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BUREAUCRATIC ORGANIZATIONS AND THE THEORY OF ADJUDICATION*

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One of the manifold jurisprudential ramifications of the "organization revolution"[1] is its effect on the nature of adjudication. Adjudication is fundamentally changed when large-scale bureaucratic organizations are involved. By paying attention to the increasing role played by such organizations in litigation it is possible to throw some new light on a number of controversies regarding the main tasks of adjudication and its appropriate forms. These controversies often assume the form of a competition between opposing models of adjudication. My thesis, generally stated, is that the choice of an adequate model largely depends on the nature of the litigants, that is on whether one thinks of litigation between individual or organizational parties. This thesis is stated more fully—in terms of two specific models of adjudication—in Part I. It is then elaborated and defended in the remainder of the Article.

I. THE TWO MODELS OF ADJUDICATION AND THEIR RELATIONSHIP

A number of writers dealing with the theory of adjudication juxtapose two opposing models of the adjudicative process.[2] Although the various pairs of models that have been proposed do not wholly coincide, they evince sufficient uniformity that they represent one dichotomy between two visions of the nature of adjudication. I will call these two visions the *arbitration model*[3] and the *regulation model*.[4]

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1. This is the title of Kenneth Boulding's book. See K. Boulding, The Organization Revolution (1953).

2. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Scott, Two Models of the Civil Process, 27 Stan. L. Rev. 937 (1975); Weiler, Two Models of Judicial Decision-Making, 46 Can. B. Rev. 406 (1968).

3. This model draws upon and corresponds to Weiler's "adjudication of disputes model," see Weiler, supra note 2, at 408, Scott's "conflict resolution model," see Scott, supra note 2, at 937, and Chayes' "traditional model." See Chayes, supra note 2, at 1282–83. Noted proponents of the view of adjudication captured by this model include

The respective features of the two models relate to a radical difference in the main function each assigns to the judicial process. According to the arbitration model, "the lawsuit is a vehicle for settling disputes between private parties about private rights;"[5] according to the regulation model, on the other hand, "[n]ot the resolution of the immediate dispute but its impact on the future conduct of others is the heart of the matter."[6] These opposing assignments of function imply some contrasting properties of adjudication which it will be helpful to spell out.

To do so, let me first distinguish two dimensions along which the models differ in their depiction of judicial decisions: a dimension of *time* and a dimension of *persons*. Along the time axis the arbitration model describes adjudication as backward looking: it focuses on a transaction between the parties that has already taken place. The point of the process is to remedy something that went wrong in that transaction. In this sense, it can be said that adjudication has to do with the past.[7] By contrast, the regulation model describes adjudication as forward looking: its main point is to shape the form of future transactions and interactions.[8]

Along the persons axis, the arbitration model emphasizes the exclusive focus of adjudication on the parties to the litigation.[9] The regulation model, by contrast, admits of no such predominance of particular litigants: other people are likely to be affected by the decision as well, and their interests are as much the judge's legitimate concern as are those of the litigants.[10] The arbitration model may accordingly be characterized as a conception of adjudication which focuses on the past and on the parties, while the regulation model focuses on the future and on a wider ambit of affected persons.

R. Dworkin, Taking Rights Seriously 81 (1977); Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978); Sartorius, Social Policy and Judicial Legislation, 8 Am. Phil. Q. 151 (1971).

4. This model builds on Weiler's "judicial-policy-maker model," Weiler, supra note 2, at 437, Scott's "behavior modification model," Scott, supra note 2, at 938, and Chayes' "public law litigation model," Chayes, supra note 2, at 1288–1304.

5. Chayes, supra note 2, at 1282.

6. Scott, supra note 2, at 938.

7. See D. Horowitz, The Courts and Social Policy 284 (1977); Chayes, supra note 2, at 1282; Weiler, supra note 2, at 410.

8. E.g., Chayes, supra note 2, at 1302.

9. See R. Wasserstrom, The Judicial Decision 114 (1961) ("Here, the rule of decision would prescribe that a decision is justifiable if and only if it best takes into account the interests of the litigants who are currently before the court."); see also Aubert, Courts and Conflict Resolution, 11 J. Conflict Resolution 40, 41 (1967)(judge provides a "service" to the litigants who are seen as the judge's "clients").

10. Several writers have emphasized the tension between these two sets of interests. See D. Horowitz, supra note 7, at 274; Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv. L. Rev. 410, 413 (1978); Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 540 (1972).

Mapping the two models along the two dimensions discloses, as the following figure helps to demonstrate, that they are not exhaustive.

FIGURE 1

PERSONS DIMENSION / TIME DIMENSION	PARTIES	EVERYONE AFFECTED
PAST	ARBITRATION MODEL (1)	(2)
FUTURE	(3)	REGULATION MODEL (4)

This figure draws attention to the possible significance of the empty boxes. Box *2* raises the problem of adjudication that is committed to the settlement of a particular dispute, but which inescapably implicates the interests of nonparties as well as those of the parties; Box *3* indicates a form of adjudication whose main point is to shape the future conduct of the particular parties. As I will later show, these two intermediate states are of special interest in the context of organizational litigation.[11]

Another distinction that is helpful to draw is the difference between the *effects* of a judicial decision and its *concerns*. The term "effects" is self-explanatory. By "concerns" I mean the likely effects that are taken into consideration by the judge and thus serve as grounds for the decision. Accordingly in the arbitration model, concerns are only a subset of the decision's effects: the model claims that the judge's concerns are primarily the effects of the decision on the parties before the court. The regulation model implies no such limitation, suggesting instead that judges concern themselves with all of the significant effects that their decision is likely to have.

In talking about the two models, I have so far maintained a certain ambiguity between their descriptive and normative claims. Indeed, the models are variably used both as descriptions of adjudication and as

11. See infra notes 46–52 and accompanying text.

recommendations of what adjudication should be.[12] They give rise, therefore, to disputes concerning both their respective descriptive adequacy and the soundness of their normative recommendations. On the descriptive side, it is sometimes claimed that both the arbitration model and the regulation model are correct, insofar as they describe two historical stages in the evolution of the central role of adjudication. We are witnessing, it is suggested, an historical transition from a judicial preoccupation with the resolution of the particular dispute, adequately depicted by the arbitration model, to a concern with setting social policy, and with shaping future patterns of conduct aimed at social goals, as described by the regulation model.[13] Others deny that any such transformation is taking place. This denial, however, rests on two opposing grounds. Some maintain that adjudication is now, as always, primarily committed to the just resolution of particular disputes.[14] Others claim that the arbitration model was never true to the real mission of the courts, and that something like the regulation model better captures the historical as well as the contemporary truth about adjudication.[15]

The agreement on the normative front is not greater. Some writers insist that the arbitration model contains features intrinsic to the judicial process[16] and argue that this model should serve to guide judges in the execution of their role.[17] The regulation model commands no less ardent support from other writers.[18] Some of them view the arbitration model as a mere pretense, hiding with misleading rhetoric the social policymaking in which judges are in fact engaged. If nothing else, it is argued, adopting the regulation model will cure the hypocrisy that the arbitration model nurtures.[19] Others view the arbi-

12. On the status of these models see Fiss, supra note 2, at 29; Sartorius, supra note 3, at 160; Scott, supra note 2, at 940; Weiler, supra note 2, at 408.

13. See D. Horowitz, supra note 7, at 4–9; Chayes, supra note 2, at 1282; Weiler, supra note 2, at 438.

14. R. Dworkin, supra note 3, at 81; Sartorius, supra note 3, at 151.

15. Fiss rejects Chayes' historical view concerning the transition from arbitration to regulation: "The function of adjudication, whether in the nineteenth century or twentieth century . . . has not been to resolve disputes between individuals, but rather to give meaning to our public values." Fiss, supra note 2, at 36.

16. E.g., Fuller, supra note 3, at 365.

17. E.g., R. Dworkin, supra note 3, at 81–84; Sartorius, supra note 3, at 151. This is also the import of Professor Fletcher's rhetorical question: "The courts face the choice. Should they surrender the individual to the demands of maximizing utility? Or should they continue to protect individual interests in the face of community needs?" Fletcher, supra note 10, at 573. Professor Mishkin calls for restraint in deviating from the conventional mode of adjudication. See Mishkin, John Randolph Tucker Lecture: Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 950 (1978).

18. Chayes, supra note 2, at 1284; Fiss, supra note 2, at 36; Pound, The Theory of Judicial Decision (pt. 3), 36 Harv. L. Rev. 940 (1923).

19. See Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823, 848–51 (1972). Dr. Raz criticizes Dworkin's position that judges never "act[] on their own beliefs as legislators do," id. at 850, but rather decide cases on the basis of preexisting,

tration model as a set of theoretical shackles unduly inhibiting judges from engaging in the important tasks of "social engineering"[20] and "giv[ing] meaning to our public values"[21] that lie ahead.

Finally, there is a view of the relationship between the two models that merges the descriptive and the normative. This view does not conceive of the models as trying to depict different historical realities, nor does it consider them to posit competing, mutually exclusive ideals. Rather, this latter view amounts to the proposition that the two models are, both in theory and in fact, inexorably linked in every institutionalized mode of adjudication. Far from being descriptive or normative alternatives, the two models are complementary, representing adjudication as a Janus-faced institution. In conjunction, the two models reflect a view of the judicial process as ridden with tension.[22]

All these conceptions of the relationship between the two models, whether that of succession, competition, or tension, have one feature in common. They all view adjudication as essentially a single, uniform institution, amenable to adequate portrayal or guidance by means of a single, albeit sometimes compound, model. In contrast to these conceptions, I will advocate a view of adjudication as a more heterogeneous institution, assuming different forms and discharging different functions in various contexts. Instead of succession, competition, or tension, this view depicts the relationship between the two models as one of division of labor. While some elements of both models can probably be discerned in all forms of adjudication—a fact emphasized and possibly exaggerated by the "inherent tension" view—we can also expect, according to this alternative position, that under different conditions one model or the other will predominate. Adjudication can resemble the arbitration model when dealing with some issues, and assume a more regulatory mode when dealing with others.

Such division of labor, I shall argue, makes good sense in the orga-

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objectively given principles. Dr. Raz calls this position a "harmful myth" that takes literally and legitimizes a misleading rhetoric that judges sometimes use. Id.

20. See, e.g., Pound, supra note 18, at 954. Pound argues that the judge should adopt a utilitarian orientation, and criticizes the preoccupation with "rights" which tend to take unjustified precedence over "policies." Id. at 954–55. On the relation between the rights-policies distinction and the two models of adjudication see discussion infra notes 68–79 and accompanying text.

