time required to resolve each dispute and thus diminish the total court workload.<sup>9</sup>

2. *Delay.* In large part, delay in resolving disputes is merely one major consequence of an overload situation. When the demand for court resources exceeds the supply, a queue begins to form.<sup>10</sup> At some point, the queue becomes so long that disputants begin to complain about untoward delay in reaching the judicial forum.<sup>11</sup> Again, any strategy which will divert a given disputant to a forum with a shorter queue (or preferably none), or which will shorten the queue in the courts is apt to be perceived as an appropriate remedy for this form of delay.

There is another sense in which time delay is sometimes experienced in the present court system. Irrespective of overload, courts can appear to lumber to their decisions. Assuming ample resources and ideal conditions, there still are many time-consuming steps—motions, interrogatories, depositions, pre-trial conferences, etc.—built into the process.<sup>12</sup> Particularly when rather simple or modest-stakes disputes are involved, there may be support for the creation of more expeditious institutions or procedures solely to shorten the time required to obtain a resolution of the matter.<sup>13</sup>

3. *Inaccessibility of courts for many litigants and disputes.* Overload and delay are closely related problems, as we have seen, and often the result of a high volume of cases being filed in the courts. Inaccessibility, on the other hand, tends to reduce the number of cases brought to the courts. As a consequence, measures which tend to improve access may simultaneously aggravate the overload and delay problems experienced by the judiciary.<sup>14</sup>

Courts may be inaccessible to one or both sides of a dispute for many reasons. Among the most significant, however, are the economic, geographic, and psychological barriers.

Litigants incur several economic costs if they are to participate in a judicial proceeding, either as a plaintiff or defendant. Ordinarily they must employ an attorney,<sup>15</sup> pay various fees,<sup>16</sup> and meet certain other expenses<sup>17</sup> directly connected with the dispute resolution event itself. Beyond that there are some less obvious opportunity costs, such as income lost while helping to prepare the case or attending proceedings,<sup>18</sup> which can be an important factor especially in the context of a dispute involving rather modest stakes.

These economic considerations can make it impossible for a disputant to prosecute or defend a case in the courts in at least two situations. *First*, low income persons are effectively barred from participation in any litigation no matter how much is at issue. They simply lack the money to hire expensive legal counsel and the other costs discussed above. Even the opportunity costs of lost wages can be prohibitive when someone exists at the margin.<sup>19</sup> *Secondly*, litigants of any income level will be effectively foreclosed when the stakes are rather modest. In many cases, a disputant would incur more costs in participating in the lawsuit than he stands to gain (or save) from winning.<sup>20</sup> Moreover, the uncertainty inherent in most litigation means the stakes must exceed the costs by a substantial margin before it is rational to file or defend a case in the courts. Thus, even a contest over several thousand dollars can prove uneconomic.<sup>21</sup>

The geographic barriers to access also are partially economic. A centralized system of courts probably saves money for the government.<sup>22</sup> But it insures those courts will be inconvenient at best for litigants living away from the city center. At the extreme, it can become physically or economically impossible for disputants to use the courts for more disputes.<sup>23</sup> Thus, one of the primary motivations for some alternative forums is the opportunity to disperse dispute resolution resources among local communities and neighborhoods.<sup>24</sup>

Psychological inaccessibility is a more subtle phenomenon. It is compounded by several factors: the anxiety-provoking formality of the typical courtroom setting, the language barrier for some litigants, the mysterious legal machinations for nearly all, and like considerations.<sup>25</sup> Many disputants overcome these feelings and file their claims with the court, at least when their grievances are acute (and especially when they have been able to hire the comforting hand of a lawyer familiar with the process.) Others are thrust into the judicial arena as defendants and, lacking a choice, manage to participate in the proceeding with varying levels of effectiveness.<sup>26</sup>

But for some people the various psychological barriers to the court may prove insurmountable. Especially for the poor, the uneducated, and the non-English-speaking, a courtroom may appear to be something to be avoided at all costs, even when entering that courtroom is the only way to right a grievous wrong or to protect oneself against a spurious lawsuit.<sup>27</sup> Whether true or not, this conception provides one of the motives for measures which have the effect of deformatizing and demystifying the process.<sup>28</sup>

4. *Economic cost of judicial resolution of disputes for disputants and government.* For disputants, this is merely a less aggravated version of the same costs which were discussed above as economic barriers to access. The legal fees, costs, litigation expense, and opportunity costs which for some disputants and some disputes constitute an absolute bar to participation in the courts<sup>29</sup> can in other circumstances merely give rise to complaints that the process of judicial resolution of disputes proved too expensive. The litigants were able to afford to prosecute and defend effectively, and the matter in issue merited a substantial investment, but the costs of participating ate up too much of the proceeds (or savings) resulting from the litigation. "There must be a cheaper way to decide these cases" is a common cry among litigants and even some lawyers.<sup>30</sup> As such, it is a powerful motive for changes which promise to reduce the cost of dispute resolution for the parties.

Governmental expenditures on courts and the entire judicial dispute resolution system in the United States appear so minimal, relatively speaking,<sup>31</sup> that it is difficult to imagine that the cost to government would be an issue. Nearly every feature of the judicial process as presently constructed seems calculated to achieve economies for government at the price of increased transaction costs for the private litigants.<sup>32</sup> Nevertheless, there apparently is a reluctance to allocate significant public monies to judicial resolution of private disputes, and especially to those categories in which the amount in controversy is rather small. It may be debatable how much greater stake the public has in the resolution of a private dispute over a million dollars than it has in one involving a hundred dollars.<sup>33</sup> Yet, the government would not blink an eye about spending scores of thousands of dollars to provide a two-month jury trial for the former<sup>34</sup> but probably would worry about expending even a hundred for a half-day hearing on the latter.

Justified or not, governmental economy is one of the prime motivations behind many reforms suggested for the dispute resolution process. Not only is it an end in itself, but it also can be viewed as a prerequisite for measures seeking to improve dispute resolution in other respects. For example, as a practical matter, it often is

not feasible to finance changes which may help the disputants, such as lowering their transaction costs or providing neighborhood dispute resolution facilities, unless simultaneously the method of handling disputes is modified to something less costly to government than the regular court process. To increase government expenditures in one direction in pursuit of a certain goal, it may be necessary in a political sense, if no other, to offer economies in another direction. Thus, instituting a network of neighborhood arbitration centers may be more feasible than a complete dispersion of the court system to the neighborhood level, assuming, of course, that arbitration is less costly than judicial adjudication.<sup>35</sup>

5. *Lack of equity in the results achieved through dispute processing in the courts.* Though there may be complaints about other aspects of dispute resolution in the courts—expense, anxiety, and the like—the present judicial process generally achieves high marks for the fairness and accuracy of its decisions, *at least in "micro-justice" terms.*<sup>36</sup> That is, once one accedes to certain simplifying assumptions, the process itself is calculated to produce a thorough and fair consideration of the individual dispute and a reasonably fair resolution of that controversy.<sup>37</sup> Judges are fairly well insulated, though not completely, from the pressures that might lead to questionable decisions, and juries are available to counteract some of the residual judicial biases. Various discovery provisions insure the parties can make a rather deep probe of the facts, and refined evidentiary rules tend to filter out matters which might mislead or prejudice the decision-maker. One or more layers of appellate review further insure that the procedures were fair and the proper law was applied in the trial proceeding.

At least two conditions must be satisfied, however, before the assumed equity of the decision-making process can hold up for the mass of disputes presently assigned to the courts for resolution. As presently constituted, the regular courts will not yield equitable results in disputes in which one or both parties lack the financial resources to afford sufficient litigation expenditures to investigate and present the case.<sup>38</sup> In fact, courts may not produce a fair outcome when there is considerable disparity between the litigants even though the less-advantaged party has enough resources to finance a reasonable level of participation.<sup>39</sup> Viewed in "macro-justice" terms,<sup>40</sup> it is not unlikely that the caseload of the courts presently is dominated by controversies in which the assumptions about adequate resources and parity between competing disputants simply do not hold up. The great mass of filings do not tend to be "Ford vs. General Motors" or "United States vs. IBM." Rather they tend to be "John Q. Consumer vs. Sears, Roebuck & Co.," "landlord vs. tenant," or "creditor vs. debtor—as Professor Galanter has put it: "haves" vs.

"have-nots." <sup>41</sup>

To the extent that the disputes assigned to the courts for resolution are between disputants of inadequate or unequal means, the present judicial system may not provide a fair forum. Thus, another reason for reform both within and without the courts is to enhance the average equity of the resolutions achieved.<sup>42</sup>

6. *Undesirable psychological outcomes from court processing of disputes.* Irrespective of the objective equity of decisions reached in the courts, some observers question the desirability of the outcomes achieved through the adversary proceedings typical of the judicial process. The courts are criticized for excluding significant underlying factors from their investigations and deliberations, issues such as the psychological and social causes which created the dispute.<sup>43</sup> If a man sues his neighbor for punching him in the nose, the judge ordinarily will decide the dispute and fashion his remedy solely on the basis of whether the defendant intentionally struck the plaintiff. The court will not seek to determine whether there is a long-standing source of irritation or a psychological predisposition toward violence.

Another shortcoming of the judicial process is the limited range of remedies ordinarily administered in civil disputes.<sup>44</sup> It does not matter so much that the courts do not venture into the underlying causes of disputes since they seldom treat those problems anyway. Typically, the court is only deciding whether the man who claims he was hit is entitled to receive monetary compensation from the alleged aggressor or not, for instance, whether the irritating conduct should stop or that either disputant should submit to psychological counseling.<sup>45</sup>

It is also alleged that the judicial process sometimes aggravates tensions between disputants and thus falls short of "resolving" disputes in any real sense. Adversary proceedings presumably tend to polarize disputants in a way that a more conciliatory approach would avoid.<sup>46</sup> Moreover, critics cite the "zero-sum" outcome of judicial decisions to suggest courts are ill-equipped to produce compromises that will be reasonably satisfactory to both parties.<sup>47</sup> In actuality, court decisions in most civil cases ordinarily are not zero-sum. A plaintiff seldom obtains all he asks nor is he often "shut out" completely. If he asked for \$50,000 in compensation, it is not necessary that the court award him either \$50,000 or nothing. The outcome may fall anywhere between zero and \$50,000. Moreover, viewed as a whole, the civil judicial process appears to involve heavy elements of negotiation, mediation, and compromise.<sup>48</sup>

But again, whether a valid charge or not, the assumed psychological inferiority of court litigation is one of the motives for some proposed reforms, especially those which emphasize conciliation and mediation techniques.<sup>49</sup>

## NOTES—CHAPTER I

1. In conducting the literature search, we consulted the standard indices in the field of law and social science, including the Index to Legal Periodicals, the Index to Foreign Legal Periodicals, the Index of Periodicals Related to Law, and the Social Science Index. These indices proved to be a fruitful source of references; about 60 of the more significant articles on particular mechanisms as well as theories of dispute resolution were abstracted by the program staff. In addition, several of the mechanisms discussed in the civil report were identified or described to us in the responses to the criminal strategies questionnaire survey (described in the companion volume reporting on the criminal strategies results, see note 4 *infra*).

2. Reports were received from Australia, Bulgaria, Canada, France, Hungary, Israel, Italy, Japan, Netherlands, Poland, Sweden, United States, U.S.S.R., and West Germany. The Access to Justice Project is funded by the Ford Administration. Professors Mauro Cappelletti and Earl Johnson, Jr. codirected the research phase of the project.

3. The European field researcher conducted 72 formal interviews in 12 countries during a five-month period in 1976. Interviews lasted from one and one-half hours to one or two days. Many of the interviewees were academic lawyers, although judges, government officials, sociologists, and other academicians were a frequent source of contact. As mentioned, most of the interviews were conducted for the criminal strategies arm of the Program, although in a few instances these interviews provided a fruitful source of information about civil mechanisms.

4. William L.F. Felstiner and Ann Barthelmes Drew, "European Alternatives to Criminal Trials and Their Applicability in the United States (Including an Appendix Surveying Non-European Alternatives)," report submitted to the National Institute for Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Washington, D.C. December 31, 1976.

5. E. JOHNSON, JR., V. KANTOR and E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* (Denver: National Center for State Courts, 1977).

6. A 1973 study reported that a typical civil case may be delayed over four years in many jurisdictions before it is brought to trial. At that time, the national average was 21 months. INSTITUTE OF JUDICIAL ADMINISTRATION (New York), *CALENDAR STATUS STUDY* vii (1973).

7. Consider the following statement by a trial court judge in New York:

Too many judges have been caught up in a consuming campaign against That Old Debbil Calendar . . . The frenzy with which we try to shorten the long line of cases shuffling toward trial, when it is accomplished by hard-pressed settlements, is highly indecorous and undignified . . . Instant justice, at trial or pretrial stage, can never be a consistent substitute for a true justice, which requires time for brewing, blending, and often brooding.

L. DOWNIE, JR. JUSTICE DENIED 148 (1971).

8. A companion report prepared by Program staff suggests the possibility that the United States has a relatively small judiciary and a rather low relative investment in the courts compared to some of the countries most analogous in economic and social terms. See E. Johnson, Jr., A.B. Drew, W.F. Felstiner, S.A. Bloch, W. Hanson,

and G. Sabagh, "A Comparative Analysis of the Statistical Dimensions of the Judicial Systems (and Related Institutions) of Seven Industrial Democracies."

9. For evidence of current proposals to release caseload pressures through all of these tactics, see the papers prepared for the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minnesota, April 7-9, 1976, especially those of Hon. Warren E. Burger, Chief Justice of the United States; and Professor Frank E. A. Sander.

10. For a brief description and references to queuing theory, see Chapter VI, note 84 *infra*. For a discussion of its relationship to the court, see Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUDIES 399, 445-48 (1973).

11. See note 6 *supra*.

12. The existence of such time-consuming procedures also makes it possible for disputants who may profit from delay (i.e., many institutional defendants) to slow down the process still further. They can make every possible motion, deploy every discovery device, and otherwise drag out the proceedings.

13. Interestingly, one of the key features of a recent legislative reform authorizing the creation of experimental procedures in certain California courts is the sharp curtailment of discovery and some other time-consuming steps. This legislation was drafted initially by the Los Angeles County Bar Association's Committee on Economical Litigation and became law in 1976. CAL. CODE CIV. PROC. §§ 1823-1833.2 (1976 Cal. Legis. Serv. ch. 960). See also, Thompson, *The Expense of Litigation: Can It Be Reduced?*, 52 L.A.B.J. 96 (1976).

14. This fear may well underlie the judicial reluctance to waive some of the economic barriers to the courts even for the poor. See *United States v. Kras*, 409 U.S. 434 (1973) and *Ortwein v. Schwab*, 410 U.S. 656 (1973).

15. Lawyers fees place highest on the list of litigation expenses. Lawyers fees basically range from \$25 to \$100 an hour; some bar associations recommend minimum fees per type of case (for example, uncontested plaintiff's divorce, \$500; simple will, \$50). (The Supreme Court held recently in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that in some instances at least, requiring lawyers to adhere to minimum fee schedules was an unfair restraint of trade). One study of automobile accident injury cases found that 35.5 percent of plaintiff's gross recovery was consumed by lawyers fees. U.S. DEPT. OF TRANSPORTATION, *AUTOMOBILE ACCIDENT LITIGATION* 36-40 (1970).

16. An American Bar Foundation Study of 30 jurisdictions reported the range of some of these fees: filing charges ranged from \$2.00 to \$35.00; service of process ranged from \$.75 to \$10.00; service by publication ranged from \$10.00 to \$150.00. Jury fees might consume up to \$50 a day for a 12 person jury, excluding mileage. Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO L. REV. 21, 40 (1968).

17. There are other expenses which one might not ordinarily expect to be as large as they are. For example, judgment fees may cost up to \$50. And then there are, of course, the costs of transcribing the record which may cost up to \$25.00 per day or more if calculated hourly. Added to this are witness fees and mileage costs. See *id.*

18. See, e.g., Posner, speaking of the effect of delay (or queuing) in the courts:

A major cost associated with queuing as a method of rationing goods is the opportunity cost of the time people spend in the queue. Where the parties' time is their own while they wait (as when a theatergoer is forced to "wait" for six months to see a popular musical), the queue is merely a "figurative" queue. [footnote omitted] The court queue is a literal queue for defendants incarcerated awaiting trial and for some owners of property "tied up" in litigation.

Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 445-46 (1973).

19. In recent years, government-subsidized legal assistance has begun to provide relief for some low-income litigants at least with respect to legal fees and the other direct costs of litigation. Still the majority remain without the means to prosecute or defend civil claims in the courts.

20. In a recent study it was found that many middle-class debtors did not defend against relatively modest claims, even when they felt they had a defense, because they decided it would cost more to employ a lawyer and win the lawsuit than merely to capitulate and pay the alleged debt. D. CAPLOVITZ: DEBTORS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 222 (1974) ("Closely related to the failure of debtors to have their day in court and their legal rights protected is the irony that lawsuits against consumers generally involve sums of money that are smaller than the amounts the debtor would have to pay a lawyer to protect his rights.")

21. If one has only a 50 percent chance of winning a lawsuit, it is not very sensible to invest \$1,000 in litigation expenses to recover a \$1,000 claim since there is a 50 percent chance of losing \$1,000, and no chance of ending up a net winner. If the claim is for \$5,000, however, a \$1,000 legal cost may be justified since there is now a 50 percent chance of losing \$1,000, but also a 50 percent chance of netting \$4,000. Obviously, the relationships between stakes, litigation costs, and probability of winning typically are more complex and the probability factor, in particular, subject to considerable uncertainty. Moreover, because of the possibility of compromise at various stages of the litigation process, even the amount of actual litigation costs and the amount of the actual winnings at stake can be unknowns.

22. See note 32 *infra* and Chapter VI note 4 *infra* for a discussion of how a centralized court system lowers the government's production costs.

23. Residents of remote villages in Alaska face this difficulty; the normal U.S. dispute resolution mechanisms are not efficient for them. This was one of the motivations for a Village Conciliation Board project in one village which uses native villagers to conciliate disputes and prevent violence in the community. See Hippler and Conn, *The Village Council and its Offspring: A Reform for Bush Justice*, 5 UCLA ALASKA L. REV. 22 (1975).

24. See, e.g., Cahn and Cahn, *What Price Justice? The Civilian Perspective Revisited*, 41 NOTRE DAME LAWYER 929 (1966), which discusses the importance of accessibility of courts as one feature in improving the quality of the "Justice Industry."

25. See *id.*; see also Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973). Both of these articles stress the critical importance of utilizing native community residents as decision-makers to achieve a more effective system of justice, one which disputants from all backgrounds will not fear and avoid.

26. How minimal and futile that participation may be is illustrated by the plight of the civil defendant in *Hunt v. Hackett*. 36 Cal. App. 3d 134 (1973), *cert. den.* 419 U.S. 854 (1974). See also Chapter VII note 5 *infra*.

27. See, for example, the conclusion of a study of plaintiffs in automobile accident cases in New York City:

The higher the socio-economic status of the injured person,

the more likely he is to make a claim and the more likely he is to press the claim by himself rather than through a lawyer.

R.E. HUNTING AND G.S. NEUWIRTH, WHO SUES IN NEW YORK CITY? 130 (1962).

28. The need to deformatize and demystify the legal process has become a frequent cry. See, e.g., Nader and Singer, *Dispute Resolution*, 51 CAL. S.B.J. 281 (1976); Halbach, *Toward a Simplified System of Law*, in M. SCHWARTZ (ed.), *LAW AND THE AMERICAN FUTURE* 143 (1976).

29. See pages 2-3, *supra*.

30. In a sense, this is the cry underlying all of the calls to reform which have been surfacing in recent years—let us find cheaper and more effective modes of dispute resolution. The most famous, early piece expressing the need for changes in our system to achieve these ends is often thought to be Pound's 1906 speech to the American Bar Association on The Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in 40 AMER. L. REV. 729 (1906). His themes have been restated and developed by many others. See, e.g., Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929 (1970); Burger, *1976 Annual Report on the State of the Judiciary*, reprinted in JUDICIAL CONFERENCE OF THE UNITED STATES, NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, RESOURCE MATERIALS 33 (April 7-9, 1976); Cahn and Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L. J. 1005 (1970).

31. For instance, on a per capita basis, the United States' judiciary is about one-third the size of West Germany's and one-half of that found in Sweden. The United States also invests less than one-half as much per capita in the judicial branch as does West Germany and somewhat less than Sweden. These and other comparisons are discussed in a companion report, E. JOHNSON, JR., et al., *supra*, note 8.

32. A centralized system yields economies of scale in numerous areas. Not only are less courtroom buildings and physical facilities required, but also better use can be made of court personnel. For example, our centralized calendar system enables one judge to call all the cases while disputants and lawyers sit and wait for assignment of their case. A centralized record system makes record retrieval quicker and more efficient. At the same time, however, while a centralized system reduces the costs of producing justice, it increases the costs to consumers of justice who, for example, must travel longer just to reach the court, must wait in longer lines, etc. See L. Wechsler and R. Warren, *Consumption Costs and Production Costs in the Provision of Antipoverty Goods* (American Political Association, Mimeo, 1970). See also Cahn and Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

33. Among other things, this is a complex issue of external benefits, their character, and distribution. According to this sort of analysis, a public investment in dispute resolution is only justified if and to the extent that the public, as opposed to the individual disputants, achieves benefits. It is neither obvious nor indisputable that the public benefits presumably generated by the dispute resolution process—*i.e.* social stability, allegiance to the political system, respect for law—are directly correlated to the amount in dispute. That is, it is not absolutely clear that providing an effective forum for the resolution of a \$50,000 dispute will produce 500 times the public benefit as a \$100 dispute. Or to recast the question, it is not axiomatic that the successful resolution of one \$50,000 dispute involving two private litigants will generate as many public benefits as would the successful resolution of five hundred \$100 disputes involving one thousand individual disputants. In fact, on grounds of pure numbers of people touched by the system, there is reason to suspect that the 500 small cases would do substantially more to promote stability, allegiance, respect, etc., than the single major case. However, the author does not seek to prejudice this issue, which is

33. (Cont.) beyond the scope of this report, but to indicate that it does exist and that our present allocation of judicial resources among civil disputes appears to be premised on an assumption that the public has a much lesser stake in the resolution of relatively modest private disputes than it does in larger private disputes. For a suggestion that it might be useful to require private litigants to pay a larger share of the total dispute resolution costs for the more economically significant disputes, see pages, 83-84, *infra*.

34. That the public might become sensitized to this issue sometime in the future was suggested by a ripple of criticism in the future was suggested by a ripple of criticism in the press over a multi-million dollar lawsuit between Doris Day and some of her former managers. Some members of the general public questioned why the government should have spent an estimated \$250,000 on a trial which lasted many weeks in order for one private person, Ms. Day, to win a few million dollars from some other private persons.

At the other end of the scale, recent figures from the Alameda County, California small claims court indicate the net government cost for processing such disputes was about eight dollars per case. Conversation with John Ruhnka, Study Director, Small Claims Court Study, National Center for State Courts, Denver, Colorado, January 20, 1977.

35. Some of the circumstances under which arbitration might be less expensive than the courts are suggested at pages 59-60 *infra*.

36. This dichotomy of "micro-justice" versus "macro-justice" considerations is borrowed from Professor Alfred Conrad. Conrad, *Macrojustice: A Systematic Approach to Conflict Resolution*, 5 GEORGIA L. REV. 415 (1971). As such, the terminology is borrowed second hand from economics and its division between "micro-economic analysis" and "macro-economic analysis." Only in the most general sense do the terms "micro-justice" and "macro-justice" purport to be analogous to the economic concepts which sound so similar.

37. Thus, in this section, "micro-justice" concerns how equitably the judicial system performs in deciding the individual dispute, while "macro-justice" shifts the focus to the whole mass of disputes assigned to the judiciary and how equitably it disposes of those disputes on the average and in the aggregate.

38. One example is provided by the cases in which debtors capitulated even when they felt they possessed a valid defense because they could not afford to employ lawyers or incur the other costs of litigation. See CAPLOVITZ, *supra* note 20.

39. For an analysis suggesting this conclusion, see Galanter *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW AND SOC'Y REV. 95 (1974).

40. See note 37 *supra*.

41. See Galanter, *supra* note 39.

42. *Id.*

43. For example, Fuller speaks of the court's adjudication process as "rule oriented," while other processes, such as mediation, look at the disputing parties themselves and try to re-orient the parties toward each other. Fuller, *Mediation—Its Forms and Functions*, 44 SO. CAL. L. REV. 305 (1971).

A similar notion has been analyzed in other terms by Golding. He speaks of the "original conflict," i.e., the dispute itself which precedes the dispute resolution process, and the "persuasive conflict," i.e., the presentation of evidence and arguments in support of one's side of the case. In court adjudication, the original conflict is superseded by the persuasive conflict, and it is this latter conflict which the court resolves, not the former. Golding, *Preliminaries to the Study of Procedural Justice*, in G. HUGHES (ed.), LAW, REASON, AND JUSTICE 71, 86-90 (1969).

44. See Golding, *supra* note 43 at 88-89:

I shall assume that in each of these contexts [jural disputes, where the original conflict has been superseded by the persuasive conflict] the parties have a problem for which they seek a solution—a solution that can be given by way of a binding decision. [footnote omitted] This ordinarily presupposes that the problem can actually be solved by the dispute settler's telling one party to do something for the other or give something to the other; in other words, that a remedy or award is possible. [footnote omitted] These are plainly distinct from effecting reconciliation by way of adjustment or compromise and from actively promoting therapeutic integration. Such settlements are not typically achievable by telling one party to do for, or give to, the other. At least, it is unusual for them to be brought about in such a way.

45. See *id.*

46. See *id.* at 88-95, discussing the differences between remedy or award, reconciliation and therapeutic integration. See also Fuller *supra* note 43, who stresses that mediation is a more effective technique of dispute resolution where the relationship between the parties is a continuing one.

47. Golding speaks of this phenomenon as a "loser-lose-all decision." Golding, *supra* note 43 at 90.

48. The clearest example of this is the formal pretrial conference, mandatory in some jurisdictions, between the attorneys and the presiding judge. Its stated purpose is to shape the case and effect better presentation at trial, but it is also hoped that settlement will result. See Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in H. JONES (ed.), THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 49 (1965); M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

Compulsory arbitration required in some jurisdictions for claims of up to as much as \$10,000 has become an integral part of the civil judicial process and provides a more subtle example of the insertion of negotiation and compromise into the system. Lawyer-arbitrators hear evidence from both sides in order to make a decision on the case, but frequently before actually deciding the case, they attempt to uncover the outside limits of an acceptable resolution for each party, so that if possible, the decision will be acceptable by both, making it more satisfying to the disputants and less likely to be appealed. See JOHNSON, *supra* note 5 at Chapter V.

49. See Nader and Singer, *supra* note 28 at 283, suggesting that the urge for reform which led to the small claims court movement grew out of reference to Norway's conciliation tribunals.

## CHAPTER II. AN OVERVIEW OF THE DISPUTE RESOLUTION PROCESS

Many of the dispute processing strategies to be discussed in future chapters involve fundamental restructuring of the dispute resolution process—transforming or transposing certain key elements of that process. These discussions are based on a specific conceptual framework, one which outlines what we perceive to be the most significant elements and the relationships among them. This chapter presents that framework, first defining some of the terminology, then describing our view of the principal elements of the civil dispute resolution process, and, finally, discussing some of the more relevant interrelationships. The chapter concludes with a brief summary of the six basic dispute-processing strategies to which the remainder of this report is devoted.

### A. Some Preliminary Definitions

Since this report eschews the dichotomy between judicial and non-judicial dispute resolution forums and, furthermore, strives for a more generalized view of the process, it uses some non-traditional terminology. Before proceeding further with a description of the process and the strategies for improving performance, it will be helpful to define some of the more prevalent terms.

The “moving party” is simply the individual or institution who feels the need to seek some sort of relief. In the formal judicial forum, this party ordinarily would be called the plaintiff. In an intra-family quarrel the son who first rushed to his father screaming “My brother took my toy airplane! Make him give it back, Daddy!!” would qualify as the “moving party.”

The moving party’s “objective” is, as the word implies, the *ultimate* relief which is being sought. It is *not* a judicial order or the equivalent which normally is merely a means to an end. Rather, it is the toy airplane the child wants to have returned from his brother, the money an accident victim seeks as a compensation for his injuries, etc.

The “source of satisfaction” is the individual or institution that actually holds the objective sought by the moving party. It is the brother who has possession of the child’s toy airplane. It is not, however, the other automobile driver in an accident situation if that driver is

insured. Then the “source of satisfaction” is the other driver’s insurance company.

The “third party intervenor” (sometimes called the “third party forum” in subsequent discussions) is the individual or institution from which the moving party seeks assistance in obtaining his objective from the source of satisfaction. It is the father from whom the boy asks physical assistance to force his brother to return the toy airplane. In traditional litigation, the “third party intervenor” (or “third party forum”) quite obviously is the court.

The “allegedly responsible party” is the individual or institution who in some way “caused” circumstances to exist which led the moving party to seek relief. In an obvious case, it is the brother who is accused of taking the boy’s toy airplane. But, in a more subtle situation, it is the husband whose very existence means a wife must seek third party intervention in order to be free to remarry. The “allegedly responsible party” may or may not be the source of satisfaction depending upon whether he actually holds the moving party’s objective or merely must be shown to have been “responsible” before some other individual or institution functioning as the source of satisfaction will yield that objective. Thus, in the typical automobile liability case, the defendant driver is the “allegedly responsible party” but his insurance company is the “source of satisfaction.”

The “responding party” is the individual or institution that answers when a moving party seeks to invoke the assistance of the third party intervenor (or third party forum). In the typical dispute, the “responding party” also is the allegedly responsible party and the source of satisfaction as well. But the most critical characteristic of the responding party is that it is he who argues about whether the moving party is entitled to the assistance of the third party intervenor in gaining his objective. Thus, he is the brother who yells back, “But Daddy, it’s not his toy airplane, it’s mine!” or “It’s his, but he promised I could play with it today.” And in most litigation in the courts, it is the named defendant.

“Eligibility determination” is simply the process through which the third party ascertains whether it will intervene to assist the moving party. It is what happens



when the Father says, "Look, boys, let's sit down and talk this over. I know that's your plane, but your brother says you promised to let him use it today." Eligibility determination in the judicial context is the entire complex set of tasks that must be accomplished before the court will render a judgment it is willing to use its powers to enforce.<sup>1</sup>

"Eligibility criteria" are the standards which the third party forum applies in determining whether it will intervene. Unless the third party forum finds that the facts of the underlying transaction satisfy the criteria it will refuse to intervene on behalf of the moving party. Consequently, in the usual dispute the moving party and the responding party argue over what the proper eligibility criteria are and whether they have been met. In the courts and other more formal forums, these eligibility criteria ordinarily are comprised of statutes enacted by legislation, past rulings of courts, and the like—what sometimes is called the substantive law. But other forums may apply different, often less precise criteria. A father is guided only by his own personal sense of what would be best for his children. A religious tribunal might apply the teachings embodied in the Bible or the Koran. Various informal forums to be discussed later in this report purport to use common notions of fairness and justice.

The "risk of error" is simply the likelihood that the third party forum will make a wrong decision about eligibility—either deciding to intervene when it should not or failing to intervene when it should. Errors can arise in several ways including the use of incorrect eligibility criteria, the failure to learn of relevant facts, incorrect weighing of facts which are known to the forum, and the like.

The "risk of error" has two dimensions—amount and distribution. That is, some types of forums will make more mistakes than others because of lack of expertise, scarcity of time, less thoroughness in their investigations, etc. Thus the quantity of errors—the amount of the risk—will vary among third party forums.<sup>2</sup> And in some forums the pattern of errors may favor one class of disputants over another—moving parties over responding parties, affluent disputants over poor ones, institutions over individuals, repetitive litigants over occasional litigants,<sup>3</sup> etc. This report describes such a phenomenon as an unequal distribution of the burden of the risk of error.

## **B. Selected Elements of the Third Party Dispute Resolution Process**

Many disputes are settled through direct negotiations between the moving party and the allegedly responsible party without the actual or threatened intervention of any third party. In some instances the movant obtains what

he wants from the allegedly responsible individual. On other occasions the allegedly responsible party persuades the moving party nothing is owed or at least convinces him to forego relief. More often the two disputants arrive at an acceptable compromise that gives the moving party some but not all of what he seeks.<sup>4</sup>

In another seemingly less satisfactory scenario, the moving party merely gives up. This avoidance phenomenon, termed "lumping it" by one observer, apparently is a common response to disputes in the United States.<sup>5</sup> Typically the reaction of the poor and powerless in confrontations with well-entrenched institutional adversaries,<sup>6</sup> a high incidence of "lumping it" probably signifies failure of society's dispute resolution system. People throw up their hands because that system is perceived as too costly, too slow or too biased to afford a reasonable possibility of relief.

The focus of this chapter and this report, however, is neither voluntary settlement nor "lumping it" behavior. Rather, we are concerned primarily with disputes in which a third party is asked to intervene. What happens after the moving party seeks to invoke some sort of third party intervention is the heart of the dispute resolution process. That process has a number of elements which often can be manipulated and a set of values (goals, effects, etc.) which usually establish the limits of permissible manipulation.

In this section, we describe those aspects of the process which can be manipulated either as a strategy to enhance performance or to make such strategies easier to implement. To state it another way, by deliberately altering one or more of these elements we set the stage for dispute processing strategies which usually involve another of these facets of the process. The six fundamental elements include: the potential source of satisfaction; the type of third party intervenor; the eligibility criteria for third party intervention; the timing of the third party intervention in relation to the eligibility determination; the means of ascertaining eligibility; and the nature of the third party's intervention. As can be readily observed, some of these elements relate to the nature of key participants in the process, others to the characteristics of certain phases of the process and one, eligibility criteria, is an ingredient which tends to permeate the entire process. Obviously it is possible to identify other "pieces" of the dispute resolution process and to devise other ways to "slice" that process.<sup>7</sup> These particular elements were chosen because they appeared to be the most significant ones for purposes of policy options which might enhance dispute resolution.

The six fundamental elements to be considered in this section are portrayed in Figure 2-1. Under each heading are displayed the major alternative forms in which that



element may appear or be-transformed. In the following discussion, we consider these six aspects of third party dispute resolution, whether and how they can be deliberately manipulated, and their implications for various dispute-processing strategies.

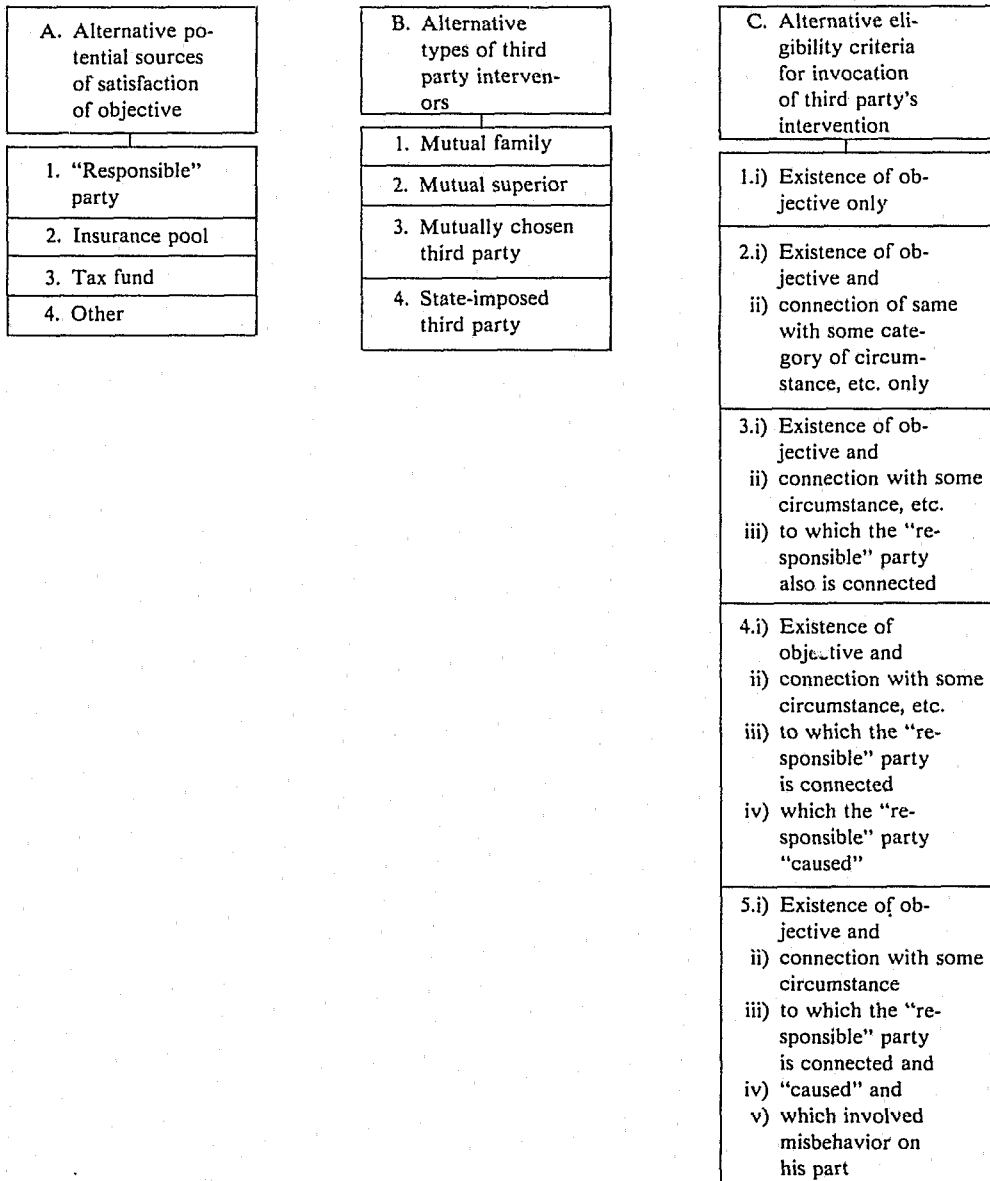
1. *Alternative potential sources of satisfaction.* In normal circumstances it is reasonable to anticipate that the moving party will look to the allegedly responsible party for the satisfaction of his objective. The latter is the individual or institution which in some way "caused" (or is thought to have caused) the moving party's objective to exist. He is the driver of the other car in an automobile accident, the other spouse in a divorce ac-

tion, etc.

The "responsible party" need not be responsible in any sense of fault. His or her (or its, if we consider institutions as neuter) conduct may have been blameless, neither intentionally harmful nor negligent. But that conduct (or in some cases the mere existence of that individual or institution) causes the moving party to have some problem he desires to remedy. There is some sort of causal link which distinguishes this category of source from the others listed in Figure 2-1.

a. *Categories of "responsible parties."* "Responsible parties" can be usefully subdivided into four sub-categories—individuals (including small, relatively

FIGURE 2-1 *Elements of Third Party Response Mechanism*

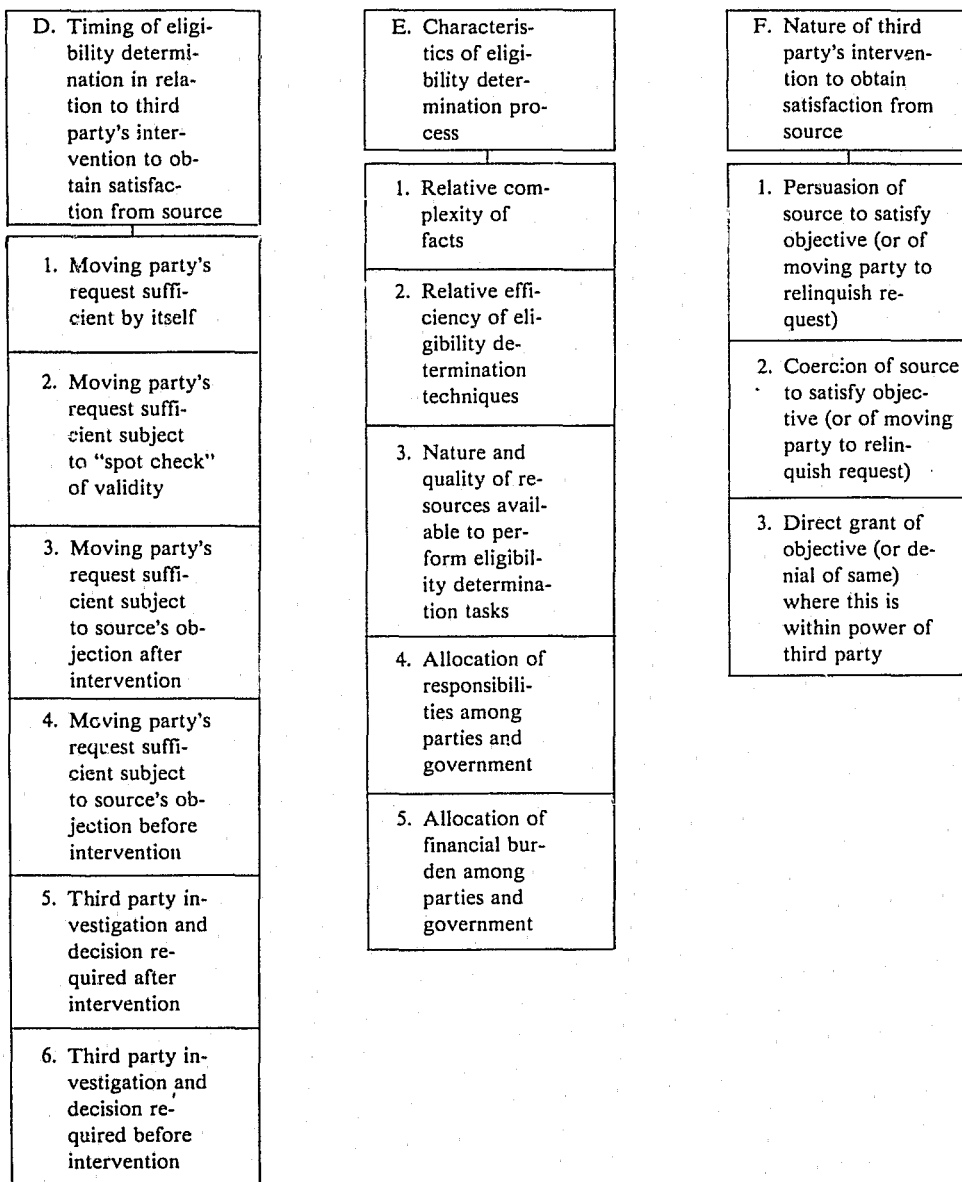


non-affluent groups of individuals), large groups of individuals (other than those united for an economic enterprise), economic enterprises, and governmental bodies. The significance of this sub-categorization will be discussed in detail subsequently.<sup>8</sup> For now, it is sufficient to note the obvious differences in capacity to absorb or spread any financial costs the *source* may incur in satisfying the moving party's objective. The individual has no one to accept a part of the burden.<sup>9</sup> But a large group, like a labor union, can spread the cost among its membership. An economic enterprise can raise its prices to customers or clients, and a governmental body can pass

the cost along in the form of increased levies on its taxpayers.

b. *Categories of substitute sources of satisfaction.* Where the moving party's objective can be attained through monetary compensation it generally is possible through various arrangements to transform the *source* from a "responsible party" to one of the other categories. The most usual *substitute source* is the insurance fund. Such funds may be comprised of premiums paid by all potential "responsible parties" (often called liability insurance<sup>10</sup>). But insurance funds also can be created by collecting premiums from potential moving

FIGURE 2-1 *Elements of Third Party Response Mechanism—(Continued)*



parties (often called first party insurance<sup>11</sup>) or through the allocation of tax monies.<sup>12</sup> Tax supported insurance funds can be further subdivided into those comprised of taxes collected from potential "moving parties," those collected from potential "responsible parties" or those made up of allocations from the general revenues. (Clearly a given fund might consist of contributions from all three of these tax sources.<sup>13</sup>)

However its funds are assembled, any of these insurance schemes—liability, first party or tax supported—is a different kind of source than the responsible party. They are established intentionally as a means of spreading the financial burden of responding to the moving party's objective.

c. *Relative risk-bearing capacity of alternative sources of satisfaction.* For purposes of designing dispute processing strategies, the most critical variable distinguishing the various sources outlined above is the relative capacity to absorb or spread two particular costs associated with the satisfaction of the moving party's objective. Those costs are the disputant's expenses of participation (lawyers' fees, etc.) and the risk of error in the eligibility determination phase. Obviously there may be a third cost to be absorbed or spread—the compensation paid the moving party—if that, in fact, is ordered by the third party.<sup>14</sup>

The risk of error is of such critical importance because many of the strategies discussed in this report tend to diminish the precision of eligibility determination and thus to enlarge the probability that mistakes will be made. Moreover, this risk is characterized by a unique attribute—barring exceptional circumstances this form of loss cannot be detected or compensated in the individual case. That is because it is the result of more or less inherent imperfections in the very process through which the third party decides whether harmful conduct is occurring or has occurred.<sup>15</sup> Through special studies we might be able to ascertain the average level of risk associated with various types of decision-making processes, but it will be rather uncommon for a third party forum to accurately detect and provide compensation to some individual injured by an error in a prior decision made by that or another tribunal.<sup>16</sup> A forum might well commit an error in one direction the first time it examines a given case and err in the other direction the second time.

Because of these factors, an individual litigant may suffer a substantial and noncompensable loss from any errors made by the third party forum in the relatively few cases in which he is involved. But for a business enterprise or other disputant involved in a mass of litigation the burden of errors committed by the courts or other third party forum will be minimized since these errors will tend to cancel out. A mistake unfavorable to the

disputant in a particular case will tend to be balanced off by an error favorable to it in another case. Moreover, to the degree a business enterprise, an insurance company or the like sustains a higher ratio of "unfavorable" errors, it generally is in a position to spread that cost to consumers, policyholders, etc. Obviously not all business enterprises, insurance companies, etc., are alike in their capacity to absorb or spread the burden of errors in the eligibility determination phase. Generally the larger the entity, the greater its financial resources and the more frequent its involvement in dispute resolution events, the more likely it will be able to absorb and/or spread this specie of loss.

