Commom Law and Its Substitutes: The Allocation of Social Problems to Alternative Decisional Institutions

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As litigation costs and effectiveness have come under attack, arbitration and mediation have become the subjects of increased scrutiny as alternative means to resolve legal disputes. Professor Barton argues that the scope of this scrutiny must be broadened to include extralegal decisional institutions such as legislatures and the free market; social problems should be resolved by the decisional institution whose dynamics and structure are best suited to effective resolution of a given problem. To determine which institution should address each problem, Professor Barton proposes a four-part analytic framework that evaluates each institution's ability to resolve effectively the problem at issue. Applying this framework to social problems such as pollution, civil rights, and factory closings, he concludes that certain aspects of these problems currently are not addressed by the proper decisional institutions.

Much attention recently has been focused on arbitration and mediation as alternative methods of resolving legal disputes.\(^1\) That valuable inquiry, however, should be preceded by a more fundamental question: What constitutes a "legal dispute" or "legal problem" as opposed to a "political" or "market" problem? The analysis of alternative dispute-settlement techniques should be extended beyond alternative formats within the legal system, to a consideration of alternative decisional institutions. It is self-evident that alternative decisional institutions such as legislatures and the free market exist.\(^2\) That certain problems may be solved better by one institution than another also is clear,\(^3\) but...
rarely is discussed. To ignore the implications of this proposition, however, is to neglect the opportunity to improve the accuracy, efficiency, and acceptability of social problem-solving procedures.

This Essay presents a starting point to assess the efficacy of three decisional systems. By examining the structures of common-law adjudication, the legislative process, and the free market in relation to the demands made on these decisional institutions, general criteria emerge to match problems and procedures. Those criteria are elaborated in examples which demonstrate that most social problems are complex, and that certain aspects of a given problem are appropriate for resolution within the decision system that currently treats such problems. Other aspects of these problems, however, would have a better chance for resolution if treated by a different decision system. Thus, more careful attention to the allocation of social problems among alternative decisional institutions is warranted.

I. THE STRUCTURE OF DECISIONAL INSTITUTIONS

Many different variables describe the structure of decisional institutions. The four most salient features of decisionmaking structures are (1) the method of problem identification; (2) the degree to which decisions within the system are either "deliberative," that is, consciously fitted within a coherent, planned, and often goal-directed order, or "spontaneous," that is, no consciously planned order or goal exists within the system, but a sort of equilibrium state is generated internally by a series of mutual adjustments among the various decisions;
(3) the roles that problem holders take in positing arguments and formulating solutions; and (4) the nature of the substantive justifications of the decisions. The decisional institutions of common-law adjudication, the legislative process, and the free market contrast starkly along these four dimensions.

A. The Method of Problem Identification

Each of the three decisional institutions identifies problems through a different mechanism. The mechanisms are either "active" or "reactive." Adjudication is "reactive" in its system of identifying problems: adjudication does not seek out problems; rather, a given problem is noticed only when the appropriate legal institutions are petitioned. Moreover, the disputants, rather than the professionals within the decisional system, are responsible for articulating the boundaries of the problem. Legislation, however, is a much more active decisional method because legislators may identify or ignore problems by whatever criteria they choose. Additionally, the legislators rather than the problem-holders define the breadth and severity of the problem. To aid in problem definition, legislators may launch whatever investigations they choose. The free market, on the other hand, resembles adjudication rather than legislation in its method of identifying problems. Lacking institutionalized personnel, the market method other than planning by which order could be achieved. M. POLANYI, THE LOGIC OF LIBERTY 154-56 (1951). The concept then was adopted by Lon Fuller in his notion of polycentric problems. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 394 (1978); Fuller, Adjudication and the Rule of Law, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 3 (1960). Deliberative order is that created by conscious planning and manipulation of the environment. Deliberative procedures involve choices or goal-setting, followed by enforcement or implementation. The alternative, "spontaneous" method of obtaining order is to take no affirmative action, but rather to allow the internal forces of a given problem to achieve equilibrium spontaneously. "Spontaneously" means nondeliberatively; it does not necessarily mean immediately or even quickly. A nondeliberative solution may proceed instantaneously, as in the case of an explosive chemical reaction. In contrast, the nondeliberative process of natural selection requires generations.

