

# A MORE COMPLETE LOOK AT COMPLEXITY

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## INTRODUCTION

The ability of courts to successfully resolve complex cases has been a matter of contentious debate, not only for the last quarter-century, but for most of the twentieth century. This debate has been part of the legal landscape at least since Judge Jerome Frank's polemic book from which this Symposium derives its title,<sup>1</sup> and probably since Roscoe Pound's famous address to the American Bar Association.<sup>2</sup> During the 1980s and 1990s in particular, the battlelines of the pro- and anti-court debate have been brightly drawn. Some commentators, most reliably successful plaintiffs' counsel and politically liberal academics, defend the judicial track record in complex matters. Simultaneously, the defense bar and the conservatives of bench, bar, and academy tend to be critical, particularly of the jury system.<sup>3</sup>

Ironically, Judge Frank represents perhaps the most prominent exception to this tendency for one's assessment of the courts to mirror one's general political

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1. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

2. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). Pound's speech was originally delivered to the American Bar Association at its 1906 Annual Meeting in St. Paul, Minnesota and has been widely reprinted. See, e.g., *HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS* 219 (George H. Williams & Kathleen M. Sampson eds., 1984); 57 A.B.A. J. 348 (1971) (abridged version).

3. See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688-94 (1993) (describing different political alignments regarding civil litigation issues and characterizing political spectrum as organized into two main camps of "Reformers," who desire controls on access to adjudication and litigation scope and outcome, as contrasted to "Preservationists," who favor relatively unrestricted access to adjudication consistent with their view of the spirit of the 1938 Federal Rules).

views. Judge Frank is generally viewed as a progressive Democrat, but this liberalism did not, apparently, stem from any particular faith in the "common man." Frank was disdainful of the jury and the mythical reverence attached to it.<sup>4</sup> Although no proponent of juries, Judge Frank was also critical of judges.<sup>5</sup> Further irony lies in Judge Frank's notorious opposition to summary judgment,<sup>6</sup> a surprising result in light of his skepticism about fact-finding generally and juries in particular. As one might expect of a charter member of the New Deal Franklin Delano Roosevelt Administration that created so many new government agencies, Judge Frank appeared to endorse the administrative agency as the rational

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4. See FRANK, *supra* note 1, at 108-45 (outlining his criticisms of the jury system, defenses of the jury, and possible jury reforms that might improve jury functioning).

5. See *id.* at 146-56 (criticizing mythology of omniscience and impartiality of judges). Frank noted that "[even without the jury,] trial-court fact-finding is the toughest part of the judicial function. It is there that court-house government is least satisfactory. It is there that most of the very considerable amount of judicial injustice occurs. It is there that reform is most needed." See *id.* at 4.

6. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (denying summary judgment to defendant, famed composer Cole Porter, when Porter was sued by far less reknown composer alleging copyright infringement); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945). In *Doehher Metal*, Judge Frank set forth the "slightest doubt" test, arguing that summary judgment should not be granted where there is the slightest doubt as to the true facts of a dispute. He reiterated this rationale and similarly denied summary judgment in the *Porter* litigation, which has become a staple of law school case books because the infringement claim was possible even if not probable.

Academics and noted jurists, such as Charles E. Clark, the principal drafter of the 1938 Federal rules, took strong issue with Frank, and the "slightest doubt" test became a minor butt of legal criticism. See *Porter*, 154 F.2d at 476 (Clark, J., dissenting); MOORE'S FEDERAL PRACTICE § 56 App. 200[2] (3d ed. 1998) (describing Frank's position on summary judgment in noted Second Circuit cases and subsequent rejection of his opposition to summary judgment); Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 504 (1950) ("[S]light doubt can be developed as to practically all things human.").

On closer examination, Judge Frank's decisions against summary judgment in the two cases (with the support of Judge Learned Hand in *Porter*) can be supported by analysis considerably stronger than the slightest doubt test. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 140-44 (1988) [hereinafter Stempel, *Distorted Mirror*]. But the slightest doubt rhetoric standing alone was too tempting a target for critics and effectively branded Judge Frank (and to some extent the Second Circuit) as abolishing summary judgment and sending every case to Frank's despised lay jurors. See Henry A. Brachtl, *Has Summary Judgment Been Eliminated in the Second Circuit?*, 46 BROOK. L. REV. 565 (1980) (noting the myth but finding summary judgment frequently successful on appeal in Second Circuit). See also Stempel, *Distorted Mirror, supra*, at 146-47 (noting Second Circuit's transition to a more favorable attitude as early as *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952), where Judge Frank concurred in the result and, although he wrote separately, did not invoke the slightest doubt test).

One biographer of Judge Frank viewed his opposition to pretrial dismissal as motivated by a desire to embrace jury unpredictability. See ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* 156-57 (1985).

adjudicator/ policymaker of choice,<sup>7</sup> although he also held reservations about administrative agency factfinding.<sup>8</sup> Although Judge Frank was enigmatic about what he really wanted when he criticized courts, it seems safe to say that he wanted less layperson decisionmaking and more policymaking and dispute resolution by technical experts such as agency officials. Judge Frank was mercifully beyond the scene when the public choice scholarship of the past thirty years dramatically punctured the original optimism surrounding New Deal agencies and faith in government.<sup>9</sup>

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7. See FRANK, *supra* note 1 at 32 (criticizing former Chief Justice Charles Evans Hughes for asserting that administrative agencies were more prone to corruption and error than courts).

8. See *id.* at 74 ("My experiences as a 'quasi-judicial' fact-finder on the SEC and my service on the bench have not changed my fundamental belief that trial-court fact-finding is the soft spot in the administration of justice.").

9. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 44–58 (1982) (observing loss of original faith and optimism regarding efficacy of administrative agencies as adjudicators and policymakers); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (finding administrative law outcomes strongly influenced by political power rather than strict logical analysis); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (discussing posited phenomenon of "agency capture" by entities that the agency was supposed to regulate). See generally Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126–28 (1989).

The "public choice" or "social choice" school of thought is generally regarded as beginning with the classic work JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (explaining political outcomes as a product of rational self-interest rather than political ideology or policy analysis; applying game theory to behavior of political actors) and built further by the work of other economists and political scientists writing during the 1960s and 1970s. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (positing that magnitude of self-interest and mobilization of interest groups is more important than overall public sentiment in political outcomes); MORRIS FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977). Arguably, the Buchanan & Tullock work was anticipated by KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951) (identifying cycling voting majorities and concluding that the agenda for decision influences legislative outcomes so that the position enjoying broadest overall support will not always prevail); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957) (placing self-interested group activity on par with ideology, policy, candidate attractiveness, and campaign organization in determining political outcomes).

"Public choice theory posits that laws generally distributing benefits and costs will not often be enacted and, once enacted, will not be updated because they do not necessarily stimulate the formation of supportive interest groups and because they offer insufficient opportunities for legislators to advance their chances of reelection." WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 157 (1994). A good deal of the public choice critique has also focused expressly or implicitly on the executive branch and its administrative agencies that are influenced by both legislators and executives. See, e.g., RANDALL B. RIPLEY & GRACE A. FRANKLIN, *CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY* 6–28 (4th ed. 1987); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY*

Notwithstanding Judge Frank, the long-running debate over court competence has tended to be both ideologically predictable and yet, paradoxically, relatively unclear in its focus. The pro- and anti-court battlelines may be brightly drawn, but the edge is blurry and blotted, as if the disputants had used a crude felt-tipped marker rather than a fine-point pen. Despite the years of debate, it remains difficult to know exactly what the contestants mean by "complex,"<sup>10</sup> let alone what a court (or any decision-maker) is to do when it "competently" processes a case.

In this paper, I assemble and assess the criteria commentators have used to measure complexity and competence. I then examine the differing definitions and connotations of court competence implicitly surrounding the competence debate. I conclude that courts are largely competent regarding most of the criteria. Encouragingly, courts are also capable of being made more competent with relative ease regarding most aspects of complexity. Perhaps, most important, courts appear to continue to be distinctly more competent as the default option for adjudication than their current competitors—broad-based legislation, administrative agencies, arbitration, mediation, and variant hybrids. However, the comparative advantage of courts is subject to potentially rapid erosion, particularly for certain types of disputes.

More particularly, courts have more competence than the alternatives where the competency in question is legal, jurisdictional, aggregative, or coercive. Courts also have a competency advantage because of their independence, neutrality, and ongoing institutional resources, as well as the procedural structure surrounding courts, which tends to promote access and fairness. However, where the competency at issue is technical complexity, difficulty ascertaining certain types of facts, or the making of certain multifaceted public policy decisions, courts may lose their default edge of competency. In particular, expert administrative agencies or alternative dispute resolution ("ADR") tribunals may have an edge over courts in one or more of these areas. Nonetheless, courts may remain the preferred default decisionmaker even in these situations because of their advantages of access, independence, neutrality, and openness, as well as their comparative flexibility.

Moving beyond default rules, the identification of the most apt mode for a particular complex matter remains dependent more on the particular matter in question and in the details of dispute resolution than upon any inherent attributes of form enjoyed by courts or their competitors. Thus, the short answer to the question posed in this segment of the Symposium is that courts and juries, at least as a default option, generally have a comparative competence advantage in the

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OF POLITICAL MARKETS (1981). Thus, although this emergent scholarship has focused much of its sting upon legislative outcomes, administrative agencies have also been diminished from the perhaps naively lofty perch they held in the minds of the New Dealers.

10. See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1692-93 (1992) (listing a large variety of differing definitions of complexity). Professor Tidmarsh argues for a different set of complexity definitions. See *id.* at 1754-804.

resolution of complex cases. Courts are likely to maintain this advantage in the future.

## I. DEFINING TERMS: THE COMPLEXITY OF COMPETENCE

### A. Complexity

Analyzing the "problem" of legal complexity and complex litigation would seem to require at least a working definition of complexity.<sup>11</sup> But legal commentators use the term to describe a multitude of traits.<sup>12</sup> Some commentators imply that analysis cannot proceed very far without a relatively succinct, uniform,

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11. Professor Tidmarsh has described the need for such a definition.

The development of this definition [of complexity] is crucial for several reasons. Should it turn out that a definition of complex litigation cannot be developed, the invitation of the Civil Justice Reform Act and the reformers to separate complex cases from routine ones much be rejected. On the other hand, should it turn out that a definition does exist, a correct understanding of complex litigation might prevent well-intentioned reform from paving the path to a procedural hell. Without a proper definition, it is impossible to decide whether separate procedural rules are necessary to cope with the reality, rather than the myth, of complex litigation; to determine the content of those rules; or accurately to assign the right set of rules to the right set of cases.... A definition can provide clues about the nature of the "disease" and thus assist in deducing appropriate treatments.

*Id.* at 1689-90. *See also* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1463 (1987) ("providing definition to an area of law represents perhaps the highest form of that enterprise as scholarship").

12. *See* Tidmarsh, *supra* note 10, at 1692 (legal scholarship on the issue reflects a "[c]acophony of [d]efinitions," and "the most striking feature of the commentary on complex litigation is the lack of agreement about a definition for the subject"). Professor Tidmarsh notes that complexity has been defined on the basis of the number of issues, parties, and forums as well as the costs of litigation, the stakes of the case, legal intricacy, factual intricacy, time required for adjudication, and the degree to which the dispute is susceptible to rational analysis by laypersons or lawyers. *Id.* at 1692-93. *See also* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 3-4 (1992) (defining a legal system as complex "to the extent that its rules, processes, institutions, and supporting culture possess four features: density, technicality, differentiation, and indeterminacy or uncertainty"); Burbank, *supra* note 11, at 1463 ("Those charged with responsibility to devise procedures for complex cases in the federal courts have [not] essayed a definition worthy of the name.") (footnote omitted). The divergence between the Schuck definition of complexity and those collected by Tidmarsh reflects to some degree the divergence that inherently results from assessing different things: complexity of the legal system versus complexity of litigation. Although definitions of either will not likely be congruent, they will overlap and should be instructive of one another.

and widely held definition of complexity.<sup>13</sup> However, for purposes of this paper's analysis, a single definition of complexity is both unnecessary and perhaps misleading. Here, I use a multifaceted definition of complexity that aggregates and orders the differing notions of complexity held by the legal community. This hydra-headed comprehensive "definition" can facilitate an analysis of whether courts and juries can cope with complex matters even though it fails to create a compact definition of the term.

The term "complex" connotes something difficult and technical. Einstein's theory of relativity comes to mind. The legal profession, however, has often used the term to mean something both more and less than quantum physics. For example, the *Complex Litigation Project* of the American Law Institute ("ALI") defined complexity for purposes of the project as being multidistrict and multiparty litigation.<sup>14</sup> This is something less than Einstein-like complexity. It resembles more the complexity attendant to following the romantic entanglements of soap opera characters.

Notwithstanding the tempting tendency to quibble over the ALI's narrow definition of complexity, there is no doubt that cases with many parties from different states (perhaps requiring considerable jurisdictional and choice of law analyses) can become difficult and technical.<sup>15</sup> It is equally true that very mundane disputes can involve many parties from many states.<sup>16</sup> The expanded reach of the multistate, multiparty case makes it more involved than simple bilateral litigation, but it hardly converts an otherwise simple tort or contract action into the legal equivalent of the theory of relativity merely because the tort or contract touches upon multiple states, persons, or institutions.

Complexity must mean something more than merely multistate, although multistate aspects of litigation clearly lead to complexity, in part as a consequence of our federal system. Complexity must also include something more than cases presenting difficulty on a par with quantum physics.<sup>17</sup> "Complexity," as legal and

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13. See Tidmarsh, *supra* note 10, at 1689-93; Burbank, *supra* note 11, at 1463-65.

14. See AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION* 3-4 (1994). See also *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* (1970).

15. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (refusing to certify class action in case arising out of AIDS-tainted blood action due to presence of differing applicable law; refusing to hold case subject to one set of general legal principles as a form of "legal Esperanto" not permitted to the court).

16. See, e.g., *In re Cuisinart Food Processor Antitrust Litig.*, Civ. Nos. H 81-196, H 81-610, H 81-444, H 81-194, H 81-170, H 81-193, H 81-71, H 195, 1983 WL 153 (D. Conn. Oct. 24, 1983) (permitting class action treatment and approving settlement in case alleging antitrust violations regarding Cuisinart food processor, resulting in provision of coupons for 50% discount on future purchases, with amount of discount not to exceed \$100).

17. See Tidmarsh, *supra* note 10, at 1693 (1992) ("It seems [from the multiple concepts of the topic] that there is no such thing as "complex litigation," only "complex

social scholars have used the term, appears to be a bubbling cauldron of many ingredients:

### *1. The Number of Parties to the Suit*

I concede that the ALI Project has made clear that the number of parties bears on the question.<sup>18</sup> Just as too many cooks may spoil the metaphorical broth, more parties to litigation generally mean more issues in the dispute, and a correspondingly larger or higher stakes dispute, all of which tends to mean a more complex matter.

Some have suggested that the real problem with the multiparty suit is that "there exist procedural and ethical impediments to joinder."<sup>19</sup> Inability to resolve mass cases en masse is often part of the complexity problem in that it tends to mean not only more fragmented resolution of large-scale problems but also creates more uncertainty, inconsistency, and opportunity for complexity-increasing behavior by the parties and counsel.<sup>20</sup> Thus, to some extent the multiparty problem may be a joinder problem, which is discussed separately below. However, it serves the overall analysis of complexity to consider, in its own right, the complexity brought to a case by multiple parties even absent any procedural problems of joinder.

For example, joinder that occurs under the current Civil Rules, or that could occur in a more aggressive joinder regime, may be part of the problem rather than part of the solution in that it tends to homogenize differences among the parties and the claims that deserve more tailored consideration if justice is to be done. Thus, efforts to adjudicate the extensive multiparty case by aggregating may not only create ethical problems of conflict of interest and divided loyalty but also can tend to over and undercompensate claimants due to the tendency to average matters through settlement or efficient remedial rules and procedures. The complex

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litigations."). Professor Tidmarsh also draws a distinction between "complicated" cases that present issues of difficulty and "complex" cases that are difficult overall. *See id.* at 1705-06.

18. *See* AMERICAN LAW INSTITUTE, *supra* note 14, at 3 (defining complex litigation as "multiparty" and "multiforum"); RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* 2 (1985); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 23 (1986) (larger number of parties a trait of complex litigation); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511 (1986) (same).

19. *See* Tidmarsh, *supra* note 10, at 1691.

20. *See* Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267 (1987) (reviewing PETER SCHUCK, *AGENT ORANGE ON TRIAL* (1986) (suggesting that class action may not be the apt vehicle for adjudicating the claims of a class of Vietnam War veterans so large and dispersed that injuries of the least affected and most affected were incompatible for joint settlement)); Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986) (criticizing an Agent Orange trial judge for granting summary judgment against class member who opted out but who had more severe injuries than average class member and appeared to have more persuasive evidence of causality than most class members; author intimates that the trial court was driven in part by desire to promote classwide resolution by discouraging opt-out plaintiffs).

case may either fall apart through the centrifugal force of the individuality of claims and multiple lawsuits or may work injustice by mashing together claims of distinctly differing value. Even without this intra-group conflict, the multiparty case may be complex simply because it is unwieldy in a system originally designed for two-party, bipolar disputes.

### 2. Complexity Induced by Joinder Problems

Professor Tidmarsh terms this "systematic dysfunction,"<sup>21</sup> and it of course overlaps with multiparty complexity. Joinder complexity is different in that it involves not so much the raw number of litigants but rather the degree to which bringing relevant litigants and claims to a particular forum induces complexity or proves impossible. To the extent joinder is incomplete, the adjudication will not completely resolve the matter with finality because full claim or issue preclusion is impossible. In addition, dysfunction results because lawyers and parties have such wide latitude to shape the form of the claim and parties joined. This latitude is used to defeat federal jurisdiction, to forum shop, to arrange litigation that is not strictly arms-length, and so on. Such joinder dysfunction or strategic use of joinder by counsel may create inequities where there are claims to a limited asset and the claim is not resolved with all interested parties present in fair (that is, non-sweetheart) adjudication.

### 3. Multiplicity of Forums

Although this definition of complex litigation is widely accepted,<sup>22</sup> this complexity, like that induced by multiple parties, is not in itself inherently complicated as a matter of substance. More forums addressing the same or related disputes tend to correlate with more issues of inter-governmental authority, differing law, less consistent results, and other aspects of complexity.

### 4. Unusually Protracted Time to Disposition of the Matter<sup>23</sup>

Although this factor, like party and forum multiplicity, does not inherently prove a matter complicated, the lengthy and the complex are often correlated. One

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21. See Tidmarsh, *supra* note 10, at 1780.

22. See AMERICAN LAW INSTITUTE, *supra* note 14, at 3 (defining complex litigation as multiparty or "multiforum"); Rowe, & Sibley, *supra* note 18, at 15, 130 (multiforum litigation complex and more difficult than other matters). See also Tidmarsh, *supra* note 10, at 1692-93 (listing large variety of differing definitions of complexity, including multiforum cases).

23. See, e.g., *Judicial Conference of the United States, Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960) (treating cases as complex because they are time-consuming and protracted); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 257 (1985) (including protracted matters in discussion of complex cases threatening to clog judicial system).



might see lengthy cases as presenting something of a sick fusion of both Murphy's Law (if anything can go wrong, it will) and Parkinson's Law ("work expands so as to fill the time available for its completion").<sup>24</sup> More can go awry in a five-year case than in a five-month case. In the protracted case, attorneys and parties have the opportunity (and often the incentive)<sup>25</sup> to engage in additional lawyering, even overlawyering, that adds complexity and perhaps pathology as well.

### 5. *Disuniformity of Law*

This legal divergence encompasses:

#### a. Pure Conflict Among Legal Rules in Substance and Applicability

An example of this conflict is choosing which state tort laws to apply, with one state continuing to adhere to a physical contact requirement as a prerequisite to an award of mental anguish damages. This basic "true conflict" of laws, like multiparty litigation, is the sort of complexity at the heart of the ALI project.