2. *Types of third party intervenors.* Though the judiciary may be the most visible institution available to intervene in private disputes, there are many others which formally or informally in one society or another serve that function.

a. *The range of alternative intervenors.* Many controversies are settled through the intervention of a respected member of the family to which both parties belong. In almost any society a father will often resolve quarrels between his children. But in countries with a tradition of extended families, an elder's "jurisdiction" may reach to younger brothers, nephews, grandchildren, cousins and even in-laws.<sup>17</sup> Custom or political arrangements may dictate that a broad range of relatively serious disputes be submitted to a senior family member rather than a court or other government-sponsored institution. Similarly, in some societies tradition or the realities of power relationships may assign dispute-resolving functions to witchdoctors, landlords, village elders and the like.<sup>18</sup>

In industrial societies, the family elder sometimes finds his analog in a corporation executive or union official. Either as a matter of company policy, union rules or contractual terms, a mutual superior of the two disputants may be empowered to resolve at least certain categories of disputes—generally those arising during work hours or otherwise threatening the institutional interest of the enterprise or union organization.<sup>19</sup>

When custom or contract do not impose a third party intervenor from the disputants' mutual social or economic organization, the parties sometimes agree to submit the controversy to a mutually acceptable third party, generally an arbitrator or mediator. The agreement to arbitrate or mediate often is reached after the dispute arises. However, it has become common for persons involved in contractual arrangements to include a clause requiring future disputes between the contracting parties to be resolved by mutually chosen arbitrators rather than the courts.<sup>20</sup>

Even where custom or mutual agreement do not offer

an alternative dispute resolver and disputants look to the state to perform that function, it does not necessarily mean the controversy will be channelled to the courts. The state-imposed third party intervenor may be an administrative functionary—ranging from a policeman or other lower level bureaucrat through “ombudsman” to a full-scale administrative tribunal.<sup>21</sup> Or it may be an “arbitrator” or “mediator” picked by the state<sup>22</sup> or a community tribunal.<sup>23</sup>

b. *Variables affecting choice of third party intervenor.* For purposes of designing dispute processing strategies, three variables appear most relevant. The first of these is the relative degree of consent required before the dispute will be submitted to the third party forum. In some instances, both contending parties must agree<sup>24</sup> while in other situations the moving party can force his opponent into that arena<sup>25</sup> and in rather unusual circumstances the third party will assume “jurisdiction” without request.<sup>26</sup>

A second variable is the relative degree of consent involved in the selection of the individual decision-maker or decision-makers who actually comprise the third party forum. In a typical voluntary arbitration, the arbitration panel must be agreeable to both disputants.<sup>27</sup> At the other end of the spectrum the parties usually must accept the luck of the draw when a specific trial court judge is assigned.<sup>28</sup>

Finally, third party forums differ in the nature of their intervention after deciding the moving party is eligible for assistance. As will be explored in detail<sup>29</sup> this may range from mere verbal persuasion of the allegedly responsible party to state compulsion backed by criminal sanctions.<sup>30</sup>

Any one of these factors can influence whether a forum implementing a given dispute resolution strategy is a desirable alternative. However, until further groundwork is laid, the relationships are difficult to explain. Hence this discussion is postponed to a later section.<sup>31</sup>

3. *Alternative eligibility requirements for invocation of third party intervention on behalf of the moving party.* A third party intervenor, however constituted, must decide whether it will render assistance to the moving party. In making that decision about the moving party's eligibility for intervention, the third party ordinarily refers to some established criteria and asks whether the facts underlying this dispute satisfy those criteria. As discussed in more detail elsewhere, the eligibility criteria can vary significantly both in source and precision.<sup>32</sup> But for purposes of designing dispute-resolution strategies, the most salient characteristic appears to be the basic substance of the criteria, that is, the number of separate fundamental eligibility criteria which must be satisfied

before the third party will intervene. In fact, one of the dispute processing strategies considered in this report (see Chapter V, *infra*) consists primarily of reductions in the number of separate criteria which must be met. By eliminating one or more of the individual criteria dispute resolution often can be simplified and many disputes may even disappear.<sup>33</sup>

Referring back to Figure 2-1, this report identifies five alternative levels of eligibility criteria which a third party might apply in deciding whether to intervene, each level adding an additional ingredient to the formulation.

a. *Alternative formulations of eligibility criteria.*

(1) A moving party might be allowed to invoke the assistance of a third party simply by establishing that he has some objective.

It is difficult to identify any situation in which a third party actually intervenes on the basis of such a minimal finding. Possible a name change proceeding most closely approximates this. However, it should be emphasized that such a proceeding really involves only the individual moving party and his or her status. It is not a case where the third party is asked to intervene to induce someone else to do something or to alter someone else's legal status (as in a divorce). Nevertheless, some recent no-fault divorce procedures border on this most simple of eligibility formulations. The moving party is entitled to a divorce even if the other spouse denies an irretrievable breakdown and irrespective of the court's opinion, although ordinarily the responding party's opposition will delay the decree and require some reconciliation attempts.<sup>34</sup>

(2) Third party intervention may require the moving party to establish only that he has an objective and that the existence of this objective relates to a certain circumstance or category of circumstance which entitles him to attain his objective.

The New Zealand Accident Compensation Act, enacted in 1972, amended in 1973 and put into operation in 1974,<sup>35</sup> is a prime example of this category. A person who sustains an injury while on the job, on the road, or at any other time<sup>36</sup> may receive compensation for his injury (the amount is usually keyed to compensation for loss of income, figured according to special formulae). The injured person must notify the Compensation Commission in writing of his injury and his desire for compensation, after which a decision is made by an administrator on whether or not he will receive compensation. Several levels of appeal are available to a rejected applicant.<sup>37</sup>

The relevant consideration for the present analysis is that the decision whether or not to compensate, and if so, at what amount, is made without regard to who might have been responsible, who else was connected with the

situation or even how the injury was caused. This contrasts sharply with the personal injury tort system which New Zealand's new compensation system supplants in which all these other individual eligibility criteria had to be satisfied before the injured party could receive relief. Thus compensation now flows automatically to many moving parties in cases that would be hotly disputed were the former criteria still in effect.

(3) Third party intervention may require establishment by the moving party of three elements—existence of his objective, relationship of the objective to a category of circumstances, and the connection of some other party or institution to those circumstances.

Many no-fault divorce laws belong to this category. In the United States no-fault divorce laws take different forms.<sup>38</sup> Many states have merely added the no-fault ground for divorce to their already existing divorce statutes which include fault as a ground for divorce. Other states have enacted new divorce laws according to which grounds for divorce are based upon irreconcilable differences and breakdown of the marriage. According to these latter statutes the petitioner shows three criteria enabling him to invoke the aid of the third party (i.e., the court) namely, that he has an objective (desire for a divorce), that his objective is related to certain circumstances (that he is married and his marriage has irretrievably broken down) and that some other party is connected to said circumstances (his spouse). The point of the new laws is that the petitioner does not have to show that the other party caused the circumstances through his/her fault.<sup>39</sup>

It should be noted that a divorce need not involve a true dispute between the parties. They may both desire to end the marriage. These uncontested divorces present a special situation in which the appropriate approach may be a recognition that no dispute actually exists and that neither the courts nor any other dispute resolution forum has a proper role to play.<sup>40</sup> On the other hand, most no-fault divorce laws do not eliminate entirely potential disputes between the spouses. If the responding party does not desire a divorce, he or she can attempt to establish that the eligibility criteria have not been met, usually by contesting whether the differences are irreconcilable.<sup>41</sup>

(4) The moving party may be required to show four elements before he can receive third party intervention—his objective, the category of circumstances related to the objective, the connection of some other party and a casual link between that party and the circumstances.

These are typically the elements which a plaintiff in a products liability case must establish. For example, a consumer of a defective automobile who was injured due

to the defect would have to establish the following before he could invoke the court's aid: that he desired compensation for his injuries, that he was injured through the use of the defective automobile (for example, from failure of the brakes), that the automobile was manufactured by some other party, and that because of the rule of strict products liability the manufacturer is causally responsible for the circumstances. He does not have to prove any negligence or other fault on the part of the manufacturer.

In a somewhat analogous approach in Bulgaria, the defendant in tort cases is presumed to be at fault.<sup>42</sup> The defendant is allowed to introduce evidence to rebut the presumption at the trial; however, the plaintiff is not required to establish that the defendant was at fault in order to invoke the aid of the court. Fault need not be established at the outset and it need not be adjudicated if not brought into issue by the defendant.

(5) The most frequent situation is where the moving party must establish five elements in order to invoke the intervention of a third party—his objective, its relationship to a category of circumstances, the other party's connection, the casual link between the other party and the circumstances, and that the circumstances exist due to misbehavior by that party.

The traditional automobile accident personal injury suit is of this type. As well as stating his desire for compensation for his injury, the plaintiff must establish that the other driver's negligence (the misbehavior) was the proximate cause of the accident which resulted in the injury. Likewise in a personal injury suit based upon assault and battery, the plaintiff must establish that the defendant intentionally hit him causing his injuries. It should be noted that all five of these individual criteria are often required by forums other than a court. The critical determinant of what needs to be established is the relevant substantive law not the forum. A potential claimant may attempt to invoke the aid of an administrative official, a consumer agency or an arbitrator, or even a parent, but be unsuccessful in gaining help if he cannot show that he has satisfied all five criteria.

*b. Implication of selecting different eligibility formulations.* One important consideration in selecting which combination of eligibility requirements is appropriate in a given situation is the comparative cost of ascertaining the existence of the different elements. For example, if all we require for invocation of third party intervention is that the moving party have some objective, it might be quite inexpensive to determine the existence of that objective, especially if we are willing to accept his subjective opinion of his desires. Even proof of the existence of a certain category of circumstances related to the objective might turn out to be rather simple, as in the case of a physical injury. This contrasts drasti-

cally with the potential expense involved in determining, for example, whether some other party caused an accident due to his negligence or actually intended to harm another person. Thus, by reducing the number of eligibility criteria to be satisfied we may diminish the cost of the eligibility determination phase, shorten the time required to render a decision and make the process accessible for those who otherwise could not afford to participate.

Reference already has been made to another closely related effect of simplified eligibility criteria. Fewer disputes may arise because it will be obvious to both parties that the moving party would be eligible for third party intervention if he petitioned for such assistance. Eligibility issues which were formerly present—the responding party's fault, for instance—no longer are relevant. Consequently, where those are the only issues potentially raised by the underlying facts the responding party ordinarily will grant the moving party his objective without any involvement by a third party.

Of course, these are not the only effects to be taken into consideration. Another important variable is the relative risk of misallocating resources associated with utilization of a particular combination of eligibility criteria. For instance, if the system awards relief without ascertaining the responsibility of the individual or institution which caused the harm, the amount of harmful conduct may increase in the future since no penalty is being imposed on the responsible party.<sup>43</sup>

The above factors are considered in more detail in Chapter V *infra* in the context of discussing the relative desirability of the alternative eligibility formulations.

4. *Timing of eligibility determination phase.* A potentially crucial, though often overlooked aspect of the total process is the relation between two events: the determination of eligibility and the third party's intervention on behalf of the moving party. It is not inevitable that a contested hearing (or the opportunity for such a hearing) must precede the invocation of the third party's power (whatever that may be) to seek attainment of the moving party's objective. Nor is it necessarily essential that the third party actually investigate the underlying facts and make a finding that the eligibility criteria have been satisfied before it acts. And, in fact, in response to the political power of some classes of moving parties, certain procedures have evolved which award relief—sometimes permanent, sometimes temporary—on the basis of rather minimal demonstrations of eligibility. This quite obviously can have significant implications for the cost, speed, accessibility and equity of dispute resolution.<sup>44</sup> At the extreme is the theoretical possibility of a procedure in which the third party intervenes in response to a bare assertion of eligibility by the moving party without any check on the veracity of the moving party's

allegations nor any recourse being available to the source of satisfaction. Though pure examples of this variation may not exist in the real world, several procedures prevalent in various modern societies verge on this extreme in their actual operation.<sup>45</sup> Moreover, in certain circumstances it might be appropriate to afford moving parties this possibility in order to enhance accessibility even at the risk there would be some abuse.<sup>46</sup> Intervention also could be granted without a prior eligibility determination, but with the source authorized to seek compensation for erroneous or fraudulent invocation of third party relief. Thus, the moving party could petition for third party intervention and receive it on his bare assertion of eligibility. But if the other party considered the action improper he could sue the moving party for damages (possibly treble damages or higher) as well as recovery of the objective. Presumably the threat of such a suit would discourage moving parties from filing erroneous or fraudulent claims.<sup>47</sup>

The next alternative is an automatic award of relief but with random verifications resulting in civil and/or criminal sanctions for those moving parties found to have filed false allegations of eligibility. Again the individual source of satisfaction is denied recourse in his specific case, but the disincentive of possible criminal and/or civil liability presumably will minimize erroneous or fraudulent requests for third party intervention. Though still primarily a theoretical possibility, it has some analogs in other governmental decision-making processes<sup>48</sup> and has been offered as a specific proposal in the consumer protection context by a respectable authority.<sup>49</sup>

In contrast, there are several operating procedures which fall within the boundaries of the next category. Once again a bare allegation of eligibility by the moving party is sufficient to cause the third party to intervene and effect a transfer of the objective from the source to the moving party. Only after the transfer is accomplished is the source entitled to demand a contested hearing at which the moving party's allegation can be tested. Naturally if the third party finds the proof deficient it will intervene to restore the original situation (where that is possible).

Though recent decisions of the Supreme Court have imposed some limitations, this basic sequence is commonly followed in wage garnishment, repossession and attachment proceedings in the United States.<sup>50</sup> Typically the creditor files an affidavit with the court asserting the debtor is failing to honor a note. In a purely *ex parte* proceeding the court issues an order authorizing garnishment of the debtor's wages or repossession of his automobile or attachment of his property. Only after the wages or other property rights have been transferred

from the debtor to the creditor can the former object and obtain a hearing.

In a possible variant on the above, the transfer might take place on the basis of the moving party's bare, unexamined allegation, but within a reasonable time thereafter the third party is required to verify the factual basis of the eligibility claim. Thus, a contested hearing would take place automatically without a demand from the source.<sup>51</sup>

At the far end of this classification fall the two patterns traditional with the common law and continental judicial systems. In most courts in the United States, the moving party's unexamined allegation of eligibility embodied in a written "complaint" is sufficient in and of itself to support a judge's grant of relief, *but only if the source (defendant) decides against demanding a prior hearing*. These so-called "default judgments" are very prevalent in many American jurisdictions.<sup>52</sup> On the other hand, most continental legal systems (including those in socialist countries) usually require the regular courts to conduct a hearing and verify the moving party's (plaintiff's) claim of eligibility *before* affording relief even when the defendant fails to respond.<sup>53</sup>

5. *Characteristics of the eligibility determination phase*. The decision-making event through which a third party forum chooses whether to intervene probably is the centerpiece of the entire dispute resolution process. Justified or not, how the forum goes about ascertaining the facts and applying the eligibility criteria to those facts has historically attracted the overwhelming majority of attention. The eligibility determination phase actually consists of several separate tasks. Without attempting to be exhaustive, it is possible to identify four such tasks—fact investigation, criteria ascertainment, issue presentation, and decision making—which are common to most eligibility determination events. Somehow the underlying facts of the dispute must be investigated to determine what happened that might make the moving party eligible (or might demonstrate ineligibility) for third party intervention. Similarly, possible appropriate eligibility criteria must be identified, an endeavor which in formal judicial proceedings sends attorneys and judges to the law library for hours and generates lengthy legal memoranda, briefs, etc. In most forums, someone then must present (and often argue) the results of the fact investigation and the criteria ascertainment tasks to the decision-maker(s). (Of course, the decision-makers may investigate the facts and criteria themselves and thus not require a presentation from the disputants or anyone else, but this is an extremely unusual procedure.) Finally, the decision maker(s)—whether a single judge or a large tribunal—must weigh the facts, choose the appropriate eligibility criteria, and decide whether the moving party

is entitled to intervention.

These four primary tasks are almost inherent ingredients in eligibility determination and thus elimination of one or more is not a viable dispute processing strategy. However, there are several characteristics of these tasks which sometimes can be manipulated to improve the cost, speed, accessibility or equity of the process. Some of the more important of these characteristics are discussed below.

a. *The relative complexity of the facts and eligibility criteria implicated in a given dispute*. This factor is largely outside the control of the contending parties or the third party forum. Though on the average it may bear some relationship to the relative consequence of the dispute, the proper resolution of a very small claim may hinge on collection of an extraordinarily complicated set of evidence and complex criteria found in a variety of sources—statutes, regulations, judicial precedents, etc. At the same time, it should be recognized that the relative complexity of the fact situation is not entirely in the hands of the gods. Largely through redefinition of the eligibility criteria (see Chapter IV, *infra*), society can drastically affect the number and complexity of the facts relevant to an eligibility determination. Thus, if recovery is possible without proof of fault, it matters little that in a given case it would require hundreds of hours of investigation to establish that now unnecessary element.

b. *The relative efficiency of the techniques available to collect the facts and ascertain the relevant criteria*. In part, this is a function of the availability of modern technology and good management.<sup>54</sup> However, it is equally influenced by two other environmental conditions which society structures. First, it depends on the powers that society confers upon a disputant to gain information from other persons, that is, whether a disputant will be allowed to extract information from the opposing party or other individuals and institutions or whether much more indirect and expensive means must be utilized. Secondly, it depends upon the type of proof which is required to establish various elements of the eligibility criteria. If society imposes a requirement that a given fact can only be established by direct testimony of a live witness who may have to be located hundreds of miles away rather than permitting proof through a document, it has increased the difficulties of investigation as well as presentation.

c. *Nature and quantity of resources used to perform eligibility determination tasks*. In many forums, most of these tasks are performed by professionals, usually lawyers and their helpers—investigators, accountants, etc. In part, this is a matter of competence. As criteria become more complex not only is their ascertainment more difficult but fact investigation also is

complicated. Even knowing which facts will be relevant to the eligibility criteria may require expertise. Moreover, techniques for acquiring facts—review of records, cross-examination, fingerprint comparisons, and the like—can be beyond the ability of the average disputant. But the nature and quantity of professional assistance also is influenced by two other factors—monopolization of the representation function and competition between the contending disputants. In many societies the legal profession enjoys a monopoly over the presentation task before the most prevalent and important forums,<sup>55</sup> a monopoly which in practice if not theory often extends to the fact investigation and criteria ascertainment tasks as well. Meanwhile, as will be discussed later, the disputants are motivated to match if not exceed each other in their expenditures on professional assistance in order to increase their chances of prevailing before the third party forum.<sup>56</sup>

By regulating the nature and quantity of professional assistance that disputants are allowed to use in a given forum, it may be possible to influence the cost, accessibility and equity of that forum. Among the possible options are quantitative limits on the amount the parties are allowed to invest in lawyers and other forms of professional help,<sup>57</sup> outright prohibitions against the use of lawyers, and the substitution of lower cost paraprofessionals for lawyers in the performance of the disputants' eligibility determination tasks.<sup>58</sup>

d. *Allocation of responsibility for fact investigation, criteria ascertainment and presentation among the third party intervenor, the parties and others.* While the factors above affect the decision-making process by increasing or diminishing the difficulty of ascertaining the facts and the eligibility criteria, the apportionment of that burden may be equally crucial to the performance of that dispute resolution mechanism. To the extent that the responsibility is normally assigned to individuals who on the average lack the means or background to conduct an adequate inquiry or to properly organize and present their case, the decision-makers will be forced to operate with insufficient data to reach a valid conclusion. Conversely, where the burden falls primarily on individuals or institutions possessing ample resources, the fact investigation-rule ascertainment-presentation functions will be performed thoroughly, there will be an adequate base for the eligibility determination and the decisions will tend to be sound. Eligibility determination responsibilities can be reallocated to the third party forum, to government agencies or from one party to another.<sup>59</sup>

e. *The allocation of the financial burden associated with the eligibility determination process.* The allocation of responsibilities and costs are severable decisions. Even if the responsibility for significant parts of fact

investigation, rule ascertainment, and presentation are assigned to individuals who personally lack the requisite funds to conduct an adequate factual investigation or to ascertain the appropriate eligibility criteria, that deficiency is sometimes remedied by providing a financial subsidy to those individuals, thus enabling them to properly discharge the duties assigned. The subsidies, in turn, may flow from the government's general revenues, from the individual or institutional opponent, or the class to which the opponent belongs.<sup>60</sup>

6. *Nature of third party's intervention.* Merely because the third party has accepted the moving party's claim of eligibility does not automatically guarantee achievement of the moving party's objective. In most instances, the third party must somehow induce the source to satisfy the moving party's goal. Dispute resolving forums differ rather drastically in the methods of intervention they have available. These methods tend to cluster in three main categories: persuasion of the disputants, coercion of the disputants, and direct grant of the objective.

a. *Persuasion of the source.* Examples of third party intervenors who must rely on persuasion are legion. In fact, the majority of nonjudicial forums lack the coercive power of the state and thus are compelled to resort to arguments, rewards, and sanctions which are more accurately characterized as persuasion than compulsion. At one extreme are forums which are purely conciliatory in the sense that the third party does not attempt to formulate an independent recommendation. Rather the third party's role is merely to facilitate the disputant's efforts to arrive at a satisfactory compromise.<sup>61</sup> In the idealized conciliation proceeding, the forum's persuasion is limited to advocacy of the virtues of two party settlement rather than of any particular outcome. Many third party forums, including some which bear the name conciliation, in fact, do render their own decisions and then seek to persuade the disputants to comply with that proposal. Two such institutions, the Community Conciliation Committees of Poland,<sup>62</sup> and the Compulsory Conciliation Boards of Sri Lanka,<sup>63</sup> as examples, depend solely on oral persuasion. The disputants are free to reject the recommendations outright and throw the issue back to the courts or some other forum having cognizance over the dispute (if such jurisdiction exists). On the other hand, some forums relying on persuasion can wield rewards and sanctions which are more palpable than mere words, yet fall short of outright compulsion. For the media complaint programs recently inaugurated in Canada<sup>64</sup> and the United States,<sup>65</sup> the solution recommended by the third party is backed by the threat of public disclosure should one of the parties prove recalcitrant. Whether operated by a newspaper, a televi-



sion or radio station, these media centers can publicize both their investigation of the dispute and the ultimate outcome. This sort of sanction is especially persuasive with disputants who are sensitive about their public image—commercial establishments, government agencies, and the like. In a similar vein, ombudsmen seldom have the power to compel compliance with their proposed resolutions of the controversies they investigate. Nor are they generally empowered to seek enforcement through the courts. But ombudsmen *are* authorized to file official reports open to scrutiny by legislators and the general public. For the bureaucrats against whom these reports are usually filed, this is a very real sanction threatening their present comfort and future careers.<sup>66</sup> Another dispute-resolving forum relying primarily on the sanction of publicity is the Swedish public complaints board.<sup>67</sup>

b. *Coercion of the disputants.* Because of its presumed monopoly of force, generally only forums sponsored by the government possess enforcement powers properly characterized as coercive. Thus, the courts and a limited number of other dispute-resolving bodies are in a position to back up their decisions with sanctions like outright seizure of the source's property,<sup>68</sup> contempt of court (which can result in imprisonment for non-compliance),<sup>69</sup> and the like, truly coercive in character. Nevertheless, certain informal dispute-resolving institutions—a father deciding an intra-family difference, for instance—enjoy compliance powers not unlike that of the state. A father's threatened spanking of his child may be as coercive as the possibility of a contempt citation. And if one includes illegal behavior in the typology, a mafia "godfather" has the ultimate sanction at his disposal.

c. *Direct grant of relief.* Of course, it is not always necessary to use either coercion or persuasion. Depending on the relief sought by the moving party, the third party forum may be able to grant the objective directly. Particularly when what is sought is a change in legal status—a divorce, legal custody of a child, title to real property, or a name change—the court or other appropriate forum can by its own act accomplish the desired end. Neither the source nor any other individual or institution needs be induced to do anything.<sup>70</sup>

### C. Interrelationships Among Elements of the Third Party Dispute Resolution Process

Most of the civil dispute processing strategies to be discussed in subsequent chapters in essence involve manipulations of one or more of the elements described in the foregoing section. But the feasibility and desirability of such manipulations normally will depend upon exist-

ing interrelationships among these elements. Frequently, it is only by preliminary rearrangement of these elements that the stage is set for deployment of one of the strategies described in Chapters III—VIII *infra*. As the characteristics of one element change, what is possible or justifiable in another element may change. Examples of some of the more important interrelationships and the implications of their possible manipulation follow.

The basic nature of the source of the moving party's objective is a very critical element closely intertwined with several others. As long as that source remains an individual (or even a small group of individuals) it is difficult to justify any substantial relaxation of any part of the eligibility determination process. Unable to absorb or spread the risk of error, the only protection such individuals enjoy is an undiluted requirement of a *thorough* fact-finding hearing which establishes their *personal responsibility* for whatever underlies the moving party's objective, said hearing taking place *prior* to any third party intervention. This has implications for several other elements of the dispute resolution structure: the eligibility criteria for third party intervention, the timing of the eligibility determination process, and the method of determining eligibility.<sup>71</sup> Any significant manipulation of any of these elements is almost certain to increase the risk the third party will intervene in error.

These constraints diminish when the source is an insurance fund, a tax fund or in fact any enterprise or institution in a position to absorb or spread the risk of error (or at least any reasonable level of risk).<sup>72</sup> In such a situation, it becomes possible to contemplate use of less precise eligibility criteria which do not pin responsibility on a specific individual. Likewise third party intervention *before* a determination of the moving party's eligibility is a less radical policy option and, moreover, a less exhaustive inquiry into the eligibility question may be justified. All of these possibilities are explored in subsequent chapters<sup>73</sup> but the interrelationship between these three factors and the nature of the source of satisfaction is crucial. Accordingly, it may be necessary to shift the source of satisfaction from an individual to an insurance fund, economic enterprise or tax fund before easing the eligibility criteria, simplifying the eligibility determination process or granting relief prior to the time such an inquiry has taken place. For example, no fault automobile compensation in the United States was predicated on a shift in responsibility for providing compensation from the individual driver who may have caused the moving party's injury to the moving party's own insurance company.

Another key element influences these strategies in a similar direction. As we have seen, the degree of compulsion attaching to a third party's decision to intervene

can vary from mere verbal persuasion to a threat that the severest forms of criminal and civil sanctions will be imposed.<sup>74</sup> Before exposing any potential "source of satisfaction" (but especially any individual person) to the full coercive power of the state it is natural to demand a *thorough fact finding hearing* which establishes *personal responsibility* for providing whatever the moving party seeks, such hearings to take place prior to the intervention.<sup>75</sup> Yet as the possible sanctions available to the third party intervenor weaken, so does the apparent need for insisting on a rigorous, precise and expensive decision-making process. Presumably we are willing to tolerate a greater risk of error because the consequences of error are less serious. An individual who considers the third party decision wrong need only say no, steeling his nerve to weather the verbal scolding or possibly the bad publicity he may receive.

For somewhat different reasons, there is a significant relationship between the disputants' relative consent to a specific third party intervenor and the availability of various access-improving strategies. That consent may be entirely voluntary in the sense that both parties must agree that their dispute will be referred to a given dispute-resolving agency before that forum *or any other* gains any jurisdiction over the matter.<sup>76</sup> Or the voluntariness may be less absolute where a given forum is chosen only in preference to other third party intervenors which could otherwise assume power to decide the case.<sup>77</sup> Or the disputants' power to choose may extend not to the basic nature of the forum but to the specific individuals hearing the dispute, that is, the composition of the decision-making panel.<sup>78</sup> In any event, as the scope of the disputants' consent increases it seems reasonable to tolerate less precision in the decision-making process. In effect, they can be deemed to have assumed the relative risk of error associated with the chosen forum. On the other hand, the relationship is more tenuous when the disputants are forced into a given arena and merely given

the right to choose who will judge their case.

#### **D. An Overview of Dispute-Processing Strategies in Civil Cases**

Having discussed the more salient elements of the dispute resolution process, we now turn to the primary topic of this report—the fundamental strategies available to respond to perceived deficiencies in the present system of processing civil cases.<sup>79</sup> Each of the following chapters considers one such strategy in some detail.

Chapter III discusses the encouragement of two-party settlement through the creation of incentives, primarily financial, which reward reasonable settlement behavior by disputants and/or punish unreasonable conduct during settlement negotiations.

Assuming two party settlement cannot be induced, Chapter IV discusses automatic relief in which the moving party is granted third party intervention without or at least prior to a contested eligibility determination hearing.

When a contested eligibility determination is necessary, Chapter V considers the circumstances in which it is appropriate to simplify and reduce the eligibility criteria that must be satisfied to justify intervention by the third party.

Chapter VI discusses various methods of reducing the scope of the eligibility determination tasks—fact investigation, criteria ascertainment, etc.—and the resources required to perform such tasks.

Chapter VII takes up the possibility of reallocating the responsibility for several of the eligibility determination tasks, especially by shifting such tasks to those best equipped to discharge them.

And, finally, Chapter VIII discusses the strategy of redistributing the cost rather than the responsibility of eligibility determination tasks, in this case to the government or to individual disputants or classes of disputants better able to afford the expense.

## NOTES—CHAPTER II

1. These tasks are spelled out at pages 16–17 *infra*.

2. As a general proposition, the risk of error probably decreases as several input factors increase. That is, if government and the disputants invest more money, time, etc. in the process, it seems reasonable to anticipate the frequency of erroneous eligibility determination will diminish. Though the nature of the forum will be one of the principal variables influencing the risk of error, there are many others, such as the complexity of a particular dispute, the financial resources the disputants have available to invest in that dispute, etc.

3. This is a problem of lack of equity. See page 4 *supra*. For a discussion of the reasons the present judicial forum is subject to a pattern of errors favoring certain classes of litigants over others, see Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW AND SOC'Y REV. 95, (1974).

The "risk of error" as used in this report is related to, but somewhat different from, the concept of "error costs" developed in Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 LEGAL STUDIES 399 (1973). Posner's "error costs" are the social costs incurred when the dispute resolution system misallocates resources either by making erroneous decisions or through making correct decisions (under the terms of existing eligibility criteria) which result in overly expensive readjustments in behavior.

4. For discussions of various aspects of negotiation in civil cases, see M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964) (Pre-trial Conferences); Posner *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUDIES 399, 417–420 (1973) (economic analysis of when cases are settled out of court; D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (lawyer-client relations in settlement); Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115, 116–18 (1969) (settlement of consumer-creditor disputes).

5. "Lumping it" means inaction, i.e., simply not making a claim. Galanter, *supra* note 3 at 124. Felstiner has elucidated the concept of avoidance as follows:

limiting the relationship with the other disputant sufficiently so that the dispute no longer remains salient . . . . [A]voidance . . . does not necessarily imply a *switch* of relations to a new object, but may simply involve *withdrawal* from or *contraction* of the dispute-producing relationship.

Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW AND SOC'Y REV. 63, 70 (1974). Also see Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW AND SOC'Y REV. 695 (1975).

6. Reasons why institutional litigants usually win over poor litigants are set out in the following table from Galanter, *supra* note 3 at 125:

### *Why the "Haves" Tend to Come Out Ahead*

Element	Advantages	Enjoyed by
PARTIES	<ul style="list-style-type: none"> <li>— ability to structure transaction</li> <li>— specialized expertise, economies of scale</li> <li>— long-term strategy</li> <li>— ability to play for rules</li> <li>— bargaining credibility</li> <li>— ability to invest in penetration</li> </ul>	<ul style="list-style-type: none"> <li>— repeat players</li> <li>— large, professional</li> </ul>

Element	Advantages	Enjoyed by
LEGAL SERVICES	<ul style="list-style-type: none"> <li>— skill, specialization, continuity</li> </ul>	<ul style="list-style-type: none"> <li>— organized professional wealthy</li> </ul>
INSTITUTIONAL FACILITIES	<ul style="list-style-type: none"> <li>— passivity</li> <li>— cost and delay barriers</li> </ul>	<ul style="list-style-type: none"> <li>— wealthy, experienced, organized</li> <li>— holders, possessors</li> <li>— beneficiaries of existing rules</li> <li>— organized, attentive</li> </ul>
RULES	<ul style="list-style-type: none"> <li>— favorable rules</li> <li>— due process barriers</li> </ul>	<ul style="list-style-type: none"> <li>— older, culturally dominant</li> <li>— holders, possessors</li> </ul>

7. Among the many other elements are the various characteristics of the disputants (*i.e.*, individual or institution, economic level, cultural background, family or other relationship between disputants, etc.), the nature of the dispute (*i.e.*, over property, legal status, etc.) and the socio-economic significance of the dispute to the disputants and society (economic value at stake, emotional content of the dispute to the disputants, externalities of deciding vs. not deciding the dispute, etc.).

For an attempt to sketch a comprehensive model of the process (or at least the judicial version), see Sheldon, *Structuring a Model of the Judicial Process*, 58 GEO. L. REV. 1153 (1970).

8. See pages 18–19 *infra*.

9. But see pages 11–12 *infra* for discussion of insurance as a possible method of spreading the financial burden.

10. Liability insurance covers the insured for his damage liability to a third person. It is based upon tort, because the insurer will pay (with certain exceptions and conditions) the damages for which the insured is liable in tort to some third party. Liability insurance is traditionally used not only in automobile accident coverage, but also in multiple other contexts such as manufacturer's products liability, homeowner's insurance against bodily injury to someone on his premises, etc. The injured party files a claim against the injurer's liability insurer. Thus, it is the potential injurers who supply the source of the funds through their insurance premiums.

11. First-party insurance is more accurately characterized as an action in contract rather than tort. It is an agreement whereby the insurer agrees (with certain limitations and conditions) to pay the insured for the insured's own injuries of a specific type. The relatively new "no-fault" automobile insurance is an example of this sort of coverage. The insured driver applies to his own insurer for compensation for his losses, regardless of who was at fault. Thus, the injured parties themselves, as insureds, are the source of the funds through their insurance premiums.

12. Compensation of injured parties from tax revenues is a form of social insurance. It may take the form of an all-encompassing scheme covering road, work, and other accidents, as in New Zealand, see 13–14 *infra*, or it may encompass only a particular class of injured or needy parties, as the social security scheme or medicare programs in the United States. Its forms are innumerable—it may take money from general revenues or from taxes on specific classes of individuals (for

12. (Cont.) example, earners), and it may give money to all injured parties or only parties injured in a certain fashion. The pool of persons providing the source of funds is either all of society or a segment of society, not just those persons purchasing or receiving coverage.

13. The New Zealand Compensation Plan derives its funds from these three types of sources. The Workers Scheme is funded from levies upon employers and the self-employed, those who may be analogized to "responsible parties" in our analysis. The size of the levy depends upon the firm or person's past safety experience. The Road Accident Scheme's funds stem from small annual levies upon licensed drivers and registered owners, the so-called "moving parties." The most recent, supplementary scheme covering all non-work, non-road accidents is funded from general tax revenues.

An estimated breakdown of 1970-71 contributions showed the following contributions:

insured employers .....	\$23.6 million
self-insured: government .....	5.2 million
others .....	1.1 million
self-employed .....	7.8 million
drivers .....	2.2 million
health department .....	8.9 million

(Figures taken from Harris, *Accidents Compensation in New Zealand: A Comprehensive Insurance System*, 37 MODERN L. REV. 361, 368 (1974).

14. Most insurance schemes are established primarily to spread the latter cost, though in practice they usually spread the others as well. But for our present purposes, it is the participation costs and the risk of error which are most relevant, and especially the latter.

15. The frequency of error, of course, will be determined in part by the precision of the forum's eligibility determination process. Some forums will be more thorough (and often more expensive and slower) than others, so the level of "inherent imperfections" of some third party intervenors will be greater than others.

16. The defense of res judicata precludes a claim which has already been fully adjudicated in a prior proceeding from being relitigated. Even matters within the scope of the prior cause of action which were not actually presented in the prior case may not be litigated again. Collateral estoppel, a related concept, precludes either party from re-litigating an issue which has already been decided in a prior action, regardless of whether or not the issue was litigated in a suit on the same claim or a different claim. See generally, R. CASAD, RES JUDICATA IN A NUTSHELL (1976). Thus, any error which may have been made in the prior proceeding will be perpetuated.

17. Dispute resolution by community or tribal elders is of long tradition in a variety of cultures. Many Japanese people, even today, prefer to resolve their disputes out of court because of their tradition of harmonious reconciliation through the village elder, whose authority in the community was sufficient to persuade the disputing parties to accept the settlement. Forms of mediation by lay committees have been institutionalized to serve the needs of extrajudicial dispute resolution in the more urbanized modern society. See Kawashima, *Dispute Resolution in Contemporary Japan* in A. VON MEHREN, ed., LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (1963).

Among the "Kpelle" of Liberia, an informal committee of neighbors and kinsmen of the disputants make up a "moot" which resolves disputes. The local chief is mediator; the session begins with a chant for harmony by the eldest man present. The disputants then speak and answer questions; the local chief points out faults on both sides and a settlement is reached. Gibbs, *The Kpelle Moot*, in P. BOHANNAN, (ed.), LAW AND WARFARE 277 (1967).

For other examples see Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284

(1967), and Roberts, *The Settlement of Family Disputes in the Kgatla Customary Courts: Some New Approaches*, 15 J. AFRICAN LAW 60 (1971).

18. Concerning dispute resolution by witchdoctors, see J. COLLIER, LAW AND SOCIAL CHANGE IN ZINATANCAN 126-50 (1973).

A review article describing dispute resolution by landlords is Cohn, *Anthropological Notes on Disputes and Law in India*, 67 AM. ANTH. 82 (pt. II, 1965).

On village elders, see H. GULLIVER, SOCIAL CONTROL IN AN AFRICAN SOCIETY (1963).

19. Union-type mechanisms for resolving labor disputes exist in varied form in many nations, especially in socialist countries: The Commissions on Labor Disputes (CLD) and the Factory Trade Union Committees (FTUC) function in the USSR. See Puchinsky, V.K., National Report for USSR, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. Bulgaria's mechanism is also called Committee for Labor Disputes. Stalev, Jivko, National Report for Bulgaria, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. Poland boasts a network Labor and Social Insurance Dispute System which includes first-step arbitration at the company itself. Los, Maria, National Report for Poland, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

20. Arbitration clauses have been standard in construction industry agreements since 1871. The American Arbitration Association maintains a list of experts in architecture, engineering, contracting, and the like, selections from which are confirmed by the parties. Some business associations recommend to their members to use arbitration clauses in their contracts. Many insurance contracts call for arbitration of certain disputes (for example, amount of claim in a no-fault automobile insurance case). Conflicts concerning collective bargaining agreements between labor and management have, for many years, been resolved by arbitration. See generally, M. DOMKE, COMMERCIAL ARBITRATION (1968); CALIFORNIA JUDICIAL COUNCIL, THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS (1972); Aksen, *Resolving Construction Disputes Through Arbitration*, 23 ARB. J. 141 (1968).

21. Perhaps the most developed network of administrative tribunals exists in England. In 1974, 7,418,000 cases were handled dealing with government benefit programs as well as land, patents, mental health, rents, road traffic, and numerous other fields. See R.W. VICK AND C.F. SHOOLBRED, THE ADMINISTRATION OF CIVIL JUSTICE IN ENGLAND AND WALES 202-245 (1968).

In Japan, the Building Contract Disputes Settlement Committee utilizes mediation, conciliation, and arbitration to resolve disputes in the construction industry. It is only one of several specialized administrative agencies which resolve disputes (other examples are environmental pollution disputes and civil liberties settlement boards). Kojima, T., Taniguchi, Yasuhei, National Report for Japan, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

In Australia, a Public Administration Tribunal resolves disputes concerning government officials' actions; the Commissioner for Community Relations attempts to settle disputes concerning the Racial Discrimination Bill and the Human Rights Bill; the Fair Rents Boards, as their name implies, resolve disputes concerning rents. Taylor, G.D.S., National Report for Australia, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

22. For example, in arbitration programs attached to small claims courts, the state-selected arbitrators are on hand to handle any claims which the parties decide to arbitrate. In the Philadelphia Compulsory

22. (Cont.) Arbitration Program and other similar plans, the arbitrators are selected from lists maintained by the court.

23. See, e.g., Social Conciliation Committees in Poland, described in J. Kurczewski and K. Frieske, *The Social Conciliatory Committees in Poland*, special report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy; Iran House of Equity, described in Bushehri and Baldwin, *The Administration of Justice by Laymen in Iran: A Report of Houses of Equity and Councils of Arbitration* in INTERNATIONAL LEGAL CENTER/WORLD ASSOCIATION OF JUDGES, COURT CONGESTION: SOME REMEDIAL APPROACHES 70 (1971). These and other community tribunals will be referred to and described at many points throughout this report.

24. See pages 18-19 *infra*.

25. This is the pattern typical of the regular courts where a plaintiff compels the defendant to submit their dispute to the judicial forum by unilaterally filing a complaint with the court clerk.

26. Certain federal administrative agencies—the Federal Trade Commission, and the like—sometimes initiate their own investigations in areas where they feel unlawful practices may be common. In the course of investigating and seeking to remedy these situations, the agency may well intervene and help to resolve a number of grievances between individuals and the offending institution or institutions.

27. See page 19 *infra*.

28. Sometimes the parties have one preemptory challenge to disqualify a judge who is deemed prejudiced. See CAL. CODE CIV. PROC. § 170.6(3) (West 1976 Supp.).

29. See pages 17-18 *infra*.

30. See pages 17-18 *infra*.

31. See pages 18-19 *infra*.

32. See pages 51-52 *infra*.

33. See page 51 *infra*.

34. The main features of the description of the New Zealand and Australian Compensation Plans are taken from G.D.S. Taylor, Access to Justice in Australia, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. Another excellent description of the New Zealand Plan is found in Harris, D.R., *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MODERN LAW REVIEW 361 (1974).

35. See, e.g., WASH. REV. CODE section 26.09.030 (1975 supp.).

36. The original plan called for compensation for the first two categories only; the 1973 amendment added the third scheme.

37. The New Zealand Scheme has not been extended to cover compensation for illness, although the issue has been widely discussed. [See *The Woodhouse Report. A Panel Discussion*, 1969 NEW ZEALAND LAW JOURNAL 297.] The Australian National Compensation Scheme proposes to include compensation for congenital and acquired sicknesses as well as injuries. The Australian plan has not been put into effect at this time, although originally it was to begin operation in various stages, beginning July 1, 1976, for certain injuries. Compensation for sickness was to commence on July 1, 1979, for illnesses beginning on or after that date, and on about January 1, 1981, for illnesses beginning prior to the 1979 date. According to the Australian scheme, a person who is injured or ill need only notify the proper department in writing of his circumstances (submission of medical reports satisfies the writing requirements). This invokes the third-party intervention, and a preliminary decision is made by officers of the department. If it is determined at this point that the applicant is not qualified for compensation, he will be notified that his medical records were insufficient to allow decision, and he may submit further material to support his application, or request a hearing before final decision. A rejected applicant may appeal his case to a special tribunal which may order a complete, new, independent determination.

Computation of the amount of compensation differs in the Australian and New Zealand schemes, but basically both schemes set minimum and maximum percentages of compensation (for example, in Australia, a disability of 10 percent or less is not compensable, in order to promote self-reliance; a disability of more than 85 percent is compensable as if it were 85 percent). The standard formula to be used in Australia is:

$$\frac{\text{earning base per week} \times \text{percentage disability}}{100}$$

The earning base per week is calculated according to actual earnings, or estimated future earnings at a set age, depending on the particular situation, and is likewise subject to a minimum and maximum level.

38. The discussion on the various forms of no-fault divorce in the U.S. is gleaned from Johnson, E. Jr., *et al.*, National Report for the U.S., unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

39. One California study showed that the switch from fault to no-fault saved about five minutes per case, or 12.5 judicial man years (2.6% of the resources available to the Superior Courts). Another important feature of the change is the elimination of many of the emotional hassles generated through establishment of fault. The actual procedure for invoking the court's aid varies according to state. In California, for example, when one party files a request for marriage dissolution, the clerk talks to both parties with an eye toward possible reconciliation. Thirty days after the filing, the judge considers the case, and if he is informed that reconciliation is not likely, he may order the marriage dissolved immediately. In another state, Oregon, the marriage can be dissolved immediately, with no judicial intervention, upon proper petition which is uncontested. *Id.* at Chapter III.

Legal systems in other countries, both east and west, are currently being modified to include no-fault type divorce laws. For example, in Bulgaria, the court will only inquire into the issue of fault if one of the parties so requests. [Bulgarian Family Code, Article 21 II, 1964.] In Sweden divorce is granted either directly or after a six month's reflection of time, and infidelity is no longer considered a relevant issue as grounds for divorce. [Swedish Marriage Code, 1974.]

40. Japan has a "no court" type of divorce, that is, a system of registration of consent divorces. Rather than requiring the parties to submit to a court proceeding, and thereby occupying court time and resources, they merely register the divorce and any accompanying financial settlement agreement. The registration procedure recognizes that courts are in effect fulfilling only a record-keeping function in the consent divorce situation anyway.

41. For example, in California, the no-fault divorce statute's language of "irreconcilable differences causing an irremediable breakdown of the marriage" has been interpreted to mean that the court must be convinced that the legitimate objects of matrimony have been destroyed. Thus, the act of finding an irreconcilable difference is not a purely ministerial act on the part of the court. See *McKim v. McKim*, 6 Cal. 3d 675, 493 P. 2d 868, 100 Cal. Rptr. 140 (1972). So the questions of whether or not the differences are irreconcilable, causing an irremediable breakdown in the marriage are at issue, certainly where one party contests them and even to a certain extent when neither party contests them.