Within every social relationship some sort of internal, spontaneous forces exist; therefore, between or among these forces some sort of equilibrium always can be achieved. The equilibrium that emerges in a given case, however, may be an undesirable state of affairs; allowing the internal forces to arrive at mutual accommodation therefore may constitute an undesirable problem-solving procedure. For example, if a quarrel develops between children over possession of a toy, the spontaneous solution would be to allow the internal forces—physical strength, intimidating personality, or capacity for revenge—to arrive at an equilibrium that may entail possession of the toy by one child subject to periodic theft through the stealth of the other. In contrast, a deliberative procedure consciously would choose between the competing claims by assessing ownership, or would develop some plan for shared possession and impose such a solution on the children. Either procedure produces order. A deliberative decisional system controls the moral or legal values expressed in that order, while the values in spontaneous systems are generated internally rather than imposed externally.


9. AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR, supra note 8, at 5.

10. Howard, supra note 8, at 346.
11. See id. at 344.
12. Id.
is quite reactive. The problem-holders, not the institution, identify the problems and boundaries of the issues.

The method of problem identification adopted by a decisional institution can affect greatly the predicted success of the institution in solving certain problems. Consider the problem of injuries to community health caused by the conversion of fossil fuels for energy needs: injuries such as cancer or respiratory impairment could lie dormant for years following a particular environmental decision. When such a problem is left to resolution by common-law adjudication, as frequently is the case, poor results are likely. The reactive nature of common-law adjudication means that the problem can be identified only when the injury, rather than merely its risk, has surfaced. The accuracy of redressing this problem therefore must suffer, since the cause of the injury can become so muddled by intervening events that the assignment of liability is impossible. Even if perfect accuracy could exist in assigning responsibility for injury, adjudication may be less suitable as a decisional system than a more active system like legislation. If the problem was identified when the original environmental decision was made, rather than only after injury had arisen, some or all of the injury could be prevented.

The free market is an even worse institution to solve the problem of a latent injury to health. Assume that no legal right protects persons from health injuries due to pollution, so that protection of health could be obtained only by purchasing from the polluter a promise to stop polluting. The potential injuree would assess the value of his health and then enter into direct negotiations with the polluter. Obvious difficulties attend this solution. First, as long as the injury is latent, the injured person has limited knowledge of the value to him of stopping the polluter. Even if such a value could be assessed accurately, the value


15. The free market is ill-suited to resolve most problems which stem from actual losses that lawyers would classify as torts. Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1108-09 (1972). Free-market exchange is completely consensual, and assumes that buyers and sellers know those with whom they should bargain. Bargains in advance of a personal injury are unlikely because potential injurees have little information regarding the probability or extent of injury, or the identity of the injuror. A bargain is equally unlikely after an accident has occurred. If the injuror had the legal privilege to act as she did, then she has done nothing wrong and therefore has no reason to pay for the injuree's loss. If the injuror held a legal entitlement not to be injured, the parties—absent the threat of going to court—will be unable to reach agreement on the price of the injury because the injuree has an incentive to lie about the price that she would have demanded for the loss prior to the accident. Id. at 1109. The injuree's asking price for the loss therefore will be inflated. Id. at 1107. On the other hand, the injuror's loss has no inherent worth to the injuror; thus, she is unlikely to accept even a reasonable offer from the injuree. No incentives for a bargain exist, and the free market realistically cannot protect the "right not to be injured." Id. at 1110 n.39. Such rights must be protected in the courts by liability rules that incorporate social determinations of the value of the violated rights. Id. at 1110.

16. Cf. A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 96-98 (1983) (analyzing the effect consumer underestimation of product risks has on efficiency "with respect to the care exercised by firms and the purchase decisions of consumers").
to a polluter of continuing polluting is likely to exceed greatly the cost of an injury to one person. The potential injuree would bid up to the assessed value of his health, but all such bids would be rejected. No agreement would be reached. If the bidder attempted to organize a group of potential injurees for collective negotiations, a free-rider problem would arise: some injurees would refuse to contribute to the collective buy-out on the assumption that others would contribute the required amount. The benefit of the buy-out—in this case, the ceasing of pollution—would accrue equally to all injurees regardless of the amount that each injuree had contributed to the settlement. Each injuree therefore would have an incentive to pay little or nothing, in the hope that other injurees would pay more than his proportionate share. If too many injurees adopted this free-rider strategy, the collective buy-out would fail. These structural obstacles inherent in a free-market solution would prevent solution of a potentially serious, chronic problem.

