VOLUME 89 FEBRUARY 1976 NUMBER 4

HARVARD LAW REVIEW

PRIVATE ORDERING THROUGH NEGOTIATION: DISPUTE-SETTLEMENT AND RULEMAKING †

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Negotiation is a vital instrument in the private ordering of affairs among disputants and among those who seek to work out rules to guide their future conduct in relation to one another. In this Article, Professor Eisenberg analyzes the way principles, rules, and precedents operate in private negotiation, both in the context of resolving present disputes and in the context of rulemaking to govern future conduct. Professor Eisenberg rejects the widely perceived dichotomy between norm-free negotiation and norm-bound adjudication, and suggests that norms play an integral role in the negotiation process, especially in the resolution of disputes. While granting that rulemaking depends in large part on the relative bargaining strength of the parties, Professor Eisenberg contends that even in rulemaking situations the invocation of norms will have a significant impact on negotiation, especially where the relationship between the parties is characterized by dependence.

A MAJOR contribution of the sociology of law has been to emphasize the general continuities between the legal system and the social system of which it forms a part.[1] Little attention, however, has been given to the continuities between specific legal processes and their unofficial counterparts. Indeed, these categories are often viewed as essentially dichotomous. Yet the two great tasks of the legal system — the settlement of disputes that have arisen out of past actions, and the establishment of rules to govern future conduct — are also performed daily without resort to that system, and it would be surprising if processes as integral to the social fabric as those of the law failed to exhibit significant continuities with private institutions directed toward accomplishing these tasks. The purpose of this Article is to explore the operation of one of these private institutions, negotiation, and to develop the extent to which elements characteristically associated with distinctively legal processes — principles,

 The research for this study was supported by the National Science Foundation.

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[1] *See, e.g.*, Bohannan, *Law and Legal Institutions*, 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 73 (1968).

rules, precedents, and reasoned elaboration — may be expected to determine outcomes reached through that institution.

One hypothesis that underlies this Article, and is of central importance to its analysis and organization, should be stated at the outset: Although negotiation is commonly taken to be a unified process, it consists in fact of two very different strands, found both alone and in combination. One strand is, like adjudication, directed toward settling disputes arising out of past events. I shall refer to this strand as *dispute-negotiation.* The other strand is, like legislation, directed toward establishing rules to govern future conduct, as through contracts, treaties, and protocols. I shall refer to this strand as *rulemaking-negotiation.* Dispute-negotiation will be examined in Part I, rulemaking-negotiation in Part II. It will be shown that just as the processes of adjudication and legislation differ because of their difference in objectives, so the nature of the negotiation process depends on the objective to which it is directed.[2]

I. DISPUTE-NEGOTIATION

Nowhere does the contrast between official processes and their private counterparts appear greater than between adjudication and negotiation. Adjudication is conventionally perceived as a norm-bound process centered on the establishment of facts and the determination and application of principles, rules, and precedents. Negotiation, on the other hand, is conventionally perceived as a relatively norm-free process centered on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff.[3] But as ap-

[2] Most of the existing literature fails to distinguish between these two strands of the negotiation process. Either general propositions about the process are derived from observations that involve only rulemaking-negotiation or only pure barter, or examples of rulemaking and dispute-negotiation are used more or less interchangeably. *See, e.g.,* T. SCHELLING, THE STRATEGY OF CONFLICT 62–63, 67–68 (1960); Kelley, *A Classroom Study of the Dilemmas in Interpersonal Negotiations,* in STRATEGIC INTERACTION AND CONFLICT 49 (K. Archibald ed. 1966); Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution,* 7 J. CONFL. RES. 26 (1963); Bartos, *How Predictable Are Negotiations?,* 11 J. CONFL. RES. 481 (1967); Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model,* 7 LAW & SOC'Y REV. 667, 667–70, 674–78, 681, 684–85 (1973) [hereinafter cited as *Negotiations as a Mode of Dispute Settlement*].

[3] *See, e.g.,* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 21–22 (1974) ("Negotiation is a bargaining process, with give and take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party. . . . It is pure bargaining . . . ."); V. AUBERT, ELEMENTS OF SOCIOLOGY 133, 135–36 (1967); Aubert, *supra* note 2, at 26–34; Eckhoff, *The Mediator, the Judge and the Administrator in Conflict Resolution,* 10 ACTA SOCIOLOGICA 148, 159–60 (1967). *See also* P. GULLIVER, SOCIAL CONTROL IN AN AFRICAN SOCIETY 233–34, 241–42, 253, 297–301 (1963) [hereinafter cited as SOCIAL

plied to dispute-negotiation, at least, this perception of negotiation is by no means self-evident;[4] on the contrary, observation suggests that such negotiation consists largely of the invocation, elaboration, and distinction of principles, rules, and precedents. Part I of this Article proceeds on the theory that the verbal behavior of negotiating disputants can to a considerable extent be taken at face value and that in most cases of dispute-negotiation the outcome is heavily determined by the principles, rules, and precedents that the parties invoke. In the balance of this Article I shall refer to this theory as the norm-centered model of dispute-negotiation (using the term "norm" to mean a standard of conduct with ethical connotations, and the term "model" to mean an abstracted representation of a complex process).

Since the ultimate validity of this model turns on the actors' subjective intent, it cannot be demonstrated directly — any more than the ultimate validity of a theory of adjudication which posits that outcomes are heavily determined by the official norms of the legal system, rather than by the personal and political views of judges. No other theory of dispute-negotiation, however, has been demonstrated to be valid in this sense, and the norm-centered model has two advantages over its few competitors: It treats the verbal content of negotiation as meaningful, and it provides coherent organization to a wide range of empirical observations.

Part I is divided into five sections. Section A is devoted to a general exploration of the universe and operation of norms in dispute-negotiation. Section B continues this discussion in the context of negotiation between disputants who are interdependent or share a cultural ideal of interpersonal harmony. Section C focuses on the role of precedent in dispute-negotiation. Section D compares dispute-negotiation with adjudication. Finally, Section E examines the effects of participation in dispute-negotiation by affiliates of the original actor-disputants.

A. The Universe of Norms

If it is common observation that the negotiation of disputes proceeds by the invocation, elaboration, and distinction of norms, it is also frequently observed that negotiated outcomes typically involve a compromise of principle. The former observation supplies the empirical base of the norm-centered model of dispute-negotiation. The latter, however, may seem inconsistent with

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CONTROL]; Gulliver, *Case Studies of Law in Non-Western Societies,* in LAW IN CULTURE AND SOCIETY 11, 18 (L. Nader ed. 1969).

[4] *See* H. ROSS, SETTLED OUT OF COURT 45–54, 98–101 (1970); Barkun, *Conflict Resolution Through Implicit Mediation,* 8 J. CONFL. RES. 121, 126 (1964); Gulliver, *Negotiations as a Mode of Dispute Settlement, supra* note 2, at 680–83.

that model.[5] The purpose of this Section is to show that the inconsistency is only apparent, and to develop in greater detail the manner in which norms operate in a dispute-negotiation context.

Such a showing can best be made by examining a detailed case history involving the compromise of an established norm. Because of the paucity of case histories of dispute-negotiation in our own culture, I shall draw a case from the book *Social Control in an African Society*,[6] by the anthropologist Philip Gulliver, which deals with dispute-settlement among the Arusha of northern Tanzania. Negotiation holds a central role as a dispute-settlement technique in Arusha society. Arusha social organization is based on age, kinship, and residence. Disputes are usually dealt with by negotiation, conducted under the leadership of notables, in age-group conclaves,[7] kinship moots, or community assemblies.[8] Although the assembly has power to levy fines in certain cases, neither the assembly nor the conclaves and moots are adjudicative bodies,[9] and notables generally do not act as adjudicators or even mediators.[10] With the advent of British colonial rule, adjudication by government magistrates became an alternative method of dispute-settlement, but the magistracy is not regarded as an Arusha institution and is therefore resorted to only sporadically.[11]

The following is one of many Arusha case histories recorded by Gulliver. It is unusually suggestive and is therefore set out in extension, despite its length: [12]

> [*Kadume's Case*] . . . About ten years before [this dispute] arose, Kadume's mother had separated from his father, Makara; and taking Kadume and the other children with her, she went to live on her own brother's farm . . . . Makara remained on his farm alone . . . and he came to depend a good deal on his immediate neighbor and half-brother, Soine, and his wife. On Makara's death his land was occupied by Soine.
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> Later Kadume . . . obtained the two cattle and three goats

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[5] *See* Northrop, *The Mediational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 350–51 (1958).

[6] P. GULLIVER, SOCIAL CONTROL, *supra* note 3.

[7] *Id.* at 25–26.

[8] *Id.* at 53–56, 183–84, 188–89, 193.

[9] *Id.* at 62–64.

[10] *Id.* at 56–57, 106–08.

[11] *Id.* at 273–74. *See also* P. GULLIVER, NEIGHBOURS AND NETWORKS (1971).

[12] P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 255–58.

Kadume's Case involved members of an interdependent group. Cases set in such a context may involve elements not present in a non-dependent context. *See* pp. 646–49 *infra*. However, while those elements may have affected the outcome, the aspects of the case that are of concern at this point are susceptible to independent interpretation.

left by his father. Although these cattle were stalled . . . on the land of Lembutua, his mother's brother, an arrangement was made for them to graze in the daytime in the paddock of Soine. Kadume was accepted as a full member of the inner lineage founded by Mesuji [the father of Makara and Soine].

About a year after the establishment of the grazing arrangement, Kadume claimed possession of all of his father's land which Soine was then cultivating for the fourth or fifth season. Soine refused to give up the land and, after a quarrel, refused to allow Kadume to continue to graze his animals in the paddock.

Kadume went to the lineage counsellor who convened a conclave of the inner lineage. This ended in failure and further quarrelling. Soine held to the arguments that Kadume's mother had deserted Makara and left him wifeless and uncared for, except by Soine himself and his wife; that Kadume had never cultivated his father's land; that Soine himself had only a small farm, but that he had rightful claims in the estate of Mesuji (i.e., the land Makara had inherited from Mesuji); and finally, that Kadume already had a piece of land on his mother's brother's farm where he was living. . . .

Later, at Kadume's insistence, the counsellor convened an internal moot which was held at Soine's homestead. . . . Kadume . . . had persuaded a lineage notable, Kirevi, to speak for him. Kirevi began the moot, and he argued that Kadume, the only adult son of Makara, had the right to inherit his father's land now he was a [mature] man. . . . He pointed out that Kadume had already inherited Makara's animals, and by the same right he should now take the land.

Soine, in reply, relied on the same arguments he had used in the earlier conclave. . . .

[Kirevi then argued that Soine's failure to turn over the land to Kadume would cause dissension within the inner lineage, and Olamal, a relative of Kadume, suggested that if the senior generation (of which Soine was a member) did not help the junior generation now, the juniors when they became mature might refuse to help the seniors.]

The counsellor commended Olamal for his speech, but said that he must look after his fathers in their old age whatever they did now. Then, turning to Soine, the counsellor said that perhaps it would be a good thing to talk of giving Kadume his father's land. . . . [A half-brother of Soine then] . . . agreed aloud that they should consider giving Kadume the land. Silence followed this statement, signifying agreement on the point. In effect Soine had tacitly expressed his willingness to allow Kadume some of the land, for when he spoke he entered immediately into a consideration of what part of the land Kadume might occupy.

Kadume broke into Soine's speech to demand that he be given the whole of his father's land; but Soine replied that Ka-

> dume had land already at his mother's brother's farm, as much almost as Soine's own farm. 'Does Lembutua (the mother's brother) want to drive you away? Are you and he not friends?' Kadume was silent, but, stirred by the insistence of Soine and the counsellor, he admitted that Lembutua did not want to evict him from that land. 'And have you not planted coffee there? Ee, and bananas and trees also?' Kadume agreed that he had. 'Then you have a farm,' announced Soine; 'And you do not need all of Makara's land. Take that portion beyond the bananas — that is yours.' He indicated the area referred to.
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> There was some discussion, and then the members of the moot all walked over onto the land in question nearby. The establishment of the new boundary took some time — about half an hour — and a good deal of bargaining, but it was successfully concluded in the end. . . .
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> The whole moot concluded by retiring to Soine's house to drink beer in commensal cordiality. Agnates took the opportunity to congratulate both Soine and Kadume on the success of the agreement, and on the conclusion of the inheritance settlement.

Was negotiation of this dispute based on principles, rules, and precedents? Gulliver thought not. He believed that Soine retained approximately half the land "despite the enunciated norms of inheritance." [13] This interpretation is certainly not compelled by the conduct of the negotiation, since the parties proceeded in large part through the invocation, elaboration, and distinction of various standards which they treated as norms. Rather, Gulliver's view, made explicit elsewhere in his book, appears to reflect the not-uncommon concept that adjudication is the model of principled dispute-settlement, and that variation from that model in itself implies a drift away from principle toward power.[14]

To explore the limitations of this view it is necessary to compare the universe and operation of norms in dispute-negotiation,

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[13] P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 258. *See id.* at 241–42; *id.* at 253 ("It can be said that in the process of discussions and negotiations towards a mutually acceptable resolution of a dispute, there is most usually a departure from the applicable norms in the end result").