42. Statute for Contracts and Obligations, Article 45.

43. The importance but yet the limitations of the deterrence function of basing relief upon responsibility may be gleaned from the following quotation:

... the primary way in which a society may seek to reduce accident costs is to discourage activities that are "accident prone" and substitute safer activities as well as safer ways of engaging in the same activities. But such a statement suggests neither the degree to which we wish to discourage such activities nor the means for doing so. As we have seen, we

43. (Cont.) certainly do not wish to avoid accident costs at all costs by forbidding all accident-prone activities. Most activities can be carried out safely enough or be sufficiently reduced in frequency so that there is a point at which their worth outweighs the costs of the accidents they cause. Specific prohibition or deterrence of most activities would cost society more than it would save in accident costs prevented. We want the fact that activities cause accidents to influence our choices among activities and among ways of doing them. But we want to limit this influence to a degree that is justified by the cost of these accidents. The obvious question is, how do we do this?

G. CALABRESI, THE COSTS OF ACCIDENTS 68 (1970).

44. See pages 3-4, 2-3, and 4 *supra* for discussion of these values of dispute resolution. By eliminating the need for a contested hearing, the moving party obtains intervention at minimal cost, in a very short period of time and thus relief becomes quite accessible for that side of the dispute. However, the responding party's costs for obtaining a contested hearing to challenge the transfer and the delays in obtaining such a hearing may have unfortunate consequences for the latter's access to dispute resolution and the overall equity of the results achieved under such a proceeding. See pages 41-42 *infra*.

45. Numerous countries have instituted summary procedures for collection of liquidated debts which operate without any preliminary check upon the truth of the claimant's allegations. The typical model is the *Zahlungsbefehl* in West Germany, according to which the creditor can obtain a decision on the debt without any hearing at all. This decision then has the force of a judgment and may be executed. The debtor must thus pay the debt without any hearing on the veracity of the creditor's claims, unless he files a *Widerspruch* (opposition) within a certain period, which will then entitle him to a hearing.

Bender, Rolf and Strecker, Christoph, National Report for Federal Republic of Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

The key point in *C's* and similar procedures in other countries is that relief is awarded on a bare assertion without any check on the veracity of the claim unless the source of relief takes the affirmative action of lodging a complaint.

Related procedures in other countries include the Order for Payment in Hungary (Nevai, Laszlo, National Report for Hungary, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy) and the Payment Order Procedure in Japan (Kojima, T. and Taniguchi, Yasuhei, National Report for Japan, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy).

46. See pages 42-43 *infra*.

47. See page 39 *infra*.

48. See pages 39-41 *infra*.

49. Rosenberg, *Devising Procedures that are Civil To Promote Justice that is Civilized*, 69 MICH. L. REV. 797 (1971). Rosenberg's theory is discussed in more detail at Chapter IV, notes 25-28 *infra*.

50. See Chapter IV, notes 40-43 *infra* for samples of typical repossession, garnishment and attachment statutes and cases by the United States Supreme Court placing certain restrictions upon these procedures.

51. Temporary Restraining Orders (TRO), authorized by Federal Rules of Civil Procedure, Rule 65, provide an illustration of how this type of mechanism might function. A TRO is granted *ex parte* by the judge upon affidavit of the moving party that there is serious need to stop the defendant's action and no time to give notice. The defendant is bound by it when he receives notice of its issuance. Since the TRO is only a preliminary injunction, the moving party's claims will later be examined and contested in a full-scale hearing on the issue of whether to issue a permanent injunction.

52. One recent study of 1,331 default judgments in consumer cases in 4 major U.S. studies revealed that some of the major reasons for

default include debtor's failure to be notified of the suit, unexpected loss of income by debtors, involuntary overextension of debtors, deception or harassment by creditors, payment misunderstandings between debtors and creditors. See D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 53 (1974). The first reason mentioned is partially attributable to the phenomenon known as "sewer service," in which process servers falsely affirm delivery of the summons but really fail to deliver them (oftentimes throwing them down the sewers in New York). See Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972).

53. In Italy, for example, there are no default judgments; thus, a hearing must be had prior to relief. Some special exceptions are made for liquidated debts, one procedure resembling those discussed at note 35 *supra*. Vigoriti, Vincenzo, National Report for Italy, unpublished report for Access to Justice Project, Center for Comparative Studies, Florence, Italy.

54. See, e.g., Frankel, *The Adversary Judge*, 54 TEXAS L. REV. (1976); J. THIBAUT and L. WALKER, PROCEDURAL JUSTICE (1975). Many factual issues are now susceptible to various methods of scientific proof—fingerprint comparison, handwriting analysis, blood-typing, document analysis, etc. These techniques may be more accessible to some disputants than others. Also some litigants, especially insurance companies and other large institutional litigants, are able to employ full-time staff and to organize their investigation of a mass of similar disputes to minimize the per dispute fact-finding costs.

55. Among industrial countries, Sweden is virtually unique in allowing non-lawyers to represent others for compensation in many judicial proceedings. See A. Bruzelius and P.O. Bolding, *An Introduction to the Swedish Public Legal Aid Reform* in M. CAPPELLETTI, J. GORDLEY AND E. JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 561-62 (1975).

56. See pages 60-61 *infra*.

57. See pages 61-62 *infra*.

58. See pages 59-60 *infra*.

59. See Chapter VII *infra*.

60. See Chapter VIII *infra*.

61. According to this model of the conciliation process, the mediator plays a neutral role by merely listening and facilitating conversation between the two disputants. Rather than suggest his own solution, the mediator endeavors to draw out each party's position in order to help them both arrive at their own compromise solution. He sensitively exposes the underlying problems in the dispute and stimulates the parties to express their preferences and limits of acceptable resolution. Frequently, the third party is aided in his understanding of the dispute by private meetings with each party. See Fuller, *Mediation—Its Forms and Functions*, 44 SO. CAL. L. REV. 305 (1971) for an analysis and illustration of a mediation of this type.

62. The crucial concept in the functioning of the Polish Social Conciliation Committees (SCC's) is voluntariness. When both parties appear before it, the SCC conducts a conciliation session which results in a resolution usually placing some obligation on one or both parties. But this obligation is not a "sanction" in the legal sense, as the SCC cannot compel its fulfillment nor can it enlist the aid of police, bailiff or other state agency. Nevertheless, the power towards effecting performance wielded by the SCC is not insignificant. The SCC or one of its members may supervise the parties, and especially in small towns, the pressure of community opinion (reinforced by social and political organizations) generally effects compliance more effectively than would state coercion.

If a party does not attend the scheduled conciliatory session, he may not, of course, be legally sanctioned. However, the SCC may (although rarely does) impose certain "educational measures" such as imposing

62. (Cont.) the obligation on that party to apologize, to repair damages or to pay a certain small sum. The SCC may also issue a reprimand or admonition. Here again, it is primarily community opinion and SCC supervision which tend to effect compliance.

In 1970, a new rule established a procedure which in certain circumstances does give some legal effect to SCC decisions. This occurs where a private accusation case which was filed in court is transferred by the court to the SCC for conciliation. The SCC's settlement may become an executable judgment if the court so orders, and failure by the party to comply may result in state sanction. This development has had some influence in formalizing certain procedures of the SCC to provide increased safeguards ensuring fairness (e.g., assurance that parties were properly notified). Kurczewski, Jacek and Frieske, Kazimierz, *The Social Conciliatory Committees in Poland*, unpublished special report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

63. The statutorily-authorized Sri Lanka Conciliation Boards which have been functioning for over 18 years are composed of lay community members appointed by the Ministry of Justice. The Boards serve as a *compulsory* first step prior to the initiation of the court process for certain civil and minor criminal disputes. Upon receipt of a complaint, the Board summons all involved parties and hears evidence from both sides. The Board members play an active, questioning role in obtaining necessary information in an attempt to achieve a settlement. Settlement frequently involves admission of fault or guilt by the defendant and a subsequent agreement on compensation. If a settlement is reached, it is filed and enforced through the courts. But if this oral persuasive procedure fails, then a certificate is issued declaring that settlement was not possible, thus allowing the complainant to pursue his case in the regular courts. For further description and analysis see Goonasekera and Metzger, *The Conciliation Boards Entering the Second Decade*, 2 J. OF CEYLON LAW 35 (1971), and N. Tiruchelvam, *The Popular Tribunals of Sri Lanka, A Socio-Legal Inquiry*, Yale Law and Modernization Working Paper No. 31 (1974).

64. The Canadian Broadcasting Company (CBC) Ombudsman is an interesting example of a media complaint program. Its aim is to use television as a means for effecting social change. On the weekly Sunday night program, complaints are aired (though these are only a small fraction of the cases actually handled). The ombudsman staff works behind the scenes to help individuals achieve redress of their grievances. Since the service handles complaints about government (e.g., unemployment insurance, worker's compensation, etc.), cabinet members are asked to view films of these broadcasts and then correct the injustices.

In its first three years, the CBC Ombudsman received 30,000 complaints and processed 10,000 of these. It has been estimated that more than 10 percent of the adult population watch the show.

See R. Cooper, *Access to Justice in Canada*, National report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

65. All types of media outlets in the U.S. are beginning to sponsor complaint resolution mechanisms. They are variously nominated "hot lines," "consumer advocates," "action lines," and the like, and are able to respond to only a fraction of the complaints which they receive. Their success lies in their visibility. Newspaper consumer columns often appear on a syndicated basis. Frequently, columns such as the *Los Angeles Times*' "Consumer Advocate" column (appearing since 1971) sifts through its bulk of complaints and then features advice, information and warnings on common problems.

The "Call for Action" radio program began in New York with radio station WMCA and now functions in numerous cities. Staffed primarily with volunteers, it functions as a referral service, but attempts to follow up on responses to complaints. The KABC Radio Ombudsman Service in the Los Angeles area acts upon complaints received by mail and by

phone concerning consumer problems as well as problems relating to government agencies. Its aim is to open lines of communication between the parties, but often goes as far as becoming involved in investigation of facts. The service is promoted heavily on the air, and although it does not produce a regular show, its promotions and consumer tips frequently refer to stories about successful dispute resolutions it has performed.

One example of a television mechanism is "Action-4," a regular segment of the evening news of NBC-TV's Los Angeles affiliate. It accepts complaints only by mail and performs mediation leading to settlement by phone and sometimes in person. It receives up to 1,500 letters per week. E. JOHNSON, JR., V. KANTOR, E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* (National Center for State Courts, 1977).

66. One clear example of the ombudsman's "sanction" by official report are the profiles on agencies prepared by the *Seattle—King County* local ombudsman's office. These profiles relate characteristic patterns of conduct by certain agencies which have been the source of numerous complaints. The profiles inform the departments of their public image, as well as recommend specific guidelines and suggestions for reform. SEATTLE-KING COUNTY OMBUDSMAN OFFICE, 1975 ANN. REP. at 2.

67. The Swedish Public Complaints Board is a government-sponsored mechanism, structured according to type of product, which aids consumers who feel they have been taken advantage of in the sale or repair of products. Lay experts receive written complaints and for those which they consider non-frivolous, they contact the selling party and attempt to *persuade* it to remedy the grievance. If this informal persuasion fails, a panel composed of both business and consumer representatives for the particular product involved, will hear the case. The Board cannot impose any sanctions, but wields a good bit of power because of the blacklists of non-cooperative businesses which it maintains and periodically publishes in the newspapers. The Board also issues products recommendations which are often followed by trade associations. Eisenstein, Martin, *The Swedish Public Complaints Board: The Keystone to a System of Consumer Protection*, unpublished special report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

68. See e.g., CAL. CODE CIV. PROC. § 484.010 *et seq.* (West 1976 Supp.).

69. See e.g., the California civil contempt statute, CAL. CODE CIV. PROC. § 1209 (5) (West 1976 Supp.) which states that disobedience of a lawful order, judgment or process of the court is a contempt of court.

70. See e.g., CAL. CODE CIV. PROC. § 1276 (West 1976 Supp.) laying out the requirements for a petition for change of name; CAL. HEALTH AND SAFETY CODE § 10460 (West 1975) authorizing registration by affidavit of a child's name change.

71. See pages 51-52, 44, and 60-61 *infra*.

72. See page 12 *supra*.

73. See Chapters IV-VI *infra*.

74. See pages 17-18 *supra*.

75. The concerns are similar and the implications the same as when the source is an individual as opposed to an institution capable of absorbing or spreading the risk of error. See page 12 *supra*.

76. This condition may exist as a practical matter in certain consumer problems where the grievance cannot be pursued in the courts for economic reasons. Thus, only if both parties consent to an arbitrator or other lower cost forum will dispute resolution be feasible.

77. As when one or both parties elect arbitration solely to avoid the possibility the other will take the dispute to court.

78. As in some voluntary arbitration schemes where both parties must agree to the panel members who will render the decision.

79. The perceived deficiencies were outlined in Chapter One. As

79. (Cont.) highlighted at that point, the strategies described in subsequent chapters address one or more of these problems but some-

times can actually aggravate others. This is because of the tension between competing goals such as access and reduced judicial caseload.



## CHAPTER III. THE SETTLEMENT INCENTIVE STRATEGY: MEASURES WHICH MOTIVATE DISPUTANTS TO RESOLVE DISPUTES WITHOUT THIRD PARTY INTERVENTION

It is a commonplace that many cases filed in the courts never are decided by judge or jury. At some point before this ultimate stage, the parties arrive at a settlement of the issues. In the United States the proportion of cases filed in court which are disposed of short of court decision and presumably "settled" <sup>1</sup> approaches 90 percent in some jurisdictions.<sup>2</sup> Other nations also report significant figures.<sup>3</sup> Such settlements can occur anytime from the filing of the action (or before) on through the process and to the moment before the decision-maker makes known his decision. Similarly, disputes brought to non-judicial forums often are negotiated between the parties rather than being decided by the third party. In fact, the statistics inevitably understate the true proportion of disputes settled between the parties since they reflect only those controversies which already have been filed with the court or some other third party forum. Many others are negotiated between the disputants without either side approaching a third party. Nevertheless, the third party forum may subtly influence these settlement negotiations as well. Each disputant will be aware that the other could invoke whatever third party institution or institutions are accessible to that disputant for that kind of dispute. Consequently, the probable decision which an accessible third party forum would reach if asked even hovers over the negotiation between disputants who have not filed their case and become a statistic.

### A. The Role of Settlement Within the Dispute Resolution Process

Settlement is simultaneously praised and condemned. The version operating within the criminal law context, known as "plea-bargaining," has generated a cacophonous roar of studies, law review articles, and political rhetoric.<sup>4</sup> In civil cases, there are fewer criticisms about the morality of compromise. Negotiation and mutual trade-offs seem commendable when what is at stake is property or status, not an individual's liberty. But what is challenged is the equity of the settlements reached, especially between disputants of disparate means or bargain-

ing power. A recent study suggests, for instance, that debtors typically are compelled to accept settlements at unfavorable terms in some cases where liability itself is questionable and in others where a reasonable compromise would be at a much lower figure.<sup>5</sup>

Nevertheless, settlement as an alternative dispute resolution technique does possess certain advantages. Compared with virtually any system of third party resolution, it is less expensive, speedier, and simpler. This is particularly true where disputants can obtain enough information to appraise the reasonable parameters of their negotiating positions without incurring substantial expenses for fact investigation or criteria ascertainment. As a consequence, the creation of a rational scheme of inducements calculated to encourage *reasonable* settlements between the parties should promote resolutions at a cost more reasonably related to the matter in dispute. Negotiated resolutions may also contribute to the psychological satisfactions of the disputants. Both sides may feel they came away from the bargaining table a partial winner and with a friendlier attitude toward each other and the process.<sup>6</sup>

### B. Incidental Effects on Settlement Negotiations of Measures Designed Primarily To Achieve Other Objectives

Of course, without any deliberate attempt to create new incentives, there already exists a configuration of inducements to settle, implicit in the present amount and allocation of costs and responsibilities in the eligibility determination process. In the most stark example, low income people are faced with a compelling need to settle, or more accurately, to surrender, on virtually any terms when sued in an ordinary court where the burden of investigation, presentation, and the rest is thrust upon the individual litigants, and with it the expenses, which are beyond the financial means of low income parties.<sup>7</sup> But to a somewhat lesser degree, the decisions of all disputants must inevitably be influenced significantly by how much it will cost them to obtain a final resolution from

the third party (or even what it will take to proceed one more step toward that decision).<sup>8</sup>

Many of the other factors discussed in Chapter II have important secondary effects. Intentionally or unintentionally, they alter the configurations of incentives to settle and thereby affect the willingness of one or both disputants to resolve without the intervention of a third party. Not only the readiness to negotiate but the terms the disputants deem minimally acceptable as a compromise solution respond to variations in the design of the dispute resolution process itself.

It probably can be assumed that reallocations which reduce the expenses of both parties proportionately will simultaneously reduce each disputant's willingness to settle. Thus, measures through which the government itself absorbs more of the expense of fact investigation, criteria ascertainment, and decision-making are intended primarily to make dispute resolution more accessible to the common citizen by reducing his participation costs.<sup>9</sup> However, those lesser participation costs mean each disputant is in a better position to await a complete investigation and a third party's decision about the merits of the controversy. Assuming a nearly equal easing of the financial burdens on both disputants, there will be less pressure to negotiate on either side and for both parties the parameters of acceptable compromise will narrow appreciably. As a consequence, with every significant and balanced reduction in litigants' expenses, it is rational to anticipate a reduction in settlement rates and a commensurate rise in the percentage of disputes necessitating third party resolution.<sup>10</sup> Though often viewed as an unhealthy development, especially by observers focussing solely on judicial efficiency and disposition statistics, a cutback in settlements is not necessarily a negative result. In many instances, those enormous settlement rates are sustained by a host of capitulations on the part of disputants unable to afford the third party resolution process.<sup>11</sup> (In this context, "capitulation" connotes acceptance of terms which are markedly inferior to those which would have been found reasonable by the third party had the dispute been able to run its full course.)

Reallocation of litigation expenses from one disputant to the other<sup>12</sup> can be anticipated to unleash a more complex set of pressures on the settlement process. Presumably such shifts will increase the settlement readiness of the disputants upon whom the new burdens are foisted, while simultaneously reducing their opponents' willingness to negotiate. In most instances, these modifications in settlement readiness will be reflected in a substantial relocation of the parameters of acceptable compromise. An offer that might have been held to be clearly unacceptable by a disputant only chargeable with

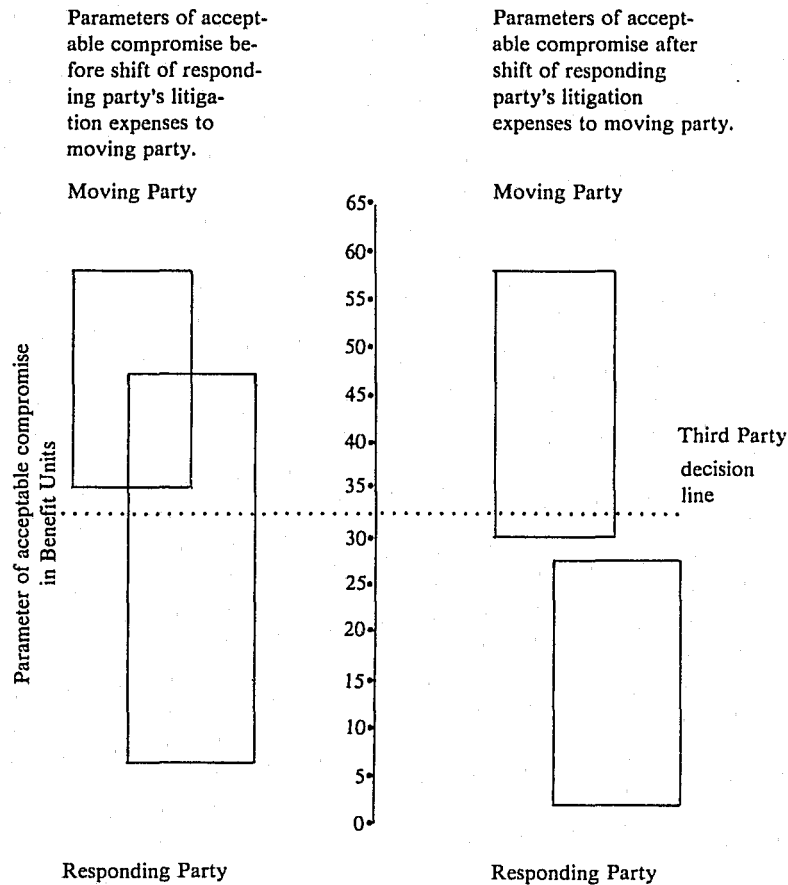
his own litigation expenses may become quite reasonable if the price of third-party resolution is hiked to include the opponent's participation costs. Meanwhile, a suggested compromise that might have been found minimally acceptable—all things considered—by the opponent may no longer seem tolerable when he is relieved of some significant proportion of the cost of waiting out the full third-party process. These attitudinal changes are illustrated in Figure 3-1.

The hypothetical situation depicted in Figure 3-1 suggests one of several scenarios that might follow a shift in participation costs from one disputant to the other. Without such a reallocation, a settlement probably would have been achieved, though on terms much more favorable to the moving party than what a third party would have found appropriate. (This follows because the area of possible compromise, where the settlement parameters of the two disputants overlap, falls entirely above the third party decision line, i.e., the resolution which a reasonable decision-maker would have imposed.) However, with the transfer of participation costs from responding party to moving party, the possibility of settlement evaporates. Even though this reapportionment has motivated the moving party to soften his demands quite dramatically, it has caused the responding party to harden his bargaining position to the point that he will refuse even the most favorable terms the moving party can be expected to offer. In fact, in the hypothetical situation illustrated by Figure 3-1, the responding party will not even accept a settlement offer which is more favorable to him than the resolution the third party would award at the completion of the entire dispute resolution process. (Of course, at the time of the bargaining, the disputants cannot predict with precision what the third party will actually decide. This third party decision line is included only as a reference point suggesting the relative equity and rationality of the settlement alternative.)

In the idealized situation, on the other hand, the reallocation of participation costs from one disputant to the other will be carefully measured to provide the exact amount of incentive adjustments needed to restore balance between the disputants. In such a case, the settlement rate should be maintained or increased, but with the terms clustering much closer to the third party decision line than was true before the expense transfers took place. Typical examples of this situation are depicted in Figures 3-2 and 3-3.

Figure 3-2 illustrates an occasion in which the shift in financial responsibility produces a settlement where none would otherwise have occurred. It might be typical of a large commercial institution moving against one of its thousands of individual customers. Because of its tradi-

FIGURE 3-1



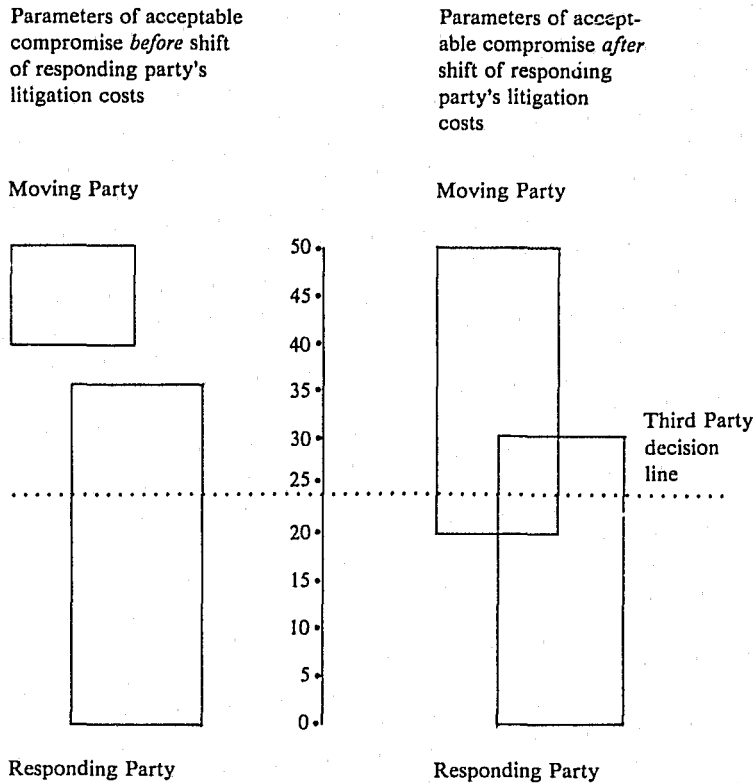
tional resource advantage, the institution holds out for its usual, though unreasonable, figure. In this particular case, however, it is faced with an individual who, for some reason, is not willing to meet those terms, even though compelled to offer a settlement far more unfavorable to him than the third party would determine to be appropriate. But after the commercial enterprise is faced with the prospect of absorbing some substantial portion of the individual customer's participation costs, it revises its estimates of what would be an acceptable compromise. Though the customer has been relieved of enough of his financial burden to be in a position to refuse clearly unreasonable offers, his settlement parameter remains wide enough to encompass the institution's new found generosity, and it is reasonable to expect a negotiated compromise ordinarily will be achieved.

Figure 3-3 reflects negotiations between the commercial institution and the majority of its customers. Settlement takes place whether or not the customers' participation costs are transferred to the enterprise. But the terms of settlement are amended drastically by the

new policy. Customers find themselves able to hold out for more reasonable offers. Meantime, the commercial establishment suddenly finds its best interests lie with a much more flexible negotiating position.

Other elements of the dispute resolution process which were mentioned in Chapter II (many of them to be discussed in greater detail in subsequent chapters) likewise can profoundly influence settlement incentives and through them appreciably alter settlement rates and patterns. However, the mechanism through which these inducements operate is nearly identical to that discussed above. The modification of such elements, whatever it is, somehow alters the amount or allocation of participation expenses experienced by the parties. Because of the altered financial circumstances, the disputants have greater or lesser, equal or unequal, motives to settle and at terms more or less generous than those deemed reasonable before litigation costs were reduced or reallocated. Thus, in comprehending how settlements are affected by measures directly aimed at reducing or shifting participation costs, we have also a fair idea about the impact of measures which only indirectly and usually

FIGURE 3-2



unintentionally transform the litigation expense pattern.

To illustrate this point, consider the consequences of a simplification of eligibility criteria in a given category of disputes.<sup>13</sup> It can be anticipated that the costs of the fact investigation, criteria ascertainment, and decision-making steps will all be reduced measurably by such a reform. If the amount of savings is equal for all disputants, it appears reasonable to predict that both sides, and particularly economically-weak litigants will be better able to afford to await a third party resolution. Consequently, assuming some provisos,<sup>14</sup> the settlement rate should fall significantly, with the average terms of settlement probably affected to a lesser degree. On the other hand, if the elements of proof excised through criteria simplification were more costly to one class of disputants than another, the incidence of cost reduction may not be balanced, but rather akin to a reallocation of participation expense among the parties.<sup>15</sup> In that event, it seems reasonable to predict very substantial movement in the average terms of settlement in favor of the class of disputants who no longer need establish the existence or absence of those eligibility factors.<sup>16</sup> A similar observation can be made about measures which award third party intervention merely upon a written or oral representation of eligibility from the moving party.<sup>17</sup> However, in this

circumstance, the pressures upon the responding party to settle on terms favorable to the moving party normally are intensified dramatically. The moving party's costs for obtaining the intervention of a third party on his behalf has been cut to a minimum. If the responding party has a recourse, it is apt to involve rather substantial expenditures.<sup>18</sup> Thus, once again, the configuration of settlement incentives appears analogous to the reallocation of participation costs from one disputant to the other.<sup>19</sup> It should be emphasized that this reallocation can serve either to create a proper balance between otherwise unequal disputants or to reinforce a pre-existing imbalance, tilting it even further toward the more powerful individual or institution. The latter eventuality is illustrated by the effects of *ex parte* wage garnishment, repossession, and the like. These collection devices, which award the credit institution its objective on the sole basis of a written recitation of facts indicating satisfaction of the eligibility criteria, ordinarily aggravate an already unequal bargaining contest between credit institutions and their individual customers.<sup>20</sup> In so doing, these measures undoubtedly increase settlement rates in such cases. But if the above analysis is correct, probably most of such dispositions are more accurately characterized as "capitulations," rather than reasonable compromises.<sup>21</sup>

### C. Measures Which Deliberately Employ Economic Incentives Calculated To Encourage Settlements

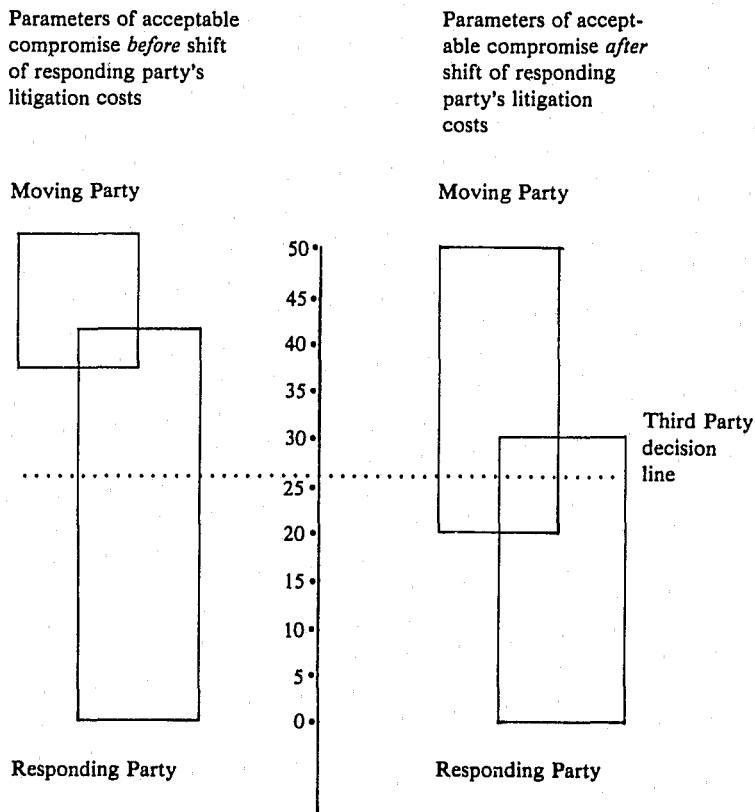
In the prior section, we considered the impact of various measures on settlement incentives and settlement rates. In every case, the operative inducement was not verbal persuasion but some economic cost or benefit. However, with respect to these institutions and procedures, increased settlement incentives and settlement rates were the largely unintended consequences of reforms designed to promote other aims. Now we take up measures in which economic incentives are deployed as part of an intentional strategy to encourage two-party settlements.

1. *Measures which penalize the failure to negotiate a reasonable settlement or reward the negotiation of a reasonable settlement.* Most settlement incentives appear in the form of retroactive penalties imposed after a third party decision has been rendered. Normally, this delay is necessary because only after the decision-maker has made his independent appraisal of the dispute is there a logical reference line for evaluating the reasonableness of any offers that may have been made or rejected during

negotiations between the disputants. It is inappropriate to reward a disputant for offering \$1,000 or punish his opponent for refusing that proposal if the only rational compromise of the dispute would exceed \$5,000. Nevertheless, once criteria for judging the reasonableness of negotiating positions are established, the government need not be confined to the imposition of penalties. It is possible to contemplate a system of affirmative rewards that could be offered the parties to encourage bargained solutions,<sup>22</sup> as a supplement or replacement for the negative sanctions.

At this point, however, penalties appear to take precedence over explicit rewards. Probably the most significant procedure presently implementing this approach to settlement inducement is England's "payment into court" system. Designed to encourage plaintiffs to accept settlement offers in damage cases, it authorizes defendants (usually insurance companies, because of the nature of such disputes) to deposit with the court a sum of money equivalent to their last offer to the injured party. This "payment into court" continues to dangle before the plaintiff and is his for the asking until final judgment is rendered.<sup>23</sup> Moreover, after judgment, the plaintiff is entitled to whatever portion of the deposit the

FIGURE 3-3



verdict awards (and a supplement should the amount of the money judgment exceed the defendant's payment into court.) But if the plaintiff's judgment is less than the defendant's "payment into court," then the plaintiff must assume the defendant's litigation costs, including the latter's legal fees.<sup>24</sup> Thus, even though victorious at the trial and under normal English procedural rules entitled to costs from the losing defendant,<sup>25</sup> the plaintiff is penalized significantly for his earlier rejection of an offer more generous than the judge or jury felt justified in awarding him. Not only is he compelled to pay his own fees and costs which normally would have been transferred to the losing defendant, but he must actually reimburse the defendant for the latter's fees and costs.<sup>26</sup> The rule is rigid in its application. If the plaintiff miscalculates only slightly and wins a court verdict of even a single pence less than the defendant's payment into court, he is liable for both his own costs and those of his opponent, just as if he had acted completely irrationally and spurned offers several times greater than his eventual verdict.<sup>27</sup> This double loss can amount to a very major deduction from the plaintiff's damage recovery in relatively modest cases, eating up virtually the entire award.<sup>28</sup>

The obvious and intended function of this special procedure is to generate powerful pressures on plaintiffs during settlement negotiations. The penalties are designed to motivate them to accept any offer from the defendant which is within sight of the court's probable award. That the incentive is very real and exerts a powerful influence over the negotiating process is confirmed by both reason and empirical evidence. In appraising any proposal from his opponent, a plaintiff clearly must take into consideration the severe financial penalty which will be imposed should he be unable to persuade the judge or jury to award higher damages. Thus, an offer that would have been deemed unreasonably inadequate in ordinary circumstances becomes compellingly reasonable when the risk of a cost-shifting penalty is factored into the plaintiff's decision-making equation.

Zander provides a simple illustration of the power of the payment-into-court incentive as applied against individual plaintiffs. In a situation where a plaintiff feels his claim is worth £10,000 and the defendant has paid in £7,500, the plaintiff's decision will have to be based in part, at least, on the risk (unlikely though it may be), that the judge will award him under £7,500. He will have to account for uncertainties such as the particular judge involved, the performance of individual witnesses, etc. An award to the plaintiff of £7,000 would be substantially reduced (by say £3,000) once plaintiffs' and defendants' lawyers' fees were subtracted. Thus, the plaintiff would have to factor into his decision the risk

that he might end up with only £4,000 on a claim he valued at £10,000. Under those circumstances, a £7,500 offer becomes reasonable and often will be accepted even though insufficient to compensate the plaintiff fully for his injuries.<sup>29</sup>

Even a country such as the United States where costs ordinarily remain with the parties incurring them could readily institute a "payment into court" procedure. All that need happen is enactment of a statute creating the desired cost transfers and a system of deposits with the court. The more serious policy question is whether given the evident bias of the system against individual plaintiffs and in favor of institutional defendants,<sup>30</sup> insurance companies, in particular, it represents an equitable method of inducing settlements.

The search for effective settlement incentive schemes need not end with the somewhat suspect "payment into court" procedure currently in effect in England. It is possible to conceive of a few rather minor modifications in that procedure which probably would enhance both the effectiveness and the equity of the approach. As one possibility, *both* parties could be required to submit a final binding offer to the court or other third party forum, probably without the deposit of any sum of money. If these proposals overlapped, the tribunal could declare a settlement. If they did not, the trial would proceed. However, a financial penalty of some sort would be exacted from the disputant whose final offer proved to be least reasonable, that is, differed most from the third party's ultimate judgment. This financial penalty could be in the form of an award of costs to the other side. With equal logic and effect, it could be set as a certain percentage of the difference between the "unreasonable" final offer and the third party's appraisal of the case. This would facilitate a further refinement, the scaling of the penalty to the relative "unreasonableness" of the offer. Scaling of penalties, in turn, would intensify the pressures on both parties to make as well as accept reasonable proposals. The retroactive penalty for outright obstinacy would be proportionally more severe than for modest miscalculations.

Whatever its amount or method of calculation, the penalty need not be paid to the other disputant. It could just as well be an assessment on behalf of the government. It still would remain an effective inducement to settle on reasonable terms. However, the incentive effects could be maximized by transferring the amount of the penalty from the unreasonable disputant to the more reasonable one. Thus, the same sum of money would simultaneously constitute a penalty for one disputant and a reward for the other, as it does under England's "payment-into-court" system.

A somewhat analogous financial incentive scheme has

been devised to encourage compliance with the decisions of a preliminary third party "screening" forum in Michigan. Under the so-called Michigan Mediation Plan,<sup>31</sup> tort claims filed in the court are automatically referred to a three-member panel consisting of one attorney selected by the Detroit American Trial Lawyers Association, one attorney selected by the Detroit Defense Counsel Association, and one Wayne County circuit court judge selected by the other two panel members.<sup>32</sup> This panel recommends a settlement figure to the parties which is final unless one of them elects to proceed to trial. But the appealing party must improve his position by at least ten percent in relation to the panel's recommendation or suffer the consequence of paying his opponent's legal fees and other litigation costs associated with the court trial he forced on them both. A plaintiff whose claim the panel valued at \$10,000 must receive a judgment of at least \$11,000 at trial or be held liable for the defendant's attorneys' fees and litigation expenses. Similarly, a defendant who appeals a case valued at \$10,000 must reduce the judgment to \$9,000 at trial in order to avoid the same penalty. Thus, the Michigan plan imposes comparable penalties on both plaintiffs and defendants.

It should be noted that the Michigan Mediation Plan differs from the other mechanisms discussed in this chapter. It does not operate to induce two-party settlements independent of the third party forum, since a third party does intervene to appraise the dispute and suggest the specific terms of a compromise.

Before considering further the problems and potential of financial incentives in support of reasonable settlements, it is desirable to set out two additional models, one actually presently functioning and the other a theoretical possibility. Both attempt to deal with an aspect of settlement in addition to the reasonableness of offers—the timing of such proposals. Thus, these systems of incentives seek to encourage *early* as well as *reasonable* negotiations.

Some insurance regulation schemes already impose a duty on insurers to speedily and reasonably settle claims filed by their policyholders. Ordinarily this is accomplished by levying financial penalties against any company which is found to have violated either mandate: timeliness or reasonability.<sup>33</sup> These incentive provisions have been an especially important ingredient in several no-fault automobile compensation plans in the United States. The New York statute is fairly typical. It requires the insurance carrier to settle on reasonable terms within thirty days after the policyholder files his claim. The penalty for failing to obey this commandment is relatively stiff: 2 percent per month interest on the damages awarded by the court retroactive to the date the insurance

company exceeded the specified time limits.<sup>34</sup>

Without such provisions there is some danger that no-fault insurance plans would not realize one of their primary goals—the elimination of automobile accident litigation.<sup>35</sup> The tort suits of the old fault liability system might merely be converted into a similar number of contract actions necessitated because of the recalcitrance of no-fault carriers to readily settle with their policyholders. The statutory penalties serve the function of attaching a financial premium on early and reasonable compromise as opposed to disposition through litigation. At a minimum, this incentive should help counterbalance the insurance companies' resource advantage in the litigation process,<sup>36</sup> and thus the natural temptation to drag the individual policyholder into that arena. The available evidence in any event suggests that these financial penalty clauses and other incentives do curtail litigation over no-fault claims and encourage expeditious settlements on terms favorable to the injured individual.<sup>37</sup>

It also is possible to conceive a comprehensive system of financial incentives keyed to the timeliness and reasonableness of settlement, applicable in all categories of disputes and administered by the court or other decision-making institution. What follows is a brief sketch of one possible format for such a scheme. Under this proposal, each disputant would be required to submit an initial sealed offer to the decision-making institution along with his pleadings (or their equivalent in a less formal dispute resolution system). If these offers overlapped, the decision-maker would declare a settlement, probably dividing the overlap evenly.<sup>38</sup> If not, the disputants would continue into the third party resolution process. However, at several intermediate stages, each party would be required to submit a further sealed offer. At any time the offers converged or overlapped, a settlement would be declared. If the disputants continued to remain apart in their evaluation of the case, the third party would render his decision. Both disputants, winner and loser alike, would then be assessed costs. These costs, however, would be calculated on the basis of the timeliness and reasonability of prior settlement offers (as measured against the third party's ultimate decision). Each disputant would be charged a percentage of the difference between his initial offer and the third party resolution multiplied by some factor related to the time that offer was made plus a percentage of the "error" in the second offer multiplied by a similar, but lesser time factor. The calculations would be repeated with subsequent regularly scheduled offers, the degree of error and the timing both influencing the amount of the assessment. The cumulative total of all these percentage charges would constitute the parties' <sup>39</sup> costs payable to the decision-making institution.

Obviously, these calculations need not necessarily lead to assessments to be paid by both parties to the government. Instead, they could be used to fix a net amount to be transferred from the "unreasonable" party to the "reasonable" one. Then once again, the same sum of money could serve simultaneously as a penalty for obstinance and a reward for rationality.<sup>40</sup>

2. *The effectiveness and equity of financial incentives in support of two-party settlement of disputes.* Any attempt to use financial incentives to encourage settlement is liable to certain dangers, most of which, however, can be minimized by careful design. Some of these problems have been highlighted in the course of describing various alternative institutions and procedures.<sup>41</sup> In this section, we probe in some depth the most pervasive issues.

One possibility is that financial settlement incentives will tend to increase the frequency and amount of error. (In the present context, error is measured by the difference between the terms of the two-party settlement and the decision a third party would have reached had the resolution process been allowed to run its full course.)<sup>42</sup> Moreover, there may be a close correlation between the incremental increase in errors and the degree to which the financial incentives are successful in encouraging a higher rate of settlements. This follows because the same psychological mechanism that stimulates a greater readiness to settle likewise pushes disputants to accept terms further removed from their estimates of the third party's likely resolution of the dispute. Ordinarily both parties are likely to offer or accept terms substantially wider from the mark because they will be factoring into the equation the probability of incurring a financial penalty and the possible amount of same. Thus, they may accept offers that are unreasonable in terms of their own predictions about the ultimate outcome because of the necessity of allowing a safety margin against imposition of a penalty.<sup>43</sup>

To the extent the settlement pressures are in balance, the range of "errors" probably will be equally distributed between the disputants. That is, in a given sample of disputes between classes of disputants to whom equivalent incentives are applied, it appears reasonable to anticipate that the pattern of "errors" will fall as frequently and as significantly in favor of one of those classes as the other.

Assuming the ideal conditions of equally-matched disputants and equally-balanced incentives, the distortions likely to be produced even by a potent set of financial penalties appear of relatively minor consequence. True, at some point the risk of error might become so large that the entire dispute resolution system was less precise and equitable than random chance selection of the winning party and his award. Or disputants

may become so fearful of being assessed a penalty that they simply refuse to take their controversies to a third party forum even when they should. Yet that sort of theoretical possibility does not rank with the major concerns foreseeable under a settlement incentive scheme. It is when the underlying assumptions about balanced parties and balanced incentives break down that this approach becomes suspect.

Merely applying precisely equal incentives to both sides of every dispute by no means guarantees the equitable settlement of controversies to the relative satisfaction of all classes of participants. Equal outside pressures imposed on disputants possessing intrinsically unequal bargaining strength probably will elevate the settlement rate, but only at the expense of skewing still further the pattern of errors. The underlying pre-existing imbalance will remain, with the weaker class of disputants experiencing a heightened need to accept terms far removed from a reasonable estimate of the third party's probable decision.<sup>44</sup>

These disparities in bargaining power sometimes may appear in subtle forms.<sup>45</sup> Possibly the most significant, outside of raw economic power, is the relative ability to distribute the risk of being required to pay for miscalculating the third party's resolution of the dispute. For institutions such as insurance companies, commercial enterprises, and government, capable of spreading risks of this nature, the financial settlement incentives are apt to have less significance. The consequences of erroneously holding out for unreasonable terms in an individual case are especially minimal—a financial penalty which easily can be averaged out by the savings achieved in the scores (or hundreds or thousands) of similar cases in which this same hard-line position compels capitulation by the individuals against whom the institution is litigating.<sup>46</sup> In the event that the institution consistently overestimates its bargaining advantage and sustains a net excess of penalties over savings, this excess normally can be easily passed on to policyholders, customers, or taxpayers as a barely noticeable surcharge.

Accordingly, even the comprehensive scheme of balanced settlement incentives envisioned earlier,<sup>47</sup> may run afoul of intrinsic, often subtle, disparities between opposing disputants or classes of disputants. In such situations, is it possible to impose financial incentives on both disputants and thereby encourage a high rate of relatively inexpensive settlements without misallocating the burden of error?<sup>48</sup> One appealing theoretical alternative is to scale the incentives to the relative bargaining power, including risk-distributing capacity, of the contending disputants. Accordingly, a much higher schedule of penalties might be imposed on more advantaged classes of disputants. If a well-heeled institution's negotiat-



ing stance proves to have been unreasonable in relation to third party award, it might be compelled to pay a sum several times larger than would have been exacted from its less affluent individual opponent, had the latter been equally unreasonable during settlement attempts. Properly designed, such scaled penalties would equalize the pre-existing bargaining disparities while maintaining their potency as settlement incentives. As a result, each side would have heightened but balanced motives to seek a negotiated resolution of their dispute, and the resulting terms would, as a general rule, fit a pattern one might expect from settlements between persons of equal bargaining power.

If the incentives themselves are unbalanced, falling entirely or primarily on one of the disputants, the probability of error will climb appreciably. More significantly, this risk will no longer be equitably distributed between the parties. All or most of the burden will be borne by the disputant against whom the incentives operate most harshly.

Unbalanced settlement incentives are not merely a theoretical possibility. The English "payment into court" procedure described earlier<sup>49</sup> raises this very problem, if applied in the American context. As pointed out then, the penalties for possible miscalculations are imposed solely on plaintiffs and not defendants. Once the defendant has made his final offer and deposited it with the court, the plaintiff risks a substantial penalty if he desires to obtain a third party evaluation of the dispute. If that judgment, in fact, falls below the defendant's final offer, the plaintiff must pay the defendant a sum that at a minimum will wipe out a large percentage of his damage recovery. In contrast, the defendant faces no such penalty should his estimate of the third party's decision prove to have been erroneous.<sup>50</sup> As a consequence, it is reasonable to anticipate that many plaintiffs would be pressured into accepting offers which are substantially lower than the decisions which would have been rendered by judge or jury had the dispute resolution process been allowed to run its course. For the same reasons, it is seldom that a defendant would make a final offer which actually turned out to have been more generous than the judge or jury.