21. See Fiss, supra note 2, at 2.

22. A clear exponent of this last perspective on the relationship between the two models is Professor Martin Shapiro, who maintains that "judging inevitably involves lawmaking and social control as well as conflict resolution," Shapiro, Courts *in* 5 Handbook of Political Science 321, 347 (F. Greenstein & N. Polsby eds. 1975), and that "judicial lawmaking necessarily creates a fundamental tension between courts and their basic social logic." Id. at 349; see also id. at 333 (calling upon a third-party official to resolve a dispute necessarily introduces a third interest, that of the official authority); cf. D. Horowitz, supra note 7, at 47 ("There is tension between two different judicial responsibilities: deciding the particular case and formulating a general policy.").

nizational society.[23] The rise and increasing prominence of the regulatory model is in part related to the organizational transformation of society. The view of litigation conveyed by the arbitration model—a private matter involving exclusively the rights and interests of the contending parties—loses its plausibility as legal transactions, and hence litigation, increasingly involve large organizations.[24] Seen in this way, the regulation model does not replace the arbitration model, nor is it locked with it in deadly competition. Instead, the regulation model offers a perception of the judicial role and a description of judicial decisionmaking peculiarly suited to organizational adjudication, while the arbitration model can more successfully describe and commend a style of decisionmaking befitting litigation among individuals.[25]

The argument that links the regulation model to organizational litigants and the arbitration model to individual litigants has two components. Part II suggests a number of ways in which organizations enhance the effects of judicial decisions both along the time dimension and along the persons dimension. These enhanced effects do not, strictly speaking, contradict occasional proclamations by judges that their concerns are predominantly limited to the fair resolution of the particular dispute.[26] Yet it seems sensible to expect that unless there are some very good reasons to the contrary, concerns and effects

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23. Compare Roscoe Pound's noted attempt to devise different judicial decisionmaking strategies depending on the subject matter of the litigation. Pound, supra note 18, at 951–52, 957.

24. On the relation between what I call the regulation model and the rise of large organizations, see Fiss, supra note 2, at 35. Chayes also links some of the changes he detects in the nature of adjudication to organizations, Chayes, supra note 2, at 1291–92, and to "[t]he emergence of the group as the real subject or object of litigation." Id. at 1291.

25. The discussion that follows touches only upon some aspects of adjudication. It rests on various tacit presuppositions, the exposition and elaboration of which would make the argument unduly cumbersome. By way of example, the role of statutes is completely iguored in what follows. For a similar approach, see R. Wasserstrom, supra note 9, at 8. This is not meant to challenge, nor to affirm, the supremacy of legislation in judicial decisionmaking. I only assume (as does most of the literature about adjudication) that legislation leaves a sufficiently broad leeway for judicial discretion and creativity that the judge's own conception of his role and the goals that he should pursue become important determinants of judicial decisionmaking. Cf. B. Cardozo, The Nature of the Judicial Process 21 (1921) ("It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.").

26. For example, Judge Bergan of the New York Court of Appeals has written:

> The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.
>
> A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues . . . . But this is normally an incident to the court's main function to settle controversy.

should by and large coincide: a decisionmaker should strive to take account of at least the major likely effects of the decision. The more judicial decisions tend to have effects beyond the resolution of the particular dispute, the more wary one is likely to be of believing or recommending that judges systematically ignore or downplay those other effects.[27] If this hypothesis is correct, then a belief in the descriptive or normative adequacy of the arbitration model betrays a tacit assumption that the effects of adjudication do not extend much beyond the particular dispute and the particular parties.[28] By contrast, the further the effects of a decision extend beyond the particular dispute, the more likely they are to force themselves on the judge, either explicitly or tacitly, as concerns, that is, as grounds for the decision. Since organizations augment the social ramifications of the judicial decisions, they incline the judge toward the regulatory mode.

This part of my argument, however, creates only a prima facie case in support of the proposed link between organizational litigants and the regulation model. Though the augmented effects of the judicial decision create a powerful temptation for judges to use a more regulatory style when organizations are present, the question remains: should this temptation be resisted? After all, the arguments made in favor of the arbitration model and which suggest reasons for a judge to adopt a relatively narrow perspective—focusing on the past transaction and on the particular parties—might still apply even when the decision's effects are far reaching. Part III examines some such arguments and demonstrates that their force depends on an individualistic conception of adjudication, that is, on a view of litigation as involving individuals only. The strictures on judicial decisionmaking advocated by the arbitration model do not apply with similar force to organizational litigants. In conjunction, the two parts of my argument suggest some good reasons for the judge to lean toward the regulation model in the case of organizational litigants, even as he adheres to the arbitration model when adjudicating individual disputes.[29]

Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 222, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970) (Bergan, J.).

27. [J]ust because a public law decision affects so wide a group, the court may believe it inappropriate, in determining liability, to base its decision on the issues raised by those few members of the group who happen to be in the courtroom. In such cases, therefore, the judge may subordinate the norm of settling the dispute that has been put to him, on the basis of the issues put to him, in favor of the function of making rules that are responsive to public needs.

Eisenberg, supra note 10, at 427–28.

28. In describing the *traditional model*, his counterpart to my arbitration model, Chayes lists as one of its elements that "the impact of the judgment is confined to the parties." Chayes, supra note 2, at 1283.

29. Compare Professor Vilhelm Aubert's attempt to define the nature of international dispute-settlement by looking to the difference between the behavioral attributes of individuals, the subjects of municipal adjudication, and those of states, the actors on the international scene. He writes:

Insofar as international law deals with the relationship between states, the legal

II. ORGANIZATIONS AND THE EFFECTS OF JUDICIAL DECISIONS

A. *Some Relevant Organizational Properties*

To attach jurisprudential consequences to the growth of organizations implies that it is possible and fruitful to identify a sufficiently large group of collective entities that have enough normatively consequential properties in common to justify treating them as distinctive subjects of legal ordering.[30] Such a belief is upheld by organizational theory, which provides a unified framework for the study of such a group of collective entities, namely that of bureaucratic organizations. It may be useful therefore to preface the discussion of the changes in the nature of adjudication wrought by organizations with a working description of those entities, especially underlining those properties that are pertinent to the arguments that follow.

Organizations, the subject matter of organizational theory and of this Article, can be characterized as large, permanent, formal, complex, functional, social structures.[31] I will briefly comment on each of these elements.

Perhaps the most distinctive feature of organizations[32] is that "they have been formally established for the explicit purpose of achieving certain goals."[33] The notion of a functional structure expresses this

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> subjects have an entirely different motivational structure from human organisms. Nations do not behave as individuals do. They are units of a different order. Many of the points [about adjudication] discussed above refer to psychological mechanisms characteristic of human beings. These may or may not have application also to nations. But it does not follow from a legal definition of a state as a legal subject that it takes on the real characteristics of the units after which its legal form has been shaped.

Aubert, supra note 9, at 47. It is somewhat ironic that Aubert himself treats municipal adjudication as applying to individuals only, failing to realize that it too deals with organizations, "units of a different order" from individuals.

30. For the general thesis that the law often ignores the organizational properties of many of its subjects and tends to assimilate organizations to individuals and treat them indiscriminately, see, e.g., A. Conard, Corporations in Perspective 420 (1976); C. Stone, Where the Law Ends: The Social Control of Corporate Behavior 1–10 (1975). I expand on this theme and argue more fully for the distinctiveness of organizations as a type of legal actor in M. Dan-Cohen, Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society (forthcoming 1985).

31. Different authors define organizations in terms of different items from this list—alone or in some combination. For example, Talcot Parsons focuses on goal-orientation: "*primacy of orientation to the attainment of a specific goal* is used as the defining characteristic of an organization . . . ." T. Parsons, Structure and Process in Modern Societies 17 (1960). Haas and Drabek emphasize permanence and complexity: "An organization is defined as *a relatively permanent and relatively complex discernible interaction system.*" J. Haas & T. Drabek, Complex Organizations 8 (1973) (footnote omitted). The title of Blau and Scott's book indicates its subject. P. Blau & W. Scott, Formal Organizations (1962).

32. I will henceforth drop the adjective "bureaucratic."

33. P. Blau & R. Scott, supra note 31, at 5. The instrumental nature of organizations is a central theme in organization theory. See, e.g., C. Perrow, Complex Organiza-

property by suggesting the familiar machine metaphor of the organization: the relationship between the organization and its individual constituents can be analogized to the relationship between a car and a heap of its disassembled components.[34] The analogy of the car can be further exploited to bring out two other aspects of the idea of structure: first, that the organization's performance or behavior, like that of the car, depends on its structure; and second, that the structure is amenable to deliberate tinkering and change. These two related ideas combine to make the organization a manipulable structure: its internal order may be modified with an eye to bringing about desirable changes in its performance.

Permanence means simply that "organizations can persist for several generations . . . without losing their fundamental identity as distinct units, even though all members at some time come to differ from the original ones."[35] Accordingly, organizations operate within a time frame that is indefinite and, in principle at least, unlimited.[36]

The designation of organizations as "large" describes both the scale of their operations and the high number of individuals involved in carrying out those operations.[37] The large size, in both of these aspects, is related to the two other properties that have been mentioned:

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tions 14 (2d ed. 1972) ("one of the dominant themes of book" is that "[o]rganizations must be seen as tools"). This theme has already been emphasized by Weber, who defined bureaucracy as "a system of continuous activity pursuing a goal of a specified kind." M. Weber, Basic Concepts in Sociology 115 (H. Secher trans. 1962); accord A. Downs, Inside Bureaucracy 24 (1976); A. Etzioni, Modern Organizations 5 (1964)("Organizations are social units which pursue specific goals."). Compare in this context Philip Selznick's distinction between "organizations" and "institutions." Organizations sometimes undergo "institutionalization," described by him as follows:

> The prizing of social machinery beyond its technical role is largely a reflection of the unique way in which it fulfills personal or group needs. Whenever individuals become attached to an organization or a way of doing things as persons rather than as technicians, the result is a prizing of the device for its own sake. From the standpoint of the committed person, the organization is changed from an expendable tool into a valued source of personal satisfaction.

P. Selznick, Leadership in Administration 17 (1957).

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> [A]ll structuralists . . . are at one in recognizing as fundamental the contrast between *structures* and *aggregates*, the former being wholes, the latter composites formed of elements that are independent of the complexes into which they enter . . . . [T]he laws governing a structure's composition are not reducible to cumulative one-by-one association of its elements.

J. Piaget, Structuralism 6-7 (C. Maschler trans. 1970).

35. P. Blau & W. Scott, supra note 31, at 1.

36. Cf. P. Selznick, Law, Society and Industrial Justice 47 (1969). ("[T]he important point is that *decision-making in the light of long-run benefits presumes a concept of the institution*. The enterprise as a going concern, as a relational entity, becomes the focus of policy and strategy.") (emphasis in original).