[14] *See id.* at 297–98:

> [One may] conceptualise two polar types of process — judicial and political . . . .
>
> By a judicial process I mean one that involves a judge who is vested with both authority and responsibility to make a judgment, in accordance with established norms . . . .
>
> The purely political process, on the other hand, involves no intervention by a third party, a judge. Here a decision is reached and a settlement made as a result of the relative strengths of the two parties to the dispute as they are shown and tested in social action. The stronger gains the power to impose its own decision, but it is limited by the degree to which its opponent, though weaker, can influence it. In this case the accepted norms of behaviour relevant to the matter in dispute are but one element involved, and possibly an unimportant one.

on the one hand, and adjudication, on the other. At this point, three differences may be identified, having to do with the problems presented by *conflicting*, *colliding*, and *person-oriented* norms.

First, norms may be said to *conflict* when they are mutually inconsistent across the entire spectrum of their applicability. For example, the doctrine of contributory negligence is inconsistent with the doctrine of comparative negligence. Typically, when two norms conflict one becomes dominant, in the sense that it is generally accepted as the "better" or "valid" norm. The other norm, while subordinate, may, however, be given some degree of continued recognition.[15]

Second, norms may be said to *collide* where each has a sphere of action within which it is admittedly valid, but they point in opposing directions in cases in which their respective spheres of applicability intersect.[16] For example, in a number of recent cases involving suits for damages against media of various sorts, the principle of right to privacy has pointed to a verdict for the plaintiff, while the principle of freedom of speech has pointed to a verdict for the defendant.[17]

Third, norms may be said to be *person-* rather than *act-oriented* where their applicability depends on the personal characteristics of the disputants rather than on the nature of their acts.[18] For example, in a society that does not recognize testamentary disposition, the norm "sons inherit" is act-oriented; its applicability does not usually depend on the

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[15] *See* Mitroff, *Norms and Counter-Norms in a Select Group of the Apollo Moon Scientists: A Case Study of the Ambivalence of Scientists*, 39 AM. SOC. REV. 579, 593–94 (1974).

[16] *See generally* Coons, *Approaches to Court Imposed Compromise — The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750, 752, 764–73 (1964).

[17] *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Time, Inc. v. Hill, 385 U.S. 374 (1967); Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded*, 387 U.S. 239 (1967) (for reconsideration in light of *Time, Inc. v. Hill*).

[18] *See* Fuller, *Two Principles of Human Association*, in NOMOS XI (Voluntary Associations) 3, 17–19 (J. Pennock & J. Chapman eds. 1969); Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 34–35 (1969); Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 328–31 (1971); L. Fuller, Interaction Between Law and its Social Context 8–15 (unpublished paper on file with the author).

Act- and person-oriented norms are, of course, polar analytical constructs rather than mutually exclusive categories. Thus in status-oriented societies these categories may intersect or even merge, since different kinds of acts are expected from different kinds of persons. *See* Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201, 1208–09 (1966).

personal characteristics of a particular father and son. In contrast, a norm such as "brothers should help each other" might be described as person-oriented, because, despite its apparent generality, its application depends almost entirely on the personal characteristics of the individual parties — a wealthy brother should not seek economic help from a poor one; an unkind brother may not be entitled to any help at all.

In adjudication (or, at least, that style of adjudication prevalent in complex Western cultures) the universe and operation of norms is highly stylized and tightly controlled. Where norms conflict, a court will characteristically treat one norm as not only subordinate but totally invalid — so that a court which adopts the doctrine of contributory negligence will deny the validity of comparative negligence. Where norms collide, a court will characteristically select one as determinative of the outcome of the case and reject the other as inapplicable — so that in a case to which the norms of privacy and free speech might be applicable, a court will typically hold that the outcome is controlled by one or the other, but not both.[19] Finally, courts tend to treat person-oriented norms as either invalid or irrelevant[20] — so that in the United States the socially recognized principle that brothers owe each other special obligations will typically give rise to neither a cause of action nor a defense.

In contrast, the universe and operation of norms in dispute-negotiation is typically open-ended. Thus it is characteristic of dispute-negotiation that when norms collide account is taken of both, although the eventual settlement may reflect an adjustment for relative applicability and weight. Similarly, the parties in dispute-negotiation may accord partial or even full recognition

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[19] *See* cases cited in note 17 *supra*.

[20] It should be noted, however, that despite this tendency, person-oriented norms can be and often are explicitly administered by courts. Prominent examples in our own culture include norms governing divorce that turn on the application of such standards as "irreconcilable differences," *see, e.g.*, CAL. CIV. CODE § 4506(1) (West 1970), and norms that make child custody turn on the child's best interests or welfare, *see, e.g.*, CAL. CIV. CODE § 4600(a) (West Supp. 1975); CAL. WELF. & INST'NS CODE §§ 600, 726(c) (West 1972); Guardianship of Marino, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. (forthcoming 1976). *See also* Fuller, *Two Principles of Human Association*, *supra* note 18, at 11–13; L. Fuller, Interaction Between Law and its Social Context, *supra* note 18, at 18–19.

Systems employing the inquisitorial method seem to make somewhat greater use of such norms than those employing the adversary method. *See, e.g.*, BÜRGERLICHES GESETZBUCH §§ 519, 530 (W. Ger.) (Civil Code). Furthermore, even where person-oriented norms are not officially relevant, they may be considered in a shadowed or covert way. *See, e.g.*, Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934); L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 405–07 (3d ed. 1972).

to a norm that is generally deemed subordinate or even legally invalid, so that a negligent plaintiff who has no "right" to prevail in a tort action because of the doctrine of contributory negligence may nevertheless make a favorable settlement by reason of the legally invalid but socially real principle of comparative negligence.[21] Finally, parties to dispute-negotiation can and frequently do take person-oriented norms into account as freely as act-oriented norms.

Because adjudication is often regarded as the paradigm of principled decisionmaking,[22] dispute-settlement processes in which the universe and operation of norms differ sharply from adjudication are often perceived as not turning heavily on principle for that reason alone. But whether a process turns heavily on principle depends on the extent to which principles determine the outcome, not on the nature of the principles nor the precise manner in which they determine the outcome. A process that accommodates colliding norms, and freely recognizes subordinate, legally invalid, and person-oriented norms, is not intrinsically less principled than a process that selects between colliding norms, treats subordinate norms as invalid, and focuses on acts rather than personal characteristics.[23]

Viewed in this light, not only the outcome but also most of the conduct of *Kadume's Case* can be explained in terms of the norm-centered model of dispute-negotiation. In drawing the conclusion that, "[t]he result [in *Kadume's Case*] was that, *despite the enunciated norms of inheritance*, Kadume obtained only about half of his father's land," Gulliver focused solely on the act-oriented and dominant norm, "sons inherit." But the verbal behavior of the parties and other relevant Arusha material indicates that two subordinate and person-oriented norms were also applicable to the dispute: (1) A well-off relative should not begrudge means of sustenance to a needy relative (Kadume already had a farm almost as big as the land in dispute, Soine did not); (2) One who voluntarily cares for an aging relative until the latter's death should share in his estate (Soine took care of Makara until his death, Kadume did not).[24] Out of the collision between the act-oriented dominant norm favoring Kadume,

[21] *See* H. Ross, *supra* note 4, at 122–25, 141, 210–12; Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 Mich. L. Rev. 689 (1960).

[22] *See* P. Gulliver, Social Control, *supra* note 3, at 297–98.

[23] *See* Coons, *supra* note 16, at 750–54, 764–79.

[24] I am somewhat diffident in citing the second norm, since Gulliver does not regard it as a generally accepted principle among the Arusha. Letter to the author from P. Gulliver, Oct. 31, 1974. However, the norm was adduced not only by Soine but also by an Arusha magistrate who discussed *Kadume's Case* with Gulliver. *See* p. 656 *infra*.

and the person-oriented subordinate norms favoring Soine, an outcome issued which accommodated all of the relevant norms by tacitly recognizing that *as a matter of principle* Kadume and Soine *each* had a right to the land.[25]

B. The Element of Reconciliation

I turn now to the effect on dispute-negotiation of a drive on the part of the disputants to reconcile differences for the purpose of maintaining interpersonal harmony. This element of reconciliation is most commonly associated with a context of interdependence — where it may grow naturally out of a personal relationship between the disputants, or where it may be imposed upon them by a group of which they are members[26] — but it is also found among non-interdependent disputants who share a cultural ideal of interpersonal harmony.[27] On the surface, this element may seem to lead to outcomes based on compromise without regard to principle, merely for the sake of peace. It will be shown in this Section, however, that the element of reconciliation does not necessarily preclude a powerful role for principles, rules, and precedents, although it may transmute the manner in which they operate. Again, such a showing can best be made by

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[25] For other Arusha cases involving similar considerations, *see* P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 190–91, 243–51.

Considerations having to do with conflicting, colliding, and person-oriented norms are applicable in the analysis of many other legal institutions. For example, one advantage of arbitration over official adjudication is that an arbitrator has power to take person-oriented and subordinate principles into account, and to adjust for colliding principles. The American jury, involving as it does both laymen and secrecy, may be seen as a device for permitting the covert consideration of person-oriented norms in what is otherwise a highly act-oriented process. Instances of justifiable rule-departures by officials, *see* M. KADISH & S. KADISH, DISCRETION TO DISOBEY (1973), frequently involve the substitution of a subordinate (and often person-oriented) rule or principle for the dominant act-oriented rule or principle that has been officially adopted by the legal system. *See* Fuller, *Two Principles of Human Association*, *supra* note 18, at 18; Fuller, *Human Interaction and the Law*, *supra* note 18, at 34–35.

[26] *See generally* P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 184; Cohen, *supra* note 18, at 1220–23.

[27] *See* D. HENDERSON, CONCILIATION AND JAPANESE LAW — TOKUGAWA AND MODERN (1964); Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN — THE LEGAL ORDER IN A CHANGING SOCIETY 41 (A. von Mehren ed. 1963); Lev, *Judicial Institutions and Legal Culture in Indonesia*, in CULTURE AND POLITICS IN INDONESIA 246, 281–90 (C. Holt ed. 1972); Cohen, *supra* note 18, at 1206–22; Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1289–1300 (1967). *But see* Buxbaum, *Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895*, 30 J. ASIAN STUDIES 255 (1971).

examination of a case history. The case I shall use is set in Java, and reported by the political scientist Daniel Lev: [28]

> [*T's Case*] In late 1960 I [Lev] agreed to accompany an American visitor on a trip across Java. In Jogjakarta we registered at the city's largest hotel . . . .
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> After registering, T and I went to our room. T went to the bathroom, where the toilet was an old-fashioned one with a wall tank and cord. When T pulled the cord the cover of the tank and the whole mechanism inside came down (though no water), nearly hit him and crashed onto the toilet bowl, knocking a huge chunk out of it. . . . During the afternoon, while I sat on the veranda writing and T slept, a servant came to the room and handed me a note which informed us that the hotel expected Rp. 5,000 for replacement of the toilet. I was astonished at this and without thinking everything over went directly to the hotel office and asked to see the manager. . . . For half an hour or more he and I argued about the bill. I told him that it was not T's fault the tank's insides had come down and that had T been hit by the falling metal, clearly the hotel would have been responsible for damages. . . . The manager would not accept this reasoning and said that T had not been hit by the metal and, since such a thing had never happened before, T must be responsible for the damage . . . . Finally I told him that we would not pay the bill, that it was best to take the matter to court, and that I would ask Judge S [a friend] . . . to talk the problem over . . . .
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> [In the course of the next several hours the manager and I met at various times to establish our relative power positions by indicating which influential officials we knew, a game often played in this kind of conflict and one that involves a good deal of bluffing. As it happened, a new element was introduced into the affair when a friend from Djakarta stopped at the hotel and mentioned that not long ago another toilet tank had fallen from the wall in the hotel. When the manager was reminded of this, the situation changed somewhat.]
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> I finally called up Judge S, fully intending to take the case to court or at least to scare the manager into withdrawing his claim . . . . Judge S's reactions left me momentarily speechless. He agreed the civil code was on our side. Then he said, "Well, but of course you are willing to pay part of the expenses for replacing the toilet, aren't you? Offer the manager some money in payment of the damages, to show good will, and then come to a settlement somewhere between his demand and your offer." When I recovered my composure I said that T was convinced he was not wrong, and why should he pay anything? Judge S replied, "Yes, of course, but that is beside the point. What is important is that you show good will and settle by

[28] Lev, *supra* note 27, at 285–86.

> *damai* (peace, compromise) if at all possible. Only if the manager demands full Rp. 5,000 and refuses the offer to damai should you take the case to court."
>
> Later . . . accepting Judge S's advice . . . we offered the manager a thousand rupiah. He carried on a bit but finally accepted without demanding more, we had some tea and small talk together, and the issue was never raised again.

In response to an inquiry concerning this case, Professor Lev added that ". . . [I] certainly intended to return to that hotel, as it was the only one convenient enough to stay in [in Jogjakarta] at the time. When I did return later, the manager and I became friends, and the incident was never raised again between us." [29]

Lev's analysis of *T's Case* is that it illustrates how the "penchant for compromise . . . contrasts with a legal culture that tends to be concerned with substance and 'right.' " [30] There are, however, at least two other possible interpretations of *T's Case*, each of which is consistent with the norm-centered model of dispute-negotiation. First, the outcome may have simply reflected an accommodation of conflicting facts and norms. After all, it could not be unequivocally established that *T* was not at fault — perhaps he pulled too hard on the cord. Furthermore, even if *T* was not at fault, he was nevertheless a cause-in-fact of damage to hotel property. Although modern legal systems have adopted the principle that liability for property damage should normally be predicated on fault, the social sphere continues to recognize a subordinate principle that one is responsible for any property damage that one has caused in fact, regardless of fault.[31] Thus the compromise settlement in *T's Case* may have reflected the likelihood that *T* was at fault and the strength, in this context, of the causation-in-fact principle.