There is some support for these theoretical propositions in a recent statistical study of the "payment into court" procedure.<sup>51</sup>

Of 664 personal injury cases studied in four cities, 41 percent (272 cases) involved a payment-into-court, and

in 61 percent of the payment-in cases, the initial amount was accepted by the plaintiff. In a large number of the remaining payment-in cases, the settlement offer was accepted after some modification of the initial amount, resulting in a total of 90 percent of the payment-in cases (244) being accepted by plaintiffs. Yet, in most of the cases where the plaintiff refused the payment-in, he was successful at trial, i.e., received damages larger than the amount paid in.<sup>52</sup> There thus remains the possibility that other plaintiffs who accepted the payment-in might have won more at trial.

Defendants, on the other hand, apparently pay in more readily when the issue is amount of damages rather than liability. In 90 cases, the plaintiff's court action failed; in only four of those cases had the defendant made a payment-in.<sup>53</sup>

A skewed distribution of the burden of error is not necessarily undesirable. For reasons explored earlier,<sup>54</sup> it may be advantageous, where possible, to allocate deliberately most of that risk to institutions capable of absorbing or redistributing the economic costs associated with error in the decision-making process. This suggests that serious consideration be given to a special settlement incentive scheme for categories of disputes which are generally characterized by contests between individuals and institutions, the former incapable of distributing the burden of error and the latter in a position to do so. By imposing significant financial penalties solely on the institutional disputant whose settlement proposals differ from the third party forum's ultimate decision, society can shift the burden of error almost exclusively to the class of disputants able to redistribute its effects. Faced with the prospect of a large penalty for failing to make reasonable offers and confronting an opponent who is free from like pressures, the institutional disputant should be motivated to propose terms which, on the average, approach to exceed what the individual might reasonably expect to attain after the time and expense of a third party resolution of the controversy. Settlement rates would rise and on terms generally favorable to the individual, meaning more disputes resolved at less cost to the disputants, as well as the government. As a consequence, individual litigants would experience an improved access to dispute resolution. And the price for this result? Possibly some increments in insurance premiums, consumer prices or tax rates—depending upon the nature of the institutional litigants affected by the settlement incentive scheme.<sup>55</sup>

## NOTES—CHAPTER III

1. The term "settled" is here used in its broadest meaning to indicate a disposition reached through volitional acts of the disputants rather than pursuant to the decision of a third party. In many instances, the settlement will amount to an abandonment or surrender by one disputant rather than a mutually-agreeable compromise of the dispute.

2. Some statistics out of Alachua County, Florida, provide a revealing insight into the number of cases which are actually settled without trial. The statistics concern automobile accident personal injury and damage cases. Only about 10 percent of the cases actually go to trial. Ten to twenty percent are settled after filing of suit but before an answer is made. Fifty percent are settled after answer but before a date for trial is even set. Another 20 percent are settled after the trial date is set, but before trial begins. Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of Its Effects*, 9 U. MICH. J.L. REFORM 1, 22 (1975).

In California in 1974-75, over 28 percent of all cases filed in the Superior Courts were disposed of before trial, and in 1973-74, over 29 percent were disposed of before trial. CALIFORNIA JUDICIAL COUNCIL, 1967 ANN. REP. 152 (1976).

3. In Sweden, for example, approximately 34,130 civil cases were settled before trial in 1974. Response to Questionnaire for Program for the Study of Dispute Resolution Policy, March 1976. In West Germany, 36,217 civil cases were settled in 1974. Response to Questionnaire for Program for the Study of Dispute Resolution Policy, March 1976.

4. See, e.g., A. ROSETT AND D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE, 161-172 and articles cited therein.

5. In one study by Caplovitz, only 53 percent of the 314 debtors who settled their debt out of court perceived the settlement as fair. "This is a most revealing statistic, for it suggests that many of the settlements represent unhappy compromises on the part of debtors seeking to avoid harsh collection practices." D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 245 (1974) [hereinafter Caplovitz].

6. Mediation, a process frequently closely akin to two-party settlement negotiations has been described as follows:

... the central quality of mediation, namely, its capacity to reorient the parties toward each other not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

Fuller, *Mediation—Its Forms and Functions* 44 SO. CAL. L. REV. 305, 325 (1971).

In the small claims arbitration context, the psychological benefits of compromise settlements have also become apparent. Arbitrators have the authority to impose judgments, yet they frequently prefer to find out the limits of acceptable solutions on both sides and reach a compromise which is mutually acceptable. Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 353 (1976). Another author, speaking of small claims arbitration states:

The process is meant to be therapeutic rather than judgmental, and with this in mind, the parties to the dispute are encouraged to express their feelings as well as telling the facts of the matter in dispute with a view to increasing mutual understanding [citation omitted].

... It [the conciliation model] aims at amicable resolution of

a dispute rather than at fault-finding and an either-or decision, an important consideration when on-going relations are at issue [footnote omitted]. Even when there is no on-going relation, compromise may be the most satisfactory solution for both parties since the outcome of litigation is unpredictable and each party risks total loss; . . .

Yngvesson and Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW AND SOCIETY REV. 219, 260 (1975).

See also, Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALBANY LAW REV. 359, 363-68 (1975).

7. See, e.g., CAPLOVITZ, *supra* note 5.

8. *Id.* See also Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOCIETY REV. 95 (1974).

9. See page 17, *supra*, 60-63, and 72-75, *infra*.

10. Posner has analyzed settlement costs in the following manner, which demonstrates the relationship between settlement and litigation costs. A plaintiff's minimum offer, he says, is equal to the expected value of the litigation to him (that is, the present value of a winning judgment *times* his subjective probability of winning, *minus* the present value of litigation expenses), plus the costs of settlement. The defendant's maximum offer is equal to the expected cost of a losing judgment *times* the probability of the plaintiff's winning, *minus* the settlement costs. It therefore seems likely that a reduction of litigation costs would *decrease* the defendant's maximum offer and *increase* the plaintiff's minimum offer, making it less likely that the parties will settle.

Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 418 (1973).

11. See Caplovitz, *supra* note 5 and Galanter, *supra* note 8.

12. See page 17 *supra* and pages 75-76 *infra*.

13. See Chapter V, *infra*.

14. See pages 26-27 *supra*.

15. See pages 27-28 *supra*.

16. See page 27 *supra*.

17. See Chapter IV, *infra*.

18. See pages 41-42 *infra*.

19. See pages 27-28 *supra*.

20. See Caplovitz, *supra* note 5, and Galanter, *supra* note 8, for discussion of the advantages that credit institutions already enjoy *vis-a-vis* their debtors.

21. See Caplovitz, *supra* note 5.

22. See page 33 *infra*.

23. This mechanism has existed in one form or another in Britain for over a century and a half. During the first 100 years after authorization, the fact of payment into court was required to be pleaded, but it was not disclosed to the jury. As of 1933, the payment into court no longer needed to be revealed until after the trial of liability and damages. Zander, Michael, *Is the English Payment-Into-Court Rule Worth Copying?* Paper prepared for Access to Justice Colloquium at the Max Planck Institute, Hamburg, July 1976 at 2 (mimeo, 1976) [hereinafter Zander].

24. *Id.* at 11.

25. The Statute of Gloucester in 1275 was the first statute to award costs to the plaintiff. See Goodhart, *Costs*, 38 YALE I.J. 849 (1929) for a history of the development of costs.

26. This is one of the provisions of the payment-into-court procedures found in Rules of the Supreme Court, Order 22. In one case, *Findlay v. Railway Executive* [1950] 2 All. E.R. 969, a plaintiff who won her case but received less than the amount paid in (judgment was £867, payment-in was £920) was given her costs in accordance with the traditional English rule. But the case was overturned, requiring plaintiff to pay her own and the defendant's costs according to the payment-in provisions. The court stated:

... the hardship on the plaintiff has to be weighed against the disadvantages which would ensue if the plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity.

Zander, *supra* note 23, at 1.

27. Zander, *supra* note 23, at 11.

28. *Id.* at 52. One study by Zander revealed that the average damage claim was for only £1,706, while the average cost for one side's lawyers was £1,027. Thus, in small cases (which are quite frequent since the average claim is under £2,000), obligations in costs due to failure to accept the payment-in may exceed the damage award. The situation is even more exacerbated when a case goes on appeal and the damages are reduced to an amount below defendant's payment-in, because the plaintiff would then have to pay his own costs (including lawyers' fees for the appeal), as well as defendant's costs from the time of payment-in. The fees here are even more likely to exceed the reduced amount of damages. *Id.* at 59.

29. *See id.* at 51-52.

30. *See* page 29 *supra*.

31. The Michigan Mediation Plan, a court-annexed program, has been operating in Wayne County Michigan since 1971. *See* Miller, *Mediation in Michigan*, 56 JUDICATURE 290 (1973).

32. *Id.*

33. This sort of settlement incentive has sometimes been criticized for encouraging insurance companies to be so liberal that they make too many errors and thus raise premium costs very substantially. *See* Statement of Herbert Wells, Chief Product Research Specialist, Farmers Insurance Companies, *Hearings, Before the Senate Committee on the Judiciary on No-Fault Insurance*, S. 354, 93rd. Cong. 1st and 2nd Sess. at 428 (1975).

34. N.Y. INS. LAW section 675 (1) (McKinney 1975-76 Supp.).

35. Note also that the claimant may force the insurance carrier into binding arbitration to resolve disputes concerning first-party benefits. N.Y. INS. LAW, section 675 (2) (McKinney 1975-76 Supp.). This has the added effect of maintaining no-fault's impact in reducing court workload. *See* E. JOHNSON, JR., V. KANTOR, AND E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* (National Center for State Courts, 1975).

36. *See* pages 28-29 *supra*.

37. For further discussion of the effects of no-fault auto insurance in reducing litigation *see* Bovbjerg, *The Impact of No-Fault Auto Insurance on Massachusetts Courts*, 11 NEW ENG. L. REV. 325 (1976); Midiss, *Accident Victims Under No-Fault Automobile Insurance: A Massachusetts Survey*, 61 IOWA L. REV. 1 (1975); Clark and Waterston, *No-Fault In Delaware*, 6 RUTGERS-CAMDEN L. J. 225 (1974); Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of Its Effects*, 9 U. MICH. J. LAW REFORM 1 (1975).

38. Thus, if the plaintiff offered to accept as little as \$2,500 and the defendant offered to pay as much as \$3,000, the decision-maker would declare a settlement at \$2,750—the plaintiff receiving \$250 more than the minimum acceptable and the defendant paying out \$250 less than the maximum he was willing to part with. To further encourage early generous settlement offers from both sides of a controversy, a third party forum might pay a bonus to both disputants when their proposals overlapped.

39. To illustrate the calculations that might follow a trial, assume a jury verdict of \$50,000.

	Plaintiff's Offers	Variance From Verdict	Time-Factor	Penalty
First	\$100,000	\$50,000	10%	\$5,000
Second	75,000	25,000	7%	1,650
Final	60,000	10,000	5%	500

PLAINTIFF'S TOTAL PENALTY \$7,150

	Defendant's Offers	Variance From Verdict	Time-Factor	Penalty
First	25,000	25,000	10%	2,500
Second	30,000	20,000	7%	1,400
Third	40,000	10,000	5%	500

DEFENDANT'S TOTAL PENALTY 4,400

40. *See* page 40 *supra*. In the example in footnote 39, the plaintiff would be required to pay the defendant \$2,750 (or alternatively the defendant could deduct that sum from the damages he must pay the plaintiff).

41. *See* page 26 *supra*.

42. *See* pages 27-28 *supra*.

43. *See* pages 30-31 *supra*.

44. *See* page 28 *supra*.

45. For a discussion of many of the subtler forms of bargaining power disparity, *see* Galanter, *supra* note 5.

46. To illustrate, consider any institutional litigant confronting 100 individual opponents in separate cases filed with a forum operating under rules which shift 20 percent of the final award from the disputant whose offer was further from that award to the disputant who was closer. For reasons explored earlier (*see* note *supra*), this penalty-reward configuration will motivate the individual litigants to accept offers much less favorable than the third party forum is likely to award. Realizing this, the institutional litigant may hold out for terms averaging 25 percent less generous than it predicts the awards would be. If in 90 percent of the cases, this hard-bargaining position resulted in settlements on such terms (as it might well), the institutional litigant would fare better than if it offered terms at or near the predicted third party award in all cases. The 10 percent of cases in which it had to pay the 20 percent penalty would be more than offset by the 90 percent of cases in which it achieved a 25 percent better settlement than the third party would have granted.

It probably can be anticipated that a rational institutional litigant will seek to arrive at a settlement offer policy which will optimize its net results across its entire caseload as opposed to minimizing the chances of incurring a penalty in a given case. The average offer should be set at a level which will yield the maximum difference between average savings below third party awards times the number of cases settled versus amount of penalty times number of cases in which penalty is incurred. At some point, of course, the institutional litigant's average offer will reach a level where it is being turned down by enough individual opponents that the resultant litigation and penalties begin to diminish the savings experienced in those cases being settled.

47. *See* pages 30-33 *supra*.

48. In this instance, we are defining misallocation to embrace any distribution which places most of the burden on one class of disputants even though that class may have a capacity to absorb or redistribute such a risk. *See* page 27 *supra*.

49. *See* pages 30-31 *supra*.

50. In England, the pressures are somewhat more balanced than would be true if a "payment-into-court" procedure were transplanted to the U.S. Under the rule applying to all litigation in England, the prevailing party is entitled to have his costs paid by the losing party. In most personal injury litigation, the plaintiff will be awarded at least

50. (Cont.) some damages and thus will be entitled to his costs from the defendant as well. Thus, when a payment into court system is superimposed over the ordinary rules, it means that the plaintiff will have his costs paid by the defendant if he obtains a verdict in excess of the payment-into-court, but will be responsible for the defendant's costs if he fails. However, in the United States, the loser does not pay the winner's costs. Hence, a payment-into-court system would only put pressure on the plaintiff since the defendant need not fear that ordinary rules would make him responsible for the plaintiff's costs should the latter obtain a verdict in excess of the payment-into-court.

51. See Zander, Costs of Litigation—A Study in the Queen's Bench Division, LAW SOCIETY'S GAZETTE (June 25, 1975). Some of the statistics are reported in Zander, *supra* note 23.

52. Zander, *supra* note 23, at 74.

53. *Id.* at 7.

54. See 12 *supra*.

55. It is interesting to note the types of institutions and individuals frequently involved in litigation. Caplovitz, for example, has studied characteristics of creditors and debtors in the context of defaults. He found that:

The majority of these debtors were living on incomes below those considered adequate for families in major urban centers . . . . [They] were disproportionately recruited from the lower blue collar occupations . . . they were much more likely out of work, and . . . their educational attainment was lower . . . . Perhaps the most significant finding concerning the social characteristics of those in default was the discovery that the great majority are members of minority groups (blacks and Puerto Ricans . . . .)

Caplovitz, *supra*, n. 5 at 24–25. Creditors, on the other hand, were lending agencies such as small loan companies and banks, and sellers, primarily direct sellers, auto dealers, and low-income retailers. *Id.* at 31, 33.

In another totally different context, we find that numerous suits, for example in small claims courts, are between individual tenants and institutional or wealthy individual landlords. Cf. SMALL CLAIMS STUDY GROUP LITTLE INJUSTICES, SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER 152–154 (1972).

Another common example of individual vs. institution is the typical personal injury case involving an individual injured party against one or more multi-million dollar insurance companies.

## CHAPTER IV. THE AUTOMATIC TRANSFER STRATEGY: MEASURES WHICH REDUCE THE NEED TO DETERMINE ELIGIBILITY FOR THIRD PARTY INTERVENTION

Even when a two party settlement is impossible, it is not inevitable that a contested hearing must be held in the third party forum before the latter decides to intervene. There are dispute processing strategies which seek to eliminate the necessity of a contested eligibility determination proceeding in a high percentage of the disputes resolved. These measures are summarized under D on the chart at page 11 *supra*. As can be observed, the underlying premise is that in some circumstances it may be feasible to insure the validity of the moving party's request for intervention by means short of a contested hearing between the moving party and the responding party. In this chapter we first examine several existing and possible procedures exemplifying this approach and then attempt to identify those classes of disputes in which measures of this general type might be appropriate.

### A. Examples of Procedures Which Grant the Moving Party's Request Without a Contested Eligibility Determination

It is fairly obvious that were it possible to assume the objective truth of the eligibility claims of the moving party in every case, it seldom would be necessary to convene a contested decision-making proceeding to determine whether a third party should intervene. With some significant exceptions, generally involving subjective influences on perception,<sup>1</sup> such proceedings are an essential step in the dispute resolving process only because of doubts about the honesty, accuracy, and completeness of the moving party's recitation of the facts relevant to eligibility. Throughout history, it has seemed unjust to compel the holder of the moving party's objective—generally an individual—to hand over the property or other objective sought by the moving party without the opportunity first to test the objective truth of the allegations of eligibility in some sort of hearing. In contemplating a departure from this traditional approach, it is not surprising to find the sub-categories of our typology breaking down along lines reflecting alternative means of motivating the moving party to tell the complete and, as nearly as possible, the objective truth in his application for third party intervention.

1. *Measures relying solely on moral sanctions and normal civil (and criminal) penalties to discourage erroneous eligibility declarations.* There presently exist a few civil and even criminal disincentives to the filing of false eligibility claims. The civil remedies—abuse of process,<sup>2</sup> malicious prosecution,<sup>3</sup> and the like<sup>4</sup>—can be invoked by the individual or institution who is the source of the moving party's objective. However, it should be stressed these remedies generally are only sought after the objective has been transferred involuntarily from the source to the moving party. Furthermore, bringing such an action is attended by the usual expenses of litigation.<sup>5</sup> The criminal sanctions, chiefly perjury-type offenses,<sup>6</sup> are subject to the usual problems of a political/policy screen.<sup>7</sup>

Because of the obvious limitations of the existing scheme of civil and criminal sanctions, it seems doubtful that they provide a sufficient disincentive to the filing of faulty claims to justify abolishing contested eligibility hearings in certain classes of disputes. On the other hand, it should be noted that some automobile insurance companies have seen fit to take an analogous step. They offer policy-holders automatic injury compensation solely on the basis of a written declaration of eligibility.<sup>8</sup> Admittedly, there is a relatively low ceiling on the sums available on such terms, and the policyholder must surrender his right to proceed through the courts for further compensation.<sup>9</sup> Nevertheless, it is apparent that some well-informed and thoughtful institutions have analyzed the costs and benefits of the litigation process and determined that it is more sensible to honor the unverified representations of their claimants in relatively minor cases than to subject these allegations to the expense of close scrutiny and the possibility of a contested proceeding.

It is not absolutely clear what factors these insurance companies expect will discourage false claims. They may well be counting on the basic honesty of the general population or perhaps the embarrassment (and moral guilt) that would be felt by anyone found to have lied even though no civil or criminal penalties were imposed. The potential loss of insurance coverage and even in-

surability may likewise be present in the mind of any policyholder tempted to make false representations. Or the insurance companies may calculate that they can absorb a fairly high rate of false claims and still experience a net reduction in costs when compared with the expense of investigating all claims and contesting some.<sup>10</sup>

The insurance company example, of course, does not constitute a dispute resolution alternative, as such. It represents a two-party settlement policy that one set of responding parties has elected to follow voluntarily in a certain category of disputes with a certain class of moving parties. The third-party resolution system is not altered in any way. Nor is the automatic settlement policy itself mandated by the state. Yet the existence and contours of this policy suggests a possible model for a dispute resolution alternative predicated on the same sort of moral and legal sanctions upon which the insurance company plan relies.

In bare outline, the theoretical model might appear as follows. A court or other dispute-resolving forum would be available to intervene on behalf of moving parties on special terms in certain categories of dispute. For reasons to be explored later,<sup>11</sup> those disputes probably should be confined to those in which the responding party is a fairly sizable institution and the objective sought (or at least that portion of it which is attainable through the special machinery) is relatively modest. In such disputes, the moving party need only submit a sworn statement, written or possibly even oral, subject to the penalties of perjury and reciting facts which satisfy the eligibility criteria set forth in the applicable laws. Assuming the sworn statement, if accepted as true, meets the applicable eligibility standards, the third party would utilize the powers at its disposal<sup>12</sup> to obtain the objective for the moving party. No representations would be solicited or accepted from the responding party, at least at this stage, nor would any hearing be required. (The requirement of an *ex parte* hearing would mark only a slight and probably not very consequential variation on the basic model.)

Beyond the inherent moral sanctions against uttering falsehoods, especially under oath and for the purpose of attaining an economic benefit, this system would depend largely upon the responding parties, themselves, to police compliance. Where the latter's own investigation revealed the moving party had submitted a false claim of eligibility, the responding party would be encouraged to file a legal complaint with the court or other forum. It might even be feasible to reduce litigation costs sharply in such cases. Beyond that, it probably would be desirable to create a new statutory cause of action with a special sliding scale of civil violations and remedies

corresponding to the nature of the deficiency in the moving party's allegation.<sup>13</sup> Otherwise errors, short of perjury or abuse of process, are likely to creep into sworn declarations of moving parties. The savings in dispute resolution expense derived from the utilization of such a system might even justify employment of a special governmental prosecution unit which would be charged with the responsibility of handling claims lodged by responding parties against moving parties for criminal perjury (and like offenses) committed in the sworn representations through which they obtained automatic compensation.

2. *Measures relying upon systematic audits of a sample of declarations and accompanying civil and criminal penalties to discourage erroneous eligibility declarations.* Measures which depend upon responding parties to police the authenticity of eligibility declarations probably have relatively limited application. A well-structured experiment might prove otherwise—possibly by demonstrating that moral constraints alone suffice to keep the vast majority of the populace in line. But the infrequent invocation of civil or criminal penalties pursuant to ad hoc complaints from an amorphous collection of responding parties does not appear to be calculated to create a reliable or significant deterrent for those not persuaded by the moral considerations. Nevertheless, a more convincing disincentive is available—one with a long history of insuring honesty in citizen dealings with government.

Probably the most critical governmental function which has been turned over to this form of deterrent is income tax collection. In the United States, every taxpayer files a written declaration of his income, deductions, and taxes due. Rather than require a hearing with each and every taxpayer at which he is expected to verify the figures supplied, the government conducts audits of a limited sample of returns.<sup>14</sup> The selection is made partially on the basis of factors suggesting a probability of error and partially on a principle of pure chance.<sup>15</sup> If an audit turns up serious, though unintentional errors, the taxpayer may be liable for civil penalties, and for intentionally false statements will face criminal prosecution.<sup>16</sup> It is the prospect of audit and possible civil and criminal sanctions which is counted on to persuade the vast majority of the tax-paying public to file honest and complete returns. Using this system, the tax authorities in the United States annually collect over 100 billion dollars<sup>17</sup> at an enforcement cost of 500 million dollars.<sup>18</sup> Though costing less than 0.25 percent of taxes collected, the deterrent effect of these systematic audits has proved sufficient to secure essentially honest and accurate returns in an estimated 40 percent and maybe even more of the cases.<sup>19</sup> Although obviously the compliance rate

could be raised to 100 percent by auditing all returns—the substantive equivalent of a contested hearing in every case—the increased enforcement cost would be scarcely justified.

An analogous system was inaugurated in some U.S. jurisdictions for administering applications for welfare assistance in the 1960's.<sup>20</sup> Rather than investigating each application individually and ascertaining the accuracy and completeness of the information supplied, the authorities accepted the allegations as sufficient.<sup>21</sup> Welfare payments were commenced immediately and solely on the basis of the applicant's unverified declaration. However, investigators from the welfare department conducted "audits" of a sample of recipients after these payments had commenced. The investigations could culminate in criminal prosecutions if they uncovered false statements in the original welfare application.<sup>22</sup> This "welfare by declaration" system stirred up controversy (as does nearly everything in the welfare field) in the United States. In any event, the approach had to be abandoned when the federal government began refusing reimbursement to states for welfare payments made to recipients later found to have been ineligible.<sup>23</sup>

At this time, the application of this principle to third party dispute resolution lies in the mists of theory and conjecture. Yet it does show enough promise in enough categories of dispute to merit further discussion.

Professor Maurice Rosenberg has suggested the creation of an institution which embodies this basic approach. This institution, termed a "department of economic justice," is designed to resolve modest consumer claims.<sup>24</sup> The department is envisioned as an administrative agency supervising a compensation fund composed of taxes levied on commercial enterprises.<sup>25</sup> Consumers would be entitled to payments out of this fund up to the modest limit of \$200 solely on the basis of a sworn declaration about the injury they suffered in the marketplace.<sup>26</sup> As in the income tax and welfare examples given above, the deterrent to improper claims lies in a systematic spot-check audit of a sample of the sworn declarations. Once again civil or criminal sanctions could be imposed on any consumer found to have presented a faulty affidavit.<sup>27</sup>

The rationale for this non-traditional approach is that the normal system of contested third-party hearings, no matter how simplified, is too expensive, especially in the light of the small sums involved.<sup>28</sup> Clearly, accessibility is maximized for the consumer who suffers some wrong at the hands of a commercial enterprise. It is unnecessary to collect documentary and testimonial evidence or to hire someone to do so; it is unnecessary to employ a lawyer or other representative to present the case before some tribunal. Rather, it is enough simply to complete a

sworn declaration describing the essential facts of the situation at the local office of the "department of economic justice." Shortly thereafter, the consumer receives a government check compensating him for the damages he sustained. Assuming fraud is rare, the expense is minimal—both for the consumer and government.

The same sort of institutional arrangement has appeal for other classes of disputes not envisioned in Professor Rosenberg's proposal. Re-designed courts or newly-created administrative agencies could be empowered to grant compensation for injuries sustained in accidents or for other losses on the basis of sworn declarations of eligibility. The payments could come from a government fund under the direct control of the court or agency. Or alternatively, the compensation could come from private insurance or a fund collected from commercial enterprises. The critical point is that the third party—the court or administrative agency—*would intervene to compel* a transfer of funds to the individual suffering the loss after receiving a declaration reciting sufficient facts to indicate his eligibility for compensation. This automatic compensation feature would be coupled with a system of disincentives predicated on systematic audits of a percentage of applicants. A special array of statutory civil and criminal penalties would await anyone whose audit revealed an erroneous or fraudulent application. The audits could be conducted by an investigative division serving as an integral arm of the court or administrative agency or as an assigned responsibility of some other investigative force, such as a separate division of the police or of the state revenue investigation body.

There is no inherent reason this sort of institution could not be employed to handle a full range of disputes in which the moving party's primary objective is economic compensation.<sup>29</sup> Assuming it worked for consumer disputes, the basic approach embodied in Rosenberg's department of economic justice should be applicable to other claims—whether they were based on theories of contract, tort or property and whether they arose out of automobile accidents, the employment relation, etc.

One possible situation in which Rosenberg's approach might be applied is a comprehensive accident compensation scheme such as New Zealand inaugurated in 1974.<sup>30</sup> Such a scheme is characterized by a unified government fund under the direct control of a government-established administrative body.<sup>31</sup> At present, applications for compensation under this plan are resolved through a process in which the administrative body combines the functions of "third party" and "responding party." Decisions are made only after individual cases are investigated and considered in the traditional format of a contested pro-

ceeding.<sup>32</sup> With the nearly complete control exercised by the compensation commission and the self-contained nature of such a scheme, it should be relatively easy to convert to an automatic compensation system enforced by spot-check audits and the accompanying deterrent of civil and criminal sanctions, at least on an experimental basis. Assuming the disincentives worked, this would combine the most comprehensive and efficient method of assembling a compensation fund with the simplest and least expensive system of distributing that fund among the injured.

An even more far-reaching and speculative combination is suggested by the increasing recognition that the income tax system can be used to make affirmative payments to as well as extract levies from the citizenry. Often termed a "negative income tax," such proposals generally have been conceived as a means of income redistribution to substitute for the allegedly more cumbersome and inefficient welfare system.<sup>33</sup> As usually presented, all income-expending units would be expected to file a declaration of income received during the previous year. From those whose earnings exceeded a certain level (calculated with reference to the number of individuals in the family), the ordinary taxes would be due and owing. But for those whose declared income fell below the specified amount, checks would be issued to make up the difference between earnings and the figure considered essential to sustain a minimal standard of living.<sup>34</sup>

Once one accepts the notion of assigning the income redistribution function to the Internal Revenue Service, it becomes interesting to contemplate the Agency's possible role as a vehicle for administering loss compensation. If upwards of 30 billion dollars in annual payments can be made solely on the basis of sworn declarations concerning the declarer's economic position<sup>35</sup> (with, of course, the usual deterrents against faulty representations), it is not out of the question that such a system could be used to distribute the smaller sums involved in compensating personal injuries or even other losses sustained by individuals.<sup>36</sup>

Of course, as is true of other phases of the income tax return, these loss compensation items would be subject to audit on a spot-check basis. Unsubstantiated claims would subject the claimant to civil penalties and intentionally false claims to criminal liability. Thus, the same deterrents which have maintained the integrity of the tax collection function and are counted on by proponents of a "negative tax" income redistribution scheme, presumably would operate to insure that compensation payments were properly distributed.

The economic advantages of using the internal revenue system to accomplish the loss redistribution tasks are

considerable. In contrast to the 56 percent which the traditional fault liability system syphons off from the compensation pool<sup>37</sup> and even the substantially reduced administrative costs which a no-fault system might require,<sup>38</sup> the tax declaration-audit system used by the tax authorities takes only 0.25 percent.<sup>39</sup> Moreover, the Internal Revenue Service represents a large, experienced investigative apparatus already possessing a full panoply of statutory sanctions, computers, and the like. Thus, it is better equipped to obtain a high rate of compliance than would the new and comparative small investigative force which likely would be assigned this responsibility in some statewide loss compensation agency or re-designed court. (See page 40 *supra*.) On the other hand, the underlying premise that this loss compensation task would be handed over from state governments to the federal government raises its own political problems in the American context.

It is clear that many practical and theoretical questions would have to be confronted and resolved before consigning the loss compensation responsibility (or even a significant part of that responsibility) to the internal revenue system. This possibility is included in this report not as a proposal but as a potential, logical extension of the more modest suggestion previously offered by Professor Rosenberg. Only if some of the underlying assumptions about human nature (see pages 43-44, *infra*) were proved out through some less grandiose reforms and experiments would an IRS-operated loss compensation scheme become a realistic alternative.

3. *Measures relying on responding party's right to demand a hearing (after the objective is transferred) to discourage erroneous eligibility declarations.* We now move to a set of dispute-processing measures which fall at the margin of the principle considered in this chapter. Unlike the measures discussed earlier, they delay rather than eliminate the responding party's right to a contested hearing over the moving party's eligibility for a third party intervention. However, since that right normally becomes available only after the intervention has taken place and the objective has been transferred into the hands of the moving party, the practical effect is often the same.

The most prevalent manifestation of this category of dispute resolution measure appears in the debt collection field. In one form or another, under one name or the other, most countries have created special procedures for the creditor class. Under most of these provisions, the creditor merely files an *ex parte* application with the court asking for relief. That relief may be a garnishment of the alleged debtor's wages,<sup>40</sup> the repossession of the debtor's automobile,<sup>41</sup> or attachment of the debtor's real or personal property.<sup>42</sup> Without a contested hearing of



any sort, the court then orders the transfer of the money or property to the creditor. Ordinarily, the debtor's only recourse is to demand a hearing about the merits of the creditor's application after the transfer has been effected and often only after the debtor posts a bond.<sup>43</sup> Such a hearing will mean the debtor must absorb the investigation and presentation expenses usually associated with a litigation event.

Obviously, these measures tend to make relief more accessible to creditors at the price of reducing the security of the debtor's property rights—a problem rendered more acute by the normal disparity between the economic position of creditors and debtors. However, it also appears possible to turn these same techniques to the service of other classes of disputants. For example, it is possible to conceive a special procedure to benefit consumers. If a product became defective or some other compensable grievance were experienced, the affected consumer would merely make application to a court or other designated forum. His sworn declaration would then be examined merely to ascertain whether it recited facts sufficient to establish eligibility for relief. If it did, then the consumer would receive his compensation, probably out of a special fund comprised of general tax revenues or special assessments extracted from manufacturers or retailers. At this point, the relevant merchant or possibly the management of the compensation fund would receive notice of the consumer's complaint and the payment made to him. A challenge could be filed, and a contested hearing could take place. If the commercial enterprise prevailed, the consumer would be compelled to return his compensation. But in the meantime, like the creditor in a garnishment proceeding, the consumer would have obtained his objective at minimal cost, and the balance of advantage in all probability would have become his.

An accident compensation plan could be composed along the same lines. The insurance fund, whether assembled from private insurance premiums or tax revenues, could make disbursements to a claimant automatically in response to the latter's sworn declaration about the accident and the injuries sustained. The private insurers or fund managers would then be entitled to a contested hearing to compel return of all or part of the compensation. Thus, the individual claimant would not be subjected to the expense and delays of a contested proceeding in order to obtain compensation for his losses. That would be his, easily and expeditiously, merely by presenting a sworn application with the appropriate dispute-resolving body. The burden of initiating a contested proceeding would rest with the institutional party. Yet the threat of such a proceeding might be sufficient to deter an individual from filing a faulty application.<sup>44</sup>

## B. Factors Determining in Which Classes of Disputes These Strategies Are Appropriate

In many senses, this set of dispute resolution measures is the most drastic, breaking sharply from traditional concepts of due process. After all, the responding party is deprived of his property or rights without a hearing or in many situations without even the opportunity to ask for one. He awakens one morning to find out that something he possessed has been transferred to someone else. If he wants it back, he must invest in an investigation to find out whether the somebody else had a sound claim. Then, depending upon the procedure involved, his only resort may be a separate suit for abuse of process (or some similar cause of action),<sup>45</sup> a complaint to the prosecutor about his opponent's criminal perjury,<sup>46</sup> or to some special investigative bureau (which might disregard his pleas because of their own priority for random audits)<sup>47</sup> or a demand for a hearing at which he probably must expend substantial sums to establish there was no valid basis for taking his property or other rights in the first place.<sup>48</sup> (Moreover, if he is short of funds, the last alternative is not realistically available.)

Before becoming carried away with the Kafkaesque tone of the foregoing scenario, it probably is well to recall that an equally compelling portrait can be drawn on the other side—the plight of the man too poor and too weak to assert his rights to something held—improperly and illegally—by another. His sole recourse is to initiate a lawsuit he cannot afford. Possibly his dilemma is as deserving of sympathy as the individual who awakens to learn something he may or may not have a right to possess has been handed over to another.

As a statistical matter, it remains an open question as to which system would produce the most injustice and the greatest maldistribution of rights and property: the present one which ordinarily allows those in possession to maintain that position until a contested proceeding has established another's superior claim; or, in contrast, a system which, in *all* disputes, would shift possession to anyone willing, in good conscience, to assert his rights against the possessor, subject, of course, to a contested hearing should the latter elect to challenge. We need not, however, confront this question in these universal terms. It is possible to isolate factors which diminish the probability the automatic transfer strategy will produce a significant proportion of improper transfers and moderate the consequences of such errors when they do occur.

The most relevant of these factors appear to be: The relative value of the moving party's objective; the relative significance of the sanctions meted out for filing a false or questionable application; the perceived risk the sanctions will be inflicted; the relative cost of the deter-

rence mechanism; the relative cost of investigating and deciding the merits of the average claim; and the responding party's relative capacity to absorb or redistribute the risk of an erroneous eligibility application.

1. *The relative value of the moving party's objective.* It seems reasonable to assume that the intrinsic economic value of the subject matter of the dispute constitutes a relevant consideration in two senses. If it is large, the temptation to file a false or questionable application in order to obtain possession will become irresistible to many more individuals, irrespective of the risk. Secondly, as the value of the subject matter increases so does the injury felt by the responding party when he awakens to find it transferred to another. Thus, the chances of an erroneous transfer and the consequences of that error presumably are both linked to the relative significance of the moving party's objective.

2. *The relative severity of the sanctions meted out for filing a fraudulent or erroneous application.* It further seems reasonable to assume that an individual with an inkling to apply for an automatic transfer to which he is not entitled will normally balance what he stands to lose if found out. The more threatening the penalty, the more persuasive the deterrent against improper applications and erroneous transfers.

At the outset, it seems reasonable to predict that the potential criminal and civil sanctions that accompany the measures considered at IA and IB above<sup>49</sup> will be more powerful disincentives than the mere restitution of the objective contemplated in the final set of strategies.<sup>50</sup> However, there is a complication in designing an effective scheme of penalties. It is not merely the intentionally false statement that must be discouraged (a comparatively easy assignment for the criminal law), but also the careless overstatement and especially the error of omission. For example, if the presence of fact "a" is sufficient to justify a transfer, but the presence of fact "b" nullifies that justification, the moving party probably should be "punished" in some way for omitting fact "b" from his sworn application, if he knew (or possibly even if he should have known) of its existence. This suggests that the schedule of penalties would have to be comprehensive and scaled to cover a multiplicity of sins, including a number that are more appropriately dealt with through civil, rather than criminal sanctions. Not that this is an insurmountable task. It has been accomplished quite successfully in the context of income tax enforcement.<sup>51</sup>

3. *The perceived risk the sanctions will be inflicted if a fraudulent or erroneous application is filed.* It is nearly an axiom of law enforcement that the certainty of punishment is a greater deterrent than its severity. Whether this can be proved empirically or not, this

commonsensical statement certainly highlights the significance of this particular element in the equation. Presumably, the greater the risk that a fraud or error will be detected and the consequent sanctions applied,<sup>52</sup> the more potent the deterrent against the filing of false or erroneous applications for automatic transfer.

4. *The relative cost of the deterrence mechanism.* Under the strategies described in section IB, the objective risk of punishment is subject to deliberate manipulation. Since the deterrent function is assigned to government, the latter can alter its policies to devote more or less energies to the detection and discouragement of faulty applications. With more investigative resources committed to this task a larger sample of claims can be probed. For those tempted to file fraudulent or careless affidavits, this escalates the chances of being found out. Assuming this heightened risk is communicated effectively to the general public, the objective risk will be translated into a perceived risk and a more effective deterrent, thereby lowering the incidence of fraudulent or erroneous applications for automatic transfer.<sup>53</sup>

Of course, every increment in resources allocated to the deterrent function raises the comparative cost of this alternative as compared with the traditional contested proceeding. At some point the deterrence expense could exceed the many costs of operating a system of contested proceedings.<sup>54</sup> If this level of expenditures were necessary to maintain a tolerable proportion of honest and accurate applications, then the automatic transfer alternative no longer would be appealing in economic terms.

Though much less expensive for government, the other deterrence mechanisms discussed in this chapter<sup>55</sup> are more costly for the class of responding parties. Moreover, relying as they do on individual initiative, these measures are less subject to deliberate societal control. Certainly, fine tuning of risk and cost is out of the question. On the other hand, it is not impossible that the actual and perceived risk of detection will be even greater. The responding parties ordinarily have a stronger motive to investigate than does a government investigative force. More important, they often already possess or have easy access to information suggesting whether particular applications appear suspect. Large institutions, in particular, with their banks of computers, detailed records, and the like normally are in a position to readily screen transfers that have been ordered against them and detect those which seem to involve potential fraud or mis-statement.<sup>56</sup>

5. *The relative cost of a third party resolution of the average dispute.* In later chapters, we will catalogue many of the costs associated with a contested proceeding in the typical third party forum.<sup>57</sup> For both disputants and for the government, there are functions assigned—

often very expensive ones—in the fact investigation, criteria ascertainment, and decision-making phases. When totalled, these expenditures frequently exceed the economic value of the subject matter of the dispute especially in the lower ranges.<sup>58</sup> Even when the bulk of such controversies are settled through negotiations between the two parties, the ultimate cost of a third party resolution of those same disputes shapes the frequency and equity of compromise.<sup>59</sup>

In any event, as the total societal cost of a contested proceeding increases relative to the value of the subject matter of the dispute, the desirability of granting third party intervention without such a proceeding likewise increases. The reasons are at least twofold. First, there is the inhibitory effect of expensive hearings on potential moving parties. Confronted with a litigation outlay representing a high percentage of what he hopes to gain, the average person normally will drop his claim, no matter how well grounded. Yet that same individual might be able to pursue his remedy if relief were possible without a contested eligibility determination. The second reason relates to the overall societal balance sheet. Thus, the total expense of resolving a given class of disputes may be reduced dramatically by substituting a dispute processing strategy which costs only a tiny percentage of the average value in dispute for a system that requires a much higher ratio of investment from the government, the disputants, and maybe others.

6. *The responding party's relative capacity to absorb or distribute a heightened risk of erroneous eligibility applications.* We have made a number of policy assumptions thus far. The value of the subject matter should fix the level of temptation. The severity of the sanctions and the perceived risk they will be imposed should establish the persuasiveness of the countervailing deterrent. And the ratio between these competing psychological forces should largely determine the frequency of erroneous applications, that is, the percentage of times moving parties file fraudulent or faulty claims (which under this set of strategies automatically results in an improper transfer). Whatever the ratio may be, moreover, it probably is reasonable to anticipate the frequency of error would be somewhat greater under an automatic transfer system than is experienced when contested hearings are required. However, the significance of this higher frequency of error will depend largely upon an entirely different factor, the nature of the disputant who must bear the burden of errors committed by the dispute resolution process.

Clearly it is the responding party who ordinarily must bear any increment in the frequency of error attributable to fraudulent or faulty eligibility declarations. If the responding party is an individual, especially one of mod-

est means, that burden can be disruptive, if not unbearable. To the ordinary economic misallocations occasioned by an erroneous claim must be added the secondary costs,<sup>60</sup> social as well as economic, which attend an error inflicted on an individual unable to absorb or redistribute it. These problems are readily appreciated from studies of the debt collection field. Individuals suffering the sort or economic loss which would be caused by an automatic transfer system frequently experience sickness, divorce, and employment difficulties.<sup>61</sup>

The implications are quite different, however, when the burden of error falls on a responding party who is in a position to absorb or redistribute it. For different reasons, insurance companies, commercial enterprises, government, and even individuals who are continually involved in dispute resolution events of a similar character fit this definition.<sup>62</sup> Where this error redistribution capacity exists, two important things happen. The secondary costs simply do not occur and thus may be removed from the equation. Moreover, it becomes feasible and equitable (and less cold-blooded) to accept a heightened risk of error and contrast it with the expense of operating a more precise (but less accessible and expeditious) alternative, such as the traditional contested hearing in the third party forum.

7. *Evolving criteria for the selection of classes of disputes suitable for automatic transfer.* Assembling all the factors described above, it can be argued that an automatic transfer strategy should be substituted if its total costs (including and especially the error costs) are substantially lower than those associated with the more traditional system of prior contested proceedings. For a prior contested hearing, the essential costs are, first, the *resolution costs*—those normally paid by the parties for fact investigation, criteria ascertainment, and presentation to the decision-making forum coupled with the government's expenditures for operating the decision-making forum (and any subsidies provided the disputants or other expenses absorbed by government.) Secondly, contested proceedings must account for their *error costs*, both *primary* and *secondary*. An automatic transfer system, on the other hand, relies on deterrence rather than a prior contested proceeding to maintain error costs at a manageable level. But the creation of a viable *deterrent* generates its own *costs*, borne in varying degrees by government and the disputants, and including the expense of investigating for error (in some percentage of transfer applications) and of applying sanctions upon those moving parties found to have committed error. Moreover, the automatic transfer system will experience its own *error costs*, both *primary* and *secondary*, usually dependent largely upon the relationship between the size of the objective which can be procured through a simple

sworn declaration and the severity and likelihood of punishment for filing a faulty application.<sup>63</sup>

But beyond these relationships, there are two critical environmental factors, one tending to favor a system of prior contested hearings and the other an automatic transfer system, whose pervasive influence must be fully appreciated.

A category of disputes in which the average stakes are quite high can be anticipated to affect simultaneously several elements. Turning first to *contested proceedings*, resolution costs presumably will increase somewhat because both parties will invest more in the investigation and presentation of the case since they have more to gain or lose. Moreover, both primary and secondary error costs will increase, not because the proportion of errors will climb, but rather because the consequence of each error is more significant. The effects of high stakes cases on an automatic transfer strategy, however, are likely to be more profound. Primary and secondary error costs will increase not only because the consequence of each error is more significant economically but because the rate of error will tend to climb very substantially, possibly several-fold, since the temptation which must be deterred is linked to the amount at stake in the proceeding. Of course, with a considerably enlarged investment in deterrence, it may be feasible to maintain existing levels of error costs or at least inhibit a dramatic rise in such costs. However, that increased investment will be reflected as an increment in deterrence costs. At some point, a dollar invested in additional deterrence resources will cease to yield a dollar reduction in primary and secondary error costs. And probably long before that, deterrence costs will have risen sufficiently to make the automatic transfer strategy an uneconomic alternative as compared with the total costs of a system depending on prior contested hearings.

The strains placed on an *automatic transfer strategy* by disputes with high average stakes find their match in the effects of another, in this case hidden, factor and its

influence on prior contested hearings. That factor is the relative incidence of economic disparities between the average moving party and the average responding party. Where those disparities are significant, the chances that error will occur because of the requirement of a prior contested proceeding appreciate considerably.<sup>64</sup> Disadvantaged disputants can be expected to be overwhelmed by the superior lawyers and other litigation resources marshalled by their affluent opponents.<sup>65</sup> In many cases, they will simply surrender without a fight. This means the error costs, both primary and secondary, probably will assume major proportions, in fact, conceivably exceeding average resolution costs.<sup>66</sup> On the other hand, an automatic transfer strategy and its error costs will not necessarily respond in the same way to economic disparities between the parties. Its errors occur when temptation overcomes fear not when a decision-maker fails to learn the objective truth because the resources of one of the disputants overpower his opponent. Thus, depending upon the deterrence mechanism which is employed, the frequency and incidence of error may be largely independent of the resource relationships between the disputants. Of course, if the responding party is expected to supply the deterrence<sup>67</sup> and that class is composed of economically disadvantaged disputants, then the deterrent itself may suffer because they lack the resources to investigate the transfer application and activate the deterrence machinery. As a consequence, the rate of error would probably increase. However, if the economically disadvantaged disputants are the moving parties in this category of litigation, then the deterrent remains intact since the affluent responding parties will be in a position to afford the necessary investigations, etc. And, of course, if the deterrent is government-operated,<sup>68</sup> the existence of economic disparity between disputants ordinarily will not swell error costs since deterrence does not depend upon the capacity of responding parties to detect erroneous eligibility applications.

