REVIEW ESSAYS

Reflections on the Enigma of Indeterminacy in Child-Advocacy Cases

IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND
PUBLIC POLICY; Robert Mnookin, Editor.† New York: W. H.
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If the alternatives are side by side, choose the one on the left; if they're consecutive in time, choose the earlier. If neither of these applies, choose the alternative whose name begins with the earlier letter of the alphabet. These are the principles of Sinistrality, Antecedence, and Alphabetical Priority—there are others, and they're arbitrary, but useful.

—John Barth¹

In the Interest of Children, a collection of five original studies of test-case litigation on behalf of children, may leave the reader wondering whether judges have available any more satisfying techniques than these to decide child-advocacy cases. To assuage the reader's doubts, this Review first describes the basic structure and substance of Mnookin's collection. It then analyzes the salient characteristics of indeterminacy in these cases and their effects on the judicial decisionmaking process. It concludes by suggesting that judicial avoidance of indeterminacy is sometimes useful insofar as it permits courts to function as symbolic political actors that minimize conflict and diffuse societal tension.

I THE PERPLEXING REALITIES: AN OVERVIEW OF THE CASE STUDIES

The case studies in *In the Interest of Children* are designed to assess whether test-case litigation is a sensible way to promote children's wel-

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1. J. BARTH, *THE END OF THE ROAD* 79-80 (rev. ed. 1967).

fare. Mnookin describes the book as "a deeply collaborative effort," but says that "[e]ach [study] is an independent contribution" (pp. x-xi). In fact, the subject matter of the studies is extremely broad-ranging, and the method of selecting the cases is never made clear.² The juxtaposition of largely unrelated inquiries makes it impossible to describe the volume as an integrated whole. The case studies must stand as the book's major contribution to the legal literature, however, and this Review will therefore describe each one briefly.

A. Smith v. OFFER

In the chapters on *Smith v. OFFER*,³ David L. Chambers and Michael S. Wald examine a case dealing with the procedural protections available to foster parents before children in their long-term care can be removed to another foster home or returned to their natural parents. The authors describe how the personal charisma and persistence of one foster parent, Mrs. Smith, persuaded the Children's Rights Project of the New York Civil Liberties Union (NYCLU) to take on the case. Subsequently, they note, the NYCLU attorney transformed a case originally perceived as better suited for Legal Services into one that raised broad challenges to the constitutionality of the foster-care system's procedures and hinted at the fundamental right of foster parents to establish a home and bring up children (pp. 79-82).⁴

Attorneys with extremely diverse perceptions of the public interest in foster-care cases represented the foster parents, the biological parents, and the foster children. These attorneys all had prior experience in child-advocacy litigation (pp. 76, 80-84, 87-95). Although the young government attorneys who represented the state and city had no previous direct experience with foster-care issues and handled many other unrelated cases during the *OFFER* litigation, they too made a distinctive contribution to the case (p. 85). To buttress their competing claims, each side introduced the testimony of highly respected experts. Not surpris-

2. In addition to the failure to explain the method of selecting the cases, Mnookin never describes the methods that were employed in conducting the case studies. Methodology may be critical in assessing the limits of the studies' findings. For example, if the contributors conducted the interviews themselves, there may have been observer effects; that is, their measurement and evaluation may have been affected by their hypotheses about the cases. Moreover, the responses of those interviewed may have been affected by their awareness that their answers were to be published or by cues about expected responses from the interviewer. Finally, the special problems of children may have been confounded with the effects of other variables, such as race and poverty. As Mnookin points out, four of the five cases are race or poverty cases as well as children's cases, and the fifth involved the handicapped (pp. 513-14).

3. 431 U.S. 816 (1977).

4. In the process of transforming the case, additional plaintiffs were added to the lawsuit (pp. 81, 83-84).

ingly, the attorneys and their experts expressed highly divergent opinions about the issues presented (pp. 84-95, 101-04).

The lengthy and complex litigation in *OFFER* made the particular judicial outcome seem almost anticlimactic. In fact, by the time the United States Supreme Court decided the case, the Catholic Guardian Society had already abandoned its effort to take away the foster children in Mrs. Smith's care (p. 114). Although Mrs. Smith's sympathetic qualities sparked the NYCLU's original commitment to litigate, the case developed a wholly independent momentum once it was converted into a system-wide attack on foster-care procedures. The mere fact that Mrs. Smith had obtained the desired relief in no way diminished the zeal with which the NYCLU pursued the claims. The case produced some changes in agency regulations on transfers from one foster home to another, but the new rules reportedly did not bring about substantial modifications in the system (pp. 114-15).

In their analysis of the case, Chambers and Wald set forth the costs and benefits of the litigation process. They focus primarily on the NYCLU's method of selecting the case and the adequacy of the court's factfinding process. They note that when Mrs. Smith first approached the NYCLU it had not yet designed a coherent legal approach for attacking the foster-care program's deficiencies in the courts, although the director of the Children's Rights Project had some past experience with the program (pp. 132-33). Once Mrs. Smith convinced the NYCLU to handle her case, the litigation proceeded with little consultation with outside experts or even other lawyers. Chambers and Wald consider the absence of consultation a serious failing in *OFFER* because it gave the NYCLU a false sense of certainty about the appropriate approach to foster-care problems. Broader discussion with experts and with other attorneys could have revealed the diversity of views about how best to promote foster children's interests. Chambers and Wald therefore recommend methods for institutionalizing a wider consultation process (pp. 133-36).

In assessing the costs and benefits of the litigation, Chambers and Wald recognize the advantages that public-interest litigants enjoy through liberal access to the courts where there is formal equality of all parties, despite differences in resources (p. 120). They indicate, however, that the piecemeal approach that courts must use in making case-by-case determinations, the rigidity introduced by the necessity of framing a claim in judicially cognizable terms, and the limitations of the courts' factfinding processes are serious impediments to the effectiveness of test-case litigation (pp. 125-30, 137-38). Chambers and Wald are particularly critical of the attorneys' poor presentation of information to the judges in *OFFER* and the judges' failure to assimilate much of the data (pp. 138-

39). After attributing these problems to certain characteristics of the adversary process, Chambers and Wald recommend that judges assume a more active role by immersing themselves in the case early enough to guide lawyers more vigorously in the presentation of evidence, by questioning witnesses more aggressively, and by calling their own experts (pp. 141-42, 144-45). They also toy with the idea of redefining the role of public-interest attorneys to give them more responsibility for ensuring that judges receive a complete picture of the issues (pp. 141-42, 144-45).

Chambers and Wald thus provide a thought-provoking treatment of the *OFFER* case. Yet, it is unclear whether broader input during pretrial consultation and in the factfinding process will aggravate, rather than ease, the problems of large amounts of conflicting information that already pervaded the litigation process.

B. *Bellotti v. Baird*

In his discussion of *Bellotti v. Baird*,⁵ Robert H. Mnookin studies litigation asserting the right of minors to obtain an abortion without notifying their parents. The case study depicts a fascinating set of multiple conflicts captured in a single lawsuit. First, the Massachusetts legislature apparently wanted to limit the impact of the United States Supreme Court's decision in *Roe v. Wade*.⁶ In that case, the Court upheld a woman's decision to have an abortion during the early stages of pregnancy because it found that her privacy interest outweighed the state's interest in protecting the unborn. Only one year after the Court's decision appeared, the Massachusetts legislature tested the limits of *Roe v. Wade* by enacting a statute that explicitly regulated the abortion rights of unmarried minors. The legislature's action was itself prompted by a second broader and ongoing conflict between those who support abortion on demand and those who vehemently oppose it (pp. 163-66). These broad institutional and political disagreements were themselves embedded in a third conflict: that between teenagers seeking independence as they approach the age of majority and their parents (pp. 152-54). The third conflict is of greatest interest to the topic of children's test-case litigation.

The *Bellotti* case illustrates how readily even the interests of children approaching majority can be invoked and then subordinated to the interests of adults. The four teenage plaintiffs were recruited by an adult director of an abortion clinic who, with the advice of his attorneys, largely controlled the direction of the litigation. Mnookin points out that the teenagers' involvement was not legally necessary since the director, the medical director, and the nonprofit organization that operated the

5. 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979).

6. 410 U.S. 113 (1973).

clinic also had standing and sued as plaintiffs. Moreover, three of the teenage plaintiffs disappeared from the case after having their abortions, and the fourth played only "a small cameo role" in the first trial (pp. 172-73). In fact, most of the testimony was presented by adults. Witnesses included the clinic's director and medical director, experts called by the plaintiffs and by the state who debated the utility of parental participation in teenage abortion decisions (pp. 177-84, 201-06), and a woman with three daughters who, along with her husband, had intervened on behalf of "a class . . . [of] parents of unmarried minor girls of childbearing age who are or may become pregnant" (pp. 175-76). The outcome of the case further undercuts any belief that the limits of childhood were the principal subject of debate. Although the clinic's director cited the autonomy interests of teenage minors, these arguments undoubtedly enhanced his own institutional position by permitting the clinic to perform the abortions at issue free of external interference. Moreover, teenagers themselves did not select between personal autonomy and parental intervention. Instead, they were given a choice between two adult authority figures who could approve their abortions: the judge or a parent (pp. 226-30).

Mnookin analyzes the adequacy of the judicial process as a forum for moral discourse (pp. 244-46), a political arena for competing interest groups to shape the law (pp. 246-49), and a means of formulating public policy on the basis of an assessment of the costs and benefits of alternatives (pp. 249-56). Still, it is unlikely that the teenage children ever really participated in the discourse, competed in the political arena, or contributed to the assessment of costs and benefits. While purportedly deciding whether teenagers should be treated as adults under some circumstances, the judicial process viewed these minors as shadowy objects to be analyzed, rather than as mature individuals who could become actively involved in the case.

C. *Halderman v. Pennhurst State School and Hospital*

In the *Pennhurst*⁷ case study, Robert A. Burt discusses a lawsuit that addressed the propriety of small-scale, community-based facilities, rather than large-scale, custodial institutions, for housing and training mentally retarded citizens. This case study is a peculiar choice for inclusion in a book on child advocacy because the decision turns less on the age of the residents at Pennhurst than on their disability. As Burt indicates, the average age of Pennhurst residents was 35, and only 100 of the 1,400 residents were children. On the average, they had resided at Penn-

7. 451 U.S. 1 (1981), *on remand*, 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd and remanded*, 465 U.S. 89 (1984), *on remand*, 610 F. Supp. 1221 (E.D. Pa. 1985).

hurst for 21 years. In fact, most Pennhurst residents apparently were institutionalized late in their childhood after prolonged efforts to provide home care failed (p. 267). *Pennhurst* is less a case about children than about dependents. Moreover, unlike other children, the dependents Burt describes had few prospects for eventual emancipation from their parents or from the state. Still, Burt's case study provides considerable insight into the effects of litigation on the administration of total institutions.

Burt's study confirms that an institution cannot be treated as a homogeneous entity. Rather, it must be evaluated as a set of interrelated, but divergent and sometimes conflicting interests (pp. 303-04).⁸ The study also contributes important new data on the competing interests of different plaintiffs in the same suit against institutional defendants. Burt describes how a lawsuit designed to improve an institution was transformed into one that sought to destroy it in favor of community placement. These strategic changes were accompanied by the addition of new plaintiffs, including not only more Pennhurst residents and their parents, but also the United States Department of Justice, and a state-wide organization composed mainly of mentally retarded people's parents (pp. 266-67, 281-325). Burt's analysis is most poignant when he chronicles the views that were largely ignored amidst the clamor for reform. For example, he sets forth the efforts by one resident's parents to keep their blind, nonverbal, and profoundly retarded nineteen-year-old son at Pennhurst, rather than subject him to a poorly conceived and possibly upsetting plan for community placement. According to Burt, the parents' doubts were simply brushed aside both by a hearing master appointed to make individualized decisions about admissions and removals at Pennhurst and by the district court judge (pp. 275-80, 352-59).

In addition to describing the heterogeneity of interests on both sides of the litigation, Burt depicts the shifting alliances these interests produced throughout the case. He explains how an initial, superficial appearance of consensus and cooperation among the parties eventually degenerated into open conflict and disagreement (pp. 280, 321-25, 327). Although the judicial process's failure to promote negotiation and conciliation is alarming, Burt also notes the symbolic value of judicial intervention. In particular, he argues that "by allying his own institutional vulnerability with the plaintiffs," the judge "heightens the moral significance of the harm suffered by plaintiffs" (p. 342). By declaring that continued injury to the plaintiffs is offensive to the judge and his office, the court forces the defendants to reconsider their policies by raising the moral costs of their actions. Burt terms this "a considerable judicial

8. See also Diver, *The Judge as Political Powerbroker: Superintending Structural Changes in Public Institutions*, 65 VA. L. REV. 43, 70-75 (1979) (describing divergent interests of defendants in institutional reform litigation).

power, akin to the force wielded by the greatest moral teachers from Gandhi to Christ to Socrates" (p. 342).

Later in his analysis, however, Burt criticizes the judge for being excessively aloof after entry of the closure order. Burt argues that judges can only succeed in institutional reform cases if they persuade participants of their commonality of interest with those who claim a greater share of the community's resources (pp. 346-48, 361-62). Burt wants judges to be both great moral teachers and political powerbrokers. However, fulfilling these disparate functions in a single case may prove impossible if framing disputes in absolute moral terms often precludes interest-group bargaining. We remember the teachings of Christ, Socrates, and Gandhi in part because their principled martyrdom captured so graphically the breach between spiritual idealism and mundane realities. Undoubtedly their lessons would be regarded quite differently if they had frequently resorted to pragmatic compromise while mouthing moral imperatives.