37. For a comprehensive review of various measures of organizational size, see Kimberly, Organizational Size and the Structuralist Perspective: A Review, Critique, and Proposal, 21 Ad. Sci. Q. 571 (1976).

complexity and formality.[38]

Formality is the organization's solution to the need for functionally coordinating the large number of people and activities.[39] Formality is attained and manifested in two main ways. One is indicated by the concept of an office, which describes a set of formally prescribed duties, responsibilities, and expectations attached to every role within the organization. The other has to do with the centrality of rules, or standard operating procedures, in the organization's operations. Both notions underline the fact that a degree of repetitiveness and routinization is essential to the organization's typical mode of operation. They also highlight the impersonality of organizational actions and decisions, insofar as these actions and decisions are the products of formal procedures and processes carried out within formally defined and circumscribed roles. Formality attaches not only to the organization's day-to-day operations, but also, in a larger temporal perspective, shapes the planning and budgeting functions, which are crucial to coordination and goal-attainment over time.

The organization's large size is also related to its complexity. This property primarily indicates the large number of interdependent, specialized sub-units that constitute the organization and interact within it.[40] The organization can also be described as complex in terms of its multiplicity of divergent individual and group interests. The organization and its decisionmaking processes can accordingly be depicted on the model of a shifting coalition whose various components engage in bargaining and strategic behavior.[41]

This description of the organization implies a picture of society that will also prove consequential in the arguments that follow. It is best conveyed by reference to the systems approach currently prevailing among organizational theorists.[42] From this point of view any organizational entity on which we might focus can also be seen as a sub-

38. On the relationship between organizational size and other aspects of organizational structure see, e.g., H. Mintzberg, The Structuring of Organizations 230–35 (1979); Blau, Interdependence and Hierarchy in Organizations, 1 Soc. Sci. Research 1 (1972); Kimberly, supra note 37.

39. See generally R. Hall, Organizations: Structure and Process 172–82 (2d ed. 1972) (discussing the factors that determine an organization's degree of formalization).

40. For a definition of organizational complexity, see J. Thompson, Organizations in Action 54–59, 79 (1967); see also R. Hall, supra note 39, at 143–49 (The three major elements of complexity are specialization of personnel at a given level in an organization, depth of the organization hierarchy, and geographical dispersion.).

41. See, e.g., R. Cyert & J. March, A Behavioral Theory of the Firm 27–32 (1963); J. Haas & T. Drabek, supra note 31, at 192–94.

42. For short descriptions of the open system approach to organizations, see J. Haas & T. Drabek, supra note 31, at 83–93; F. Kast & J. Rosenzweig, Organization and Management, 97–120 (3d ed. 1979); Kast & Rosenzweig, General Systems Theory: Applications for Organizations and Management, 15 Acad. Mgmt. J. 447 (1972). For examples of writings that adopt the systems approach see H. Koontz & C. O'Connell, Management: A Systems and Contingency Analysis of Managerial Functions (6th ed.

system in some larger superordinate system of which it is a part, and which provides the essential environment to which this sub-system under consideration must adapt in order to survive. Thus the most inclusive system—society—is marked by a high degree of interdependence among a multitude of partially interlocking organizations. As in a net, so also in this organizational social system, the effects of each local change reverberate throughout.

The sketch of the organization that I have presented, though rough, accomplishes several objectives. First, it allows us to identify the group of collective entities that are directly and unambiguously the subject matter of the present argument: certain business corporations, trade unions, universities, and government agencies, for example, are by all accounts large, permanent, and complex, and otherwise satisfy the proposed description.[43] Second, the organizational properties that I have listed are responsible, in ways that I am about to indicate, for the shift from the arbitration model toward the regulation model discussed in this Article. Finally, the various properties in this list can be seen as continua along which specific entities will be differently located: organizations can be more or less large, or more or less formal and so forth. My arguments contemplate clear cases of bureaucratic organization, exemplified by such familiar giants as General Motors or the AFL-CIO, which possess all the listed properties to a high degree. Framing the argument in terms of specific organizational properties, however, should help in assessing its applicability to collectivities that lack some of these properties. So even though this Article focuses on organizations as they have just been described, some of its arguments also apply to collectivities that share only few of these properties, such as large, unorganized groups that are sometimes parties to litigation.

B. *The Extended Effects of Adjudication*

Having established the identity of organizational litigants, the next step is to outline the ways in which such litigants tend to augment the social effects of judicial decisions, and to indicate the implications of this augmentation on the nature of adjudication.

Recall the analysis of adjudication (in Part I) in terms of the time and parties dimensions.[44] Even if a judicial decision is oriented solely to the particular parties and their dispute, its effects are bound to extend along both of these dimensions. First, the particular decision

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1976); Yuchtman & Seashore, A System Resource Approach to Organizational Effectivenss, 32 Am. Soc. Rev. 891 (1967).

43. It should be noted that the term "organization" as used in this Article pertains both to "private" and to "public" entities. Thus my discussion of adjudication ignores this traditional distinction and introduces instead the division between organizational litigants (both private and public) and individual litigants. I expand on this theme in M. Dan-Cohen, supra note 30.

44. See supra notes 7–11 and accompanying text.

reached is likely to affect parties other than the litigants. The imprisonment of the accused in a criminal trial may have grave significance for his children and his wife. A decision awarding an exorbitant sum of damages in a tort case will often impoverish not only the defendant but his creditors too, and send both the successful plaintiff and her spouse on a round-the-world tour.

Every judicial decision is also likely to have some impact on future behavior. Given that the decision indicates the way courts are likely to decide similar situations in the future, it becomes part of the predictive data on which people may rely in shaping their transactions. Two kinds of such future effects can be identified: the decision's effects on the future conduct of the parties themselves, and its effects on the conduct of other people who come to know of the decision.

Since all three kinds of effects are, from the point of view of the arbitration model, unintended side effects, I will call them, following analogous economic usage, judicial externalities. Notice that the three kinds of externalities I have distinguished correspond to Boxes *2–4* in Figure 1:[45] the direct effects that the resolution of the dispute has on nonparties correspond to Box *2*; the future effects of the judicial decision on the parties themselves correspond to Box *3*; and the future effects on nonparties (in addition to the parties) belong in Box *4*. Each of these externalities is likely to increase in the organizational society and in relation to organizational litigants.

1. *Box 2: Effects on Nonparties.* — It is hard to think of any judicial decision that would have absolutely no indirect effects on nonparties. Only if the litigants live on separate, otherwise uninhabited islands, and thus carry the fortune or misfortune inflicted upon them by the judicial decision to their respective isolated places of abode, will the effects of the judicial decision go no further than the immediate parties involved. The more our conception of society resembles this picture of individual isolation, the fewer judicial externalities we would expect. Conversely, the farther from this archipelago of isolated islands we travel, and the more interdependent society becomes, the more judicial externalities we would expect. The picture of a society composed of isolated individuals, each one inhabiting his or her own island, recalls the familiar atomistic imagery characteristic of the liberal philosophical and legal tradition.[46] By contrast, a high degree of interdependence is a salient feature in descriptions of the organizational society, particularly those descriptions that invoke the systems imagery to describe the interconnections among organizations.[47] A decision concerning an organization is accordingly more likely than one pertaining to an individual to reverberate through the system, affecting in various ways other organizations and, through them, multitudes of individuals.

45. See Figure 1 supra p. 2.

46. See C. McPherson, The Political Theory of Possessive Individualism (1962).

47. See supra note 42 and accompanying text.

A second factor in the dramatic increase in judicial externalities caused by organizational litigants is the result of organizations' large-scale operations and transactions, and hence the likely large magnitude of the subject matter of litigation. Many organizations exist so that they can bring to bear large, combined resources on large-scale and widely coordinated projects not feasible for individuals. The sheer magnitude of the resources sometimes at stake in organizational litigation ensures that the judicial decision will have allocative and distributive ramifications on many individuals not present or represented in court.

Finally, the very admission into court of organizations seen as legal entities creates a rift between the nominal parties to litigation and the individuals whose interests ultimately underlie the organization's claim and justify its legal recognition. Viewed as a coalition, the organization represents the diverse interests of different groups of individuals. These interests will often be significantly affected in various ways by the judicial decision aimed at the organization. Even a judge who habitually purports to focus only on the parties before her must realize that when those parties are organizations her decision will affect many individuals who populate the area behind the "corporate veil," but do not participate in the proceedings, and that the soundness of the decision must ultimately be measured by those effects.

As a result of these three factors, litigation involving large organizations will often fit the model depicted in Box *2*: the resolution of the particular dispute will have relatively farreaching consequences for many individuals who are not litigants, and possibly for society as a whole. To focus in such cases on the "parties," as the arbitration model requires, may sometimes prove impossible. But more frequently, it will just seem foolish. In this way, the question of how to resolve fairly a dispute between two parties arising out of a past transaction can easily be transformed; the decision will turn into a complex computation of the likely effects of different possible resolutions on the conflicting interests of numerous individuals not present in court.

2. *Box 3: Future Effects and the Structural Injunction.* — Other factors push organizational litigation toward the model described in Box *3*, which emphasizes the impact of the judicial decision on the future conduct of the particular parties. The first factor that has this effect is the routine and recurring nature of organizational operations. As indicated earlier, the organization typically performs a recurring set of operations in the execution of a function or the pursuit of a goal. Consequently, a particular transaction that leads to litigation is often one of a series of similar transactions in which the organization will continue to be involved in the future. Thus, the seemingly backward looking resolution of the particular dispute is likely to shape those future transactions, more so than in the standard case of the individual litigant.

The likelihood that the judicial decision will indeed be brought to

bear on future similar transactions is increased by another organizational property—planning. If behavior—individual or organizational—were always spontaneous, without any prior consideration or deliberation, consequences, including legal consequences, would not be taken into consideration as determinants of action. Only to the extent that conduct contains an element of planning do the judicial externalities we are now considering occur. Generally speaking, planning is both a virtue and a standard of organizational activity, while spontaneity is praised and practiced more often when individuals act alone. Organizations, which typically engage in relatively thorough formal and long-range planning, are more likely to be guided by the prospect of future judicial decisions than are individuals, whose calculating rationality may more often give way to spontaneity and caprice as important and acceptable predicates of action.

Permanence is another organizational property that increases the future effects a judicial decision is likely to have on the litigating parties. An organization's existence is indefinite in time, so the organization may carry the marks of a judicial decision indefinitely into the future.

The final and most important organizational feature responsible for increased future judicial externalities is what has been referred to as the manipulable structure of organizations. Forming an organization, just like signing a contract or constructing a machine, comprises an element of "presentiation":[48] it is the creation in the present of a structure that will develop in the future in a more or less predictable and specified manner. As a result, a decision concerning the organization which brings about (whether intentionally or not) a change in its internal structure is very likely to have lasting effects on the organization's future performance.