Assume, however, that (as was probably the case) the settlement was not based on the accommodation of conflicting norms and facts to which both parties gave some degree of recognition. The case can still be interpreted as one in which the outcome turned heavily on principle. Even if it was clear to Lev that *T* was not liable on the basis of the relevant legal rules — that is, even if Lev gave no recognition to any counter-norm or alternative facts — the manager may nevertheless have *believed in good faith* that *T* was liable. On that assumption, if Lev, as *T*'s stand-in, had refused to pay anything, he and the manager would have

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[29] Letter from Professor Lev to the author, July 31, 1973.

[30] Lev, *supra* note 27, at 285.

[31] *Cf.* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 470-76 (2d ed. 1959) (absolute liability in primitive and early English law).

been left in a state of permanent opposition: The case would have been one in which a claimant had put forth a claim of right, founded, he believed, in justice, and the respondent had answered by denying that the claimant had any right whatsoever on his side — surely a slap in the face that would have made a continued relationship between the parties extremely difficult. On the other hand, if in such a case the respondent makes a payment in satisfaction of the claim, he tacitly admits that the claimant has some degree of right; while the claimant, by accepting, indicates that the books are now closed on the matter. In *T's Case* the hotel manager did not get the full amount he claimed. He was not, however, placed in a position where his claim of right was rejected out of hand. Instead his claim was accepted, but with the modification that a colliding defense was also accepted. The claim and defense were mutually accommodated, and an amicable relationship between the parties could and did continue.[32]

In short, it is oversimplified to regard the element of reconciliation as necessarily standing in opposition to principle, rule, and precedent. Rather, these elements are likely to interact: In cases where the disputants place a premium on the continuance of an ongoing relationship, the element of reconciliation is likely to provide each disputant with an incentive to give some weight to his opponent's good faith claim or defense and the norms and factual propositions that underlie it, even if he regards the norms as invalid and the facts as wrong. Admittedly, a disputant may also surrender in such a case even though he does not regard the claim or defense as either reasonable or asserted in good faith. Perhaps, indeed, that is just what happened in *T's Case*. But in most such cases a perception of reasonableness or good faith will be critical: While interdependence or a shared ideal of interpersonal harmony may induce disputants to place a high premium on peace, the parties are unlikely to achieve peace through a settlement based on a norm or factual proposition that one regards as neither valid nor asserted in good faith.

C. The Role of Precedent in Dispute-Negotiation

1. The invocation of precedent. — The normative model of dispute-negotiation posits that principles, rules, and precedents

[32] *See generally* P. GULLIVER, NEIGHBOURS AND NETWORKS, *supra* note 11, at 151–61; Cohn, *Some Notes on Law and Change in North India*, 8 EC. DEV. & CULT. CHANGE 79, 85–86, 91 (1959) (among the Chamars of North India — and apparently among other indigenous Indian groups — it is crucial that a dispute-settlement be put in the form of compromise, even if only in a rhetorical sense).

will heavily determine negotiated outcomes, even when they conflict with self-interest. Internalization of moral standards and the pressure of peer-group and public opinion contribute to the force of principles and rules in such negotiation.[33] The source of the power of precedent requires exploration, however, because the mere performance of an action does not necessarily give rise to a moral obligation to perform the same action again. In some cases past actions may be transposed into principles or rules, as where the actions were taken by persons who are regarded as models to be emulated, or where widespread repetition gives rise to a perception that a course of conduct has become a rule of conduct.[34] Equally important, where the precedent consists of an interaction between the respondent and a third party who was situated similarly to the claimant, the claimant may appeal, through invocation of the precedent, to an underlying (although often merely implicit) norm that one should deal evenhandedly with similarly situated others — the principle of equal treatment. This principle is potentially applicable whenever two or more persons stand in a similar relation to a third person. For example, if Professor *A* has permitted Student *X*

[33] Special pressures may come into play when a claimant invokes a rule promulgated by an organization, in a dispute with the organization itself. Since such rules often represent directives from higher to lower levels of the organization, *see* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 741 (1973), or a consensus within the organization, *see* Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 927–30, 935 (1972), an official's failure to comply with such rules will ordinarily be treated as a criterion of unsatisfactory performance, and flagrant or persistent disregard may subject him to intra-organizational sanctions such as admonition or discharge. In addition, an organization normally has a stake in achieving its objectives through rules rather than individualized commands. By dramatizing the organization's power over the individual, individualized commands tend to produce resistance in the form of avoidance or subversion, *see* Kelly, *Experimental Studies of Threats in Interpersonal Negotiations*, 9 J. CONFL. RES. 79, 101–02 (1965), and make necessary constant monitoring for obedience, *see* J. THIBAUT & H. KELLY, THE SOCIAL PSYCHOLOGY OF GROUPS 130–31 (1959). In contrast, where a general rule is applicable

> power is transferred, so to speak, from personal agents to the norms. Then, when A tries to induce B to do something, B is expected to perceive the locus of causality for the influence attempt not as internal to a whimsical or self-aggrandizing A but as existing in the depersonalized norm on behalf of which A is acting. We might expect that the . . . [resistance] that B might mobilize against A's suggestion would not exist for an impersonal set of rules.

Id. at 133. *See* Pastore, *The Role of Arbitrariness in the Frustration-Aggression Hypothesis*, 47 J. ABN. & SOC. PSYCH. 728 (1952). If the organization failed to respect its own rules, these objectives would be subverted.

[34] See P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 248 ("We Arusha have always given bridewealth; it is our custom from long ago and has always been so. Did not the big men long ago do this?"); Fuller, *Human Interaction and the Law*, *supra* note 18, at 1–20.

to make up immediately an exam that *X* missed because of illness, it will be very difficult for *A* to require Student *Y*, who missed the same exam for the same reason, to postpone a makeup until the next regularly scheduled examination period. Similarly, a child will claim treatment equal to that given a brother or sister of similar age, and an established tenant will expect to be given treatment comparable to that given similarly situated tenants. Failure to accord equal treatment in such cases is likely to bring on very strong resentment, and few are willing to meet the invocation of precedent with the answer, "Too bad." Instead the party against whom the precedent is invoked is likely either to yield to the claim or to attempt to make a principled distinction of the precedent. Distinctions, in turn, will be met either with reasoned counter-argument or with the invocation of a counter-principle.[35]

Another explanation of the influence of precedent has been put forth by Thomas Schelling in his book *The Strategy of Conflict*.[36] Schelling suggests that two parties who are unable to communicate can concert their actions by choosing a course of conduct that each believes the other will choose because that course is more conspicuous or prominent than any alternative. (For example, a husband and wife who lose each other in a department store might try to reunite by meeting at a location each believes to be prominent in the minds of both.) [37] He then argues that comparable considerations apply even in cases where the parties can communicate, so that "a cynic" might often be able to predict the outcome of negotiation "on the basis of some 'obvious' focus for agreement, some strong suggestion contained in the situation itself, *without much regard to the merits of the case* . . . ." [38] Observing that "[p]recedent seems to exercise an influence that greatly exceeds its logical importance or legal force," [39] Schelling concludes that precedents — and even standards of fairness — derive a large part of their force from the fact that they provide solutions which are prominent.[40]

This view has little operational significance as applied to

[35] When there has been prior interaction between the claimant and the respondent, precedent may derive its force from the claimant's perception of the prior interaction as a tacit agreement that the parties will conduct themselves in a certain way with regard to the subject matter of that interaction. *See* Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797, 836–38 (1973). The later varying action may then be regarded by the claimant as a violation of that agreement.

[36] T. SCHELLING, *supra* note 2.

[37] *Id.* at 54.

[38] *Id.* at 68 (emphasis added).

[39] *Id.* at 67.

[40] *Id.* at 67–68, 72–73.

principles and rules, because few principles are sufficiently specific to provide a prominent solution, and in any event explicit negotiation usually involves a number of principles and rules, no one of which is structurally more prominent than the others. It does seem likely that the force of precedent stems in part from the prominence effect; but by overlooking the powerful normative implications that precedent may acquire, Schelling gives that effect a wholly disproportionate weight. Furthermore, although Schelling treats the prominence effect as if it were an independent variable, in fact its force will depend largely on the opportunity of the parties to communicate and the type of negotiation involved. A prominent solution will exert its strongest pull where both parties will be better off if they concert their actions, and communication between them is blocked. In such a case each party will be motivated to concert, and can do so only by selecting a course of action he believes will be conspicuous to the other. Both parties, if they are economically rational, will therefore embrace that solution willy-nilly. The presence of an opportunity to communicate, however, will in itself diminish the significance of the prominence effect, because if the parties want to agree, they can do so by means other than the selection of a prominent solution.

Furthermore, when the purpose of negotiation is dispute-settlement, the process tends to be a zero-sum game (that is, a contest in which the winner's gains are exactly balanced by the loser's losses).[41] Characteristically, if the respondent negotiates and settles he cannot be better off, and may very well be worse off, than if he does not. Under those circumstances it is highly unlikely that the respondent will make a settlement simply because there happens to be a prominent settlement-point on which his attention can be focused. Of course, a precedent may nonetheless have significant weight in dispute-negotiation because of its normative implications. But where those implications are weak, and the principle of equal treatment is inapplicable, a precedent will usually influence the outcome of dispute-negotiation through the prominence effect only if it happens to fall within the settlement zone established by norms or other strong forces at play in the particular case. An otherwise prominent solution — even the single prominent solution — that is not within that zone will have little or no effect.

[41] *See* J. WILLIAMS, THE COMPLEAT STRATEGYST 15 (rev. ed. 1966); Morganstern, *Game Theory*, 6 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 62, 63 (1968). As in most cases where a process is labeled zero-sum, this characterization pertains only to outcomes, and excludes both transaction costs and indirect benefits derived either from engaging in the process or from conferring a benefit on the other party.

2. The precedential effect of a settlement. — The force of precedent in dispute-negotiation is not confined to the effect of past precedents on present disputes. Rather, its force, as in adjudication,[42] is double-edged: In resolving their dispute the parties are also likely to take into account the precedential effect of the contemplated settlement on future behavior.[43] A characteristic response in dispute-negotiation is, "If I agree to do this for you, I will have to do it for everyone else." Why "have"? Partly because the respondent may no longer be able plausibly to argue infeasibility, but more importantly because "everyone else" will surely invoke the principle of equal treatment.[44] Thus one dimension of this response is to spell out to the claimant the full implications of the parties' negotiation in light of the intense strength of the principle of equal treatment. A second and perhaps more fundamental dimension of this response is that it constitutes a shorthand way of turning an issue of expediency into one of principle. To the implied question, "Can't you do this for me?," this response impliedly answers, "The issue is not whether I can do this for you, but whether I should do this kind of thing for persons situated like you."

D. Dispute-Negotiation and Adjudication

The preceding sections have dealt primarily with continuities between the processes of dispute-negotiation and adjudication. This section will deal primarily with discontinuities between them. An exploration of these discontinuities is of interest both in itself — among other things, it helps explain why a disputant

[42] *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 544–47, 64 N.E. 442, 443–44 (1902).

[43] *See* Heymann, *supra* note 35, at 836–37; *City Bills UC for Fire Aid*, Daily Californian, July 9, 1973, at 1, col. 5. *But see* V. AUBERT, *supra* note 3, at 133 (1967).

An interesting side effect of this phenomenon is the occasional attempt consciously to limit a settlement's precedential weight by labeling it "unique" or "not a precedent" at the very time it is made. *Compare Dollar Declines for a Second Day*, N.Y. Times, Feb. 12, 1972, at 47, col. 1, *with U.S. Removes a Major Monetary Irritant by Helping Britain Repay IMF $1.2 Billion*, Wall St. J., April 28, 1972, at 8, col. 2. *See also* J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT 70 (1961); E. PETERS, STRATEGY AND TACTICS IN LABOR NEGOTIATIONS 180 (1955).

[44] Schelling argues that "the basis for [this] universally exploited" response is that a person who uses it "places [his] bargaining reputation in jeopardy and thereby becomes visibly incapable of serious compromise." T. SCHELLING, *supra* note 2, at 29. But if A is negotiating with X, who is similarly situated to Y and Z, a concession to X will weaken A's position as to Y and Z *whether he has used the response or not*. It is true that if A has used the response (to the knowledge of Y and Z), he will be especially vulnerable — but that is largely because Y and Z will then use A's own prior words to keep him from distinguishing X's case from theirs.

would prefer one process rather than the other — and because it illuminates the elements of each process. I shall focus on the discontinuities which cluster around two deep cleavages: the graduated character of dispute-negotiation as against the binary character of adjudication, and the intimacy of dispute-negotiation as against the role of the stranger in adjudication.