D. *Roe v. Norton*

In his treatment of *Roe v. Norton*,⁹ Stephen D. Sugarman studies a case in which the court determined whether mothers receiving Aid for Dependent Children (AFDC) could be held in contempt and jailed for refusing to reveal the identities of the fathers of their illegitimate children. The case involves a particularly disadvantaged group of children: not only are they poor and illegitimate, but many are members of minority groups (pp. 371-76). Consequently, the effects of race or ethnicity, age, illegitimacy, and poverty on judicial, legislative, and administrative decisionmakers are irretrievably confounded. In addition to these complications, the children's interests here are also heavily bound up with those of adults, including their mothers and state officials (pp. 366-70).

After a brief history of the AFDC program and maternal cooperation requirements, Sugarman analyzes Connecticut's efforts to get mothers to reveal the identities of the fathers of their illegitimate children. A congressional amendment to the program encouraged these efforts by offering federal money and cooperation in locating absent fathers to improve state paternity and support programs for illegitimate children. Connecticut first devised regulations that terminated all assistance to mothers who refused to cooperate in identifying fathers. When a federal court overturned these regulations, Connecticut reacted by altering them to terminate only the mother's, and not the child's, assistance upon non-cooperation. When the federal judiciary rejected the modified

9. 422 U.S. 391 (1975) (per curiam), on remand sub nom. *Doe v. Maher*, 414 F. Supp. 1368 (D. Conn. 1976), vacated and remanded, 432 U.S. 526 (1977) (per curiam).

regulations, Connecticut designed new ones that held a mother in contempt of court with the possibility of a jail sentence if she refused to cooperate in identifying her child's father (pp. 377-79). According to Sugarman, the contempt provision was invented and pushed through the Connecticut legislature by a state assistant attorney general who "was personally challenged . . . 'to concoct a system' of forced maternal cooperation that the liberal Connecticut federal judges would accept" (p. 381).¹⁰

Sugarman's case study is the only one that focuses on the interaction among the legislative, administrative, and judicial branches. In many ways, it is more a description of how institutional dialogue occurs, with all its frustrating, fitful stops and starts, than it is of how children's rights are promoted (pp. 434-39). As Sugarman explains, the participants in his study may have used "children as cover" (p. 444) by "rationalizing . . . [their] position as child-centered while actually employing other deeply held values to arrive at that position" (p. 447). Much as in Mnookin's study, the legal processes described in Sugarman's study relegated children to the status of objects to be analyzed and at times manipulated in the service of other interests.

E. *Goss v. Lopez*

In their discussion of *Goss v. Lopez*,¹¹ Franklin E. Zimring and Rayman L. Solomon examine a suit in which the courts decided whether students subject to long-term suspension were entitled to procedural protections under the due process clause. Zimring and Solomon's work represents a significant addition to the book because it deals with the public school, an institution that influences virtually all children.

The suit in *Goss v. Lopez* began when the Columbus chapter of the National Association for the Advancement of Colored People (NAACP) held a meeting for parents and students who were angry about suspensions resulting from numerous sit-ins, marches, fights, and disturbances between black and white students. Although the NAACP had already organized a demonstration at the Columbus and Ohio School Board Headquarters, the parents demanded that legal action be taken. The white attorneys who advised the parents about bringing the suit were skeptical of its chances for success, but NAACP officials feared that without legal action, the situation would explode. Despite their reservations about the strategic posture of the case, the attorneys agreed to file suit. According to Zimring and Solomon, the NAACP wanted to extract maximum symbolic impact from the case. Therefore, rather than contest

10. Quoting James Higgins, Assistant Attorney General for Connecticut (p. 381).

11. 419 U.S. 565 (1975).

the application of Ohio's statutory provisions and regulations regarding disciplinary actions against students, the NAACP challenged their facial validity on constitutional grounds. This approach greatly enhanced the chances that the case would receive Supreme Court review (pp. 466-70).

After these initial stages, the NAACP was not actively involved in the case (p. 469). As the case progressed to the Supreme Court, however, an increasing number of national public-interest organizations participated in and influenced the plaintiffs' side of the case. By contrast, the defense of the school board, administrators, and principals of the Columbus school system remained largely a state and local affair (pp. 480-82). The shift in plaintiff participation paralleled a rapid transformation in the substance of the case from a "racial rights" into a "student rights" case (p. 471). The angry black parents in Columbus were not primarily concerned with the effect on student rights of characterizing the school system as a "traditional father-knows-best family with clear authority structures," or as a state agency where "principals and teachers are regulators and students are the subjects of the regulation" (p. 457). Instead, these parents were much more concerned about how blacks are treated by white-dominated institutions in general and the schools in particular. Zimring and Solomon accept this highly significant metamorphosis from a "racial rights" to a "student rights" case as a justifiable legal strategy that downplayed the threat of racial violence. Still, the redefinition of this "client-centered" problem into a "lawyer-centered" argument raises serious questions about the legal system's ability to respond to broad complaints about institutional racial discrimination.

Zimring and Solomon analyze the case as one in which symbol and substance were inextricably intertwined. Although the entitlements for students that emerged from the case were extremely modest (p. 458), *Goss* sparked strong rhetoric in legal, educational, and academic circles because it "serv[ed] as a 'lightning rod,' a symbol of larger movements in constitutional law, legislation, school administration and school composition, in American adolescence, and in the fabric of American culture" (p. 455). In particular, *Goss* stripped supervisory school personnel of the legitimating cloak of paterfamilias and left them with the more modest raiment of state official and administrator. While the *Goss* decision can be characterized as a "symbolic victory," this term deserves more careful definition. *Goss* exemplifies the court as a myth-breaker that sweeps away an outmoded model of school authority, rather than as a mythmaker that forges a new and equally compelling image of school administrator. Perhaps this accounts for Zimring and Solomon's observation that *Goss* seems like a 1960's nostalgia trip (p. 506).

II

A FRAMEWORK FOR ANALYSIS: MNOOKIN'S THREE
PUZZLES OF CHILD-ADVOCACY LITIGATION

Mnookin introduces the five studies with a set of chapters describing three basic problems that characterize child-advocacy litigation: (1) the enigma of indeterminacy; (2) the dilemma of legitimacy; and (3) the paradox of child advocacy. Mnookin takes full responsibility for these chapters but says that "[t]he ideas expressed were very much shaped by the project and the collaborative process" (p. xi). The chapters are intended to provide a "helpful framework" (p. xi) for understanding the studies and presumably to provide the reader with a sense of the overall structure of the book. Although the three problems Mnookin cites are not clearly elaborated in the case studies, this Review will focus on them because no unifying theme clearly emerges from the studies themselves. Where appropriate, this Review will draw on the lessons set forth by the various contributors in analyzing their respective case studies.

A. The Enigma of Indeterminacy

The enigma of indeterminacy refers to the problems of proof that any decisionmaker faces in making rational choices in the context of children's issues. According to Mnookin, two fundamental problems typically confront a policymaker in this area. The prediction problem refers to the inability to predict the consequences of alternative children's policies. The value problem arises from the difficulty in selecting criteria, or goals, that should be used in assessing the alternative consequences (pp. 16-17).

Mnookin claims that the enigma of indeterminacy is aggravated by several additional factors. Policy decisions affect many children, and children may react differently to a particular decision rule. Solutions become more difficult as more individuals in large organizations are required to implement them. In addition to the interests of children, policymakers must inevitably consider the interests of others. All of these factors complicate the indeterminacy associated with achieving a rational choice in children's rights cases (p. 19).

Mnookin acknowledges that the enigma of indeterminacy need not always be an obstacle to rational decisionmaking. In particular, there may be "easy" cases in which it is clear that some policy change is immediately necessary. For example, Mnookin labels as "easy" those cases in which young people are exposed to a substantial risk of immediate harm, although he concedes that the need for prompt action does not necessarily eliminate concerns about which remedy is most appropriate. He also considers "easy" the cases that expand children's access to existing gov-

ernmental benefits, although again he recognizes that the reallocation of resources may benefit some children while harming others. Thus, even in Mnookin's "easy" cases, substantial indeterminacy remains (pp. 23-24).

B. The Dilemma of Legitimacy

The dilemma of legitimacy focuses on whether courts have the capacity to make sound policy decisions and to create and enforce remedies, and whether such policymaking can be reconciled with majority rule and popular control (p. 25). Mnookin differentiates the policymaking capacity of the judicial process from that of legislative and administrative processes based on five characteristics. First, the judge assumes a largely passive, impartial, and neutral role in responding to the parties' presentation of issues and evidence. By contrast, the legislative and executive branches, although affected by outside pressures, can develop policy without waiting for third parties to file a formal complaint (p. 59). Second, judges are generalists who hear a broad variety of cases and sometimes lack the expertise necessary to evaluate alternatives comprehensively (pp. 59-60). Third, the litigation process limits the material available to a judge deciding a child-advocacy case. Legislative and executive policymakers have more flexible ways to obtain evidence (p. 60). Fourth, judicial decisions must be justified in formal written opinions, while the legislative and executive branches are not often subject to a similar requirement (pp. 60-61). Finally, the judge has some discretion in selecting and designing a remedy, but is not free to engage in broad-ranging policymaking that does not vindicate the legal rights at issue (p. 61). Mnookin does not conclusively evaluate the relative capacity of courts, legislatures, and administrative agencies to formulate policies on children's issues. He merely observes that all five characteristics affect the court's capacity to engage in policymaking in this area (pp. 64-65).

Mnookin's discussion of legitimacy raises an additional concern. Even if courts can adequately formulate policy, this role may be inconsistent with democratic principles of majority rule and popular control. After acknowledging that courts indeed make policy (pp. 26-33), Mnookin catalogs three arguments advanced by proponents of judicial activism. First, legislative and administrative processes are not necessarily more politically accountable if interest-group politics leads both the legislative and executive branches to neglect less well-organized groups. Judicial intervention can compensate for the systematic discounting of less powerful interests (p. 35). Second, the court's accountability to the democratic process has been seriously underestimated. Judges are appointed because their values are compatible with those of elected officials. Judges must also generate popular assent to implement broad-ranging remedies. In extreme cases, popular checks such as constitu-

tional amendment, impeachment of judges, or congressional control of jurisdiction and procedure can be invoked (pp. 35-36). Third, if the courts impose proper policies, judicial activism is legitimate, regardless of whether judges are accountable through democratic processes (pp. 36-37). As this argument indicates, the issues of judicial capacity and legitimacy are highly interrelated. If a court lacks the capacity to formulate proper policy, its efforts to implement reform may be perceived as illegitimate. Conversely, if the court's role in policymaking is viewed as improper, there may be little, if any, attempt to enforce its remedies, and its capacity to formulate policy will thereby be undermined (p. 25).

In addition to this rather conventional treatment of the dilemma of legitimacy, Mnookin adds a brief section on whether judicial activism is justified by the political powerlessness of children (pp. 37-41). If access to the political process is the relevant criterion in deciding whether courts should intervene to protect children's interests, judicial activism is proper because children certainly have a limited voice in legislative and executive processes. They may not vote, are ineligible to serve in the legislature, have little funding, and are poorly organized. If, however, the relevant criterion is the likelihood that the political process will consistently discount the rights of children, arguments for judicial activism are more tenuous. Mnookin points out that there is no sense among political actors that children constitute a discrete and insular out-group. All actors in the political process have been children and frequently are closely related to children as parents or guardians. Under this view, there is no reason to suspect that the interests of children will be systematically undervalued in the political process (pp. 37-39).

Even assuming, however, that legislators are receptive to children's claims, another problem presents itself. Who will represent children in the political process? Mnookin briefly surveys several possibilities, including parents, guardians, and service professionals with special responsibilities to children. None of these groups, however, is a wholly adequate representative for children. Parents are frequently disorganized and unable effectively to represent their children's interests in the political process. Service professionals are usually highly organized but have interests that may diverge from those of the children they purportedly represent. For example, service professionals often have a vested interest in the perpetuation of programs in which they are employed, regardless of whether the programs promote the best interests of children. On the whole, Mnookin concludes that the adequacy of children's representation in the political process is, at best, questionable (pp. 39-41).

C. The Paradox of Child Advocacy

The description of the representation of children in the political pro-

cess leads naturally to the third problem that Mnookin poses: the paradox of child advocacy. According to Mnookin, the attorney-client relationship in any public-interest case affords the attorney considerable discretion in deciding when, where, and how to bring suit. Public-interest lawyers in class actions frequently make strategic decisions without much input from the clients they purportedly represent (pp. 52-53).

Mnookin plausibly argues that the problems of client control are exacerbated when children, rather than adults, are the clients in a public-interest case. Children often communicate through intermediaries, such as parents or service professionals, who may not adequately represent their interests. Moreover, because most public-interest organizations pursuing children's rights are supported by foundations and the federal government, rather than by dues-paying members, inadequate representation of children's interests will not necessarily lead to termination of funding (pp. 53-55).

These difficulties are further complicated by the use of class actions in many children's rights cases. While class actions afford numerous strategic and procedural advantages, they further obscure the proper role of attorneys in representing children's interests. A large class of children may not share a single set of stable preferences or objectives. Even if it does, it is unclear how public-interest lawyers can ascertain these preferences or objectives, given their limited resources. Mnookin concludes that it is unclear whether public-interest lawyers in class-action litigation about children's rights adequately represent their clients' interests (pp. 51-53).

III

RESTRUCTURING THE PUZZLES: MORE ON THE ENIGMA OF INDETERMINACY

By now, it should be clear why this collection of child-advocacy cases calls to mind Barth's pointed observations about principles of decisionmaking. Mnookin paints a somewhat depressing picture of courts forced to make decisions that may jeopardize their institutional legitimacy without much assurance that they are being guided by anything more than intuition. Under these circumstances, it would hardly seem irrational for judges to resort to Sinistrality, Antecedence, and Alphabetical Priority as rules of thumb. Careful analysis of the enigma of indeterminacy will help the reader to understand how the courts cope with the difficult conditions that Mnookin describes without resorting to Barth's extreme measures.