These factors, especially the one last mentioned, create for the judge a powerful opportunity—and temptation—to form a present decision that will have lasting and desirable effects on the future conduct of the organization. The structural injunction is the form in which the judiciary has responded to this opportunity. It is a relatively new and highly controversial form of remedy in which the judge fashions, by means of an injunction or decree, changes in the internal structure of an organization that are meant to avert future grievances similar to those which brought about the litigation.[49] Since the structural injunction is the most typical and salient feature of Box *3* organizational adjudication, a further comment seems appropriate here.

Commentators tend to present the structural injunction as a depar-

48. For a definition and discussion of the twin concepts of "presentiation" and "futurizing" see Macneil, The Many Futures of Contract, 47 S. Cal. L. Rev. 691, 800-04 & n.310 (1974) (explaining that to presentiate is to perceive the future as "present in place or time," while to futurize is to "prepare for the future").

49. See sources cited in note 50 infra.

ture from the traditional judicial role of providing a present remedy for a past grievance by emphasizing that the structural injunction necessarily involves the court in a prolonged and constant process of shaping the future.[50] However, there is an important sense in which the main attraction of the structural injunction, at least in the literal sense of this term,[51] resides precisely in the fact that the judge need not be involved in a constant process of reshaping the future when he issues an injunction. Rather, the judge's activity can be limited to the present; it can be essentially a one time operation that brings about a present change in the structure of the organization. However, structure inevitably shapes future events. The judge and the decree both operate in the present, but the structural change brought about by the decree carries the effects of the judicial decision into the future.

Of course, this description of the structural injunction is an idealization. The "present's" duration is indefinite, and it sometimes may take a longer "present" to tinker with the structure of the organization than to administer a more traditional remedy. Nevertheless, the realization that in the case of the structural injunction the judge can bring about a particular change, here and now, is essential to its proper understanding. It is by means of the organization's manipulable structure that the effects of this decision are carried into the future.[52]

3. *Box 4: The Regulation Model.* — Moving finally to Box *4*, which describes the effects of the judicial decision on the future conduct of nonparties as well as parties, it is necessary to add one factor to those already enumerated. It is quite simply nonparties' awareness of the judicial decision. Obviously, if the decision is unknown to anyone but the parties involved, it will not influence nonparties' future behavior. It is

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50. See Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43 (1979); Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Fiss, supra note 2, at 44–58; Mishkin, supra note 17, at 959; Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784 (1978); Note, Implementation Problems in Institutional Reform Litigation, 91 Harv. L. Rev. 428 (1977); Note, The *Wyatt* Case: Implementation of a Judicial Decree Ordering Institutional Change, 84 Yale L.J. 1338 (1975).

51. The actual decrees commonly described as structural injunctions often contain provisions that merely set substantive standards (e.g. of racial equality in schools or of the appropriate treatment of prison inmates) rather than mandate a specific change in the structure of the target organization. See supra note 50 (discussing cases). Obviously the logic of my comments holds only with respect to those decrees (or parts thereof) which do mandate or otherwise bring about such a structural change.

52. Compare Professor Stone's recommendation that:

> [T]he society shall have to locate certain specific and critical organizational variables, and, where feasible, reach into the corporation to arrange them as it itself deems appropriate . . . .
>
> [W]hat I have in mind is a legal system that, in dealing with corporations, moves toward an increasingly direct focus on the *processes of corporate decision-making*. . . .

C. Stone, supra note 30, at 120–21 (emphasis in original).

equally clear that judicial decisions are seldom if ever secret, and thus are virtually always bound to have some future impact on nonparties. Still, for two reasons, it seems reasonable to believe that the dissemination of knowledge of judicial decisions is positively correlated with the rise of large organizations.

The first reason pertains to the difficulty of transmitting information in a society composed of individuals as compared with a society composed of large organizations. The large number and relative isolation of the individuals in the individualistic society require a very elaborate communications system to inform each individual about court decisions.[53] In the organizational society, by contrast, there is a relatively small number of large interdependent units, which makes the dissemination of information in general, and of court decisions in particular, easier and therefore more likely.

The second reason has to do with a difference between the entities themselves. Organizations are much more likely than individuals to command the time and resources needed to learn about potentially relevant judicial decisions before acting. Unlike individuals, organizations are often equipped with specialized "sensory mechanisms" in the form of permanent legal staffs, whose role is to gather pertinent legal information and bring it to bear on the organization's decisionmaking. The point is not that legal advice will be relatively less costly for most organizations than for most individuals (though that may be true), but, more importantly, that for many organizations, legal advice is institutionalized. Thus, the legal point of view plays a regular and permanent role in the organization's decisionmaking process.[54]

The relationship between organizations and the nature of adjudication can be summarized as follows. We have characterized modes of adjudication in terms of two dimensions along which they can be distinguished: a dimension of persons—litigants and nonlitigants—and a dimension of time—past and future. The organization is a peculiar entity with regard to these two dimensions. With regard to the dimension of

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53. A system of judiciary law (as every candid man will readily admit) is nearly unknown to the bulk of the community, although they are bound to adjust to the rules or principles of which it consists . . . . [T]hose portions of the law which are somewhat complex . . . are by the mass of the community utterly unknowable . . . . Unable to obtain professional advice, or unable to obtain advice which is sound and safe, men enter into transactions of which they know not the consequences . . . .

J. Frank, Courts on Trial, 283–84 (1949) (quoting J. Austin); see also Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1699 (1976) (addressing the "different degrees of responsiveness" by the citizenry to a system of formal legal rules).

54. The arguments in this section do not imply that organizations are in general more amenable to legal control than are individuals. Whether or not this is the case depends on many factors not here examined. That organizations augment the effects of judicial decisions does not mean that those effects would be necessarily the ones desired by the legal decisionmaker.

persons, the organization is a mode of unification. It presents to the court the semblance of unity, of a single litigant, while at the same time it consists of a plurality of individuals and interests, not nominally present in court. As for the dimension of time, the organization is a mode of presentiation: it compresses a diachronic sequence of events into a synchronic structure. On account of both these features, a decision that is directed to the organization in the present is likely to affect many individuals and shape the future. In terms of Figure I, the very nature of organizations as litigants transforms the judicial process, forcing it to move from Box *1*, describing the arbitration model, into Boxes *2* and *3*, toward the form of adjudication described in Box *4* as the regulation model. This movement, I will now argue, is not seriously inhibited by the normative considerations that underlie the strictures imposed by the arbitration model on judicial decisionmaking. Consequently, in the organizational setting, the judicial decision may be informed by concerns that are, roughly speaking, coextensive with the decision's expanded effects.

III. The Form of Organizational Adjudication

As we have just seen, the very presence of organizations in court as litigants generates pressures on the judical process that cause it to drift from the mode of arbitration toward the mode of regulation. I shall now suggest some reasons why these pressures should not be resisted. These reasons are all based on the claim that the strongest arguments in support of various features of the arbitration model presuppose individual litigants and do not apply to organizations. Consequently, regulation is a more suitable (or less objectionable) form of adjudication in dealing with organizations than with individuals. To show this, it is necessary first to spell out, in somewhat greater detail than I have done so far, the difference between the two models of adjudication.

A. *Legislative and Judicial Decisionmaking*

Generally speaking, the essential mark of the arbitration model is the sharp distinction it draws between the mode of decisionmaking appropriate for a legislature and that appropriate for a judge.[55] The regulation model, by contrast, tends to blur that difference; subject to the obvious limitations on judicial decisionmaking imposed by the Constitution and by relevant statutory provisions, the discharge of the judicial task resembles good legislative practices under the regulation model much more than it does under the arbitration model. Four features of adjudication as described by the arbitration mode sharply distinguish the judicial style of decisionmaking from the legislative style. Two of

55. E.g., R. Dworkin, supra note 3, at 81 (arguing that judicial decisionmaking should always be distinctive and that judges never, not even in "hard cases," act as legislators).

these features are already familiar from the discussion of the two models in Part I. Along the time dimension, a judge focuses on the details of a past transaction and decides on the basis of the preexisting rights that were implicated in it. The second familiar feature of adjudication from the arbitration perspective is related to the persons dimension: the judge is typified by a special concern for the actual parties before him. The just resolution of *their* dispute is the judge's prime objective; the general social ramifications of the decision, which are all important for the legislator, are for the judge only of secondary significance.

The third feature that distinguishes judicial decisionmaking from legislation is the former's strong commitment to consistency in decisionmaking, reflected in the doctrine of precedent.[56] Fourth, judges as described by the arbitration model are distinguished from legislators by their passivity:[57] judges are expected to rely exclusively on the litigants' presentations of the issues, the facts, the interests, and the remedies involved in the controversy.

The regulation model does not constrain the judge in these four ways. Inasmuch as the judge must exercise discretion he should do so in a more legislative or regulatory style than the arbitration model permits. The judge should be active, seeking out all the information and considering all the solutions that bear on the problem at hand. He should not timidly follow precedent, but rather should feel free to innovate if innovation is socially desirable. The judge's interest is primarily with the future effects of the decision, not with preexisting expectations. Finally, the judge should give equal weight to *all* effects, no matter whether they befall the particular parties or others.[58]

As a matter of sound decisionmaking the four features of adjudication as depicted by the arbitration model impose fairly drastic constraints on the judge, dramatically inhibiting his or her ability to search for a socially optimal decision. The judge is constrained from taking full account of the decision's effects on society's welfare; he is bound to follow previous decisions even though he may thereby perpetuate the folly of his predecessors; and he must passively accept the positions and facts as presented by the litigants though he may find them lacking or misconceived. From a purely utilitarian perspective, the soundness of such rigid constraints on judicial decisionmaking would seem doubtful at best.

These constraints do make better sense, however, if interpreted in terms of a normative orientation that predominates in recent American moral, political, and legal thinking. Loosely associated with Kant, this philosophical orientation views the law as primarily committed to the

56. For a good general discussion, see Goodhart, Precedent in English and Continental Law, 50 Law Q. Rev. 40 (1934); for a more philosophical discussion of the doctrine of precedent, see R. Wasserstrom, supra note 9, at 39–83 (1961).

57. See, e.g., Chayes, supra note 2, at 1283; Weiler, supra note 2, at 413.

58. See supra note 4.

ideal of individual autonomy.[59] It rejects utilitarianism's "uncompromising universality [that] deprives all individual differences, and thus the individual himself, of moral significance."[60] Instead, advocates of this orientation profess commitment to the uniqueness of individuals as "the ultimate moral particulars."[61] Accordingly, norms that assure that all individuals are treated with "equal concern and respect"[62] are given preeminence in this scheme and are allowed to override conflicting considerations of social utility.[63] This is obviously only a very rough sketch of what I shall call the individual autonomy perspective, but it should suffice to state my general claim. It is from such a perspective that the insistence on a sharp difference between the modes of decisionmaking applicable in adjudication and in legislation, and the imposition on the former—but not on the latter—of seemingly counterproductive constraints, can make better sense.