1. The Binary Character of Adjudication. — The classical model of adjudication, at least in complex Western cultures, is characterized by the dominant role of an official, neutral third party who is vested with formal power to impose a settlement after affording the disputants an opportunity to make arguments and present proofs. For convenience, I shall refer to this model as traditional adjudication. It is sometimes suggested, directly or by inference, that this form of adjudication is distinguishable from negotiation (and other forms of dispute-settlement) because it is a zero-sum game.[45] But zero-sum outcomes are characteristic of all dispute-settlement processes, including dispute-negotiation.[46] If *B* damages *A*'s car, and *A* claims the cost of repairs, *A*'s gain in dispute settlement can only come at the expense of *B*'s loss, whether the dispute is settled by traditional adjudication, dispute-negotiation, or other means.[47]

There is, however, a closely related factor, bearing both on outcomes and on the manner in which the outcomes are rationalized, that does tend to distinguish the two processes. Dispute-negotiation has a *graduated* and *accommodative* character: In reaching and rationalizing outcomes, any given norm or any given factual proposition can be taken into account according to the degree of its authoritativeness and applicability (in the case of a norm) or probability (in the case of a factual proposition). In contrast, traditional adjudication tends to have a *binary* character: In reaching, and even more clearly in rationalizing outcomes, any given proposition of fact is normally found to be either true or false, colliding norms are generally treated as if only the more compelling norm were applicable, conflicting norms are generally treated as if only the dominant norm were applicable, and each disputant is generally determined to be either "right" or "wrong."[48] One cause of this binary character is that

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[45] *See* Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY 69, 73–74 (L. Nader ed. 1969); V. AUBERT, *supra* note 3, at 135–36.

[46] *See* p. 652 *supra*.

[47] If transaction costs were taken into account, adjudication would not be a zero-sum game. Assume plaintiff is entitled to $40,000 if he prevails, and each party spends $10,000 in attorneys' fees. If plaintiff wins, he nets $30,000 and defendant loses $50,000. If defendant wins, each loses $10,000.

[48] *See* V. AUBERT, *supra* note 3, at 138; Aubert, *Researches in the Sociology of*

the very purpose of resorting to adjudication may be to achieve a clear-cut determination of which disputant is right. The binary character of traditional adjudication also reflects a second deep cleavage between that process and dispute-negotiation. While dispute-negotiation is usually controlled by the disputants themselves, and is therefore characterized by its *intimacy*,[49] traditional adjudication is characterized by the central role given to a *stranger*.[50] The impact of the stranger's role makes itself felt dramatically across every element of the two processes: selection and application of norms; determination of facts; choice of remedy; and, perhaps most dramatically, the emotional effect of participation.

2. The Impact of the Stranger. — *(a) The selection and application of norms.* — It has been shown that in social relations a broad spectrum of norms can be taken into account in a wide variety of ways, while in traditional adjudication the selection and application of governing norms is highly stylized.[51] The insertion into the dispute of a stranger is a major cause of this stylization. Since the stranger typically draws his authority from the principle of objectivity,[52] in reaching, and particularly in rationalizing, his decision he is likely to stress his compliance with that principle and to downplay the amount of his discretion. One way in which the stranger can achieve that end is by treating norms in a binary fashion, rather than attempting to assign appropriate degrees of weight.[53] Furthermore, a decision that is rationalized on the basis of the norms advanced by one of the two disputants requires a smaller commitment of resources by the stranger than an accommodative solution, and involves less risk that the stranger will

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Law, 7 AM. BEHAV. SCIENTIST, Dec. 1963, at 16, 17; Coons, *supra* note 16; Kawashima, *supra* note 27, at 48.

Various practices may soften the binary edges of adjudicative outcomes. A jury and even a judge may self-consciously reach a compromise decision — for example, by imposing liability in a questionable case, but holding down damages, *see* V. AUBERT, *supra*, at 139, or by splitting multiple issues in different ways. *See, e.g.*, Lewis v. Permut, 66 Misc. 2d 127, 320 N.Y.S.2d 408 (Civ. Ct. 1971).

[49] *Cf.* G. SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 126–28 (K. Wolff ed. 1950) (intimacy of the dyad).

[50] *See* M. GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 101–02 (Blackwell ed. 1965); G. SIMMEL, *supra* note 49, at 216, 402–08; Aubert, *Courts and Conflict Resolution*, 11 J. CONFL. RES. 40, 42 (1967); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 743–44, 755, 757–60 (1973); *Dispensing Justice is a Very Serious Matter to 'Judge of the North,'* Wall St. J., Jan. 14, 1974, at 1, col. 4.

[51] *See* pp. 643–46 *supra*.

[52] *See* G. SIMMEL, *supra* note 49, at 145–53.

[53] *See* Coons, *supra* note 16, at 787–88.

settle the dispute on the basis of norms that neither party deems relevant.

The impact of a stranger is even more pervasive in the area of person-oriented norms. Since such norms tend to be intimate in nature, a stranger typically has little standing to dictate behavior on their basis. Furthermore, a stranger is typically not in position to determine the applicability of such norms, which usually depends upon intimate familiarity with the parties. To determine whether the norm "One who takes care of an aging relative should share in his estate" is applicable, an adjudicator would have to determine not only the texture of the relationship between the decedent and the claimant, but that between the decedent and other potential claimants to his estate — no easy task even for an intimate, but a herculean one for a stranger. For both these reasons, a stranger is usually much readier to invoke act-oriented than person-oriented norms.

All of this is pungently summed up in comments on *Kadume's Case* made to Gulliver by an Arusha magistrate: [54]

> . . . [The magistrate] was certain that, had the case come before him in court, he would have awarded all the disputed land to the son, Kadume. This decision would be based directly on the rule that a son has the right to inherit his deceased father's land in precedence to his father's brother. I pointed out that, in the moot in question, the father's brother, Soine, had been allowed to retain part of the land. The magistrate commented that it had been a good settlement in the circumstances. It had, he said, taken account both of Soine's special relationship with his brother before the latter's death, and of Soine's shortage of land in contrast with Kadume who had a farm on the land of his mother's brother. Additionally, the magistrate noted, the settlement had been such as to permit full lineage

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[54] P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 273. Another example of the way the stranger tends to apply act-oriented norms is given by Gulliver in his description of *Sendu's Case.*

Sendu had been allocated a piece of land by the chief in 1941, and in 1942 he allowed two younger brothers to have the use of part of it. In 1954 one of these brothers died, and the other, Leshiloi, claimed the field the decedent had cultivated. In the quarrel that followed Sendu sought to evict Leshiloi altogether. The case eventually went through a court of first instance and two appellate levels.

> In each of the three successive courts the magistrate . . . declared that it was Sendu's duty to assist his younger brother . . . and to give him the use of some land. The magistrate of the Arusha Appeal Court actually advised Sendu to allow Leshiloi to remain on the land cultivated for twelve years by the two younger brothers; the magistrate of the local court and the District Commissioner in his Court merely counseled the general obligation to be generous and to observe fraternal responsibility. These were all merely *obiter dicta,* and the actual judgments awarded the whole area to Sendu.

Id. at 271. *See* Coons, *supra* note 16, at 782; Fuller, *Two Principles of Human Association, supra* note 18, at 17.

> unity to continue without great strain. 'Those men (i.e., counsellor and notables) were right,' he declared. 'They know the custom of inheritance, but they also know the people of the lineage and their affairs. But I cannot judge like that for I am a magistrate of the court. I must follow the custom. The law is that a son inherits his father's property. If I fail to follow the law, people will say that I am wrong — and the chief and District Commissioner [will say so] too.'

Thus, the stranger-adjudicator is likely to treat as irrelevant some principles the disputants themselves regard as relevant, and consequently to have at his command less than the sum total of principles potentially applicable to a dispute. In a real sense, therefore, traditional adjudication may actually be a less principled process than dispute-negotiation.[55]

(*b*) *Fact-determination.* — Just as the universe and operation of norms is more constricted in adjudication than in dispute-negotiation, so is the universe of techniques for fact-determination. In dispute-negotiation most factual issues can be determined by explicit or tacit agreement, since the participants in the process will have personal knowledge of most of the material facts. Where the disputants do not have personal knowledge, they can often agree on the truth of a proposition on the basis of their mutual acceptance of a relator's credibility. If agreement on a factual proposition cannot be reached, a further cluster of techniques is available. The disputants can assume the truth of the proposition provisionally, and proceed to develop and examine its implications; they can bypass the proposition provisionally, to determine whether a settlement can be reached if its truth is left open; [56] or they can make a settlement whose terms accommodate, in an appropriate way, conflicting versions of the proposition or doubt as to its validity. Finally, if none of these techniques proves effective, the disputants can terminate negotiation entirely.

The insertion of a stranger into a dispute, coupled with the binary character of traditional adjudication, entails radical changes in the modes of fact-determination. Propositions of fact

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[55] It may be more difficult to enforce even act-oriented norms through adjudication than through negotiation, because of problems posed by the requirement that factual propositions be proved to the satisfaction of the stranger. For example, in a dispute involving a claim of employment discrimination, both disputants may know perfectly well that the respondent has wrongfully discriminated against the complainant in subtle but important ways, but it may be virtually impossible to prove discrimination to the satisfaction of the third-party adjudicator if the respondent acted within the form of all relevant rules. *See* J. KUHN, *supra* note 43, at 84–85.

[56] *See, e.g.*, Gulliver, *Negotiations as a Mode of Dispute Settlement, supra* note 2, at 686.

that could be quickly agreed to in dispute-negotiation must be laboriously reconstructed to the stranger's satisfaction.[57] The linear nature of the process may make it difficult or impossible to develop and test hypotheses on a provisional basis or provisionally to bypass contested propositions. The compulsion to reach a decision may preclude the adjudicator from declining to render judgment when he is genuinely undecided.[58] Exclusionary rules, necessitated by the role of the stranger, may prevent consideration of relevant evidence, and thereby the establishment of important facts. The binary character of the process may force the adjudicator to treat as unquestionably true propositions he regards as only probably true. In sum, the modes of fact-determination associated with traditional adjudication may be not only less efficient but actually less reliable than those associated with dispute-negotiation.

(*c*) *Choice of remedy.* — In choice of remedy, too, dispute-negotiation is considerably more flexible than adjudication, and for the same reasons. Just as the stranger is ill-equipped either to select or to apply person-oriented principles, so he is ill-equipped to determine whether a person-oriented remedy — an apology, a handshake, an invitation[59] — would be either appropriate or effective; and just as a stranger typically lacks the moral authority to invoke person-oriented norms even when he believes himself capable of selecting and applying them, so he typically lacks the moral authority to order a person-oriented remedy even when he believes it would be efficacious. Similarly, a stranger-adjudicator cannot easily decree a remedy logically unrelated to the claim before him, such as topping off a tree to improve the claimant's view in lieu of paying damages for defamation.[60]

(*d*) *Emotional effect of participation.* — The elements considered so far concern the manner in which outcomes are reached and rationalized in adjudication and dispute-negotiation. A second set of elements concerns the emotional effect of participation in each of these processes. The major discontinuities in this area relate to the disputant's sense of control, and of being judged.

In dispute-negotiation, the settlement is made by the parties

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[57] *Cf.* Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 11–12 (arbitrator in labor dispute can obtain technical information more quickly by informal proceedings than by formal questioning of experts).

[58] *See, e.g.*, A. EPSTEIN, JURIDICAL TECHNIQUES AND THE JUDICIAL PROCESS 2, 12 (1954).

[59] *See, e.g.*, Kawashima, *supra* note 27, at 45; P. GULLIVER, NEIGHBOURS AND NETWORKS, *supra* note 11, at 53–56.

[60] The adjudicative process may, in fact, develop a momentum of its own, *see* Fuller, *supra* note 57, at 25–26 & n.21, so that the judgment may divert the parties from more personalized remedies.

themselves. Each party therefore controls the process, or at least shares jointly in its control. As a consequence, the disputant must be treated with dignity, at the risk of a breaking-off; may participate freely and directly, unless he voluntarily chooses to negotiate through affiliates; and may have his full say, although some of what he says may seem rambling or irrelevant. Correspondingly, dispute-negotiation does not entail a passing of judgment upon the disputant by a superordinate party. Indeed, it may not involve any definitive judgment at all. Since a negotiated settlement can take account of competing norms, the disputants can recognize the validity of the norms invoked by the claimant and still accord a degree of recognition to those relied on by the respondent to justify his actions. In some cases it may suffice that the respondent admits either that he *might* have been wrong, or that the claimant's belief that he was wrong is held in good faith. Thus, participation in the process need not be overly threatening, and a reasonable degree of harmony between the parties can be maintained both during and after resolution of the dispute, as in *T's Case*.[61]

Where, on the other hand, the dispute is settled by a stranger-adjudicator, each disputant is by posture a supplicant and by role an inferior. He must tacitly admit that he cannot handle his own affairs. He must appear at times and places which may be decidedly and expensively inconvenient. He must bend his thought and expressions, perhaps his very body, in ways that will move the adjudicator. He must show various signs of obeisance — speak only when permitted, be orderly, and act respectfully if not deferentially.[62] He not only has little or no control over the process, but may be sharply limited in both the content and form of his say and the extent of his participation. Indeed, because of the superstructure necessitated by the role of the stranger — particularly limitations on cognizable evidence and norms — the proceeding is likely to be conducted in a manner so technical that each disputant can participate only through an intermediary who himself assumes a large degree of control over the disputant by virtue of his technical mastery. Finally, the settlement is not fashioned by the disputants themselves, but comes down in the form of a judgment by a superordinate, while the binary nature of the process so structures the dispute that the judgment must recognize one party as "right" and brand the other as "wrong."

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[61] *See* pp. 647–48 *supra*. *See also* Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 323 (1967).

[62] *See, e.g.*, Jones v. United States, 151 F.2d 289 (D.C. Cir. 1945); United States v. Bollenbach, 125 F.2d 458 (2d Cir. 1942); Lyons v. Superior Court, 43 Cal. 2d 755, 278 P.2d 681, *cert. denied*, 350 U.S. 876 (1955).