A. An Array of Characteristics of Indeterminacy

Mnookin differentiates between indeterminacy regarding prediction

and indeterminacy regarding values. By stopping at this preliminary point in the analysis of indeterminacy, however, Mnookin overlooks some of the most interesting claims that can be made about the effects of indeterminacy on the decisionmaking process. Because indeterminacy is not a uniform concept, more of its characteristics must be analyzed to understand fully the enigma of indeterminacy and how judges respond to it. These characteristics include: (1) substantive domain; (2) the manifest-latent distinction; (3) resolvability; (4) time frame; (5) quantifiability; and (6) cost of error.¹²

1. *Substantive Domain*

Mnookin's distinction between values and prediction is one way of characterizing the substantive questions that can be indeterminate. However, it seems useful to refine his distinction further by breaking it down into three components. First, there may be indeterminacy about ends or goals. This sort of indeterminacy parallels what Mnookin calls indeterminacy about values. Mnookin's case study of *Bellotti v. Baird* illustrates this type of indeterminacy. There, some participants sought to promote parental sovereignty; others pushed for recognition of young people's legal autonomy; and still others urged that the state protect children from harm under the doctrine of *parens patriae*. As Mnookin indicates, this clash over values made *Bellotti* a hard case (p. 258).

Second, there may be indeterminacy about means, or cause-and-effect relationships. That is, even assuming complete agreement about values, there may be considerable disagreement about the validity of competing claims about the effects of policies designed to promote these values. For example, everyone may agree that children should have a significant adult with whom they identify and affiliate, yet there may be significant disagreement about the best method of ensuring identification and affiliation. This form of indeterminacy is illustrated by Chambers and Wald's case study of *Smith v. OFFER*, in which child development experts strongly disagreed about how attached children are to biological parents from whom they have been separated for a long period of time (pp. 101-03).

Finally, there may be indeterminacy about implementation. Assume, for example, that everyone agrees not only about the values to be promoted but also about the relative merits of competing theories on how to promote these values. Even then, there may be indeterminacy in predicting how well field-level personnel will implement the particular theory selected. This problem is exemplified by Mnookin's observation

12. This list consists of a non-hierarchical array of characteristics implicated by the case studies that seem likely to prove of analytical importance. I plan to develop a more comprehensive treatment of the characteristics of disputes in an upcoming Article.

that indeterminacy is aggravated when large groups of individuals or organizations are required to alter their behavior in response to a decision (p. 19).¹³

2. *The Manifest-Latent Distinction*

Presumably there is some level of indeterminacy associated with a set of solutions or outcomes that can be accurately assessed with perfect information.¹⁴ With no device akin to Bentham's Panopticon, or all-seeing eye, however, courts must satisfy themselves with an approximate perception of indeterminacy. The divergence between perceived and actual indeterminacy makes the distinction between manifest and latent indeterminacy significant. Where indeterminacy is perceived and actually exists, it is manifest. Where indeterminacy is not perceived but exists, it is latent. Where indeterminacy is perceived but does not exist, it is imaginary.¹⁵

More specifically, when a decisionmaker accurately evaluates the range of available alternatives and the conditional probability that any given one is correct, indeterminacy is manifest. Indeterminacy can be latent in two distinctive dimensions. First, the conditional probability that any given outcome or solution is correct once it is chosen can be overestimated. Second, the range of possible solutions can be underestimated. Conversely, imaginary indeterminacy can be created either by underestimating the conditional probability that any given outcome or solution is correct or by overestimating the range of possible solutions.¹⁶

13. Mnookin also implicitly recognizes indeterminacy about implementation, as opposed to values and theories of cause-and-effect, in an earlier article on indeterminacy. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 257-58 (Summer 1975). In this article, Mnookin argues that "[i]n many instances, a judge lacks adequate information about even the most rudimentary aspects of a child's life with his parents and has still less information available about what either parent plans in the future." *Id.* at 257. He also points out that a judge who orders that a child be removed from a home usually does not know where the child will be placed after removal. *Id.* at 258. While Mnookin couches these observations in terms of imperfect information, the paucity of data in fact gives rise to indeterminacy about implementation.

14. Unless the conditional probability that a solution will prove correct when chosen is 100%, indeterminacy will not disappear with perfect information. Even if decisionmakers can definitely determine the conditional probability that a given solution is correct, they can not guarantee that it will work. See *infra* note 16. If the conditional probability that a given solution is correct is zero percent, the decisionmaker will label it "irrelevant." Irrelevancy is a form of determinacy that permits screening of possible solutions for consideration. In most real-world situations, imperfect information will significantly compound indeterminacy in the decisionmaking process.

15. Another way to understand this distinction is to treat manifest indeterminacy as an accurate assessment, while latent indeterminacy is a false negative and imaginary indeterminacy is a false positive.

16. Assuming that outcomes can be described as a function of a single attribute or index, these dimensions can be captured by measuring the mean of the distribution of the conditional probabilities that the outcome is correct given that it is chosen and the sample variance of the distribution of outcomes measured in terms of the underlying outcome index. Where indeterminacy

The case studies provide several examples of latent indeterminacy. In *Bellotti*, one plaintiff, the director of an abortion clinic, did not acknowledge the possibility that some pregnant teenagers might be too immature to consent to an abortion, even though the plaintiffs' own expert witnesses testified that certain younger adolescents might not be able to give informed consent (pp. 177-80). In *Roe v. Norton*, the state attorney general contended that holding mothers receiving AFDC in contempt for failure to identify the fathers of their illegitimate offspring would invariably promote their children's best interests, although there were strong reasons to doubt his flat assertion (pp. 384-87). In *Pennhurst*, the judge, expert witnesses, and parties overlooked many of the difficult questions surrounding the benefits of community placement for the mentally retarded (pp. 330-36).

It is harder to find instances of imaginary indeterminacy in the studies. This form of misperception may be less frequent in test-case litigation, or the authors may not have ferreted out overstated claims about indeterminacy as effectively. One possible example of imaginary indeterminacy can be found in *Bellotti* when the state sought medical experts to testify about teenage abortions. As the assistant attorney general initially assigned to the case explained, "[T]he people who you could easily get as experts were so wrapped up in the right to life that they had never performed an abortion. How could they testify about abortions when they'd never performed them?" (p. 181). The medical expert who testified on behalf of the state about the medical risks of teenage abortions focused heavily on possible complications and the increased risks for teenagers, although on cross-examination, he admitted that he had never performed abortions and had published articles on the rhythm method (p. 181). The experts available to the state may have exaggerated the uncertainties associated with teenage abortions because of their moral and philosophical beliefs. The case study does not, however, provide sufficient data to pursue this interpretation more fully.

There is no reason to believe that the relative levels of manifest, latent, and imaginary indeterminacy remain stable over time. Misperceptions of the level of indeterminacy can seriously distort the decisionmaking process. In fact, participants may try to manipulate these perceptions in response to the requirements of the decisionmaking process. Moreover, perceptions of indeterminacy may be unconsciously transformed in response to dynamic changes in circumstances.

is latent, the mean value of the conditional distribution will be too high, the variance of outcomes will be too low, or both. Conversely, where indeterminacy is imaginary, the mean value will be too low; the variance, too high; or both.

3. *Resolvability*

Indeterminacy is resolvable if it can be eliminated through some systematic process, provided that the cost of this process is not prohibitive. Two major methods to resolve indeterminacy about values, means, or implementation are available: theoretical techniques and empirical techniques. For example, moral discourse is a theoretical method of resolving value indeterminacy.¹⁷ According to Mnookin, in *Bellotti v. Baird*, the court served as a forum for a moral dialogue about how principles of sexual autonomy affected the limits of childhood. However, the discourse was limited to counsel and the court. No "moral theorists" participated in the process of resolution (pp. 244-46). By contrast, using a plebiscite is an empirical method of resolving value indeterminacy, although the choice of voting rules necessarily rests on theoretical considerations.¹⁸ Because courts are not overtly political,¹⁹ they cannot initiate the use of referenda on issues that come before them. Still, they certainly are influenced by public opinion polls.

The application of either technique to value disputes leads to inherently unstable outcomes. Because the propriety of the outcome of moral discourse is seldom indisputable, the result obtained is apt to be challenged if the losing party believes strongly in its view.²⁰ Because a head-counting process need not address itself carefully to the underlying philosophical arguments about values, it is likely to change in response to extraneous factors and can be highly vicissitudinous.²¹

17. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 1-19 (1980) (using dialogue based on liberal principles to allocate social goods).

18. The choice of voting rules can engender serious disagreement. Should the plebiscite focus on the opinions of legislators, parents, children, service professionals, or the entire population? Should point voting be used, or is it more efficient simply to count heads? For a good introduction to these problems, see R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 102-29 (4th ed. 1984). For a more in-depth discussion, see generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) (describing problems inherent in devising collective choice processes that are rational, decisive, and egalitarian), and J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962) (analyzing different rules for structuring collective choice processes).

19. In fact, the courts serve a countermajoritarian function. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962); See also Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 46 & n.73, 49-55 (1985) (courts implement Madisonian ideal of governance by officials devoted to a public good distinct from the struggle of private interests when they reject political outcomes based on unprincipled bargains among competing social groups).

20. See Shapiro, Book Review, 2 CONST. COMMENTARY 488, 492-94 (1985) (reviewing T. FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* (1984)) (describing volatile outcomes when moral discourse was used to resolve value disputes regarding school desegregation).

21. See T. LOWI, *THE END OF LIBERALISM* 63 (2d ed. 1979) ("[Interest-group liberalism] impairs the potential of positive law to correct itself by allowing the law to become anything that eventually bargains itself out as acceptable to the bargainers. . . . Interest-group liberalism seeks pluralistic government, in which there is no formal specification of means or of ends. In a pluralistic government there is, therefore, no substance. Neither is there procedure. There is only process.").

Similarly, indeterminacy about means can be resolved by applying theories of cause-and-effect. For example, in *Smith v. OFFER*, the expert witnesses presented elaborate theories about the process by which children develop bonds with adults. Based on these theories, the experts drew inferences about the probable effects on children of disrupting long-term foster care relationships. Another method for resolving indeterminacy about means is empirical. Rather than simply presenting abstract theories, an expert may gather relevant data and perform statistical analyses to substantiate a causal claim. In *Bellotti*, Mnookin describes the statistical evidence before the court as rough estimates by several experts based only on recollections of their own general experience (pp. 202-04). In *OFFER*, Chambers and Wald criticize the factfinding process, in part because the parties failed to develop useful statistical information (pp. 104, 138-139). The case studies thus provide no example of a rigorous application of the statistical approach to questions about means.

In fact, applying empirical techniques to resolve indeterminacy about means is often difficult because of the lack of available data. Frequently researchers are limited by real-world constraints from answering some of the most interesting questions about children's welfare. Obviously funds for research on children are limited (p. 531 n.1). Moreover, there are ethical and practical restrictions on how closely experimenters can approximate the perfect paradigm to learn about the effects of particular approaches on children. The welfare of children cannot be seriously jeopardized in pursuit of greater scientific expertise, and the paramount importance accorded to family privacy interests has frequently precluded researchers from acquiring more data on intrafamily practices and their effects on children. Large-scale institutions ordered to provide services to children may also impede researchers' access to their internal procedures. Even where access is feasible, the more limited communicative skills of young children may preclude a full understanding of their problems. It is also possible that changing social conditions will alter the results of an experiment over time.

Indeterminacy about implementation conceivably could be resolved through theoretical techniques. For example, experts on implementation theory could present their views on the most effective way to implement a judicial decree. But just as moral theorists are not asked to resolve value indeterminacy, implementation theorists are not called to testify about how to maximize the impact of a judicial decree. Presumably judges consider their own expertise as to both moral values and the

The resolvability of value indeterminacy is further complicated by the effect of governmental intervention on the head-counting process. See S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 6-8 (1974) ("[A judicially recognized] right is best treated as a resource of uncertain worth, but essentially like other political resources . . .").

implementation of judicial reforms sufficient to dispense with such testimony. Empirical techniques can be and are usefully employed to resolve indeterminacy about implementation, however. For example, the judge may appoint a special master to monitor the implementation of a decree or require administrators to make periodic reports to the court. These approaches are especially likely in cases like *Pennhurst*, where the judge is mandating complex structural reform of a total institution.

If perceptions of the resolvability of indeterminacy were wholly accurate, this characteristic would be relatively insignificant in influencing the decisionmaking process in test-case litigation. Most complex, indeterminate questions about values, means, or implementation are, as a practical matter, irresolvable. Consequently, resolvability does not assist in differentiating among possible responses to indeterminacy. If perceptions of resolvability are erroneous, however, they can have a greater impact on the decisionmaking process.²² Decisionmakers may overestimate the resolvability of indeterminacy about means and implementation because of the "scientific" aura surrounding the use of expert witnesses or the reliance on special masters and the representations of professional administrators. These misplaced perceptions can in turn affect the court's responses to indeterminacy.

For example, in *Pennhurst*, the hearing master rejected the arguments of two parents who preferred that their son remain institutionalized, rather than be subjected to an uncertain community placement procedure. The master concluded that "the sole parental objection supported by any degree of evidence in the record is the[ir] concern . . . that they might be 'embarrassed' if they encountered [their son] in the community. . . ." (p. 277). Although the district court judge did not affirm the hearing master's ruling, he did order temporary community placement for the child before a final decision about the parental objections was made. According to the judge:

The resistance of [these] parents to [their son's] proposed change of residence is not unusual. Many parents of retarded residents of *Pennhurst* have experienced the same reaction when evaluating a transfer of their son or daughter to a community living arrangement. . . . [These parents should] visit the community living arrangement and see for themselves what the living arrangements are and what programs will be available for their child. It might also be helpful for the[se] parents . . . to speak to other parents who like themselves violently opposed the transfer of their

22. The disparity between perceptions of resolvability and actual resolvability could arguably be treated as another example of the manifest-latent distinction. However, the manifest-latent distinction will be used exclusively to refer to the perceived level of indeterminacy. When perceptions of some other characteristic of indeterminacy diverge from reality, I will describe the real and perceived qualities and how they differ, rather than using the manifest-latent distinction as a shorthand description.

child to a community living arrangement, but who, after having observed the improvement in their child's skills as a result of the care, training and education received in the community living arrangement, are now most supportive of the community living arrangement In most cases, a family's acceptance of their retarded child living in their community not only strengthens the family ties but results in joyous satisfaction in observing the increase in those life skills which will better enable their child to cope as effectively as his or her capacity permits (pp. 278-79).