The support given by the individual autonomy perspective to the difference between legislation and adjudication in decisionmaking strategies, however, depends on a particular conception of the difference between the types of decisions made through these modes of decisionmaking. The distinction most commonly drawn between legislative and judicial decisions points out that the former are typically general, the latter particular.[64] It is important, however, to separate two different senses of the general-particular distinction. First, a decision can be

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59. See Professor Hart's eloquent testimony:

> We are currently witnessing, I think, the progress of a transition from a once widely accepted old faith that some form of utilitarianism, if only we could discover the right form, *must* capture the essence of political morality. The new faith is that the truth must lie not with a doctrine that takes the maximisation of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals, if only we could find some sufficiently firm foundation for such rights to meet some long familiar objections.

Hart, Between Utility and Rights, 79 Colum. L. Rev. 828, 828 (1979) (emphasis in original); see also B. Ackerman, Private Property and the Constitution 42 (1977) ("American lawyers are in fact limiting themselves to the elaboration of two different, but not *that* different themes. One is 'effiency' [1/M] which among the competing rules will maximizesomething-or-another-thatsound-like-Social-Utility. The other theme . . . I shall call Kantian simply to suggest its general concerns, if not usually its particular phrasing.") Barry, And Who Is My Neighbor? (Book Review), 88 Yale L.J. 629, 630–31 (1979) (asserting that current moral analysis is exhibiting "a shift from consequentialism as a starting-point to absolutism as a starting-point"); Young, Dispensing with Moral Rights, 6 Pol. Theory 63 (1978) (moral rights, as opposed to legal rights are an indeterminate and shaky foundation for recognizing the validity of an individual's claim).

60. C. Fried, Right and Wrong 33 (1978).

61. Id. at 20.

62. R. Dworkin, supra note 3, at 180–81.

63. See, e.g., id. at 198–99, 269; C. Fried, supra note 60, at 7–13; R. Nozick, Anarchy, State, and Utopia (1974).

64. This distinction plays an important role in administrative law, where it helps distinguish an agency's adjudicatory function from its rule-making function. See, e.g., J. Dickinson, Administrative Justice and the Supremacy of Law in the United States 21

particular or general in reference to the transaction to which it pertains. Judicial decisions are typically transaction-specific while legislation is normally transaction-general—it pertains to a generically described, indeterminate series of future transactions. Second, a decision can be person-specific or person-general: judicial decisions are commonly thought of as addressing a specific individual, identifying him or her by a proper name; legislation uses no proper names but instead addresses broad categories of individuals. The common failure to distinguish these two aspects of the general-particular distinction probably results from the fact that they appear as two sides of the same coin: by dealing with a particular transaction a court's decision must also, it may seem, deal with the particular, identifiable parties to that transaction.[65]

But the view that transaction-specificity and person-specificity are coextensive overlooks the phenomenon of organizational litigants. Organizational litigants split apart the two aspects of the general-particular distinction. When organizations litigate, a judicial decision no longer uses proper names nor does it address particular individuals. The judicial decision becomes person-general even as it remains transaction-specific.

Now, as I will soon indicate in greater detail, person-specificity is the more significant of the two aspects of a judicial decision's supposed particularity. This aspect underlies the various justifications suggested by the individual autonomy perspective for the special constraints imposed on judicial decisionmaking by the arbitration model. Common among proponents of the individual autonomy perspective is the view that there are certain norms that apply with special stringency in the context of an interpersonal relationship. These norms prescribe the appropriate ways one individual may treat another; they prescribe modes of treatment that express the respect due to another human being as an autonomous moral agent, possessed of dignity. Such norms, when they apply, override or displace considerations of social utility. The various constraints imposed on judicial decisionmaking by the arbitration model can be generally understood in these terms. When an organization is interposed between the judge and the individuals ultimately affected by the judge's decision, however, so that the relevant individual interests are mediated by those of the organization, these norms, and the constraints on judicial decisionmaking that derive from them, are drained of their special force. Put metaphorically, my general

(1927); Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259, 265 (1938).

65. The following quotation illustrates the common identification of the particularity of the judicial decision with its individuality: "*Any lawsuit tends to focus on the particular.* The nature of the litigation heightens the impact of specific wrongs which are presented in immediate and graphic terms. *This emphasis on the individual's point of view* is precisely one of the strengths of a judicial forum. . . ." Mishkin, supra note 17, at 964 (emphasis added).

point is that organizations serve as "moral buffers" between the judge and the particular individuals that are ultimately affected by the judicial decision, thereby radically transforming the nature of the interaction that takes place in the courtroom.

We shall now turn to a more detailed elaboration of this claim by discussing the four constraints on judicial decisionmaking which the arbitration model prescribes and which the regulation model would relax.

B. *Constraints on Judicial Decisionmaking*

1. *Past-Orientation.* — The judicial decision is inevitably torn between its role in settling the particular dispute between the specific parties and its role in shaping the law that will govern future transactions and other parties. Roscoe Pound called these two functions of the judicial decision the "deciding" and the "declaring" functions, and long ago noted the tension and the trade-off involved in carrying out both of them: "[T]here has been sacrifice of particular litigants and sacrifice of certainty and order in the law, as decision has fluctuated between regard to the one or the other of the two sides of the judge's duty."[66] While the tension is constant, there are different ways to strike the balance. One way, advocated by Professor Wasserstrom, is to have the judge come up with the best general rnle that will subsume the case under consideration, and then decide the case in accordance with that rule.[67]

The balance suggested by the arbitration model is quite different: it puts much more emphasis on the priority of the particular transaction between the parties, and attempts to reduce the intrusion of the future effects of the decision on the decisionmaking process. One famous and highly influential version of such an attempt is Ronald Dworkin's *rights thesis*.[68] According to this thesis, judges should not base their decisions on grounds of policy—that is, on the likely effects of the decision on the welfare of society—but rather on principles, that is on arguments having to do with the preexisting legal and moral rights of individuals.[69] How can a judge be required to disregard, in good conscience, the ef-

66. Pound, supra note 18, at 943.

67. R. Wasserstrom, supra note 9, at 138–71.

68. See R. Dworkin, supra note 3. Dworkin's rights thesis generated considerable discussion. For some noted critiques see Greenawalt, Policy, Rights, and Judicial Decision, 11 Ga. L. Rev. 991 (1977); Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 Ga. L. Rev. 969 (1977); Raz, supra note 19, at 823; Raz, Professor Dworkin's Theory of Rights, 26 Pol. Stud. 123 (1978). For a reply to some of these criticisms see Dworkin, Seven Critics, 11 Ga. L. Rev. 1201 (1977). It is not my aim here to enter this debate between Dworkin and his critics. I view Dworkin's position as expressing one of the features of the arbitration model, and examine the relevance of his arguments to organizational litigation.

69. On the principles-policies distinction and its relevance to adjudication see also Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973).

fects of his or her decision on the social welfare? Dworkin's answer is that when a judge decides a case on grounds of policy, rather than as a matter of a party's preexisting right, the decision amounts to "tak[ing] property from one individual and hand[ing] it to another in order just to improve overall economic efficiency."[70] This, argues Dworkin, would be wrong, since "we all agree that it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event."[71] A judicial decision is, however, free of such wrongdoing if it is based on an argument of principle, because "[i]f the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him."[72]

This argument has a distinctively individualistic flavor. The intended rhetorical force of invoking "the rights of an innocent man" and of describing the reliance on prior policies as a "sacrifice" of those rights depends on a strictly individualistic imagery. Replacing the "innocent man" in the above statement with the "innocent corporation" turns it from the intended conclusive rhetorical argument into an invitation to investigate the problematic relations between individual autonomy, the public interest, and corporations.

In accepting this invitation, I will focus on Dworkin's reliance on the notion of unjust or unfair surprise to support his view: a party can defeat the court's application of policy by pointing out "that it is unjust to take him by surprise."[73] For this claim to have the overriding force that Dworkin intends it to have, it must be linked (in terms of his own scheme) to the ideal of individual autonomy. It is this essentially Kantian notion that underlies Dworkin's "anti-utilitarian concept of a right,"[74] according to which "it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent" the invasion of such a right.[75] If an individual can successfully oppose considerations of social policy by invoking the danger of an "unfair surprise," then this notion must itself implicate basic values of individual autonomy and dignity in the way that individual rights do.

The necessary link between unfair surprise and individual autonomy can be established by noting the significance for one's freedom of action—an important aspect of one's autonomy—of protecting one's well-founded expectations. Without a certain degree of predictability the exercise of one's freedom of will becomes pointless. It is for this reason that, once an individual's interest or plan has to some degree crystallized and become definite, it is no longer to be frustrated even

70. R. Dworkin, supra note 3, at 85.
71. Id.
72. Id.
73. Id. at 86.
74. Id. at 269.
75. Id. at 199.

for worthy reasons of social policy. The very fact that an individual relied for good reasons on a certain state of affairs may invest that state of affairs with a moral significance it otherwise lacks.[76] The existence of a well-founded expectation "upgrades" a claim, which may not itself implicate the individual's autonomy, into one that does. This gives the individual a certain immunity against an unfair surprise and justifies a judicial decision upholding the expectation in the face of contrary policies.

This additional protection extended by the rights thesis to individual interests does not, however, apply to organizations. Frustrating organizational "expectations" (plans) does not in itself implicate individual autonomy. In the typical case in which a legal claim is made on behalf of an organization, the individuals whose interests may ultimately be affected by the disposition of that claim are unlikely to have formed any explicit and firm expectations, whose frustration may undermine their plans. Indeed, in many such cases those affected individuals—for example, the shareholders of the large business corporation—may not even know of the transaction that gave rise to the specific claim.

This is, of course, not to deny that organizational "expectations" need protection. Indeed, as implied by the importance of planning for the organization's operations,[77] uncertainty is a major problem for organizations. Uncertainty, however, typically involves a loss in utility terms and enters, therefore, into the policy considerations that apply to the case. My point is only that surprise to an organization entails no independent moral reason to *exclude* underlying policy considerations, whereas such a reason may well exist, according to my interpretation of Dworkin's view, with respect to individual litigants.[78]

Moreover, in many cases organizations' own interests may comport, rather than collide, with a future-oriented approach by the court. The main reason for this lies in an important difference that often exists between individuals and organizations in regard to their respective stakes in the judicial decision. The individual litigant's encounter with the law is typically a unique occasion in which the stakes for him or her are relatively high. There is little attraction for this litigant, therefore, in the judicial strategy recommended by Wasserstrom, according to which the judge must first formulate the socially most desirable rule that pertains to the case under consideration, and then decide the case according to that rule.[79] If the individual litigant loses in the particular

76. On the relation between predictability achieved by fixed rules and the ideal of individual autonomy, see Kennedy, Legal Formality, 2 J. Legal Stud. 351, 371 (1973).