#### b. Institutional Differentiation in the Making and Applying of Law

Professor Peter Schuck coined the term "institutional differentiation" to describe a system that "contains a number of decision structures that draw upon different sources of legitimacy, possess different kinds of organizational intelligence, and employ different decision processes for creating, elaborating, and applying the rules"<sup>26</sup>—in other words, American law.<sup>27</sup>

#### c. Difficulty Ascertaining Applicable Law

This includes difficulty encountered because a legal issue is relatively new and unsettled. There may be no case on the topic or only a handful of lower tribunal cases of unclear precedential value. In addition, law may be difficult to

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24. See C. NORTHCOTE PARKINSON, *PARKINSON'S LAW AND OTHER STUDIES IN ADMINISTRATION* 15-16 (1957).

25. See *infra* notes 53-54 and accompanying text (high stakes cases may prompt lawyer and party behavior designed to complicate the case or that complicates the case due to greater incentives to prevail in—or at least not lose—a high stakes case).

26. Schuck, *supra* note 12, at 4. Professor Schuck also provided the following illustration: "Product safety, for example, is institutionally differentiated in that it is governed by statutory provisions, regulatory standards promulgated by several different agencies and private technical organizations, tort litigation, and common law contract principles." *Id.*

27. Chief Justice William Rehnquist seems to concur with Professor Schuck's assessment. See William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, SUPREME CT. PRESS RELEASE, Jan. 1, 1998 (In lauding administrative reforms in the federal courts, Chief Justice Rehnquist observes that "[d]ecentralized management has established the Judiciary as an archetype for other complex public and private institutions.").

ascertain not because it is novel but because its determination is logistically difficult or its unearthing unfamiliar. For example, the average American lawyer or judge may find certain international law questions difficult because source materials are less accessible or less well understood. This is different than the problem of selecting between or among clear but competing rules of law, which is discussed below. Here, the problem is defining the law, not selecting it.

#### d. Difficulty Choosing Applicable Law

A difficult choice exists when there are two or more competing bodies of law—none of which is binding. This forces the decisionmaker to incur the analytic costs of determining which body of law to adopt. Even if the choice of law analysis is not a brainteaser, the need to conduct the analysis may be time consuming, particularly in the post-Brainerd Currie<sup>28</sup> and *Second Restatement*<sup>29</sup> era when courts collected and weighed multiple factors, including the sometimes elusive animals public policy, government interest analysis, and the “better rule of law.”<sup>30</sup> Where these factors auger in different directions with differing magnitudes of strength, the exercise can become exceedingly complex.

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28. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 371–77 (3d ed. 1986) (articulating “government interest analysis” in choice of law, arguing that law of the most interested state should be applied absent other compelling factors).

29. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (law of state with “most significant relationship” to dispute should be applied). Factors used in identifying the most significantly related state include:

- (a) the need of the interstate and international systems;
- (b) the relevant policies of the forum;
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- (d) the protection of justified expectations;
- (e) the basic policies underlying the particular field of law;
- (f) certainty, predictability, and uniformity of result; and
- (g) each in the determination and application of the law to be applied.

30. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (proposing that courts apply better rule of law when applicable law not definitively decided by compelling tangible factors such as party residence, citizenship, and location of events).

Although Leflar’s idea still has much to commend it, it ironically serves as something of a benchmark illustrating the degree to which law has become more contentious, as well as more “complex.” Prior to the backlash against the Warren Court and the rise in competing jurisprudential schools such as law and economics, critical legal studies, critical race theory, positive political theory, law and society, postmodernism, and the new legal process, it made more sense to talk of judicial selection of a “better rule of law.” Today, in a profession where Ronald Dworkin and Robert Bork are both regarded as in the “mainstream” (see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 428 (1990)), the notion of widespread consensus on the relative worth of particular legal doctrines seems Pollyannish.

### 6. *The Legally Technical Nature of the Case*

This factor addresses whether the legal issue is intrinsically accessible to laypersons or, instead, is derived from a legal regulatory regime that is not innately obvious. For example, determining whether a death from stabbing was murder is ordinarily less legally technical than determining whether a defendant has violated statutory land use and permit requirements. According to Professor Schuck, “[t]echnical rules require special sophistication or expertise on the part of those who wish to understand and apply them. Technicality is a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires.”<sup>31</sup>

### 7. *The Difficulty of the Legal Issues in the Case*

Sometimes legal questions are simply hard<sup>32</sup> regardless of whether there exists murkiness of legal authorities, competing bodies of law, or technicality. For example, the issue of whether a lawyer may restrict his or her practice to clients of a particular race, gender, or ethnicity<sup>33</sup> is, at least for me, a difficult question.<sup>34</sup>

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31. Schuck, *supra* note 12, at 4 (citing Internal Revenue Code as “probably the leading example of technical rules”). This is not to underestimate, however, the tendency for criminal law to make fine technical distinctions between, for example, premeditated murder and manslaughter. However, once these distinctions have been laid out, they are more amenable to resolution according to the “common sense” of the lay decisionmaker than are the more technical dictates of the tax code or the zoning board.

32. See Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 84 (1981); Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 498 (1980).

33. See *Stropnick v. Nathanson*, Law. Wkly. No. 22-012-97 (M.C.A.D. Feb. 25, 1997); Richard Lovant, *Lawyer Discriminated by Refusing a Male Client*, CHATTANOOGA TIMES, Feb. 27, 1997, at A10 (divorce lawyer unwilling to accept male clients disciplined by Massachusetts Commission on Attorney Discipline); Chris Reidy, *Woman Lawyer Told To Pay Over \$5,000 for Refusing Case MCAD Rules Refusal to Represent Constitutes Gender Discrimination*, BOSTON GLOBE, Feb. 26, 1997, at E2 (woman family law practitioner in Boston deemed by state ethics authorities to have acted improperly in restricting her representation to women).

34. Although noted legal ethics scholars Deborah Rhode and David Wilkins have agreed that restricting a law practice to clients of certain gender or race is improper, both treat the legal issue as difficult. See Deborah L. Rhode, *Can a Lawyer Insist on Clients of One Gender*, NAT'L L.J., Dec. 1, 1997, at A21 (noting that she and Professor David Wilkins both agree with the MCAD decision but that the question is difficult). Notwithstanding that the disciplinary board decision is endorsed by these two prominent professional responsibility expert, the question of whether a lawyer may restrict her practice to clients based on their gender is sufficiently vexing that it inspired an entire symposium issue of a law review with only one commentator expressly supporting the client and the other nine tending to support the attorney. See Symposium, *A Duty to Represent? Critical Reflections on Stropnick v. Nathanson*, 20 W. NEW ENG. L. REV. 5 (1998); Martha Minnow, *Forward: Of Legal Ethics, Taxes, and Doing the Right Thing*, 20 W. NEW ENG. L. REV. 5, 5-6 (1998) (Minnow notes that the case “raises many issues” of difficulty. Her view

Cases presenting this question are complex even where the facts are stipulated and the matter presented in classic bipolar fashion in a single state. Similarly, the issue of whether a public university may restrict racially defamatory speech is, for me, a good deal tougher than is usually acknowledged by the antagonists on either side of this debate<sup>35</sup> no matter how simple the rest of the case.

The difficulty of these types of cases results not from technical or scientific complexity but instead stems from the difficulty in making a determination in the face of competing values of similar attraction. Such cases are difficult to decide as a matter of philosophy and policy rather than as a result of technical difficulty. These sorts of cases may also be politically difficult to decide because a preference for certain values is likely to bring criticism from at least some elements of the body politic. By contrast, most dispositions of contract, tort, and property claims are unlikely to attract the attention of those outside the immediate litigation.

#### 8. *Difficulty in Choosing, Crafting, or Administering Remedies*

Where a case presents claims not readily susceptible to traditional money damages or injunctive relief, decisionmakers face difficulty in selecting a remedy due to the seeming inappropriateness or inadequacy of garden-variety remedies.<sup>36</sup> The tribunal may then actually need to create new remedies or make hybrid remedies from the established precedents. School desegregation and deinstitutionalization of persons with developmental disabilities are two ready examples.<sup>37</sup>

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is that the attorney should be permitted to turn down a client "based on her commitment to eradicate gender bias in the realms of divorce law.").

35. Compare Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (justifying "hate speech" regulation) with Stephen G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988) (criticizing hate speech regulation as matter of policy and finding First Amendment bar to such regulation).

36. See Tidmarsh, *supra* note 10, at 1691 (cases are complex where "remedy is difficult to implement").

37. For example, *Brown v. Board of Education*, 347 U.S. 483 (1954), holding publically segregated schools to violate the Equal Protection Clause, was an open case until 1995. See *Brown v. Unified Sch. Dist. No. 501*, 878 F. Supp. 1430 (D. Kan. 1995) (costs proceeding). Even after dramatic guidance from the highest court in the land, the remedial aspects of desegregation remained complex. See also *Missouri v. Jenkins*, 495 U.S. 33 (1990) (invalidating court-ordered tax increase to fund order designed to reduce inequalities between primarily white and primarily black public schools in Kansas City, Missouri); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding broad remedies for segregation); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (striking down state anti-busing law); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*) (establishing an extensive apparatus for deinstitutionalizing the majority of the Pennhurst population composed of persons with developmental disabilities, including Special Master to implement orders and Hearing Master to rule initially on

The most common examples of such remedial difficulty occur in cases involving government entities or public law reform efforts. More than twenty years ago, Professor Abram Chayes dubbed this type of dispute "public law litigation" and identified these traits as defining features of the genre, arguing that such cases required more active and nontraditional judicial involvement in presiding over the dispute.<sup>38</sup> Although the legal profession is divided over the benefits and detriments of such public interest, institutional reform litigation (for example, efforts to reshape educational, medical, law enforcement, or other government organizations), all sides would seemingly agree that such cases are more complex than traditional lawsuits.<sup>39</sup>

Chayes argued with considerable force that public lawsuits were different in kind as well as in quantity in that: (1) "the scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties;" (2) the party structure is "sprawling and amorphous" rather than classically bilateral; (3) the factual inquiry is not historical but instead is "predictive and legislative;" (4) the relief is forward-looking and involves parties outside the suit; (5) the remedy is often negotiated; (6) the remedy requires continued judicial supervision and implementation; (7) the court engages in significant case management and supervision of fact development; and (8) the dispute is about public policy at least as much as about private entitlements.<sup>40</sup> Although these multiple distinctions encompass several aspects of complexity in addition to remedial difficulty, the public policy driven, ongoing, forward-looking judicially supervised remedy is to a substantial degree what makes Chayes's Public Law Litigation both different and complex.

The remedial difficulty identified by Chayes is not necessarily confined to public law litigation. It can arise in purely private disputes presenting remedial difficulty. For example, if an employer has systematically discriminated against a class of employees, how are damages calculated? What changes in employer practice are required? Who will police the implementation of any such changes? In addition, the modern era of litigation also creates additional complexity to the extent that more cases today generate substantial funds for multiple and farflung claimants, often requiring considerable administrative apparatus for communicating to parties, bringing disputants together, and disposing of the funds.<sup>41</sup>

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objections to placement and habilitation plans developed by mental health professionals working under supervision of Special Master).

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

39. For a review of the Chayes article, reactions to it, and its rise to prominence in the legal literature, see Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 MICH. J. L. REFORM 647 (1988).

40. Chayes, *supra* note 38, at 1302-03.

41. See Tidmarsh, *supra* note 10, at 1693 n.31 (citing securities class actions and mass tort product liability litigation (particularly Agent Orange and Dalkon Shield) as examples).

### 9. *The Density of the Legal Context of the Case*

I borrow the term density from Peter Schuck's typology of density, which defines dense rules as those that are "numerous and encompassing. They occupy a large portion of the relevant policy space and seek to control a broad range of conduct, which causes them to collide and conflict with their animating policies with some frequency."<sup>42</sup> To some degree, one might say that the American tradition operates from a baseline of substantial legal density as a matter of course. Recall Alexis De Toqueville's famous observation that eventually, every political question in the United States becomes a legal matter.<sup>43</sup> However, density, as Shuck uses the term, means more than heavy legalization of arguably political matters.<sup>44</sup> It focuses more on the comprehensive further legalization of the already legal. Even where legal matters are not politically charged, the law is dense when it regulates so many areas of national conduct.

### 10. *The Factually Technical Nature of the Case*

By this, I mean whether the facts necessary to assess the matter, particularly contested facts, are highly technical in their meaning, or whether the appreciation of the facts requires greater technical background or comprehension. For example, an auto accident at an intersection is normally not factually complex while a patent infringement suit normally is.

### 11. *The Nature of the Proof*

In addition to possible factual complexity, the evaluation of some types of evidence (for example, chemistry lab reports) will be more complex than other types of evidence (for example, eyewitness testimony) to nonspecialists such as a federal trial judge or jury. The sheer volume of facts to be assembled and sifted may also prompt observers to deem a case complex.<sup>45</sup> To some extent, this "weight of the evidence" definition of complexity, like that based on multiple parties,

42. See Schuck, *supra* note 12, at 3–4. Professor Schuck continues: "An example of a dense legal regime is that governing pension administration, which cuts across and seeks to integrate a wide variety of legal specialties." (footnote omitted).

43. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillip Bradley ed. 1945) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.")

44. Although dividing the world into law, politics, policy, and the like may be useful as a basic means of analysis, my own view is that there is seldom a very clean line between the legal and the political. For the most part, policy choices in the United States (and most industrial or post-industrial nations) are reflected in the legal regime and operationalized through the legal regime. Although law may be less political than electoral or legislative politics because legal analysis accepts certain policies as established at the outset (rather than in play as in parliamentary debate), legal adjudication is part of the implementation of public policy and functions best when it appreciates the political and policy choices undergirding the law.

45. See Kirkham, *supra*, note 32, at 498.

forums, and competing law, seems to speak more of the "bigness," expense, or resource straining nature of the case than of complexity as difficulty.

*12. The Degree to Which the Matter Taxes the Ability of the Factfinder To Make a Rational Analysis of the Dispute*

More complex cases may resist logical analysis, particularly for lay jury factfinders.<sup>46</sup> Some of this may result from the heuristic biases humans have in assessing information<sup>47</sup>—information processing problems that are thought to be reduced in judges and special masters due to their legal training<sup>48</sup> but which cannot be eliminated. For example, people tend to overvalue short-term losses in relation to long-term detriment and to overestimate the probability of the occurrence of a catastrophic event.<sup>49</sup>

In addition to information processing errors stemming from cognitive miscues, certain disputes may invoke sufficient emotional responses from decisionmakers as to make adjudication difficult. For example, it is hard for a jury to find no liability when it sees in the courtroom a paraplegic plaintiff, even one seemingly more at fault than the defendant. Sympathy and cognitive error can combine to make it difficult for decisionmakers to calculate relative costs and benefits. To paraphrase Stalin, "a single death is a tragedy; a million deaths is a statistic."<sup>50</sup> Applied to dispute resolution, it may be hard for the decisionmaker to adequately appreciate aggregate costs weighed against an individual's plight. Conversely, arguments for aggregate wealth maximization may prompt decisionmakers to give short shrift to questions of individual justice.<sup>51</sup>

This type of complexity is a function both of the nature of the decisionmaker and the nature of the dispute. Human beings are subject to cognitive limitations of the sort discussed above. Lay persons appear to be more susceptible

46. See Tidmarsh, *supra* note 10, at 1691.

47. See Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in DECISION MAKING: DESCRIPTIVE, NORMATIVE, AND PRESCRIPTIVE INTERACTIONS 167 (David E. Bell et al. eds., 1988); RATIONAL CHOICE: THE CONTRAST BETWEEN PSYCHOLOGY AND ECONOMICS (Robin M. Hogarth & Melvin W. Reder eds. 1987); JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds. 1982).

48. Arguably, decisionmakers with special expertise such as industry arbitrators also avoid some common heuristic biases due to their superior experience and knowledge but it is unlikely that they are immune to these apparent traits of human nature.

49. See *supra* note 47.

50. See Gary Garrett, "Only 22", CHATANOOGA TIMES, Feb. 19, 1998, at A8 (using Stalin quote in commentary). *But see* Julia Solovyova, *Mustering Most Memorable Quips*, THE MOSCOW TIMES, Oct. 28, 1997, at 1 (quote is widely attributed to Stalin but has never been firmly established as having been said by Stalin at any particular time to a specific person).

51. See George J. Stigler, *Law or Economics?*, 35 J. L. & ECON. 455, 459 (1992) (efficiency can be judged only with respects to goals sought; where reduction of aggregate costs is not primary goal, result that fails to minimize overall costs is not necessarily inefficient).

to these tendencies than are trained professionals. However, certain sorts of disputes greatly tax the cognitive capacities of both lay and professional decisionmakers.

### *13. The Degree to Which the Dispute Challenges the Competency of Advocates*

Professor Tidmarsh has termed this form of complexity "Lawyer Dysfunction," defined as "the inability to perform [the lawyer's] formulational task assigned by the adversarial system" and suggests a number of common sources.<sup>52</sup> Like the cognitive complexity discussed above, this complexity is a function both of lawyers generally and the nature of the dispute in particular. Lawyering is always a relatively challenging activity. Some lawyers are extremely competent while others are only marginally competent or less. Certain disputes, however, are more taxing to even the competent advocate. Even though the things that make the matter difficult for the lawyer are usually factors of complexity in their own right, the complexity of the matter is exacerbated to the extent that lawyers are less able to process the dispute and minimize the consequences of complexity.

### *14. The Stakes of the Dispute*

Although a million-dollar slip-and-fall case is still, at bottom, a slip-and-fall case, the practical consequence of higher stakes is to push disputants toward making the matter more complex by investing more resources in disputing. The result is more discovery, more pretrial motion practice, more comprehensive and sophisticated legal research and argumentation, more investigation, perhaps more use of experts or intricate courtroom technology, and a general increase in the complexity of the matter.<sup>53</sup>

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52. Tidmarsh, *supra* note 10, at 1757. Professor Tidmarsh continues: First, the nature of information that the attorney must garner and marshal may make it impossible for the attorney to formulate adequate proofs and arguments [as where fact preparation is too vast to be well done in the time allotted].

A second, less frequent cause of lawyer dysfunction occurs because of the open-textured and uncertain nature of substantive law [combined with notice pleading].

A third problem...arises when the lawyer believes that the factfinder would be unable to comprehend or decide rationally the case if the facts were fully presented, and thus, tries the case based on a "fictionalized," simplified version of the transaction....

Finally, lawyer dysfunction arises from the inability of lawyers representing the same or similar interests to develop a single, coherent, and rational position for presentation to a decisionmaker.

*Id.* at 1757-58.

53. See Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983) (finding



I also suggest that one unfortunate consequence of our adversarial system is its tendency to tempt disputants and counsel to manufacture as many issues as possible (thereby increasing complexity) when the stakes are higher, perhaps also increasing the amount of marginal or even frivolous disputing behavior. This tendency is not unique to litigation as opposed to other forms of dispute resolution. But the greater range of procedures available in litigation may exacerbate this effect. In addition, commentators have defined a case as complex where the matter is likely to have "nationwide consequences."<sup>54</sup>

### *15. The Odds Facing the Disputants*

This risk factor is related to the stakes of the case but is different in that it depends not on the value of the matter at issue but rather on the chances for victory or defeat. Although a pedestrian matter may entail great uncertainty regarding the odds at trial, the less certain matter tends to become more complex in practice for the same reason that high-stakes cases tend to become more complex. When the odds are close to determinative, disputants tend not to invest great resources as the investment is unlikely to pay dividends. However, in a close case, more lawyering may tip the odds, and more lawyering generally means more complexity.

### *16. The Overall Indeterminacy of the Law*

Legal indeterminacy encompasses some of the uncertainty factors discussed above, such as competing bodies of law, difficult or novel legal questions, and technical complexity.

#### *a. Mixed Signals*

Legal indeterminacy can stem from mixed or incomplete signals by lawmakers. For example, the text of a statute may, if read literally, suggest *X* while the legislative history of the law suggests *Y*. The interpreting court, unless it can easily follow the literal language or deem it to bring an absurd result (and thus follow the legislative history), is thus charged with the task of resolving a different sort of indeterminacy.

#### *b. Flexible Rules*

Indeterminacy has also been characterized as

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that in many instances risk rather than technical complexity or difficulty per se is the relevant determinant of the consumption of legal services by clients).