In essence the judge ignored the strong desires of numerous parents because he firmly believed that community placement would prove so beneficial that the parents ultimately would be appeased. His conviction must have been predicated on the representations of experts and reliance on the hearing master. As Burt indicates, however, the judge was misled into concluding that doubts about the utility of community placement had been resolved by a false appearance of unanimity among the experts (pp. 329-36). The judge was especially vulnerable to this type of error because of the "scientific" aura surrounding the testimony. Although expert witnesses can usefully assist in resolving indeterminacy about means and implementation, overreliance on their testimony can also harm the decisionmaking process by distorting perceptions of resolvability.

4. *Time Frame*

A distinction related to the resolvability of indeterminacy is its time frame. If indeterminacy is irresolvable, it will exist indefinitely, but resolvable indeterminacy may be short-term or long-term, depending on how long the process of resolution takes.²³ Once again there may be some relationship between the substantive domain of indeterminacy and its short-term or long-term nature. Value indeterminacy is almost inevitably long-term because of the inherent instability of the processes for resolution. Means indeterminacy is generally long-term in test-case litigation because debates about means are likely to involve complex, difficult questions that cannot be resolved quickly. The time frame of implementation indeterminacy depends in part on the time frame for the evaluation of intervention. For example, if the success of judicial intervention is to be measured in six months, indeterminacy about good-faith

23. This distinction between short-term and long-term indeterminacy is different from Mnookin's observation that "there remains the question whether the best interests [of children] should be viewed from a long-term or short-term perspective" (p. 18). See also Mnookin, *supra* note 13, at 260. Mnookin's remarks refer to a prescriptive problem: At what time should we determine whether intervention has been successful? How the court answers this question will depend in part on the mode of decisionmaking it adopts. See *infra* notes 39-41 and accompanying text (contrasting short-term horizon of incrementalist decisionmaking with longer-term horizon of synopticism). The distinction between short-term and long-term indeterminacy in this section is related, but is descriptive rather than prescriptive.

compliance with the mandate by responsible administrators will be short-term by definition.²⁴

The distinction between short-term and long-term indeterminacy is illustrated by a hypothetical case involving compulsory vaccination. Assume that doctors have developed a vaccine. Through a testing process, they can determine fairly quickly whether it is effective or has harmful side effects. This indeterminacy about means is resolvable in the short term through empirical methods. The testing will undoubtedly be complete well before the case arrives in court. Any doubts that the judge has about these issues can be satisfied through the introduction of expert testimony on the research findings. Nevertheless, indeterminacy about values may persist. For example, parents may sue to prevent their children from being inoculated because their religion forbids such medical treatment. The State will argue that these beliefs should be subordinated to its interest in promoting the public's health, safety, and welfare. Because this dispute will probably be decided through moral discourse, doubts about the propriety of the resolution will often persist. Because of the long-term nature of value indeterminacy, the debate about the morality of compulsory vaccination can properly be reopened. On the other hand, reevaluation of the vaccine's efficiency and safety is likely to seem fatuous unless some new, contradictory evidence has been unearthed.

5. *Quantifiability*

Indeterminacy is quantifiable if specific numerical probabilities can be used to characterize the likelihood that each member in a set of possible outcomes or solutions is the correct choice.²⁵ Indeterminacy is high if a decisionmaker must choose from a large set of extremely disparate alternative solutions, none of which has a high probability of being correct. Indeterminacy is low if the decisionmaker must choose from a small set of narrowly limited alternatives, at least some of which have a high probability of being correct.²⁶

24. Prescribing the time at which intervention will be evaluated does not define the long-term or short-term nature of all forms of indeterminacy about implementation implicated by a decision. Although a compliance schedule can impose temporal limits on indeterminacy about the defendants' willingness to cooperate, it does not establish parallel limits on broader kinds of indeterminacy, such as whether officials are generally willing to cooperate or whether the possibility of non-cooperation should affect the formulation of remedies for plaintiffs.

25. In classical decisionmaking theory, a "risk" is a probability of known magnitude, while an "uncertainty" is a probability of unknown magnitude. See Edwards, *The Theory of Decision Making*, 51 PSYCHOLOGICAL BULL. 380, 390-91 (1954). Indeterminacy as used here covers both concepts. If indeterminacy is quantifiable in the abstract, but the cost of doing so is prohibitive, then indeterminacy will be deemed nonquantifiable. Where the costs of information decline substantially, this type of indeterminacy may become quantifiable.

26. Indeterminacy that is quantifiable can be characterized through two gross measurements: (1) the mean of the distribution of conditional probabilities that any given solution is correct, and (2) the variance of the distribution of outcomes. See *supra* note 16 and accompanying text. For

Quantifiability is related to the substantive domain of indeterminacy. Quantifying value indeterminacy may strike the reader as anomalous.²⁷ Conceivably one could use a plebiscite to quantify relative societal commitment to various competing propositions. A comprehensive measure would account not only for the number of adherents to a proposition but also for the intensity of their beliefs. Because the individuals polled could misrepresent the depth of their commitment, however, quantification of value indeterminacy could be seriously distorted without any readily available means to monitor, eliminate, or control for the inaccuracy.²⁸

By contrast, social scientists have taken up the quantification of

purposes of simplicity, this discussion assumes that specific numerical probabilities can be assigned to the success of each outcome in the sample.

27. Limits on the quantifiability of social issues have not always been so apparent. For example, in the 1800's, Adolphe Quetelet, a Belgian astronomer, attempted to create a social physics by applying the methods developed in the natural sciences to political, social, and moral phenomena. He firmly believed that the social order was governed by laws that exhibited the same regularity as those governing the physical world, and that these laws could be revealed through the application of statistical methods. Quetelet's story is an extreme example of the effort to "mathematize" society. For a lively account of his attempt, see Porter, *The Mathematics of Society: Variation and Error in Quetelet's Statistics*, 18 BRIT. J. HIST. SCI. 51 (1985). See generally PROBABILITY SINCE 1800 (M. Heidelberger, L. Kruger & R. Rheinwald eds. 1983) (collecting contributions to symposium on the history of probability theory). Ironically, the very effort to quantify indeterminacy through statistical techniques may have heightened general awareness of the pervasiveness of chance. Porter, *supra*, at 62-63.

28. People may misrepresent the intensity of their commitment due to the difficulty of describing and comparing subjective states or due to their desire to influence the decisionmaking process. The problems of accurately ascertaining and quantifying individual values are serious. Some promising efforts have been made to develop voting rules that encourage voters to reveal their true preferences. D. MUELLER, PUBLIC CHOICE 68-89 (1979). Nevertheless, the generally-recognized dilemma in this area persists: The more sensitive a voting rule is to intensities of preference, the more distortion is possible through manipulative voting strategies. See R. MUSGRAVE & P. MUSGRAVE, *supra* note 18, at 111.

The collective decisionmaking process will sometimes more accurately reflect the intensity of preferences through processes that combine issues in packages or platforms and permit logrolling, or trading votes, on issues. See D. MUELLER, *supra*, at 49-58 (vote trading improves outcomes of collective decisionmaking where voters have an equal stake and state their preferences honestly). The competitive political effort to win votes by creating attractive platforms or package proposals will account for individual preferences more efficiently. R. MUSGRAVE & P. MUSGRAVE, *supra* note 18, at 115-16; see J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (5th ed. 1976) (analyzing democratic process as method of ensuring free competition among political representatives for a free vote); see also A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1956) (setting forth model of legislative process in which representatives act to maximize their chances for reelection).

Packaging issues and logrolling seem more consistent with legislative, than judicial, proceedings. The very process of singling out an issue for judicial review can reduce the courts' ability to weigh individual value preferences, even if they command the resources to do so. Moreover, the lower courts are largely unable to structure their dockets to facilitate vote trading across cases. Only the Supreme Court can significantly manipulate the set of cases and issues it will decide at a given time. See *infra* notes 59-60 and accompanying text. The larger number of judges on the Court may also enhance the possibilities for logrolling. Nine justices with control of their

indeterminacy about means and implementation as a chosen profession. The classic social science finding reports the probability that independent and dependent variables are not correlated and indicates whether this probability is less than some collegially-determined threshold of significance.²⁹ Decisionmakers in the judicial process are likely to rely on experts or officials for definitive answers to questions about means and implementation. Insofar as these experts or officials perceive their role to be quantifying, rather than resolving, indeterminacy, a distinctly frustrating dialogue at cross-purposes will result.

The relative quantifiability of indeterminacy can affect the decision-making process. Judges may be better able to assess the costs and benefits of various forms of intervention where indeterminacy is quantifiable. At the same time, however, judges may confuse the quantifiability of indeterminacy with heightened determinacy in the decisionmaking process. The availability of expert testimony and statistical evidence can further compound this error, just as it influenced perceptions of resolvability discussed earlier.

6. *Cost of error*

Indeterminacy in the decisionmaking process implies the possibility of erroneous intervention. Decisionmakers are concerned with not only the probability of erroneous intervention but also its associated costs. For example, the cost of error may exceed the foregone benefits of correct intervention where the demand for reform is politically volatile and

docket may be more apt to trade votes or package issues than district judges who sit alone or three-judge appellate panels with no significant power to determine their overall caseload.

In fact, there is some evidence that logrolling occurs on the Court. W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 56-68 (1964); B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* 226, 266, 276, 303, 448 (paperback ed. 1979); cf. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823-24, 832 n.63 (1982) (assuming that logrolling does not occur on the Court so that Arrow's impossibility theorem can be applied to explain fluctuating plurality opinions). Yet, even the Supreme Court's relative advantages in this regard probably do not match the capacity of the legislature to package issues and trade votes.

In test-case litigation, the courts frequently confront disputes that spring from some form of legislative failure. If the legislature, with its theoretical and practical advantages in gauging individual preferences, cannot satisfactorily quantify or resolve value indeterminacy, how can the courts be expected to do so? The judiciary's peculiar disadvantages in this regard suggest that its role in such value disputes may be more heavily symbolic, than instrumental. See *infra* notes 66-83 and accompanying text. Alternatively, one could argue that the Court serves as a decisional oligarchy for resolving disputes that cannot otherwise be decided through collective choice processes. See D. MUELLER, *supra*, at 16-17 n.5. These possibilities are by no means mutually exclusive.

29. See Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1054 n.20 (1985). The established convention is that the probability that the dependent and independent variables are not correlated is less than 5%. A more stringent threshold that social scientists frequently use is 1%. See L. HOROWITZ, *ELEMENTS OF STATISTICS FOR PSYCHOLOGY AND EDUCATION* 166-68 (1974).

intense.³⁰ Decisionmakers must therefore consider not only the likelihood of mistake, but also the intensity of various groups' reactions to error.

The cost of error will also vary according to the distribution of the burdens and benefits of a particular solution. If the burdens are narrowly concentrated, the affected group is likely to mobilize to protest the decision, especially if the chosen solution is arguably ineffective. A narrow concentration of burdens is thus apt to spark demands for alternative solutions. Where the benefits of a solution are narrowly concentrated, the advantaged group will not protest an otherwise ineffective solution as long as its own benefits materialize. In fact, this group will mobilize to prevent changes that threaten its benefits by exaggerating the utility of the chosen solution, attacking the merits of alternative solutions, and refusing to acknowledge the full range of available solutions. A high concentration of benefits is therefore likely to rigidify the decisionmaking process. The distribution of burdens and benefits is related to the intensity of individual preferences. A diffusion of burdens or benefits reduces the possibility that affected groups will mobilize because each group member's stake in the issue is quite small.³¹

Pennhurst provides an interesting example of the effects of the distribution of a proposed solution's burdens and benefits. The plaintiffs originally requested modest improvements at *Pennhurst* but later amended their complaint to seek closure of the institution. A decision mandating modifications could have benefited not only the mentally retarded residents but also service professionals and administrators who would have enjoyed enhanced resources to do their job.³² Closure, on the other hand, threatened the latter's livelihood while possibly increasing the overall costs of compliance (p. 330). Although a diffuse group of taxpayers theoretically would bear any general cost increase, the burden could have been perceived as concentrated because limited funds had to be reallocated among various state programs (pp. 343-44, 348-50). The shift in proposed remedies also sparked the organization of dissident parents who perceived themselves as disproportionately burdened by a closure order because they doubted the efficacy of community placement or wished to avoid the stigma of encountering their mentally retarded chil-

30. The solution of a problem may produce "a crisis of rising expectations," while the failure to solve it may provoke violence and hostility. Under these circumstances, the cost of error is high, while the benefits of successful intervention are much more modest. See S. OLSON, CLIENTS AND LAWYERS 5-7 (1984) (describing rising expectations due to government intervention).

31. See Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 366-72 (J. Wilson ed. 1980); J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 14-18 (1978).

32. See Diver, *supra* note 8, at 70-71 (officials with direct operating responsibility at institutions, though defendants, are likely to support plaintiffs' claims that more funds or additional personnel are needed).

dren in the community (pp. 275-78, 352-54). The transformation of *Pennhurst* potentially could have impelled another group to mobilize for protest: property owners or residents who opposed the creation of a small-scale treatment facility in their neighborhood. Burt does not discuss opposition by such groups or its effect on the implementation process, however.