77. See supra note 33 and accompanying text.

78. On Dworkin's own doubts as to the applicability of the rights thesis in an organizational context, see his reply to critics in R. Dworkin, Taking Rights Seriously 345 (paperback ed. 1978).

79. See supra text accompanying note 67.

controversy, he can take little comfort in the thought that the rule under which he lost will, in the longer run, yield the right decisions most of the time. As far as he is concerned, the rule misfired, and the unfairness of the loss to the particular individual is not mitigated by the overall gains to others that the rule has in store.

All this, however, is much less true when organizations, not individuals, are the litigants. Marc Galanter has characterized organizational litigants as "repeat players," as distinguished from litigants who are "one shotters." Repeat players, Galanter observed, "can . . . play for rules in litigation . . ., whereas [a one shotter] is unlikely to."[80] The organization's stake in the single, particular lawsuit will often be negligible compared to the volume of future similar transactions that it will conduct, and that will be influenced by the rule enunciated by the court. The backward-looking model of litigation and the exclusive concern with who receives the actual "purse" is therefore often inadequate as a description of the interests of the parties themselves as far as organizations are concerned. For the organization, unlike the individual, a rule that works well most of the time is a good rule; in the long run the organization is likely to reap the benefits of the rule, which will offset its occasional misfires.

Two other aspects of organizations point to the possibility that an organization may engage in litigation though it is quite indifferent as to its outcome. The first aspect is the organization's interest in certainty and predictability. Two of the aforementioned organizational characteristics account for organizations' particular interest in the certainty of the law pertaining to their future transactions: organizations typically engage in relatively long-term planning and operate by establishing standard operating procedures.[81] On both accounts organizations have a high stake in clarifying the law, and will therefore be inclined to enter "test case" litigation to determine the relevant legal rules.[82] In such cases, the organization is not interested in the resolution of the particular dispute, nor even in the content of the rule adopted by the court, but only in the clarity and certainty of such a rule.

The organization's formal structure, rather than its self-interest, may also be responsible for litigation. Organizations may sometimes engage in litigation solely because of an institutional need to externalize decisions that are difficult to reach within the organization.[83] An insurance company may, for example, litigate a large claim that, in terms of its own interests, it should have settled instead, just because its

80. Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95, 97, 100 (1974).

81. See supra note 33 and accompanying text.

82. Compare Aubert, supra note 9, at 45 (a party for which a lawsuit is "a regular, calculable element in business operations" may enter a test case to obtain a certain legal rule for the future).

83. Id. at 46.

internal structure does not allow for such a decision, or because such a decision creates overly large career risks for the relevant decisionmakers. What prompts the organization to litigate in such circumstances is the need for some authoritative resolution of the case rather than interest in a particular outcome.[84]

As these arguments suggest, when organizations are the litigants the concerns of the arbitration model may not be relevant to the purpose of adjudication even from the parties' own point of view. An alternative procedure, that focuses the court's attention on the merits of the general rule under which the particular case is to be decided, may often better respond to the peculiar organizational interests in the judicial process.

2. *Parties-Orientation.* — The second limitation on the scope of judicial considerations suggested by the arbitration model is the idea that the judge should consider only (or predominantly) the effects of the decision on the actual parties before her. The judge's primary responsibility is to the litigants, and her main task is to settle their dispute equitably *as far as they are concerned.*[85] This special attention to the parties raises a question about the moral ground for discriminating between the interests of tbe litigants and those of any other individuals (who might sometimes be described abstractly as "society as a whole") likely to be affected by the decision. Why should the judge give any primacy at all to the parties before her over those not present in court? A possible answer to this query is: precisely because they are before her.[86]

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84. See H. Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 166 (2d ed. 1980).

85. This constraint on judicial decisionmaking is different from that based upon Dworkin's principles-policies distinction discussed in the previous sub-section, since the latter allows the consideration of rights of parties other than the litigants, if such other persons' rights might be implicated by the decision. Dr. Raz raises the possibility that "Dworkin really has in mind not that judicial decisions should be based on rights rather than goals, but that they should be based on the interests of the litigants . . . excluding the interests of others as well as wider moral considerations," Raz, supra note 68, at 133, n.2. Professor Greenawalt considers at length the same hypothesis about Dworkin's position, but provides textual evidence to support an opposite conclusion, namely that Dworkin does admit the rights of nonparties as relevant to the judicial decision. Greenawalt, supra note 68, at 1016–26.

86. Any attempt to single out some effects on some persons as intrinsically more significant to a decision must be repugnant to the utilitarian creed. As pointed out by Bernard Williams, the utilitarian is committed to the notion of negative responsibility—that is, to the view that individuals bear equal responsibility for all the foreseen consequences of their decisions, irrespective of how these consequences come to pass. J. Smart & B. Williams, Utilitarianism For and Against 95 (1973). Utilitarianism would accordingly be inhospitable to a theory of adjudication that enjoins the judge to discriminate between his decision's effects on different persons—that is, litigants and nonlitigants. It can, perhaps, accommodate the special concern with the parties and their claims on practical grounds, based, for example, on an empirical assumption that the parties are likely to be most severely affected by the decision. However, such a rule of

Looking at the issue from the individual autonomy perspective, one can think of three related arguments for the special attention paid by the judge to the parties before her. The first argument is based on the notion of integrity—"the idea . . . that each of us is specially responsible for what *he* does, rather than for what other people do."[87] Integrity involves "tak[ing] seriously the distinction between my killing someone, and its coming about because of what I do that someone else kills them: a distinction based, not so much on the distinction between action and inaction, as on the distinction between my projects and someone else's projects."[88]

To illustrate the application of this line of reasoning to the judicial role, take a dramatic example: the death penalty. Jerry is charged with murder, and Judge Janice is asked by the prosecutor to impose the death penalty. The prosecutor argues that, according to the most updated research on the matter, failure to do so will reduce deterrence and will result, within the next year, in three more killings than if Jerry is executed. Now assume that the statistics offered by the prosecutor are reliable, and that the judge accepts this piece of information as true. Is it dispositive of her moral responsibility in the matter? Should she now proceed to pronounce Jerry's death sentence with a clear conscience, without any further moral qualms? The argument from integrity suggested above gives a negative answer. There is, as far as the judge's moral responsibility is concerned, a significant difference between the three lives that might be lost unless Jerry is hanged and Jerry's life. The difference lies in that Judge Janice is called upon to kill Jerry. It is Janice killing Jerry—pure and simple. Judge Janice may, of course, think it a good thing that she should kill Jerry. And she might think it a good thing precisely because she thereby saves three lives. But she kills Jerry nonetheless. If she refrains from killing Jerry, she does not thereby decide to kill three other persons. She does not kill them. Others will. The argnment from integrity suggests that this makes an important difference.[89]

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decision does not amount to anything more than a rule of thumb, a presumption to be rebutted by the actual facts and likely effects of particular decisions.

87. Id. at 99.

88. Id. at 117.

89. This analysis does not ignore, but rather rejects, a possible counter-argument based on the notion of the judicial role. The view that in issuing a death sentence the judge kills the defendant is wrong, one could object, because it ignores the fact that the judge acts in her judicial, not in her personal capacity. I find such an objection misplaced. The notion of role helps define Janice's moral responsibility; it does not replace that responsibility. That in considering whether Jerry should die Janice acts in her judicial capacity is of course highly relevant to the determination of her moral responsibility in the matter. There are things a person is morally entitled (or even obliged) to do only in carrying out a certain role. But it is still the person who does those things, and it is still his or her moral responsibility for them that is at stake. Consequently, when the judge examines her moral obligations in discharging the judicial role from the autonomy perspective she is bound to recognize the difference between her moral position vis-a-vis

The second argument that can justify paying special attention to the litigants is the argument from directness.[90] Roughly, the notion of directness involves drawing a line between those persons who are the intended objects of one's deliberate action and other persons on whom the impact of that action is only an unintended side effect. The agent has a special responsibility, it has been argued, with regard to the former category of people not present in the case of the latter category. The notion of directness thus expresses the special concern, fundamental to the individual autonomy perspective, with the treatment of one individual by another, that, is with other-regarding behavior that takes place in an interpersonal context in which respect for the other's person is the dominant (and categorical) norm.[91] This view does not deny, of course, the relevance to the acceptability of one's actions of the side effects that such actions have on people towards whom the actions are not directed. But these ramifications enter the decisional process only as part of the general weighing of consequences; they do not carry the categorical force of norms that regulate one's attitude and behavior toward the immediate, intended, and particular objects of one's action.[92]

The implications of the notion of directness for judicial decisionmaking can be illustrated by the familiar predicament of the judge faced with the decision whether to foreclose the mortgage of the proverbial impoverished widow who has defaulted on her monthly payments.[93] After long deliberations, the judge decides that as far as the parties are

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the litigants with whom she directly interacts and other individuals, though the difference may sometimes be overriden by other considerations.

See a consideration and a rejection of the "role theory" of the judge's moral responsibility in Kennedy, supra note 53, at 1772–73; cf. Nagel, Ruthlessness in Public Life *in* Mortal Questions 75 (1979) (examining "the continuities and discontinuities" between the moral responsibility of public officials and private citizens); Williams, Politics and Moral Character *in* Moral Luck, 54, 63–66 (1981) (examining arguments that claim to justify a lawyer's "morally disagreeable activity . . . in the enforcement of some legal rights").

90. See C. Fried, supra note 60, at 35–42.

91. The idea of directness has an ancient pedigree in the form of the doctrine of double effect, prominent in Roman Catholic moral theology. See C. Fried, supra note 60, at 202–03, and sources cited therein. For a modern philosophical argument that relies on the doctrine of double effect, see Boyle, Toward Understanding the Principle of Double Effect, 90 Ethics 527 (1980).

92. This point is summed up well by Professor Nagel as follows:

> The view that it can be wrong to consider merely the overall effect of one's actions on the general welfare comes into prominence when those actions involve relations with others. A man's acts usually affect more people than he deals with directly, and those effects must naturally be considered in his decisions. But if there are special principles governing the manner in which he should *treat* people, that will require special attention to the particular persons toward whom the act is directed, rather than just to its total effect.

Nagel, War and Massacre, 1 Phil. & Pub. Aff. 123, 133 (1972).