The prospect of subjection to such a judgment, coupled with the lack of control over the process leading up to the judgment, tends both to generate a state of tension and to drive the disputants irreconcilably apart, whatever the outcome.[63]

E. The Role of Affiliates in Dispute-Negotiation

In the dispute-negotiation cases considered in the previous sections, affiliates of the original actor-disputants participated in lieu of or in addition to the actors themselves. For example, both Soine and Kadume were joined in the moot by their allies, who often spoke for them, while *T* appeared only through his representative, Lev. Viewed in institutional terms such affiliates serve two major types of functions. First, they may facilitate the negotiation process, by relieving the respondent of the embarrassment of admitting fault or by representing a disputant who has a distaste or a disability for negotiating personally. Second, they may introduce an adjudicative element into dispute-negotiation. The purpose of this section is to consider the mechanics and some of the implications of these two functions.

1. Accounting and Demanding. — Since dispute-negotiation usually turns in large part on whether the respondent has violated some norm, a settlement often cannot be achieved unless the respondent accounts for his past actions by explicitly or implicitly admitting that a norm-violation has occurred.[64] The difficulties involved in admitting fault might therefore provide a substantial obstacle to settlement in many cases, if the account had to be rendered by the actor himself. One set of institutions

[63] *See* Kawashima, *supra* note 27, at 49. These emotional ramifications tend to reinforce the impact of the stranger in narrowing the universe of available remedies: An apology that would once have sufficed may not bridge a gap made irreconcilable by the very act of resort to adjudication.

In addition to the discontinuities discussed in the text, there are also important economic differences between the two processes. Adjudication normally involves heavier transaction costs, in terms of both time and money, than dispute-negotiation. Moreover, because of the binary nature of traditional adjudication the most unfavorable outcome each disputant may incur is usually worse than the most unfavorable outcome he may incur in negotiation. All other things being equal, application of the minimax principle (that each party to a contest will choose a strategy minimizing the other party's maximum possible gain, and maximizing his own minimum possible gain) will give rise to a preference for a nonbinary process. Despite all this, there are cases where a disputant may prefer adjudication. For example, a claimant may seek an authoritative declaration that he was right, an institutional disputant may be more interested in making law than in recovering damages, and a disputant who represents others may want to shift responsibility for disposition of a dispute to a third party. *See generally* Aubert, *supra* note 50, at 43–46.

[64] *See* E. GOFFMAN, RELATIONS IN PUBLIC 108–18 (1971). *See also* Scott & Lyman, *Accounts*, 33 AM. SOC. REV. 46 (1968).

whose purpose or effect is to overcome this obstacle are those involving the concept of *party*,[65] in which the roles of *actor* and *accountant* are split between different persons, so that the negotiator can concede a norm-violation without admitting *his own* fault. The legal profession is an obvious example of such an institution, but there are many others that function at the pre-legal stage. For example, if an actor-respondent is insured against liability for his alleged wrong, the accounting for his act is given not by the actor himself but by an insurance adjuster.[66] The adjuster is in every sense a respondent — it is his company's money that is at stake, not the actor's — but liability does not turn upon *his* fault. While fully involved in the dispute, therefore, the adjuster is likely to be relatively dispassionate: It is not he who is accused of wrong, and a settlement of the claim involves no admission of fault by him. Similarly, a customer who has a dispute with a department store employee may complain to the store's president or its customer-service department; a consumer who has a dispute with a retailer concerning product quality may call the manufacturer's hot line; a student who has a dispute with a faculty member may go to the Dean.

Mechanisms involving negotiation between groups consisting of an actor-disputant and his affiliates, such as that employed by the Arusha, tend to serve the same purpose: Since most members of the actor-respondent's group will not have participated in the complained-of act, they can make admissions or proposals, more or less on his behalf, that he himself might be embarrassed to make.[67] In all these cases the institutional structure permits the claimant to deal with a person who, while institutionally affiliated with the actor-respondent, can nevertheless account dispassionately for his affiliate's actions, since he is not alleged to be personally at fault.

A counterpart to the respondent's use of an affiliate to render his account is the claimant's use of an affiliate to present his demand. The claimant may employ an affiliate for this purpose because the affiliate is a better negotiator, or because the respond-

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[65] *See generally* A. DOUGLAS, INDUSTRIAL PEACEMAKING 13–22 (1962).

[66] *See generally* H. ROSS, *supra* note 4. The insurance policy may, in fact, effectively prohibit the insured from negotiating on his own behalf. *See, e.g.*, Kinderwater v. Motorists Cas. Ins. Co., 120 N.J.L. 373, 376–77, 199 A. 606, 608 (1938). In some cases, however, the insured may keep a hand in the settlement process just because he perceives that it involves an implicit decision on the rightfulness of his act. *See* H. ROSS, *supra*, at 72.

[67] *See* P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 235–36.

In Arusha dispute-settlement the original respondent often signifies his assent to a proposal simply by failing to object, and is therefore spared even the embarrassment of formal acquiescence. *See id.* at 226.

ent does not want to negotiate and the affiliate has power to constrain negotiation, or simply because the claimant is averse to dealing personally on the subject matter of the claim. Whatever the reason, one effect of demanding through an affiliate is to relieve the respondent of the embarrassment of dealing directly with the very person he has wronged. A second effect — particularly where the respondent also negotiates through an affiliate — is to help set the stage for the assumption by the affiliates of an adjudicative function.

2. The Element of Adjudication. — An adjudicative function of a sort is an implicit element of the norm-centered model of dispute-negotiation even in cases involving only the original actor-disputants, since resolution of a dispute will turn in large part on the judgment each party renders on the norms and facts adduced by the other. However, this element tends to be enhanced and made explicit when an affiliate enters the picture, because the affiliate normally brings to the dispute a degree of objectivity which the actor-disputant cannot attain. For example, in his study of the insurance-settlement process, H. Laurence Ross found adjusters to be concerned not solely with minimizing claims costs, but also with making settlements that are fair [68] — meaning, for this purpose, mutually satisfying to the parties and reflective of "what the claim is worth" in an objective sense.[69] "The minimum settlement value would be the actual expenses; you couldn't ask the man to reduce his special damages." [70] "When it is a clear-cut case of liability and you owe it, then I don't think the person should be satisfied with just the specials, and we should pay more in all fairness to the parties involved." [71] Even when there are strong doubts as to liability, adjusters are reluctant to pay less than the amount of the medical bills.[72] This was not just a matter of what was necessary to settle a claim: Ross concluded that insurers could secure lower settlements on a great many claims if it were not for ethical constraints on adjuster behavior — constraints which are on the whole shared by management.[73]

Similarly, negotiation conducted jointly by an actor and his allies on an institutionalized basis tends to slide imperceptibly into adjudication by the allies. Thus, in Arusha dispute-settle-

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[68] *See* H. Ross, *supra* note 4, at 45–54, 56, 65–66.

[69] *Id.* at 48–49.

[70] *Id.* at 49 (quoting an informant). Ross adds that for this purpose "special damages" are determined net of collateral benefits such as other insurance. *See id.*

[71] *Id.* at 51.

[72] *Id.*

[73] *Id.* at 52.

ment mechanisms affiliates may put considerable pressure upon the disputant to go along with a settlement they judge appropriate.[74]

> . . . dependence [on one's associates] means not only assistance — which is what the Arusha themselves always stress — but the liability of constraint. A man's associates, though certainly supporting him, may come to urge, even insist, on a settlement which he would prefer to reject. Not only can he not afford to do without their support in the particular instance, but he is bound up with them in the permanent relationships involved in the groups and categories to which he and they both belong. . . . It is possible to say that a disputant is judged privately by his associates, who will thus determine their support of him before a wider group. However close they are to him, and however strongly they may support him, they, or some of them, are likely to take a more dispassionate view than he himself does.

How can an affiliate, tied as he is to one party, achieve the objectivity required to fill an adjudicative function? To begin with, since he is not alleged to be personally at fault, the affiliate's emotions are usually not as highly engaged as those of the actor-disputant. If, as is frequently the case, the affiliate is a professional, objectivity may itself be a norm in which he is schooled. The lawyer is perhaps the most prominent affiliate of this type, but other professionals may also play such a role. An example is the architect, who represents the owner during the construction period.[75] According to Johnstone and Hopson: [76]

> As part of their administration of the construction process, architects informally adjudicate many disagreements that develop. . . . The architect listens to both sides, personally examines the site if necessary, and then makes a ruling. Some-

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[74] P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 235–36. *See also id.* at 185–86, 208–13.

[75] *See* Q. JOHNSTONE & D. HOPSON, *supra* note 61, at 317. *See also* J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING & THE CONSTRUCTION PROCESS 524–44 (1970).

[76] Q. JOHNSTONE & D. HOPSON, *supra* note 61, at 316–17.

The architect's adjudicative role finds formal sanction in the standard form contracts of the American Institute of Architects (AIA), which provide that disputes between the owner and the contractor shall be decided by the architect in the first instance. *See, e.g.*, AIA STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR WHERE THE BASIS OF PAYMENT IS A STIPULATED SUM, art. 1 (AIA Doc. No. A101, April 1967 ed.); AIA GENERAL CONDITIONS OF THE CONTRACT OF CONSTRUCTION, art. 2.2.6 (AIA Doc. No. A201, 12th ed. 1970). Although AIA contracts also provide for arbitration, *see id.*, art. 7.10, as a matter of practice the architect's resolution of disputes is usually final. *See* Q. JOHNSTONE & D. HOPSON, *supra*, at 321–22. *See also* Feller, *supra* note 33, at 743 (industrial-relations officer).

> times the owner is unaware of the controversies involving his interests. The architect assumes the dual role of agent for the owner and neutral adjudicator of conflicts involving the owner's interests as against the contractor. The amazing thing is that architects successfully perform these diverse roles without the interested parties objecting to the conflict of interest. This combining of agent and neutral adjudicator tasks, so foreign to the lawyer's way of working, is traditional for architects.

Structural factors may also promote objectivity.[77] Ties to one party may well be balanced by pulls in the other direction. The insurance adjuster may be under pressure to attain a high rate of file-clearance; [78] the Dean may be interested in keeping the peace; the customer-relations service may be under a general directive to go along with the customer in doubtful cases; negotiating allies may be anxious to achieve reconciliation between the actor-disputants. Thus the affiliate may be oriented toward both disputants (although in different degree), so that he is institutionally as well as emotionally free to consider the claim on its merits.

Finally, in many cases objectivity is attained through placement of the adjudicative function not in one affiliate but in two — one representing the claimant, and one the respondent. Such paired affiliates are likely to find themselves allied with each other as well as with the disputants, because of their relative emotional detachment, their interest in resolving the dispute, and, in some cases, their shared professional values.[79] Each affiliate therefore tends to take on a Janus-like role, facing the other as an advocate of his principal, and facing his principal as an advocate of that which is reasonable in the other's position.[80]

This type of role is brought into its sharpest focus when the paired affiliates are lawyers. Because a lawyer is both a personal advisor and a technical expert, each actor-disputant is likely to accept a settlement his lawyer recommends. Because of their training, and the fact that typically they become involved only

[77] It should be stressed that objectivity is neither predicated on nor equivalent to neutrality. For example, the architect, while an independent professional, is employed by the owner, and responses from architects surveyed by Johnstone and Hopson indicate that many give the owner the edge on close questions. *See* Q. JOHNSTONE & D. HOPSON, *supra* note 61, at 323–24.

[78] *See* H. ROSS, *supra* note 4, at 59–61, 127–28.

[79] *See id.* at 86; R. WALTON & R. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 284, 294–95 (1965).

[80] *See, e.g.*, F. IKLÉ, HOW NATIONS NEGOTIATE 143–46 (1964); R. WALTON & R. MCKERSIE, *supra* note 79, at 286–87; R. Engor, H. Ewalt, P. Healy, J. Hutson, S. Kin & G. Young, The Lawyer as a Negotiator — A Survey of the Washtenaw [Michigan] County Bar 21–22, Dec. 1965 (unpublished paper on file in the University of Michigan Law School Library).

when formal litigation is contemplated, lawyers are likely to negotiate on the basis of *legal* principles, rules, and precedents. When these two elements are combined, the result is that paired legal affiliates typically function as a coupled unit which is strikingly similar to a formal adjudicative unit in terms of both input and output.[81] Indeed, in terms of sheer number of dispute-settlements effected, the most significant legal dispute-settlement institution is typically not the bench, but the bar.

II. RULEMAKING-NEGOTIATION

I turn now to rulemaking-negotiation, that is, negotiation to establish rules to govern future conduct. Examples include collective bargaining, international treatymaking, the negotiation of commercial contracts, and negotiation among legislators (or between legislators and interest groups) concerning the form and content of proposed legislation.

As the last example indicates, rulemaking-negotiation is itself a critical element of the legislative process.[82] The discussion in Part II will not therefore be based on a comparison between an official process and its private counterpart, but rather on the elements of rulemaking-negotiation in various contexts. The theory on which Part II proceeds can be quickly sketched. The critical variable in rulemaking-negotiation is the existence or nonexistence of dependence between the negotiating parties. Under conditions of nondependence (as in the negotiation of commercial contracts by previously unrelated parties) basic terms are shaped almost entirely by bargaining power and appeals to self-interest, while subsidiary terms are shaped to a large extent by

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[81] *See* Patterson & Cheatham, *The Lawyer and the Private Legal Process*, 24 VAND. L. REV. 295, 298, 308 (1971). Of course, the coupled unit of lawyers differs from formal adjudicative units in important respects. The lawyers are not only able but likely to take all colliding principles into account; they may take account of subordinate principles; their factfinding procedures have the simplicity and open texture of all negotiation; they may be more flexible in their choice of remedies; and within the leeways left by principles, rules, and precedents, their decisions may turn partly on such factors as prominence, personal force, and risk preference. On another level, since each disputant stands in at least a rudimentary interpersonal relationship to a component of the coupled unit of lawyers, the parties are likely to perceive adjudication-by-lawyers as more human and less threatening than formal adjudication. *See generally* Aubert, *supra* note 50, at 48–49.