Burt is skeptical of some attorneys' claims that the shift to a closure remedy was "a crucial and regrettable turning-point in the litigation" (p. 311). Certainly, though, the significant alteration in the distribution of the proposed solution's burdens and benefits may have changed the dynamics of the litigation and accelerated the breakdown of apparent consensus among the parties. The distributional effects of a solution, as well as the magnitude of error, can seriously affect the decisionmaking process.

B. The Implications of the Array for the Case Studies

All of the case studies in Mnookin's book involve test-case litigation. This term is never clearly defined but the studies share the following characteristics: (1) novel issues of law are raised by (2) multiple plaintiffs, a class of plaintiffs, or an organizational plaintiff (3) with direct or indirect involvement by public-interest lawyers (4) in a case brought in federal court (5) against a state or local governmental entity or its representative. Under these circumstances, all of the cases undoubtedly illustrate decisionmaking in the face of high levels of long-term, irresolvable indeterminacy with a potentially high cost of error.³³

When confronted with broad demands for immediate action in the face of high levels of long-term, irresolvable, and potentially costly indeterminacy, judges are likely to resort to a variety of avoidance devices that either suppress indeterminacy or redefine responsibility for making a decision.³⁴ As later illustrations from the case studies will show,³⁵ courts in test-case litigation are especially prone to rely on avoidance devices because the issues are framed in ways that emphasize indeterminacy. The use of these devices can frustrate the plaintiffs' efforts to obtain satisfactory relief.

Understanding indeterminacy enables plaintiffs to optimize the chances for meaningful judicial intervention. Even in novel lawsuits at

33. This conclusion is reinforced by Mnookin's observation that four of the five case studies related to problems of race or poverty, and the fifth, to problems of the handicapped. *See supra* note 2. These characteristics undoubtedly compound problems of indeterminacy by introducing perplexing questions about the values implicated by the claims of traditionally disadvantaged groups and the best methods of vindicating these values.

34. *See infra* notes 39-48 and accompanying text.

35. *See infra* notes 49-62 and accompanying text.

the cutting edge of reform, attorneys may do well to couch their claims in ways that make indeterminacy manageable. Plaintiffs should not emphasize value disputes but should, where possible, focus on questions relating to means and implementation.³⁶ Value indeterminacy is apt to be long-term and irresolvable. It may also entail a high cost of error if the values at issue are central to the disputants' way of life.³⁷ Means and implementation indeterminacy lend themselves more readily to quantification by experts, a practice that leads courts to believe that the indeterminacy is resolvable. For example, where appropriate, counsel should frame their requests for relief as specifically as possible so that in evaluating a claim of right, the judge can be confident of a workable remedy. Plaintiffs can also suggest short-term evaluations of the requested judicial intervention to make implementation indeterminacy seem more susceptible of prompt resolution.

Defendants could conceivably counter these tactics by highlighting indeterminacy as much as possible. This defense strategy can have unpredictable consequences, however. If courts react by employing avoidance devices, their response may be as unsatisfying for defendants seeking clear-cut vindication as for plaintiffs seeking major reforms. Defendants may therefore be better off presenting their own limited range of attractive alternatives in a way that understates indeterminacy. This approach can be especially advantageous when defendants have better access to experts who can address questions relating to means and implementation. For example, in some institutional reform cases, defendants may have a virtual monopoly on experts who are familiar with the institution's special problems.³⁸

These strategies should not be automatically condemned as ways to manipulate courts by rendering indeterminacy latent. If courts otherwise avoid high levels of indeterminacy in a manner that frustrates the parties' demands, the litigants will not necessarily mask indeterminacy to a greater extent than courts do, and they may improve their chances for

36. In fact, this may be what happened in *Goss v. Lopez* when the plaintiffs' lawyers transformed broad grievances about institutional racial discrimination into a legal complaint that examined the appropriate procedures to employ in subjecting students to long-term suspensions. See *supra* Part I, Section E.

37. See, e.g., K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 192-215 (1984) (arguing that current debate over abortion is particularly hard-fought because it is a referendum on the place and meaning of motherhood); see also G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 87-114 (1985) (describing intensity of conflict when ideals clash in the context of abortion debate). I plan to address the intractability of value disputes further in an upcoming essay on bilingual education as a status conflict.

38. See, e.g., M. REBELL & A. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS* 159-67, 174 (1982) (defendant school district presented comprehensive expert testimony and data on its approach to linguistic minority students, which plaintiffs were unable to counter with general criticisms and testimony about abstract educational theories).

meaningful judicial intervention. To understand why and how courts avoid indeterminacy, this Review will now turn to an analysis of judicial avoidance.

IV

JUDICIAL AVOIDANCE: WHY INDETERMINACY MATTERS

The previous treatment of indeterminacy facilitates an understanding of judicial avoidance. This Review will first examine the process by which test-case litigation generates avoidance. It will then describe different avoidance devices observed in the case studies.

A. The Features of Test-Case Litigation that Generate Avoidance Responses

In test-case litigation, attorneys frequently force the courts to confront novel issues against a background of wide-ranging policy arguments. This approach does not allow the court to make marginal adjustments to established doctrine. Rather, it forces the courts to embrace a model of comprehensive rationality, or synopticism. Under this model, a judge must specify the goal to be attained, identify all possible methods of achieving it, evaluate the effectiveness of each method, and select the most efficient method.³⁹

By contrast, traditional litigation enables a judge to employ a model of incrementalism. Under this model, policymaking is ad hoc and narrowly confined in scope. Policymakers consider a small set of alternatives that differ only slightly from each other and from the status quo. Moreover, these analysts consider only a narrow range of consequences for each alternative and "routinely exclude remote or uncertain consequences, even though those consequences might prove momentous. [T]he [incremental] process is dynamic and remedial . . . [consisting of] a series of small adjustments and avowedly temporary 'fixes'."⁴⁰ Over-arching utopian visions play no part in the process. Incrementalism often occurs through decentralized decisionmaking.⁴¹

Forcing judges into a synoptic mode in test-case litigation necessarily presents them with a task of Herculean proportions.⁴² A decisionmaker confronted with demands for immediate and comprehensively

39. See Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396 (1981); Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?*, 2 LAW IN TRANSITION Q. 134, 137 (1965).

40. Diver, *supra* note 39, at 399.

41. *Id.*; Shapiro, *supra* note 39, at 138-39.

42. See, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 50-52, 63 (1973) (rejecting comprehensively rational "in-the-best-interests-of-the-child" standard as unworkable, documenting the limits on the court's capacity to predict the effects of child-placement decisions, and proposing adoption of a "least-detrimental-alternative" standard).

rational action in the face of high levels of long-term, irresolvable, and potentially costly indeterminacy will find the situation extremely unpleasant. Under these circumstances, the decisionmaker is likely to experience cognitive dissonance that results in the suppression of indeterminacy.⁴³ The judge will find the requirement of intervening without decisive data inconsistent with the role of synoptic decisionmaker.⁴⁴ To achieve cognitive consistency, the judge will alter one of these perceptions. Because the role of the judge as synoptic decisionmaker presumably is more resistant to change than perceptions of the level of indeterminacy,⁴⁵ the judge probably will suppress perceptions of indeterminacy.⁴⁶ If the level of indeterminacy is so high that suppression is not

43. Cognitive dissonance occurs when a person holds inconsistent beliefs that create tensions to reduce or eliminate the inconsistency. The more important the beliefs, the stronger will be the motivation to achieve cognitive consistency. Because positive beliefs about one's self are highly important, cognitions that are seriously inconsistent with a positive self-image will generate considerable dissonance. See generally L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1-31 (1957) (describing how inconsistent cognitions arouse dissonance and how actors reduce dissonance by altering or adding cognitions).

Although Festinger originally described his theory purely in terms of inconsistent cognitions, subsequent theorists have adduced alternative theories to explain his experimental results. For example, impression management theory focuses on a person's need to present a consistent image to others. Dissonance arises when people believe that others consider them to have behaved incongruously; if others were not scrutinizing their conduct, dissonance would not arise. Tedeschi, Schlenker & Bonoma, *Cognitive Dissonance: Private Ratiocination or Public Spectacle?*, 26 AM. PSYCHOLOGIST 685, 691 (1971). This approach converts cognitive dissonance into a sort of "face-saving theory." *Id.* at 694; P. ZIMBARDO, *THE COGNITIVE CONTROL OF MOTIVATION* 15 (1969).

Another theorist has explained Festinger's observations by equating the process by which individuals use external cues to evaluate others' attitudes with that for evaluating their own attitudes—at least where internal cues are weak, ambiguous, or uninterpretable. In other words, people form opinions about their own attitudes, emotions, and other internal states based on what they think others would infer from their overt behavior. Bem, *Self-Perception Theory*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 2, 4-8 (L. Berkowitz ed. 1972). For a general overview of the issues, see R. WICKLUND & J. BREHM, *PERSPECTIVES ON COGNITIVE DISSONANCE* 260-84 (1976). For a good recent discussion of the alternative views of the impression management school, see Schlenker, Forsyth, Leary & Miller, *Self-Presentational Analysis of the Effects of Incentives on Attitude Change Following Counterattitudinal Behavior*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 553 (1980).

44. The judge's perceptions of the rationality of the process may be misplaced and in part derive from efforts to quantify indeterminacy in other realms. Schumpeter has argued that the quantification of economic exchange resulted in attempts to quantify and rationalize other social and moral phenomena. J. SCHUMPETER, *supra* note 28, at 123-24. For a competing account of the source of efforts to rationalize social and moral phenomena, see *supra* note 27. Because this Review focuses on judge's beliefs about their role, regardless of their accuracy, it will not address the "rationalist critique."

45. See R. WICKLUND & J. BREHM, *supra* note 43, at 124-26 (discussing difficulties in measuring resistance to change of cognitive elements).

46. *Id.* at 243-45. This process occurs unconsciously, rather than as the product of conscious manipulation. Interestingly, the unconscious process of selective exposure may begin only after the judge has reached a "tentative" decision. *Id.* at 170-90 (summarizing findings on selective exposure after a commitment has been made). The speed with which a "tentative" decision is made may in turn depend on whether the judge is a generalist or a specialist. See *infra* note 84.

These unconscious processes do not, however, preclude the possibility of conscious efforts by

feasible, the judge may seek ways in which to deny full responsibility for making a decision. Cognitive dissonance arises only when a decisionmaker feels responsible and accountable for the consequences of intervention.⁴⁷ By disclaiming responsibility or displacing it onto another, the judge can alleviate dissonance when other beliefs, attitudes, and perceptions are resistant to change.

Indeterminacy alone cannot entirely explain these judicial responses. Indeed, such a reductionist analysis would hardly do justice to the complexity of judicial choice. This Review simply argues that indeterminacy plays an important role in shaping judicial decisionmaking. Although this account emphasizes cognitive dissonance, the underlying processes that generate avoidance responses can alternatively be explained in nonmotivational terms. For example, proponents of cognitive heuristics contend that decisionmakers develop shortcuts, or heuristics, for coping with indeterminacy when the costs of information are too high. This "satisficing" behavior is entirely rational under the circumstances. A motive to achieve consistency plays no part in people's unconscious reliance on these information-processing techniques. The use of these heuristics only becomes irrational when they are applied in inappropriate situations.⁴⁸

the parties to manipulate indeterminacy to achieve a favorable outcome in the decisionmaking process. The very notion of conscious manipulation to achieve a favorable outcome may seem paradoxical in the context of high levels of indeterminacy. After all, how do parties conclude that an outcome is beneficial under these circumstances? One way is to redefine the criteria for labeling an outcome as favorable in a way that avoids indeterminacy. For example, a group seeking improved conditions for the educable mentally retarded may hail increased funding for training these individuals as a "victory," regardless of whether the training in fact leads to improved skills. Advocates have redefined a "favorable" outcome in determinate terms (the allocation of funding), rather than indeterminate ones (the impact of funding). See M. FEELEY & A. SARAT, *THE POLICY DILEMMA* 47-48 (1980) (in the face of indeterminacy about how to reduce crime, the Law Enforcement Assistance Administration became little more than a check-writing machine).

47. See R. WICKLUND & J. BREHM, *supra* note 43, at 51-71 (discussing relevance of foreseeability and responsibility to dissonance). For evidence of the great sense of responsibility for decisionmaking that is instilled in judges, see Goldberg, *Judicial Socialization: An Empirical Study*, 11 J. CONTEMP. LAW 423, 429 (1985) (interviews with District of Columbia superior court judges indicated a persistent awareness of "overwhelming" responsibility and power).

Another prerequisite for the arousal of dissonance is the decisionmaker's perception that any commitment to a belief or attitude was the product of free choice, rather than coercion. See R. WICKLUND & J. BREHM, *supra* note 43, at 25-50. One could argue that most judges do not perceive their commitment as a product of free choice because they must decide the cases assigned to them and have no control over their docket. Of course, the Supreme Court does not fit this model. See *supra* note 28, and *infra* notes 59-60 and accompanying text. However, judges express a deep sense of responsibility because they focus on their freedom to choose among a variety of alternatives in a given case, rather than on their control over case assignments. This Review therefore assumes that judges do not perceive their decisions as "coerced" in a manner that would prevent cognitive dissonance.

48. Ross & Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 135 (D. Kahneman, P. Slovic & A. Tversky eds. 1982).

If courts generally rely on institutional and procedural devices as heuristics when data collection is not cost-efficient, these rules of thumb would produce problems in test-case litigation only because they are misapplied. That is, shortcuts are utilized when in fact the courts could profitably invest some resources in accumulating additional information. Each of these rationales is plausible, and they need not be mutually exclusive. In any event, both make clear the importance of indeterminacy in the decisionmaking process.