93. See R. Wasserstrom, supra note 9, at 141–43; Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451, 460–61 (1974).

concerned, justice (fairness, equity, respective rights, preexisting expectations, balance of interests or what have you) requires a decision for the widow. It is then pointed out to the judge that a decision for the widow is likely to harm other widows in the future, who will find it more difficult to obtain loans. To that argument the judge may reply, in the idiom of directness, that her decision directly affects only the widow and the particular lender-plaintiff, and thus the judge's primary responsibility is to them. This special responsibility is not cancelled by the unintended side effects that the decision is likely to have on other people in the future.

The third argument for the primacy of the litigants is what Charles Fried calls the personalist argument.[94] It suggests that special duties of love and friendship are born of personal acquaintance. As stated by Professor Fried the personalist argument contends that

> some preferences for known over statistical lives is justified by virtue of the fact that it is with known lives that we enter into relations of love and friendship, while to the abstract statistical lives we stand in relations defined by justice and fairness . . . . The reason for the preference would be that relations of love and friendship are personal relations, in which the parties to the relation are aware of each other as particular persons, as individuals, rather than as abstract persons having only such characteristics as make them the appropriate objects of duties of justice and fairness.[95]

The link between the personalist argument and the judicial role is established by the view that attitudes such as love, pity, and compassion should find expression in the law. Thus, for example, Professor Noonan believes that "[t]he central problem . . . of the legal enterprise is the relation of love to power";[96] similarly Professor Kennedy is concerned with "the pity and fear aroused in us by the image of a fellow human being at grips with institutions of formal justice";[97] and Professor Fletcher views excuses in the law of torts "as expressions of compassion for human failings in times of stress."[98] Such attitudes belong to the domain of interpersonal relations, and are properly invoked, according to the personalist argument, as responses to *particular* individuals.[99] Special duties of love and friendship alluded to in the personalist argument do not arise in the case of "abstract persons having only such

94. C. Fried, An Anatomy of Values 222–23 (1970).

95. Id. Though Fried himself rejects this argument, he later changed his mind and adopted a view in line with the personalist argument. See Fried, supra note 60, at 184–85.

96. J. Noonan, Persons and Masks of the Law xii (1976).

97. Kennedy, supra note 76, at 380.

98. Fletcher, supra note 10, at 553.

99. The point is made eloquently by Professor Noonan, who says that "[w]e can often apply force to those we do not see, but we cannot, I think, love them. Only in the response of person to person can Augustine's sublime fusion be achieved, in which justice is defined as 'love serving only the one loved.'" J. Noonan, supra note 96, at xii.

characteristics as make them the appropriate objects of duties of justice and fairness."[100] The personalist argument thus offers another straightforward reason in support of the judge's special concern for the lives and interests of the particular individuals with whom she is engaged in a personal relation in court.

The three arguments outlined above—the argument from integrity, the argument from directness, and the personalist argument—are closely related. They all share a belief in the moral significance of the uniqueness of the individual and in the moral importance of the interpersonal relation. What is distinctive about the courtroom as a forum for decisionmaking is, according to these arguments, its uniquely dramatic setting, where the moral drama results from the personal interaction between three particular individuals: the two parties and the judge. The special concern for the parties, emphasized by the arbitration model, is accordingly born of the special moral considerations that attach to the treatment of one individual human being by another and which apply in this setting.

The characterization of the judicial decision which underlies this entire line of argument is that it is a personal decision, issuing from and pertaining to particular, identified individuals. But this characterization of the trial no longer holds true when organizations, not individuals, are the litigants. The "presence" of an organization in court deprives the process of its essentially personal character and renders judicial decisionmaking impersonal. The judge is no longer interacting with any particular individual whose fate is directly determined by the judicial decision. That she deals with an organization should not, of course, obscure for the judge the plain truth that her decision will ultimately affect different people in various ways. But, unlike individual litigants, none of the individuals indirectly affected by the decision in the case of organizational litigants should be singled out for *special* concern. Rather, the judge is both free and obligated to give equal weight to all persons who are likely to be significantly affected by the decision concerning the organization. None of them stands to the judge in this special relationship that would entitle them to the protection of those values involved in the treatment of one individual by another.

3. *The Method of Precedent.* — A similar analysis leads to a parallel conclusion with respect to the third feature that, according to the arbitration model, must distinguish adjudication from legislation: the great importance of precedent in adjudication. Courts seem to be exceedingly anxious to demonstrate a consistent approach to similar situations, and go to great lengths to justify new decisions in terms of older ones. The need to justify new decisions by demonstrating their consistency with old ones is peculiarly judicial. No legislator is similarly bound or expected to make new decisions by reference to and in light

100. C. Fried, supra note 94, at 223.

of old ones. Nor is this decisional strategy free from puzzlement. It in effect forces a judge to perpetuate what he believes are bad decisions; when he finds prior decisions to be sound there is no need to bind him to them by the doctrine of stare decisis.[101]

Even granting that an element of stability and predictability is preserved by the method of precedent would not by itself sufficiently account for the insistent judicial preoccupation with precedent. First, the reverse side of stability and predictability is conservatism and rigidity. The perpetuation of prior decisions may be harmful even if those decisions were correct when made, because they may have become outdated. Second, if the values of stability and predictability were so important and so successfully served by the method of precedent,[102] there would be no reason to free legislation from that blessing completely. If, on the other hand, the contribution of precedents to stability is not of such preemptive importance, this suggests that in deciding a case, this particular value should be considered among other values.[103] It seems unlikely that, when so considered, precedent would win much of the time on the sheer weight of its contribution to stability and predictability.[104]

Considerations such as these,[105] I believe, have led Professor Dworkin to conclude that the special role played by precedent in adjudication must be explained "by appeal . . . to the fairness of treating like cases alike."[106] But this phrase, as it stands, is quite obscure. Why is it fair to treat like cases alike? We surely are not committed to such a principle in our daily lives. On the contrary, we often treat "like cases" differently merely for the sake of variety, diversification, or experimen-

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101. "[I]f the doctrine of precedent has any significant meaning, it would seem necessarily to imply that rules are to be followed *because they are rules* and not because they are 'correct' rules." R. Wasserstrom, supra note 9, at 52.

102. Commentators tend to be skeptical about the actual contribution of the doctrine of stare decisis to uniformity and predictability. See, e.g., J. Frank, supra note 53, at 268–71, 282–85; R. Wasserstrom, supra note 9, at 64–66 and sources cited therein; Chayes, supra note 2, at 1287–88.

103. This is probably what Chief Justice Stone meant by stating that "before overruling a precedent . . . it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity." United States v. South-Easteru Underwriters Ass'n, 322 U.S. 533, 580 (1944) (Stone, J., dissenting).

104. It might seem possible to ground the method of precedent in the value of enforcing preexisting expectations. This, however, appears to be circular: one would have a sound expectation that a particular decision would be based on a prior one only if one assumed the court's commitment to the method of precedent. At any rate, the rejoinder to such an argnment in favor of stare decisis would be along the same lines as the argument under the heading "past orientation" that underlines the difference between individual and organizational expectations. See supra notes 66–84 and accompanying text.

105. But see quite a different approach in Professor Shapiro's attempt to account for the doctrine of stare decisis in terms of communication theory. Shapiro, Toward a Theory of *Stare Decisis*, 1 J. Legal Stud. 125 (1972).

106. R. Dworkin, supra note 3, at 113.

tation. There is no abstract general duty to treat like cases alike. If you service one of your cars every 6000 miles, you face no charge of unfairness if you fail to do the same to your other car. Those who recurrently do the same things on similar occasions are more likely to be scorned as compulsive neurotics than praised for exemplary fairness. The phrase remains obscure until we realize that it does not refer to "treating cases" but rather to "treating people." Properly understood, the principle is plainly about the fairness of treating people in like cases alike. A possible reason this corrected principle is indeed a principle of fairness is the postulated moral equality of all people. If the surrounding circumstances of two cases are equal, and yet the treatment awarded to the individuals involved is different, that difference may be accounted for in terms of a difference between the individuals themselves or a different attitude of the decisionmaker toward the individuals involved. Treating individuals differently in the same circumstances might therefore be viewed as an indication of an invidious violation of the postulate of moral equality. The principle of treating like cases alike is therefore a principle of fairness since it guards against such a violation of individuals' moral equality and against the arbitrary and prejudicial treatment of some individuals by authority.

The insistent resort by courts to precedent as a means to ensure that "like cases be treated alike" can now be understood in the light of the circumstances that distinguish judicial from legislative decisions. Again, the personal nature of the judicial decision dramatically challenges the ideal of equal treatment and makes the moral equality of individuals highly vulnerable. The occasion that calls for tailoring an individualized norm also permits the incorporation in that decision of considerations that single out the particular individual concerned for preferential or detrimental treatment. The elaborate intellectual mechanism by which courts demonstrate that like cases are treated alike can accordingly be understood as a demonstration that all individuals are treated alike—that is, in Dworkin's felicitous phrase, with equal concern and respect.[107] The individual who is otherwise completely exposed to the state's authority is shielded by the court's strong commitment to treat him or her as a member of a large and more anonymous group, composed of those similarly situated individuals whose cases have been decided in the past.[108]

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107. Id. at 180–83, 272–78.

108. This argument is different from the familiar argument that precedent contributes to "the prevention of partiality or prejudice." Goodhart, supra note 56, at 56. As Professor Wasserstrom points out in criticizing the latter argument, R. Wasserstrom, supra note 9, at 78–79, the doctrine of precedent can perpetuate the initial biases of the precedent-making judge, and thus increase, rather than decrease, the overall amount of prejudice in the system. My point is that the doctrine of precedent helps eliminate a special kind of bias or prejudice—the one aroused by and directed toward the particular individual. It thus helps eliminate the special offense to the person involved in singling out the particular individual for mistreatment, and it mitigates the appearance of domi-

Once again, this argument for the method of precedent depends on the assumption that the judge addresses a particular individual. It does not apply when the court's decision pertains only to large, anonymous groups of people, as is the case when the litigants are organizations. In these cases, the distinctive nature of adjudication that justifies the insistent resort to precedent is strongly attenuated. The court need no longer artificially "generalize" its decision. It may instead face the issues head-on, much as a legislature would do, without excessive engagement in strategies whose main justification is no longer present.

Before concluding this section, it should be noted that the method of precedent as here analyzed exposes a fundamental tension within the arbitration model. In the preceding section we emphasized the special significance of the particularity of the individual litigants within this model. The personalist argument, for example, draws upon the particularity of the parties to the litigation and elaborates the implications of the personal relations that characterize it. The judge, we have argued, is called upon to respond to the uniqueness and the humanity of the parties, and thus to give preeminence to their claims over those of other interests that may be implicated in his decision. The method of precedent, by contrast, is a strategy to neutralize the personal aspect of adjudication. It forces the judge to assume a detached position that ignores the particular individuality of the litigants by assimilating them into the impersonal group of prior litigants.