54. See Tidmarsh, *supra* note 10, at 1693. See also JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979), reprinted in 80 F.R.D. 509, 522 (1979) ("sweeping nature of potential relief" is a trait of complex antitrust cases); Dennis A. Kendig, *Procedures for Management of Non-Routine Cases*, 3 HOFSTRA L. REV. 701, 706 (1975) (arguing that "presence of large stakes" increases litigation complexity).

a quality of both rules and of legal processes and institutions. Indeterminate rules, processes, and institutions are usually open-textured, flexible, multi-factored, and fluid. The familiar reasonableness standard in tort law is an example of an indeterminate rule. Turning on diverse mixtures of fact and policy, indeterminate rules tend to be costly to apply and their outcomes are often hard to predict.<sup>55</sup>

### 17. *The Degree to Which the Case Attempts To Effect Political Change*

This factor involves the extent to which suits challenge traditional viewpoints, creating additional uncertainty as to whether the challenge or the status quo will prevail.<sup>56</sup> "Nonpolitical" litigation, no matter how involved, nonetheless focuses on making factual determinations to fit into an existing judicial mold. However, policy advocacy or political change litigation seeks to change the legal mold<sup>57</sup> and thus brings an additional level of uncertainty and complexity to the matter.

### 18. *The Indeterminacy of Law in Factual Application*

This aspect of complexity, like others, is in part a function of difficulty, technicality, competing regimes, and the like. But even where law in its unadulterated form is "clear," the correct legal resolution of a factual dispute can be anything but clear. Like contract and statutory language, any legal rule can become ambiguous in application, particularly as the nonlegal world becomes more complex, producing products, business transactions, financial instruments, and government entities not contemplated by legal rulemakers. As society grows more complex, the application of even simple law becomes more complex.<sup>58</sup>

For example, the rules of personal jurisdiction have been relatively stable since *International Shoe Co. v. Washington*,<sup>59</sup> but cases continue to arise not only

55. See Schuck, *supra* note 12, at 4. Professor Schuck further observed: "Indeterminacy's relation to legal complexity is itself complex. Ironically, rules and institutions that are designed to reduce the law's indeterminacy may actually increase it, due to the cumulative effect of their density, technicality, and differentiation. Indeterminacy then, may be a consequence, as well as a defining feature, of complexity." *Id.*

56. See Tidmarsh, *supra* note 10, at 1718-21; Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. REV. 469 (1989); Chayes, *supra* note 38, at 1314-16.

57. See Hazard, *supra* note 56, at 471. This type of complexity is, of course, related to the public law litigation and remedial complexity discussed by Chayes. See also *supra* notes 37-38 and accompanying text.

58. The proffered prescription of some commentators for simpler, clearer, and less discretion-permitting legal rules (see, for example, RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995)), cannot cure the complexity problem even if these commentators are correct in positing that rule rigidity and simplification will reduce complexity.

59. 326 U.S. 310 (1945) (holding that defendant is subject to personal jurisdiction of a state where defendant has sufficient "minimum contacts" with the state

because of distinguishable facts but also because of completely new types of factual scenarios. At the time of *International Shoe*, there was no Internet and there were no websites. Now, there is litigation over whether maintenance of a website constitutes sufficient minimum contact.<sup>60</sup>

Similarly, the law of insurance policy construction has not changed significantly during the 1990s.<sup>61</sup> But when the new millennium arises, claims and losses related to the "Year 2000 Problem," in which computers may err or fail because of difficulty interpreting an "00" date, will create complex insurance disputes as the traditional law is applied to a new type of factual scenario.<sup>62</sup>

### 19. Difficulty in Processing Material Information for the Dispute

Professor Tidmarsh has argued that a number of perceived litigation complexities are interrelated in that they involve attorney "difficulty in amassing, formulating or presenting relevant information to the decisionmaker."<sup>63</sup> This element of complexity may merely restate or recombine other aspects of the problem but may also identify a distinct aspect of the complexity problem: the adversarial model of party development and presentation of information (really lawyer fact-finding and presentation) may not be particularly good generally and may be particularly bad for complex cases.<sup>64</sup>

The adversarial model may be particularly problematic concerning the receipt of expert information, complex material, or the processing of information

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such that exercise of jurisdiction will not offend traditional notions of fair play and substantive justice).

60. *Compare* *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), *and* *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (maintenance of website subjects defendant to personal jurisdiction), *with* *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (websites insufficient basis for personal jurisdiction).

61. *See generally* JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS (1994 & Supp. 1998) (demonstrating that insurance policy construction based on standard contract law has remained relatively stable through twentieth century). Chapter eleven discusses the "reasonable expectations doctrine," an innovation in insurance coverage adjudication but not a radical change in the method of resolution of most disputes.

62. *See generally* Mitchell L. Lathrop, *It's Only a Question of "Zeros" and "Ones": The Year 2000 Problem*, in MEALEY'S EMERGING INSURANCE BATTLES CONFERENCE 1998, 165 (Feb. 1998).

63. *See* Tidmarsh, *supra* note 10, at 1691, 1766-73.

64. *See id.* at 1811-12; John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1987). The traditional justification for the adversarial approach is that it promotes incentive to ferret out facts and to present the client's case comprehensively and zealously. I largely accept this rationale but find relatively "pure" adversarialism problematic in many instances, although an opposingly pure "inquisitorial" approach, in which cases are begun and developed by judicial officers may be more problematic. *See* Jeffrey W. Stempel, *All Stressed Up But No Place To Go: Pondering the Teaching of Adversarialism in Law School*, 55 BROOK. L. REV. 165 (1989) (reviewing STEPHAN A. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988)).

for policy determination. For example, early twentieth century evidence expert John Henry Wigmore deemed cross-examination "one of the greatest engines...for the detection of liars."<sup>65</sup> Wigmore might not have been so sanguine had he seen modern cross-examination of expert witnesses or persons alleged to have committed financial industry fraud, medical malpractice, legal malpractice, product misdesign, inadequate quality control of manufacturing, and the like.

The Perry Mason style of cross-examination may seem just the ticket for exposing the murderer or philandering spouse as untruthful,<sup>66</sup> but it is a crude device for more subtle matters. It tends to result in grandstanding that may have thespian strategic value, particularly in jury trials, but does not provide significant logical examination of a complex matter being adjudicated.<sup>67</sup> Even with simple issues and ordinary witnesses, this mode of proving and testing assertions has strong potential for error.<sup>68</sup>

## *B. Two Caveats About Relative Preferences and Distinguishing Court Competence and Juror Competence*

### *1. Compared to What?*

At the risk of making a pun too corny and bad for even legal literature, I want to suggest prior to discussing definitions of complexity, competency and the competency of courts for administering complex disputes that the relativity important to this inquiry is not Einstein's theory as an example of complexity but rather the relative attributes and detriments of courts as adjudicators in complex

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65. See JOHN HENRY WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* 659 (1913).

66. Even in this less complex sphere, cross-examination is overrated and falls substantially below the claim made by Wigmore.

67. See Walter R. Lancaster, *Choosing Your Weapons: The Art of Expert Cross-Examination*, *LITIGATION*, Fall 1997, at 46, 60 ("Once you become adept at doing [expert cross-examination], you will be able to destroy any expert, every time."). The problem with this assessment, braggadocio notwithstanding, is that if it is true, cross-examination is an engine for deception rather than truth. By definition, not every expert is wrong about every point of testimony. But if every expert can be destroyed on cross-examination, even the completely accurate, honest, and correct experts and cases will be dashed on the shoals of adversarial advocacy. How does this help the adjudication of either simple or complex cases?

68. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 396-401 (4th ed. 1995) (reprinting articles alternately lionizing and decrying famed New York trial attorney Max Steuer). Steuer obtained acquittal of the owners of an infamous shift factory where 200 workers were killed in 1911 because exits at the sweatshop were locked. Steuer took advantage of the over-zealous preparation of the prosecutor and scored points cross-examining a survivor who barely spoke English by making her mannequin-like testimony seem too rehearsed to be true. Although Steuer can be lauded as a master of adversarial cross-examination, the fact remains that the immigrant textile worker's testimony was almost certainly accurate even if it was stilted from rehearsal. Even with this obviously non-expert and non-complex witness, Wigmore's celebration of cross-examination falls short of its billing.

disputes. In short, in judging courts, the question cannot be whether courts are superior to some mythically perfect decisionmaker. Rather, the question must be whether courts are better in dealing with complex cases than are the alternative means of dispute resolution. This assessment is not one of mathematical formula but instead is one of rational comparison coupled with particular caution in seeking to avoid endorsing the disputing forum thought most favorable to one's own preferred causes and parties.<sup>69</sup>

Realistically, American courts compete for dispute resolution and policy enunciation business with

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69. To some degree, a reasonable amount of preference cannot be divorced from meaningful substantive thought on the issues of this Symposium. For example, to say—without more—that one prefers courts because one thinks gender discrimination plaintiffs will win more in that arena is partisanship unhelpful to the debate. However, it is perfectly appropriate to support adjudication (rather than arbitration/mediation of employment disputes) if one's analysis holds that courts do a better job in unearthing relevant evidence, exposing pretext, awarding damages, etc. and that these traits make discrimination plaintiffs more likely to prevail because litigation is more likely to uncover discrimination that actually occurred. It is also appropriate—but not persuasive to me—for a pro-employer analyst to argue that arbitration is preferred, even though less relevant material comes to light, because the aggregate cost of developing better information through litigation is too high in light of the gains obtained from more extensive enforcement of national anti-discrimination policy.

At some point, a “neutral, dispassionate, objective” analysis of any complexity becomes intertwined with one's own policy preferences. Debate would be pretty sterile without this. The ultimate winner of the debate must also establish the superiority of one's policy preferences. An agnostic might carry this burden through legal positivism by simply demonstrating that the applicable law codifies his or her preferred policy position. Thus, the scholar who argues that litigation is superior to ADR because it provides better decisions on discrimination claims despite the expense can point to the support for this view in the repeated passage of favorable legislation that makes no adjustment for alleged expense.

Applying this sort of criterion to the courts-ADR debate, gives different debating subdivisions an advantage. For example, those favoring courts as a forum more hospitable to civil rights and job discrimination claims can invoke considerable legislative support for these causes—although there remains the annoying decision in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), which required an age discrimination plaintiff to arbitrate based on an agreement he was forced to sign as a condition of working. By contrast, those favoring courts as a preferred forum for securities fraud litigation have their argument diminished by the Private Securities Reform Act of 1995, which at least suggested some congressional misgivings about the manner in which such cases were adjudicated. But, on the other side of more complex side of the coin, while 1995 Act may have restricted access to the courts, it did not replace adjudication with arbitration, something that Congress could have done, or at least attempted to do if not thwarted by the Seventh Amendment. See Hope Viner Samborn, *Fear of Filing: Securities Fraud Plaintiffs Steering Clear of Federal Restrictions by Suing in State Court*, Study Says, A.B.A. J., May 1997, at 28 (Prior to the Act, an average of 176 companies sued in securities fraud class actions; after the Act, 1996 saw only 148 companies sued during the one-year period).

- *Other American courts.* As any zealous forum-shopping attorney knows, many disputes can be brought in a number of different federal and state courts.
- *Foreign courts.* In an increasingly global economy, disputing outside the United States is increasingly an option for American entities and appears to involve an increasing proportion of the domestic legal profession.
- *Forums of ADR,* both in the United States and abroad. ADR includes arbitration, either through well-established organizations such as the American Arbitration Association or through ad hoc or sui generis arbitral appointments (for example, selecting a mutually agreeable third person as the arbitrator); mediation, either through an established group such as JAMS-Endispute, state and local networks, or sui generis selection; and hybrids such as Arbitration/Mediation<sup>70</sup> and One-Way<sup>71</sup> or High-Low Arbitration.<sup>72</sup> I also include as arbitration hybrids ADR devices designed to spur settlement negotiations such as Early Neutral Evaluation<sup>73</sup> and the Summary Jury Trial.<sup>74</sup>
- *Administrative Agencies* (federal, state, or local).
- *Semi-Private Administrative Bodies,* which are the private organizations established or supported by government as regulatory or adjudicatory bodies. Medical practices boards or other professional standards

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70. This is simply ADR that begins as mediation but where the mediator becomes an arbitrator and renders an award should the parties fail to reach a mediated resolution.

71. In one-way arbitration, one of the disputants agrees to comply with the arbitrator's award while the other disputant is free to move to litigation if unhappy with the arbitrator's disposition. Businesses dealing with consumer complaints are thought to be the leading users of one-way arbitration, which holds the potential for streamlined disposition of the matter while also providing consumers the assurance that they may go to court if dissatisfied with the arbitral forum.

72. In high-low arbitration, the arbitration takes place in conjunction with a partial settlement agreement in which the disputants agree that the outcome of the claims will be no less than X dollars (the low) and no higher than Y dollars (the high), with the arbitration award reaching a result within the parameters set by the parties.

73. Early Neutral Evaluation involves a disinterested lawyer reviewing the dispute acting as an adjunct of the court. The evaluator renders a view of the case that is thought to provide the parties with feedback that can be used in assessing the reasonableness of their respective settlement positions. See generally JOSHUA ROSENBERG ET AL., REPORT ON THE EARLY NEUTRAL EVALUATION PROGRAM FOR THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (1992).

74. In a summary jury trial, the parties present an abbreviated view of the case to a jury drawn from the actual jury pool of the court. The summary jury deliberates and renders a nonbinding verdict (although jurors are led to believe their verdict is binding) that is hoped to move the parties toward settlement. See generally Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980).

organizations dominated by members of the profession are examples as are Trade organizations.

- *Imbedded Forums*, which are the in-house complaint departments of retailers, the workplace ombudsman, or the grievance system established in the workplace (which for organized labor also includes labor arbitration).<sup>75</sup>
- *Self-Help*, which can include repossession (so long as one does not breach the peace), refusal to provide repeat business, public criticism, competition, or exiting the situation (although exit is considered its own response by many authorities).<sup>76</sup>
- *Inaction* or “lumping it” as the Wisconsin Civil Litigation Project so eloquently phrased the phenomenon.<sup>77</sup> Inaction differs from self-help in that the aggrieved party does not informally attempt retaliation or some partial recompense but largely tries to put the dispute “behind” him or her and continues on with pre-dispute life as usual. For example, a customer dissatisfied with an auto mechanic would be exercising self-help in switching auto shops for future work but would be lumping it to keep returning for future work without some recompense for the deficient prior work.
- *Informal Negotiation*, which is arguably better classified as a variety of self-help but which in my view deserves its own status both because of its frequency and because it is qualitatively different than self-help such as taking one’s business elsewhere or lumping the matter but continuing to do business with the offending party.

A responsible effort to critique the quality of litigation as a means of dispute resolution must compare litigation to these major realistic alternatives rather than to some mythically perfect system of processing cases, complex or otherwise.

## 2. Court Competence: Beyond the Judge Versus Jury Debate

In discussing the competency of courts, critics have not always taken care to separate judicial competency in general from the competency of juries in particular. This is the flip side of the judge-versus-jury fixation, which focuses on

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75. See David Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC’Y REV. 631 (1980–81); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC’Y REV. 525, 544 (1980–81) (reviewing modes of dispute resolution in addition to traditional litigation, government agencies, and common ADR forms such as arbitration).

76. See Trubek et al., *supra* note 75; Felstiner et al., *supra* note 75; Miller & Sarat, *supra* note 75.

77. See Felstiner et al., *supra* note 75.

the relative merits of these modes of factfinding rather than focusing on courts in general as opposed to the alternatives.

Some critics of courts regale their audiences with anecdotes about multimillion dollar verdicts over coffee spills or jurors taken in by the slickest or most charismatic witness despite overwhelming evidence to the contrary. Even if every anecdote or accusation about a bizarre jury determination were true and not misleading (and I tend to side with the jury's defenders more than its critics), this would still fall quite short of determining that courts as a whole were insufficiently accurate to decide complex cases. It is of course possible that courts are, except for juries, completely competent.

Even if jurors are incompetent to a large degree, countervailing forces may mute the negative impact on the courts of any jury incompetence. As plaintiff's lawyers are quick to remind us, judges frequently set aside or reduce the jury awards that make headlines as supposedly sorrowful examples of the degree to which litigation has become a lottery. In addition, there is really no persuasive evidence to suggest that juries are any more bamboozled by celebrity, charisma, friendship, politics, prejudice, pseudo-science, and the like than are judges, arbitrators, or mediators.

Consequently, a sound examination of the courts-versus-alternatives debate in the context of complex matters must consider the judicial system as a whole, one that makes determinations through the joint efforts of trial judges, juries, special masters, appellate judges, attorneys, parties, and witnesses. This comprehensive view of the system must then be compared to similarly comprehensive views of alternative disputing forums.

### *C. Competence*

In addition to defining "complexity," or at least assembling the differing notions of complexity, evaluating the competency of courts for complex cases also requires an assessment of what is meant by "competence." Like complexity, competence is more multifaceted and complex than is generally appreciated by those who decry or defend judicial competence. There may be a relatively bright line dividing the critics and defenders of courts, but, as with complexity, it is not a particularly well-defined line regarding the meaning of competency.

To say that an entity is competent implies a range of attributes. Thus, to debate whether courts are "competent" requires the debaters to be clear as to the type of competence envisioned. This section assembles and describes varieties of competency.

In addition, one needs to be clear about what one means by "courts." Referring to "courts," I include juries as part of the court system unless otherwise indicated. One of the unfortunate tendencies of the debate over court competence has been a tendency to focus on judge versus jury debates over competence. Obviously, both bench trials and jury trials are part of the judicial system. In addition, an equally obvious but frequently overlooked fact is that even in "jury trials," the jury determination controls only a portion of the dispute's resolution.



The judicial system outside the jury shapes the dispute, determines what aspects of the dispute go to trial, regulates the trial, and may even set aside or overturn the jury verdict. A comprehensive discussion of courts and complex cases cannot focus inordinately on the "judge versus jury" debate.<sup>78</sup> Competency is multifaceted and, broadly examined, includes many aspects.

### *1. Legal Ability*

To state the obvious, a decisionmaking institution has legal competence when it is effective at analyzing and deciding legal issues in a dispute. Presumably, courts will score high on this measure of competency as compared to other entities.

### *2. Fact-Gathering Ability*

Fact gathering ability is the capacity of the entity to bring forth information relevant to the dispute. For example, the broad range of discovery available in American courts as directed by self-interested (or at least client-interested) counsel is generally thought to produce a great deal of useful information for the parties and the decisionmaker. It is also thought to produce a good deal of irrelevant or duplicative information and to substantially raise the cost of dispute resolution.

Thus, courts are thought by many to be quite competent at obtaining information but simultaneously incompetent in not screening the information sufficiently or paying too high a price for it. In assessing this aspect of judicial competency, one must not only determine whether this by-now conventional wisdom is correct but also decide whether the information gathering ability of courts outweighs the costs and detriments of information overload. More important, we must assess the courts' overall balance in information assembly compared to alternative tribunals.

### *3. Fact-Discerning Ability*

Fact discerning ability is the competency of sifting through information to determine what actually happened, who is telling the truth, what the documents mean, and the like. It is the entity's capacity for correctly assessing the information before it. Courts may or may not be good at this relative to other alternatives, depending on the factual dispute and the other alternative. For example, a court may be considerably worse than an arbitration panel of Nobel Laureates for deciding the bona fides of a patent but considerably better for determining whether an unfair labor practice has occurred or whether an injury from a flying elbow during a basketball game was intentional.

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78. Furthermore, this segment of the Symposium is well-represented by excellent papers concerning the comparative competence of jurors. Rather than joining in this discussion as such, this article addresses the complexity question regarding courts as institutions rather than addressing juries as a part of the court system.

The role of the lay jury complicates the inquiry. To some, the jury is a group of underinformed, emotional amateurs. To others, it is a particularly effective device for assessing witness credibility and the plausibility of certain assertions regarding proffered explanations for events.