[82] *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS 41–45 (tent. ed. 1958); W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 216 (1971); Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 1 (1973); Note, *Legislative Bargains and the Doctrine of Repeal by Implication*, 46 U. COLO. L. REV. 289 (1974).

reasoned elaboration and the invocation of precedent. Under conditions of dependence (as in collective bargaining) most terms are shaped by both bargaining power and norms.

A. Rulemaking-Negotiation Between Nondependent Actors

The prototype of rulemaking-negotiation between nondependent actors is negotiation between a previously unrelated buyer and seller, on a competitive market, for the provision of goods, space, or services. At least in the early stages of such negotiation both actors have a live option to abandon their dealings and turn to a third party to make alternative arrangements. The availability of this option largely determines the elements of the negotiation, since there is little reason in such cases to either invoke or respond to norms.

Normally, actors in this position will begin their negotiation by addressing terms covering matters they regard as critical ("basic terms"),[83] and only after those are settled will they move on to terms covering matters they regard as of secondary importance ("subsidiary terms"). It hardly pays to spend time on subsidiary matters unless and until the actors are sure they can agree on basics. Furthermore, if the actors agree on basics they can frequently assign the job of hammering out subsidiary terms to specialized affiliates.[84] Finally, subsidiary terms will often fall naturally into place once the actors have agreed on basics.[85] The difference in negotiating basic and subsidiary terms is not, however, merely a matter of chronology. There are also critical differences in the manner in which the negotiation of each kind of term is likely to proceed.

1. Basic terms. — Most issues involved in rulemaking-negotiation can result in any one of a variety of dispositions. Where

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[83] *See, e.g.*, F. IKLÉ, *supra* note 80, at 215; Herzel, *Analysis of the Negotiation of an Acquisition Agreement*, 27 BUS. LAW. 1223 (1972).

In common parlance, an agreement on basic terms is often referred to as an agreement in principle. *See, e.g., GAC Agrees to Sell Insurance Group to Ahmanson & Co.*, Wall St. J., July 26, 1973, at 3, col. 2; *Apeco Corp. Sets Agreement to Buy Van Dyke Research*, Wall St. J., Mar. 29, 1973, at 10, col. 1.

[84] *See, e.g.*, I. ZARTMAN, THE POLITICS OF TRADE NEGOTIATIONS BETWEEN AFRICA AND THE EUROPEAN ECONOMIC COMMUNITY — THE WEAK CONFRONT THE STRONG 15 (1971).

[85] Gulliver has suggested that negotiating parties normally begin by settling the smaller and less crucial issues, until only "the final core differences" are left for resolution. Gulliver, *Negotiations as a Mode of Dispute Settlement*, *supra* note 2, at 685–88. However, this conclusion seems to be based principally on cases involving either disputes or rulemaking-negotiation between interdependent parties who are more or less constrained to reach an agreement. Such parties can safely begin with minor terms, knowing that settlement of such terms will eventually be effective even if they temporarily bog down on major terms.

the interests of the actors are opposed in significant part — as is typically the case in a context of nondependence — the set of possible dispositions of each issue can be conceived of as a continuum, the end points of which represent each actor's most and least preferred outcomes. Essentially, the negotiation of any given basic term in such a context consists of an effort by each actor to influence the other to agree to a settlement-point as close as possible to his own most preferred disposition.[86] While the major determinant of the actual settlement-point is likely to be the pre-existing bargaining power of each actor, affective and reasoned persuasion also play important roles.[87] Unlike dispute-negotiation, however, reasoned persuasion in rulemaking-nego-

[86] *See* C. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION 19–21 (1963); Iklé & Leites, *Political Negotiation as a Process of Modifying Utilities*, 6 J. CONFL. RES. 19 (1962).

[87] A striking example of the significance of persuasion as an independent factor in rulemaking-negotiation is given by the sports entrepreneur Bill Veeck in his autobiographical THE HUSTLER'S HANDBOOK (1965). Veeck describes how early in his career he approached Branch Rickey, already recognized as a genius at trading, with a proposition for purchasing two ballplayers — a pitcher named Vandenberg and an outfielder named Norman.

> I phoned Rickey, made an appointment, and went over to his hotel. And I tell you, as I walked into that lobby all my brashness oozed out of me. Visions of the . . . countless . . . Rickey triumphs came floating through my head. For the first time, it occurred to me that if I let myself get trapped in a room with Rickey, there was a strong possibility that he would still have Vandenberg and Norman, as well as my promissory note, and I would end up with two guys I had never heard of. . . .
>
> I picked up the house phone and called his room. "Come on up," he said expansively.
>
> "No, Mr. Rickey," I said, completely deflated. "I'm going to send you up a note."
>
> There was a message pad right alongside the phone. I wrote: *I will pay $5000 for pitcher Vandenberg and $3500 for outfielder Norman, a total of $8500 to be settled at a mutually agreed-upon date.*
>
> I called over a bellboy, a fresh-faced young kid, handed him the note and told him to take it up to Mr. Rickey's suite. . . .
>
> A few minutes later the bellboy came back down and handed back the note. "Mr. Rickey," he said, "says for you to come on up."
>
> . . . "Look," I said. "Take this back and tell Mr. Rickey I'd just as soon do this my way."
>
> Down he came again. "Mr. Rickey still wants you to come up. He says I'm to tell you that he isn't used to dealing through messengers."
>
> Well now, I could detect a slight note of resentment in his voice. The boy had obviously begun to enjoy his role as negotiator and was, I thought, justifiably disturbed at being downgraded. "I want you to do me a favor," I told him. "You take this note up one last time and tell him I'm going to leave if he sends it back again. Tell him I'm scared of him because I know if I go up there I'll end up buying two catchers I don't need for twice as much money as I've got to spend. . . ."

Id. at 133–34. Since a trip to Rickey's room would not in itself alter the relative bargaining power of the parties based on pre-existing economic factors, and since Rickey could transmit his own bargaining power through the bellboy as well as in person, it seems that what Veeck feared was that *purely through the use of argument* Rickey could persuade him to do something that was really against his own interests. This he sought to avoid by constricting communications to a channel wide enough for haggling, but too narrow for persuasion.

tiation between nondependent actors is characteristically *not* based on a norm-grounded claim of right.[88] For example, if *T* wishes to lease commercial space in *L*'s newly constructed building, he is unlikely to claim that he has a right to lease the space, and still less likely to claim a right to a particular rental, a particular duration, or a particular type of lease. Rather than arguing on the basis of principles, rules, and precedents, each actor tries to persuade the other that (i) his own minimum disposition is at or close to the point professed, and (ii) the other's interests would be served by a disposition at that point.[89]

Furthermore, much that is said in a persuasive mode in rule-making-negotiation is not intended solely to persuade. Normally each actor is willing to modify his position and each knows of the other's willingness. Therefore, such negotiation often proceeds by a series of reciprocal concessions. The timing and size of these concessions may be critical, since concessions that come too fast or are too large may unduly raise the other actor's expectations and actually make agreement more difficult.[90] Caught between the need to show that the minimum acceptable settlement-point is less than that professed, and the danger of moving toward that point too quickly, each actor may use the rhetoric of persuasion not only to persuade, but also as a technique for putting out nonbinding clues indicating the settlement-point he actually deems acceptable.[91]

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[88] Principles and precedents may, however, determine the framework within which the parties operate, if only because they shape the parties' perceptions of what is possible. *See* note 101 *infra*.

[89] *See* F. IKLÉ, *supra* note 80, at 199–204; C. STEVENS, *supra* note 86, at 57–58, 67–69; R. WALTON & R. MCKERSIE, *supra* note 79, at 46–75; Iklé & Leites, *supra* note 86, at 22–24.

[90] *See* C. STEVENS, *supra* note 86, at 98–100; R. WALTON & R. MCKERSIE, *supra* note 79, at 87–93. *See also* Komorita & Brenner, *Bargaining and Concession Making under Bilateral Monopoly*, 9 J. PERS. & SOC. PSYCH. 15 (1968).

[91] *See* E. PETERS, *supra* note 43, at 148–62. A union negotiator gave Peters the following illustration of this process:

> "So I make a long speech, giving all the reasons, for the hundredth time, why the union is justified in asking for fifteen cents. . . . Then I wind up by saying, 'We are not bluffing, Mr. Employer. Unless we get a fair and reasonable settlement, your plant will be shut down tomorrow.'
>
> "Now, notice the smoke signal I sent up. I didn't say: 'Unless we get fifteen cents an hour the plant goes down tomorrow.' I said: 'Unless we get a fair and reasonable settlement.' A very important difference. I'm feeling you out, trying to talk to you in sign language.
>
> "Okay, you're an old hand in this game; you been through the mill. You can read smoke signals. So first you double-check, to make sure you're reading me right. You say, 'That's all well and good for you to talk like that, but the trouble is we can't agree on what's fair and reasonable; you insist that fifteen cents is fair and reasonable.'
>
> "Then you wait for my reaction. If I open my big mouth and say, 'Why, fifteen cents, of course, that's fair and reasonable,' then to hell with me, I'm not talking sign language. I'm just giving you a run-around. But if I keep quiet, and wait very politely, as if I expect you to continue and

2. Subsidiary terms. — Once basic terms have been agreed to, the impetus of rulemaking-negotiation shifts from determining whether a deal can be made to wrapping up a deal that has been made. In agreeing on basic terms the actors will have explicitly or implicitly committed themselves to make a good faith effort to agree on subsidiary matters.[92] This commitment normally requires acceptance by the negotiators of the implications of previously determined basic terms, and fair dealing in those areas where subsidiary terms cannot be established by implication. Two of the major techniques employed to effectuate these requirements are reasoned elaboration and the invocation of precedent.

(*a*) *Reasoned elaboration.* — Reasoned elaboration is that "area of rational discourse . . . where men seek to trace out and articulate the implications of shared purposes . . . [that] serve as 'premises' or starting points."[93] It is a technique that is characteristic of, although not exclusive to, the legal method. In adjudication and dispute-negotiation, reasoned elaboration tends to take as its starting point norms of general applicability derived from sources outside the immediate dispute. In the establishment of subsidiary terms through rulemaking-negotiation, on the other hand, reasoned elaboration tends to take as its starting point the specific basic terms agreed to by the actors themselves.[94] In effect, previously established basic terms serve as situational principles from which the negotiators derive situational rights.

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don't want to interrupt — then, you can consider that you have double-checked the situation. I *am* using sign language, and I am saying plainly that I'm ready to drop below fifteen cents. We're on the same wave length.

"You're thinking now, he's ready to drop down from fifteen cents, but how far? You start feeling me out. You go on talking, 'As I was saying, the trouble here is we can't agree on what is a fair and reasonable settlement. What would you consider fair and reasonable? You won't agree on three cents. Is it four cents?' You pause briefly. 'Is it five?' You pause for a longer period of time. 'Is it six?' You pause significantly for a still longer period. 'Is it seven?' The pause is shorter. Now you proceed rapidly: 'Eight? . . . Nine? . . . Ten? . . . Eleven? . . . Twelve? . . . Thirteen? Fourteen? . . . Fourteen and a half?' From seven cents up, you raced through those figures in such a hurry there is no room for me to have illusions that you are giving them any consideration at all. . . ."

Id. at 38–39.

[92] *See generally* Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673 (1969).

[93] L. Fuller, The Forms and Limits of Adjudication 26 (1959) (unpublished paper in Harvard Law School Library).

The intellectual activity that takes place in [reasoned elaboration] . . . resembles logical deduction, but it also differs in important respects . . . . In logical deduction, the greater the clarity of the premise, the more secure will be the deduction. In the process [of reasoned elaboration] . . . the discussion often proceeds most helpfully when the purposes, which serve as "premises" or starting points, are stated generally and are held in intellectual contact with other related or competing purposes.

Id.

[94] *See* F. IKLÉ, *supra* note 80, at 215–16.

For example, suppose that L begins negotiations with T concerning the rental to T of commercial space for a retail store under a percentage lease — that is, a lease in which the rent will consist of a stated percentage of T's gross receipts, perhaps together with a guaranteed flat minimum.[95] L and T agree on the percentage, the guaranteed minimum, and the duration of the lease, and turn the matter over to their lawyers, L^1 and T^1, to wrap up the details. L^1 may begin by arguing that L is *entitled* to a provision giving him the right to inspect T's books and records, on the ground that the arrangement is based on income-sharing, and L can hardly be required to take T's reports as to his gross income on faith.[96] On the other hand, T^1 may argue that T is *entitled* to a provision excluding receipts attributable to sales taxes from gross receipts, on the ground that in substance such amounts are a tax on the consumer which T collects for the government, not part of T's income-and-expense streams.[97] Frequently, a claim of right based on implication from basic terms may be met by a similarly based response. For example, L^1 may argue that L is entitled to a provision prohibiting assignment or sublease without L's consent, on the ground that T's character and ability are an essential part of what L is contracting for.[98] If T is a corporation, L^1 may further argue, on the same ground, that L is entitled to some form of protection, such as a right to terminate the lease, if there is a change in the control of T. T^1 may respond that since the purpose of such provisions would be to protect L's interest in his tenant's gross receipts, a substituted tenant or a reconstituted T should have the right to continue under the lease if L is guaranteed that the rent will continue to meet or exceed the average rent paid during a specified period before the change.[99] Similarly, L^1 may argue that L is entitled to a radius clause, under which T agrees not to operate another

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[95] *See generally* Landis, *The Drafting of Percentage Leases*, 11 U. TORONTO L.J. 43 (1955); Note, *The Percentage Lease — Its Functions and Drafting Problems*, 61 HARV. L. REV. 317 (1948).