B. Methods of Avoidance Observed in the Case Studies

The case studies illustrate a variety of ways in which the courts have alleviated dissonance through suppression of indeterminacy or abdication of responsibility. These include: (1) restatement of the issues; (2) emphasis on a sympathetic fact situation; (3) reliance on areas of agreement; (4) reaction to distributional consequences; (5) reallocation of the burden of proof; (6) deferral of a decision; (7) disclaimers of authority; and (8) diffusion of responsibility.⁴⁹

1. Restatement of the Issues

By restating issues in narrow, legal terms, the courts can not only minimize the significance and visibility of broad, indeterminate social issues but also restructure their decisionmaking responsibility. In test-case litigation, the judge may have to assume a particularly active role in reframing issues if the parties make broad philosophical claims that require wide-ranging judicial findings. For example, in *Goss v. Lopez*, the Supreme Court did not attempt to dictate the "best" hearing procedures for schools to employ when students were subjected to long-term suspension. Instead, the Court decided what minimal procedures were necessary to satisfy the due process clause. By restating the issue in legal terms, the Court avoided considerable indeterminacy regarding the most effective methods for disciplining recalcitrant students and redefined the limits of its responsibility for intervention.⁵⁰

49. Other empirical research also suggests that reliance on avoidance techniques is not unusual. In a study of 65 federal trial court proceedings decided between 1970 and 1977 that involved educational policymaking, two investigators concluded that judges frequently employed avoidance devices. They described four devices: (1) irrelevance, or a conclusion that a party's evidence was outside the scope of the legal rule being applied; (2) relying on a failure to satisfy the burden of proof; (3) maximizing areas of agreement between the parties; and (4) deferring to another governmental body's resolution of social-fact questions similar to those presented in the pending litigation. M. REBELL & A. BLOCK, *supra* note 38, at 21, 50-54. The first three devices resemble restatement of the issues, reallocation of the burden of proof, and heavy reliance on areas of agreement. The last resembles the legitimate use of shorthand devices to avoid time-consuming and repetitive resolution of indeterminacy.

50. Mnookin makes a similar observation when he remarks that "substantive disputes about policy may be transmuted into due process claims" (p. 519). Mnookin argues that heavy reliance on

2. *Emphasis on a Sympathetic Fact Situation*

The courts may rely heavily on a particular fact situation that makes the case seem "easy," even if its broader implications are doubtful. This process also suppresses indeterminacy and redefines decisionmaking responsibility. Thus, in *Smith v. OFFER*, the district and appellate courts confronted a class action of broad and uncertain implications. Yet, Mrs. Smith was a sympathetic plaintiff, and there was little disagreement about the proper outcome in her case. The courts therefore focused on achieving the appropriate outcome in Mrs. Smith's case, while limiting their decisions' implications for other members of the class (pp. 112-17).

3. *Overreliance on Areas of Agreement*

Decisionmakers can also suppress indeterminacy and redefine responsibility by overemphasizing limited areas of substantive agreement. For example, the courts may place considerable emphasis on family autonomy, simply because there appears to be greater consensus about this value. For example, Mnookin has recommended according significant weight to family autonomy principles in an earlier article advising judges on how to formulate standards in child custody disputes.⁵¹ Similarly, in *Pennhurst*, the judge and parties overemphasized their consensus about the desirability of some reform in the treatment of the mentally retarded. Consequently, they did not adequately address the problems of what remedy to implement, a source of considerable disagreement (pp. 24, 304-05). As *Pennhurst* illustrates, overreliance on areas of agreement can diminish the quality of judicial intervention when apparent consensus breaks down in an ongoing lawsuit seeking institutional reform.⁵²

procedural remedies is partly a result of training and inclination but that "there is a deeper reason as well, having to do with the enigmatic nature of the interests of children" (p. 520). Mnookin also contends that because the courts recognize that a general rule helps some children and hurts others, they seek to avoid the adverse consequences by establishing individualized hearings (p. 520). However, these hearings may vest excessive discretion in idiosyncratic, low-level decisionmakers (p. 521).

The claim here is somewhat different. First, "legal training and inclination" that rely heavily on procedure are not wholly fortuitous phenomena. Instead, if indeterminacy permeates the legal process, standard legal training would logically preoccupy itself with procedural remedies, rather than highly indeterminate substantive issues. See S. SCHEINGOLD, *supra* note 21, at 158-62 (arguing that legal education fosters use of processes that simplify and focus issues without promoting clarification and understanding of complex problems).

Second, my claims about restating the question emphasize the restructuring of the process to highlight consensus. The use of individualized hearings is only one possible device for coping with indeterminacy, and it may serve more than one purpose. See *supra* note 49, and *infra* notes 51-62 and accompanying text. While individualized hearings are certainly an important feature of judicial decisionmaking, they hardly exhaust the possible responses to indeterminacy.

51. Mnookin, *supra* note 13, at 264-65.

52. See *supra* note 7 and accompanying text and *infra* notes 80-83 and accompanying text.

4. *Reaction to Distributional Consequences*

Courts will be more influenced by the predictable distributional consequences of a decision when confronted with highly indeterminate, irresolvable substantive issues.⁵³ For example, a judge may decide a case in a way that maximizes net benefits to well-organized groups likely to protest any adverse effects they suffer. In child-advocacy cases, courts will be especially attentive to claims made by service professionals, such as teachers and social workers, who are better able to mobilize for protest than disorganized parents and children. This attentiveness may be compounded by the fact that service professionals frequently are responsible for implementation of a court's decree. If the development of public-interest law firms has redressed this organizational imbalance, however, these distributional considerations will be less influential. The courts may also select remedies that not only concentrate benefits but also diffuse costs, thereby minimizing the possibility of protest. Distributional consequences may have a more pronounced impact on decisionmaking where the level of indeterminacy is sufficiently high that other means of suppression, such as restatement of the issues or emphasis on sympathetic facts, are no longer feasible.

5. *Reallocation of the Burden of Proof*

Courts can also suppress indeterminacy and redefine responsibility for decisionmaking by shifting the burden of proof. By simply concluding that one party has failed to sustain its burden, the decisionmaker avoids acknowledging that indeterminacy makes it impossible to ferret out conclusive information. The allocation of the burden of proof under such circumstances determines the outcome of the case.⁵⁴

In the case studies, the allocation of the burden of proof was frequently a source of contention. In *Smith v. OFFER*, for example, the plaintiffs sought to alter the procedures for transferring foster children from homes in which they had resided for over one year. They challenged the notice and hearing requirements under applicable state regulations as constitutionally inadequate, arguing that the State had to provide a full hearing before the child's removal (p. 81). In essence, they sought to impose a heavier burden of proof on state officials planning to alter the status quo.

53. See *supra* notes 30-31 and accompanying text. This technique for dealing with indeterminacy may be used consciously; however, it can also be the unconscious product of repeated decisionmaking in indeterminate test-case litigation. The behavior of judges may be gradually shaped by prior positive and negative experiences with the formulation of remedies in such cases.

54. Martin Shapiro has chronicled the same phenomenon in administrative decisionmaking and judicial review under conditions of high indeterminacy. See Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L. J. 1487, 1508-09 (1983).

In a lawsuit antedating *Pennhurst*, plaintiffs representing institutionalized mentally retarded patients argued that a state special education act was unconstitutional because it excluded persons on the ground of uneducability or untrainability. The plaintiffs contended that as a factual matter, all mentally retarded persons were capable of benefiting from educational efforts (p. 298). The defendant state officials initially acceded to this claim in reaching a consent agreement, although this consensus subsequently disintegrated (pp. 300-01). By eliminating the exception for uneducable or untrainable persons, the plaintiffs shifted to the State the heavy burden of establishing other grounds for refusing to provide educational programs for the mentally retarded.

In *Goss v. Lopez*, the plaintiff students challenged the state statutory procedures for long-term suspension as constitutionally inadequate. The plaintiffs contended that due process required more stringent procedural protections, including a hearing, before a student could be suspended for over 10 days (pp. 471-72). Again, the plaintiffs were arguing that school administrators should bear the burden of proving the propriety of long-term suspension before intervention, rather than requiring students to prove impropriety after the fact.⁵⁵

As these examples illustrate, the burden of proof may be allocated by statute or regulation, but the judiciary's interpretation of the statute and its constitutionality may reallocate the burden. This device can be used without ever acknowledging that high levels of indeterminacy render the allocation of the burden of proof outcome-determinative.⁵⁶

55. In *Bellotti v. Baird*, the plaintiffs challenged a state abortion law requiring parental notification if a minor sought judicial authorization for an abortion, rather than securing both parents' consent (pp. 150, 167). The plaintiffs argued that the notification requirement violated due process and equal protection (p. 171). The purpose of notification was to allow parents to voice their objections to their minor child's planned abortion (p. 167). In seeking to abolish the requirement, the plaintiffs did not actually try to shift the burden of proof. Pregnant minors still had to go to court and convince the judge that they should be allowed to have an abortion. Yet, eliminating a primary source of opposition undoubtedly made it easier for pregnant teenagers to sustain their burden of proof.

In *Roe v. Norton*, the plaintiffs challenged as unconstitutional a state maternal cooperation requirement that mandated that mothers receiving AFDC identify the fathers of their children or be jailed for contempt (pp. 381-82, 386-88). The lawsuit focused on abolishing the contempt statute altogether, rather than shifting the burden of proving its applicability. In essence, the case sought to shift the burden of non-cooperation from mothers receiving AFDC to the State.

56. As this discussion makes clear, the courts seldom were asked to determine the best interests of children without further guidance. Each case involved regulations or statutes, only some of which referred to the "best interest" standard. Mnookin never explains whether this additional statutory language contributed to the clarity of the decisionmaking process. Instead, he focuses exclusively on the "best interest" standard in his analysis of the effects of indeterminacy on the decisionmaking process (pp. 17-18). Chambers and Wald briefly mention the possibility of legislative presumptions that would employ a test other than the "best interest" standard (p. 128). They express some doubt that legislatures will devote sufficient time to arriving at sensible solutions, although they recognize the utility of such an approach (pp. 128-29). While this concern is

6. *Deferral of a Decision*

Decisionmakers may defer intervention when confronted with indeterminacy. Decisionmakers will rarely use this technique explicitly, instead relying on less obvious methods of deferring a decision. After all, indeterminacy only becomes a thorny problem when coupled with a demand for immediate action, and open delay is unlikely to satisfy this demand. Mnookin provides one example of a subtle decision-deferral device when he documents the courts' heavy reliance on individualized hearings (p. 519). These hearings permit individual field-level officials to resolve indeterminacy on a deferred case-by-case basis. As another decision-deferral device, the courts may also delegate considerable discretion to special masters or administrators in implementing particular remedies.

Courts confronted with demands for immediate action can achieve greater flexibility in responding to indeterminacy by employing decision-deferral devices. The use of decision-deferral devices is most effective where low levels of indeterminacy are resolvable in the short term. Judges are most likely to acknowledge indeterminacy in its fullest proportions under these circumstances. Explicit acknowledgment of indeterminacy can then be successfully coupled with deferral, monitoring by independent observers, and judicial evaluation.⁵⁷

Yet, decision-deferral devices also can be a highly disingenuous response to indeterminacy. Their use is more probably a means of suppressing indeterminacy or abdicating responsibility where high levels of indeterminacy are irresolvable or resolvable only in the long term. As Mnookin points out, field-level decisions are generally less visible, and delegating discretion to administrators or hearing officers may simply serve to suppress indeterminacy.⁵⁸ Moreover, in the absence of careful follow-up and evaluation, deferral of a decision may be nothing more than a way of abdicating responsibility for making a decision. As with

legitimate, it is to some extent belied by the pervasive statutory and regulatory provisions encountered in the studies.

57. Chambers and Wald recommend in their case study that indeterminacy be more openly acknowledged and systematically addressed by broadening input into the judicial process (pp. 137-47). This Review's in-depth analysis of indeterminacy indicates that such suggestions are likely to go unheeded unless the level of indeterminacy is low and resolvable in the short term. Moreover, even if judges receive diverse information, it is unclear how they will process it if they have made a "tentative" decision early in the case. For example, some individuals who have tentatively committed themselves to a position will attend to conflicting information because they consider themselves "intellectually honest." The information may not cause these judges to change their position, however. In fact, they may seek out the inconsistent data only to refute it and thereby reassure themselves of the correctness of their decision. R. WICKLUND & J. BREHM, *supra* note 43, at 173-74. Chambers and Wald's prescriptions raise several other problems as well, which will be discussed at greater length below. See *infra* notes 81-83 and accompanying text.

58. See *supra* note 50.

reactions to distributional consequences, the disingenuous use of deferral devices is likely to occur when indeterminacy is so high that other methods of suppression are not feasible.

7. *Disclaimers of Authority*

While total abdication of responsibility for decisionmaking seldom occurs openly because of its damaging institutional consequences, this response can occur in subtler ways. In *The Least Dangerous Branch*,⁵⁹ a classic exposition on judicial review, Alexander Bickel has catalogued avoidance devices employed by the Supreme Court. Among these devices, he lists reliance on standing, ripeness, the requirement of a case or controversy, the denial of certiorari, and the political question doctrine.⁶⁰ Denial of certiorari is far and away the Supreme Court's most effective device for avoiding decisionmaking. Lower courts must rely on other, much less effective devices.

The case studies provide several examples of disclaimers of authority. In *Bellotti*, for example, the Supreme Court refused to pass on the constitutionality of a Massachusetts statute regulating teenage abortions until the state court had an opportunity to render an "authoritative construction" of its parental consent requirement (p. 191). Yet later, the Court issued a plurality opinion that suggested what sort of juvenile abortion statute would be constitutional. Mnookin describes the plurality's remarks as essentially an advisory opinion (p. 217). He suggests that besides providing needed guidance to state legislatures, the plurality may have discussed these issues to explain why the Court refused to decide the case until the state court interpreted the statute (p. 217). The plurality's guidelines made clear that the state court could conceivably have construed the law in a constitutionally acceptable way, even though such a reading would have required a considerable judicial gloss on the statutory language (pp. 189-90, 194-97).