Facts might further be divided according to categories of historical fact, legislative fact, mixed questions of law and fact, and social fact.<sup>79</sup> Courts and juries are traditionally viewed as quite competent regarding historical fact and mixed legal and factual questions.<sup>80</sup> However, this competence may pale beside the competence of scientific or expert tribunals for certain disputes. Commentators express considerable division regarding whether courts are competent at determining legislative or social facts, with similar division regarding whether courts should make more or fewer such determinations.<sup>81</sup>

#### *4. Mastery of Technical Aspects of the Dispute*

By mastery, I mean the decisionmaker's ability to understand technical, scientific, or specialized facts at issue and the ability to make sound assessments regarding such facts. Thus, a lay jury is thought by some as insufficiently competent to understand chemical engineering while a judge hearing expert testimony is competent to then decide many questions regarding chemical engineering disputes. By contrast, an arbitration panel of chemical engineers would probably be thought highly competent to make assessments of factual disputes regarding the chemical engineering of a product.. This same panel, however, would likely score low on legal competence and perhaps other measures of competency as well.

#### *5. Impartiality*

Impartiality can be examined both overall and in relation to the complexity of the dispute. Impartiality is important to competence in at least two

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79. See MOORE'S FEDERAL PRACTICE §56.11[5][a] (3d ed. 1998) (Issues of historical fact concern the unfolding of events and the existence or nonexistence of matters. Mixed questions of fact and law may also be termed "ultimate fact" in that they can involve application of legal determinations and policy decisions based on the record of historical fact.).

Legislative facts are those larger conclusions about the way in which the world operates, such as those "found" by Congress when enacting laws. "Social facts," a term coined by Monahan and Walker, relate to determinations of facts outside the confines of a particular dispute, based in large part on records or research findings. See John Monahan & Laurens Walker, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 174-78, 345-57 (4th ed. 1998).

80. See MOORE'S FEDERAL PRACTICE §56.11[5][a] (3d ed. 1998). Indeed, a basic assumption underlying civil litigation, which involves so much assessment of historical fact and mixed questions, is that courts can adequately process this information at both the pretrial and trial phases of adjudication.

81. See Monahan & Walker, *supra* note 79, at 345-57; Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Fact*, 41 VAND. L. REV. 111 (1988).

major ways. First, an impartial evaluator is more likely to reach an accurate determination than is the examiner who has a bias that warps his or her examination.<sup>82</sup> Second, the product of an impartial evaluator is more likely to be accepted by the disputants and by society.<sup>83</sup>

There is, of course, a point at which even the fairest of evaluators is not wanted because of his or her lack of other attributes of competence. For example, one might not want Mother Theresa presiding over a six-month patent trial. But where other aspects of competence are not greatly disparate, the impartial evaluator is generally considered preferable. An aggrieved employee will probably prefer to press a job-related claim before a judge or outside arbitrator rather than an in-house arbitrator, even though the latter may be far more familiar with the job setting.<sup>84</sup>

### 6. Credibility

Although this is obviously related to impartiality in that impartial decisionmakers tend to have more credibility, the notion of credibility also stems from other attributes of a dispute resolution system in addition to the credibility an evaluator has due to its legal, technical, or factual competence. The type of credibility to which I refer includes many factors.

#### a. Openness

Where the dispute resolution process is more open, the resulting decision generally has greater credibility, unless the openness is thought to prompt the decisionmaker to "pull punches" or otherwise modify its analysis and decision in order to receive great public acceptance or favor. Openness includes not only the public nature of proceedings but also the availability of the entity's record for public viewing. In addition, the quality of the record may create greater openness. Thus, for example, a full transcript of a trial makes it quite accessible to the outside world.

On the openness measure, courts score quite high in that judges are widely known and their backgrounds and past decisions quite easily located. By

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82. I realize that under the American system of litigation, judges and juries do not actively investigate claims but instead evaluate the material brought forward by the parties and counsel. Nonetheless, the task of the adjudicator remains more active than passive. The adjudicator must "ferret out" the truth from the competing data set forth by counsel.

83. See GEOFFREY C. HAZARD ET AL., CIVIL PROCEDURE § 1.2 (4th ed. 1992).

84. This preference for some detached impartiality even at the expense of expertise exists even within the same system of dispute resolution. For example, attorneys representing taxpayers historically have advised the taxpayer of means to pay the alleged deficiency and sue for a refund in federal district court rather than taking the matter to Tax Court out of a view that District Court judges are both more independent (they have life tenure and tax court judges do not) and less predisposed toward the IRS, which routinely appears before tax court judges attempting to collect from deadbeat or deceitful taxpayers.

comparison, arbitrators, mediators, and executive officials are not as capable of being examined. In addition, the preferred arbitrator or mediator of one disputant can often be vetoed by another disputant. Once proceedings are under way, most facets of judicial dispute processing are open to the public and reasoned opinions are the order of the day. Administrative decisionmaking is similar but less open. ADR varies according to the dispute and the organization.

#### b. Training of Personnel

Where the formal training and acculturation of the persons in the dispute resolution entity are professional and neutral, the entity is more likely to possess credibility. This applies primarily to the key decisionmaking personnel like judges and arbitrators but is also applicable to nonprofessional or secondary personnel such as clerks of court and tribunal administrators.

#### c. Intellect, Skill, and Prestige of Personnel

Where the decisionmakers and supporting staff are more intelligent and talented, the resulting decisions are thought likely to be better—or at least thought to be better. In this area of credibility and competence, courts are once again mixed. Judges, particularly federal judges and state supreme court judges, are considered the intellectual elite of the legal profession and normally have the objectively prestigious indicia to support the notion. Although the matter is open to debate, conventional wisdom holds that the average judge is more prestigious than the average arbitrator, mediator, or agency official.<sup>85</sup> These elite judges share their

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85. Historically, courts have enjoyed more prestige than other dispute resolution institutions, probably because of the centrality of the judge in American law and in the courts. As Supreme Court Justice Louis Brandeis observed regarding the Supreme Court, it is one of the few Washington institutions that does its own work. CHARLES WYZANSKI, *WHEREAS—A JUDGE'S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW* 61 (1965) (quoting Brandeis). See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 113–14 (1986) (describing Brandeis's statement).

Brandeis's differentiation would appear to still hold for courts as compared to legislatures and executive agencies. Notwithstanding the greater use of law clerks than in Brandeis's day, judges remain less reliant upon or guided by staff than other public officials.

As to the pecking order of dispute resolvers, one might apply the observations of comic strip author and business gadfly Scott Adams, who takes issue with the notion that cable companies will take over the function of phone companies in the future because of the greater carrying capacity of cable. According to Adams (who once worked for the phone company), "[t]his argument misses one important fact: Cable companies are staffed with people who couldn't get jobs at telephone companies." SCOTT ADAMS, *THE DILBERT FUTURE: THRIVING ON STUPIDITY IN THE 21ST CENTURY* 45 (1997).

Although one may debate cable versus phone, there is little debate that historically most lawyers working in private practice, mediation, arbitration, or administrative law jumped at the chance for a judgeship. The flow of intellectual talent has been toward the courts, at least the upper levels of the courts. This tradition may be eroding due to a widening income gap between judges and successful practitioners, greater scrutiny

power with lay juries of lower education and no specialized training in either law or the subject matter of the dispute. In fact, a potential juror who has such expertise will probably be removed at the request of at least one of the disputants.

#### d. Expertise of Personnel

This includes not only training and intellect but also experience and informal learning acquired by the decisionmaker and other personnel in the dispute resolution system. Here again, courts present a contradictory situation. Judges and professional staff have a good deal of accumulated expertise, while lay jurors typically have none save that acquired from daily living.

All of these credibility factors bear upon both the likely competence of the decisionmaker and the degree to which its decisions will enjoy acceptance by the disputants and others. In addition, further facets of a dispute resolution entity may also affect its competence.

#### e. The Sociology of the Adjudicator

Like most of the other factors of credibility, this factor overlaps with others such as the credibility factors listed above. However, the sociological traits of the adjudicator (or adjudicators: both judges and jurors may be considered adjudicators of the court system) are distinct from the degree to which those sociological traits confer credibility or prestige upon the adjudicator. For judges in particular but also for jurors, these sociological factors include: education, social and geographic background, economic status, race, gender, ethnicity, and age.

These factors bear upon a mixture of the competence of the adjudicator, its credibility, and its capacity for impartial and credible decisionmaking. For example, the more educated evaluator is likely to have greater technical competence or at least the ability to acquire technical understanding. He or she is also less likely to be influenced by social prejudices. Similarly, the prestige accorded the position should enable recruitment and selection of more diverse and qualified personnel. Courts as compared to other alternatives generally attract personnel of high socioeconomic status (judges) through a selection procedure that emphasizes training, experience, and accomplishment. This elitism of sorts is also lessened by the public status of courts and the political scrutiny to which the system is subjected. Thus, there is an emphasis on selecting judges of varied backgrounds, ideological as well as demographic. This may give courts a

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of judicial appointees regarding their personal lives, and a perception that burgeoning judicial dockets have made the post less attractive. It is also less clear whether state and local trial courts are similarly attractive to talented lawyers.

The traditional pattern may also be changing as alternative forums become more established, prestigious, and lucrative. For example, some judges have left the public bench to become better-compensated private judges. In addition, large stakes arbitrations and mediations are able to obtain lawyers of prestige equalling or exceeding that of most judges (for example, name partners in large firms, former senators, or cabinet members).

comparative advantage over some alternatives, or it may give merit a backseat to politics and public sentiment.

f. Promotion and Incentive Structure

The promotion and incentive structure of an entity may be particularly important. Like other factors there is overlap, in this case with independence, impartiality, and credibility. For example, lower court judges are generally seen as being elevated based on the quality of their work. Although there are of course political and other factors, the variegated types of disputes brought to lower court judges makes it less likely that such a judge will find his or her career stalled by having displeased a particular constituency.

At the very least, judges at nearly every level of the local, state, or federal systems have a considerable degree of job security. A judge will not be immediately fired for having rendered what some may regard as the "wrong" decision. Contrast this to providers of ADR, who are retained piecemeal for disputes. If an arbitrator finds for the labor union too often or holds a brokerage house responsible for what those in the industry regard as acceptable conduct, these arbitrators are probably not likely to see a substantial amount of additional business from these quarters. To the extent that ADR providers engage in ADR only as a "second job" or as a public service activity, this reduces any tendency to respond to the most likely future employer or to routinely split the difference. But where nonjudicial decisionmakers have substantial economic incentives for future employment, the nonjudicial forum may be significantly less competent than the courts because its decisionmakers are compromised by economic self-interest.

Regarding incentive structure, courts have the additional advantage of having lay jurors as participants. At the conclusion of the matter, the jurors leave and return to normal life. The jury ordinarily has no incentive to curry favor with a particular constituency or operator of the program. It is independent to a degree beyond that of even the life-tenured federal judge who aspires to higher appointment.

An unfortunate exception is the juror in the high-profile trial who wishes to publish a memoir or appear at any length in the media. However, these situations are rare and their occurrence appears uncorrelated with the complexity of the case. Jurors in a celebrity murder trial are more likely to land a book contract than those sitting through six months of antitrust or patent adjudication.

It must be remembered, however, that the jury's "one-shot" participation and independence can also be a negative factor. The fact that the jury does not live with the ramifications of its decisions gives it the opportunity to free William Penn from the tyranny of the Crown but also gives it the power to impose enormous costs on a commercial defendant due to the outrageous conduct of a few officials. The billion-dollar punitive damages verdict may be an apt incentive to deter socially undesirable behavior (for example, intentional pollution or knowingly unsafe products) but it may also be an excessive expression of dislike for outsiders

or hard-edged business conduct that poses little threat to society at large (for example, the *Texaco v. Pennzoil* verdict).<sup>86</sup>

g. The Psychology of the Adjudicator

Psychology of the adjudicator is of course related to the sociological factors. In particular, this factor focuses upon the conscious and subconscious goals and motivations of the adjudicator. As discussed above, evaluators both in and out of the judicial system may have various motives both altruistic and self-interested. Holding other factors constant, the system that best contains self-interested motivations and rewards altruistic impartiality is more likely to render consistently better decisions. The impartiality, independence, and sociological factors discussed above all have a bearing on this. These factors suggest that courts may have an advantage over alternatives in creating structure in which the adjudicator's mindset is one of "doing justice" and "getting it right" rather than advancing a career, punishing an outsider, or advancing a political agenda.

7. *Procedural Competence*

Competence in this area is, in particular, whether the process impedes or invites, protects or exposes, expedites or delays, is final or contingent, and so on. As discussed above, process that obtains more information is generally better than process that gathers less information, although there is significant potential for information overload and undue expense. Procedural competence also implies the power to join necessary or useful parties, to compel production of information and attendance of witnesses, and to adhere to resulting decisions, as well as the power to shape remedies as necessary for resolution of the case.

a. Quality Control, Particularly Availability of Review

The most obvious type of review is vertical review through appeal. There also exists horizontal review of a sort. Short of the United States Supreme Court, no single court opinion binds all of the nation's courts. Even the Supreme Court cannot bind state courts on matters of purely state law. This allows for development of competing precedents and legal rules. In addition, adjudication normally produces a fairly extensive record of the proceedings below. Although there have been criticisms of the relatively reduced scrutiny of cases on appeal in

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86. Reports of *Pennzoil v. Texaco*, in which a Texas jury rendered an \$11 billion verdict against Texaco for inducing a breach of contract in connection with a corporate acquisition, span the spectrum of opinion. However, a substantial group of commentators has suggested that the jury was inordinately influenced by preference for Houston-based Pennzoil (nomenclature is not destiny) over New York-based Texaco (ditto), an adverse reaction to Texaco lawyer and key witness Martin Lipton, who was regarded as a noticeably Jewish New Yorker, and the view that any punitive award should be based on the value of the acquisition lost or Texaco's wealth rather than upon the degree of any wrongdoing actually perpetrated by Texaco. See generally THOMAS PETZINGER, *OIL AND HONOR: THE TEXACO-PENNZOIL WARS* (1987).

recent years, appellate review of the lower court cases remains extensive, performed by a panel of at least three judges, who usually hold oral argument and issue written opinions regarding their decision.

b. Consistency of Outcomes

By consistency of outcomes, I mean the record of the adjudicator in treating like cases alike. Generally, consistent decisions for similar cases is regarded as a symptom of competence while divergent results are defensible only where the underlying dispute differs sufficiently.

c. Predictability of Outcomes

Outcome predictability is in part a function of consistency. In the main, what I mean by predictability is the degree to which the decisionmaking process in question is susceptible of prediction as to outcomes (or at least range of outcomes) by the disputants and outside observers.

d. Consistency of Process

Consistency of process is the degree to which disputes—at least disputes of the same nature—are processed in the same manner. Dispute resolution that proceeds in accordance with set rules is presumptively more competent because of its consistency, so long as the rules themselves are not incompetent or the tribunal is not stripped of necessary discretion.

e. Predictability of Process

Predictability of process means the degree to which disputants can rely on the decisionmaker—or even require the decisionmaker—to follow an established process for resolving the dispute.

f. The Cost of the Process

The expense of disputing is not an element of competence as the term is normally used to connote skill. However, at some point, great expense or inefficiency in reaching even the soundest of results makes the tribunal less competent in the broad sense in which I am using the term.

g. The Time Required for Dispute Resolution

Like cost, time-to-decision is not a reflection of the quality of the decision as such. But unduly long waits for reaching even Solomonic results make the tribunal less competent.



### 8. *The Response to the Decision*

The response to the decision is the reaction of individual actors and markets to the various adjudicators. By this I mean a constellation of several factors.

#### a. Influence

Whether the decision is influential, regarded as isolated, or representative of other future outcomes is important to the response to the decision. One obvious illustration of this factor is the degree to which litigation adjudication, particularly at the federal circuit court level, has binding effect or strong precedential value. A decision that resolves not only the instant dispute but provides strong or definitive legal resolution of an issue is generally more competent than a decision that has little or no relevance to anyone but the disputants.

#### b. Behavior Modification

Whether the decision prompts a change in behavior by actors engaging in the activity that was the subject of the dispute is also important to the response to the decision

#### c. Legal Reform

A third factor is whether the decision prompts law reform agents to respond to codify, modify, or reverse the determination. The most obvious example of this phenomenon is legislation to "overturn" judicial decisions.<sup>87</sup> Such intervention may be seen as evidence of incompetence (that is, the legislature views the court as having erred). Such a response also suggests that courts are quite competent in obtaining the attention of other decisionmakers and in obtaining resolution of the social problems reflected in litigation. Ordinarily, extrajudicial forces do not respond to disagreeable court decisions until they at least reach the circuit court level,<sup>88</sup> but legislative or executive response does take place with some

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87. To be precise, legislation does not reverse a particular decision by changing the particular result as to the parties involved because this would tend to violate constitutional prohibitions on a bill of attainder (decreeing by legislation a particular adjudicative result) or ex post facto law (creating liability for conduct that predated the enactment of the law. See generally GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 57 (10th ed. 1980); THE FEDERALIST NO. 78 (Alexander Hamilton). Rather, we speak of a court decision disliked by the more overtly political branches as being "legislatively overruled" rather than "reversed." See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). The practical effect of this sort of response is, however, to change the results for other similar cases that may be in the dispute resolution "pipeline" and which would stand to benefit from the precedential force of the decision that is being changed by the legislation.

88. But see Roger Parloff, *Liti-slation*, AM. LAW., Jan./Feb. 1992, at 80 (reviewing efforts of timber industry to enact legislation in response to adverse district court preliminary injunction limiting cutting in habitat of Spotted Owl).

frequency,<sup>89</sup> at least where there are federal court decisions of prominence. The same is also largely true of state supreme court decisions, which may often be modified by state legislative action.<sup>90</sup>

Whether alternative forms of dispute resolution are as subject to political response is less certain. My presumption is that arbitration, mediation, and other ADR outcomes are subject to such revision<sup>91</sup> but not nearly to the degree as are judicial decisions.<sup>92</sup> This leaves aside (for the moment) the question of whether more frequent executive and legislative response is a good thing.

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89. See Eskridge, *supra* note 87; Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 587 n.14 (1991) (describing narrow defeat of 1990 Civil Rights Act designed to overturn portions of seven Supreme Court decisions from 1989 term and two decisions from earlier terms). See also *id.* at 657–59 (describing successful legislative attempts to overturn earlier Supreme Court decisions concerning attorneys' fees recovery, pregnancy discrimination, nondiscrimination obligations of colleges receiving federal financial assistance, and handicapped children's rights). The Civil Rights Act of 1991 was ultimately passed and did overturn or modify significant portions of the 1989 Term Court decisions that had been the subject of the vetoed 1990 Act. See generally Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 160–61, 187–89 (1993) (describing the impact of the 1991 Act on the litigation of job discrimination claims) [hereinafter, McGinley, *Reinventing Reality*].

90. See, e.g., CAL. CIV. CODE § 2860 (West 1994). In 1987, the California legislature enacted a bill substantially accepting but modifying *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358 (1984), which required insurers to provide separate counsel for policyholders when there was a conflict of interest that may affect insurance coverage for the policyholder and insurer defending a third-party's tort claim.

91. For example, in the 1980s, the Supreme Court generally expanded the reach and enforcement of arbitration clauses. See generally Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 272–79. In response, a number of states passed legislation designed to require greater disclosure and clarity in arbitration agreements.

However, these state-based efforts have been held violative of the Federal Arbitration Act's general command that an arbitration agreement be enforced "on the same terms" as any other contract. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (striking down application of Montana statute requiring arbitration clauses be separately and clearly presented in dispute between sandwich shop chain and franchisee); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989) (striking down Massachusetts law that required arbitration clauses in securities brokerage account agreements to be conspicuous and forbidding brokerage houses from requiring arbitration clause as "nonnegotiable condition precedent to account relationships").

92. Some of this difference in response undoubtedly stems from the more privatized nature of nonjudicial dispute resolution. As a result, arbitration, mediation, and its hybrids may simply not be sufficiently visible to attract legislative attention. However, it is also the case that the privatized nature of ADR or regulated nature of the spheres where

## II. ASSESSING COURTS IN CONTEXT: A RESTRAINED BRIEF OF SUPPORT FOR THE JUDICIARY IN COMPLEX MATTERS

### A. *Criticism of Courts Lacks Persuasive Force and Empirical Substantiation as Many Disputants Continue to Come to Court When They Can*

Those critical of the courts have been long on anecdote and ideology and relatively short on proof of deficiency. Examples of tragedy, stupidity, sloth, delay, prejudice, overcompensation, undercompensation and the like are not a basis for major reform without some evidence that there exists an iceberg under this tip.