## NOTES—CHAPTER IV

1. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUDIES 399 (1973) for an interesting discussion of how a litigant's faulty perceptions of his probability of succeeding, as well as the expected value of winning, may affect his likelihood to settle and how much he will expend in trying to win.

2. Abuse of process may be most simply described as the use of a judicial process for purposes outside the regular scope of the process. The process may even have been validly issued. Proof of a cause of action for abuse of process requires a showing of three elements:

- 1) illegal, improper use of process;
- 2) ulterior motive or purpose in exercising such improper use of process;
- 3) damage to the plaintiff from the improper use.

1 AM. JUR. 2d Abuse of Process § 4 (1962).

An example of abuse of process is where a person who has lawfully seized another's property misuses it, with bad intentions, causing damage to it. *Id.* § 11.

3. A person against whom civil or criminal proceedings have been brought maliciously and without probable cause may file a suit for malicious prosecution. 52 AM. JUR. 2d Malicious Prosecution § 1 (1970). Malicious prosecution implies improper issuance of legal process; abuse of process consists in the misuse of a legal process which may have been validly issued. A valid cause of action for malicious prosecution consists of at least six elements:

- 1) institution or continuance of original proceedings (civil, criminal, administrative, disciplinary);
- 2) defendant of the malicious prosecution suit initiated the proceedings;
- 3) original proceedings terminated in favor of the plaintiff in the malicious prosecution suit;
- 4) malice in instituting the proceedings;
- 5) lack of probable cause for the original proceedings;
- 6) damage resulting from the proceeding.

*Id.* § 6.

4. For instance, the federal government has established a set of criminal penalties for false declaration of eligibility to various government agencies. See 18 U.S. Code 1001 *et. seq.*

5. See Chapters VI and VII *infra*.

6. As an example of a criminal penalty for false allegations, we may look to federal public welfare law. 42 U.S.C. § 1383 (a) provides that persons who knowingly or willfully make or cause to be made any false statement or representation of a material fact in applying for supplemental security income benefits are guilty of a misdemeanor and may be fined up to \$1,000 and/or imprisoned up to one year.

7. By political/policy screen is meant that administrative agencies filter the cases which come to them, rather than processing all cases as do the courts. A particular agency may screen cases based upon its own policy decision to consider one type of injustice more significant in a particular year (e.g., false advertisers rather than manufacturers who make defective products), and thus process all of the former and none of the latter type of case. Likewise an agency may accept or reject cases based on political judgments—i.e., a particular party wishes to ignore one type of case and investigate thoroughly another type; or a particular

politician encourages the agency to take on a particular group of cases which otherwise it might not handle.

8. Often insurers do not write this technique into the policies, but handle some of these claims on an "office" basis as the situation warrants. It is a more common practice with first-party comprehensive coverage than with liability coverage, although it may also be done in the latter situation.

9. Claims compensated automatically probably do not exceed a few hundred dollars (many of them, such as broken windows, average about \$100). This makes perfect sense when one realizes that the primary motivation for the procedure is economic—to avoid the costs of investigation where they exceed or closely match the amount of the claim.

10. When investigation, adjustment and litigation expenses take up over 50 percent of every premium dollar, an insurance company can experience a fairly high rate of false claims under an automobile compensation plan and still be better off than if it continued to use the more traditional investigation/litigation approach. Keeton & O'Connell, *Basic Protection Automobile Insurance*, in *CRISIS IN CAR INSURANCE* 40, 90-91 (R. KEETON, J. O'CONNELL, J. McCORD eds.) (1968).

11. See pages 43 and 44 *infra*.

12. See pages 17-18 *supra*.

13. A statute, for instance, might merely require the moving party to return the objective where it was found he had made a simple, honest, good-faith error in his eligibility application, but impose a treble damages penalty where the error was found to be the result of negligence, and tenfold damages where it was intentional.

14. In 1974 the IRS audited 2.4% of the total tax returns, the largest jump in many years. U.S. COMM'R OF INTERNAL REVENUE, 1974 ANN. REP. 21. In 1971, 1.5 million or 2% of total returns were audited. J. CHOMMIE, *THE LAW OF FEDERAL INCOME TAXATION* 885, n. 12 (2d ed. 1973) [hereinafter Chommie].

15. Selection of returns for auditing is done by computer. Initially, the returns are processed at 10 service centers where computers are used to check for mathematical errors and to record the data on tapes. The tapes are then sent to a central location where a three-year record of all taxpayers' returns is filed. Once again computers process the information to determine which returns to audit. *Id.* at 13. Because more returns are identified in this process than the IRS can handle, a second selection process is done by hand. Criteria for selection include amount of potential revenue (thus large corporations, gamblers, etc. are selected), large deductions claimed, and actions of taxpayers as well as discrepancies and informants' information. Chommie, *supra* n. 14 at 885.

16. The IRS has numerous civil and criminal sanctions at its disposal to penalize for income tax errors. Interest of 6% a year is always charged for any deficiency. Aside from that, the IRS can impose other additions to the tax: 5% per month for failure to pay a tax or deficiency, 5% for negligence or intentional disregard of rules (in addition to the deficiency penalty), 50% for fraud with tax evasion intent and 100% for failure of another person to collect and pay over amounts due (e.g., officers of a corporation, creditors who have taken over a business, sureties and others).

Various sections of the Internal Revenue Code designate willful

16. (Cont.) evasion or willful failure to pay over as well as furnishing false forms to employees as felonies with fines up to \$10,000 and/or 5 years in prison. *Id.* at 930-44.

17. In 1973 the IRS collected \$177.2 billion from individual income tax returns; in 1974 \$205.0 billion was collected. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1975 at 232, Table 382 (96th ed. 1975).

18. In 1974 the IRS spent a total of \$663,092,000 on compliance (up from \$596,754,000 in 1973). Of this sum \$495,152,000, or about 75 percent, was spent on audits of returns. The next highest expenditure (\$85,903) was spent for tax fraud and special investigations. The remainder of compliance expenditures went for taxpayer conferences and appeals, technical rulings and services, and legal services. U.S. COMM'R OF INTERNAL REVENUE, 1974 ANNUAL REP. 108, Table 22.

19. By careful selection of returns for auditing, additional revenue may be increased while number of returns audited decreases. In 1970, 2.0 million returns audited yielded \$3.10 billion additional tax and penalties; in 1971, 1.6 million audits resulted in \$3.4 billion in additional tax and penalties. Chommie, *supra* n. 4 at 885 n. 12. Approximately 60% of the returns audited show some discrepancies. Most are settled during administrative conferences. Chommie, *supra* n. 14 at 13.

20. Telephone interview with Barbara Leyser, Center for Social Welfare Policy and Law, New York, New York, February 24, 1977.

21. *Id.*

22. *Id.*

23. *Id.*

24. See Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 813-16 (1971) [hereinafter Rosenberg].

25. Professor Rosenberg suggests a pilot program in several cities, funded initially with public or private funds. Once it has proven successful the Department of Economic Justice could be funded from "appropriately gathered revenues." Furthermore, since a more efficient watch can be maintained over commercial enterprises who frequently make and/or sell defective or unsafe products, monetary sanctions against these violators could be used to recoup amounts paid out to consumers. *Id.* at 814-15.

26. As envisioned by Rosenberg, a consumer would present his grievance and sign his name to a statement taken down while he was making his declaration. He will then receive compensation for his injury right then and there. Rosenberg suggests a ceiling limit of \$100-\$250 and a floor of \$25. *Id.* at 814-15.

27. The Department of Economic Justice program instills in the consumer a feeling that society trusts him to only make honest claims. But to counter the possibility of cheating, Rosenberg suggests that the consumer simply be told:

'We trust you and will pay you, or repair or replace your defective product. To guard against cheating by those who might put in false claims, we will run random spot checks on applicants, investigating some claims intensively. If the follow-up uncovers fraud, we will deal with the culprit accordingly.'

*Id.* at 815. Presumably by dealing "accordingly" Rosenberg means such sanctions as fines for civil fraud and perhaps even penalties for criminal fraud, on the analogy to the tax evasion sanctions discussed at note 16 *supra*.

28. The sum of all these proposals can be put bluntly. We lawyers must rid ourselves of the habit of mind that holds that in conflict management, happiness is a thing called 'certiorari granted' or 'probable jurisdiction noted'. We have to reconcile ourselves—indeed, we have to dedicate ourselves—to the proposition that courts cannot do everything to correct society's flaws. We have to withdraw from the judicial process some of the disputes that now threaten the administration of justice—quantitatively, qualitatively, and explosively.

*Id.* at 816.

29. See pages 11-12, *supra*.

30. See pages 13-14, *supra* for a description of such plans which alter the source of the moving party's objective from an individual to a government fund.

31. The three-member Accident Compensation Commission which administers the system functions independently of government control and is endowed with discretionary powers. At least one of the three members must be an attorney with seven years experience in practice. An Accident Compensation Appeal Authority reviews cases appealed by dissatisfied claimants. Higher level court review by the Administrative Division of the Supreme Court and the Court of Appeal are sometimes available, but not as a matter of right. See Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MODERN L. REV. 361 (1974).

32. According to the New Zealand Plan, an injured party submits his claim of injury in writing to the commission along with proof of the fact and amount of his injury (e.g., medical records). After examination of the records, a determination of amount of compensation is made. A rejected or dissatisfied claimant may then apply for a review by the Commission. Only after this review can the claimant continue through the appellate structure described in note 31 *supra*. The Appeals Authority may conduct the matter as a complete re-hearing. See Taylor, G.D.S., National Report for Australia, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

33. Under recently proposed plans for 'negative income taxation,' the existing federal income tax mechanism would be used to distribute cash to poor people. The use of the federal tax system to accomplish this 'welfare' objective would be achieved, generally speaking, by assuming that a person's "income"—as defined in the Internal Revenue Code—is the proper measure of his economic well-being for the purpose of determining the amount of financial support he should receive. Given this premise, and given a decision as to what is a minimum tolerable 'income,' the role of government as bestower of case benefits would become as relatively mechanical as its role as tax collector; individualized determinations by caseworkers would be avoided.

Klein, *Some Basic Problems of Negative Income Taxation*, 1966 WISCONSIN L. REV. 776 (1966) [hereinafter Klein]. See also B. BRUDNO, POVERTY, INEQUALITY AND THE LAW, CASES—COMMENTARY—ANALYSES 798-818 (1976) for further discussion of various types of negative income tax proposals.

34. For example, if it were agreed that a minimum tolerable income for a family of two or more is 3,000 dollars per year, and if the family's actual income were 1,400 dollars, then there would be a "negative income" of 1,600 dollars and the family would become entitled to a payment of some fixed percentage of that amount. The plan could be dovetailed even more closely with tax provisions by assuming that the minimum tolerable income (the "poverty line") is determined by reference to exemptions and deductions allowed under the Code. Thus, for a family of four the "poverty line" would be 3,000 dollars—four exemptions at 600 dollars each plus a minimum standard deduction of 600 dollars. For a family of five the figure would be 3,700 dollars, and so forth.

Klein, *supra* note 34 at 776.

35. One estimate by the Council of Economic Advisers put the total cost of a negative income tax, under which four-member families with incomes under \$6,600 would receive some benefits, at \$20 billion. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 172 (1969).

36. In operation, this system probably would require each income expending unit to include in its annual declaration to the tax authorities not only earnings, deductions, and the like but economic losses, out-of-pocket expenditures, etc., attributable to any accident (or other circumstances to be covered under the plan) which may have occurred

during the previous year. To the extent that these losses were less than the taxes due for that year, they would be deducted from the tax bill as a credit. If, on the other hand, losses exceed the taxes due, the government would forward a check to the taxpayer for the difference. Two simple examples illustrate the calculations:

Taxpayer "A"	
Income .....	\$20,000
Deductions .....	2,000
Taxable income .....	18,000
Taxes due .....	3,000
Loss from auto accident .....	1,000
Net tax due from taxpayer to government .....	\$ 2,000
Taxpayer "B"	
Income .....	\$20,000
Deductions .....	2,000
Taxable income .....	18,000
Taxes due .....	3,000
Loss from auto accident .....	5,000
Net compensation due from government to taxpayer .....	\$ 2,000

The integration of the losses into the calculation of income taxes is not without precedent. Present law allows the deduction of "casualty losses" in figuring the net income on which the tax rate percentage is applied. Admittedly, these are property losses attributable to theft, fire and the like, rather than personal injuries. I.R.C. 165 (c)(3). Moreover, they are treated as "deductions" not "tax credits". (A "tax deduction" is deducted from the taxpayer's income before applying the tax rate percentage to calculate the amount of tax due. A "tax credit", on the other hand, is deducted from the tax itself. In practical terms a "tax credit" reduces the taxes owed by the full amount of the credit. A deduction only reduces a person's tax bill by a percentage of its amount, to be precise by the tax rate percentage which the taxpayer is assessed for his highest level of income.) Nevertheless, it may be significant that the government currently accepts a substantial diminishment in annual tax revenues solely on the basis of taxpayers' declarations about their economic losses.

37. Keeton & O'Connell, *Basic Protection Automobile Insurance in CRISIS IN CAR INSURANCE* 40, 91 (R. KEETON, J. O'CONNELL and J. McCORD, eds.) (1968).

38. In speaking of the costs of their proposed Basic Protection System of no-fault insurance, Keeton and O'Connell state:

The over-all cost of the new system, including amounts paid as basic and added protection benefits, amounts paid on tort claims, and amounts expended in administering claims of both types, will be no greater, we believe, and may be substantially less than the constantly rising cost of the present system. Of course, the proposed system will involve certain additional costs due to the payment of benefits to those who now go uncompensated, the increased benefits available to those who now receive less than full reimbursement of economic loss, and the payment of attorneys' fees. At the same time other costs of operating an automobile claims system will be diminished or eliminated. The proposed plan will reduce amounts paid for pain and suffering and the excessive amounts now awarded in lump-sum adjudications and settlements when future losses are overestimated. Moreover, costs of administration will be sharply reduced because less time and expense will be devoted to controversies over fault and pain and suffering.

R. KEETON AND J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 295-96 (1965).

One study estimated that if the Keeton-O'Connell Basic Protection Plan were implemented in Michigan, premiums could be reduced 25%, and 50% more victims would receive benefits than under Michigan's current system. Harwayne, *Insurance Costs of Basic Protection Plan in Michigan*, in R. KEETON, J. O'CONNELL and J. McCORD, (eds.), *CRISIS IN CAR INSURANCE* 119 (1968).

39. See notes 17 and 18 *supra*.

40. Garnishment provisions are frequently subcategorized under attachment, see note 42 *infra*. In some states garnishment is called trustee process. An example of a statute dealing with attachment of wages is MASS. GEN. LAWS ANN. Ch. 246 §28 (1976-77 Supp.):

If wages for personal labor or personal services of a defendant are attached for a debt or claim, an amount not exceeding one hundred twenty-five dollars out of the wages then due to the defendant for labor performed or services rendered during each week for which such wages were earned but not paid shall be reserved in the hands of the trustees and shall be exempt from such attachment . . . The amount reserved under this section shall be paid by the trustees to the defendant in the same manner and at the same time as such amount would have been paid if no such attachment had been made . . .

41. Many states have enacted statutes based upon the Uniform Commercial Code's repossession provision. See, for example, MASS. GEN. LAWS ANN. Ch. 106 §9-503 (1958):

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action . . .

42. See, for example, MASS. GEN. LAWS ANN. Ch. 223 §42 (1976-77 Supp.);

All real and personal property liable to be taken on execution, except such personal property, as, from its nature or situation, has been considered exempt according to the principles of the common law . . . or which is specifically exempt from execution . . . and except as provided in the four following sections, may be attached upon a writ of attachment in any action in which the debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover; but no attachment of land shall be made on a writ returnable before a district court unless the debt or damages demanded therein exceed twenty dollars.

See also, N.Y. CIV. PRAC. LAW & RULES §6211 (McKinney 1963) concerning the order for attachment:

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the plaintiff's demand together with probable interest, costs, and sheriffs fees and expenses.

43. Recent Supreme Court cases have restricted the use of seizures prior to hearing. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the Court found that a statute allowing prejudgment garnishment of wages, denied due process. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court extended *Sniadach* to attachment of other property as well, where there is no opportunity to be heard or notice before the property is seized.

However, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) the Court seemed to have edged back from the prior hearing requirement by holding that an *ex parte* seizure of property was valid where the creditor made a nonconclusory affidavit to a judicial officer and a prompt post-seizure adjudication was available.

Prejudgment remedies have, however, also been limited by statute. The Uniform Commercial Credit Code, for example, flatly bars use of prejudgment wage garnishment (§5.104).

44. The deterrent could be increased by allowing recovery of penalties for negligently or deliberately false declarations.

45. See page 38 *supra*.

46. See page 38 *supra*.

47. See page 38 *supra*.



48. See pages 41-42, *supra*.  
 49. See pages 38-41, *supra*.  
 50. See pages 41-42, *supra*.  
 51. See note 16, *supra*.  
 52. See pages 39-41, *supra*.  
 53. See pages 39-41, *supra*.  
 54. See pages 57-60 and 72-75, *infra*.  
 55. See pages 38-39, *supra*.

56. It should not be implied from this discussion that a governmental deterrence mechanism could not use similar sophisticated techniques to guide its selection of investigative targets. Yet it is difficult to duplicate the information base likely to be in the possession of the responding parties, particularly those which are large business organizations. To overcome this handicap, government investigators could base all or part of their sample on identifications made by responding parties. Thus, the government deterrence mechanism would capitalize on the special knowledge and resources of this class of responding parties.

57. See pages 57-64 and 72-75, *infra*.  
 58. See Chapter VIII, note 3, *infra*.  
 59. See pages 26-30, *infra*.

60. These costs are akin to the costs suffered by personal injury victims denied compensation. See CALABRESI, *THE COST OF ACCIDENTS* 39-67 (student ed. 1973).

61. One study of the effects of wage garnishment on debtors in four cities found that basic problems often resulting from indebtedness were bankruptcy, ill health, job instability, marital instability and curtailment of family expenditures. Of the debtors surveyed, 49% experienced adverse health (½ of whom consulted a doctor), 43% disregarded needed dental care, 34% suffered family disruption and 9% divorced or separated. See D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 273-89 (1974). See also Brunn, *Wage Garnishment in California, A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1964); Note, *Wage Garnishment as a Collection Device*, 1967 WISC. L. REV. 759; Note, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968).

62. See page 12, *supra*.

63. Because of the number and complexity of the elements relevant to a judgment about the suitability of automatic relief in a given class of disputes, possibly a symbolic formula will contribute to an understanding of the essential relationships. When fully assembled, the proposed formula appears as follows:

When  $CR + EC_p + EC_{cep}$  is greater than

$$\frac{O}{P.R} + EC \frac{o}{p.r} + o$$

then moving parties' objectives should be granted without a prior contested hearing.

Commencing our translation of the symbols with the lefthand side of the formula, CR (resolution cost) is the average cost of conducting contested proceedings in this particular category of disputes. For the sake of simplicity this single symbol encompasses all the expenses of fact investigation, criteria ascertainment, and decision-making by whomever expended. It is total societal cost that is being expressed, not merely a governmental one.

EC<sub>p</sub> (error cost-primary) represents the primary socio-economic cost associated with the risk of error in decisions rendered by a contested proceeding. EC<sub>cep</sub> (error cost-secondary), in turn, represents the secondary socio-economic costs attributable to disputants who lack the

capacity to redistribute the primary socio-economic burden when an error is foisted on them.

Thus, the entire left hand expression in the formula summarizes the most important costs of resolving a dispute through the more traditional mechanism of contested proceeding. Obviously, all these elements are subject to deliberate manipulation, in part, through measures already discussed. However, there are environmental limitations on the maximum effects of such manipulation. For example, dispute resolution costs can be reduced only so far. The bare necessities of the contested proceeding place some real boundaries on the degree to which the CR element in our equation can approach zero. (Moreover, as CR decreases, there will be a tendency for the other two elements, EC<sub>p</sub> and EC<sub>cep</sub>, to increase as a less expensive process normally means a less accurate one.)

Moving to the other side of the formula, DC (deterrent cost) summarizes the expenditures on investigators, prosecutors, and even court proceedings associated with the creation of effective disincentives against fraudulent or erroneous applications. O (objective) represents the average value of the objective sought by the moving party in this class of disputes. P (penalty) represents the average severity of the prospective penalty which will be imposed for the filing of a fraudulent or erroneous application. R (risk of penalty) is the perceived risk the penalty actually will be experienced if a fraudulent or erroneous application is filed. After combining these elements, the resulting expression

$(\frac{O}{P.R} < O)$ , reflects the average primary cost of error, that is the risk that temptation will overcome fear multiplied by the economic consequence of that level of risk. Of course, the elements in this expression must be adjusted to recognize the underlying reality that a large proportion of the population will resist temptation even in the absence of any palpable sanctions. For them, probably the vast majority, moral sanctions would be sufficient to deter them from submitting sworn applications for transfer which were anything but the complete truth. The next

symbol  $\frac{EC_o}{p.r}$  refers to the secondary costs of error attributable to a

disputant's inability to absorb or redistribute them. Obviously, the amount of these secondary costs will be in part a function of the average amount of error cost to be borne and in part a function of the average capacity to redistribute such costs which is possessed by the responding parties typically involved in the relevant category of dispute. (However, this latter factor should be identical on both sides of the equation, since it is assumed that the composition of the disputants will remain constant no matter which dispute-processing strategy is employed).

It should be noted that this does not purport to be a precise mathematical formula that can be operated to predict when an automatic transfer strategy will be preferable. Rather, it is designed to illustrate approximate relationships among the factors which appear most relevant to such a decision.

64. See page 9, *supra* and pages 60-61 and 75-76, *infra*.

65. See Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limit of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

66. Secondary error costs may be magnified further if most of the errors are cast upon a class of disputants who lack the capacity to redistribute such errors. Obviously, this will be a common situation because those lacking the financial means to participate effectively in contested proceedings are most often modest income individuals equally incapable of redistributing primary error costs through the market, insurance premiums or taxes.

67. See pages 38 and 41-42, *supra*.

68. See pages 39-41, *supra*.



## CHAPTER V. THE ELIGIBILITY SIMPLIFICATION STRATEGY: MEASURES WHICH VARY THE ELIGIBILITY CRITERIA WHICH MUST BE SATISFIED TO JUSTIFY THIRD PARTY INTERVENTION

The dispute-processing strategy discussed in this chapter becomes relevant when the disputants are unable to negotiate a two-party settlement and the third party approaches the task of deciding whether to intervene. Fundamental to that decision are the criteria which must be established to exist in order to justify intervention. The basic alternative eligibility requirements were set forth in Chapter II at pp. 12-13 and are located in the chart at p. 10 as elements C(1)-C(5). In essence, the criteria comprise various combinations of existence of an objective, connection with some category of circumstances, connection between the other party and the circumstances, and misbehavior of the other party.

### A. Measures Which Substitute General Fairness Standard for Detailed Eligibility Criteria

There are, of course, other ways in which eligibility criteria can be "simplified" beyond those discussed in Chapter Two and portrayed in the chart on pp. 10-11. Merely rephrasing existing rules in a less complex form—that is, in short, straightforward English sentences—is sometimes seen as a significant reform.<sup>1</sup> And, in fact, to the extent these simpler formulations are understandable by non-lawyers fewer disputes may arise because the common citizen will be in a better position to guide his conduct in accordance with legal rules. Moreover, it may become feasible to contemplate using various popular tribunals composed of laymen as described in Chapter VI<sup>2</sup> to decide legal disputes since expertise would no longer be important in reaching a proper decision.

Another sense in which "law simplification" is sometimes used connotes "delegalization" of dispute resolution.<sup>3</sup> At the extreme it would mean abandonment of any predetermined eligibility criteria. The third party forum would merely grant relief if it wanted to, for good reason or bad, without reference to any rules previously formulated by the legislature, administrative agencies, or the third party forum, itself. The absolute rulers in some ancient kingdoms may have possessed powers approaching this extreme, but modern analogs are difficult to identify.

There are, however, many present forums that dispense with precise, detailed eligibility criteria, instead applying general notions of equity and justice.<sup>4</sup> The third party forum intervenes presumably only when it finds the facts demonstrate that the moving party "deserves" some relief from the source of satisfaction according to standards commonly shared by society's members. Because of the vague and subjective nature of such eligibility criteria, they tend to provide little guidance to individuals or institutions seeking to conduct their affairs in a manner that will minimize the possibility of being subjected to civil sanctions. A third party forum may decide a moving party "deserves" relief in one case and decide that justice and equity do not dictate relief in another identical case a week later. The uncertainty becomes even greater when two different decision-making panels address identical fact situations with only their own personal (and probably different) conceptions of the community's contemporary standards of justice and equity as a guide.

This loss of predictability, however, must be balanced against other important values. The cost and time demands of the dispute resolution process frequently can be reduced substantially when general fairness standards are substituted for a precise, detailed eligibility formula. Neither the disputants nor the third party forum need delve deeply into the statute books, reports of prior decisions of that or some other forum or otherwise devote time and energy to criteria ascertainment. This ordinarily can be expected to reduce expenses for both government and the disputants even when lawyers are employed to represent the parties and to judge the dispute. Beyond that, the absence of precise, detailed eligibility criteria may make it easier for the parties to dispense with legal representation and for government to use common citizens rather than law-trained professionals as the decision-making forum.<sup>5</sup>

Selecting classes of disputes for which a general fairness standard is appropriate tends to involve fewer, less complex considerations than those applicable when we are deciding whether to eliminate some element or elements from a more precise eligibility formulation, a topic

to be considered below.<sup>6</sup> Basically, the choice revolves around the relative importance of the competing values of precision and predictability, on one hand, and cost and accessibility on the other.

Most categories of disputes presently assigned to forums employing general fairness standards (i.e., certain small claims courts, community tribunals, etc.)<sup>7</sup> tend to involve interpersonal conflicts or low-stakes economic controversies unlikely to affect general practices one way or the other.<sup>8</sup> Precision and predictability are less relevant since either no planning is undertaken based on probable legal consequences or the consequences in these particular disputes have only a minimal impact on planning.<sup>9</sup> At the same time, these often are exactly the kinds of disputes that disputants cannot afford to litigate in forums that use precise, detailed eligibility criteria requiring them to employ lawyers. Moreover, government also may find it difficult to justify the expense of professional law-trained decision-makers to resolve such controversies in terms of stakes/cost ratios.<sup>10</sup> All of these factors apparently conspire to suggest that general fairness standards be applied in eligibility determinations in such cases. But the treatment of classes of disputes in which there is a more direct conflict between the competing precision/predictability and cost/access values probably will require some careful experimentation.

## **B. Measures Which Eliminate or Modify Certain Elements of Eligibility Criteria**

These strategies are closely related to the investigation and decision-making processes. Elimination or modification of elements of eligibility criteria often reduces the time and other resources required for investigation and deciding a dispute, simply because fewer facts need to be investigated and decided. For example, a no-fault divorce law<sup>11</sup> may require a showing of objective (desire for divorce), circumstances (irretrievable breakdown of marriage), and connection of another party (spouse). But by obviating the need to determine fault of the spouse, the most complex issue (and most expensive to establish) is eliminated from the costly judicial process. Another relationship between the eligibility standards and the investigation and decision-making phases concerns the risk-of-error. By eliminating subjective and/or difficult-to-prove criteria, simpler eligibility standards may allow the use of less expensive and less thorough investigation and decision-making techniques without increasing the risk of error.<sup>12</sup> To illustrate, in the typical automobile accident only a small possibility of error is involved in the establishment of most of the eligibility factors, i.e., the nature of the injuries, and who was involved in the incident. Most errors are committed in attempting to ascertain who was at "fault." Eliminate the need to

prove "fault" and the risk that the forum will produce an erroneous decision is likewise reduced. It also becomes feasible to contemplate utilizing a less thorough (and less expensive) decision-making forum.

Several factors determine the appropriateness of a particular set of eligibility criteria: the nature of the source of satisfaction; the nature of the moving party's objective; the cost of establishing whether any particular criterion exists; and the nature of society's objectives for the dispute resolution process.

1. *The relationship between eligibility criteria and the source of satisfaction as defined in chapter II.* The source of satisfaction is the party from whom the moving party seeks his objective, and the one against whom the third party is asked to intervene. The source may be typed into two primary classifications—individual and institutional.

Generally, if the source of satisfaction is an individual, it becomes difficult to dispense with any of the five eligibility criteria mentioned at the beginning of the chapter. Since we are imposing upon an individual the responsibility of satisfying the movant's objectives, the third party intervenor must be able to identify some specific individual as having been the cause of the existence of the moving party's objective (the third and fourth elements), as well as state a rational basis for imposing the duty to supply the objectives upon that specific individual. This frequently will require a showing of moral guilt on the part of that other party (the fifth element). A clear example is where the defendant is required to compensate the plaintiff for injuries sustained by the plaintiff when the defendant punched him in the nose. The rationale for imposing the duty to pay upon the individual need not be actual fault, however; recently individuals have been required to satisfy the moving party's objective because of our judgment that people in the category of that individual (the source) are the best cost avoiders. In other words, we view that source as possessing the capacity to reduce grievance-generating conduct, and thus, the need for moving parties to seek objectives. In order to encourage that individual or institution to take the necessary steps to avoid further harm in the future, we impose upon him the duty of satisfying the moving party's objective which arises due to his failure to take those steps in this case.<sup>13</sup>

Another reason for requiring a more stringent set of eligibility standards where the source of satisfaction is an individual is the concern that an individual is less able than an institution to spread the costs of satisfying the objective and/or the costs arising from any errors made in the decision-making process.

The value judgment underlying loss spreading is that it hurts less to take a little money from each of a large number of people than it does to take a large amount

from a single person.<sup>14</sup> A single individual is disadvantaged in terms of loss spreading for two reasons: he is less likely to have the opportunity to pass on to others the costs of his losses, and he is less likely than an institution or business to have the resources to adequately insure himself against such risks.<sup>15</sup>

Equally as important as the ability to spread losses is the ability to spread the costs arising from the risk of error inherent in the decision-making process. Risk of error takes a variety of forms, as, for example, the probability of an innocent person being found guilty or vice versa, or of a faultless person being found liable for damages in a negligence suit, or of a person who is found liable being required to pay too much (or too little) in damages. The risk of error is more costly for an individual than for an institution both in terms of the expenses involved in taking additional precautions to avoid involvement in the legal process (e.g., installing safety mechanisms before versus after assembly of an automobile) and in terms of the inability to spread the extra losses as described in the preceding paragraph, once the error has been made against his interest.<sup>16</sup>

There are situations where it may be feasible to consider dispensing with one or more of the five basic eligibility criteria even against an individual source. First, in some categories of disputes, the cost to the individual as source of satisfaction may be so slight in absolute terms that the cost of compliance or of an erroneous transfer is minimal. Secondly, there are situations where the cost of granting the moving party's objective is deemed to be substantially less significant than the objective itself. This would generally be true in situations, such as divorce where it has been determined that the moving party has a greater interest in freedom from an unhappy marriage than the other spouse has in maintaining an unhappy relationship.

If the source of satisfaction of the moving party's objective is not an individual but rather an institution or other loss-spreading organization, it seems easier to justify reducing the number of eligibility criteria because the costs of satisfaction do not fall as heavily as they would upon an individual. The number of eligibility elements dispensed with probably should be related to the scope of the institution's loss-spreading capacity. For instance, if the institution redistributes its losses by passing on the costs to a certain segment of the public, ordinarily the eligibility standards should link that segment of the public to the moving party's objective. This is the pattern which has evolved in products liability cases in which the manufacturer can spread his losses to the purchasers of his product. In such cases, we allow the moving party to dispense with establishing the fifth eligibility element—standard negligence of the other party,

yet we do require a showing that his injury or loss was somehow linked to the particular product and thus to the consumers of that product who are the real source of satisfaction.

But where the immediate source of satisfaction is not a manufacturing enterprise, but an insurance company composed of prospective injured parties, it may be feasible to use criteria which require establishment of even fewer elements, such as the suffering of a loss or the suffering of a loss coupled with a certain circumstance such as that the loss resulted from an accident or other circumstance related to the definition of the insured population.

Where the source of satisfaction is a tax fund, it may be reasonable to authorize the satisfaction of the objective upon a showing merely of a connection between the objective and the activity which is the source of the tax revenues. For example, a fund raised through road use taxes might be the source of compensation for all injuries occurring in road accidents irrespective of the cause of such injuries or who was at fault. Under such a scheme, an injured party would only be required to establish that his injury was connected to a certain category of circumstance, namely, that the injury occurred while he was on the road. In fact, this approach is implemented in one facet of the New Zealand Compensation Plan which allows compensation for road-connected injuries paid out of a road-tax fund.<sup>17</sup>

A tax fund composed of general revenues might be employed as a source of satisfaction of any objective of a moving party, in which case we would need to require only that the moving party specify his objective. It would be unnecessary to establish any connection between his objective and a certain source of tax revenues because the tax fund would not be earmarked. It would be an economic resource for satisfaction of any kind of objective. Another facet of the New Zealand Compensation Plan is akin to this because it provides compensation for non-road, non-occupation-related injuries from a general tax fund. The plan does, however, require proof of a certain form of loss—e.g., personal injury—rather than the proof only that a general loss was suffered.<sup>18</sup>

2. *The relationship between eligibility criteria and the nature of the objective sought.* The nature of the moving party's objective is another factor which affects the optimum eligibility criteria. If that objective is redistribution of income or of non-unique property, it is easier to eliminate one or more of the eligibility criteria. Where society has made a policy determination that in certain circumstances a redistribution of income is justified, it becomes easier to allow the granting of that redistribution without a showing of fault or some other individual or even the connection of some other person to the

situation. A moving party need be required to show only that he had this objective (compensation or other redistribution of income) and that his circumstances were such as to justify satisfaction of this objective.

To illustrate, under the proposed Australian Compensation Plan, an individual who suffers economic loss due to illness is entitled to compensation upon proof of loss due to a certain circumstance, namely illness.<sup>19</sup> It is clear in a system such as this which compensates for loss due to any sickness, that we would hardly expect the moving party to have to show a relationship between his illness and some other party or pin fault on any individual or institution.

If, however, the moving party's objective is to redistribute *unique* property or to require another party to act or refrain from acting, then it is virtually always necessary for him to establish the first four eligibility criteria, and frequently the fifth also. Satisfaction of either of these objectives evidences that some party has either conveyed unique property or performed or desisted from some specific act. In order to require satisfaction of the objective we must, almost by definition, be able to identify the other party and his connection to the objective which compels him to be the source of satisfaction. An example from nuisance law should illustrate this. A landowner who is troubled by loud noises may bring a nuisance action for an injunction against continuance of the noise-producing action. However, unless he can identify the noisemaker, even a declaration by the court that the noise is a nuisance could not result in elimination of the noise. (Perhaps monetary damages could be awarded, but it is unlikely that they would be paid by some source other than the noisemaker; hence, we still need to identify the noisemaker.)

Another kind of objective, i.e., change of status, under some circumstances might warrant elimination of all but the first eligibility element. It is feasible to require proof of only the moving party's objective (his desire to change his status). This, however, would be possible only where society has determined that the individual's right to alter his own status is preeminent over anyone else's right to see that status maintained. Currently, for example, change of marital status through no-fault divorce requires a finding of irretrievable breakdown of the marriage. Conceivably the law could authorize divorce solely upon the request of *one* party upon proof only of his or her desire to terminate the marital status. This further simplification of eligibility criteria would reflect a societal judgment that one spouse's desire to terminate a marriage, regardless of the objective quality of the marriage, enjoys preference over the other spouse's desire to see their marital status maintained.

### 3. *The relationship between eligibility criteria and the*

*cost of proving various elements.* The cost of establishing whether or not a particular element exists will also be a relevant consideration in deciding whether or not that particular element should be included in the set of eligibility criteria for third party intervention in a particular kind of case. In certain categories of disputes, we may find, for example, that the potential benefit from including a particular element (enhanced precision perhaps, or an individual's feeling that justice was done because someone was proved to be at fault), does not justify the relatively weightier cost of establishing the existence of the eligibility requirement.

The costs described in this section may be compartmentalized into at least four categories. This should provide some insight into the situations where cost considerations may suggest an easing of eligibility criteria.

First of all, there are the incremental costs (fact investigation, criteria determination, and decision-making processes) associated with establishing the existence of the particular element in cases in which the other eligibility elements already have been decided. In a personal injury suit, for example, both the moving party and his adversary must investigate, research, and present facts about the element of fault, and the judge (and a jury if there is one) must hear the presentations and formulate a decision on this element in addition to other eligibility requirements such as the existence of damages warranting compensation. Thus, the incremental costs of establishing fault are clearly juxtaposed against the incremental benefits of adding fault as an additional criterion.

Secondly, another kind of cost of establishing a particular element arises where the claims would not even be disputed by the parties but for the necessity of proving that particular element. In the previous situation, elements other than fault were disputed and thus investigated and decided upon; in the instant situation, it is assumed the other elements, such as causation, damages, etc., are clearly present and conceded by the parties. If it were not for the particular additional element (such as fault in a personal injury suit), the claim would not need to be investigated, researched, and determined. The source would satisfy the moving party's objective without third party intervention if the fault element were not part of the criteria. Hence, the cost of establishing the existence of the particular element is equivalent to the total cost of the entire third party intervention (investigation, determination, etc.).

Thirdly, oftentimes a claim cannot be pursued at all because of the prohibitive cost of suit to the moving party. The expensiveness of a particular litigation, in turn, may be due to the difficulty of establishing a particular element. If that element were not required, the

aggrieved party might be capable of pursuing his claim. Hence, the cost of non-enforcement of claims that cannot be pursued unless a particular element is eliminated is another subcategory of the cost of establishing the existence of a particular element. An unhappily married individual might find he could afford to file for dissolution of marriage where required to prove the irretrievable breakdown of his marriage, but not where he is also required to prove that this was the fault of his spouse.<sup>20</sup> Accordingly, if fault is a required element, for that individual the cost of establishing fault is the cost of having to remain legally married.<sup>21</sup> Similarly, an indigent individual injured in an automobile accident might not be able to pursue his claim for compensation because of the prohibitive expense of establishing that the other party was at fault. The direct and indirect costs of non-enforcement in this situation could be enormous, involving misallocation of societal resources as well as denial of compensation to the individual suffering the loss.<sup>22</sup> But were a standard of no-fault liability in use, he would more likely be able to afford participation in the decision-making process.

Fourthly, many elements are difficult to prove, and therefore highly susceptible to error. Incremental increases in the risk of error associated with the establishment of a particular criterion can be a significant cost. The field of products liability comes to mind immediately. It may indeed have been due to the uncertainties as well as the costs involved in requiring a consumer to prove that the manufacturer of an article was negligent which motivated the recent trend toward strict products liability. Eliminating the need for proof of fault also eliminates the error costs attendant upon proof of a manufacturer's negligence. Those costs were often significant, considering the frequent need to fall back upon *res*

*ipsa loquitur* for the necessary proof. The uniform products liability standard enables manufacturers to calculate the costs of operating without having to estimate the fluctuating and uncertain expense of being held liable where not at fault, and not being held liable where actually at fault.

4. *The relationship between eligibility criteria and society's goals for the dispute resolution process.* The nature of society's objectives will significantly affect a well-considered determination of whether or not to require a particular eligibility element in a given category of case. First of all, it must be determined whether or not society's objectives are advanced by requiring or eliminating establishment of a particular criterion. For example, it is often argued that requiring proof of negligence in automobile accident litigation will enhance deterrence of future negligence, thereby advancing society's interest in minimizing future harm or increasing future satisfaction (i.e., reducing the number of accidents due to negligent driving). The accuracy of this claim should be examined,<sup>23</sup> but even if it is found to be valid, one must still inquire whether society's objectives are advanced *sufficiently* to counteract the costs associated with that element (i.e., the cost of determining whether or not the element exists, the cost of non-enforcement of claims which cannot be asserted because of the expense of establishing that element, the cost of the risk of error due to ambiguities, and difficulties in establishing the element). In sum, then, the advancement of society's interest through requiring establishment of a particular element usually thought to increase deterrence of undesirable activities may not always fare well when balanced against the costs accompanying the proof of that element.

## NOTES—CHAPTER V

1. For example, consider the following challenge to American lawyers set out in Nader and Singer, *Dispute Resolution* 51 CAL. S.B.J. 281, 317 (1976):

An activist bar also could take the lead in simplifying standard transactions in order to avoid disputes and to enable people to handle most of their own affairs. At present, people not only do not write the contracts they sign, but they cannot understand them. Substantive legal rules and the processes of their application might be revised in such a way that major matters, such as automobile accidents, marriage dissolutions, and the transmission of wealth at death, could be handled without unnecessary litigation or other intervention of the judicial system . . . . Such arrangements of legal responsibilities and liabilities should be as simple and as easy to apply as possible . . . .

2. See pages 57–59 *infra*.

3. One noted advocate of simplification of the legal process has spoken of "legal pollution."

More and more, legal pollution is clogging the everyday affairs of all of us. Thickening layers of legalism seem to surround our lives. We have far too many laws; we rely too heavily on law as an instrument of social change; we depend too much on courts, legislatures, and administrative agencies to resolve our woes. The entire system is in danger of becoming "Bleak House" writ large unless corrective actions are taken.

Ehrlich, *Legal Pollution*, in *New York Times Magazine* (Feb. 8, 1976).

4. See, for e.g., the New York arbitration program for small claims, Determan, *The Arbitration of Small Claims*, 10 FORUM 831 (1974). Mechanisms in other countries which use common notions of equity include the Polish Social Conciliation Committees and the Iran House of Equity, both of which may be termed "lay courts." See J. Kurczewski and K. Frieske, *The Social Conciliatory Committees in Poland*, special report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy; Bushehri and Baldwin, *The Administration of Justice by Laymen in Iran: A Report on Houses of Equity and Councils of Arbitration*, in INTERNATIONAL LEGAL CENTER, WORLD ASSOCIATION OF JUDGES, COURT CONGESTION: SOME REMEDIAL APPROACHES 70 (1971).

5. See pages 57–59 *infra* and 72–75 *infra*.

See also, Halbach, *supra* note 1, at 144:

Lawyers should recognize in their work the premise (even if unarticulated) upon which enlightened, successful business executives operate: that one should constantly strive to redesign the system in which one works to eliminate tasks when possible, to enable others to be shifted to lower-paid employees, and to routinize all but the vital judgment elements of still others.

6. See pages 51–54 *infra*.

7. See note 4 *supra*.

8. There are some significant exceptions, however, especially consumer disputes in which a mass of customers may have similar grievances against a given firm or industry, each one involving rather modest stakes, but collectively amounting to millions of dollars. This problem can become especially acute when very extensive and specific consumer protection laws have been enacted. These provisions will have little effect on the marketplace if all consumer cases are diverted to tribunals composed of individuals lacking knowledge of these precise criteria.

9. Individual disputants caught up in a heated neighborhood squabble illustrate the first point. They may be guided by the actual decision rendered by the third party but probably would not shape their conduct on the basis of some refined legal rule applicable to their underlying dispute. The emotional component of the dispute simply would tend to overwhelm the rational plotting of future conduct by the disputants.

Low-stakes economic controversies seem unlikely to affect the future conduct even of business enterprise and other institutional litigants which do plan on the basis of legal consequences. Unless there is a mass of such cases involving a single type of transaction, the economic impact of winning or losing probably will not affect company profits sufficiently to alter its future practices.

10. The propriety of allocating civil dispute resolution resources on the basis of stakes/cost ratios may be questioned. See page 3 *supra*. Nevertheless, it is apparent that such considerations are involved at present. Contrast the average time and cost commitment to small claims court cases with the typical business contract litigation in the regular courts. Even where government is willing to supply a law-trained decision-maker (e.g., a small claims judge), that decision-maker may be under pressure to decide an overwhelming volume of cases. With the same or a lesser financial commitment, government might be able to establish a forum using panels of part-time, often uncompensated laymen who could devote much more time and care to each individual dispute. See pages 57–60 *infra*. However, these lay decision-makers would be a feasible alternative only if the eligibility criteria consisted of commonly held notions of fairness and justice rather than detailed, technical legal rules.

11. As an example of a recent no-fault divorce statute, consider California Civil Code §§ 4506 (West 1970):

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

- 1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.
- 2) Incurable insanity.

12. See Chapter II, note 37 for a description of the proposed Australian National Compensation Scheme, one plan which sharply reduces eligibility criteria.

13. For an example of a case which explicitly based its determination of liability upon this rationale see *Brody v. Overlook Hospital*, 121 N.J. Super. 299, 296 A. 2d 668 (1972), applying strict liability to a hospital and bloodbank for hepatitis-infected blood. The court stated: "This theory has the effect of forcing the entity that markets the product to consider the 'accident costs' of the product when deciding whether and from where to procure it." In this type of situation, the hospital could have taken more care in selecting a blood bank from which to buy; the blood bank could take more care in screening donors.

14. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 39 (1970). Throughout the book, and especially in Chapter Four, are discussions of so-called secondary cost avoidance.

15. *Id.*, Chapter Four.

16. Although the risk of error results in added costs, it also results in social gain. In the instant example a driver might begin to drive more carefully because of the risk that he will not get fully compensated for losses. There is a social gain in the consequent reduction in number of accidents. The social cost due to error is, therefore, in actuality a netted

16. (Cont.) figure of social loss and social gain. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 405 (1973).

17. Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MODERN L. R. 361 (1974).

18. *Id.*

19. See Chapter II, note 37 *supra*.

20. As only a partial indicator of what the additional cost might be, we could consider the fact that the elimination of fault in marriage dissolution cases saves an average of five minutes per case, or 2.6 percent of the judicial resources of the California Superior Court. Johnson, E., Bloch, S., Drew, A.B., and Schwartz, E., *et al.*, *Access to Justice in the United States: The Economic Barriers and Some Promising Solutions*, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. This figure does not even cover the added expenses due to the time the attorney must spend investigating and preparing the fault issue.

21. This could have several significant non-monetary consequences. See for example, *In Re Raya*, 255 Cal. App.2d 260, 63 Cal. Rptr.252 (3rd Dist. 1957), a California case in which both parents almost lost custody of their children to the state because each parent was cohabitating with another partner. They were unable to marry their present

partners because they could not afford the costs of a marriage dissolution proceeding.

22. The extremely large judgments being handed down in favor of victims of automobile accidents gives some indication of the amount needed to compensate for actual damages (e.g., doctor bills) as well as pain and suffering. Any potential plaintiff who had not filed his claim because he could not afford to, would have had to incur the identical burdensome expenses but without any compensation.

23. There are several indications that perhaps this claim is invalid. For instance, it may be true that following a rule which enhances society would be of more future benefit to society than following a rule of proof of negligence, even with its potential reduction in the number of accidents.

There has also been some discussion to the effect that increased precision of rules (*i.e.*, prescribing specific conduct rather than simply offering standards of conduct) enhances effect on primary behavior. See Ehrlich and Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. OF LEGAL STUDIES 257 (1974). In other words, precise rules encourage desirable activity and discourage undesirable activity. A rule which incorporates negligence may be less precise than a no-fault rule and thus not be as effective in deterring undesirable behavior.

## CHAPTER VI. THE RESOURCE REDUCTION STRATEGY: MEASURES WHICH MANIPULATE THE INVESTIGATION AND DECISION-MAKING PROCESS THROUGH WHICH ELIGIBILITY FOR THIRD PARTY INTERVENTION IS DETERMINED

The strategies described in Chapters VI, VII, and VIII come into play only after the parties have been unable to resolve their dispute without third party intervention, only become of essential importance after the third party finds it necessary to use a contested proceeding to make its eligibility determination, and furthermore, has established certain criteria to guide that decision. As such, this category does *not* embrace strategies which eliminate or substantially reduce the necessity of making a choice between the moving party and the source of satisfaction, a set of responses considered in Chapter IV. Moreover, though obviously affected by the relative complexity of the eligibility criteria discussed in Chapter V, the subject here is the process itself through which criteria of whatever nature are applied to decide whether the third party should intervene on behalf of the moving party.

Three basic strategies are considered in Chapters VI through VIII. In one way or another, all three affect the tasks to be performed in reaching a decision: fact-investigation, criteria ascertainment, presentation, decision-making, and the like.<sup>1</sup> The measures discussed in Chapter VI, though powered by various motives, *reduce the resources* required to accomplish these tasks. In Chapter VII, measures are discussed which *reallocate* the *tasks* among the disputants and government. Chapter VIII considers measures which *redistribute* the costs of performing these tasks among disputants, government, and others in society.

These three strategies may be followed either inside or outside the formal judicial system. Sometimes they are implemented through reform of court procedures while on other occasions, they are reflected in the design of non-judicial forums. Some of the measures discussed in Chapter VI, however, represent such fundamental restructuring of the decision-making process that, as a practical matter, they would be difficult to install in the judicial context. For the purposes of this report, the considerable array of actual and possible measures to be

discussed in Chapter VI will be grouped into two broad categories:

- Measures reducing the amount or cost of resources used in the eligibility determination process.
- Measures increasing the "productivity" of the eligibility determination process.

As is true throughout, inclusion in this report does not imply any endorsement of the wisdom or equity of a particular measure. It merely constitutes a recognition that the institution or procedure is being attempted somewhere or looms as a logical, though not necessarily superior, possibility.

### A. Measures Which Reduce the Amount or Cost of Resources Used in the Eligibility Determination Process

The several tasks involved in determining eligibility for third party intervention have been catalogued elsewhere.<sup>2</sup> Each of these tasks must be performed by someone. In the regular courts, most are carried out by professional judges and lawyers. The judges have primary responsibility for the decision-making phase while lawyers (sometimes with assistance from investigators, accountants, and other specialists working under their direction) perform fact investigation, rule ascertainment, the organization and presentation of the eligibility issues, etc. These human resources are quite expensive, representing some of the best-educated, highest-paid individuals in society. The first set of measures to be discussed seeks to substitute less costly human resources for those currently performing some of the eligibility determination tasks.

1. *Measures substituting uncompensated or lesser-compensated decision-makers.* There are a considerable number of institutions, most inaugurated in relatively recent times, which utilize uncompensated decision-makers in place of judges or other professional person-



nel. Sometimes the goal is enhanced geographic accessibility. Often it is to introduce flexibility and community values into the decision-making process, in other words, to substitute for the professional judge and the precision and uniformity of decision which he represents, a decision-making forum which is not socialized to his set of values and capable of a more conciliatory and individualized form of justice.<sup>3</sup> Whether a primary purpose or not, a common characteristic of most of these institutions is the absence of compensation for the decision-making panel. Moreover, this cost reduction aspect frequently is essential if the government is to afford some of the fundamental goals of these institutions. For instance, if those decision-makers required compensation, it might not be economically feasible to disperse decision-making forums in thousands of individual neighborhoods, even though that might lower the citizens' "consumption" costs appreciably and thus make justice much more accessible.<sup>4</sup> Similarly, it may not appear very cost-effective to assign highly-paid professional judges to spend the hours necessary to probe the psychological dimensions of an intra-family or intra-neighborhood squabble in order to arrive at a "therapeutic" compromise. A panel of uncompensated community residents, on the other hand, could devote a full afternoon or evening to the same dispute without putting a direct strain on the government budget.<sup>5</sup>

Among the interesting institutions utilizing uncompensated decision makers are:

- *The Community Conciliation Committees (Poland)*. The members of these committees perform this function in their "off-time" and without monetary compensation of any sort. Selected by the local "popular front" <sup>6</sup> on the basis of criteria which stress qualities of respect and leadership, these panels often contain teachers and others with above average education and status—people who would be classified as middle or upper-middle class in the United States.<sup>7</sup> Submission of disputes to the Community Conciliation Committees is entirely voluntary. The hearings themselves usually take place in the evenings and are quite informal with the committees' decision constituting recommendations to the disputants, and not final, binding pronouncements.<sup>8</sup>

- *The Compulsory Conciliation Boards (Sri Lanka)*. In many respects, these boards are similar to the Polish Community Conciliation Committees despite the vast differences in political and cultural context. They are composed of citizens chosen for their standing in the local community (in this case, by the ministry of justice on the basis of nominations from various community groups).<sup>9</sup> The board members are uncompensated, proceedings are informal, and the decisions merely persuasive.<sup>10</sup> However, unlike the Polish committees, jurisdic-

tion is not a voluntary choice for the disputants. Every civil controversy must be submitted to one of these boards for an attempted conciliation before a regular court can hear the case. If the board's recommendation is accepted that becomes the final resolution. If the attempt fails, the board prepares a certificate which must be submitted to the judge before he can proceed to trial.<sup>11</sup>

- *The New York small claims arbitration system*. This system represents a substantially different form of institution than those described above. The panel members are not laymen but rather lawyers who have agreed to serve as uncompensated voluntary "arbitrators." (Actually, they are not "arbitrators" in the traditional sense since the parties to the dispute play no role in their selection.)<sup>12</sup> Moreover, their decisions are binding on the disputants, though the decision to refer a dispute to one of these "arbitrators" rather than the small claims judge is theoretically voluntary.<sup>13</sup> The same informality apparently pervades the proceedings, and they are held at convenient hours.<sup>14</sup> The cost reduction goal appears to be a paramount consideration, however, and there is not the geographic dispersion which features the Polish and Sri Lanka forums.<sup>15</sup>

In addition to the Polish and Sri Lanka institutions (which draft carefully-screened opinion leaders) and the New York system (which relies upon the willingness of lawyers to volunteer their services), there is at least one other potential source of uncompensated decision-makers. That is the theoretical possibility of a forum composed of common citizens chosen by lot or in some similar rather arbitrary and non-discriminatory manner. This approach may appear similar to the American jury system. However, unlike the traditional jury, these panels of randomly-selected citizens would be deciders of the appropriate criteria as well as the facts. Moreover, they would preside over the proceedings in the cases assigned to them for resolution.

The recognition of this theoretical alternative opens a number of possibilities in the details of design. The random panels could be invested with the power to reach binding decisions, as the New York arbitrators, or merely to hand down recommendations with persuasive appeal, as the Polish and Sri Lanka tribunals. The random selection could be made from the citizenry of a large geographic area or be confined to a very tiny neighborhood. With modern census data and computer technology, it should even be possible to assemble randomly-selected panels composed of persons especially knowledgeable in a certain subject matter or possessing (or lacking) certain other desired (or undesirable) characteristics. The essential underlying principle is that service on such general or specialized decision-making panels would be considered a normal incident of citizen-

ship, a responsibility to be discharged seriously and without compensation.

All the institutions and possibilities discussed thus far depend upon the availability of persons willing to serve (or at least willing to be drafted) as uncompensated decision-makers. As a consequence, these measures tend to share two common characteristics. First, the dispute resolution caseload usually is distributed widely among a large number of such forums. Accordingly, each individual panel only hears and decides a handful of disputes each year.<sup>16</sup> Since they need devote only a few hours annually to these duties, panel members probably are more ready to volunteer or less resentful of a draft.

Secondly, these forums appear best suited to disputes in which society is willing (and possibly pleased) to tolerate a substantial risk of error and a wide variation among the decisions reached in like fact situations.<sup>17</sup> These decision-making panels normally will not be equipped by education or background to apply the sophisticated, precise criteria which judges and other professional decision-makers do. (The lawyer arbitrators in New York's small claims courts presumably are an exception.)<sup>18</sup> Nor will the lay panel members have the opportunity or incentive to devote the necessary time to gain such an education or experience. Thus, it is not surprising to find that resort to these forums is often voluntary with the parties, and the decisions frequently merely persuasive, not binding. The disputants are offered an outlet to a professional decision-making forum, and society can ease its collective conscience with the knowledge that there will be a less precise and uniform outcome only if the disputants so choose.<sup>19</sup>

In addition to institutions which utilize uncompensated decision-makers, there are others which employ professional, but less well-paid personnel in that capacity. Of course, some economies of this nature generally are experienced any time a certain class of disputes is channeled away from the courts to an administrative tribunal, since the hearing officers and the like assigned to decide cases in administrative forums normally are less well paid than judicial officers.<sup>20</sup> In that connection, there appears to be a widespread movement in the United States and some other countries to substitute administrative adjudication for the courts.<sup>21</sup> Conversely, it should be noted that another modern trend—toward professionalization of the judiciary—is replacing low-salaried justices-of-the-peace, magistrates, and the like with better qualified, but also more costly, judges.<sup>22</sup>

For present purposes, the conflicting trends of judicial professionalization and "administrization" of disputes are not as relevant as some measures which can be used to divert controversies to other less expensive forums.

• *The ORA mediation institution (Hamburg, Ger-*

*many*). Briefly summarized, this is a government-sponsored organization, over 50 years old, which performs two functions: legal advice to the poor and mediation services to any disputants, irrespective of means, who voluntarily submit their differences for resolution.<sup>23</sup> Operating out of over 25 decentralized locations, the agency relies on off-duty judges, part time lawyers, and other professionals, each serving only a few hours a month and receiving nominal compensation.<sup>24</sup> As the term "mediation" connotes, the nature of ORA's power in dispute resolution is minimal. Referring to our earlier anatomy of the process, it falls at the minimal level of third party intervention—attempted persuasion of the disputants with no sanctions available to punish non-compliance.<sup>25</sup>

• *Lawyer "arbitration panels" (some U.S. jurisdictions, especially Pennsylvania)*. Though called "compulsory arbitration," this procedure pioneered in Philadelphia and now spreading to several other major states, has been more accurately characterized as "trial by lawyer panel."<sup>26</sup> Under this system, all court cases below a certain level (in Philadelphia \$10,000) are automatically diverted to three-member panels chosen at random from those members of the legal profession who have agreed to participate.<sup>27</sup> Panel members receive nominal compensation for their efforts,<sup>28</sup> with the result that disputes are resolved at apparently about one-fifth the cost of a judicial decision.<sup>29</sup>

• *Administrative tribunals (England)*. Most administrative forums in the United States consist of full-time administrative judges, hearing officers, etc., or full-time government employees for whom adjudication is a collateral duty.<sup>30</sup> In England, the same sort of disputes between government and the private individual or institution are decided by citizen panels called "Administrative Tribunals." These tribunals have been created pell mell since World War II and now number in the thousands.<sup>31</sup> They are highly specialized, and generally composed of a part-time lawyer serving as chairman and part-time laymen expert in the substantive field in which the tribunal exercises jurisdiction.<sup>32</sup> Hearings are held at convenient hours (both for disputants and tribunal members), usually in the evening. Proceedings are informal and decisions binding. Appeals to the courts are limited narrowly to issues of law and procedure.<sup>33</sup> Lawyers are permitted, but with rare exception, government-subsidized legal aid is not available to poor people appearing before tribunals. Though initially designed solely to decide disputes between citizens and government agencies arising out of the administration of various social programs, in recent years, administrative tribunals have been created to hear cases between private parties.<sup>34</sup> Significantly, these part-time citizen panels now

dispose of more non-criminal cases than the entire English court system,<sup>35</sup> a development that is not universally welcomed.<sup>36</sup>

Many of the observations made earlier about the circumstances favoring uncompensated decision-makers<sup>37</sup> apply with nearly equal force to the use of lower-compensated professionals. For example, the willingness of qualified professionals to serve part-time at below market rates will be enhanced if the time demands are minimal and the hours do not conflict with the panel member's regular occupation. However, the very fact these decision-makers sometimes are professionals participating daily in the total dispute resolution system can introduce a new consideration. In certain situations, they may gain enough financially from the existence of a cheaper and more expeditious alternative forum to justify any apparent economic sacrifices. There is some evidence suggesting that many Philadelphia lawyers serving on that city's arbitration panels are receiving an economic dividend from the operation of that system which is larger than any income loss which might be experienced during the hours devoted to deciding cases as part of one of these panels.<sup>38</sup> For such professionals, it is relatively easy to write off the "sacrifice" of working for nominal compensation as a sound investment yielding very substantial profits.

2. *Measures reducing support costs of the decision-making forum.* In most countries, the budget of the formal judiciary contains many expensive elements beyond the judge's salaries. Working in large, sometimes opulent quarters, judicial decision-makers typically are surrounded by a supporting cast of clerks, reporters, bailiffs, and other auxiliary personnel. Of course, this in no way suggests this amount of assistance and this level of expenditure are excessive.<sup>39</sup> For the most part, the assistance and costs are easily justified, at least when the disputes being resolved involve stakes or issues of substantial significance. But these statistical facts do offer a hint of where the real economies lie in some of the alternative forums to which disputes are sometimes diverted.

Many alternative institutions experience savings by eliminating or reducing the cost of physical facilities. The previously mentioned compulsory arbitration plan in Philadelphia, Pennsylvania, for instance, uses lawyers' offices for its hearings.<sup>40</sup> Thus, it is feasible to simultaneously hear hundreds of disputes in an equal number of law offices without investing a nickel in the construction or maintenance of a single courtroom. Another approach has been adopted by the Hamburg ORA, also discussed earlier.<sup>41</sup> Mediations are conducted in various government offices during off-hours, a system facilitated by the fact the regular office hours for ORA are in the

evening.<sup>42</sup>

These institutions, as well as others described in this report, also have largely eliminated the auxiliary personnel common to judicial decision-making forums. They function without reporters, bailiffs, law clerks, and the like—a very substantial percentage of the judiciary's budget.<sup>43</sup> However, they generally do continue to depend upon a core administrative staff to accept filings, assign cases, and maintain records.<sup>44</sup> Sometimes the functions performed by other support personnel can be assumed by the decision-making forum itself. An arbitration panel composed of lawyers can research its own legal precedents, if that becomes necessary, rather than looking to a law clerk. However, other functions are simply lost. The verbatim transcript of hearings, for instance, will not be available if the decision-making forum operates without a trained reporter.

There is at least one example of an attempt to utilize a somewhat different approach: to replace expensive auxiliary personnel with lower-cost modern technology. The housing court hearing examiners in New York employ tape-recording equipment to maintain a verbatim record of proceedings in these forums. Should an appeal be filed, it is still necessary to incur the expense of transcribing the tape. But this system does cut support expenditures by thousands per annum for each forum.<sup>45</sup>

3. *Measures affecting input expenses of other participants.* Actually, the measures discussed thus far represent direct economies only for government. Alternative forums and other strategies which reduce costs for government are appealing to budget-conscious officials and may be expected to reduce delay by processing more cases at present levels of investment in the dispute resolution system.<sup>46</sup> But it is not government which in ordinary circumstances provides most of the input for the decision-making process. Rather, as observed earlier, it is the disputants who bear most of the burden and incur most of the costs. It is the common citizen who so often determines he simply cannot afford to participate in a third-party forum, either to prosecute or to defend a claim. Accordingly, it is only as input costs are lowered for disputants that dispute resolution becomes more accessible. And so, we now consider those relatively few measures which directly and intentionally benefit the disputant as opposed to government.

a. *Fixing limits on disputants' allowable expenditures.* It is apparent that most litigation costs borne by the parties constitute interdependent variables. If one disputant utilizes more expert personnel or invests larger sums in order to more thoroughly probe and analyze the underlying transaction, the other disputant, almost in self-defense, is compelled to obtain similar expertise and make similar investments. If he fails to do so, his

chances of prevailing in the decision-making phase presumably depreciate. Or in the somewhat different terms of our earlier discussion, his failure to match his opponent magnifies the risk he will be the victim of an error.<sup>47</sup>

When both contestants possess ample means and the controversy itself involves a subject matter with a substantial economic value, this mutually reinforcing escalation of litigation expenditures is no particular problem. In fact, it can prove healthy, producing a more precise and equitable decision at the end of the process. But if either disputant is of comparatively limited income, he is seriously threatened with being "out-investigated" by his more affluent opponent.<sup>48</sup> If he recognizes this probability before an action is commenced in the third party forum, he may well elect to surrender without even bothering to participate in that process. The most extreme, yet probably most common, example of this phenomenon is the impoverished individual confronted by an institutional opponent who throws up his hands in resignation because of the awesome litigation power of his opponent, rather than either sue or defend against a suit.<sup>49</sup> Even if a less affluent disputant initially participates, he may be compelled to capitulate during the course of the proceeding, not necessarily because he has been unable to finance minimal (and possibly sufficient) preparation, but rather because he perceives himself as having been "out-prepared" by his wealthy adversary. Facing near certain defeat, it seems more sensible to compromise on even the most unfavorable terms.

When the subject matter of the dispute is itself of rather modest dimension, a new sort of problem arises. Even an affluent individual will be severely restricted in the funds he can reasonably commit to the case. He cannot afford to allocate a sum anywhere approaching the value in dispute for fear the fruits of any ultimate victory would be entirely eaten up by the litigation costs. Though this practical limitation affects every disputant to some extent, its application is far from uniform. Repetitive litigants, in general, and institutional ones, in particular, feel its consequences much less severely. In fact, the existence of this reality tends to operate to their advantage in any controversies against individual disputants. The reasons for this are manifold.<sup>50</sup> However, they tend to boil down to advantages borne of economies of scale and cost redistribution potential. That is, a repetitive disputant can afford to retain lawyers, investigators, etc. on a permanent basis, and follow other practices which will lower his litigation costs per dispute quite dramatically.<sup>51</sup> Possibly even more important, the repetitive litigant can "afford" to invest an otherwise uneconomic sum in any given dispute because that cost can be distributed among the hundreds or thousands of other cases in which that willingness and ability force the

opponent to capitulate before any significant financial commitment has been made.<sup>52</sup> The power to redistribute cost becomes the power to intimidate the opposition.

For purposes of the present discussion, these differentials in financial means, economies of scale, and cost redistribution capacity assume importance because they impair the eligibility determination process. Many disputants are denied access entirely and others suffer inappropriate defeat, not because they lack the resources necessary to a minimally adequate fact investigation, but for lack of enough to match an advantaged opponent (generally, either a wealthy or repetitive litigant).

One cure for these common disparities is to reallocate the burden of expense, a possibility to be considered in Chapter Eight.<sup>53</sup> But a more direct approach is to forbid expenditures by either disputant beyond a level which might disadvantage the other. It is roughly analogous to the rationing of commodities. The greater purchasing power of the wealthy is nullified by limiting the quantity they are allowed to buy, generally the same amount which the common citizen can afford even with his relatively limited resources.

There are at least two methods of imposing a limitation on the parties' litigation investment. One is a strict quantitative quota. For example: "No disputant may allocate, directly or indirectly, more than 'X' dollars to any individual dispute in this forum (or of this particular type, or in which the value of the subject matter is less than 'Y' dollars, etc.)." A quantitative restriction might also be expressed as a percentage of the amount in controversy. "No disputant may allocate directly or indirectly, more than 'X' percent of the amount in controversy to any individual dispute in this forum." Or to neutralize *some* (but only some) of the advantages enjoyed by institutional litigants, the test could be phrased in units of input rather than monetary terms. "No disputant may allocate, directly or indirectly, more than 'X' attorney hours to any individual dispute in this court."

Whether because of problems of definition and enforcement or otherwise, we have been unable to uncover any forums where *quantitative* restrictions have actually been imposed on litigation expenses in civil cases.<sup>54</sup> Generally for other reasons, some jurisdictions have imposed a form of quantitative limitation on expenditures for representation in certain cases (generally consisting of ceilings on the fees which government will pay to a lawyer for defending a criminal case).<sup>55</sup> However, these quantitative restrictions usually only apply to one of the two disputants, the one depending upon a government subsidy, and thus may impair the equity of the decision-making process.

However, a number of countries have established another sort of limitation in civil cases which has the

same underlying purpose. It is in the nature of a *qualitative* ban, prohibiting any disputant from employing certain types of professional assistance. As might be expected, the most common is a ban against lawyers. Among the forums in which lawyers are excluded are small claims courts in certain jurisdictions in the United States,<sup>56</sup> Houses of Equity in Iran,<sup>57</sup> Polish Community Conciliation Committees,<sup>58</sup> and Swedish Public Complaint Boards.<sup>59</sup> It should be highlighted that not all of these forums prohibit lawyers from participating in the pre-trial phases—fact investigation/rule ascertainment, etc. Yet by barring them from the presentation stage, where they ordinarily enjoy a monopoly in the regular courts, the practical effect is probably nearly the same: for the most part, these high-priced professionals are not available to either side at any time during the process.<sup>60</sup>

More sophisticated qualitative limitations have been proposed occasionally and still others are theoretical possibilities. Recognizing that the ban against lawyer participation has merely motivated institutional litigants to develop their own cadres of middle management advocacy specialists in some jurisdictions,<sup>61</sup> it may be reasonable to contemplate extending the prohibition beyond lawyers to other forms of litigation assistance.<sup>62</sup> The ultimate aim apparently is to leave each disputant naked in the dispute resolution process, stripped of any outside resources or assistance. Given inherent disparities in intelligence, education, and sophistication, whether this would lead to sound and equitable decisions may be debatable. An illiterate, low income disputant is unlikely to be a match for a college-educated, middle class individual, even if both are making their first court appearance.

A more promising alternative appears to be an affirmative provision, simultaneously limiting both disputants to assistance from "lay advocates" and providing such assistance at government expense to those unable to afford their own. The operational procedure most nearly approximating this approach is the Harlem neighborhood court, actually a branch of the New York small claims arbitration system. This pilot project employs so-called "consumer advocates." These para-professionals are available at no cost to any litigant who desires help in preparing his case for presentation before the volunteer arbitrator or the professional judge. Their services, however, do not extend to the hearing itself—probably because of the statutory provisions controlling all small claims proceedings. At that point, both disputants must represent themselves.<sup>63</sup> In effect, the Harlem neighborhood court's consumer advocates provide government-subsidized assistance to the unsophisticated disputant in the pre-trial phase—fact investigation, criteria ascertainment, etc., but not at the decision-making phase. Yet

this arrangement is not far from what might be called a "second-tier forum" in which only less expensive, less trained advocates could appear and where such advocates were made available at government expense to all those needing them.<sup>64</sup>

b. *Reducing disputants' need to expend.* There is another approach which government can employ to lower input costs for disputants. If the proceedings are simplified sufficiently, it may become feasible for a common citizen to represent himself and thus avoid the expense of professional assistance. (Whether the rules can be adjusted to the degree that an unrepresented disputant will be on a par with a "carefully-counseled adversary" <sup>65</sup> is a related and difficult question. Possibly only a ban on professional assistance coupled with the simplification of the process can achieve that objective.<sup>66</sup> In any event, it is not surprising to find many of the institutions and procedures which aspire to improve the decision-making process stripping away many of the complexities, technicalities, and formalities of traditional judicial procedure. These measures include:

(1) *Simplification or elimination of written pleadings.* The New York small claims arbitration system probably has carried simplification of written pleadings further than any. The plaintiff initiates the suit by filling out a postcard "complaint" in his own words. A carbon copy remains with the court, but the postcard itself is mailed to the defendant who writes his "answer" in some free space on the card and returns it.<sup>67</sup> Other jurisdictions have surpassed New York, however, by replacing written pleadings entirely with oral declarations.<sup>68</sup>

(2) *Elimination of limitations on methods of proof.* Probably nothing mystifies the layman more than complex and technical rules of evidence. Prohibitions against hearsay, authentic (but unauthenticated) documents, and the rest of the rules of evidence may be based on sound policies and valid psychological principles. But for a non-lawyer, these provisions are impossible to comprehend or manipulate. And in disputes where the stakes are not high, more injustice may be nullified by the existence of such rules (and the consequent expensiveness of participation) than litigants could possibly suffer because of their absence. Certainly many decision-making forums which cater to small and modest claims have officially abandoned or loosened the traditional evidentiary constraints.

A rather advanced example of this approach is provided by the Swedish Public Complaint Boards. Decisions in such forums frequently are based upon reports of testimony obtained through correspondence and telephone conversations.<sup>69</sup> Acceptance of such evidence obviously should tend to lower the costs of fact investiga-

tion as well as simplifying the presentation of the matter to the decision-maker. But since investigation and presentation are conducted by staff of the Board, these economies benefit primarily the government rather than directly lowering the participating costs for disputants.<sup>70</sup> But the same principle is operative in the relaxed evidentiary rules used by some small claims courts<sup>71</sup> and compulsory arbitration programs<sup>72</sup> in the United States.

(3) *Simplification of the sources and content of criteria.* Some forums explicitly substitute common notions of fair play and justice for the usual sources of criteria: statutes, treatises, prior court decisions, and the like.<sup>73</sup> This reduces the need for and one of the advantages enjoyed by professional advocates who are steeped in the criteria (that is, the substantive law) used in the formal courts. It should be noted, this shift from relatively specific criteria to a more generalized version presumably also diminishes the uniformity and precision of decisions rendered in the alternative forum.<sup>74</sup>

(4) *Deformalization of the presentation phase.* Some forums likewise officially dispense with many of the motions, the special etiquette, and other formalities which characterize judicial hearings, and typically are known only to the professional advocates who regularly appear before such tribunals.<sup>75</sup> The effect is to make laymen comfortable in an alien, often intimidating setting, and to curtail the professional's advantage, if not eliminate his role.<sup>76</sup>

In the context of traffic offenses, West Germany has carried this principle one step further by eliminating the need for an oral hearing entirely. A defendant can contest a charge merely by writing his own version of the incident on the document containing the arresting officer's accusation and then mailing it to the authorities.<sup>77</sup> The two versions are weighed and a decision rendered without any verbal testimony being taken. Only if defendant is dissatisfied with this disposition is a hearing scheduled.<sup>78</sup> To the extent the professional advocate's advantage is more pronounced in an oral proceeding, this procedure should reduce the need to incur the expense of employing a lawyer. Moreover, by dispensing with an oral hearing in a substantial percentage of contested cases, the defendant's other transaction and opportunity costs should be diminished as well. He need not travel to a courthouse, or lose time from his employment, etc.

Although this procedure presently operates in a certain type of criminal case, it also appears adaptable to many civil disputes. There is nothing inherent in the approach that restricts it to traffic cases. The procedure becomes useful, however, in disputes in which the factual issues are more complex and especially where some of the important evidence is not in the possession of the disputants themselves. It also is not a satisfactory ap-

proach if one of the disputants is unable to communicate effectively through the written word.

## B. Measures Which Increase the Productivity of the Eligibility Determination Process

Though most attention appears to have focused on "input" factors, it is possible to detect certain measures which have the effect of enhancing the efficiency of the decision-making forum. To use other terminology, these measures seek to increase the forum's productivity, the output of decisions rendered per unit of time invested (or often to substitute a new, more productive forum for an existing one).

1. *Examples of measures enhancing decision-making productivity.* In general, these measures fall within one of three categories: Measures upgrading the expertise of the decision-makers; measures simplifying the criteria which must be satisfied; and measures simplifying the decision-making procedures themselves.

a. *Upgrading the decision-maker's expertise.* There is a presumption, though frequently difficult to confirm, that decision-makers who come to a dispute with some expertise in the subject matter will be able to arrive at better (or at least equivalent) decisions in a shorter time than their amateur colleagues. Subject matter expertise can be engendered by:

(a) distributing disputes of different types among special panels composed of decision-makers already expert in the relevant field. The closest analogs appear to be certain specialized administrative tribunals<sup>79</sup> and arbitration panels, the latter chosen by the disputants themselves because of their subject matter expertise.<sup>80</sup>

(b) training decision-makers in the subject matter of typical categories of disputes.<sup>81</sup>

(c) assigning subject matter experts to interpret facts and otherwise assist decision-makers in specific categories of disputes.<sup>82</sup>

(d) utilizing computers, programmed with the relevant criteria and technical background, to analyze the pleadings and evidence and identify the issues for the decision-making panel. As yet, only a theoretical possibility, this measure does have some analogs. In recent provocative experiments, computers have been programmed to prepare testamentary wills and divorce pleadings for the clients of lawyers.<sup>83</sup>

None of these approaches to greater decision-making productivity are in widespread use and only (a) and (d) appear calculated to enhance output appreciably. In the case of (a), the distribution of disputes among expert panels, the relative cost-effectiveness will hinge on

whether the productivity gains yielded by the expertise of the panels exceed the several possible costs of the distribution mechanism itself. The latter will always include an administrative surcharge caused by the added expense of screening and assigning disputes to appropriate forums. There also may be additional costs because of an incidence of erroneous assignments, slack decision-making resources in certain specialties, and bottlenecks in others, etc.<sup>84</sup> The computerization of the decision-making phase, like the computerization of the rest of the dispute resolution process, is difficult to assess without a heavy investment in experimental applications.<sup>85</sup>

b. *Simplifying the criteria which must be satisfied.* Chapter V was devoted exclusively to an evaluation of measures which seek to simplify eligibility criteria. For now it is sufficient to highlight that, among the many effects of criteria simplification, increased decision-making productivity may be one. With fewer issues to be considered in order to decide whether the moving party is eligible for third party intervention, it is probable that evidence can be taken and a decision rendered in a shorter period of time.<sup>86</sup> As a result, costs per dispute should diminish both for the government and the disputants. Delay may be diminished, and dispute resolution should become more accessible in the category of cases to which criteria simplification applies.

c. *Simplifying the decision-making process itself.* We already have discussed simplification of decision-making procedures in the context of its implications for input costs, specifically curtailing the need for professional assistance.<sup>87</sup> Certain of those measures may simultaneously enhance the decision-maker's productivity by shortening the time required to hear and decide the average dispute. For instance, elimination of wrangles over the admissibility of certain items of proof could frequently expedite many trials. On the other hand, it also is possible to imagine these measures sometimes operating to lengthen hearings even while making the system more accessible. Merely to reverse the above example, the absence of any evidentiary constraints could mean the decision-making panel would be subjected to an endless parade of minimally relevant testimony.

There remain, however, other measures in which the effect on decision-making productivity is more predictable. They endeavor to enhance output by:

• *Motivating disputants to confine the dispute to the minimum number of issues.* Beyond the traditional and often complex method requiring detailed pleadings, admissions, motions, summary judgments, etc.,<sup>88</sup> there are some subtler possibilities. Costs could be allocated on an issue-by-issue basis, with the financial burden associated with hearing and deciding a given point falling on the

disputant who "erroneously" disputed that particular issue. (Obviously, the financial disincentive could be framed as a penalty bearing no necessary relationship to the cost of hearing or deciding the issue, but with the accounting still accomplished issue-by-issue.)<sup>89</sup> In a less punitive, but more speculative approach, the disputants could be required to submit "offers of proof" and documentary evidence to a specially programmed computer. The computer, in turn, would identify the issues actually in dispute both for the parties and the decision-making forum. Hence, the hearing could be confined to a highly-refined agenda.<sup>90</sup>

• *Encouraging less time-consuming and cumbersome methods of proof.* A step beyond the elimination of evidentiary constraints, this measure provides positive reinforcement to disputants who prove facts through the most expeditious means available. The Philadelphia compulsory arbitration program illustrates this approach in its encouragement of simple medical records to establish the extent of injury in contrast to the hours of expensive expert testimony ordinarily offered to establish the very same ultimate fact in a formal judicial proceeding.<sup>91</sup> Though the Philadelphia program apparently relies on group pressures to encourage expeditious modes of proof, it is not difficult to construct more palpable incentives (or for that matter, disincentives). Thus, a financial reward could be granted to disputants utilizing a specified, time-saving form of evidence. (Clearly, the amount of this bonus would have to be substantially less than the average cost of proving this same element through alternative and less-favored means.) Conversely, financial penalties could be imposed on those using the less-favored mode of proof at least when less time-consuming evidence was available to support the same factual element. These financial penalties could be easily characterized as "license fees" for those disputants wishing to occupy the decision-maker's time with expensive modes of proof when cheaper, though possibly less dramatic, forums were available.

• *Discouraging time-consuming methods of presentation.* A typical decision-making hearing is taken up with more than the straightforward presentation of evidence. An average jury trial expends hours on opening and closing statements, histrionic asides during the course of the submission of evidence, and the like. All in all, the attempt to woo the emotions of the decision-maker occupies a substantial percentage of the time of many decision-making hearings. Outside of outright bans on such appeals (an approach which seldom succeeds entirely anyway), the only real inhibition of this sort of time-consuming, expense-producing conduct is a decision-making forum comprised of persons not suscep-

tible to emotional argument. Testimony about the lawyer panels used in the Philadelphia compulsory arbitration program illustrates the significant savings experienced when emotional appeals become irrelevant or even counter-productive.<sup>92</sup> (At the same time, any such sav-

ings must be balanced against the very important values which may be served by juries and other decision-making forums whose composition entices advocates to attempt emotional persuasion.)



## NOTES—CHAPTER VI

1. See Chapter II, *supra*.

2. See pages 16–17, *supra*.

3. The Polish Social Conciliation Committees are a prime example of a dispute resolution mechanism whose purpose is to utilize community members as decision-makers to achieve social harmony and cooperation in the neighborhood in accordance with the ideals of socialist doctrine. SCC's in two towns in Poland were the subject of an empirical study prepared for the Access to Justice Project in Florence, Italy. See Kurczewski, Jacek and Frieske, Kazimierz, *The Social Conciliatory Committees in Poland*, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. The authors of this study have analyzed the concept of the SCC into three models: (1) the self-government in justice model (dealing with disputes voluntarily submitted by fellow community members), (2) the pre-trial diversion model (servicing both voluntary and assigned disputants, thus alleviating the burden on the official state judicial system, and (3) local social order agency model (aiding local agencies in preventing disputes and transgressions within communities).

It is particularly the first, self-government model to which we are alluding herein when we speak of decision-makers who are more in tune with the social values of the disputants. As the authors of the Polish Study note, no one model prevails, nor are the models devoid of tension in their relationships to each other. Yet the self-government model seems to be most inherent to the current functioning of the SCC's.

To summarize, we may say that the SCCs as presently operating show the influence of each of the three "models" we have been discussing. They do not conform entirely to any one model; rather they perform to greater or lesser degree, the social functions or goals behind all three models. However, considering both the legal principles and the actual practices of the SCC's, which stress the SCC's mediatory and arbitral dispute settlement functions, they come closest at present to fulfilling the self-government in justice model. Even so, certain modifications would be necessary if this model were to be completely realized. In particular, functions which involve *involuntary* compulsion—such as mandatory conciliation—would have to be done away with. As to the other two role models, pre-trial diversion and social order agency, they are fulfilled to a lesser degree (the former probably more than the latter) by the SCC's present operation. Moreover, the changes that would be required for their more complete fulfillment, which changes would de-emphasize mediatory and arbitral functions and emphasize mandatory and authoritative (conciliation or settlement) functions, could constitute fundamental alterations in the nature of the SCCs as an institution—especially as regards both the role of voluntariness and the autonomy of the SCCs from organs of the state administration. Moreover, the development of the SCCs in complete conformity with either of these models would ultimately duplicate already existing institutions.

The previous paragraph should make it clear that, as we suggested earlier, an overall answer to the future development question must refer to the tensions between the social function models presently influencing the SCCs. This is especially so since, as should now be evident and as we earlier hinted, there are fundamental incompatibilities between the models which would make it impossible for the SCCs to serve them all fully at once.

This by no means suggests that we will now advocate choos-

ing one model to the exclusion of the others as a blueprint for future development. It does mean that we advocate that modifications—by law or by practice—in the SCCs' operation be made only with an understanding of how they will affect the various social functions of the SCCs. And we suggest that this is particularly important where the change might affect the capacity of the SCC to fulfill the self-government in justice model. For it is this social function which the SCCs are *uniquely* suited to perform. And, arguably, it is this model which has been affirmed by the Polish public in their positive assessment of the SCCs—since the present functioning of the SCCs (which was so assessed) corresponds much more closely to this model than to either of the others.

*Id.* at 289–91.

4. This problem has been spoken of as a "double bond," i.e., as "consumption costs" to the user of the system decrease, the "production costs" of the system increase. This phenomenon has been illustrated in an analysis of transactional costs of two antipoverty programs in California, with special emphasis on the categories of scale, location, routine, decision-making, personnel and clientele. L. Wechsler and R. Warren, *Consumption Costs and Production Costs in the Provision of Antipoverty Goods* at 18–21 (Mimeo, American Political Science Association, 1970).

5. For a clear picture of the complex psychological factors involved in resolving certain types of disputes, see the analysis of a mediation in a collective bargaining dispute in Fuller, *Mediation—Its Forms and Functions*, 44 SO. CAL. L. REV. 305, 312–325 (1971). Fuller shows how a skillful mediator can probe both sides, bring about mutual trust and cooperation, and make the parties recognize certain features of their relationship, such as, for example, that a continuing relationship requires that each side not take all it can get from the other now, but rather learn to give and take on the right points to effect a working agreement.

Complexities which consume large quantities of time during resolution are especially evident in family disputes. In the marriage context, the movement towards court-connected conciliation demonstrates a belief that parties other than judges can effectively deal with these problems, in less time perhaps and certainly at smaller salaries. See e.g., Foster and Freed, *Divorce Reform: Brakes on Breakdown?*, 13 J. FAMILY LAW 433 (1973–74).

In the juvenile context, even the judges themselves have recognized that parent-child disputes are complex and require more time than the court can spend on them. Suggestions have been made and programs implemented for turning some of these disputes over to the community, for resolution at less cost and perhaps with greater effectiveness. See Bazelon, *Beyond Control of the Juvenile Court*, 21 JUVENILE COURT JUDGES JOURNAL 42 (Summer 1970).

Statsky, *Community Courts: Decentralizing Juvenile Jurisprudence*, 3 CAPITAL U. L. REV. 1 (1974).

The "moot," a community discussion in which friends and relatives of the disputants meet together to help resolve disputes, has long been used in primitive societies. See Gibbs, *The Kpelle Moot*, in P. BOHANNON (ed.), *LAW AND WARFARE* (1967). One scholar has suggested that this type of mechanism could fruitfully be introduced into the United States as an adjunct to the criminal justice system. Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

6. The Front for National Unity, the largest national political body in Poland, brings together all active political and social interests in the country and thus is perhaps the most appropriate body to develop the SCCs. Its purpose is to pursue goals which satisfy interests common to all groups of society within the socialist socio-economic framework.

The local committees of the FNU bear a large measure of responsibility for the creation of a Social Conciliation Committee. In order for an SCC to be established, the local committee must officially propose to the lowest self-governmental administrative body of the territory under consideration that an SCC is needed. In order to ascertain the extent of this need, the local committee of the FNU holds citizens' meetings and gathers records of numbers and types of disputes brought to the police, the courts, and other agencies. The popular front's local committees also bear responsibility for nominating and selecting the citizens to serve as SCC members. Kurczewski, Jacek, and Freiske, Kazimierz, the Social Conciliatory Committees in Poland, unpublished special report prepared for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

7. The list of candidates promulgated by the local committee of the FNU is constituted of members of the Communist party, as well as of other parties (agrarian, democratic), groups (e.g., cultural catholic organizations) and unaffiliated persons. The local committee looks for people with certain crucial qualities, such as being known and held in high regard in the area, other experience in social activity and no court record. Candidates must be at least 26 years old, and factors such as tact, patience, and ability to persuade others are frequently considered. Since the position is uncompensated except for minor expenses such as travel, it is also important to find people who are not overly committed to other social activities. Kurczewski, Jacek, and Frieske, Kazimierz, The Social Conciliatory Committees in Poland, unpublished special report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

8. See Chapter II, Note 47.

9. In Sri Lanka board members are lay citizens appointed by the Ministry of Justice. The Chairman of the Board, who exercises significant influence over the Board's activities and techniques is typically of such standing as a retired teacher or local dignitary. Response to Questionnaire for Dispute Resolution Policy Study by Dr. Neelan Tiruchelvam, 1976, on file at the University of Southern California, Social Science Research Institute.

10. For a description of the informal nature of the oral proceedings of the Conciliation Boards, see Chapter II, Note 48. Note also that evidence is not given under oath.

11. Although the Boards function independently of the courts, there are nevertheless significant interrelationships. The Boards are a compulsory first step in initiation of the court process; also, settlements achieved by the Boards are enforced through the courts. See Chapter II, Note 48, *supra*. The mandatory nature of the Boards enables them to divert approximately 15,000-20,000 cases per year from the courts. Response to Questionnaire for Dispute Resolution Policy Study by Mr. R.K.W. Goonasekere, on file at the University of Southern California, Social Science Research Institute.

12. Arbitrators are selected from among outstanding lawyers in the expectation that they will be able arbitrators. Each one must participate in an orientation seminar conducted by the administrative judge of the civil court in order to qualify for this voluntary job and to be sworn in. See Civil Court of the City of New York, Manual, Small Claims Part (1973).

13. When litigants appear for their hearing, they are advised of their right to have the case tried before a judge or an arbitrator and are told that no appeal is available from the arbitrators' decision. Both litigants must sign a consent form for trial before an arbitrator. Officially, the choice is purely voluntary. In practice, however, the circumstances provide subtle pressures towards selection of an arbitrator; since several

arbitrators are on hand each evening, those cases may be heard more quickly, and as the hour gets later, the litigants begin to realize that they may have to wait until midnight to see the judge. About 80% of the litigants usually agree to arbitrate. Determan, *The Arbitration of Small Claims*, 10 FORUM 831, 833 (1974).

14. Small claims sessions are held in the evenings, usually beginning around 6:30 p.m. and often lasting until midnight. This affords litigants the opportunity to pursue their claims during non-working hours. Sessions are usually convened three or four nights a week in each county of New York and in East Harlem once a week. Only the Harlem branch is effectively a neighborhood court; litigants must travel considerably to reach the other courts, even if located in their county.

The arbitration procedure is especially informal, with the arbitrator and litigants sitting together around one table. Both at trial and before an arbitrator, the ordinary rules of evidence do not apply. See Civil Court of the City of New York, Manual, Small Claims Part (1973).

15. *Id.*

16. In New York, for example, 800 attorneys serve as arbitrators and hear about 25,000 cases per annum. Civil Court of the City of New York, Manual, Small Claims Part at 9 (1973). Simple calculations reveal that each attorney therefore averages just over 30 cases per year, which probably means that he spends only a few evenings each year conducting arbitrations.

17. See page 18, *supra*.

18. The lawyer arbitrators in New York begin with the advantage of a three year legal education, are chosen because of their reputed ability, and participate in a special orientation seminar before commencing their duties.

19. See page 19, *supra*.

20. In 1970, the federal government's 650 administrative hearing officers were paid a salary of \$25,044 to \$31,724. At this same time, federal district court judges (who preside over trials) were earning \$40,000. K.C. DAVIS, ADMINISTRATIVE LAW TEXT 220 (3rd ed. 1972).

21. Some statistics from the U.S. are revealing. In 1962-63, on the federal level, 7,095 civil trials were held in district courts. That same year 81,469 cases were disposed of by federal agencies after an oral hearing; millions more were disposed of informally. *Id.* at 4. By 1957 review of decisions of administrative agencies constituted almost 1/3 of the total U.S. Supreme Court cases decided upon the merits. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1957).

22. The trend may be illustrated by some California statistics. Each year for 20 years the number of justice courts has declined. In 1952-53 there were 349 justice courts; in 1974-75 there were 199 justice courts (200 justice court judges). Only 42 percent of the judges in these 199 courts were attorneys. CALIFORNIA JUDICIAL COUNCIL, 1976 ANN. REP. 133 (1976).