[96] *See* Landis, *supra* note 95, at 57–59.

[97] *See id.* at 52–53. As to the need for such a provision, see Schoen-McAllister Co. v. Oak Park Nat'l Bank, 349 Ill. App. 500, 111 N.E.2d 378 (1953) (retailers' occupation tax); Levy v. Forma, 65 N.Y.S.2d 505 (Spec. Term 1946), *aff'd mem.*, 271 App. Div. 970, 69 N.Y.S.2d 324 (1947), *aff'd mem.*, 297 N.Y. 848, 78 N.E.2d 865 (1948) (excise tax).

[98] *See* Landis, *supra* note 95, at 62–64; Note, *Resolving Disputes Under Percentage Leases*, 51 MINN. L. REV. 1139, 1147–48, 1152 (1967). As to the need for such a provision, see MacFadden-Deauville Hotel, Inc. v. Murrell, 182 F.2d 537 (5th Cir. 1950) (assignment allowed under lease that did not expressly prohibit either assignment or sublease).

[99] *See* Landis, *supra* note 95, at 62–63. For an illustrative case, see Food Fair Stores, Inc. v. Blumberg, 234 Md. 521, 200 A.2d 166 (1964).

store within a defined geographical area, on the ground that such a provision is necessary to prevent T from diluting gross receipts by diverting sales to nearby locations.[100] T^1 may respond that such a clause should not cover any stores T already owns within the radius, since it could not have been in the parties' contemplation that T would have to sell such stores or pay L a percentage of their gross income. In all of these cases, the technique of reasoned elaboration used by the affiliates to establish subsidiary terms is closely comparable to the techniques of implication and construction used by the courts to settle disputes where the parties have left a gap in their agreement. The affiliates, like the judge, typically do not ask what the parties "really" meant, but what treatment is appropriate given the purposes that are objectively revealed.

(*b*) *Precedent.* — Two factors limit the operation of reasoned elaboration as a technique to establish subsidiary terms. First, many matters of secondary importance cannot easily be derived by reasoned elaboration from basic terms. Second, once basic terms have been established, the actors are not only obliged to deal fairly with each other in negotiating subsidiary terms, but want to set those terms as quickly as possible. Reasoning out each subsidiary term by implication would normally be consistent with fairness, but unduly time-consuming. The use of precedent to establish such terms, however, will normally satisfy the demands of both fairness and expedition. That the contours of a term have already been shaped by past actors makes for speed; that a term has been repeatedly used by similarly situated actors provides strong evidence that it is reasonably fair. The use of precedent, in the form of standard patterns that have been developed by similarly situated actors, is, therefore, a conventional element in the negotiation of subsidiary terms, and a party who proposes to depart from such a pattern normally must demonstrate the legitimacy of such a departure.[101] As a final point,

[100] *See Drafting Shopping Center Leases*, 2 REAL PROP. PROB. & TRUST J. 222, 235–36 (1967). As to the need for such a provision, see William Berland Realty Co. v. Hahne & Co., 26 N.J. Super. 477, 98 A.2d 124, 129–32 (Ch. 1953), *aff'd in part and rev'd in part*, 29 N.J. Super. 316, 102 A.2d 686 (App. Div. 1954) (lessee allowed to transfer some operations to store across the street in the absence of a prohibitory provision).

For comparable issues in the negotiation of a business-acquisition agreement, see Herzel, *supra* note 83.

[101] Precedent may also exert a channeling influence on the negotiation of basic terms. *See* P. GULLIVER, SOCIAL CONTROL, *supra* note 3, at 235. For example, two parties considering a lease are likely to begin negotiations within a zone whose boundaries have been determined by such precedents as prevalent types of leasing arrangements, prevalent forms of lease, and prevalent rentals. *See, e.g.*, Kaufman,

it should be noted that in rulemaking as in dispute-negotiation,[102] the force of precedent is double-edged: The parties will not only employ precedents to shape their agreement, but will be aware of the precedential effect of any agreement they reach, and this awareness is itself likely to condition the terms of their agreement.[103]

B. Rulemaking-Negotiation in the Context of Dependence

The preceding section dealt with cases in which both actors had a live option, at least in the early stages of negotiation, of turning to a third party to satisfy their objectives. The present section will deal with cases in which one or both actors lack such an option, because the relationship is characterized by dependence. The dependence may be mutual and evenly balanced, mutual but uneven, or unilateral. As the differential in dependence increases, so does the bargaining power of the less dependent party, since it is easier for him than for the more dependent party to satisfy elsewhere those needs that otherwise fall within the ambit of the relationship. This increase in bargaining power (together with other characteristics of such relationships) may affect both the less dependent party's willingness to negotiate at all, and the elements of negotiation when it does occur.

1. Willingness to negotiate. — In a dispute context, a respondent may need some incentive to engage in dispute-negotiation, because the outcome of such negotiation is unlikely to make him better off and may very well leave him worse off. In a dependency relationship characterized by unequal strength, the stronger or less dependent party — *L* — may prefer to avoid engaging in rulemaking-negotiation with the weaker or more dependent party — *M* — for comparable reasons. Those readjustments in the relationship that *L* desires will often be achievable by sheer power; those readjustments desired by *M* will frequently benefit the latter only at *L*'s expense. More fundamentally, the very nature of a dependency relationship may dispose *L* against negotiation. In some cases (*e.g.*, parent-child, guard-prisoner), *L* may perceive the relationship as one in which *M* has only such rights as *L* chooses to confer, and may therefore resist negotiation because it turns in significant part on a claim-of-right approach. Alternatively, *L* may admit that *M* is vested with independently created rights (*e.g.*, doctor-nurse, master-servant), but may perceive the relationship as superordinate-subor-

The Maryland Ground Rent — Mysterious But Beneficial, 5 MD. L. REV. 1, 1–16 (1940).

[102] *See* p. 653 *supra*.

[103] *See* A. SOLMSSEN, THE COMFORT LETTER 161–62 (1975).

dinate in nature, and may therefore resist negotiation because it tacitly assumes equality between the parties.

L may also resist negotiation in such cases because of the adversarial nature of the negotiation process. Relationships characterized by dependence tend to be intimate in nature, and are frequently premised on mutual trust and confidence. The adversarial element in negotiation may threaten the continued vitality of such relationships by undermining this underlying premise. All of these problems may be exacerbated if *M* seeks to negotiate through an affiliate.[104] Unlike his principal, *M*'s affiliate will not carry into negotiation the psychological apparatus of subordination, need not be overwhelmingly concerned about arousing *L*'s personal hostility through aggressive tactics,[105] and will normally view the situation in an emotionally detached way. The interposition of an affiliate by *M* tends therefore further to undermine both superordination and intimacy.[106]

L's entry into negotiation may also give rise to certain expectations as to *M*'s right to participate in decisionmaking that *L* may wish to avoid. For example, in 1971 the interns' and residents' association at the Highland General Hospital of Alameda County, California, staged a "heal-in" [107] to promote demands for higher pay for themselves and improved medical facilities for patients. The director of the County Health Care Services Agency, Dr. James Malcolm, was willing to negotiate on pay,[108] but stated that while he would "discuss," he would not "negotiate" the association's demands for improved medical services. "There are some things that are management prerogatives. The ultimate decision on the quantity and quality of services rests with the

[104] *Cf.* Leifermann, *A Sort of Mutiny—The Constellation Incident*, N.Y. Times, Feb. 18, 1973, § 6 (Magazine), at 17, 30 (refusal by aircraft carrier captain to negotiate with representatives of protesting black sailors).

[105] *See* G. SIMMEL, *supra* note 49, at 164.

[106] Undoubtedly this element accounts in part for the emotional response of paternalistic employers to the prospect of unionization. This has been most notable lately in the area of professional sports, where owners have displayed enormous resistance not only to unions but to the concept of negotiating with agents of athletes rather than with the athletes directly.

A related problem may occur in a highly status-oriented culture if persons of different status are represented by persons of equal status. *See generally* Cohn, *supra* note 32, at 90–91.

[107] The heal-in consisted of an attempt to jam the hospital's facilities by admitting patients who would normally have either been turned away or treated as out-patients.

[108] Letter to the author from Dr. James C. Malcolm, Aug. 20, 1973; Letter to the author from Dr. Lawrence Hoban, Hospital Administrator, Highland General Hospital, Feb. 20, 1974 .

[county] board of supervisors . . . and I'm their agent." [109] Apparently Dr. Malcolm had no objection to either negotiation or representation as such. Why then did he resist entry into "negotiation," as opposed to "discussion," on patient services? The reasons are not hard to guess. Entry into negotiation implies, as entry into discussion does not, that both parties will engage in an effort to reach agreement; that both have a rightful interest in the matter at hand; and that agreement is a rightful way of deciding the matter.[110] Furthermore, entry into negotiation implies a rightful interest in the *type* of matter involved, and may therefore imply the additional rights of notice and a chance to present one's position before future changes are instituted in like matters. Finally, entry into negotiation suggests that each party will attempt to convince the other through reasoned persuasion, and therefore that each will have to *justify* his position as a condition to maintaining it.[111] Thus negotiation on patient services would have been inconsistent with the position that decisionmaking in that area was within Dr. Malcolm's sole discretion, and that while he might, if he chose, give the interns and

[109] *Interns, Residents Turn to 'Unions' to Improve Wages, Patient Care*, Wall St. J., March 6, 1972, at 1, col. 6, and 19, col. 3.

[110] An exception is negotiation with a criminal, such as a kidnapper, an art thief, or an airplane hijacker. Here the duress and overtly wrongful character of the demand involved in the situation nullify the usual inference that entry into negotiation implies a recognition of a rightful interest on the part of both parties. Sometimes, of course, negotiation is refused even under such circumstances as a matter of principle. *See, e.g., Argentine Band Says It Will Kill Fiat Aide if Demands Aren't Met*, N.Y. Times, Mar. 25, 1972, at 2, col. 3.

[111] Thus a parent may refuse to comply with a child's request to be told "why" he must do something. "You will do it because I say so." The parent knows that once reasons are given a certain loss of control will follow.

L may engage in interchange with a view to obtaining *implicit* agreement, even where he will not negotiate by engaging in interchange that is *explicitly* designed to reach agreement. Thus many prison administrators would refuse to negotiate about institutional rules with inmates, on the ground that inmates have no right to participate in such decisions. Nevertheless, the entire working of a prison frequently depends upon a complex of tacit bargains between senior inmates and guards, of which the administration can hardly be unaware. *See* Rutherford, *Formal Bargaining in the Prison: In Search of a New Organizational Model*, 2 YALE REV. OF LAW & SOC. ACTION 5, 9–10 (1971). By keeping the interchange as well as the goal of agreement tacit, the stronger party leaves open the position that he had tolerated, but not *recognized*, the weaker party's participation in decisionmaking, and that any accommodation of the latter's views rested on grace or expediency rather than principle. For this reason, the resulting bargain does not easily lend itself to formulation as a general maxim, and tends to have little precedential weight. For this reason too, tacit bargaining may be utilized where the parties wish to sanction an action which appears to conflict with a principle one or both regard as important, and there is no way to articulate a general exception to the principle that both parties can accept.

residents a chance to present their views, he was obliged neither to listen to nor reason with them.[112]

Given the disadvantages of negotiation from *L*'s perspective, why should he ever negotiate? In dispute cases there are a number of social mechanisms to compel a stronger party to enter into negotiation, such as the threat of formal adjudication and the pressure of peer-groups. In rulemaking-negotiation, however, such mechanisms may be unavailable: adjudication, because it is oriented toward settling disputes, while *M*'s demand is professedly to establish a new rule; appeal to a peer-group, because the relevant peer-group may share *L*'s perception of the relationship as one in which negotiation is inappropriate. In some cases the legal system may provide a mechanism to compel negotiation — for example, the National Labor Relations Act explicitly requires labor and management to negotiate with each other in good faith [113] — and in others, *M* may be able to compel *L* to negotiate by the exertion of private (and perhaps extra-legal) pressure or by the mobilization of public or peer-group opinion, as through a boycott or sit-in.[114] More commonly, however, *L* consents to negotiate either because he believes himself morally obliged to do so, or, more pragmatically, because he believes that establishing rules by the sheer use of power may entail undue costs.[115] Although *M* is weaker than *L*, if the relationship is one of mutual dependence *M* may be able to impose costs on *L* sufficient to set constraints on the latter's behavior. Indeed, establishment of rules through power may induce resistance on *M*'s part even where resistance may not be economically rational.[116] Thus a party who believes he is being treated unfairly by his bargaining partner will sometimes reduce his own payoff in order to re-

[112] Thus a less dependent party may refuse to negotiate with a more dependent party for the very purpose of asserting his authority to settle a matter unilaterally.

[113] National Labor Relations Act §§ 8(a)(5), 8(b)(3), 8(d), 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1970).