Furthermore, even the supposedly incriminating anecdotes usually have more to the story or are not readily accepted as evidence of a problem by a large portion of the body politic. The McDonald's scalding coffee case<sup>93</sup> serves as an

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ADR is widely used may make the outside response to ADR decisions the likely province of some entity other than a legislature.

In the wake of the Supreme Court decisions making securities claims more readily arbitrable, the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers, with the support of the Securities and Exchange Commission, promulgated regulations designed to make arbitration clauses in investor agreements more conspicuous and understandable. See *Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses*, Exchange Act Release No. 34-26805, 54 FED. REG. 21144 (May 10, 1989) (presence of predispute arbitration clause in a contract must be indicated above the signature line, the customer must be given a copy and acknowledge it in writing, a minimum size type must be used and the clause must be in outline form to improve readability).

Similarly, the Equal Employment Opportunity Commission has announced that it considers en masse arbitration clauses inappropriate for application to employment discrimination claims and has sought to obtain injunctive relief against company-wide insistence on arbitration. See *E.E.O.C. v. Kidder, Peabody & Co.*, 979 F. Supp. 245 (S.D.N.Y. 1997). However, the EEOC position, despite its sensible analytic and legal underpinning, is in tension with *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20 (1991) (requiring arbitration of age discrimination claims pursuant to arbitration agreement required as condition of employment in securities industry), and has been rejected by the *Kidder, Peabody* trial court.

In a similar vein, the American Arbitration Association has established a policy of not arbitrating employment discrimination disputes even where the arbitration clause in question is enforceable under federal law unless the clause is the product of a higher degree of disclosure and understanding by the employee. The AAA also requires that the arbitrators have some expertise in discrimination law and that the arbitration procedures provide additional prerogatives to the employee disputant than would obtain in the ordinary arbitration of commercial disputes. See AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR RESOLUTION OF EMPLOYMENT DISPUTES (1997). See also Robert L. Corrado, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1066-67 (1996) (discussing AAA Employment Arbitration Rules).

93. See Steve Wilson, *Coffee-Spill Award No Grounds for Backing Props. 103, 301, ARIZ. REPUBLIC*, Oct. 27, 1994, at A2 (reviewing facts of case and concluding, contrary

example. Businesses, defense lawyers, and editorial page writers publicized the case as an example of legal system incompetence and jury irrationality<sup>94</sup>—and many seem to agree. However, a substantial number of observers (not totally drawn from the ranks of plaintiffs' personal injury lawyers) disagree.<sup>95</sup> Like me, they think liability is apt when a retailer serves coffee far hotter than required (180 degrees Fahrenheit) to drive-through commuters who can reasonably be foreseen to spill the scalding brew on occasion.<sup>96</sup> Thus, even if the anecdotes are but the tip of an iceberg of allegedly incompetent adjudication, the case for major changes in juries, courts, or the law generally is not made until there is something approaching agreement that these events—fully understood in context—are “bad” and require reform to eliminate them.

Obviously, in arguing that courts are competent and deserve a continued role as our default means of dispute processing (or as a backstop to or avenue of review of other default disputing options such as administrative agencies or

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to earlier opinion column, that the jury verdict was reasonable under the circumstances and was not itself evidence to support vote for tort reform); Andrea Gerling, *How Jury Decided How Much The Coffee Spill Was Worth*, ST. LOUIS POST-DISPATCH, Sept. 4, 1994, at D11 (describing the background of the case in which plaintiff sought compensation for injury when coffee purchased at McDonald's drive-through facility spilled, causing serious burns). The jury award of \$2.86 million (\$2.7 million in punitive damages) was reduced to \$640,000 on appeal and the case ultimately settled for \$200,000. *See McDonald's Settles Lawsuit Over Burns from Coffee*, WALL ST. J., Dec. 2, 1994, at B6.

94. *See, e.g.*, Alex Kosinski, *Justice to Go: Recent Multimillion-Dollar Judgments Have Been Made by a Group of People Answerable to No Constituency: Juries*, FT. LAUDERDALE SUN-SENTINEL, Feb. 21, 1995, at I6 (Ninth Circuit judge criticizes the verdict and the concept of broad jury power to render large awards, particularly of punitive damages). *See* Andrea Gerling, *supra* note 93, at D11:

Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans—including many who typically support the little guy—to be outraged at the verdict. And radio talk show hosts around the country have lambasted the plaintiff, her attorneys and the jurors on air. Declining to be interviewed for this story, one juror explained that he already had received angry calls from citizens around the country.

95. *See, e.g.*, Wilson, *supra* note 93; Gerling, *supra* note 93, at D11:

It's a reaction that many of the jurors could have understood—before they heard the evidence. At the beginning of the trial, jury foreman Jerry Goens says he “wasn't convinced as to why I needed to be there to settle a coffee spill.”... What the jury didn't realize initially was the severity of [plaintiff's] burns.... Even more eye-opening was the revelation that McDonald's had seen such injuries many times before.

96. *See* Gerling, *supra* note 93, at D11 (describing jury reaction against McDonald's upon finding that most vendors served coffee at much lower temperature and that McDonald's was aware of many similar injuries in the past but did not change practices). In its defense, McDonald's argued that expert coffee gourmets like coffee at 175 degrees or more in order to release aromatics in the coffee. Although this may be a valid defense for Starbucks, one is hard pressed to accept this as an overriding rationale for the serving of scalding coffee of McDonald's quality.

arbitration), I am adopting the classic negative debater's posture of cloaking myself in the presumed continuation of the status quo. Until those critical of judicial competency both make their case persuasively and articulate a reasonably concrete better alternative, there should not be major revolution in the judicial system—for cases either simple or complex. Although this may be a cowardly means of hiding behind inertia, it is both an apt approach to law reform and a position that can resist logical attack even if it perhaps cannot resist the political attack of well-heeled interests with a partisan reason for altering the court system and in particular removing “complex” litigation from the courts.

To the extent that attacks on the system are not based on anecdote and ideology, the argument against the judicial status quo generally is that it simply is getting too large. Cited as evidence of the need for reform are the aggregate statistics showing an ever-increasing docket, which brings increasing delay<sup>97</sup> and higher expense.<sup>98</sup> To a large degree, this simply indicates that courts are maintaining or increasing their popularity as a forum for the resolution of disputes both simple and complex.<sup>99</sup>

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97. There is apparently not an ironclad correlation between caseload and delay. Many courts have reduced their average times to case disposition at the same time that caseloads were growing. See RICHARD A. POSNER: *THE FEDERAL COURTS: CHALLENGE AND REFORM* 153–65, 220–32, 290–95 (1996).

98. See, e.g., Robert H. Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976) (arguing that a “litigation crisis” exists due to growing caseload and that reform is required). To be fair and careful, we should distinguish between arguments that posit (a) that federal Article III courts are becoming too crowded with increasing tasks and caseload, which is bad because federal courts should be limited in scope but deep in expertise because of their role in the overall national justice system and (b) that too many cases are being brought to courts generally.

The former argument, stronger and more difficult to refute, is frequently made by prestigious legal leaders such as Chief Justice Rehnquist. See William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary*, SUPREME COURT PRESS RELEASE, Jan. 1, 1998 (warning against overexpansion of federal jurisdiction by which the federal judiciary “will become so large that it will lose its traditional character as a distinctive judicial forum of limited jurisdiction.”). I am more persuaded by those who see less need for exclusivity in the federal courts. See, e.g., Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

99. Without question, judicial caseload has grown. For federal courts, the total number of cases was approximately 83,000 in 1960 and approximately 300,000 in 1983. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 57 (1996). But the rate of growth has slowed significantly during the 1980s and 1990s. In 1996, approximately 330,000 cases were filed in federal courts. *Id.* at 60–61. The number of civil cases went from approximately 53,000 (1960) to approximately 260,000 (1983) to approximately 270,000 (1995) in that period, suggesting that the any “litigation explosion,” real or imagined, during the past twenty years can not be laid solely at the feet of overzealous, greedy claimants. *Id.* at 57, 60–61.

Consider from somewhat more distance than normal the arguments of those who argue for court reform or restriction based upon the growth of litigation. Ordinarily, the popularity of a good or service is taken as an indication of its desirability and worth.<sup>100</sup> To court critics, the popularity of adjudication has been turned on its head to become a "problem" rather than an indication of the market expressing a preference for courts in light of the disputes to be resolved.

In other words, to the extent there is a real growth problem in the national judicial caseload, the consumers of dispute resolution have voted with their feet—and their checkbooks. For less sophisticated disputants, the preference for litigation over alternatives may be suspect because it may only reflect the growth of the population or more disputes among the populace. Lay disputants arguably file lawsuits due to lack of knowledge about alternatives or a paucity of alternatives. But when more sophisticated disputants go to court, this would seemingly indicate a rational market preference. Consequently, it is interesting to note recent history of contract and other commercial disputes.

For these disputes, there has not been a litigation boom, which may indicate increasing use of ADR alternatives for these types of cases. But any movement of commercial cases from the courts to ADR does not necessarily stem from a view that courts are less "competent." The movement, if any, may result from perceptions of lowered disputing costs, which may not be accurate. From 1981 to 1996, the number of private "contract" disputes in the federal courts was stable or in slight decline, there were 29,720 cases in 1981 and 28,445 in 1995.<sup>101</sup> An examination of cases arguably and broadly defined as "commercial" shows a similar pattern with the exception of bankruptcy, which has mushroomed from fewer than 2000 cases in 1981 to 5500 in 1995.<sup>102</sup> Within the contract domain, insurance cases (usually declaratory judgment actions regarding coverage commenced by insurers or sophisticated policyholders) nearly doubled from 4000

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In recent times the number of private civil actions moved from approximately 160,000 in 1983 to approximately 220,000 in 1995, an increase of nearly 40%, but the increase between 1960 and 1995 was more than 230%. *Id.* at 57, 60–61. From 1960 to 1995, however, the national population grew from approximately 150 million to 265 million persons, an increase of 77%, with national population currently increasing at the rate of 2.5 million persons each year. See Fred Meyerson, *When the Pollution Problem is Really a People Problem*, INT'L HERALD TRIB., Nov. 11, 1997, at 8. The rate of civil litigation growth has thus been greater than the general level of population growth during most of the past forty years, but civil litigation growth in federal court during the 1980s and 1990s is only about one-third as fast as it was during the 1960s and 1970s.

100. Certain aspects of antitrust law might be seen as exception in that restraint is sought of the product or service so popular that it dominates the market. But, if Section 2 of the antitrust law (*see* 15 U.S.C. § 2) is wise, this occurs for reasons focusing on the larger question of economic health over a longer time horizon rather than because there is anything "wrong" with the good or service so popular it threatens to become a monopoly.

101. See ADMIN. OFF. OF THE U.S. CTS., FEDERAL CASELOAD STATISTICS tbl. C-4 (1981 & 1995).

102. *Id.*

to 7500 during the same time period.<sup>103</sup> "Securities" cases stood at 2000 in 1981 and remained at almost exactly the same figure in 1995.<sup>104</sup> "Other" personal injury claims, which includes product liability, also remained stable, so long as asbestos claims are excluded.<sup>105</sup> Patent, trademark, and copyright claims have increased from 4000 in 1981 to 7000 in 1995.<sup>106</sup> The big engine of private civil action growth was civil rights, which saw growth from 8000 cases (5500 job discrimination cases) to 33,000 (16,000 job disputes) during the same period.<sup>107</sup>

Thus, the picture of court workload and complexity is itself complex. In many areas both simple and at least potentially complex, there has been stability or modest growth. On the whole, however, it seems fair to conclude that there has been major growth, at least in federal court, of complex cases. The growth in intellectual property cases seems an obvious example and bankruptcy is another, although federal courts have, to a large extent, cornered the market on this type of claim. Although the product liability caseload has not increased except for asbestos, asbestos is to some extent the catalyst that has driven much of the scholarship and debate about the role of courts.<sup>108</sup> Asbestos claims, at least when aggregated, seem to pose many of the indicia of complexity discussed above. Post-asbestos mass torts, such as those involving silicon implants or other biomedical devices, seem to present even more complexity because of the less certain proof surrounding technical issues and more potentially differing law.<sup>109</sup> The greatest growth has been in civil rights claims which are sometimes mistakenly seen as uncomplex because the issues are not technical or scientific. But discrimination claims are quite complex in terms of legal doctrine and the difficulty attendant in separating the real and pretextual reasons for an adverse employment decision.

Although the caseload picture is cloudy, it appears that the docket of complex matters has increased significantly but not with "litigation explosion" velocity. Those arguing that claimant behavior demonstrates a vote of confidence in the courts' ability to handle complex matters can make a convincing case from the numbers. At the very least, complex cases appear not to be avoiding the judicial

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103. *Id.*

104. *Id.*

105. In 1981, there were 13,000 "other" personal injury claims in federal court. In 1995, the figure was 15,000, with 6500 "asbestos" cases as well. *Id.*

106. *Id.*

107. *Id.*

108. See, Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993) (but also noting similar pattern in Dalkon Shield and other mass tort litigation).

109. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (refusing to certify class in tainted blood action in part because of perceived differences in potentially applicable state tort and product liability law); David Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. (forthcoming Mar. 1999) (making persuasive case based on available medical literature that, contrary to testimony of plaintiffs' experts, silicon breast implants pose no significant health risk).

system even though the law during this same time period has made exit to ADR considerably easier.<sup>110</sup>

Although not all commercial or products cases are "complex" even under the broad "definition" of complexity promulgated above, many products, securities, contracts, and other commercial cases can become textbook examples of complex litigation. Reflection on *Eisen v. Carlisle & Jacquelin*<sup>111</sup> or other securities class actions and product liability claims involving asbestos, biomedical devices, chemicals, and pharmaceuticals underscores the potential of these claims for complexity.<sup>112</sup> Although these cases are not the growth engine of the federal courts during the 1980s and 1990s, there is no apparent flight from the judiciary by these sophisticated claimants.

Although courts may have their problems, claimants with an opportunity to go to court over such disputes appear to do so with continuing or increasing frequency. This court preference may be asymmetric a good deal of the time (for example, brokerage houses that prefer arbitration for portfolio management and job discrimination claims, although this effort to shift the default locus of disputes has met with considerable scholarly criticism).<sup>113</sup>

Commercial actors who are often in the position of opposing claimed rights to recovery also reflect a continuing preference for courts. For example, insurance companies and commercial policyholders often file declaratory judgment actions to resolve coverage disputes and attempt to litigate in certain states because

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110. See, e.g., Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1380 (1996) (Supreme Court caselaw from 1983 on has favored enforcement of arbitration and other ADR clauses, even where clause is part of contract of adhesion).

111. 417 U.S. 156 (1974) (involving class of six million persons certified by district court as trading in odd-lot shares of stock with 2.25 million identifiable class members in action for damages pursuant to FED. R. CIV. P. 23(b)(3); court holds that the plaintiffs must shoulder \$225,000 of the cost of mail notification to identifiable class members). A Second Circuit judge on the reviewing panel referred to *Eisen* as a "Frankenstein monster posing as a class action." See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting). See also Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, (1979) (arguing that class action device can accommodate such cases).

112. See, e.g., PETER SCHUCK, *AGENT ORANGE ON TRIAL* (1986); JAMES KAKALIK, ET AL., *COSTS OF ASBESTOS LITIGATION* (1983); Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

113. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 36; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Stempel, *supra* note 110; Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992). But see Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996) (expressing some criticism of recent precedents favoring arbitration but generally supporting enforceability of arbitration clauses in context of employment claims).



of the applicable law, which can be determined with comparative certainty vis-a-vis arbitration or other ADR.<sup>114</sup> In the state courts, creditors are the party most likely to invoke the courts for a contract claim in seeking to collect debts. They brought close to 200,000 such cases in 1992 alone in the seventy-five most populous counties.<sup>115</sup>

State court data—although, like the federal court data, less detailed and informative than one would prefer—not only reflects a similar pattern of commercial actor confidence in courts but also shows overall attraction to courts for disputing the types of product liability and contract/commercial law claims presenting substantial risk of complexity. In a Bureau of Justice Statistics Study of the nation's seventy-five largest counties, there were nearly 16,000 fraud cases in 1992 and nearly 13,000 product liability claims.<sup>116</sup> If only a few of these become like *Eisen v. Carlisle & Jacquelin*<sup>117</sup> or the asbestos cases, the system will be strained. Although the data is hardly conclusive, there certainly is no showing of a mass exodus from the judicial system for industry-wide securities claims or mass torts.

Of course, to some extent the question before this panel is whether claimants should continue to have the choice of relatively open access to courts. To address that question, the following section assesses judicial competency according to the aspects of complexity previously listed.

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114. See JEROLD OSHINSKY & THEODORE A. HOWARD, *LITIGATING THE INSURANCE COVERAGE CLAIM* §3.02[B] (2d ed. 1998). In 1981, there were 2000 insurance suits in the federal system, a figure that had increased to 5500 in 1995.

115. See Carol J. DeFrances et al., United States Department of Justice, Bureau of Justice Statistics, *Special Report, Civil Justice Survey of State Courts, 1992: Contract Cases in Large Counties 2* (BJS Rpt. No. NCJ-156664 (Feb. 1996)) (on file with author).

Contract cases comprised 48% of the caseload in these 75 largest U.S. counties (366,336 cases), of which more than half (189,246 or 25% of the total caseload) were contract claims brought by a "seller," which means that virtually all these claims were debt collection actions. Only the number of automobile accident cases (227,515 or 29.8% of all cases) surpassed the number of debt collection actions in the state courts.

116. See *id.* The exact figures were 15,927 fraud cases (2.1% of all cases) and 12,857 product liability cases (1.7% of the total). In addition, there were 8159 employment cases (1.1%), which often involve complex legal issues related to discrimination, disability, or public policy that make the cases expensive, protracted, and difficult for the decisionmaker. See Ann C. McGinley, *The Emerging Cryonyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997) (courts often confuse issues of intent, motivation, and cause in discrimination claims); McGinley, *Reinventing Reality*, *supra* note 89 (courts often confuse questions of relevancy in discrimination litigation); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 216 (1993) (courts have difficulty applying substantive standards of proof and pretrial motions in discrimination cases).

117. See *supra* note 111 (describing the *Eisen* case).

*B. On the Relative Scale, Courts Continue to Compare Favorably to Alternatives—Particular Where the Matter is Complex*

With all their admitted shortcomings, courts (and juries) have a good deal of relative competence to address complex disputes. Consider the ability of courts on each of the complexity traits listed in Part I, above. To simplify the analysis and presentation, I characterize the aspects of complexity presented in Part I according to four basic categories:

- (1) complexity created by the size or scope of the dispute;
- (2) complexity occasioned by uncertainty regarding the matter or difficulty in assessing the law or fact of the dispute;
- (3) complexity stemming from human limitation; and
- (4) complexity resulting from the political aspects of adjudication.

Using these four dimensions of complexity, this section examines the relative competence of courts and alternatives.

*I. Complexity Because of Size or Scope*

Where the litigation is complex because it involves *a large number of parties*,<sup>118</sup> a judicial system still largely arranged for the traditional biparty-bipolar dispute becomes strained. Through joinder, courts possess greater capacity to aggregate parties and claims than do private arbitration and mediation forums that depend on consent in order to even proceed en masse, much less do a competent job en masse.<sup>119</sup> The comparative advantage for courts in a case that is complex because of multiple parties holds to some degree even where industry-wide arbitration is imposed by mass form contracts. For example, the securities industry has insisted that all employees sign arbitration agreements as a condition of employment,<sup>120</sup> but in any dispute involving parties outside the industry, a stock exchange arbitral forum will lack the breadth of joinder available to the courts.

To some extent, a multiparty case involving judges and lawyers may become more complex because of ethical rules requiring judicial impartiality<sup>121</sup> and

118. See *supra* notes 18–20 and accompanying text.

119. There is some evidence that arbitration's reach is being extended to parties that did not sign an arbitration clause but are otherwise linked to a party that agreed to arbitration. See Allen B. Green & Jamie L. Boucher, *The Spike in Mergers is Prompting U.S. Courts to Compel Corporate Parties Who Have Not Signed Any Arbitration Agreements to Arbitrate International Disputes*, NAT'L L.J., Feb. 23, 1998, at B4. However, the prevailing rule remains that arbitration agreements are contracts personal to the executing party and neither bind affiliated entities nor are subject to assignment.

120. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (requiring arbitration of Age Discrimination in Employment Act claim based on an agreement required by NYSE member brokerage houses as condition of employment).

121. See 28 U.S.C. § 455 (1994) (judge shall recuse self when judge or any close family member has any financial interest in controversy or when impartiality may be reasonably questioned); MODEL CODE OF JUDICIAL CONDUCT Canon 2 & 3 (1990). Canon 2

prohibiting conflict of interest or conflicted loyalty for lawyers.<sup>122</sup> These aspects of litigation may require new judges, new counsel, or other safeguards against bias that might not be required in nonjudicial disputing forums. However, it seems incorrect to suggest that courts are incompetent for complex cases because they are more ethical than other decisionmaking entities. Rather, the ethical rules attending the judicial system arguably make it more competent on the dimensions of public confidence in the result and party acceptance of the result in a manner that outweighs any additional cost and delay occasioned by the necessity of following a body of ethics law that is itself rather complex.

One possible alternative to courts that might "solve" multiparty complexity better than courts is a comprehensive legislative solution. Similarly, a nationwide administrative tribunal might leapfrog the joinder, jurisdiction, and choice of law issues facing courts in the multiparty case. However, legislative solutions are not feasible for any but the most extraordinary of complex cases. Congress (and it would need to be Congress rather than a state legislature) cannot realistically respond to every multiparty complex matter taxing the courts. Only the superproblematic will merit congressional attention. Even then, there is no guarantee that legislative resolution will reflect a more competent approach, even if Congress were able to achieve it.

For example, efforts to achieve a national and complete settlement of the litigation brought by states against tobacco companies illustrate the problem. Since June 1997 there has been an agreement between most of the prosecuting states and the tobacco industry for resolving the litigation and wide congressional support for enacting facilitating legislation.<sup>123</sup> Sufficient division over the concept and its implementation exists so that Congress has yet to act to keep and implement the settlement and may not do so.<sup>124</sup> If swift congressionally imposed resolution of

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states that a judge shall avoid even appearance of impropriety. Canon 3 states that a judge shall perform duties of office impartially. *See also* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 593-96 (1988) (describing background and application of judicial disqualification statute).

122. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8 & 1.9 (1983). Rule 1.7: lawyer may not simultaneously represent clients with directly adverse interests. Rule 1.8: prohibiting lawyers from certain business or financial ties to clients; Rule 1.9: prohibiting lawyers from representing client in matter substantially related to work done for former client.

123. *See* John M. Broder, *The Tobacco Agreement: The Overview; Cigarette Makers in a \$378 Billion Accord to Curb Lawsuits and Curtail Marketing*, N.Y. TIMES, June 21, 1997, at A1; Harry Berkowitz & Susan Benkelman, *Big Tobacco's Concessions: Industry to Pay \$368B, Issue Warnings That Smoking Kills*, NEWSDAY, June 21, 1997, at A4; James Rosen, *Tobacco Settlement: \$368 Billion*, NEWS & OBSERVER (Raleigh), June 21, 1997, at A1.

124. *See Federal Subcommittee Warned Not to Tamper With States' Settlements*, MEALEY'S LITIG. REP.: TOBACCO, Dec. 18, 1997, at 1; James Toedtman, *Tobacco Money Tug-of-War; Congress Leaps Into Federal, State Fray*, NEWSDAY, Dec. 9, 1997, at A17; John M. Broder & Barry Meier, *Tobacco Deal in Jeopardy*, WILMINGTON STAR-NEWS (NC), Sept. 14, 1997, at 1A.

multiparty disputes cannot occur for the well-publicized, publicly supported tobacco situation managed by state attorneys general and endorsed by the President, this hardly supports faith in legislative intervention as a principal means of dealing with complex multiparty disputes.

Use of widespread agency authority to resolve multiparty disputes entails similar political problems: will Congress and the President support the initiative? Can an acceptable entity be established even when there is general political agreement? In addition, proposals for omnibus agencies or comprehensive legislative solutions may present constitutional issues. Parties restricted in their prior access to courts may raise persuasive due process or equal protection objections when what were judicial causes of action become petitions to an executive branch agency or are "resolved" through legislative fiat.

Nonetheless, some legislative/executive initiatives appear to have worked well and offer promising models for the future. Examples are the adjudication/compensation mechanisms for Black Lung benefits<sup>125</sup> and injuries from vaccine side-effects.<sup>126</sup> However, these success stories<sup>127</sup> are not really responses to complexity in the sense of the substantive difficulty of the case and are only barely responses to the complexity occasioned by multiple parties. These disputing systems do not really resolve a multiparty controversy but instead establish a streamlined means of processing a large number of relatively routine two-party controversies. To the extent that some mass torts can be seen as simply cases with a lot of claimants, the vaccine/black lung approach might work. To the extent that a multiparty complex case means widely dispersed disputants pursuing the same prize (for example, a corporate takeover), none of the existing alternatives seems more competent for the task than courts.

Disputes considered complex because of a *multiplicity of forums*<sup>128</sup> fit much the same pattern. One means of achieving greater consistency than courts can provide is the omnibus legislative/administrative agency solution. However, this is

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125. See Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901–45 (1994).

126. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa1–aa34 (1994); National Swine Flu Immunization Program of 1976, 42 U.S.C. §§ 201, 247b (1994).

127. The vaccine programs are considered success stories. See Denis J. Hauptly & Mary Mason, *The National Childhood Vaccine Injury Act: The Federal No-Fault Compensation Program that Gives a Booster for Tort Reform*, 37 FED. B. NEWS & J. 452 (1990) (finding program effective in delivering fair compensation at lower cost than litigation and suggesting it as model for tort reform generally). The Black Lung Benefits program has met with criticism based on its cost and overinclusiveness but is still generally seen as a useful means of removing a potential avalanche of cases from the federal courts. See, e.g., Dan L. Burk & Barbara A. Boczar, *Biotechnology and Tort Liability: A Strategic Industry at Risk*, 55 U. PITT. L. REV. 791, 855–56 (1994) (criticizing Act on these grounds); Allen R. Prunty & Mark E. Solomon, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 672 (1989) (acknowledging criticism but finding program valuable on whole); Donald T. DeCarlo, *The Federal Black Lung Experience*, 26 How. L.J. 1335 (1983) (same).

128. See *supra* notes 22–23 and accompanying text.

practically difficult and, even if achievable, raises serious questions as to whether the rights of the litigants suffer when they are unable to insist on having the cases decided in their own state courts according to the applicable law of the state most closely connected to the dispute.

In the absence of any new reorganization of the national dispute resolution network, courts appear to be significantly more competent than other entities for deciding the multi-forum dispute. Existing judicial statutes, rules, and doctrines provide for the transfer of cases between states and between state and federal courts as well as for a wide array of judicial powers.<sup>129</sup> Different laws can be applied in different forums as between different litigants. This may be complex and cumbersome, but courts can and have done it. Arbitrators and mediators can do it informally or within a more limited system of decisionmaking (for example, transfer among the regional office of the American Arbitration Association), but this ADR flexibility carries with it substantial danger of error (doing things off the cuff tends to reduce the rigor and thoughtfulness of analysis), inconsistency, unpredictability, and insufficient guidance to others.

Cases considered complex because they are *unusually protracted*<sup>130</sup> are unlikely to be solved when the dispute is moved out of the judicial system. Complex cases are not protracted because they are in the courts; they are protracted because they are complex. In all likelihood, such cases would be reasonably lengthy and cumbersome even if moved into a procedurally streamlined forum because of the involved nature of the case. On one hand, the sometimes baroque procedural potential of the courts can invite an explosion of time-consuming pretrial litigation. On the other hand, courts are well-equipped to deal with these initiatives provided judges will swiftly and firmly decide motions and otherwise prevent litigants from drawing out a matter.

Although many judges fall short of this ideal “no-nonsense” judge that moves cases along as expeditiously as possible, the track record of the alternatives

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129. See, e.g., 28 U.S.C. § 1251 (original Supreme Court jurisdiction over some types of cases potentially complex because of conflict between states, countries, or ambassadors); *id.* § 1254 (certiorari power to review federal court decisions); *id.* § 1257 (certiorari power to review state court decisions); *id.* § 1292 (permitting discretionary interlocutory review); *id.* § 1331 (federal question jurisdiction); *id.* § 1332 (diversity jurisdiction); *id.* § 1335 (interpleader available where claimants satisfying minimal diversity make inconsistent claims to a thing); *id.* § 1367 (power to exercise supplemental jurisdiction over claims arising from common factual nucleus); *id.* § 1391 (broad venue provisions); *id.* § 1404 (providing for change from inconvenient venue); *id.* § 1406 (providing for transfer of cases with improper venue); *id.* § 1407 (providing for consolidation of multidistrict litigation for pretrial matters); *id.* § 1441 (providing for removal of actions from state to federal court); *id.* § 1447 (providing for remand of removed cases to state court); *id.* § 1605 (exceptions to general immunity of foreign state); *id.* § 1651 (wide judicial authority to issue remedial and procedural writs); *id.* § 1738 (full faith and credit for judgments); *id.* § 1781 (providing for letters rogatory and discovery of evidence abroad); *id.* § 1826 (punishment for uncooperative witnesses); *id.* § 1827 (interpreters available).

130. See *supra* notes 23–25 and accompanying text.

to courts is not always encouraging. Administrative agencies can be notoriously slow in making determinations. Legislation, although subject to flash fires of activity, may also languish for years. A party seeking to delay the day of reckoning in commercial arbitration is at least as well equipped to do so as the average litigant. The arbitrator can be endlessly unavailable for the limited window of hearing dates established by the arbitrator or panel of busy business or professional persons. Unless the foot-dragging is blatantly obvious, most arbitrators will indulge the delay.<sup>131</sup>

Part of the delay potential in ADR occurs because processes like arbitration and mediation focus so intently on the hearing or meeting as the means of resolving the dispute. By contrast, the judicial system contains a number of devices for obtaining resolution of the matter, or at least parts of it, without a hearing. In addition, mediation and arbitration (to the extent it is nonbinding) may merely add an additional step in the dispute resolution process. Court decisions, whatever their other faults, tend to be relatively final (although subject to appellate review), thus limiting protractedness to some degree.

Administrative agencies appear an imperfect alternative, either because, like ADR, they can be as slow as any court, or because the agency determination is not final until reviewed by at least an appellate court. This makes the total elapsed time to disposition relatively similar to those disputes that have been assigned to the judiciary from the outset.

To the extent that *joinder disfunction*<sup>132</sup> is a source of complexity, nonjudicial alternatives appear to have similar drawbacks. As previously noted, ADR forums seldom can force the substantially affected parties to a dispute to join in one proceeding. Although this disaggregation may make for simpler dispute resolution, its piecemeal operation may not be the best means of processing complex disputes. Conversely, overaggregation may obscure evidence, work to the disadvantage of certain parties, or result in a preclusive effect for an erroneous result.<sup>133</sup> At this juncture, the best we can say is that the benefits and detriments of joinder probably vary according to the case at hand. By having more joinder potential than ADR but not such joinder power as to rush to judgment or bind future claimants too easily, courts may have stumbled onto the optimal mix of aggregated and detached processing of cases.

The joinder disfunction caused by permitting lawyers to be the masters of the claims and to permit strategic use of that prerogative may be a problem for the courts, but it would also seem to be an equivalent problem for ADR alternatives.

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131. See, e.g., James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, AM. LAW., Jan./Feb. 1985, at 107 (describing an arbitration dispute in which recalcitrant party engineered delay and the matter took eight years to complete).

132. See *supra* notes 20-21 and accompanying text.

133. See Marcus, *supra* note 20, at 1277; Nesson, *supra* note 20, at 534 (suggesting that class action treatment of Vietnam veterans with widely different exposures to dioxin may have made classwide relief excessively generous or inadequate depending on the class member).

Administrative agencies may have an advantage over courts in constraining lawyer behavior (for example, in rulemaking proceedings, the agency rather than private lawyers frame the case) and in achieving an omnibus resolution of a matter. But, as discussed above, too much aggregation carries costs of its own by homogenizing claims that may deserve to remain distinct and by potentially sealing the vault of the dispute, perhaps after a rush to judgment. In addition, agency proceedings are in fact framed by lawyers—government lawyers—who can act as strategically or foolishly as their counterparts in the private sector.

## 2. Complexity from Uncertainty or Difficulty

If the complexity at hand results from *disuniformity of the law*,<sup>134</sup> it is hard to see a comparative advantage for the existing alternatives to courts. By disuniformity, of course, I mean *conflicting law with competing claims to controlling the subject matter of the dispute, the overall indeterminacy of the law, and the indeterminacy introduced by institutional differentiation*. Institutional differentiation by definition affects all forms of law and dispute resolution in society. Thus, it makes even less sense to address this aspect of complexity in the abstract. Assessing courts on this dimension of competence for complex matters must be a matter of relative comparison. Courts appear more competent to address all aspects of the disuniformity problem than are existing alternatives.

The judicial system at both the federal and state levels has an established system of generally adhering to precedent as well as resolving conflicts among states, trial courts, circuits, and agencies. Courts finding themselves hamstrung by nonuniform law can also signal lawmakers for help or even launch loud protests and criticisms through lengthy expositions via judicial opinion. Quality control is provided by appellate review. Agency dispute resolution can possess many of these same characteristics, but only by providing for judicial review.

By contrast, the existing private ADR, foreign, or self-help disputing options have no similarly developed set of rules and culture designed to foster uniformity of substantive law and legal policy. Thus, to the extent that differing law is the complexity villain, courts again seem superior. Nonjudicial alternatives may have other attributes such as speed or streamlined process (at least for noncomplex cases and perhaps for difficult matters), but they achieve this to some degree by according “rough justice,” hardly the stuff of legal uniformity.

In addition, most nonjudicial alternatives for disputing lack the extensive reporting and referencing system that has grown around the judiciary. Merely knowing “the applicable law” may be difficult for arbitration or mediation, let alone having a uniformity of law. Thus, if complexity is induced because of the *difficulty ascertaining applicable law*,<sup>135</sup> courts are considerably better equipped to ferret out the legally controlling principles from nonapparent or competing legal norms. This applies to administrative agencies as well as ADR options.

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134. See *supra* notes 26–27 and accompanying text.

135. See *supra* note 28 and accompanying text.

To the extent there is overall indeterminacy in the law due to the inherent limitations of linguistic and political clarity in the sources of the law,<sup>136</sup> courts are comparatively better situated to resolve them than are the alternative forums in light of the special interpretative expertise of courts. However, in cases where the legal regime is technical or specialized, an administrative agency or equivalent may be better equipped to resolve uncertain legal questions or mixed questions of uncertain law and specialized fact.<sup>137</sup>

However, to the extent that nonjudicial dispute processors are handing out rough justice, there may be a tacit consistency lacking in the courts that are legally bound to weigh and decide matters of competing legal rules and to make fine distinctions, ensuring that current cases meet the legal analytic framework of applicable precedent. If the law is not altered, cases must be distinguished on the basis of particular facts and doctrine. Only in comparatively rare situations do courts differentiate (or admit that they differentiate) on the basis of equitable factors alone. By contrast, arbitrators (particularly labor arbitrators) may decide the instant case on any number of equity or fairness factors without regard to governing law—or at least very little regard for governing law so long as the arbitrator's decision is based on the labor agreement under which employer and worker operate.<sup>138</sup>

A possibly resulting paradox is that courts may have considerably more competence dealing with disuniformity as a doctrinal matter, but arbitration or similar forms of dispute resolution may have at least the potential for more consistency of justice even though the results fit less consistently with formal legal doctrine. It is not clear that any such greater freedom to seek tacit equity makes ADR superior to courts.

For an ADR mechanism such as mediation, which in "pure" form does not make a legal ruling at all, the question of legal uniformity may be irrelevant. Mediators generally attempt to bring about a result from supervised negotiation or agreement and through "empowering" the participants to craft a resolution of the dispute tailored to them and facilitating a voluntary solution.<sup>139</sup> Because different disputants will have different goals and means of empowerment and satisfaction,

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136. For example: statutes, court decisions, regulations, executive orders, and treaties.

137. This appears to be the Supreme Court's view. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that courts should defer to agency interpretation of law within agency's domain so long as interpretation is reasonable). *See* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (discussing the long history of judicial deference to agency expertise).

138. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (holding that labor arbitrator's award will be upheld so long as it "draws its essence" from the collective bargaining agreement).

139. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 10–15 (1994); *See generally* Symposium, *Mediation*, 24 FLA. ST. U. L. REV. 839–1009 (1997).



mediation—when it works—is inherently less legally and factually uniform than litigation. Many mediators adopt the view that it is improper even to state for the disputants any summary or understanding of applicable legal rules as this turns mediation into “evaluation” that is no longer true mediation.<sup>140</sup> Although the facilitative-evaluative controversy is to a large extent a false dichotomy, the continued debate among dispute resolution professionals underscores the degree to which mediation is different from other forums in that mediation is less concerned with common law-style consistency.<sup>141</sup>

But, as the above discussion shows, better competence at dealing with complexity does not necessarily mean better results. For example, in a complex body of law, there may be sophisticated precedents that make it difficult for a party to recover for what is generally perceived of as a wrong. For example, a discharged employee may have been unfairly fired due to a personality clash with a most difficult boss. She cannot recover unless she also proves racial, ethnic, gender, religious, or age-based animus. If this is absent, the unfair treatment is perfectly legal in most at-will employment situations. A court following the rules will therefore deny relief. An arbitrator, however, may provide some relief (and not have the decision set aside) if the circumstances of the discharge seem unfair.<sup>142</sup>

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140. See BUSH & FOLGER, *supra* note 139, at 15–53; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

141. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 10–16 (1996) (reviewing mediators' facilitative approaches aimed at empowerment and variant mediator styles). In accord with Professor Riskin's observation, I have suggested that mediator styles are often not purely facilitative and that mediators should have freedom to incorporate more evaluative methods according to particular dispute resolution situations. See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

142. A well-publicized example of this may have recently taken place in the arbitration of NBA basketball player Latrell Sprewell. As most everyone on the planet now knows, Sprewell and Golden State Warriors coach P.J. Carlesimo had an altercation, which led to an attack by Sprewell on Carlesimo. The league ejected Sprewell for a year, with Sprewell grieving the punishment, which resulted in arbitration under the ABA Players Association's agreement with the league.

Arbitrator John Feerick, Dean of Fordham Law School, heard extensive testimony, including uncontested information that Sprewell had gone to the locker room after the first serious altercation and returned 20 minutes later to attack Carlesimo with renewed zeal. Amazingly, Feerick found Sprewell's conduct not to be premeditated, suggesting that the use of legal experts for juries hardly removes accusations of irrational fact-finding (Feerick's determination was widely criticized in the press). Whatever its other attributes, however, Feerick's decision does have the tone of rough justice. By ending Sprewell's suspension from the league on July 1, 1998, Feerick reduced the punishment substantially but still required Sprewell to lose more than \$6 million of income as punishment for his attacks on the coach. More strict construction of the applicable powers of the Commissioner would appear to have supported the more draconian suspension.

On the criticism front, most decrying Feerick's ruling compare it to having a rank-and-file worker reinstated after choking the boss. But Sprewell was not merely fired from

The focus in both arbitration and mediation is first the instant dispute and secondly the informal common practice (if not common law) for dealing with this segment of disputes. Only as a tertiary matter are arbitrators and mediators concerned with the greater body of the law and where the instant decision fits within the larger legal landscape. This more confined focus may make these alternatives to courts more uniform in that they are arguably subject to less *institutional differentiation*<sup>143</sup> as compared to the more widespread and open court system. Administrative tribunals fall somewhere in between in that agency factfinders typically have relatively broad discretion and are not required to adhere to very specific formulas for decision. For example, many agency determinations can be based on "substantial evidence on the record" or are enforced so long as there has not been an "abuse of discretion."<sup>144</sup> Nonetheless, agency decisionmakers must be significantly cognizant of where the instant decision fits within the greater framework of the substantive law or body of regulatory practice. Even where the decisionmaker is an administrative law judge rather than an agency employee per se, there is not only a focus on the overall legal topography but less protection to allow the decisionmaker to exercise independence to deviate from the agency's agenda.