These conflicting tendencies within the arbitration model are not surprising. Both can be explained in terms of the individualism of this model. This individualism tries to respond to both the moral equality and the empirical, concrete uniqueness of individuals. Love and friendship, invoked in the personalist argument, respond primarily to the latter. Justice and fairness, on which the method of precedent rests, respond to the former. Ideally, there is no real contradiction between these two sets of values and sentiments. To see that this is so, we may resort to Professor Dworkin's helpful distinction between "treatment as an equal" and "equal treatment."[109] The moral equality of all persons requires that each individual should be awarded "treatment as an equal," that is, should be treated with "equal concern and respect." This, however, does not necessarily redound to an actual "equal treatment" of all individuals. Equal concern and respect for each individual is compatible with a treatment that responds to the individual's full and unique humanity, taking into account the particular circumstances of his or her life. Ideally, one can treat people with equal concern and respect, in accordance with their moral equality, doing, at the same time, full justice to their particularity and uniqueness.

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nation of litigant by judge. Unlike the more general point made by Goodhart, the present argument is not, therefore, open to Wasserstrom's objection.

109. See R. Dworkin, supra note 3, at 227.

But this is true only ideally. The strictures imposed by the arbitration model on judicial decisionmaking contemplate human weaknesses and imperfections that dominate the imperfect world in which adjudication actually takes place. The response to human particularity may, in fact, be not love and friendship, but rather bias, prejudice, and hatred, which will deny to the litigants not only equal treatment, but also treatment as equals. In trying to diminish these dangers, the method of precedent, with its attempt to infuse the treatment of particular individuals with a certain degree of abstraction and generality, also diminishes the ability of the judge to respond positively to the full and unique humanity of the litigants.

While the ideal of impersonal justice is compatible with love and compassion for the individual, when these two strands are combined in a real world institution, they are likely to generate conflicting strategies meant to guard against the corrupting effects of human weaknesses on these two ideals. Accordingly, adjudication is torn between an emphasis on the preeminence of the litigants, calling for a full recognition of their uniqueness and particularity, and an emphasis on abstraction and generality, to safeguard fairness against the dangers of bias and prejudice. This tension, however, prevails in adjudication only so long as it deals with individual litigants. The twin ideals that generate this tension are no longer operative when the litigants are large, impersonal organizations. In such a case, the judge need neither give priority to the plight of particular individuals nor resort to precedent as a means to ensure fairness to those individuals.

4. *Judicial Passivity.* — Judicial passivity designates the exclusive reliance by judges on the positions taken by the parties; these positions are assumed to exhaust the range of facts, issues, and remedies to be considered by the judge. From a utilitarian perspective, this too is a puzzling feature. As a social decisionmaker, the judge should be expected to generate the best possible decision. What is the best possible decision will often be influenced by what the parties to the litigation think. But while what they believe should be given appropriate weight in reaching the decision, there seems to be no reason that this factor should be dispositive of the case. It seems odd to cripple a sound utilitarian calculus by systematically excluding relevant options and perspectives merely because the parties did not happen to present them. Here again a possible account of judicial passivity is linked to an individualistic view of adjudication.

This account is based on both moral and psychological attributes of individuals. On the moral side, judicial passivity can be understood as a reflection of individuals' autonomy, whereas, on the psychological side, it is a response to their subjectivity. Judicial passivity expresses the belief in the ultimate right of every individual to shape his or her own life, to choose goals, and to define interests. No one else can coercively intervene in this process without violating the individual's free-

dom of will, and thereby his or her autonomy.[110] Because of the ideal of individual autonomy no one is entitled to substitute one's own opinion for the individual's regarding that individual's wants and interests. Because of individuals' subjectivity—that is, because of the ultimate inscrutability of their minds—no one is capable of confidently doing so. Respectful of their autonomy and baffled by the inscrutability of their minds, the judge, faced with individual litigants, remains passive: it is entirely up to them to present the judge with their respective visions of their lives, their interests, and their claims.

But insofar as judicial passivity is indeed based on individual autonomy and subjectivity, it has no place with respect to organizational litigants. One should not confuse individual autonomy with organizational autonomy. In fact, given the oligarchical and oppressive propensities of organizations, the two are frequently antagonistic to each other. Consequently, the claim made on behalf of the organization is not immunized from active judicial scrutiny by any individual's moral autonomy. Nor does subjectivity bar judicial activism with respect to organizations. Organizational claims are the products of interpersonal processes, in which positions must be articulated and justifications given. Furthermore, conceived as an instrument for the achievement of goals, organizations must support their claims by a means-ends rationality that is capable of objective statement and is accessible to other minds to the same extent that it is accessible to the organizational decisionmakers themselves. We may conclude that the moral and psychological attributes that advise judicial passivity with regard to individual litigants are absent when organizations are concerned. The judge may therefore exercise greater freedom and initiative when dealing with organizational litigants than he is used to doing in the case of individuals.[111]

IV. CONCLUSION

Part II demonstrated that the participation of organizations in litigation is likely to increase the effects of judicial decisions considerably and carry them far beyond the particular litigants and the resolution of

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110. Cf. Kennedy, supra note 53, at 1737. This idea received a vivid expression in an old contract case:

> A man may do what he will with his own, having due regard to the rights of others, and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant who has been so employed and paid for building it, to say that his own performance would not be beneficial to the plaintiff.

Chamberlain v. Parker, 45 N.Y. 569, 572 (1871). But the locus classicus of this moral sentiment is still, it seems to me, Bartleby's defiant response to his employer's urgings: "At present I would prefer not to be a little reasonable." H. Melville, Bartleby *in* The Portable Melville 465, 490 (J. Leyda ed. 1976).

111. Cf. Professor Fiss' argument for abandoning the passive posture of the judge in structural reform litigation, in Fiss, supra note 2, at 24–27.

the particular dispute. This creates pressure, and a prima facie reason, to take these effects into consideration in reaching the judicial decision, thus shifting from an arbitration model of adjudication toward a regulation model. However, the arbitration model, seen as a normative model, insists on some restrictions on judicial decisionmaking which distinguish it from legislation and inhibit its drift toward the mode of regulation. Part III focused on four such restrictions: first, that the judge should be concerned with existing rights to the exclusion of the general future effects of her decisions; second, that the judge should be predominantly concerned with the parties rather than with the effects of the decision on others; third, that the judge should decide the particular case in the light of precedents; finally, that the judge should be passive, relying exclusively on the presentations of the parties. The insistence on these restrictions can best be understood, I have argued, in terms of arguments that presuppose a conception of adjudication as a personal interaction among particular individuals. However, these arguments are inapplicable to a major segment of contemporary litigation, in which organizations rather than individuals take part, thereby removing the personal element from the judicial process. When organizations are involved, an important difference between the nature of the judicial and the legislative decision is obliterated, and the basis for the various restrictions on judicial decisionmaking within the arbitration model is undercut. Free of these restrictions, judges may adopt, in the case of organizational litigants, a more regulatory, legislative mode of decisionmaking. More specifically, they may give equal weight to the various interests affected by their decision, take into account arguments based on desirable policies as well as arguments framed in terms of existing rights, downplay the importance of precedents, and perform a more active role in determining the interests, shaping the issues, and designing the remedies involved in litigation. Thus, by adjusting the style of decisionmaking to the nature of the litigants, the judge may be able to escape, to a certain degree, the dilemma between the opposing pressures and attractions of arbitration and regulation, a dilemma that a more unitary view of adjudication presents in full force.

This happy conclusion must, however, be qualified in four ways. First, it ought to be read only to suggest a different relative emphasis that the judge should give to the conflicting decisional strategies that compose the two models. An attempt to practice any of the aspects of either of the models in its purity is likely to lead to a caricature of the judicial process.[112] Secondly, my argument has been in the main a negative one. It only shows that some important arguments in favor of the

112. This was probably the experience of Justice Robinson, who claimed to disregard precedent completely and insisted on deciding each case on its merits. See Bruce, Judicial Buncombe in North Dakota and Other States, 88 Cent. L.J. 136, 137 (1919); Robinson, Judge Robinson's Reply, 88 Cent. L.J. 155, 156 (1919); Note, Rule and Discretion in the Administration of Justice, 33 Harv. L. Rev. 972 (1920).

restrictions imposed on adjudication by the arbitration model do not apply to organizations. It does not follow, however, that sufficient support for the same restrictions in the case of organizations cannot be found elsewhere, notably in some utilitarian considerations. So, though I do in fact believe that withdrawing from these restrictions the support of arguments based on individual autonomy does considerably weaken them, I have not, strictly speaking, affirmatively established that a change in judicial strategy of the kind I have described is indeed warranted.

Third, in dealing with adjudication, I have distinguished organizational from individual litigation in mutually exclusive terms. This plainly overlooks the important group of cases in which the litigation takes place between an individual on the one side and an organization on the other. The oversight is not, however, as dramatic as the importance of this category of cases may make it seem. Though these "mixed" cases obviously introduce additional complexities into the judicial role, the implications of my arguments for the judicial treatment of such cases are fairly straightforward. To explore these implications in any detail at this point is likely to be more tedious than fruitful, but their general direction can be briefly indicated. The "mixed" cases, pitting an individual litigant against an organization, call for a correspondingly mixed judicial strategy, one that draws selectively on both models of adjudication and that treats the parties, in terms of the preferred style of decisionmaking, asymmetrically. So, for example, the court may rely on certain considerations of social policy to defeat the organizational litigant's prior "expectations," though similar considerations would not be permitted to ground a decision against the individual litigant in a way that would amount to unfair surprise. Similarly, the judge may feel free to scrutinize more thoroughly and actively the organization's statement of its claim than he is permitted to do with regard to the individual party's presentation of its case.[113]

Finally, my discussion has emphasized the pitfalls of an overly unitary concept of adjudication. However, it is equally important to realize that the willingness to subdivide adjudication into categories marked by fundamental differences in decisionmaking processes must also have its limits. The concept and the institution of adjudication, like other concepts and institutions, can bear only so much internal strain. At some point, the use of the same concept to designate what have become radically dissimilar sub-categories may become confusing, just as the use of

113. An analogous conclusion to the one reached in this Article with respect to adjudication can also apply to the substantive, procedural and evidentiary aspects of law. My arguments in favor of a different style of adjudication for individual and organizational litigants imply the broader view, according to which different substantive principles, procedures and burdens of proof might be appropriate for individuals and for organizations. In M. Dan-Cohen, supra note 30, I explore some such additional ramifications of this general view.

the same institutional structure for serving essentially different social functions may be inefficient. My conclusions regarding the radical differences in the nature of adjudication occasioned by large organizations therefore raise the question whether the same institutions and the same officials who settle individual disputes should also be charged with overseeing interorganizational conflict and cooperation.