[114] *See, e.g.*, R. WALTON & R. MCKERSIE, *supra* note 79, at 392–98, 402–03, 405–06 (use of direct-action tactics in civil rights movement). If *M* is a member of a class with a relatively long time-span for achieving its ends, he may seek those ends indirectly by operating on intellectual opinion. So, for example, prison administrators are now more likely than they once were to be amenable to negotiation with prisoners, partly as a result of changes in the perception of prisoners' rights. *See generally* Rutherford, *supra* note 111; Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726 (1972).

[115] *See, e.g.*, Baldwin, *The Costs of Power*, 15 J. CONFL. RES. 145 (1971); Harsanyi, *Measurement of Social Power, Opportunity Costs, and the Theory of Two-Person Bargaining Games*, 7 BEHAV. SCI. 67 (1962). *See also* J. CROSS, THE ECONOMICS OF BARGAINING 120–50 (1969).

[116] *See generally* Kelley, *Experimental Studies of Threats in Interpersonal Negotiations*, 9 J. CONFL. RES. 79, 101–04 (1965).

duce that of his partner.[117] Furthermore, where *L* establishes rules by power, *M* may attempt to to avoid performing at all (so that a system to monitor performance must be established), or may perform in a literally compliant but substantively grudging and unsatisfactory way.[118] *L*'s own self-interest may therefore lead him to prefer to establish rules through procedures, such as negotiation, that *M* regards as legitimate.[119]

2. Elements of negotiation. — Rulemaking-negotiation between actors involved in a heavily and mutually interdependent long-term relationship — for example, union-management, partnership, marriage, or wartime alliance [120] — normally centers on proposals for readjustments in the terms of the relationship. While often founded largely on bargaining power, such negotiation is also likely to involve a strong claim-of-right element. This normative or claim-of-right element may be involved because the proposal for readjustment arises out of a past dispute that remains unsettled or was settled in a manner that one party regards as unsatisfactory.[121] More fundamentally, since the actors are locked into a relationship with one another, and typically cannot deal with third parties to satisfy those needs that fall within the ambit of the relationship, each may believe himself *entitled* to those changes in the terms of the relationship that are required to keep it fair in light of changing circumstances.[122] Finally, since each actor can punish as well as reward, and since the prosperity of each depends on the other's continued viability, getting one's way through the use of bargaining power, unalloyed

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[117] *See, e.g.*, L. FOURAKER & S. SIEGAL, BARGAINING BEHAVIOR 36, 65–66 (1963); White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*, 19 J. LEGAL ED. 337, 349–50 (1967).

[118] *See, e.g.*, R. WALTON & R. MCKERSIE, *supra* note 79, at 366 ("'[Our division of the UAW] had the best contract in the industry, but we had difficulty realizing these gains during contract administration.'").

[119] *See* Heymann, *supra* note 35, at 869–70.

Professor Heymann adds that "a process which accords equal importance to each individual may be valued . . . because of the social relationships it expresses, engenders, or maintains. . . ." Furthermore, since the power balance may shift in a continuing relationship, the presently more powerful party may wish to hedge against a possibly less powerful future by acquiescing to the use of a process not based entirely on power.

[120] *See* STRATEGIC INTERACTION AND CONFLICT, *supra* note 2, at 200–01 (remarks of E. Goffman); Fuller, *Mediation — Its Forms and Functions*, *supra* note 18, at 310.

[121] *See, e.g.*, W. SIMKIN, *supra* note 82, at 192–93.

[122] In some cases, such as wages, change over time actually becomes the norm, so that a party who resists an accustomed change may be perceived as himself the proponent of change.

by persuasion based on either norms or appeals to the other actor's self-interest, may be highly inadvisable.[123]

While the claim-of-right element is likely to be strongest in those relations that are defined in terms of joint interest, trust, and confidence (such as partnerships), it is also present in heavily interdependent relationships that are defined in adversarial terms. For example, in negotiating a new collective bargaining agreement, union negotiators will support a wage demand not simply by stressing that failure to satisfy the demand will precipitate a strike, but also by arguing that the proposed new wage is fair, based on principles (real wages should not go down; gains from increased productivity should be shared between capital and labor in an equitable manner) and precedents (comparable wages in the company's other plants, in the industry, in the area). Management, on its part, will respond in like terms.[124]

The question arises whether such argumentation is real or specious. The answer is, it is both.[125] Because such negotiation has a significant dispute element, the actors genuinely believe that norms are relevant. Because it has a significant rulemaking element, the actors also genuinely believe that it is proper to bring bargaining power to bear.[126] This may also be a case in which prominence has an important bearing on explicit negotiation. Tacit coordination, upon which Schelling's analysis of prominence is based, will succeed only if all the parties are motivated to concert on the same solution, and the clearest case in which the parties are so motivated is that in which they will undeniably be better off if they agree than if they do not.[127] These conditions are often not met in dispute-negotiation (since the respondent frequently knows in advance that he can only lose or draw) or in rulemaking-negotiation between nondependent parties (since each actor can normally achieve an equally satisfactory outcome by negotiating with a third party). They are met, however, in situations involving heavy long-term interdependence, since a payoff is characteristically available to the parties only within the context of their relationship, and is attainable within the relationship only if both parties agree. A prominent solution that lies within the zone established by the parties'

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[123] *See* pp. 675–76 *infra.*

[124] *See, e.g.*, A. DOUGLAS, *supra* note 65, at 50–55, 203–48; C. STEVENS, *supra* note 86, at 69–70. As a result of the combination of a claim-of-right element and an adversarial structure, proposals to change the rules governing an interdependent relationship are often couched as demands, and the negotiation process has a higher emotional charge than rulemaking-negotiation between nondependent parties.

[125] *See* E. PETERS, *supra* note 91, at 41–43.

[126] *See, e.g.*, A. DOUGLAS, *supra* note 65, at 111–12.

[127] *See* pp. 651–52 *supra.*

bargaining power and the competing norms may therefore be seized upon by each party, if only because its adoption does not involve a tacit admission that the other has greater bargaining power or more compelling principles on its side.

In contrast, prominence is not likely to play a significant role when the differential in dependence between *L* and *M* is very great, since a payoff is usually available to *L* outside the relationship. Normative elements, however, are likely to be significant, assuming negotiation occurs at all. In those cases in which *L* has agreed to negotiate because he feels himself morally obliged to do so, or because he believes his outcome will be enhanced if rules are established through procedures *M* deems fair, it follows that once in negotiation he will be responsive to the norms that *M* invokes. *L* is also likely to be responsive to norms invoked by *M* as a result of an underlying principle that dependence itself creates a right to fair treatment. So, for example, if *T* wants to lease commercial space for a retail store in *L*'s newly constructed building, he is unlikely to claim he has a right to such a lease. If, however, such a lease has been made, and *T* has developed goodwill dependent on his location, he may very well believe that he has a right to a renewal if he has carried out his obligations in a satisfactory manner and if he is willing to pay a reasonable rent; and *L* may agree. The operation of this norm is illustrated in a study by I. Zartman of trade negotiations between the (then) six member-nations of the EEC and an eighteen-nation block of African states: [128]

> . . . [T]he Africans were left with few arguments to enhance their cause. Their possibilities of threat were limited, since there were no alternatives with which to threaten the Six: the Eighteen had nowhere (or no better place) to go than into renewed Association [with the Six] . . . . Appeals to the Europeans' interest were little used, since the Six were already taking care of their own interests . . . .
>
> . . . The Eighteen could warn . . . . [They] warned of instability if their peoples' rising expectations were not satisfied. They warned of economic stagnation if their desires for development were not encouraged.
>
> The Eighteen could also attempt to build obligations. They repeatedly cited the European commitment to continue the Association . . . . They invoked French responsibility for having started the price-support system in the first place. They recalled the *richesse oblige* inherent in being a developed state.
>
> . . . [A]nalysis indicates that weak states in fact tried to pin moral obligations on the strong (not having any other kind), and the strong repeated the same reasoning when acting.

[128] I. ZARTMAN, *supra* note 84, at 64–65, 225. *See also id.* at 227–28.

3. Dependence between nondependent actors. — In considering rulemaking-negotiation between nondependent actors no explicit account was taken of dependence; and, of course, at first glance it would seem to be a contradiction in terms to say that dependency plays a role in such cases. However, actors who are not dependent when they first make contact may become dependent through the very process of negotiation, because as negotiation proceeds each actor normally develops an investment in its success, and becomes dependent upon the other's cooperation to reap a return on that investment.

One source of this investment has to do with information. To enable negotiation to proceed each actor normally must reveal matters he would otherwise keep confidential.[129]

> . . . [S]uppose that in negotiations looking toward a reduction in armaments between two hostile countries, *Country A*, to the surprise of *Country B*, seems quite ready to agree to a broad limitation on the production and use of *Weapon X*. *Country B* at once begins to ask itself such questions as, "Why is that? Are they aware of some limitation on the effectiveness of *Weapon X* we don't know about? Or do they want to give up producing *Weapon X*, which they fear, and divert our resources to *Weapon Y*, against which they perhaps have developed an adequate defense?"

Thus if the negotiation is not successfully consummated, one actor may have surrendered valuable information to the other for no return. A second source of the investment has to do with time.[130] Not only does the time each actor sinks into the process have a substantial value, but the passage of time may render unavailable alternative opportunities that an actor has forgone in the hope or expectation that the negotiation would issue in agreement.

Since each actor's investment in rulemaking-negotiation can bear fruit only if agreement is reached, and since agreement re-

[129] Fuller, *Human Interaction and The Law*, *supra* note 18, at 28–29. *See also* F. IKLÉ, *supra* note 80, at 48; R. WALTON & R. MCKERSIE, *supra* note 79, at 141–42.

Similarly, plaintiffs' negligence lawyers regard it as bad faith for an insurance adjuster to enter negotiation despite the fact that he is unable to make a binding agreement. "This is one of the first questions that I ask an adjuster: 'Are you authorized to negotiate a settlement in this case today, or are you here to pick my mind and determine what is in the file?' If that is the case, then we are talking about pre-trial discovery, which I do not feel is fair." H. ROSS, *supra* note 4, at 84–85. Conversely, an adjuster stated, "If you want to get the last dime [from the insurance company] . . . you begin by not cooperating . . . so they have no information to use against you." *Id.* at 146.

[130] *See* J. CROSS, *supra* note 115, at 12–14; Meltsner & Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259, 260, 262 (1973).

quires the cooperation of the other actor, the very entry into such negotiation frequently gives rise to an obligation to negotiate in good faith — an obligation whose intensity increases with the growth of each actor's investment. This obligation accounts in significant part for the role of norms in the establishment of subsidiary terms after basic terms have been agreed upon.[131] Long-continued negotiation may also give rise to an obligation to negotiate in good faith even on basic terms themselves. Thus negotiation, once begun, has a tendency to generate its own momentum, so that to the outside observer negotiators may often seem to seek agreement for its own sake.[132]

III. Conclusion

A model of dispute-negotiation in which outcomes depend heavily on the determination of facts and the application of norms accounts for the verbal behavior of disputants, and for such phenomena as the precedential effect of negotiated settlements and the roles played by affiliates. Of course, this model does not account for all dispute-negotiation behavior. In some cases, a settlement will be made to achieve peace. However, such cases tend to be limited by the tendency to resist a claim or defense not based on norms, and by an awareness that the precedential effect of a settlement will shape future rights and liabilities. In some cases, one or both parties will respond to bargaining power alone. However, such cases tend to be limited in a context of nondependence by various second-level institutions (such as official adjudication) whose purpose or effect is to constrain dispute-negotiation along normative lines, and in a context of interdependence by peer-group and internal pressure to resolve outstanding disputes in a mutually satisfactory manner. Finally, in cases in which norms and factual propositions are uncertain and conflicting, there will be a range of acceptable outcomes, and elements other than norms and facts — in particular, prominence, personal force, and risk-preference — will determine the precise point within that range at which the settlement falls. However, fine-tuning through the application of non-normative elements is consistent with the norm-centered model, as long as these elements do not begin to operate until norms and facts have been focused near their limits of precision. Indeed, a comparable process occurs in traditional adjudication, although somewhat different fine-tuning elements — the passion of the jury, the eloquence and personal

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[131] *See* pp. 669–71 *supra*.

[132] *See* F. Iklé, *supra* note 80, at 143–45.

force of counsel, and the eyes and heart of the judge — are involved.

Different models are appropriate for rulemaking-negotiation. When such negotiation occurs in a nondependent context, it tends to center on bargaining power, and not on norms — although as negotiation proceeds, an obligation to deal fairly arises, and the elements of reasoned elaboration and precedent begin to play significant roles. When rulemaking-negotiation occurs in a context of interdependence, both norms and bargaining power tend to play important roles, since an actor who is locked into a relationship is likely to believe himself entitled to those changes in the terms of the relationship that are required to keep it fair in light of changing circumstances. In practice, the last model may account for a significant number of cases of negotiation between interdependent parties, since in such a context it is often difficult to say whether the claimant is attempting to settle a past dispute or to change the rules governing the relationship — particularly since a settlement may itself take the form of rules rather than a transfer of money or property. Correspondingly, many cases that can be identified as dispute-negotiation may have a strong rulemaking component, where the parties are engaged in a continuing relationship or where the settlement will become known to third parties situated similarly to the claimant. In these cases, however, the rulemaking component is more likely to augment the force of norms than to diminish them, because it tends to limit the pressure to settle purely for the sake of achieving peace, and to place the issues in a more universal perspective.