Thus, although the picture is unclear, it appears that courts are at least as competent as other alternatives for determining matters complex because of nonuniform law and legal norms. Where the complexity at hand is the *legally technical nature of the case*, the *pure difficulty of the legal issues in a case*, the *difficulty choosing applicable law*, or the *density of the legal context*,<sup>145</sup> courts are in a sense superior and inferior to ADR mechanisms and agency adjudicators. Courts have a ready body of "legal" precedent, even if the precedent is confusing. In addition, the judges determining applicable law are, to state the obvious, specifically trained in this enterprise, as are the lawyers advocating on behalf of parties and the law clerks who assist the judges. Although this infrastructure produces enough debatable decisions to support hundreds of scholarly legal periodicals, none of the other alternatives for dispute resolution can come close to courts in terms of legal competence.

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his immediate employer, as a construction worker might be given the heave-ho after bopping the job site foreman. Rather, Sprewell was ejected not only from the team but was effectively removed from the business of professional basketball (at least at any remotely comparable salary level). Under the League's ruling, Sprewell could not go to another team coached by someone other than Carlesimo. The construction worker could both in theory and in practice go to another job site and at least hope for work, even if word of the previous incident had gotten around.

On the Sprewell incident and arbitration, see generally Oscar Dixon, *Sprewell Suit Seeks Lost Wages, Damages*, USA TODAY, May 21, 1998, at 3C; Mike Wise, *N.B.A. Star Who Choked Coach Wins Reinstatement of Contract*, N.Y. TIMES, Mar. 5, 1998, at A1.

143. See *supra* notes 26–27 and accompanying text.

144. See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, §§ 11.1–11.5 at 173–210 (1994) (discussing standards of judicial review of administrative action).

145. See *supra* notes 33–36 and accompanying text.

To some extent, this last observation is something of a tautology: legal institutions do better with law than nonlegal or semi-legal institutions. It is not much of an insight, but it is useful to keep this relatively simple fact in mind in assessing the court competency debate. Because courts would seem to have an undeniable competency edge on legal issues, any persuasive criticism of court competency in complex matters must focus on issues of fact competency, policy competency, efficiency or power (for example, ability to resolve all claims as to all disputants).

The complexity presented by difficulty choosing law can be seen in the post-*Restatement*, post-Currie world<sup>146</sup> as more an exercise in choosing or fashioning policy than as an exercise in discerning applicable law. Unless courts engage in unfettered policy analysis or partisan favoritism, however, the process of selecting applicable law remains primarily a legal exercise. However, selection of the applicable law also utilizes factfinding, fact evaluation, identification of a number of contacts and interests, and a balancing of these factors. This type of balancing, although obviously vested with components of policy selection, has long been part and parcel to the judicial function, particularly for constitutional law and administrative law matters. As a result, courts are nearly as competent in this area of adjudication as they are in "finding the law" or presiding over the fact development and factfinding process.

In addition to relatively pure "legal" indeterminacy, there is also the indeterminacy of law in factual application. Although this problem runs across the spectrum of disputes, it logically becomes more pronounced in complex matters. In such cases, courts appear relatively well-equipped. They have legal expertise and can isolate facts through the pretrial process, motions, and specialized verdict forms. However, alternative disputing mechanisms such as arbitration, mediation, or agency regulation may be better positioned to do this by applying specialized knowledge to make the application of law and legal characterization of fact more sensitive in application. Or, particularly in mediation, the forum may draw from the disputants information that makes the application of law to fact more accurate. This possible advantage of ADR or agencies is speculative, however. Once again, an aspect of complexity seems as well addressed by the courts as by any forum.

One type of complexity—*difficulty choosing, crafting, or administering remedy*<sup>147</sup>—criticizes the courts' powers and resources more than it attacks the courts' legal, factual, or technical expertise. For example, if a government is violating the law, courts are usually quite capable of making this determination. However, a court cannot require Congress, state legislators, or even city councilpersons to appropriate funds necessary to permit the enjoined government defendants to comply with court orders.<sup>148</sup> Even in cases of egregious misconduct by elected officials and their appointees, courts have only indirect remedies such as

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146. See *supra* notes 28–30 and accompanying text.

147. See *supra* notes 38–40 and accompanying text.

148. See *Spallone v. United States*, 493 U.S. 265 (1990) (holding city council members cannot be held in contempt for failure to vote to fund remedial relief ordered by court in Yonkers housing discrimination case).

holding a particular executive official in contempt to coerce compliance.<sup>149</sup> Courts not only lack "power of the purse" but are also constrained in their ability to exercise contempt citations, to exercise authority outside jurisdictional borders, to conduct in depth or farreaching investigations, to bring new entities into a case, to remove entities impeding case resolution, to influence public sentiment, or to harmonize state and local laws and norms. Courts may use indirect means to attempt to obtain compliance with decrees or require certain actions but at some point hit a metaphorical "wall" in their ability to get results.

In these respects, as on so many other dimensions of complexity, the "weakness" of the courts, particularly in farflung, complex public law matters appears comparatively strong when juxtaposed against the capabilities of the alternatives. Mediation, despite its many merits as an ADR device, lacks all that courts lack and more. So, to do arbitration and the ADR hybrids. Administrative agencies and legislatures may have more raw power than courts, but in application this remedial potential is limited not only by the practicalities of agenda control and vote assembly but also by constitutional constraints on the exercise of executive/legislative power. In theory, comprehensive legislative solutions or aggressive agency regulation backed by broad legislative charter "fix" the problem of limited judicial remedial authority. In practice, these non-judicial solutions to complex disputes can be achieved only rarely and at some cost to the nuanced justice thought to be achieved by adjudication.

When faced with *factually technical* issues,<sup>150</sup> courts may be at their competence ebb tide. When complex disputes are ceded to arbitrators, mediators, or agencies, they can be routed to expert decisionmakers. Construction cases can, for example, be arbitrated by a panel of engineers or architects. Patent disputes can be mediated by a scientist. Tariff controversies may be decided by a group that does nothing but assess tariff classification. By comparison, courts can be seen as hapless generalists with no particular expertise and no ready means of acquiring it in order to resolve the dispute.

Although this is probably the best indictment of judicial competence to process complex matters, it is not dispositive. Courts possess the means to acquire even highly technical expertise through the receipt of expert evidence and through the judge's ability to absorb background and additional evidence. Advocates aid this process by framing the factually technical information, bringing important sources of information to the court, and probing and attacking the opposition's sources. To be sure, this is done with an air of partisanship that can obscure and mislead.

Sorting through the wealth of proof produced by the adversarial model of dispute resolution is the essence of adjudication.<sup>151</sup> If courts are thought

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149. See *id.*

150. See *supra* note 45 and accompanying text.

151. See HAZARD ET AL., *supra* note 83, §1.2, at 4-5. In the section on the Adversary System, the authors identify two assumptions of the American litigation system: (1) that truth is more likely to emerge from bilateral investigation and presentation,

insufficiently competent to do this for the complex cases, the adversary system itself is indicted, for "simple" claims as well as for the complex. But the alternative, court (or other government agency) development of the case, calling on court-appointed experts, has long been thought too fraught with problems of motivation or nonneutrality to replace the status quo. Of course, courts are free to bring in court-appointed expertise or appoint special masters to address the problem of suspect information procured by the parties. Unfortunately, the judiciary and litigants have exhibited some hostility to these initiatives, exhibiting a counter-productive reaction to reasonable efforts to deal with complexity. Failure to utilize this option in the past hardly proves court incompetence to evolve along this dimension in the future, however.<sup>152</sup>

Related to technical complexity is the complexity presented by the *nature of the proof*. This complexity, too, raises serious questions about judicial competency. Like the problems presented by technical complexity, these can be mitigated by judicial supervision of the litigants' proofs, court-appointed experts, special masters, or similar initiatives. In addition, courts may here again enjoy relative superiority to other modes of dispute resolution. For example, if the "true facts" of a case are difficult to obtain because of evidentiary spoliation or a conspiracy of silence, the broad discovery available to litigants may be more successful in ferreting out information than the more limited means of fact development in arbitration or mediation. Once again, government agency procedures are a hybrid but generally appear to present fewer opportunities for digging for hard facts. Where the proof has been unearthed but is technical, courts may lose some competency ground to the more specialized forums.

### 3. Complexity from Human Limitation

Related to the nature of proof is the difficulty of processing the information relevant to the dispute, which can be a function of technicality, uncertainty, heuristic biases or some combination of these factors. Certainly, the *difficulty processing material information about the dispute* adds to case complexity.<sup>153</sup> Courts seem as well-situated as any entity for facing this difficulty

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motivated by the strong pull of self-interest, than from judicial investigation motivated only by official duty; and (2) that the moral force and acceptability of a decision will be greatest where it is made by one who does not have, and does not appear to have, the kind of psychological commitment to the result that is implied in initiating and conducting the presentation of a case.

152. See *id.* §1.2 at 5-6 (footnotes omitted):

The principle of party-prosecution has been modified in modern judicial administration by the proposition that the court has an affirmative responsibility to move a case along to settlement or trial. The principle of party-presentation is modified by the strong common law tradition that the judge who conducts the trial should play an active part in directing it so that, within the issues made by the parties, the true facts of claims and defenses will emerge and the appropriate law be applied to them. To this end, the judge could exercise considerable initiative.

153. See *supra* notes 46-47 and accompanying text.

except to the extent that this form of complexity stems from the influx of layperson decisionmaking via the jury. Criticizing courts on this ground to some extent merely reiterates the "judge versus jury" debate. If those skeptical of the jury prevail, by implication, litigation suffers as a means of addressing complex disputes. Even if the deficiencies alleged of the jury are correct, this may not outweigh the countervailing advantages courts have in dealing with complex disputes.

Jury-based indictments of law (for complex cases and other matters) are both more and less powerful than often assumed. The anti-jury arguments are less powerful because they tend to understate or ignore the degree to which judges as human beings have similar foibles. In addition, they may have other foibles not shared by the jury: sensitivity to peer pressure or press criticism; aspirations to higher appointment; vulnerability to personal lobbying or concerted efforts to "play" to the court. However, the anti-jury arguments may implicitly make a more powerful indictment of courts. If judges are similar to juries in deficiency in processing information, then the entire litigation system is indicted, at least in part, by any persuasive jury criticisms.

Because of the "*processing difficulty*" and "*intractable irrationality*" factors,<sup>154</sup> courts are vulnerable because of jury emotionalism, local favoritism, or political and social pressure. This problem, to the extent it exists, would appear to be as significant for simple matters as for the complex. A judge and jury may for example, have no real prejudices about an obscure, technical, protracted patent dispute. If they can understand the case, they can resolve the dispute fairly. But in a simple assault and battery case involving a local football hero and, let's say, Dennis Rodman, both judge and jury may find themselves unable to set aside their irrational preconceptions of who must have been the instigator. Thus, these aspects of the Tidmarsh list of types of complexity<sup>155</sup> may not be a complexity criticism but rather a more general indictment of courts.

In addition, imbedded irrationality seems likely to be shared at least in part by the alternative means of dispute resolution. There is evidence that removing the lay populace decreases irrationality but there is also evidence that expert and experienced decisionmakers acquire preconceptions of their own that may not be entirely rational. On the whole, however, this aspect of judicial performance seems a fair ground for criticism, although not necessarily for complex cases alone.

For cases that are complex because of *lawyer disfunction*,<sup>156</sup> courts again appear to be no worse than their alternatives. It is possible, of course, that lawyers will malfunction less often in ADR or administrative agency settings where less emphasis is placed on legal rules such as those governing civil procedure or discovery. But increasingly, ADR forums and administrative agencies are

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154. See *supra* notes 46-49 and accompanying text.

155. See Tidmarsh, *supra* note 10, at 1766-80.

156. See *supra* note 52 and accompanying text.

developing more involved procedures of their own.<sup>157</sup> Thus, the chance that lawyers will have less that can go wrong in other forums seems remote.

Courts in fact may aid lawyer performance in several important respects. First, legal precedent is better established and more widely reported, enabling counsel to better prepare the presentation of a dispute and to better determine settlement options. Second, case records and information are generally more widely available than in nonjudicial forums. Unless a protective order applies, lawyers can often learn from and emulate the pleading, motion, discovery, and trial practice of lawyers who have preceded them in the prosecution and defense of complex claims. Third, the judge and staff can and do assist counsel, remind counsel, cajole counsel, require resubmission by counsel and so on, all without disturbing the normal adversarial operation of the system. Although this can of course occur in other forums, the professional culture of judging includes a tradition of assisting counsel, particularly less experienced or overmatched counsel.

Complexity stemming from the *stakes of the dispute*, the *odds facing disputants*,<sup>158</sup> and the frequently resulting "no stone unturned" or "scorched earth" disputing policies would seem to infect both adjudication and its alternatives. If the case is important, it is more likely to take on some of the trappings of complacency regardless of the forum. Attorneys who have participated in multi-week, multi-month, multi-party, or multi-million dollar arbitrations can attest to this: moving the high stakes, high risk dispute out of the courts does not necessarily reduce delay or cost very much and may not ease the complexity problem at all.

Courts may have somewhat more difficulty managing this sort of complexity because of the greater range of procedural options available in litigation as compared to other dispute resolution methods. The sheer scope and variety of procedural options for the clever attorney produces opportunities for strategic behavior that may increase the complexity attending the dispute. Conversely, the presence of the judge and his or her intervention can reduce this tendency by reining in or discouraging attorney excess.

Similarly, the greater range of procedural options allows courts to utilize varieties of motion practice to resolve cases in ways that stop short of embracing the full complexity of the matter. For example, a court may enter judgment in a complex matter upon relatively simple grounds such as a statute of limitations defense. Even where the case is too large to eliminate through pretrial procedure, it may be pared down through the granting of partial summary judgment, dismissals of certain claims, or a declaration that certain types of relief are impermissible or automatic. Where a case resists disaggregation to reduce complexity, litigation procedure may be used to aggregate parties or claims and thus facilitate omnibus settlement discussions, a strategy difficult in ADR forums and often impractical in

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157. See Bruce M. Selya, *Arbitration Unbound? The Legacy of McMahon*, 62 BROOK. L. REV. 1433 (1996) (criticizing tendency for arbitration to become more proceduralized similar to adjudication, particularly where arbitration is widespread or supplants litigation to some degree).

158. See *supra* notes 53-54 and accompanying text.

administrative proceedings as well. Although the important case presents complexity difficulties, courts seem as well situated to deal with them as are any of the realistic alternatives.

#### 4. *Complexity from Political Aspects of Adjudication*

Where a case is complex because of its political, distributional, public policy or remedial aspects,<sup>159</sup> courts appear considerably better versed to decide the question than are ADR forums. It is considerably less clear whether courts have comparative advantages over executive agencies and legislatures in these sorts of cases. One's answer to this dilemma most often seems to turn on the baseline ideology of the examiner. My own view (influenced of course by my own political liberalism and post-realism) is that courts are superior to legislatures for these sorts of claims unless the legislature is unusually well-informed and has overwhelming consensus on the issues at hand.

If the legislature is not well-versed in the facts of the issue, the interest group dynamics are likely to produce a "solution" to the dispute or issue driven more by power politics than anything resembling rational thought. Where the legislature is divided, the matter in question may not be apt for a legislative solution, which by definition extends to all of society (at least the society in a given jurisdiction) tempered only by the statutory and regulatory interpretation of the courts. Although this judicial prerogative is considerable, it is not as broad as the judicial power to differentiate among common law cases. In deciding politically or socially charged disputes, courts have the advantage of looking at specific components of the problem, working with a record, acting independently, and applying substantive rationality to the dispute.

Arguably, administrative agencies could combine the best of both the legislative/politically responsive world and the judicial/substantively rational world. But in practice, the reduced independence and neutrality of the agency makes it subject to both executive and legislative interference.<sup>160</sup> Worse yet, the political pressures on the agency will not necessarily reflect society's preferences. Judicial review may serve as a check on agencies, but the review is generally deferential. Although agencies remain an attractive option in specific cases, courts

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159. See *supra* notes 32–41, 56–57 and accompanying text.

160. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that courts have an advantage over agencies largely because of independence but also because of a commitment to rational legal process for dispute resolution and policy formation); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (agencies subject to interest group capture and political pressure).



appear better versed to address the unknown "public law" disputes<sup>161</sup> of the future that have the effect of placing "authority in the dock."<sup>162</sup>

5. *Summary: The Comparative Advantages of Courts for Many Complex Cases*

This perhaps excessive tour of the many and varied aspects of complexity largely suggests that courts are, at least in relative terms, quite competent to handle complex matters. Depending on how one defines complexity, one can make a stronger or weaker case for courts and certainly can craft an indictment of courts. However, a more holistic review of complexity makes it difficult if not impossible to find courts unfit for complex matters. More important, courts appear to be as good or better than their alternatives for addressing complex disputes, by almost any definition of complexity.

When one adds to the mix a broad view of "competence," the case for retaining courts as a default means of processing complex disputes appears to get stronger. In dealing with complex cases, courts have advantages of neutrality; sophistication; greater factfinding ability; a wider variety of factual evaluators; greater investigative and interpretative resources; the informational and disciplining value of precedent; the logistical support of computers, libraries, clerks, and masters; greater opportunity for self-correction; and more rigorous quality control.

Against this array of competency enhancers, the leading alternative dispute resolution modes of arbitration and agency review rely mainly on the asserted advantages of greater decisionmaker expertise regarding the subject matter of the underlying dispute. However, this argument in favor of government agencies or ADR may be merely a brief in support of greater specialization rather than a suggestion of complexity incompetence. While specialization may be useful,<sup>163</sup> its relative absence to date does not suggest courts have done a poor job. For example, despite the availability of specialized expertise through arbitration, there continues to be strong demand for decisions of the Delaware Chancery Court.<sup>164</sup> In addition,

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161. See *supra* notes 35–40, 55–56 and accompanying text, discussing Chayes, *supra* note 37, and political litigation.

162. See Hazard, *supra* note 56, at 471. See also *supra* notes 55–56 and accompanying text.

163. See Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 88–110 (1995) (supporting greater experimentation with specialized tribunals in apt cases); Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 4 (1989) (finding specialized jurisdiction an effective approach in the Federal Circuit for patent and trade disputes).

164. See Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5 (1995) (finding specialization of Delaware Chancery Court in corporate governance matters effective in part because the historical context is less likely to be replicated in other proposed efforts to create business court specialization).

greater specialization may present an opportunity for greater efficiency by creating a judicial economy of scale for the bench.<sup>165</sup>

Self-help or resort to foreign courts are alternatives only touched upon in this paper. In the case of self-help, there is little to say. Where a disputant prefers self-help, this logically takes place because the party has the opportunity to engage in self-assistance and finds this an attractive option on cost-benefit grounds. The complexity of the matter and the competence of the actual or potential tribunal have little or no direct impact except to the extent that lack of confidence in the courts may make self-help slightly more attractive at the margin.

This paper has of necessity said little about the comparative advantages or disadvantages of foreign courts for complex cases primarily because of lack of knowledge as to the intricacies of foreign tribunals. In addition, however, this alternative route is not widely available to most disputants and, where available, is open to the disputant not because of case complexity but because of other aspects of the case. Consequently, a disputant is unlikely to select a foreign court amidst a range of options because of the complexity of the instant dispute.

### *C. The Judicial System Can Respond to its Most Powerful Critics Through Modest Reforms.*

#### *1. A Modest Brief for Increasing Experimentation with Greater Specialization.*

As the preceding discussion suggests, there may well be advantages of expertise and efficiency from specialization by the courts. The challenge is not to overspecialize in a way that undermines the essential character of our largely successful judicial dispute resolution system or to through specialization make service in the courts less attractive to persons of talent and energy. My own view continues to support moderate specialization initiatives, particularly some specialization at the trial level, preserving generalist appellate review.

#### *2. Taking the Fright From Horror Stories of the Jury*

In the main, my prescription as to the judge-jury debate is simply to take with a block of salt the anti-jury arguments, which are often based on the rare or even apocryphal anecdote and what might be termed a "law of small numbers." Although they should not be so heavily discounted as to be ignored, neither have the anti-jury forces made a convincing case for radical change.<sup>166</sup> Simultaneously,

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165. See Stempel, *supra* note 163, at 111-14 (suggesting that trial court specialization would produce greatest economy of scale).