In *Pennhurst*, the federal district court denied a motion to reopen the trial made by parents who opposed closure of Pennhurst. The parents argued that their special parental perspective had not been adequately represented at trial. The judge denied the motion on two grounds. First, the state and county defendants had already filed an appeal from the closure order so the court no longer had jurisdiction in the case. Second, the parents failed to speak up at earlier and more appropriate times. Burt describes this ruling as difficult to justify. Nevertheless, the disclaimer of authority did allow the judge to suppress indeterminacy in the decisionmaking process.

59. A. BICKEL, *supra* note 19.

60. *Id.* at 111-98.

A disclaimer of authority is an effective means of suppressing indeterminacy and avoiding responsibility. This device may be used when indeterminacy is so high that other means of suppressing it are no longer workable.

8. *Diffusion of Responsibility*

Courts can also diffuse responsibility for making a decision to reduce cognitive dissonance. When decisionmakers delegate authority to lower court judges, special masters, or field-level officials, they lessen their own accountability for erroneous intervention in the face of indeterminacy. The use of individualized hearings not only suppresses indeterminacy and defers decisionmaking but also diffuses responsibility.

Another device for diffusing responsibility is the use of collective, rather than individual, choice processes. A district court judge sitting alone is less able to diffuse responsibility by looking to his colleagues than an appellate court judge sitting with two other judges or a Supreme Court Justice sitting with eight others. Some diffusion of responsibility for decisionmaking in the face of high levels of indeterminacy may have occurred through the use of three-judge district court panels in four of the five case studies.⁶¹ Diffusion of responsibility may also partially explain the use of group, rather than individual, decisionmakers in rendering final decisions.⁶²

61. The effects of collective, rather than individual, decisionmaking at the trial court level are not extensively addressed in the book. Only the unwieldy nature of the procedure is mentioned. As Chambers and Wald explain, "[d]ue to the time involved in getting judges together, most judges treated such cases [those requiring a three-judge panel] as raising strictly legal issues about which extensive testimony was unnecessary, even inappropriate" (p. 140). The use of multi-member panels may, however, have had other effects on the decisionmaking process through the diffusion of responsibility. If three judges arrived at disparate "tentative" decisions about the case, their attempts to solicit information consistent with their divergent viewpoints might have led to broader input. Chambers and Wald's failure to address the possibility that properly structured multi-member panels could result in more diverse data-gathering is especially disappointing in light of their call for broader input in the process. *See supra* note 57. Moreover, compromises may have been more common in the case studies because of the collective-choice processes employed. *See supra* note 28 and *infra* note 78.

62. Group decisionmakers also may be used because collective choice leads to superior outcomes or alleviates fears about arbitrary or dictatorial behavior. As previously discussed, group decisionmakers may be better able to arrive at outcomes that accurately reflect intensity of preferences. *See supra* note 28. On the other hand, the dynamics of group decisionmaking can distort the deliberative process in unfortunate ways. For example, individuals are sometimes less willing to express their views when they believe that the rest of the group has arrived at a different conclusion. *See, e.g., Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719-20 (1971) (describing pressures on single dissenting juror to conform).

Whatever the reasons, collective decisionmaking to determine final outcomes is a consistent feature of the judicial process. Findings of fact are made collectively by juries, and ultimate decisions about law are made collectively by appellate panels. The major exception to this generalization occurs when a district court judge makes findings of fact in civil cases seeking exclusively equitable relief. *See Lorillard v. Pons*, 434 U.S. 575, 583-84 (1978); *Dairy Queen, Inc. v.*

V

SYMBOLIC POLITICS: CAN AVOIDANCE BE FUNCTIONAL?

A complete treatment of the enigma of indeterminacy would now examine the functional and structural characteristics of courts and evaluate how they affect responses to indeterminacy. The limited scope of this Review does not permit an exhaustive discussion of these institutional features.⁶³ Instead, it will focus on a single functional characteristic of the courts that Mnookin overlooks. Mnookin discusses the policymaking role of the courts at length and contrasts it with their dispute-resolution function (p. 27). He argues that dispute resolution, rather than policymaking, has traditionally been the norm for the courts. This analysis of instrumental functions does not, however, fully capture the rich and variegated role of American courts. Although several other functions could be added,⁶⁴ a particularly important but frequently neglected

Wood, 369 U.S. 469, 470-73 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508-11 (1959) (examples of Court's scrupulous efforts to maintain right to jury trial where cases present both legal and equitable claims).

63. I plan a more comprehensive treatment of these functional and structural characteristics in an upcoming Article that will permit careful comparison of different types of decisionmakers. Mnookin's book does not lend itself to an exhaustive comparison of these characteristics because it focuses almost exclusively on the courts. Only the case study of *Roe v. Norton* entails any in-depth, detailed investigation of other decisionmakers (pp. 408-33).

Although this Review focuses on one neglected functional characteristic of the courts, other relationships between indeterminacy, responses to indeterminacy, and structural features of the decisionmaking process may exist. For example, cognitive dissonance theory predicts that the greater the cost of access, the greater will be the tendency to suppress indeterminacy in the decisionmaking process. See A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 92-94 (1970); see also Aronson & Mills, *The Effect of Severity of Initiation on Liking for a Group*, 59 J. ABNORMAL & SOC. PSYCHOLOGY 177 (1959); and Gerard & Mathewson, *The Effects of Severity of Initiation on Liking for a Group: A Replication*, 2 J. EXPERIMENTAL SOC. PSYCHOLOGY 278 (1966) (discussing positive relationship between members' favorable evaluations of a group and the stringency of initiation requirements). In addition, the structure of the judicial process may impede the courts' ability to quantify and resolve value indeterminacy. See *supra* note 28.

The structural characteristics of the decisionmaking process may have other significant effects on responses to indeterminacy. For example, there may be structural limits on the ability of various participants to utilize particular avoidance devices. In test-case litigation, judges may be more able than parties to initiate restatement of the issues, emphasize areas of agreement, react to distributional consequences, reallocate the burden of proof, defer decisions, and disclaim authority. The parties may be better able consciously to manipulate suppression of indeterminacy because of their greater access to information. They may also be able to highlight sympathetic fact situations. Administrators may welcome deferral devices where indeterminacy is short-term and resolvable because of the greater flexibility and discretion they afford. Where indeterminacy is long-term and irresolvable, however, these same officials may vigorously protest the disingenuous application of deferral devices for fear of becoming "scapegoats." The pervasive presence of indeterminacy may influence the institutional features of the decisionmaking process, just as it does legal training. See *supra* note 50. Decisionmakers who frequently face long-term or irresolvable indeterminacy are more likely to formalize and legitimate the use of various avoidance devices in the decisionmaking process.

64. See *infra* note 72. For example, a tribunal may serve certain ritual functions in the community. See, e.g., Gibbs, *The Kpelle Moot*, in *LAW AND WARFARE* 277-89 (P. Bohannon ed.

one is the courts' symbolic role in diffusing tension among competing groups through the suppression of indeterminacy.⁶⁵

A. *The Symbolic Value of Suppression*

In his analysis of judicial avoidance devices, Bickel characterizes them as tools that the Court employs in observing the passive virtues essential to maintaining the legitimacy of judicial review.⁶⁶ As Bickel explains, the Court plays a role in generating consensus about fundamental moral values,⁶⁷ but it "must remain above the day-to-day battle" to preserve its constitutional mystique.⁶⁸ The Court must employ "constitutional generalities . . . capable of containing most differences and of embracing either result of most trials of political strength."⁶⁹

Through these generalities, "the Court can help bring about acquiescence by assuring those who have lost a political fight that merely momentary interest, not fundamental principle, was in play."⁷⁰ Yet, where these generalities are insufficient, the Court can quite properly stay its hand through the use of avoidance devices, in part because the issues are too indeterminate to merit definitive intervention. As Bickel concludes, "[t]he passive devices are thus justified as lesser rational alternatives to an otherwise unavoidable principled judgment, which would, in turn, be unwise in the given circumstances."⁷¹ Bickel's observations are consistent with the claim that avoidance devices are employed to diffuse tension by suppressing indeterminacy.⁷²

Murray Edelman has undertaken a thorough exposition of symbolic politics. As Edelman explains:

[E]very political institution and act evokes and reinforces a particular response in its audiences. Permanent institutions like elections, legislative debate and enactment of laws, and courtroom rituals bring out very nearly the same response among the entire population of spectators. In democratic countries these institutions reinforce beliefs in the reality of citizen participation in government and in the rational basis of governmental decisions, regardless of what is said in the course of the proceed-

1967) (describing use of ritual in informal dispute resolution to involve entire community in therapeutic response to family disputes).

65. See S. SCHEINGOLD, *supra* note 21, at 5-8, 13-38, 97-116, 179 (1974); cf. M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 38-41, 56-72 (1964) (discussing symbolic value of administrative tribunals in the role of adjudicator and distributor of entitlements).

66. A. BICKEL, *supra* note 19, at 70-71, 205-07, 239.

67. *Id.* at 30-31, 239-40.

68. *Id.* at 105.

69. *Id.*

70. *Id.* at 30.

71. *Id.* at 206.

72. Bickel notes other reasons for using avoidance devices as well. For example, they may catalyze an institutional dialogue with the legislative or executive branch. *Id.* at 70-71, 206-07.

ings on particular occasions. Men may dislike a winning candidate, law, or judge's decision, yet be reassured by the *forms* of the election, legislature, and court. They may approve a particular administrative ruling, yet be repelled by what they see as the arbitrary manner in which it was reached and issued. So government not only confers benefits; its forms also placate or arouse spectators. Political analysis must, then, proceed on two levels simultaneously. It must examine how political actions get some groups the tangible things they want from government and at the same time it must explore what these same actions mean to the mass public and how it is placated or aroused by them [P]olitical acts are both instrumental and expressive.⁷³

Edelman's analysis illuminates Bickel's notion that through symbolic behavior, the courts generate assent and induce acquiescence among groups denied the tangible benefits they desire. While Bickel asserts that courts induce acquiescence among losing parties by emphasizing the play of momentary interest and appealing to larger constitutional principles, Edelman cites reliance on procedures that highlight the opportunity to participate in a seemingly rational process.

The preceding analysis of indeterminacy indicates that an appearance of rationality, rather than an emphasis on momentary interest, may be more often used to appease losing parties. An apparent commitment to synopticism, or comprehensive rationality, provides a basis for the losing party to acquiesce in the decision. The losing party should submit to the decision because an unbiased decisionmaker has purportedly considered all the available alternatives before intervening. Incrementalism, by contrast, hardly diffuses tension. When a court openly acknowledges the marginal nature of its analysis, the losing faction will be motivated to challenge an admittedly "quick fix" on the problem.⁷⁴ Moreover, the use of avoidance devices that suppress indeterminacy may prevent a court from perceiving the full range of interests at issue. Consequently, the court will be less apt to recognize the degree to which its decision was produced by the play of such forces.

The symbolic diffusion of tension is probably more often necessary where a decisionmaker faces high levels of irresolvable and potentially costly indeterminacy. According to Edelman, symbolic cues are most likely to be utilized where public values concerning important normative issues are bipolar, or split into two clearly defined adversary foci. Sym-

73. M. EDELMAN, *supra* note 65, at 12 (emphasis in original). For further elaboration on these themes, see M. EDELMAN, *POLITICS AS SYMBOLIC ACTION* (1971), and M. EDELMAN, *POLITICAL LANGUAGE* (1977).

74. Of course, even if a court emphasizes the play of momentary interest, a losing minority may not challenge the decision immediately if the constellation of interests remains largely unfavorable, and further protest seems futile. Still, it seems important to distinguish between rational inaction based on a calculation of the net gain from seeking reform and acquiescence induced by symbolic political behavior.

bolic reassurances are less salient where there is unipolarity, a high level of consensus about the normative concerns, or where there is multipolarity, the wide dispersal of values along a continuum of possibilities.⁷⁵ To the extent that the adversarial model of litigation highlights the bipolarity of conflicts, the judiciary is more likely to rely on symbolic politics to alleviate deep-seated cleavages.⁷⁶ Where the bipolar model is converted into a multipolar one, however, the need to resort to symbolic cues will be diminished because tension is diffused structurally by the wide scattering of values among a range of different groups.

Allowing intervention of parties with distinctive views can achieve this transformation.⁷⁷ *Smith v. OFFER* illustrates how the intervention of biological parents and the appointment of separate counsel for foster children and foster parents changed a bipolar conflict into a multipolar one (pp. 85-95). Obviously, generous rules of intervention will only succeed in producing a multipolar conflict where distinctive points of view in fact exist. In other cases, intervenors and amici will simply reinforce the bipolar nature of the dispute. For example, in *Goss v. Lopez*, numerous parties were involved, but all could be classified in two diametrically opposed groups (pp. 480-82). The structure of the litigation process may create an appearance of bipolarity, even where the dispute is multipolar. In *Pennhurst*, the participants in fact had highly diverse perspectives, but the adversarial model of litigation created a deceptive sense of two basic opponents, the parents and the institution. This may have produced excessive reliance on symbolic cues when more instrumental responses would have been useful (pp. 322-25, 330-36).⁷⁸

Broad intervention that introduces highly diverse perspectives

75. M. EDELMAN, *supra* note 65, at 175-77. Of course, other factors may affect the use of symbolic cues. For example, where the courts engage in institutional dialogue, as in *Roe v. Norton*, symbolic politics may be less useful because other governmental bodies are less influenced by these devices than the general populace.

76. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282, 1284, 1302 (1976) (describing traditional bipolar model of litigation and contrasting it with multipolar public law litigation).

77. *Id.* at 1289-92 (describing liberalized standing doctrine and generous rules of intervention as facilitating shift from bipolar to multipolar litigation model).