23. In performing its two basic functions of giving advice or information and conducting conciliation procedures, the ORA goes beyond the purely legal. It provides advice in about 60,000 cases a year, often in the areas of tenancy, labor, domestic relations, social insurance, and numerous others. A special "Confidential Unit for Engaged and Married Couples," staffed with doctors, psychologists, social workers, and clergymen as well as lawyers, provides advice regarding all aspects of the relationship. Aside from its informal conciliation services, the ORA is also statutorily authorized to perform formal voluntary conciliation for persons of all economic levels. Its orders are enforceable. The ORA is also a settlement authority before which private criminal complaints are compulsorily brought for conciliation attempts prior to court suit. Bender, Rolf, and Strecker, Christoph, National Report for Federal Republic of West Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

24. While there are only about 10 full-time staff members, almost 250 part-time staff members participate in carrying out the functions of the ORA. They include 93 presiding officers (including 64 judges), 11 attorneys, 5 administrative attorneys, and 3 district attorneys. It is interesting to note in this regard that although the set legal counseling fee is only 6 DM, the ORA pays half of its own expenses from the income collected in fees. Bender, Rolf, and Strecker, Christoph, National Report for Federal Republic of Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

25. Staff members, bound to secrecy and manifesting impartiality, approach the complained of party in an attempt to reach a friendly settlement of the opposing interests rather than as an adversary. In fact, the mediators may not subsequently represent the complainants in court if the case should proceed to that stage. During this process, the mediators have no power of compulsion to wield; they merely endeavor to persuade the parties to agree. The situation is very different when the ORA is acting as a conciliation court, in which case the ORA, still acting in its neutral capacity may promulgate enforceable orders. Bender, Rolf, and Strecker, Christoph, National Report for Federal Republic of Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

26. Rosenberg and Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961).

27. When any case up to \$10,000 is filed, it is automatically placed on an arbitration list and after the attorneys file a Certificate of Readiness the case is assigned to a three-person panel of attorney arbitrators. The chairman sets a convenient time and location for the hearing, the arbitrators hear both sides of the case, take evidence and ask any questions they wish answered. Consciously or subconsciously the arbitrators may even attempt to find out the limits of acceptable solution on both sides, in order to achieve a mutually acceptable resolution and avoid appeal of their decision. The arbitrator's decision may be appealed if either party requests a trial *de novo* within 20 days of the filing of the award. In order to appeal, the appellant must reimburse the county for the arbitrators' fees. See E. JOHNSON, JR., V. KANTOR AND E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES at Chapter Five (1977).

28. The arbitrators' fees which are paid by the county unless one party appeals the decision consist of \$50 per case for the chairman and \$30 each per case for the other two arbitrators. Since there are at least 3,000 arbitrators, each one hears only three or four cases a year. Based on interview with Judge Stanley Greenberg, Court Administrator for the Philadelphia Court of Common Pleas in Philadelphia, Pennsylvania, October 31, 1973.

29. It has been estimated that the Philadelphia arbitration program saved between half-a-million and a million dollars a year. See E. JOHNSON, JR., V. KANTOR AND E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES at Chapter Five (1977). The California voluntary arbitration program saved \$100 to \$200 per case. See CALIFORNIA JUDICIAL COUNCIL, A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS 32 (1972).

The savings flow from numerous sources. An arbitration hearing lasts on the average only a few hours, compared to the several days of jury trial required for a personal injury case. This saves money to the court in salaries of its personnel, as well as to the parties in their litigation costs.

These court-annexed arbitration programs have also allowed reduction in calendar backlogs not only in the courts where the arbitration takes place, but in higher levels of the court also, because judges were shifted to hear those cases.

Other savings flow to parties from reduced need for witnesses and

extensive discovery, and from the shorter amount of attorney preparation time required for an arbitration than an adjudicated case. See *id.*

30. Although the Administrative Procedure Act, 5 U.S.C. §§ 500-576 sets minimum procedural requirements, each agency generally promulgates its own rules; thus procedures are not uniform from agency to agency. An administrative hearing differs from a trial. Pleadings are relatively unimportant; their main function is just to let the other side know his opponent's position. Discovery systems are generally inadequate; some agencies have the power to subpoena witnesses or documents, while other do not. The Administrative Procedures Act provides for right to counsel, although this is not always followed. The right to a jury trial does not apply.

A hearing embodies trial-type techniques (presentation of evidence, confrontation of witnesses, etc.) when there are issues of fact to be resolved. When there are other than factual issues to resolve, the hearing is more like an argument. Administrative agencies also rely to a large extent on informal methods of complaint resolution. For a more complete description of U.S. administrative law see B. SCHWARTZ, ADMINISTRATIVE LAW (1976); K.C. DAVIS, ADMINISTRATIVE LAW TEXT (3d. ed. 1972); P. NONET, ADMINISTRATIVE JUSTICE (1969); P. WOLL, ADMINISTRATIVE LAW: THE INFORMAL PROCESS (1974).

31. There are between 1000 and 2000 tribunals in England and Wales. R.W. VICK AND C.F. SCHOOLBRED, THE ADMINISTRATION OF CIVIL JUSTICE IN ENGLAND AND WALES 209 (1968).

The growth of cases handled by administrative tribunals is evident from the following statistics: in 1960, 118,653 cases were resolved by the tribunals, in 1970, 1,118,132, and in 1973, 1,354,324 cases. See ENGLAND AND WALES, Chapter in A COMPARATIVE ANALYSIS OF THE STATISTICAL DIMENSIONS OF THE JUDICIAL SYSTEMS (AND RELATED INSTITUTIONS) OF SIX INDUSTRIAL DEMOCRACIES, Table 2-5. For background on the growth and functioning of the administrative tribunals see generally, VICK AND SCHOOLBRED, *supra* this note at 202-44; N. VANDYK, TRIBUNALS AND INQUIRIES (1965); R.E. WRAITH AND P.G. HUTCHESSON, ADMINISTRATIVE TRIBUNALS (1973).

32. See WRAITH AND HUTCHESSON, *supra* note 31 at 103-105 for a description of tribunal membership. Generally professional bodies are consulted for names of experts in their particular field. For example, doctors' names may be suggested by the Royal Colleges, medical faculties of universities, or hospital authorities. *Id.* at 104.

33. Any party to a tribunal proceeding has the right to an appeal on a point of law. He may either appeal to the High Court or require the tribunal to state the case for an opinion from the High Court. If the tribunal refuses to state the case the appellant may directly petition the High Court to force the tribunal to state the case. See VICK AND SCHOOLBRED, *supra* note 31 at 239-41.

34. The rent tribunals, for e.g., deal with adversary proceedings between landlords and tenants, either to establish a fair rent, to reduce the period of secured tenure of a tenant who is guilty of certain acts, or related types of problems. See VICK AND SCHOOLBRED, *supra* note 31 at 213-15.

35. In 1973 the number of cases disposed of by the administrative tribunals was greater than two-thirds the number of civil cases processed in the courts. See A COMPARATIVE ANALYSIS OF THE STATISTICAL DIMENSIONS OF THE JUDICIAL SYSTEMS (AND RELATED INSTITUTIONS) OF SIX INDUSTRIAL DEMOCRACIES (Chapter 8).

36. See Hanson and Walles, *Delegated Legislation and Administrative Tribunals*, GOVERNING BRITAIN (1975); see also Cavanaugh and Hawker, *Laymen on Administrative Tribunals*, 52 PUBLIC ADMINISTRATION (LONDON) 209 (1974).

37. See pages 57-59, *supra*.

38. Plaintiffs' lawyers have indicated it is worth their time to serve despite the small remuneration because they derive economic benefit from having so many of their own cases arbitrated rather than adjudicated in court. Not only does arbitration accelerate the disposition of the case (and thus the receipt of the lawyer's fee) but it often increases his profit margin. This follows because plaintiffs' lawyers' contingent fees are a fixed percentage of the award regardless of which technique is used, and arbitration requires less effort than court adjudication. The defense bar does not receive as great an economic benefit because they are usually paid hourly by their insurance company clients rather than per case. Yet they have actively accepted the economic sacrifice involved and joined the list of arbitrators, in order to protect their clients from facing an arbitration panel composed almost entirely of plaintiffs' attorneys. E. JOHNSON, JR., V. KANTOR, AND E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* at Chapter Five (1977).

39. Even the rather opulent courtrooms can serve an important symbolic and psychological function, enhancing compliance with the decision of the forum, the reliability of testimony, etc.

40. See page 59 *supra*.

41. See page 59 *supra*.

42. The Hamburg ORA services the city of two million inhabitants with a main office and 26 branches scattered throughout the city. The main office is open from 8:00 a.m. to 2:30 p.m. The branches are open in the early evenings, once or twice a week, to enable utilization at business off-hours. Bender, Rolf and Strecker, Christoph, National Report for Federal Republic of Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

43. See note 39 *supra*.

44. The Philadelphia Compulsory Arbitration Program is staffed by one judge who spends at least half his time in the arbitration program, one administrator, two administrative clerks, and one data processor. The program regularly uses one hour of computer time daily. FALL, A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS 33 (1972).

45. Parties must pay for a transaction of the recording if they wish to have one, but those litigants who wish only listen to the tapes may do so free of charge.

46. See E. JOHNSON, JR., V. KANTOR, AND E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION IN CIVIL CASES* at Chapter One (1977).

47. See Wenger and Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. HEALTH and SOC. BEHAVIOR 66 (1969); RUBIN, *CONSUMERS AND COURTS* (1971).

48. In this context, "comparatively limited income" has two dimensions: first, limited in comparison with the total resources possessed by the opposing disputant and, second, limited in comparison with the maximum sum the opponent might reasonably invest in this particular dispute.

49. See D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* (1974).

50. Many of these are catalogued in Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOC'Y REV. 95 (1974).

51. See, for instance, the factor highlighted by Professor Galanter: . . . RP's (Repeat Players) may enjoy access to competent paraprofessional help that is unavailable to OS's (One-Shotters). Thus, the insurance company can, by employing adjusters, obtain competent and experienced help in routine negotiations without having to resort to expensive professionally qualified personnel.

*Id.* at 98.

52. For a discussion of the reasons an institutional litigant can afford

to appeal adverse legal rulings even in minor disputes where an individual could not justify a like expenditure were the ruling to have been unfavorable to him, see M. CAPPELLETTI, J. GORDLEY, AND E. JOHNSON, JR., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1975), 184-195. Similar considerations influence the initial investigation and decision-making phases.

53. See pages 81-84, *infra*.

54. Some countries, however, do limit the amount that lawyers can charge for certain types of cases. See note 37, Chapter Eight, *infra*, for discussion of the fee as a percentage of the amount in dispute.

55. As of 1965, in 35 states, the assigned counsel is paid from county or state funds; in four states he is paid only in capital cases; and in six states he is not paid at all. The majority of those states which do authorize payment limit the amount (from maximum of \$25-\$500 in noncapital cases). Many states do not even provide specifically for reimbursing the attorney for out-of-pocket expenditures. L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 16 (1965).

56. In at least five small claims court jurisdictions in the United States, lawyers are completely barred from representing litigants. They are California, Idaho, Nevada, Oregon and Washington. *Buyer v. Seller in Small Claims Court*, 1971 CONSUMER REPORTS 624, 629-31.

This exclusion has been found not to be a denial of due process rights of the litigants. Prudential Insurance Company of America v. Small Claims Court, 76 Cal. App. 2d 379, 173 P. 2d 38 (1946) (holding that barring attorneys from small claims court is not a denial of due process because on appeal a trial *de novo* is available in a regular court). See also *Mendoza v. Small Claims Court*, 49 Cal. 2d 668, 321 P. 2d 9 (1958), *reh. den.* February 26, 1958 (holding void an amendment to the California Code of Civil Procedure which granted jurisdiction to the small claims court over unlawful detainer actions, since the defendant might be deprived of his property (evicted), without a hearing at which he had the benefit of counsel and before a trial *de novo* could be had).

57. By 1970 there were 3000 Houses of Equity in Iran. These lay courts are composed of 3 regular and 2 alternative elected members who serve without compensation. Jurisdiction is generally limited to \$130 in financial matters and \$650 in movable property cases. See Bushehri and Baldwin, *The Administration of Justice by Laymen in Iran: A Report on Houses of Equity and Councils of Arbitration*, in INTERNATIONAL LEGAL CENTER/WORLD ASSOCIATION OF JUDGES, *COURT CONGESTION: SOME REMEDIAL APPROACHES* 70 (1971).

58. See Chapter II, Note 47, *supra*, describing certain aspects of the Polish SCC's. The conciliation Committee itself plays an active role in questioning parties and calling in experts for advice. Kurczewski, Jacek, and Frieske, Kazimierz, *The Social Conciliatory Committees in Poland*, unpublished special report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

59. See Chapter II, Note 42, *supra*.

60. See Note 56, *supra*, this chapter, listing states which ban lawyers from appearing in Small Claims Court and discussing the limits of constitutionality of such bans.

An exception is found in England. Government subsidies are not allowed for representation before most administrative tribunals under the terms of the English legal aid program. Yet as part of its so-called "25 pound scheme," lawyers can provide legal advice and other services during the fact investigation/criteria ascertainment phase in preparing individuals to present their own cases before the tribunals. See Paterson, *Legal Aid as a Social Service* in M. CAPPELLETTI, J. GORDLEY, AND E. JOHNSON, JR., *supra* Note 25, at 353, 359 and Pollack, *Legal Aid as a Social Service—the Cobden Trust Report in id.* at 368, 374.

61. See Note 51, *supra*.

62. See E. JOHNSON, JR., V. KANTOR, AND E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION IN CIVIL CASES*, at Chapter Seven (1977) for a suggestion that repetitive litigants be barred from using the same non-lawyer to represent them more than a few times.

A non-lawyer handling litigation for an institution which is a frequent user of the forum, such as a credit company or a landlord, can become quite proficient in the techniques and potentialities of the particular forum, so that by his sixth or seventh, let alone his hundredth, piece of litigation, his competence in that forum closely approximates that of a lawyer. See also Moulton, *The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Court of California*, 21 STAN. L. REV. 1657, 1662 (1969):

The agent of a business that frequently resorts to small claims court to collect delinquent accounts will quickly become familiar with the procedure of the small claims court and with the relevant law governing the types of cases he usually handles. *Repeated participation in small claims court is a form of legal education.* (Emphasis added.)

63. See N. Blumenfeld, *Small Claims Court and the Low Income Consumer* (Masters Thesis, Queens College, City University of New York, August, 1972).

64. See E. JOHNSON, JR. V. KANTOR, AND E. SCHWARTZ, *supra* note 62 at Chapter VIII.

65. The United States Supreme Court has stated: "laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1974) (concerning access to legal representation primarily in civil matters.)

66. See page 62 *supra*. See also E. JOHNSON, JR., V. KANTOR AND E. SCHWARTZ, *supra* note 62 at Chapter Seven for a discussion of this issue.

67. The claimant or his representative appears at the Small Claims Office and files his complaint by giving basic relevant data to the clerk (including names and addresses, amount of claim, etc.), pays the \$3.18 fee and signs the card on which the clerk has written the relevant information. The hearing date is set, the claimant receives a notice of claim and need not return until the date of the hearing. The clerk then sends the card to the defendant telling him to appear alone or with any witnesses or evidence in defense of this claim. Civil Court of the City of New York, Manual, Small Claims Part (1973).

68. For example, the ombudsman offices operating at the state level in Hawaii, Iowa and Nebraska receive oral complaints about government agencies from their citizenry. Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L. REV. 397, 422 (1975). In fact, even the investigations carried out by the ombudsmen are often done by telephone.

Other complaint mechanisms operate through oral complaints also. Examples are the business-sponsored consumer complaint mechanisms such as Whirlpool's "Cool Line," Westinghouse Electric's "Sure Service," and others. See NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STAFF STUDIES ON BUSINESS SPONSORED MECHANISMS FOR REDRESS AND ARBITRATION (n.d.)

69. Martin Eisenstein, *The Swedish Public Complaints Board: The Keystone to a System of Consumer Protection*, a special report prepared for the Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

70. The issue may be affected, however, by whether the decision-maker hears all evidence and then merely applies the rules to screen out inadmissible items before reaching a decision. At least the non-lawyer can present his case without a befuddling bombardment of objections.

71. The presentation of evidence in small claims courts is informal. While it is necessary for a litigant to bring receipts, cancelled checks and the like, the formalities of its introduction do not pertain. Ideally,

the judge plays a more active role in eliciting necessary information, with the parties either just "telling their story" or responding to the judge's questioning. Litigants may generally bring witnesses along, but there is no formal cross-examination procedure, with its consequent impeachment techniques. This informal type of procedure rests much of the responsibility for balancing the disputants' positions upon the judge; a passive judge who merely lets each side tell his story may be granting the advantage to a party who has more know-how about what information is crucial to the case. See Moulton, *The Persecution and Intimidation of the Low-Income as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1667 (1969). But an active judge may take testimony out of court, informally visit a scene relating to a dispute, examine evidence outside the presence of the parties and take other actions amounting to a suspension of the rules of evidence. See *id.* at 1665. By doing so, a judge can theoretically balance any inequity in the parties' understanding.

72. Among the various court-connected arbitration plans in existence, the general trend is that rules of evidence apply, but in a related manner. For example, in the Philadelphia Compulsory Arbitration Plan, certain types of reports (police, salary loss) are admissible without a foundation establishing authenticity. Expert testimony must be in writing and submitted one week prior to the hearing. The rule of thumb is that rules of evidence should be "liberally construed" to promote the aims of justice. CALIFORNIA JUDICIAL CONFERENCE, *ROLE OF ARBITRATION IN THE JUDICIAL PROCESS* 30 (1972). In the Ohio Compulsory Arbitration Plan even more evidentiary restrictions are lifted; in fact, the rules of evidence do not even apply. Hearsay is admissible; bills paid for services are admissible without proof; testimony is narrative rather than as question and answer. *Id.* at 38-39.

73. See pages 50-51, *supra*.

74. See page 9 *supra*, and pages 50-51 *supra*.

75. For example, even the location where the tribunal meets may be deformed. Instead of taking place in a courtroom, with the judge sitting high up and in formal attire, the forum may meet in a more casual atmosphere. The Houses of Equity which are lay courts in Iran may meet in any appropriate public building, including the mosque, school or village hall. Bushehri and Baldwin, *The Administration of Justice by Laymen in Iran: A Report on Houses of Equity and Councils of Arbitration* in INTERNATIONAL LEGAL CENTER/WORLD ASSOCIATION OF JUDGES, *COURT CONGESTION* 70, 80 (1971). The Ombudsman in Tanzania used to make safaris to villages to hear cases and receive complaints. Norton, *Tanzanian Ombudsman*, 22 INT'L & COMP. L. Q. 603 (1973). The specialized housing court in Boston also journeys to local areas where it sets up and holds "court" sessions in surroundings which are accessible and familiar to the parties. Telephone conversation with Chief Housing Inspector, Boston Housing Court, January 6, 1977.

76. The concern for making laymen comfortable in the proceedings is especially manifest in the small claims court literature. Consider, for example, a bill introduced into the California legislature, A.B. 3606, 1975-76 Regular Session, calling for experimental small claims courts with revised procedures. Reforms included would be evening and Saturday sessions, mandatory Spanish interpreters, availability of a legal adviser, and the potential to change hearing times for the convenience of the parties. These changes would all tend to counteract the intimidating trappings of a court and make the parties unfamiliar with the court feel more comfortable.

77. Interview with Harald Von Kempfski, Ministry of Justice, Bonn, Germany, November 2, 1976.

78. *Id.*

79. For example, unemployment insurance boards, welfare and social security agencies, workman's compensation boards and numerous others exist in the United States. In Great Britain there are nearly 2000 of these specialized tribunals, dealing with agriculture problems, rent

79. (Cont.) disputes, health matters and a wide variety of other fields.

80. For example, the panel of three arbitrators in medical malpractice cases is composed of one attorney, one physician and one other person chosen by the parties from lists submitted to them. MICH. COMP. LAWS ANN. section 600-5044 (West 1976-77 Supp.). In this and other fields, lists of arbitrators with specialized backgrounds is often supplied by the American Arbitration Association.

In Sweden, the Public Complaints Board resolves consumer cases by mediation and sometimes by hearings intended to persuade settlements. Not only are the people who hear the cases representative of certain industries, but the entire complaints Board institution is set up according to specialties (e.g., shoes, appliances, etc.) See Eisenstein, *supra* note 69.

Other specialized courts in the U.S., such as housing courts, are also staffed with people having background in the particular industry, as in this case, in real estate, construction or a related field. See Comment, *The New York City Civil Housing Court: Consolidation of Old and New Remedies*, 47 ST. JOHNS L. REV. 483 (1973).

81. Another effective way of obtaining decisions by well-informed persons is to train them for a particular category of dispute. This has been used increasingly in community mediation and arbitration programs. For example, the American Arbitration Association has a full-time faculty which conducts training programs to prepare persons for conflict-resolution in a wide range of areas—including the housing, school, prison and civil rights fields. Other programs have trained youth as well as adults to become sensitive to the problems of parent-child disputes. See Statsky, *The Training of Community Judges: Rehabilitative Adjudication*, 4 COLUM. HUMAN RIGHTS L. REV. 401 (1972).

82. The Labour Courts in Israel utilize such a procedure. A panel of medical experts is appointed and paid by the court. The parties are saved the expense of production of medical evidence; the court is saved time and effort. Ginossar, *Access to Justice in Israel*, National Report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

Experts may also be of use to the decision-makers of an administrative tribunal. For example, one component of the Board of Grievances in Saudi Arabia is an investigations committee composed of legal, financial, administrative, medical and engineering specialists who investigate complaints and report to the Board's President. Long, *The Board of Grievances in Saudi Arabia*, 27 MIDDLE EAST JOURNAL 71 (1973).

In the United States, when the Better Business Bureau is mediating disputes between consumers and business it sometimes calls upon its constituent members to provide advice in a wide range of technical matters.

83. Computer technology is rapidly expanding into multiple areas of law and the legal process. For example, programs have been designed to manage a law firm's will and must inventory and periodically select for review its documents. See Welborne, *Computer Management of a Will Inventory*, 15 JURIMETRICS JOURNAL 1 (1974). Numerous computer systems have been developed for access to legal research materials. See Slayton, *Electronic Legal Retrieval—The Impact of*

*Computers on a Profession*, 14 JURIMETRICS JOURNAL 29 (1973). See also, R. FREED, *COMPUTERS AND THE LAW—A REFERENCE WORK* (4th ed. 1973); Popp and Schlink, *JUDITH, A Computer Program to Advise Lawyers in Reasoning a Case*, 15 JURIMETRICS JOURNAL 303 (1975).

84. These costs may be best analyzed and understood by the use of "queuing theory" (first propounded in 1909 by Erlang, a telephone engineer concerned with avoiding congested telephone equipment). Queuing theory treats the smooth or congested performance of a system as a function of the system's expected demand, the length of time needed to serve each person and how long or short a wait is tolerable or desirable. In its applications to expert decision-making panels, then, queuing theory tells us that erroneous assignments or insufficient resources in certain areas of expertise may increase waiting time in these areas, while too many experts in another field may induce idle capacity.

See any of the following, or comparable introductory references on queuing theory: R.J. THIERAUF AND R.C. KLEKAMP, *DECISION MAKING THROUGH OPERATIONS RESEARCH* 414-48 (1975); F.S. HILLIER AND G.L. LIEBERMAN, *INTRODUCTION TO OPERATIONS RESEARCH* 285-356 (1967). See also, D.R. COX AND W.L. SMITH, *QUEUES* (1961); T.L. SAATY, *ELEMENTS OF QUEUING THEORY* (1961).

85. The issues in this field appear especially adaptable to study through simulated "laboratory" experiments, in which hypothetical dispute situations were submitted to decision-making panels, some assisted by computers and others not so assisted. Differences in outcome and decision-making process could be measured and analyzed in this context without subjecting actual disputants to the vagaries of an unproved and unrefined system.

86. See pages 50-51, *supra*.

87. See page 62, *supra*.

88. One of the theoretical purposes of the old code pleading system, now largely supplanted by notice pleading in most U.S. jurisdictions, was the thorough refinement of the issues so that only those actually in dispute needed to be heard at trial. Unfortunately, it was a complex game which made the expertise of the lawyer even more indispensable and the process even more confusing to the layman. This should serve as a warning to reformers seeking to manipulate the dispute resolution system in order to reduce the resource investment of the government-sponsored forum. It is entirely possible to accomplish that goal but at the expense of complicating the game for the disputants and thereby increasing their participation costs.

89. See pages 30-33, *supra*.

90. Again this application of computer technology probably could be tested rather easily through simulations in a "laboratory" context. See notes 83 and 85 *supra*.

91. Interviews with plaintiffs' lawyers and defense lawyers in Philadelphia, Pennsylvania, conducted in connection with preparation of report for the National Center for State Courts, a version of which is published as E. JOHNSON, JR., V. KANTOR AND E. SCHWARTZ, *supra* note 27.

92. *Id.*

## CHAPTER VII. THE RESPONSIBILITY REALLOCATION STRATEGY: MEASURES REALLOCATING THE RESPONSIBILITIES FOR FACT INVESTIGATION, CRITERIA ASCERTAINMENT OR DECISION-MAKING

The measures discussed in Chapter VI sought to reduce the scope (and normally the expense) of the fact investigation, criteria ascertainment or decision-making phases of the total eligibility determination process. Among other effects, it could be anticipated that these measures would either make the process more expeditious, more accessible to disputants, or less costly for government to supply, or all three. We now turn to a strategy that essentially leaves the various phases of the process intact, but reallocates the responsibility for one or more phases in a manner calculated to achieve some improvement. That is, the same criteria may have to be satisfied and the same sort of evidence may have to be collected and presented, but there is a change in who is required to perform these functions. Responsibilities ordinarily foisted on the moving party or the responding party may be shifted to the other, or more usually, to the third party forum itself. (Actually, the reallocation of responsibility is frequently coupled with some narrowing of the scope of fact investigation, criteria ascertainment or decision-making. Thus, the same institution often involves a combination of the resource reduction and the responsibility reallocation strategies.<sup>1</sup>)

The measures implementing this responsibility reallocation strategy generally fall into two broad categories:

- Measures shifting responsibilities from the disputants to the third party forum (or another government-funded agency).
- Measures shifting responsibilities from one of the disputants to his opposing disputant.

It appears that the first of these approaches is more significant and thus will occupy most of this chapter.<sup>2</sup>

### **A. Measures Shifting Fact Investigation, Criteria Ascertainment or Presentation Responsibilities from Disputants to the Third Party Forum**

The prevailing mode of fact investigation and criteria ascertainment in most countries is essentially adversarial. Even those nations which term their judicial systems

inquisitorial in fact rely on the disputants to conduct much of the investigation. As a consequence, fact investigation often is characterized by duplication, inefficiency, and considerable expense.<sup>3</sup> Several of the measures uncovered during our research seek to substitute a unified and less costly search for the truth.

The existing institution which most clearly implements this principle is the "active judge," a phenomenon analyzed perceptively and in detail by Professor Jolowicz in a recent book.<sup>4</sup>

In Poland, for example, judges in the regular courts have a legislative duty to assist unrepresented civil litigants in procedural matters, such as the admission of probative evidence, a duty which stands in stark contrast with the American judge's typical perception.<sup>5</sup> This auxiliary responsibility is viewed as a desirable function and not as something which interferes with the judicial role. Other countries, such as Italy, do not view the judicial function in precisely the same light, yet at least favor an active judge in small claims litigation.<sup>6</sup>

Viewing himself as an independent fact-pursuer rather than merely a passive processor of facts found and presented by the disputants, the "active judge" conducts much of the interrogation during hearings and otherwise attempts to make up for any deficiencies in the investigation conducted by a party or parties. Presumably this represents a distinct advantage for the less affluent litigant, since he should be able to pare his investment in fact investigation, criteria ascertainment, or presentation of the evidence, relatively confident that the active judge will make up for his omissions through an aggressive and independent pursuit of the relevant information at the hearing.

From the viewpoint of fact investigation and criteria ascertainment, the primary weakness of the "active judge" model is the inability of the courtroom-bound judge to conduct investigations in the field. After all, it normally is in the homes, offices, factories, and neighborhoods that the underlying incident took place and in which the witnesses live and the other evidence is



located. Any proof that a party already has brought to a hearing and can produce in response to the judge's questioning is really already half-processed. The major and expensive task of initial identification of the evidence and the procuring of same still rests primarily with the individual disputants. It is the disputants who must employ the professionals—lawyers, investigators, accountants, and the like—who are equipped to analyze the dispute, search out and evaluate the relevant evidence, research the eligibility criteria, organize the presentation of the case, etc. Thus, only in disputes in which the parties can personally testify to most of the salient facts does the "active judge" virtually eliminate the need for substantial investigative efforts by the disputants.

Nevertheless, by carrying forward another step the principle embodied in the notion of an "active judge," it may be possible to construct a model which will largely alleviate the fact investigation and criteria ascertainment responsibilities of the parties. (In doing so, however, such a model also will depart still further from the traditional adversary approach.) The core element of this approach is the assignment of an investigative staff to the "active decision-maker." Under this plan, sometime after the moving party filed his complaint, an investigator—acting as an agent of the decision-maker—would conduct a field investigation of the dispute, identifying and interviewing witnesses, procuring physical evidence, obtaining laboratory tests, locating the relevant eligibility criteria, and the like. The results of this investigation might be embodied in a written report which could be the basis of negotiations between the disputants and the blueprint for the "active decision-maker's" conduct of the hearing, if one were necessary.

The model is not entirely unfamiliar. Possibly the closest analogy within the regular judiciary in the United States is the probation officer and his sentencing report. At least in the U.S. Federal Court system, such officers are agents of the judge.<sup>7</sup> They investigate the background of convicted defendants, conducting interviews, and gathering other evidence in the field.<sup>8</sup> This information is compiled in a written report, usually accompanied by a recommended disposition, which forms the basis of the sentencing hearing.<sup>9</sup> Admittedly, this is a specialized type of court-affiliated investigation unit, rather far-removed from the resolution of civil disputes. Moreover, there are some significant differences between the operation of the probation office and the role outlined for a civil disputes investigating unit. Nevertheless, it is interesting to observe that in certain circumstances courts have established their own investigative capacity rather than rely upon the adversary process to generate the facts relevant to an important judicial decision.

In the limited context of landlord-tenant disputes, one U.S. jurisdiction already is experimenting with this approach. The recently established housing court in Boston employs so-called "housing specialists" to assist the judges who decide cases in that forum. Serving under the direct supervision of the housing court bench, these specialists investigate the underlying facts of disputed cases between landlords and tenants. They are empowered to examine the premises, gather documentary evidence, and interview witnesses. These investigations are at no expense to the disputants but form the factual basis for most decisions rendered by housing court judges.<sup>10</sup>

At least two non-judicial forums depend on government-paid investigators rather than the disputants to provide the decision-making tribunal with the information it requires to determine eligibility for intervention. The more common of these institutions is the ombudsman, whose staff possesses extraordinary powers to investigate complaints against government. The other example is the Public Complaints Board, a recent innovation in Sweden, which is empowered to investigate, mediate, and recommend resolutions chiefly in consumer and landlord-tenant disputes. In both of these institutions, the government employs investigators who independently probe the underlying dispute thus absorbing the responsibility and cost of that critical function.

Ombudsman offices generally accept citizen complaints about government action by telephone or letter. Unlike a court or other more traditional dispute resolving agency, however, ombudsmen do not expect the grievant to gather the evidence and prove he deserves relief. Rather, their own investigators collect the relevant documents, interview witnesses, and report the "facts" to the decision-maker, that is, ordinarily the ombudsman, himself.<sup>11</sup>

Swedish Public Complaints Boards likewise receive citizen complaints through rather informal channels, usually about consumer matters. These boards, which specialize in various product areas, have their own investigative staffs which attempt to determine the facts and mediate the dispute. If mediation efforts fail, the decision-makers—boards composed of citizen experts drawn from business and consumer groups—consider the investigators' report and sometimes hear from the disputants before issuing the recommended resolution of the dispute.<sup>12</sup>

As an alternative to attaching the investigating unit to the "active decision-maker," it is theoretically possible to establish an independent branch of state-paid investigators to perform this function in civil disputes. Somewhat akin to the investigative divisions of those independent regulatory agencies which receive individual citizen complaints (Federal Trade Commission,



Interstate Commerce Commission, etc.), this approach offers the advantage of preserving the decision-maker's image of neutrality during the pre-hearing stage. But the role of the civil investigating unit would differ significantly from the typical investigative division of an administrative agency. Its duty would be to impartially investigate and report (probably without recommendation) concerning every disputed case. In contrast, administrative agencies typically allocate their investigative resources on the basis of political and policy considerations with satisfaction for the individual disputants given low priority. This political-policy filter means that a high percentage of citizen complaints are never probed by such agencies.<sup>13</sup> Among the most difficult management problems to be overcome in designing any civil investigations unit—whether administered by the judiciary or another governmental branch—is whether and how to apportion the unit's investigative resources.

A third alternative—an investigative unit administered by the executive but serving in part at the direction of the decision-maker—is illustrated by New York's new housing court system. Manned by "hearing examiners" rather than judges, this court enforces housing codes as well as landlord-tenant laws.<sup>14</sup> Rather than relying on evidence produced by the parties to establish the condition of the apartment units in dispute, the hearing examiner is empowered to direct agents of the housing code division (a part of the executive branch) to conduct an independent inspection of the premises and report their findings to the court. This avoids the expense of an adversary process in which both sides would have to obtain witnesses, take photographs, etc. and present them to the hearing examiner. Of course, this represents a relatively limited application of the court-directed independent investigator, confined as it is to only one specie of factual issue which may divide the disputants. That it arose in this context is easily understood. The independent investigative force was already in existence and was expert in the collection and evaluation of evidence in this very area. The creation of a new unit carrying the broader mandate of investigating all the issues in a wide variety of disputes represents a more ambitious and difficult step, politically and practically.

An analogous and very interesting mechanism has been created recently in Japan for the resolution of environmental disputes, which allows the court to draw on the investigative resources of another governmental agency in civil litigation disputes. Commissions have been established at the national and local level specializing in pollution cases.<sup>15</sup> These commissions have several functions, among them mediation, conciliation, and arbitration.<sup>16</sup> But the central commission also may be enlisted by the courts to investigate certain key issues involved in

private litigation filed in the courts.<sup>17</sup>

In particular, if the causal link between the defendant's polluting activities and the injury sustained by the plaintiff is in dispute, the court may request the central commission to investigate and determine that largely technical issue. Using its own government-financed investigative and scientific resources, the commission then conducts an inquiry which results in an "Adjudication of Causality."<sup>18</sup> The commission's findings, for practical purposes, decide that issue between the parties and can provide the essential predicate for a substantial damage award from one private disputant to another. This procedure thus allows moving parties to seek relief without incurring the often prohibitive cost of proving the causal link between pollution and injury and makes available scientific resources that might not otherwise be available to private litigants at any price.

The "active decision-maker" and his extensions clearly represent, in varying degrees, a shift of the investigative burden from the disputants to the government. As a practical matter, this approach should be compared with a strategy discussed in the next chapter—government absorption of the *cost* of fact investigation and criteria ascertainment in the context of adversary proceedings through legal assistance programs and related measures.<sup>19</sup> Unless the inquisitorial investigation can be accomplished significantly more cheaply than a government-subsidized adversarial investigation, it may make more sense to invest the funds in legal assistance for disputants<sup>20</sup> rather than in tribunals possessing their own investigative services.<sup>21</sup>

Whether cost reduction as well as cost reallocation takes place will be determined by the interrelationship of two factors. The first of these factors is the disputants' perceptions about the fairness and thoroughness of the independent government-funded investigation. If the investigators are deemed unbiased and competent, the parties presumably will forego conducting their own examinations of the facts and the law, or at least constrict the scope of such investigations significantly. This should result in savings to the disputants and thereby enhance the accessibility of the process to those of modest means. The problem for program designers and politicians is to produce a system which in actuality and appearance is independent of any economic or political group and unbiased with respect to various interest groups. Still, that is what is expected of the judge or other decision-maker during the decision-making phase of the eligibility determination process. It is not impossible to imagine that similar objectivity could be introduced into the fact investigation phase with the appropriate administrative arrangements and personnel policies.

Balanced against any savings generated by the dispu-

tants' avoidance of fact investigation and rule ascertainment costs are, of course, the additional expenses incurred by the government attributable to its assumption of this enlarged role. Even where the investigative force consists solely of the "active judge" or some other "active decision-maker," it is reasonable to anticipate an incremental increase in the governmental budget.

Though occasionally saving time, the decision-maker's vigorous pursuit of all the relevant facts ordinarily will lengthen hearings,<sup>22</sup> thereby reducing the number of cases each decision-maker can resolve in a given period and in the long run requiring budgetary adjustments in order to expand the corps of decision-makers. If the "active decision-maker" is supplemented with an independent government-funded investigative unit, the public sector's costs can be expected to mount still further.

Nevertheless, in comparing the costs of an independent fact investigation/rule ascertainment unit with costs of an adversary system, there are several possible sources of economic advantage for the former. Most obvious, duplication of effort is avoided (at least to the extent the disputants are dissuaded from conducting their own parallel investigations). Secondly, the central unit is in a position to develop superior management practices and to employ advanced investigative techniques often unavailable to the average litigant or his lawyer. Thirdly, as a government organization, it may be feasible to grant the unit powers not permitted lawyers or private detectives.<sup>23</sup>

In any event, the net level of cost reduction can be approximated by a simple formula: the disputants' savings attributable to their foregoing some or all of their fact investigation/rule ascertainment efforts minus the government's expenditures on its independent investigation of these matters. The social and political questions raised by a delegation of the primary investigative tasks to a theoretically unbiased government body are more complex.<sup>24</sup>

## **B. Measures Shifting Fact Investigation, Criteria Ascertainment, and Presentation Responsibilities from One Disputant to Another**

When one identifiable class of litigants is better able to afford the eligibility determination process, dispute resolution may be improved by transferring more of the burden to members of that class. Rather than requiring both disputants to conduct a full investigation, it is conceivable that society might require the more advantaged party to bear the primary responsibility for these activities.

Criminal cases theoretically resemble this allocation. The police and prosecutor are charged with the responsibility of searching out evidence favorable to the defendant as well as the prosecution. Furthermore, law enforcement authorities are compelled to turn over such evidence to the accused upon request.<sup>25</sup> Thus, theoretically, criminal defendants should be able to forego the expense of an independent investigation of the facts and law. Largely for reasons of motivation, defendants probably cannot realistically rely on law enforcement investigations to probe exculpatory factors as thoroughly as evidence suggesting guilt and thus must be prepared to conduct a fairly extensive independent investigation. Nevertheless, it probably is fair to say that the prosecution bears a larger share of the pre-trial burden in criminal cases.

Conceivably civil dispute resolution could be structured in a similar manner, at least where clear resource disparities can be anticipated analogous to those obtaining between the state and the individual in criminal prosecutions. That is, one party could be assigned the responsibility of conducting a thorough, "impartial" investigation of the dispute with a duty to make available to the opponent all interview reports, documents, and other evidentiary items uncovered during the investigation. The insurance company in personal injury litigation, for instance, might be charged with the responsibility of interviewing all witnesses to the accident and collecting all other relevant evidence and then be required to provide this material to the individual plaintiff.

We found no third party forums which actually employed this approach fully. However, the practical effect of many provisions shifting the burden of proof was to reallocate the primary burden of fact investigation, criteria ascertainment, and presentation.<sup>26</sup> These measures are usually rationalized on the basis of which party has better *access* to the relevant evidence, however, rather than which has the superior *financial resources* to conduct an appropriate inquiry. In a products liability case, for instance, the manufacturer will be assigned the responsibility of establishing there was no negligence in the manufacture of the product since he presumably is in a better position to determine what happened on his assembly line than is an outsider.<sup>27</sup> For slightly different reasons, some countries require defendants in personal injury cases to establish the absence of fault rather than expecting plaintiffs to prove the defendant's fault.<sup>28</sup>

That this is not a common strategy probably can be explained in part by the neutral, actually passive stance which is traditional among dispute-resolving forums deciding civil cases. The notion of imposing unequal burdens on competing litigants merely because one has greater means with which to investigate the dispute is

foreign to the image of a completely impartial decision-making institution.

It also probably is fair to suggest that even if a society desires to shift the burden from one party to the other, that normally would be accomplished more effectively by redistributing the *expense* of fact investigation, etc., rather than reallocating the *responsibility* for actually performing these functions.<sup>29</sup> It simply is unrealistic to expect a disputant, especially a private party, to conduct an unbiased investigation or make an unbiased presentation merely because society has decided to transfer that responsibility to him from his opponent.

### **C. The Effects of Reallocating the Responsibilities for Fact Investigation, Criteria Ascertainment or Presentation**

The responsibility reallocation strategy, by itself, ordinarily serves one primary goal—increased accessibility for the party *from* whom responsibility is shifted. For example, if moving parties no longer are required to locate and present the evidence establishing their eligibility, they will be able to afford to seek third party intervention in a greater range of disputes. Grievances which would have been too costly to litigate before the shift in responsibility (and hence cost) now can be taken to the third party forum. Similarly, if government assumes such responsibilities from both moving parties and re-

sponding parties, then third party resolution becomes more accessible for both sides.

The responsibility reallocation strategy, however, also generates effects beyond enhanced access. For reasons explored earlier,<sup>30</sup> settlement incentives and hence settlement rates will be influenced, often profoundly, by the sort of cost-shifting implicit in the reallocation of eligibility determination responsibilities among the parties and the third party forum. If responsibilities were somehow shifted from moving parties to responding parties, for instance, moving parties would be in a better position to hold out for better terms and responding parties would be compelled to be more generous with their offers.

In the right circumstances, reallocating these responsibilities also may enhance the accuracy and equity of the eligibility determination process. This presumably will happen, for instance, if duties are removed from disputants unable to adequately perform their assigned functions and shifted to the third party forum or to other disputants who are in a position to afford to undertake such responsibilities. Thus, a reform which somehow transferred the pre-hearing investigative function from the parties to the third party forum<sup>31</sup> might result in a more thorough probe of the facts relevant to eligibility and fewer erroneous decisions. This is especially probable when disputants typically implicated in such cases lack the means to pay for adequate investigations.

## NOTES—CHAPTER VII

1. See e.g., the Swedish Public Complaints Boards, pages 62 *supra* and 73 *infra*.

2. For some reasons the second approach is less significant, see pages 75–76 *infra*.

3. It should be noted, however, that there is some evidence the adversarial mode yields some advantages over the inquisitorial approach, at least in the prosecution/decision-making phase. A recent series of "laboratory" experiments indicated that adversarial proceedings tended to neutralize bias more effectively. Whatever advocates working for the disputants also would be more diligent and effective in fact investigation or criteria ascertainment was not directly studied.

4. M. CAPPELLETTI AND J. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION (1975).

5. The commitment of American judges to passivity and neutrality is dramatically illustrated by the following exchange taken from the transcript of a 1971 trial held in the Superior Court in Santa Barbara, California. The trial which was spread over seven days involved a multi-plaint complaint seeking over \$100,000 in damages.

The defendant was being sued on a promissory note and was representing himself because he could not afford to retain an attorney. The judge turned down the defendant's request for advice, stating, "The Court is not in the habit of giving advice to people acting in propria persona." *Hunt v. Hackett*, Superior Court of the State of California for the County of Santa Barbara, No. 82938, Reporter's Transcript on Appeal at 85, lines 7–8. Upon further explanation that he could not afford an attorney to give him the needed advice, the judge again stated: "In a civil matter, the Court is not in a position to act as counsel for either party. I would have to refuse." *Id.* at lines 17–19. Even when the defendant responded that the charge against him might possibly relate to criminal matters and would definitely affect his livelihood, the court responded:

I don't think that is a function of the Court in a civil matter. If you elect to claim the privilege against self-incrimination, the Court will rule on it when the matter comes up.

*Id.* at 85, line 28, 86 lines 1–4.

6. Although their policies vary, many countries believe that the court's role should be as an active auxiliary to litigants. See M. CAPPELLETTI AND J. JOLOWICZ, *supra* note 4, at 244–74 for an illuminating discussion of the role of the active judge in various countries in such matters as evidence, presentation of issues in dispute, and development of the proceedings.

7. It is the function of the judge to sentence the convicted offender. The probation officer aids the judge by gathering information relevant to deciding which alternative type of sentence is most suitable. See A. SMITH AND L. BERLIN, INTRODUCTION TO PROBATION AND PAROLE 32–36 (1976) [hereinafter SMITH & BERLIN].

8. See *id.* at 89–105; R. DRESSLER, PRACTICE AND THEORY IN PROBATION AND PAROLE (2d ed. 1969). For a history of probation see C. L. CHUTE & M. BELL, CRIME, COURTS AND PROBATION (1956).

9. Two complete (fictitious) sample pre-sentence reports are printed in SMITH & BERLIN, *supra* note 7 at 37–54. The long form report contains detailed information about the present offense (description, defendant's statement, complainant's attitude, mitigating/aggravating

circumstances), about previous legal history of the defendant (prior arrests, etc.), family background, personal history (birth, school, employment, neighborhood habits, religion, health) and a list of sources of information. The short form contains many of these same elements but devoid of analysis and interpretation.

10. The Boston Housing Court, with its two judges, employs six housing specialists. They think of themselves as the "eyes and ears of the court." Much of their work is performed before a case is actually adjudicated; they help the citizenry fill out complaints and are often sent by the judge to mediate and arbitrate controversies where the judge feels that would be suitable. Once a case is in court, the judge may send out one of the specialists to examine the premises, say, where the tenant claims a certain repair was not made and the landlord claims it was made.

Housing specialists usually have some technical competence in the housing or construction fields; many races are represented. Sensitivity to the often emotional problems they deal with is considered a valuable trait.