166. See Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998). See also W. Kip Viscusi & Reid Hastie, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998) (taking less supportive view of civil jury).

legal reformers must avoid making jury traditionalism a sacred cow that inhibits streamlined adjudication procedure.

Whatever the episodic or even frequent miscues of jurors, judges have an ample arsenal for correction and pronounced tendencies to correct. Thus, even if the critics are correct about juries, this does not effectively indict the judicial system as a whole, which frequently corrects or reduces juror error and excess. If anything, the current tendency may be so suspicious of the jury as to promote overcontrol and meddling by the courts.

Furthermore, courts to date have not taken sufficient steps to utilize additional techniques for furthering juror understanding. Obvious examples and possibilities for improvement are notetaking, edited videotape presentation of some witnesses, judicial summary of the evidence at various junctures of trial, willingness to entertain and answer seriously juror questions, allowing jurors to visit sites at issue in the suit and, of course, better jury instructions.<sup>167</sup>

An additional avenue of obtaining better juries lies in improving jury composition. According to many observers, a combination of an underinclusive jury pool, escape from jury duty by many managerial and professional prospective jurors, and use of peremptory challenges to remove jurors that might be too thoughtful has led to at least a narrowing and perhaps a dumbing down of the typical jury. Although there are obvious exceptions, the average jury is devoid of professionals, the highly educated, and upper socioeconomic status persons generally.<sup>168</sup> Simultaneously, the average jury also underrepresents ethnic and racial minorities.<sup>169</sup> Although this is regrettable for any trial, it poses potential for disaster for complex litigation.

One obvious solution to explore is the use of "blue ribbon" or expert juries. Notwithstanding the obvious dangers of elitism and class bias, the notion of impaneling a jury with minimum educational or experiential qualifications relevant to the subject matter of a factually or legally complex case is worthy of experimentation. Even though juries perform better than their critics suggest, one cannot help but be concerned when high stakes antitrust, patent, securities, or copyright cases are tried to a jury whose model member is a retiree with a high school education or an unemployed twenty-seven-year-old with eighteen months of college. There exists some historical precedent for expert juries<sup>170</sup> which, combined

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167. See, e.g., Bill Ibelle, *What Happens When Jurors Can Ask Questions*, LAWYERS WEEKLY USA, Mar. 23, 1998, at B1 (reporting on courts permitting juror questions and suggesting this improves quality of information adduced in trial and quality of juror deliberations).

168. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 500-10 (1997); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community"*, 69 S. CAL. L. REV. 155 (1995).

169. See Smith, *supra* note 168, at 500-10; Sobol, *supra* note 168.

170. See Charles W. Fournier, Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980).

with a flexible and functional constitutional interpretation, should avoid a Seventh Amendment bar to their use.<sup>171</sup>

### 3. *Relaxation of the Traditional Choreography of Trial*

Regardless of whether the factfinder is judge or jury, the traditional stylized presentation of evidence at trial bears reexamination. Scholars have criticized the theatrical nature of American trials and suggested the European model as an improvement. Although Europhiles may overlook the value of committed parties ferreting out relevant material and ensuring that adjudication does not become captured by those favored by the government, their criticisms of the stilted choreography of trial are well-taken.

Consider the means by which an intelligent person in a vacuum would look for information and come to a conclusion regarding a legal dispute. Contrast this with what actually happens at trial. Witnesses are not allowed to elaborate freely but must respond to a series of "baby-step" questions designed to spin the facts as favorably as legal ethics will permit, followed by an array of "Isn't it true that..." cross-examination questions designed to extract tricky or awkward-sounding concessions or to highlight unfavorable but marginal information. This little theatre takes place before an audience kept largely in the dark about the proceedings and who may or may not get the point of the exercise.<sup>172</sup>

Although this model may make for interesting prime-time drama and seems to work passably well for the "ordinary" case (perhaps defined as a case like the ones jurors have seen on television lawyer shows), it is a most awkward way to bring forward and weigh information about a complex matter. In complex cases, the evidence, particularly expert evidence, can be reviewed in a less formal, seminar classroom manner so long as the judge adequately controls the proceedings to prevent jurors from being "bamboozled" by the slick expert of thin substance. Information about business, international trade, chemical manufacturing and the like could also be absorbed more readily by lay jurors if the presentation of

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171. See William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580 (1991) (finding changes in jury selection and use not to violate Seventh Amendment); Steven Friedland, *The Competency and Responsibility of Jurors in Deciding Case*, 85 Nw. U. L. Rev. 190, 216-20 (1990) (advocating procedural reforms such as juror questioning and notetaking and finding this consistent with Seventh Amendment).

172. The potential confusion attendant in such awkward proceedings is dramatically illustrated in a story told to me by a then-sitting federal district judge speaking with law students at a trial competition over which she presided years ago. According to the judge, her father was a criminal defense lawyer in an arson prosecution who successfully excluded an official record of modest importance via hearsay objection. The defendant was convicted. In discussing the matter with jurors after the verdict, the defense lawyer was shocked to learn that the jurors had assumed the excluded document was a signed confession and had drawn an adverse inference from the successful objection—exactly the opposite effect than that intended and reasonably expected by counsel. In retrospect, it might well have been better to have provided more explanation to the jury rather than less regarding the meaning of evidence rules and objections.

information was designed to inform rather than to score tactical rhetorical points against the opposition.

#### 4. *The Assessment of Experts*

As noted above, the presentation and evaluation of expert evidence in particular could benefit from a less stylized and more informative presentation. It is difficult to address coherently any subject when forced to deliver the message in bits and pieces with frequent interruptions and hostile questions. Where the subject is one that by definition lies beyond the normal experience of judges and jurors, conveying a coherent examination of the area becomes even more difficult under these conditions.

Imagine the expert testimony as a tutorial for judge and jury. Now imagine a college organic chemistry class that begins with a preliminary argument among the students as to whether Professor Van Buckholtz is qualified to teach the course. After extensive argument and handwringing, Professor Van Buckholtz is allowed to begin—or rather, her research assistant begins by asking Van Buckholtz a series of questions about her background, her preparation for the class, any specific reading for the class, her opinion on the topic du jour, and reasons for the opinion. All during the questioning, the students who thought Van Buckholtz had no business on the podium interrupt to attempt to persuade the undecided members of the class that a particular question or answer is outside the scope of the class, unsupported, or otherwise deficient.

If Van Buckholtz is on a pedagogical roll, her detractors in class will scream that she is not answering the research assistant's questions but has embarked on a narrative answer. The research assistant struggles through, putting as much of Van Buckholtz's erudition before the class as possible in the limited time. In the waning minutes of class, the anti-Van Buckholtz students then begin asking her leading questions designed to attack her qualifications, character, class preparation, or understanding of the material. The questions are structured to cast doubt on the Van Buckholtz presentation but do not attempt to outline the organic chemistry topic of the day in any clearer detail.

Imagine the undecided members taking a final examination on the material on the heels of this hypothetical tutorial. Although this sort of sturm and drang might initially liven up the classroom, my bet is that the charm of the drama will wear off soon and that this organic chemistry class will have more trouble than the average getting admitted to medical school. Yet this tortured approach to learning technical, complex, unfamiliar material is hard-wired into American litigation. The particularly unfulfilling posturing of the opposition is lionized as the greatest engine for the discovery of truth ever known.<sup>173</sup> Although there are of course reasons to place some controls on potential "yarn spinning" by the witness coached by counsel, do the system's fears of the bamboozled judge or jury really require such choppy examination of complex issues addressed by experts?

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173. See WIGMORE, *supra* note 65, at 659.

One potentially promising reform would be to let experts present their seminar on the matter at issue under broad-based questioning by the judge based on a suggested outline and proposed questions of both proffering counsel and opposing counsel. Attorneys would be permitted to intervene if thought necessary (but objections or criticisms of the judge's examination would presumably be made at sidebar out of the jury's hearing). The court would make extensive use of *in limine* motions ruling on evidentiary matter. Proffering counsel would also be permitted limited supplementation of the examination under the active supervision of the judge. Opposing counsel would be permitted limited cross-examination controlled by the judge, who could take an active role in questioning, probing, or commenting upon any expert witness. The judge would encourage opposing counsel to confine the cross-examination to the merits of the expert's qualifications and opinion rather than engaging in a theatrical effort to "trip up" the expert or suggest through innuendo conspiracy between the expert and proffering counsel.

#### *5. Reducing the Outmoded Procedural Bars to Effective Adjudication in Complex Matters*

The complexity induced by multiparty, multiforum, costly, protracted, repetitive, and inconsistent litigation could perhaps be reduced through procedural reforms permitting courts to more easily render comprehensive and effective resolution of certain complex disputes. There exist several options.

##### **a. More Judicial Receptivity to Class Actions Sounding in Tort**

Although the progression of injury and the precise amount of damages may vary significantly among class members, the class action device still holds promise as an efficient means for rendering a considered and consistent decision on issues of fault, causation, and liability. These cases can be tried as partial class actions that decide only the common claims, leaving room for individual damage assessment. To the extent defendants win, however, the large tort consolidation will be efficient.

##### **b. More Aggressive Use of Masters for Damage Hearings in Class Actions in Complex Tort Cases When Liability is Found**

Although the Seventh Amendment provides a limit on this approach by requiring jury trial for those who demand it, the availability of streamlined damage hearings may induce most claimants to forgo the jury calculation of damages, so long as the masters do not render awards considerably below those of the mythical rational jury.

Class action treatment of torts also holds a potential *in terrorem* effect for defendants and may extract extortionate settlements for claims best described as weak, however. The mere act of certifying the class provides significant settlement value to the claim, and by making the case a potentially crippling one that the company cannot afford to lose, the court arguably makes settlement mandatory for defendants irrespective of the merits.

The class device also provides substantial incentives for defendants to attack the *in terrorem* liability by settlements designed to buy off class counsel more than to fairly compromise a contingent liability.

Courts can address some of these problems by rigorously policing settlement, with a particular eye to whether the package is designed to appeal more to attorneys than clients. In addition, courts may hear and decide key pretrial motions, including Rule 12 and summary judgment motions, prior to the certification decision. This will help ensure that the claims are sufficiently meritorious to permit the settlement-promoting impact of aggregation to come into play.

Courts cannot, of course, shoulder this burden alone. Defendants must be willing to litigate aggressively the class complaints viewed as "strike suits" or they should not be heard to complain and demand reform in the halls of Congress. Similarly, defendants must be equally willing to make reasonable settlements in meritorious mass cases. A reasonable "millions for defense but not one cent for tribute" policy based on the defendants' assessment of the merits of the case would do more to eliminate frivolous class complaints than any legislation. Plaintiffs' attorneys do not make a living from frivolous complaints unless defendants allow it.

c. More Willingness to Accord Class Treatment to Cases Touching on Multiple Jurisdictions and Presenting Attendant Choice of Law Problems

An arguably erroneous example is the Seventh Circuit opinion in the *Rhone-Poulenc* case<sup>174</sup> seeking class action treatment for victims of AIDS-contaminated blood used in transfusions. Because of the differing state laws applicable to class members, the appellate court reversed class certification, finding that general legal principles (derisively labeled "esperanto" law) could not be applied and that state law analyses tailored to subclasses would make the proposed class action impracticable. What was really gained by this exercise in formalism? After reading the opinion, one continues to wonder if product liability law is really so disparate from state to state. To be sure, the *Rhone-Poulenc* court had other concerns, such as the potential *in terrorem* impact of a classwide judgment against a defendant that had been winning individual suits to date. Perhaps the invocation of multistate laws should not continue to be this formidable a bar to aggregation of claims.

d. Other Mechanisms

Another potential improvement could result from greater judicial willingness to use sampling of representative cases in mass claims in order to set parameters for settlement.

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174. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

Also welcome would be more judicial effort to ensure that earlier or aggregated cases in mass claims, particularly the mass tort product liability claims, are fully, fairly, and competently litigated early on so that the pioneer plaintiffs are not shortchanged and so that the early cases set fair and useful parameters for attempts to settle the remainder of the claims.

### III. FROM FRANK TO THE FUTURE: THE PERPETUAL ASSAULT ON THE JUDICIAL SYSTEM

Complex matters (however defined) challenge any mode of dispute resolution or regulation. However, a broad-based comparative analysis of the multiple forms of complexity suggests that the courts are at least as well equipped to process and decide complex matters as are other existing institutions or methods.

Among the alternatives to courts, ADR is episodic and less consistent. Administrative regulation and adjudication has some advantage over courts in some instances but also has obvious disadvantages. Legislative compensation schemes or other enforced global settlements are not only difficult to obtain but difficult to craft. Even more than the relatively expert, nonpartisan, and professional executive agencies, legislatures are subject to criticism regarding impartiality, the length of the body's analytical horizon, the incentive structure of the participants, and the overall quality of personnel. When compared to courts, even these alternatives seem less competent for the complex cases, at least if one adopts a broad definition of competence that includes not only substantive knowledge but independence and integrity.

Consequently, it is probably no accident that America has evolved a system where a public judiciary—rather than private entities, the legislature, the executive, or hybrids—addresses disputes absent party agreement to the contrary. Legislatures set broad social policy through statutes, appropriations, investigations, and rhetoric. Legislative policymaking is, of course, subject to substantial executive input through agenda-setting, the veto power, presidential appointments and the bully pulpit of marshalling public opinion. The executive continues to set policy through agency appointments and initiatives with legislative oversight, supervision, amendment, and so on. Although states may deviate from this federal model of lawmaking, the pattern is essentially the same.

The judicial role has historically been to enforce these policies but at the same time to address each case—even the complex ones—on its own merits and equities. Although the norms of judicial restraint counsel courts to take these cues and adjudicate accordingly, the judiciary retains freedom to honorably resist initiatives with which it disagrees through adverse commentary, colloquy seeking assistance or reform, and creative interpretation to provide for the best application of positive law under the circumstances. Legislatures, administrative agencies, and ADR methods simply cannot perform this role. In the war to have complex matters heard and resolved, courts retain a superior vantage point and inventory of means to fulfill this role—both the role of application and enforcement of relatively unproblematic law and the role of loyal opposition working within the rules of the



system to reduce absurd results and to bring greater rationality to the application of positive law.

For disputes with roots in the common law, this "separation of powers/checks and balances" model of policymaking does not literally apply but is an ever-brooding omnipresence. Absent constitutional restrictions, the political branches may intervene to dramatically change the common law. Common law claims are largely judicially-created but comprise a different sort of policy making, more incremental than sweeping or abrupt. Regardless of the origin of law and policy originating in the common law, the same comparative advantages of courts would seem to obtain.

While legislatures and executives may be adept at setting policy, they seem ill-suited to implementing it through adjudication except through the vehicle of the regulatory agencies which, when they make case determinations (rather than engaging in broad regulatory rulemaking), tend to operate in a quasi-judicial or semi-judicial manner. Furthermore, even the most respected agencies are subject to at least modest judicial review. That trait of the modern administrative state, which has been operative since the New Deal, should have tipped us off to something. To resolve disputes, whether simple or complex, it remains hard to beat courts on an *ex ante* basis.

But at this juncture, society has considerable experience with lawmaking, law application, and adjudication. We can, at least for recurring types of disputes, assume a partially *ex post* vantage point for analysis. Although we do not know how the next automobile accident, product liability claim or securities dispute will unfold, we have now seen enough of them to know which types of disputes are likely to be significantly "complex" according to one of the criteria discussed in this article. It therefore is possible to think about establishing modified or new procedures for resolving certain categories of disputes, as well as modifying traditional adjudication along the lines discussed above.

Some reflection (or, more precisely, my reflections) on this matter does not lead to an extreme chauvinism about courts. There are a number of areas in which traditional adjudication can be modified or for which a category of dispute could be removed from the traditional judicial system or addressed in first instance by a nonjudicial tribunal. Compulsory court-annexed arbitration of negligence or "simple" contract actions seeking money damages provide good examples.

However, as one catalogs categories of cases susceptible to this type of reform, one is left with the inevitable conclusion that it is the relatively simple, repetitive, predictable cases that are the leading candidates for removal from traditional adjudication. For the complex matters, courts appear to be more apt—at least *ex ante*—than the alternatives.

In short, courts not only appear to be here to stay,<sup>175</sup> they are a fixture on the legal landscape for good reason. They appear to be the superior default methodology for addressing the complex case and can become more adept with relatively modest reform.

Yet courts have been the perennial whipping boy of the system. At least since Pound's assault of 1908, courts have been a lightning rod for criticism. A roster of luminaries stretching from Pound<sup>176</sup> to Arthur Vanderbilt<sup>177</sup> to Learned Hand<sup>178</sup> to Richard Posner<sup>179</sup> has gotten a good deal of mileage out of court- or law-bashing (even if offered in the spirit of constructive criticism). Is the current debate about courts merely part of this historical trait or has something changed during this era?

Undoubtedly, some of the current attack on courts is merely the baseline level of criticism attending an institution in the center of contested matters. In addition, some of the current angst about courts and complex cases stems from the greater magnitude of complexity and accompanying uncertainty throughout society. As the volume and difficulty of disputes are subject to increases, misgivings about court competence to adequately address them will likewise increase.

Some of the attack, too, is self-interested. Those unhappy with the judicial forum seek a strategic advantage by transferring disputes impacting them to a more hospitable forum. Today's interest group activity directed against the judicial

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175. See Joseph A. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1398 (1992) ("Courts are not obsolete—they serve in areas and ways that no other entity can.").

176. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REPORTS 395 (1906) reprinted in 57 A.B.A. J. 348 (1971) (abridged version).

177. Arthur Vanderbilt, Chief Justice of the New Jersey Supreme Court for many years, is widely viewed as a court reformer who lambasted the judicial system's resistance to change, remarking that "judicial reform is not a sport for the short-winded." ARTHUR VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xix (1949); William H. Rehnquist, *Seen in a Glass Darkly: The Future of Federal Courts*, 1993 WIS. L. REV. 1, 11 (quoting Vanderbilt).

178. Learned Hand once remarked that he "dreaded a lawsuit almost beyond anything else short of sickness or death." Learned Hand, *Address of Learned Hand (United States District Court)*, in ASS'N OF THE BAR OF THE CITY OF NEW YORK, *LECTURES IN LEGAL TOPICS*: 1921-22 89, 105 (1926).

179. See RICHARD A. POSNER, *OVERCOMING LAW* (1995) (attacking newly developing schools of legal scholarship and noting degree to which judges are driven by personal goals as well as legal doctrine); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 124-57, 423-53 (1990) ("Legitimacy in Adjudication" chapter characterizes many judicial opinions as erring due to adherence to brittle formalist analysis; "Neotraditionalism" chapter discusses past views of law as self-contained discipline and criticizes this formalism).

system may be of a higher, more dangerous quantum because of its organization, sophistication, and funding.<sup>180</sup>

These factors may explain the criticism of courts but fail to make the criticisms compelling. Although criticism of courts undoubtedly will continue so long as courts exist, the judicial record on complex matters is largely one worth admiration rather than excoriation. The criticism will continue but so, too, will the courts. Courts will in fact be in greater demand for complex disputes than for the simple or routine.

### CONCLUSION

Despite misgivings about their competence in complex cases, courts today continue to survive their seemingly perennial "trial," just as they have since Judge Frank attacked them fifty years ago.

Rather than engage in excessively negative hand-wringing about courts and complex cases, policymakers and the legal profession would better spend their time working for nonpartisan improvement of the judicial system for cases simple and complex. This may include use of administrative agencies or ADR devices operating within the judicial system. While we reflect on what might be called the "Frank Tradition" of criticizing courts, we would do well to reinvigorate the "Pound-Vanderbilt" tradition. That tradition is one of long-term commitment to improving quality and an attempt to discourage "reform" motivated by short-term partisan gain. Proposed changes satisfying this Pound-Vanderbilt reformist tradition should also presumptively carry a consensus supporting adequate financial and logistical support for the judicial system. For any system of dispute resolution, impoverishment generally reduces competence.

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180. See generally ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993); MARK P. PEFRACCA, THE POLITICS OF INTERESTS: INTEREST GROUPS TRANSFORMED (1992).