78. *Bellotti* had elements of multipolarity because of the divergent perspectives presented by abortion clinics, teenagers, parents, and the State; however, the underlying debate over the morality of abortion was bipolar. In *Norton*, the dispute before the court was treated as a bipolar confrontation between the mothers receiving AFDC and the State, although its multipolar aspects could have been heightened by more carefully distinguishing between the privacy interests of AFDC mothers and the protected interests of their children.

Most of the case studies involved bipolar disputes. Even those that might have been multipolar tended to be assimilated to the bipolar framework of the adversarial process. The pervasiveness of bipolarity may explain Mnookin's generalization that in these cases "the federal courts often attempt to cut a compromise in situations where the parties were unable to do it themselves" (p. 519). This technique could simply be one way in which the courts not only resolve the dispute before them but also dissipate tension generated by high levels of indeterminacy in a bipolar dispute.

undoubtedly heightens the court's awareness of indeterminacy. Judges may therefore rely more heavily on avoidance devices where numerous parties participate in the litigation. In some instances, this use of avoidance devices will be accompanied by reliance on symbolic cues to diffuse tension and induce acquiescence among competing factions. Avoidance mechanisms are most likely to be accompanied by symbolic cues where the dispute before the court is highly indeterminate because of its bipolar nature. Where the dispute is clearly multipolar, avoidance may still occur, but it is less likely to be coupled with symbolic reassurances.⁷⁹

B. *Symbolic Politics in the Case Studies*

To illustrate these claims about symbolic politics, it is useful further to examine *OFFER*, *Goss*, and *Pennhurst*. In *OFFER*, a multipolar dispute, Chambers and Wald focus on how instrumentalist objectives were frustrated by inadequate factfinding and case selection processes. They conclude that the symbolic impact of the Supreme Court's decision in furthering efforts to reform the foster-care system was probably negligible, in part because the opinions in the case articulated numerous competing considerations. In other words, the symbolic significance of *OFFER* was dissipated by the multipolar character of the dispute (p. 117).

By contrast, Zimring and Solomon conclude that the principal impact of *Goss*, a bipolar dispute, was symbolic:

It may be the case that the Supreme Court's belated recognition that schools are not families was an important symbolic step in the direction of more intimate regulation of public schooling. . . . To say that the outcome of this lawsuit was more important symbolically than substantively is in no sense to deny its importance. Symbols count The intangible but nonetheless important role of the competition between authority and autonomy symbols and the way in which this conflict was resolved may be the enduring legacy of *Goss v. Lopez* (p. 508).

Zimring and Solomon argue that "the contending parties were not far apart on the institutional issues of school disciplinary administration," and that "[o]nly a question of principle precluded settlement" (p. 505). In treating the instrumentalist stakes as low, Zimring and Solomon emphasize the heightened symbolic significance of the case. It may be

79. In fact, in multipolar disputes, the most likely response may be resolution through a process of interest-group bargaining. Such a bargaining process may seem more consistent with legislative or administrative, than judicial, decisionmaking. In institutional reform cases, however, where judicial intervention in a multipolar dispute is ongoing and continuous, judges can utilize their position to facilitate bargaining among the parties. See M. REBELL & A. BLOCK, *supra* note 38, at 68-70; Diver, *supra* note 8, at 77-86. Diver quite properly raises concerns about the effects of such "political" behavior on judicial legitimacy. Diver, *supra* note 8, at 103-05. It is unclear whether similar possibilities for interest-group bargaining exist in cases involving more short-lived judicial intervention.

that instrumental consequences are less salient than symbolic cues where a bipolar disagreement exists. The case study cannot demonstrate whether the minimization of the Court's instrumental function is a prerequisite for, or a consequence of, its more prominent symbolic role. It does confirm, however, that the decisionmaker confronted with a bipolar dispute is likely to rely heavily on symbolic cues.

The *Pennhurst* case indicates that the decisionmaker's perceptions of bipolarity affect the degree to which symbolic cues will be employed and that misperceptions of bipolarity can produce inappropriate reliance on symbolic cues. In *Pennhurst*, the judge responded in highly symbolic ways to an apparently bipolar confrontation. Burt argues that the Court allied its institutional vulnerability with the plaintiffs to heighten the moral significance of their harms (p. 342). Yet, rather than inducing acquiescence through this symbolic exercise, the Court confronted a breakdown in the process of negotiation and conciliation that had previously generated apparent consensus (pp. 280, 321-25, 327).

Because the dispute was in fact multipolar, rather than bipolar, the symbolic cues were arguably misdirected. Symbolic politics failed to diffuse tension in the face of multipolar disagreement. Given the broad range of perspectives, a more heavily instrumentalist response that allocated tangible benefits on the basis of interest-group bargaining might have proven more productive (pp. 348, 361).⁸⁰ Moreover, reliance on symbolic cues may have been particularly ineffective because of the Court's ongoing intervention over a substantial period of time. *Pennhurst* thus differs from *Goss*, where symbolic cues worked in the context of a single, short-lived intervention.

Recognizing the courts' symbolic function has important implications for analyzing judicial responses to indeterminacy. For example, the Chambers and Wald case study advocates broadening access to the judicial process to force judges to acknowledge the far-reaching implications of their policymaking role.⁸¹ While broadened access could conceivably have a beneficial effect on policymaking in multipolar disputes,⁸² it might well produce disastrous consequences in bipolar ones. Broader access would undoubtedly make the indeterminacy of the decisionmaking process painfully obvious, reinforce the polarization of opposing factions, and render the suppression of indeterminacy and use of symbolic cues

80. See generally M. REBELL & A. BLOCK, *supra* note 38, at 68-70 (describing judge's role in facilitating instrumentalist bargaining and negotiation through litigation); Diver, *supra* note 8, at 77-105.

81. See *supra* note 57.

82. Broadened access could also arguably lead to serious delay, judicial paralysis, or hopeless confusion. Chambers and Wald do not explain how to reap the benefits of increased input, while avoiding these negative effects.

considerably more difficult.⁸³ Without a better understanding of the relative importance of the court's symbolic function and policymaking role in different types of disputes, it is impossible to tell whether a blanket prescription to broaden input will on balance be beneficial.

C. *Mnookin's Puzzles Revisited*

Understanding the relationship between indeterminacy and institutional characteristics of the courts clarifies Mnookin's three puzzles because the enigma of indeterminacy is linked to the dilemma of legitimacy and to the paradox of child advocacy. Many attacks on the court's capacity and legitimacy center on the inaptitude of the judicial process for making policy. Frequently, critics argue that policy issues are unduly narrowed by a legalistic approach and that relevant information is distorted or excluded by rules on standing, jurisdiction, and evidence.⁸⁴ These approaches are, however, highly predictable responses to a requirement of immediate action in the face of indeterminacy.

While the dilemma of legitimacy is hardly eliminated by these observations, its troublesome nature can be more fully appreciated. Although the dilemma derives in part from certain structural characteristics of the judiciary, it is also a product of the highly indeterminate problems we ask courts to decide. To the extent that indeterminacy is long-term and irre-

83. The outcome in *Goss* may seem inconsistent with this claim. There, the Court successfully utilized symbolic cues, although numerous amici participated in the case. A closer examination of *Goss* reveals, however, that increased participation in the case did not necessarily heighten indeterminacy. First, the intervention in the case was extremely one-sided, with virtually all major participation on the plaintiffs' behalf. Moreover, all of the additional participants shared a common perception of the appropriate approach to the case. Second, the case was framed in narrow procedural terms, and the amicus briefs did not present novel material for the Court's consideration. In fact, the primary benefit of amici's participation may have been the prestige they lent to each side's arguments. Third, the broad participation by numerous amici occurred rather late in the litigation when the Supreme Court decided to hear the case (pp. 480-82). The contention that broad participation in *Goss* did not heighten indeterminacy is substantiated by the nature of the trial proceedings. As Zimring and Solomon note, the three-judge court heard very limited evidence in the case (pp. 473-74, 476-78). These observations indicate that the case study of *Goss* does not contradict the theoretical arguments made here. This careful analysis emphasizes, however, that in assessing the effects of broadened participation on indeterminacy, one must consider not only the number of participants, but also the time and nature of their involvement and the distinctiveness of their arguments.

84. Another basis for criticism is the fact that judges are generalists, rather than specialists. See *supra* Part II, Section B. Yet, a generalist is less likely to have a predetermined approach to coping with cognitive dissonance when confronted with high levels of indeterminacy. A federal district court judge probably has not developed rigid attitudes about children's issues. By contrast, a family court judge who hears numerous child-custody disputes may enter decisions that "freeze" certain attitudes or beliefs about the issues, even though the outcomes were originally tentative responses to indeterminate problems. Thus, the judge who amasses expertise may at the same time develop attitudes that are extremely resistant to change and require considerable suppression of indeterminacy. See R. WICKLUND & J. BREHM, *supra* note 43, at 22-23 (describing "freezing" effects of commitment to a behavior).

solvable, all decisionmakers, private or public, suffer the same limitations. In fact, the critical question may be when, if ever, public choice processes can justifiably supplant private choice processes under these circumstances. If government intervention can be justified, then the choice of the proper government body to intervene will depend on the nature of the justification and the ability to bear the cost of error. If symbolic as well as instrumental functions are an important component of government action, they may afford a rationale for intervention despite high levels of irresolvable indeterminacy. The judiciary may enjoy certain peculiar advantages in the symbolic political process to the extent that it is responsible for articulating moral values and generating normative consensus.

As for the paradox of child advocacy, this puzzle exemplifies the problems created by indeterminacy. This indeterminacy may relate to values. That is, decisions about who can best represent a child's interests may depend on one's beliefs about what is best for the child. The paradox may also involve indeterminacy about means because competing theories about the process of representation influence evaluations of a representative's adequacy.⁸⁵ Finally, the paradox may implicate indeterminacy about implementation when a court confronts conflicting claims about how well a certain advocate will represent a particular group of children. The courts have responded to this indeterminacy in a predictable fashion. They have reframed the issue in narrow, legal terms by asking whether there is standing, whether there is a conflict of interest among members of the class, whether the named plaintiffs are typical of the class, and whether the attorneys have provided effective representation. These procedural questions suppress indeterminacy and redefine responsibility by focusing not on whether optimal advocacy is achieved, but on whether adequate representation has been provided.

Mnookin recognizes that "[a]ll three puzzles flow from the fact that children often lack the ability to define and defend their own interest" (p. 511). For Mnookin, this observation poses "profound questions of political theory" regarding the allocation of decisionmaking power among children, parents, and the state and among different branches and levels of government (p. 513). "Who decides" becomes a critical determinant of outcomes under conditions of indeterminacy.

There is no reason to believe, however, that the enigma of indeterminacy would be solved if children were miraculously endowed with adult

85. For example, some commentators argue that clients are largely passive or "captured" by their attorneys in class-action litigation (pp. 53-55), while others contend that class representatives can be actively involved in controlling the litigation and that a class action may spur grass-roots organizing in the community. See J. HANDLER, *supra* note 31, at 28-32; S. OLSON, *supra* note 30, at 21-37; see also S. SCHEINGOLD, *supra* note 21, at 131-48.

powers of articulation and full participatory status. Indeterminacy might be reduced but would hardly be eliminated because these "whiz kids," much like their adult counterparts, would continue to disagree about values, means, and implementation. Here, four of the five case studies involved race or poverty issues, and the fifth involved the handicapped. These characteristics may have introduced significant elements of indeterminacy into the decisionmaking process. As a consequence, it is impossible to tell whether the increment in indeterminacy due to the plaintiffs' status as children significantly altered the decisionmaking process. Beyond some threshold level of indeterminacy, courts may simply have to rely on the avoidance devices described, regardless of whether the plaintiffs are children or adults.

It is also impossible to analyze all the ramifications of "who decides" unless symbolic functions as well as policymaking and dispute resolution are considered. High levels of indeterminacy certainly affect the courts' ability to formulate policy, just as they affect other potential decisionmakers. What may differentiate the courts from other decisionmakers is the symbolic effect of judicial intervention. In some instances, the courts may be uniquely suited to diffuse tension generated by controversial issues and reaffirm basic shared values. To the extent that child-advocacy cases necessitate such symbolic exercises, the courts can play a critical role in their disposition.

CONCLUSION

This Review has examined the themes Mnookin raises in his introductory and concluding chapters to promote a deeper understanding of the case studies. It has stressed the central importance of indeterminacy in the decisionmaking process and the relevance of symbolic politics to child-advocacy litigation. There may be, of course, other fruitful ways of lending coherence to Mnookin's empirical volume. For example, it might be useful to analyze selected characteristics of the litigants and the litigation process to assess their importance in decisionmaking. Were cases organized differently depending on the size of the plaintiff class or on whether an organizational plaintiff was involved? Did the presence of intervenors or amici significantly affect the handling of the cases? Did highly visible, national public-interest organizations deal with cases differently than did less well-known organizations? Did it matter whether the defendant was a state official with many competing obligations, such as the state attorney general, or one with a narrower range of duties, such as a school administrator? Did the nature of the relief sought affect the success of the litigation? How successful was the intervention where it was complex and required long-term monitoring? Answers to these and similar questions could also improve our understanding of the value of

test-case litigation in promoting children's interests.⁸⁶

Although *In the Interest of Children* may leave the reader troubled because of its lack of a satisfying overall structure and methodology, Mnookin has drawn together talented people and interesting case studies. This in itself is no mean achievement. The book does not speak clearly to any single audience, but it can provide useful material for those interested in a particular area of child advocacy covered by one of the cases. It may also serve as a springboard for more systematic, empirical treatment of these problems.

86. Joel Handler has employed this approach in analyzing 38 case studies of reform litigation. He examined the characteristics of the social reform groups and their lawyers, the distribution of the costs and benefits of reform activity, the nature of the bureaucratic procedures required to implement reform, and the characteristics of the judicial relief requested. J. HANDLER, *supra* note 31, at 1-41, 191-233 (1978).