The housing specialists now take the "court out into the community" by traveling around to local areas and holding regular court sessions there, thus making justice more accessible to the citizenry of Boston. Telephone conversation with Mr. Felix Vazquez, Chief Housing Inspector, Boston Housing Court, January 6, 1977.

11. Ombudsmen in the United States are described in E. JOHNSON, JR., OUTSIDE THE COURTS: A SURVEY OF DIVERSION IN CIVIL CASES Chapter Six (1977). Statewide ombudsman offices are described in Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L. REV. 397 (1975).

12. For a description of Swedish public complaint boards, see Per Olof Bolding, National Report for Sweden, report for the Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

13. In fact, one survey recorded that 51 of 64 agencies studied did not even have an organizational unit to handle complaints or a specific processing routine. Rosenblum, *Handling Citizen Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices*, 26 ADMIN. L. REV. 1, 10 (1974). Most of the agencies did report, however, that requests received via a congressman's office received priority over one received from a private citizen. The political considerations involved are clearly illustrated by response times to complaints: those from the White House are responded to within one day, those from Congress within three working days, and those from the public "as soon as possible." *Id.* at 11.

14. The New York Housing Court began functioning in October, 1973 as part of the New York Civil Court. It handles diverse actions relating to building operation and maintenance, including landlords' eviction actions, tenants suits to compel landlords to achieve and maintain housing code compliance and even proceedings relevant to foreclosure of real property liens. The Court has the power to impose civil fines, issue injunctions, appoint receivers, enforce liens, and even order minor criminal fines and imprisonments. Many things make the Housing Court's procedures unique. The Court can, for example, consolidate all pending actions concerning any one building regardless of diversity of plaintiffs and may order any remedy it feels would be effective regardless of the remedy originally sought. This consolidation

authority saves time (since often several tenants, for example, might have the same complaint) and presumably enhances the possibility of justice being done since the Court has more of the relevant facts before it.

Equally important, the Housing Court may retain its jurisdiction over the case until violations have been remedied. It may order inspections to determine if compliance has been accomplished, and may also order a receiver to collect rents and make necessary repairs. The Court thus wields exceptional power in assuring rehabilitation of much of the city's housing.

The Court maintains its records on cards, indexed according to address for each reference. It also maintains a profile on all buildings which have ever been involved in Housing Court actions.

For reference, see *The New York City Housing Part: New Remedy for an Old Dilemma*, 3 FORDHAM URBAN L. J. 267 (1975) and *The New York City Civil Housing Court: Consolidation of Old and New Remedies*, 47 ST. JOHNS L. REV. 483 (1973).

15. These central and local "commissions for Settlement of Environmental Pollution Disputes" were created by legislation enacted in October, 1970. The commissions are comprised of judges, government officials, members of the medical profession, etc. Their investigative and other costs are absorbed by the government with the exception of rather minimal filing fees charged the parties. T. Kojima and Y. Taniguchi, Access to Justice in Japan, National Report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy [hereinafter Japanese National Report].

16. Pursuant to a 1974 amendment a local commission is empowered to intervene in an environmental dispute in an attempt to mediate a settlement. Conciliation efforts, on the other hand, can be initiated only if one of the disputants petitions for such assistance. After an investigation which may include inspection of factory premises by the commission a settlement plan is proposed. Unless one of the parties objects, the plan becomes binding. The legislation also authorizes the disputants to submit the controversy to arbitration by a commission. If a damage claim already has been filed in court, a litigant can even petition a commission to conduct an independent government-financed inquiry and issue an "Adjudication of Causality". Unless appealed within 30 days the commission's decision disposes of the issue of whether the defendant's activities caused the plaintiff's injuries. See, Japanese National Report, *supra* note 15.

17. One of the parties may also petition a commission to intervene. *id.*

18. The Commissions absorb most of the cost of investigation in mediation, conciliation and arbitration proceedings as well as when intervening in a litigation event. *Id.*

19. See pages 80-81 *infra*.

20. It should be emphasized that the full legal assistance expenses that might have been paid by government in adversarial proceedings are not limited to those currently covered by the typical legal aid program for poor people. In some disputes, government subsidies would have to be paid to middle-class as well as low-income litigants. And in many cases, government would be required to pay expenses for both sides of the same dispute. See *e.g.*, E. JOHNSON, JR., V. KANTOR, AND E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION IN CIVIL CASES, Chapter Seven (1977). For further discussion of this issue see pages 80-81, *infra*.

21. Cost considerations, of course, are not the only criteria in making this policy choice. See *e.g.*, note 1 *supra*.

22. Jolowicz notes, for example, that the traditional notion of a single session trial before a civil jury is impossible where the judge plays an active role, since he cannot even know what supplemental evidence is required until he hears the evidence which the parties do have already. If the judge were to hear the witness' testimony prior to trial it would destroy the purpose of the trial as a trial of fact. M.

CAPPELLETTI AND J. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION 264 (1975). He further notes that even though the active judge's role may enhance efficiency, it will increase the court's workload, except where the judge's active role increases the number of settlements. *Id.* at 265-67.

23. The statewide ombudsmen legislatively authorized in the United States, for example, have access to information and agency documents which ordinary citizens and even lawyers could not obtain. In most states this privilege extends even to documents expressly made confidential. The ombudsman generally confers with high level agency officials by phone, mail or personal visit both to investigate and mediate the claim. By performing so much investigative work, the governmental ombudsman function shifts a large portion of investigation costs from the citizen to government. These powers are described in Frank, *supra* note 9.

24. Possibly the most significant non-economic problem is the danger that bias may infect the fact investigation/criteria ascertainment process. It is true that government currently subsidizes these activities for many litigants by furnishing public defenders in criminal cases and legal services lawyers to poor people in criminal cases and some civil cases. However, these are advocates employed to assist one side in an adversary process. They are expected to conduct biased investigations and make biased presentations favoring their clients. Each side, in effect, is guaranteed an initial probe that will be biased in his favor and, furthermore, that the decision-maker will at least have to consider every factor that might be helpful to the litigant. Whether a single investigator charged with conducting an impartial investigation can maintain enough neutrality to dig as deeply for facts or legal principles favorable to one disputant as the other, or one class of disputants as another appears more problematic. Even if neutral and thorough in fact, the investigation may be perceived as biased by one (or even both) disputants merely because of the absence of a relationship between them and the investigative body. It also may be easier to corrupt a process which depends upon a single investigation unit working with or for the decision-making unit rather than advocates responsible to the opposing disputants.

25. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the prosecution's suppression of evidence which favors the accused defendant and which is material to guilt or punishment violates due process. In *Brady* the defendant had made a request for the evidence. Whether the requirement of a request will remain is still unclear. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 222 (1976). The ABA's Code of Professional Responsibility, adopted in various forms in all states but one, retains the duty of bringing forth evidence even without a request, in section 7-103(B):

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

26. "Burden or proof" has two principal meanings in the civil context. One is referred to as the burden of persuasion, meaning that if the trier of fact, after examining all evidence and deliberating, is still in doubt, the party with the burden of persuasion will lose; in other words, he bears the risk of non-persuasion.

The second meaning is commonly termed the "burden of going forth with the evidence." Most simply, this means that the party who bears this burden will be non-suited, and lose his case, if he fails to produce evidence. In a jury trial this burden also means that the party must have produced sufficient evidence for the judge to send the case to the jury.

26. (Cont.) See discussion in F. JAMES, JR., CIVIL PROCEDURE 248-80 (1965).

27. The shift to products liability has taken over from the areas of both negligence (tort) and warranty (contract). It has eliminated the need for a plaintiff to prove negligence (often either impossible or enormously expensive) or even set up a case of *res ipsa loquitur*. It was felt that the manufacturer was in the best position to know these sorts of facts; furthermore, by shifting the burden to the manufacturer the law could internalize the losses due to defects, hopefully increasing avoidance actions by manufacturers.

The requirement of proof of a warranty was eliminated for similar reasons. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Rptr. 697 (1962) in which the court states:

. . . The purpose of such liability [strict liability in tort] is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are

powerless to protect themselves. Sales warranties serve this purpose fitfully at best.

A plaintiff in a products liability case now need not prove the elements of negligence or warranty, but rather only that the product is defective (often a matter of common knowledge or comparison with similar products) and that the defect caused the injury. See generally, D. NOEL AND J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL (1974).

28. For example, in tort cases in Bulgaria fault is presumed, thus simplifying evidentiary requirements. The plaintiff need not prove fault; evidence of fault is introduced only if the defendant is trying to rebut the presumption that he was at fault. See Jivko Stalev, Access to Justice in Bulgaria, National Report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

29. See pages 81-84 *infra*.

30. See pages 27-29 *supra*.

31. See pages 73-74 *supra*.

## CHAPTER VIII. THE COST REDISTRIBUTION STRATEGY: MEASURES MANIPULATING THE INCIDENCE OF THE EXPENSES OF FACT INVESTIGATION, CRITERIA ASCERTAINMENT OR DECISION-MAKING

The various expenses associated with the eligibility determination process will, as an initial matter, tend to follow the assignment of responsibilities among the several participants. This assignment of responsibilities, in turn, is determined in large part by the fundamental structure of that process. Accordingly, some of the measures discussed in Chapter VII (and to a lesser extent in Chapter VI) had the indirect effect of reallocating the expense burden among the disputants and government. The measures discussed in this chapter, however, merely involve selective reallocations of the financial burdens in certain cases or with respect to certain kinds of disputants. The process itself and the original task assignments remain intact. Society can effect a redistribution of the expense of any of the constituent parts of the eligibility determination process in at least two ways:

- Government can absorb the expense, wholly or partially;
- Government can mandate a redistribution of the expense among the parties.

These two approaches are considered in the following pages.

### A. Government Absorption of Expenses of Fact Investigation, Criteria Determination, or Decision-making

Under the general rubric of legal aid, many countries have inaugurated systems for transferring the expense—but normally not the responsibility—for various phases of the dispute resolution process from lower income parties to the state. Chief among these expenses, of course, is the compensation of lawyers, who perform so much of the fact investigation and criteria determination tasks.<sup>1</sup> However, the legal aid systems of several nations likewise absorb all or part of the costs of expert witnesses<sup>2</sup> and other direct expenses associated with tasks assigned to the parties.<sup>3</sup> And Sweden, at least, even assumes governmental responsibility for many of the parties' less obvious litigation costs, such as travel and

lodging expenses while investigating the case or attending hearings.<sup>4</sup>

Though enormous strides have been made in the past dozen years, government does not yet absorb these expenses for the majority of low income disputants in the United States. Before 1965, governments in the United States for all practical purposes did not absorb any of the litigation costs of civil disputants (other than sometimes foregoing the court's own nominal fees through *in forma pauperis* provisions). Private charity was the only source of help for low income citizens implicated in a dispute in which the courts might intervene. By 1965, charitably financed legal aid societies were funded at an annual level of \$5.3 million or about two and one-half cents per capita.<sup>5</sup>

With the advent of the OEO Legal Services Program, the federal government began to assume the burden of redistributing the eligibility determination expenses (fact investigation, criteria ascertainment, presentation, etc. expenses) which the structure of the process foisted on the poor.<sup>6</sup> The budget for this federal program started at an annual level of \$25 million in 1966, and rather quickly reached \$71 million where it remained for the first four years of the current decade.<sup>7</sup> Even after a 75 percent expansion from 1974 to 1976, per capita expenditures on civil legal aid currently are less than \$.60 per person.<sup>8</sup> This is about one-half England's current per capita investment in civil legal aid and about one-quarter that of Sweden and Quebec province, Canada.<sup>9</sup> The Legal Services Corporation estimates that current budget levels permit it to provide legal assistance to less than 25 percent of low income citizens needing such help.<sup>10</sup>

As traditionally conceived and practiced, the expense redistributions achieved through legal aid are limited to low income disputants. In the United States, no relief is afforded the middle income or more affluent litigant even when he is locked in a conflict over a relatively modest sum. However, England, in theory, and Sweden, in reality, have begun to address the problem of the middle class litigant. This is accomplished by the government's

partial absorption of lawyers' fees and other litigation expenses for the middle class while the poor continue to receive a total subsidy. Both countries utilize a sliding scale means test keyed to net income.<sup>11</sup> However, inflation long ago eliminated the middle classes from partial subsidation under the English scheme.<sup>12</sup> Sweden, on the other hand, currently offers at least some subsidy to over 80 percent of its population.<sup>13</sup>

A redistribution of more generalized, though less significant, application has been proceeding slowly over the decades in several countries—the government's gradual assumption of a higher percentage of the judicial budget. In earlier times, nearly all of the expenses of the decision-making body itself were expected to be paid by the disputants in the form of court fees.<sup>14</sup> This alone was a substantial barrier to access for many citizens since court fees could soon approach or even outstrip the economic value of the matter in dispute.<sup>15</sup> But the modern trend is to reduce the judiciary's dependence upon court fees in absolute terms and as a proportion of its budget.<sup>16</sup> As observed elsewhere, this may not be an entirely healthy development. A sophisticated fee structure could encourage less expensive, more equitable two-party settlements,<sup>17</sup> and, moreover, properly managed, the funds derived thereby could provide a source for the subsidation of certain parties in other phases of the investigation-criteria-decision process.<sup>18</sup>

## **B. Government-Mandated Redistribution of Expenses among the Parties and Others Involved in the Process**

Government options are not necessarily limited by its willingness or capacity to absorb the expenses of the eligibility determination process within the regular governmental budget. Through its power to structure the process and the financial arrangements, the state can redistribute the expense burden among private individuals and institutions in a manner calculated to improve performance.

1. *Redistribution among "classes" of disputants.* Reallocations among disputants may assume several forms. First, there is the redistribution of lawyer expense from the *class* of low-income litigants to the *class* of higher-income litigants. This is the principle underlying the Soviet legal aid system. In that country, the legal profession is organized into geographic collectives, each with a central administration and an income-pooling arrangement.<sup>19</sup> These collectives are directed to provide free representation in certain categories of cases and to any client unable to afford a fee.<sup>20</sup> Though the burden of financing legal representation apparently shifts from the low-income Russian to his lawyer, in reality, it is proba-

bly more accurate to view it as a redistribution from the class of low-income disputants who pay no fees to those more affluent ones whose fees in effect support the collective and its attorneys. Thus, a Soviet lawyer working on a non-fee-paying case presumably will be receiving his normal share of the collective's income out of the compensation pool accumulated from paying clients by himself and other members of the law collective.

In contrast, a somewhat analogous system of legal aid still prevalent in certain non-Communist countries normally fails to shift the economic burden beyond the lawyer. This is the so-called "charitable model" in which individual lawyers are assigned to represent low-income disputants without compensation.<sup>21</sup> This model has proved unsatisfactory for the very reason that individual lawyers shirk their responsibilities in uncompensated cases because these cases diminish the time available for fee-producing legal representation.<sup>22</sup>

With no income-pooling arrangements to spread the income loss sustained in providing uncompensated representation, an individual lawyer either absorbs that loss himself or, more commonly, minimizes the time committed to the unpaid case to which he is assigned. No significant part of the burden falls on the more affluent who are paying the lawyer's fees.

Once we extend the discussion beyond existing institutional arrangements, however, to encompass the proposed and the possible, it is feasible to identify a number of potential reforms which build upon this principle of redistributing the financial burden of eligibility determination from one class to another within an essentially free market economy.

The notion of a universal tithing upon lawyers has been advanced.<sup>23</sup> In essence, the concept is to impose a duty upon all lawyers to devote a certain percentage of time to uncompensated legal work on behalf of the class of litigants or types of cases favored by the particular proponent. Thus, while one advocate of such a plan might seek a tithing of time for representation of low-income disputants, another may ask for a commitment to "public interest" cases.<sup>24</sup>

To the extent a time tithing is universal and is assigned to representation of low-income disputants, the practical effect should be a redistribution of the financial burden from the impoverished litigant class to the more affluent litigant class. Assuming a 10 percent tithing, the legal profession would have to charge sufficient rates in the remaining 90 percent of cases (those from which its members receive compensation) to sustain itself economically during the hours devoted to uncompensated service. It seems reasonable to anticipate the rather rapid build-up of a "surcharge" approximating 10 percent on all legal work done for the more affluent classes coupled



with the diversion of 10 percent of the profession's total time to representation of the poor.<sup>25</sup>

The problems with the time tithe appear not in the underlying theory, but in the political and management spheres. Most proposals have been for voluntary tithes or tithes imposed as an ethical obligation by the profession.<sup>26</sup> It seems doubtful that either would produce the universality of commitment necessary to effect an inter-class redistribution of the burden. Rather, such plans share the defect of the charitable legal aid model—the burden will remain with the individual lawyer agreeing to tithe.

He will suffer an income loss *vis-a-vis* other members of the profession and will soon lose the incentive to continue the tithe. The alternative of a statutory duty offers greater promise of universal application. However, the difficulties of effectively enforcing a time commitment suggest the universality may be more apparent than real.<sup>27</sup> Moreover, nearly insurmountable political opposition can be foreseen to any statute which awarded government the necessary policing powers over the workload of the legal profession.

There appears to be a more direct and practical means of redistributing the expenses of participating in the eligibility determination process from the class of low income disputants to the class of more affluent disputants. Instead of imposing a time tithe, government could levy a monetary tax on all legal fees. The proceeds of this tax could then be channeled to the representation of those otherwise unable to afford to pay the cost of participation in the process. This would be substantially equivalent to the "dedicated" sales tax commonly used to finance highway construction and certain other activities in the United States.<sup>28</sup> To enhance the redistributive effects, such taxes might be limited to certain legal fees: those paid by corporations; those above a certain total amount; those paid by persons or entities with incomes above a certain amount; those in which the hourly rates exceeded a certain amount, etc. Similarly, a sliding scale could be used, proportioned to the size of the fee, the wealth of the client, the fee schedule, and the like. Whatever sophistications were introduced into the tax rates, the incidence of the tax would fall primarily upon the consumer, in common with other "sales taxes."<sup>29</sup> Accordingly, those expenses of low-income disputants which were paid out of these revenues would have been shifted effectively to a class of more affluent litigants. The political and management problems should be no more difficult than those associated with the collection of any similar direct tax.

Some idea of the tax rates necessary to implement a complete shift of eligibility determination costs can be gleaned from some recent statistics in the United States.

During 1971, total legal fees received by the legal profession exceeded eight billion dollars.<sup>30</sup> A 10 percent "dedicated sales" tax on those fees would have yielded revenues exceeding eight hundred million dollars. That is about eleven times the amount actually expended on legal representation of the poor in civil cases that year,<sup>31</sup> and probably approaches the total needed to finance the responsibilities currently assigned low income disputants in the presently structured eligibility determination process.<sup>32</sup>

A similar redistribution of expenses could be achieved by "dedicating" to low-income litigants all fees received by the courts from more affluent litigants.<sup>33</sup> In fact, were such fees raised to the levels prevailing in some countries,<sup>34</sup> it might be possible to fund from this source much of the legal expenses and other costs incurred by low-income disputants during the fact investigation, criteria determination, and decision-making phases of the process. Again, a redistribution of expenses would have occurred, from the *class* of low-income disputants to the *class* of more affluent ones.

2. *Redistribution between individual litigants.* Redistribution between classes of litigants can be differentiated from redistribution between individual litigants. In the latter, the affluent litigant in a specific case would be expected to assume responsibility for some or all of the expenses incurred by his low-income rival in that same case. At this point it remains essentially a theoretical possibility. Our research uncovered no existing forums actually employing this approach in its pure form. Nevertheless, the justification for such reallocations appear especially strong when an affluent individual or institution is the moving party. Having petitioned the third party's intervention against a low income individual, it can be argued the affluent moving party should be responsible for supplying the funds necessary to insure the decision-making apparatus will operate effectively. Or to focus on the plight of the low-income individual rather than the needs of the system itself, it can be argued that he who seeks to deprive the poor man of his rights should be compelled to supply the means of preserving those rights; that the affluent litigant should not be allowed the unjust enrichment of an erroneous eligibility determination.

When government is the moving party, the justification is even clearer. After all, it is government which designs the process, in effect determining the scope and cost of the functions to be performed in resolving a dispute and allocating these responsibilities among the participants. If government chooses a design which imposes substantial financial burdens on responding parties (that is, a complex system which requires lawyers, etc.) and then sues a low-income individual in that forum,

simple fairness seems to suggest that government should assume the expenses associated with the responsibilities it has assigned to those opponents who otherwise cannot defend themselves.<sup>35</sup>

The economic rationale for cost redistribution between competing disputants is less clear. On the one hand, it could be argued that the affluent moving party should attain his goal only if the economic value is sufficient to justify the full cost of the decision-making process (including those responsibilities nominally assigned to the low-income responding party) and not merely the costs associated with the responsibilities which happen to have been assigned the moving party. Accordingly, no economic misallocations occur if he is unable to pursue his objective because of being required to bear the total burden. On the other hand, there may be some distortions introduced by the differential expenditures required of affluent moving parties when they seek an objective from a low-income responding party rather than an affluent one. Cases that would be filed against the latter presumably would not be filed against the former.<sup>36</sup>

3. *Redistribution among classes of disputes.* Reallocations predicated on the comparative means of classes of litigants or individual litigants are not the only ones calculated to enhance performance in certain circumstances. It also is possible to identify possible redistributions between classes of *disputes* which should have analogous effects, at least in lesser controversies. The primary example extant is the legal fee schedule and the court fee schedule presently operating in the Soviet Union. Both these schedules are related to the amount at stake in the dispute. In both instances, the *percentage* charged by court and counsel *increases* with the economic value in controversy. Thus, Soviet lawyers are authorized to charge only 5 percent of value in cases involving 100 rubles or less (equivalent to \$160.00) and court fees are set at 2 percent. But in cases involving stakes of 300–500 rubles, legal fees are about 4 to 6.5 percent and court fees 2 percent. For cases over 500 rubles in value, lawyers can set fees at 6 percent and the court charges 6 percent.<sup>37</sup> This pattern contrasts with most Western countries where court fees are a flat sum irrespective of the economic value at stake.<sup>38</sup> Moreover, legal fees tend to roughly reflect the quantity of time required to handle a given case rather than the amount at stake in that case.<sup>39</sup> As a consequence of the usual fee structure in Western countries, legal expenses and court costs generally absorb a much higher percentage of the economic value in modest disputes than in more financially significant ones.<sup>40</sup>

At a minimum, a legal and court fee system like the Soviet's tends to restore some equity in the allocation of expenses between smaller and larger disputes.

Moreover, to the extent that minor claims require lawyers and third party forums to devote as much time in proportion to the amount in dispute as do larger claims, a progressive sliding fee scale should produce a significant redistribution of expense from lesser to larger disputes. In effect, disputants involved in more economically significant cases would be subsidizing those implicated in smaller claims. It would be roughly equivalent to introducing a fee schedule for lawyer services in which attorneys could only charge \$5.00 an hour for work performed in small claims cases while they were permitted to charge much higher rates, say \$50.00 an hour, in bigger cases.

Whatever the actual relationship between the Soviet fee schedules and resource expenditures by lawyers and courts in different strata of disputes, it would be possible to design a theoretical model in which real and substantial redistribution occurred. The difficulties are not those of design, but of feasibility. In the context of a free economy, differentials in legal fees of the dimension described would create powerful incentives for lawyers to shun lesser cases.

Rather than attempting to impose a progressive schedule on lawyers' fees, government might accomplish the desired redistribution solely through a redesign of the court fee schedule. However, this plan would require the government to convert the fees it collects into a fund from which lawyers could be compensated at regular rates in minor cases. By setting the charges for major cases at a relatively high level—say 10 percent of the amount in dispute—enough income could be generated to subsidize a substantial portion of the legal fees required by litigants involved in minor disputes.

The primary rationale for the redistribution of expenses between classes of disputes is the desire to make dispute resolution forums available to relatively modest disputes. Unlike redistributions between low income and affluent disputants, this approach is blind to resource disparities among contending parties. Affluent disputants implicated in minor disputes would benefit in the same way as the poorest litigant. The aim would be to allow citizens of whatever income level to seek relief or defend even where the ratio between costs and the value in dispute ordinarily would be prohibitive.<sup>41</sup>

One possible justification for such redistribution is that society has as great a stake in the proper resolution of disputes in which the private stakes are relatively modest as it does in those in which the disputants have a huge amount riding on the outcome. Or to restate the proposition more conservatively, possibly the external benefits accruing to society from dispute resolution are not directly proportional to the economic value the private parties are contesting.<sup>42</sup> In either event, society presum-

ably can take these factors into consideration in setting its fee schedules. At a minimum, it could deduct society's benefits from the costs it will incur, a calculation which probably would result in a lower net rate of fees for minor disputes than major ones.<sup>43</sup>

Alternatively, such redistribution might be justified on a variation of the "deep pockets" theory commonly used to support analogous redistributions schemes such as the

progressive income tax or the spreading of products liability losses. Disputants, at least relatively affluent ones, can "afford" to pay rather high litigation fees when involved in high stakes litigation, but no one, no matter how wealthy, can "afford" to do so in modest disputes. So it is merely a matter of charging those who can afford and transferring it to those involved in circumstances where they cannot.

## NOTES—CHAPTER VIII

1. See e.g., page 62, *supra*.

2. Aside from the usual court fee exemption provided by many countries (see Note 4, *infra*), indigent litigants are sometimes excused from payment of expenses for such matters as expert witness costs. The exemption is sometimes triggered by income level or by type of dispute (e.g., guardianships, pensions in Hungary—see Nevai, Laszlo, National Report for Hungary, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence Italy), and may require some showing of a sufficient prospect of success (e.g., West Germany—see Bender, Rolf, and Strecker, Christoph, National Report for Federal Republic of Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy). Some systems require the litigant to reimburse the court if he loses (e.g., Japan—see Kojima, T. and Taniguchi, Yasuhei, National Report for Japan, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy).

3. As with payment of witness fees, exemption upon income level and/or type of dispute. In Hungary, fees are often exempted for guardianship disputes, disputes concerning the sale of agricultural products, and others. See Nevai, Laszlo, National Report for Hungary, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. In Poland, fees are often exempted in labor and alimony suits, among others. Los, Maria, National Report for Poland, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. West Germany exempts poor litigants from court fees if there is a sufficient probability of winning the suit. Experiments are being considered for proportional exemptions from court costs according to income level as standardized in tables. Bender, Rolf and Strecker, Christoph, National Report for the Federal Republic of Germany, unpublished report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

4. Benefits under general legal aid in Sweden include travel and maintenance of the [assisted person] or his legal representative, or of an attendant or other person, whose services are deemed necessary, for attendance before a court or any other authority, if personal appearance was ordered . . . .

Public Legal Aid Law of May 26, 1972, Section 9, in M. CAPPELLETTI, J. GORDLEY and E. JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 534 (1975).

5. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, 1956 SUMMARY OF CONFERENCE PROCEEDINGS 46 (1966). For a description of the origins and philosophy of the charitably-financed legal aid movement see R. H. SMITH, JUSTICE AND THE POOR (1919).

6. For a discussion of the origins and development of the OEO Legal Services Program, see E. JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974) (hereinafter JOHNSON).

7. See JOHNSON, *supra* note 6 at 99 (annual budget increased from \$25 million to \$40 million from July 1966 to June 1967) and Legal Services Corporation News, August-September 1976 at 1. (Federal

funds were frozen at \$71.5 from 1970-1975). In 1976, total federal appropriations were \$92.33 million; \$125 million have recently been allocated for 1977. *Id.*

8. In 1974, legislation was enacted transferring the function of the OEO Legal Services Program to a newly formed public corporation, the Legal Services Corporation. M. CAPPELLETTI, J. GORDLEY, and E. JOHNSON, JR., *supra* note 4, at x. In its first fiscal year, the Corporation received an appropriation of \$88 million and for its second year \$125 million.

9. E. Johnson, Jr., A. B. Drew, S. A. Bloch, E. W. Hansen, and G. Sabagh, A Comparative Analysis of the Statistical Dimensions of the Judicial Systems (and Related Institutions) of Six Industrial Democracies, for the Program for the Study of the Policy of Dispute Resolution for the National Institute for Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Washington, D.C.

10. One study estimated that the Legal Services Program is handling only about one million of the four million legal problems per year estimated among the persons ostensibly covered by the program. L. GOODMAN AND M. WALKER, THE LEGAL SERVICES PROGRAM: RESOURCE DISTRIBUTION AND THE LOW INCOME POPULATION 14 (1975). This latter study contains regional, state, and county breakdowns of the percentages of poor people covered by the Legal Services Program, as well as expenditure and other resource breakdowns.

11. The scale works as follows in England: persons who have no greater than £250 per year disposable income and £125 disposable capital receive free legal aid. Those with greater than £700 per year disposable income or £500 disposable capital receive no legal aid. In between those levels, a person must contribute up to one-third of the amount by which his disposable income exceeds £250 or disposable capital exceeds £125. Paterson, *Legal Aid as a Social Service*, in M. CAPPELLETTI, J. GORDLEY, AND E. JOHNSON, JR., *supra* note 4 at 353, 358.

The Swedish system, described in note 13 *infra* is based upon the Swedish Public Legal Aid Law of May 26, 1972, SFS 1972: 429 and is reprinted in CAPPELLETTI, GORDLEY, AND JOHNSON at 526-60.

12. Of all legal aid cases apart from those in magistrates' courts approximately 50 percent have a nil contribution, i.e. do not involve any payment by the applicant. In the remaining cases there is a steady tendency for the amount of contribution required to rise. There is no doubt that were the scales to be revised on a cost of living basis to make them equivalent to those originally calculated before 1949 for the Act or to the amended scales of 1960, there would be a big increase in legal aid applications from those who at present are too rich to qualify but too poor to go it alone. It is this fact, with its prospect of increased costs, that prevents such an elementary measure of justice being put through. Until this is done there will, increasingly, be one law for the rich and the poor, but injustice for the man in the middle.

Paterson, *Legal Aid as a Social Service* in CAPPELLETTI, GORDLEY AND JOHNSON, *supra* note 11 at 353, 358.

13. In Sweden, citizens are eligible for some legal aid if their annual income does not exceed eight times a certain base amount. The base

13. (Cont.) amount used is the one utilized in the insurance law to guarantee a minimum social standard to all citizens. Thus parties whose incomes vary from as low as the base amount (in 1973, the base amount was 7,300 crowns) to as much as eight times that amount (58,400 crowns in 1973 or roughly \$15,000) may receive legal aid. Government aid is based on a sliding scale which allows the poorer litigant to receive higher benefits than one with a higher income. But at least those of middle-income are offered the opportunity to obtain a partial subsidy or legal assistance. See M. CAPPELLETTI, J. GORDLEY, AND E. JOHNSON, JR., *supra* note 4, at 569. Swedish officials estimate that over 80% of the population is eligible for government-subsidized legal assistance in that country. Interview with I. Gulnas, Attorney General of Sweden by Earl Johnson, Jr., March 26, 1976.

14. The U.S. system is based upon the old English fee system, according to which parties paid fees for services to clerks, bailiffs, secretaries, sheriffs, witnesses, and even the judges (who were also on salary). After the American Revolution, the states retained fee systems, but the details of these systems varied according to the constitutional provisions of each state. Most of the state constitutions provided that judges would receive fixed salaries instead of fees from the disputants. For further discussion of the history of the fee system see Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO L. REV. 21, 27-33 (1968) [hereinafter Silverstein].

15. One author reports, for example, that in Germany a case for 200 DM or less costs 336 DM for trial at two levels; a 1,500 DM case costs 1,675 DM; even a 10,000 DM case will cost almost that amount in fees if taken up to a third level. Baur, *Armenrecht und Rechtsschutzversicherung*, in *STUDI IN MEMORIA DI CARLO FURNO* 89, 93-94 (1973), reprinted in CAPPELLETTI, GORDLEY AND JOHNSON, *supra* note 4 at 396.

16. "All the clerks, sheriffs, and other functionaries of the English courts were paid chiefly . . . by fees collected for their services. Even the judges . . . also received fees from the litigants. Indeed, the limited data available indicates that the fees were the greater part of judges' income. . . ."

"Two vestiges of the fee system still remain [in the United States]. One is that in many states sheriffs, justices of the peace, constables, and probate judges or commissioners are compensated, in part at least, by fees. . . . The other vestige is that court fees are still charged to litigants for services rendered by clerks and other officials. Thus, . . . the litigants pay a share of the cost of operating the courts, although in general the fees charged are much too low to cover the actual costs involved. . . ."

Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO L. REV. 21, 27, 29 (1968).

See also Saari, *Open Doors to Justice—An Overview of Financing Justice in America*, 50 JUDICATURE 296, 302 (1967) discussing proposals in Colorado and New York to have the state take over a larger portion of the judiciary's budget, making it less dependent upon fees and fines.

17. See pages 26-28 *supra*.

18. See pages 80-81 *infra*.

19. All lawyers in the Soviet Union are members of regional boards; there is no private practice. A person who needs the services of a lawyer contracts with the local board, although he may request a particular lawyer if he so desires. The fee is paid directly to the local bureau. See V. K. Puchinsky, *Access to Justice in the U.S.S.R.*, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

20. In many classes of cases, court costs are entirely waived. These include: industrial/office workers suing for wages or other labor relations claims; plaintiffs suing for alimony; collective farm members

suing for compensation for farm work; all parties in suits between citizens and administrative bodies; plaintiffs suing for compensation for death/injury of a breadwinner; as well as others. Court costs may also be waived on a case-by-case basis depending upon the finances of the individual party. V. K. Puchinsky, *Access to Justice in the U.S.S.R.*, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

21. Legislative materials from several countries adhering to the charitable model are collected in M. CAPPELLETTI, J. GORDLEY, & E. JOHNSON, JR., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* 245-70 (1975). They include materials from Italy, France (before 1972) and references to Portugal.

22. The charitable model experiences other significant problems. The Italian system has been criticized on grounds: (1) it provides legal aid only for actual litigation, whereas a more affluent person can buy legal advice and information concerning his rights; (2) legal aid must be requested in a written petition containing statements of facts and positions as well as documentation of poverty, a requirement which weighs heavily where illiteracy is still prevalent; (3) the attorneys who write the petition and represent the indigent are less capable and less aggressive than the attorneys who are hired by affluent people; and (4) in order to obtain legal aid the party must appear for an examination before the legal aid commission. Since the indigent must demonstrate he has a reasonable case at this time and the adverse party is also present and can submit evidence, in essence a preliminary judgment on the merits is made in a nonjudicial setting. Furthermore, the indigent is required to reveal his case before trial. *Id.* at 252-54.

23. Tucker has suggested a tithe on a certain percentage of every lawyer's time or income, for use in representing the poor. Since not all lawyers are as capable or prefer to work in certain of these areas, she would allow a lawyer to finance another to do the work instead of doing the work himself. Another related suggestion by Tucker is that of a bar-sponsored internship in public service (e.g., public defender's office, legal aid office), somewhat akin to a medical internship, for every law graduate. Tucker, *Pro Bono Publico or Pro Bono Organized Bar?*, 60 A.B.A. J. 916 (1974) [hereinafter Tucker].

Another advocate of a time tithe on lawyers is James Brosnahan, the president of the San Francisco Bar. He has suggested that every lawyer consider whether he could contribute 75 hours a year (one and one-half hours a week) to representing the poor. See *Newsletter of the Bar Association of San Francisco* at 6 (October-November 1976). Suggestions have also been made to require a number of hours of a lawyer's time to be devoted to *pro bono* work, the number to be determined by the lawyer's income bracket. For example, a lawyer earning \$40,000 to \$60,000 per annum might be required to devote 80 hours a year, while a lawyer earning a larger sum might be required to devote 120 hours a year. (Proposal being considered by the California State Bar, Section of Legal Services, Special Committee on Pro Bono Legal Services.)

Another suggestion revolves around the power of licensing; lawyers might be made periodically to certify that they have well used their licenses to practice in some program for the public good. See MARKS, LESWING and FORTINSKY, *THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY* (1972).

24. For one of the seminal articles on public interest law see Cahn and Cahn, *Power To the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970), especially the section dealing with the law firm as a source of "capital" for public interest law at 1031-37. The authors stress that private law firms have much to offer to public interest law, obviously in their legal expertise in areas which are increasingly affecting and aiding poor people (antitrust, tax law, etc.) and perhaps even more critically in the area of law office management which, if emulated by a public interest firm could increase efficiency and output. Cahn and Cahn suggest that a private firm can

24. (Cont.) best implement its public interest work component, by developing a clear structure for assignment, number of hours, bookkeeping, and other matters. This upgrades *pro bono* work to co-equal status with private work and allows the firm to recognize the nature of the contribution it is making to public interest work, and perhaps to periodically revamp its approach to achieve the best results for the time and effort spent. *Id.* 1031-34.

See also *Structuring the Public Service Efforts of Private Law Firms*, 84 HARV. L. REV. 410 (1970); M. TUCKER, *THE PRIVATE LAW FIRM AND PRO BONO PUBLICO PROGRAMS: A RESPONSIVE MERGER* (1971); Tucker, *The Private Lawyer and Public Responsibility*, 51 NEB. L. REV. 367 (1972); Ashman and Woodard, *Private Law Firms Serve the Poor*, 56 A.B.A. J. 565 (1970); Ferren, *Public Interest Component in a Private Law Firm*, in N.Y. PRACTICING LAW INSTITUTE, PUBLIC INTEREST LITIGATION 15 (1975).

25. The legal profession's ability and motivation to impose this "surcharge" on work performed for paying clients will be influenced by at least two factors—the relative elasticity of demand for the services performed by lawyers and the relative amount of "slack" time available to lawyers, that is, time which lawyers would have available to provide uncompensated service without seriously cutting into fee-generating work hours. The relative ease with which the legal profession has raised legal fees over the past decade suggests that demand for its services is rather inelastic. That, coupled with its monopoly over many legal tasks, suggests the profession probably could raise fees another 10 percent without losing clients or business (especially if, as suggested, the time tithe were imposed and fees were raised across the board, not merely on a lawyer-by-lawyer basis. The considerable "slack" time existing in the profession is more apparent than real. True, studies suggest lawyers only spend an average of 28 hours of a 40 hour work week (i.e., 70% of their time) in activities "billable" to paying clients. Cole & Greenberger, *Staff Attorneys vs. Judicare: A Cost Analysis*, 50 J. URB. LAW 705, 708 (1973). Consequently, they presumably could devote an average of three or four of their "free" hours to uncompensated work for the poor without having to reduce the time spent on "billable" cases and then without suffering any loss of income which must be made up through a "surcharge". However, except for relatively marginal practitioners, it is probable that most lawyers are fully occupied already. Activities not billed to clients reflect time spent in generating new business, in continuing education, in professional and public service work, etc., all essential to the lawyer's professional success. Accordingly, at least a substantial proportion of the hours diverted to uncompensated services to the poor through a "time tithe" probably would represent a net decrease in the time available for "billable" work on behalf of paying clients.

26. See note 23 *supra*. Other proposals are in the wind. The idea of tithes will shortly be under discussion by the American Bar Association.

27. The California State Bar Board Committee on Legal Services will shortly be considering a proposal made by Ralph Gampell, president of the State Bar, for legislation along these lines. The proposal would call for a study of a plan for having dentists, doctors and lawyers required to devote a certain number of hours per year to the poor. It would also authorize the State Bar to proceed with providing its own program for voluntary *pro bono* services, coordinated by an ad hoc committee. Telephone conversation with member of legal services staff, California State Bar, January 19, 1977.

28. The federal revenue has grown fairly steadily from certain dedicated types of taxes. For example, social insurance taxes (employment, unemployment insurance, etc.) amounted to \$14.7 million in 1960, \$45.3 million in 1970 and \$76.8 million in 1974 (the bulk of the increase due to the employment taxes levied on both employers and employees). Excise tax trust funds (used for airports, airways and highways) accounted for \$2.5 million in revenue in 1960, \$5.4 million

in 1970 and \$7.1 million in 1974. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1975 at 226 (96th ed. 1975).

29. In fact, the incidence of sales tax, other state and local taxes, and certain federal taxes is so regressive that it practically negates the progressivity of the individual and corporate federal income tax. LAMPMAN, *ENDS AND MEANS OF REDUCING INCOME POVERTY* 99 (1971). One study reported that in 1965, considering all taxes, the population in the bottom fifth of income paid 22 percent of income in taxes; the upper and middle classes paid between 24 percent and 26 percent. Another state study reported that those with income under \$2,000 paid 34.2 percent; those earning \$3,000-\$3999 paid only 33 percent, and those earning \$5,000-\$7,499 paid only 29 percent of their income in taxes—all this despite the fact that the income tax component of the tax incidence is progressive. See E. JOHNSON, JR., *JUSTICE AND REFORM* 198-99 and n. 69 (1974) citing Batchelder, *Palliatives; Transfer From Peter to Paul*, in *THE ECONOMICS OF POVERTY*, 137 (1966).

30. In 1973, the figure rose to almost \$11 million. Of this amount approximately \$2.9 million was received by sole proprietorships, \$5.9 million by partnerships, \$1.0 by corporations, and \$1.0 by other or unknown forms. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1975 at 163 (96th ed. 1975).

31. Federal expenditures on legal aid were approximately \$71 million for 1970-75. See note 7 *supra*.

32. The Legal Services Corporation has estimated that its current \$125 million annual budget allows it to meet about 25 percent of need. See note 10 *supra*. However, such projections ignore the non-poor who require at least partial subsidy to participate effectively in the process. These forecasts also could be affected profoundly by large-scale adoption of strategies which reduced the need for lawyers or the level of other participation costs (see especially Chapters IV, V, and VI *supra*).

33. One California proposal would amend the Business and Professions Code to allow funds collected in court fees to be used for legal services for the poor. It would give 85 percent of the collected fees to qualified legal aid programs and 15 percent to qualified support centers. In countries with no qualified programs, the money would be held in trust to be used by qualified programs requesting to serve the county or after a certain number of years to be distributed to programs outside of the county. See State Bar of California, Legal Services Section, Standing Committee on Legal Services for the Poor, Minutes, December 22, 1976.

34. In West Germany, for example, court costs may be extremely high in certain cases because they are keyed to the amount in controversy. For example, a case worth 11,500 DM may consume over 1,000 DM in court fees alone, excluding attorneys fees. Often these costs must be paid in advance as, for example, by a party requesting an evidentiary hearing. See R. Bender and C. Strecker, *Access to Justice in the Federal Republic of Germany*, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

Court costs in Japan have also reached a very high level in both the smaller and larger cases. See T. Kojima and Y. Taniguchi, *Access to Justice in Japan*, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

35. Some state courts have held that due process considerations require the government to absorb the defendants' legal costs in at least one such category of civil dispute in which government is the moving party. *State v. Jamison*, 251 Ore. 114, 444 P.2d 15 (1968); *Danforth v. State Dept. of Health and Welfare* 303 A. 2d 794 (Me. 1973). But California courts have ruled otherwise. See, e.g., *In re Robinson* 8 Cal. App. 3d 783 (1970).

36. As an example, debts of a size that would be collectible through the courts against one class of debtors would not be collectible—in

36. (Cont.) economic terms—against another class. This might result in denial of credit to the latter group in circumstances in which they otherwise would receive credit or in higher interest rates for credit extended to that group than otherwise would obtain.

37. The scale for the attorneys fees makes somewhat finer distinctions than that for court fees. The ratios are as follows (amount in dispute/maximum fee):

- less than 100 roubles/5 roubles
- less than 100–300 roubles/10 roubles
- less than 300–500 roubles/20 roubles
- more than 500 roubles/30 roubles
- non-monetary action/15 roubles
- extremely complicated case/60 roubles.

Lawyers may be paid an extra 10 roubles for each day of trial after the third day.

The scale for the amount of state duty (the largest component of court costs) is as follows: (amount in dispute/state duty):

- up to 20 roubles/30 copecks
- up to 20–50 roubles/50 copecks
- up to 50–500 roubles/2 percent of amount
- more than 500 roubles/6 percent of amount
- non-monetary action/30 copecks

V. K. Puchinsky, Access to Justice in the USSR, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

38. In the United States, court charges are generally based on a flat fee schedule. There is a rather wide range of fees for any particular item, because of the diversity by jurisdiction. An ABA study of 30 jurisdictions found that filing charges range from \$2.00 to \$35.00, service of process from 75¢ to \$10.00, service by publication from \$10.00 to \$150.00, and court reporters from 10¢/page to \$1.25/page. See E. JOHNSON, JR., *et al.* Access to Justice in the United States, national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedures, Florence, Italy.

In the Netherlands, the court costs are based on a flat rate which

varies according to type of court: about 25 hfl in canton court and from 60–70 hfl in arrondissement court. See J.C. Houtappel, Access to Justice in the Netherlands, National Report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy.

39. In the U.S., for example, many states have suggested fee schedules although in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the court held that a mandatory minimum fee schedule for certain real estate transactions which required a lawyer's services violated the antitrust laws. These suggested fee schedules are based upon type of case, not number of hours, but even a cursory examination reveals that the legal fee is most closely related to the amount of time required rather than the amount at stake. For example, according to one Connecticut bar association, the minimum schedule for a simple will was \$50.00, for a change of name \$150.00, and for uncontested divorce \$500.00. See E. Johnson, Jr., *et al.*, Access to Justice in the U.S., national report for Access to Justice Project, Center for Comparative Studies in Judicial Procedure, Florence, Italy. See also Cole and Greenberger, *Staff Attorneys vs. Judicare: A Cost Analysis*, 50 J. URB. LAW 705 (1973), especially chart at 710 showing cost of judicare per type of case and average number of hours spent.

40. See note 15 *supra*.

41. For discussion of how common it is for civil defendants, even those with substantial incomes, to capitulate in court suits because it would cost more to litigate successfully than to concede and give the plaintiff what he wants, see D. CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* (1974).

42. See pages 3–4 *supra*.

43. Assuming that the external benefits achieved by society from the resolution of the average "minor" dispute were \$50 and the average cost of resolving such disputes were \$40, application of this approach could result in a net disbursement to the disputants of \$10. If the external benefits generated by the average "major" dispute were \$100 but the average cost to society of resolving such disputes were \$1000, the government might charge the disputants \$900 in fees.

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