Therefore, two relationships between problems and procedures can be stated in the context of the method of problem identification: problems based on events likely to occur in the future are more suitable for resolution by procedures that employ an active rather than reactive system of problem identification; and the transaction costs of a reactive system sometimes make the decisional procedures of that system infeasible for solving particular problems.

B. Deliberative Versus Spontaneous Decisionmaking

The second structural variable of decisional institutions is the degree to which decisions within the system are deliberative or spontaneous. The alternative decision systems vary greatly in the degree to which they exhibit a consciously planned and ordered decisional structure, instead of an unplanned, internally generated dynamic order of interacting decisions.

Problems with large numbers of variables that interact or trade off among one another generally are solved best by allowing the spontaneous equilibrium to emerge. Such problems require a complex optimization of the competing variables; deliberative procedures often are incapable of reconciling such complexities. Nevertheless, if the deliberative process is attempted, the subtleties of the variables are likely to be compressed, or some variables dropped altogether. Thus, the construction of a good marriage or a good relationship between parent and child cannot proceed wholly deliberatively. The variables are too numerous and too ill-defined; they interact in ways too complex to expect total planning to be feasible, much less successful.

Adjudication generates common law that is a series of general statements about the results of hundreds of local decisions made by judges who are close to

17. *See supra* note 7.
18. *See M. Polanyi, supra* note 7, at 156.
19. *Id.*
discrete sets of facts. The common law is a dynamic equilibrium of competing principles that constantly is adjusted and refined through the distribution of written opinions vested with importance by the doctrine of stare decisis.\textsuperscript{21} Although each adjudicatory decision is highly deliberative, involving a careful consideration of contending arguments and resulting in a clear choice between alternatives, the atomistic nature of the legal system lends a distinctly spontaneous quality to the common-law doctrines that emerge.\textsuperscript{22} This spontaneity suggests that the common law may be capable of resolving such issues as social adjustment to a multiracial society, the complexity of which follows from a need to make frequent, small, subtle adjustments among a multitude of variables.\textsuperscript{23} Conversely, the common law is ill-equipped to generate a single, large-scale, well-planned, coherent solution for any but the most simple problems.\textsuperscript{24}

Legislation, in contrast, is deliberative in nature, almost without exception. It proceeds by authoritative, centralized evaluations that are intended to govern wide varieties of local conditions over a long period of time. Legislation relies on fewer numbers of decisions with less regard for factual nuances and less expectation that the decision will need frequent modification. Legislation is capable of conscious planning; the common law is not because the legal system demands definite standards of proof and causation.\textsuperscript{25} By contrast, legislation prospectively preempts activities by certain classes of individuals.\textsuperscript{26} Consequently, legislation can engage in active planning by being more cavalier in evidentiary and causation standards.\textsuperscript{27}

Regardless of the simplicity or complexity of a given problem, legislation also differs from the common law in that the consequences of errors are relatively more severe given the limited number of legislative decisions. There are fewer decisions because each decision is intended to embrace more than a single set of problem-facts. The compensating strength of legislation, however, is that

\begin{itemize}
  \item \textsuperscript{21} As Polanyi states:
  
  The operation of Common Law thus constitutes a sequence of adjustments between succeeding judges, guided by a parallel interaction between the judges and the general public. The result is the ordered growth of the Common Law, steadily re-applying and re-interpreting the same fundamental rules and expanding them thus to a system of increasing scope and consistency . . .

  Accordingly, the operation of a judicial system of case law is an instance of spontaneous order in society. M. Polanyi, supra note 7, at 162.

  \item \textsuperscript{22} Id.

  \item \textsuperscript{23} As stated in Cowan, Decision Theory in Law, Science and Technology, 17 Rutgers L. Rev. 499, 501 (1963): "[L]aw is highly skilled in making value judgments, or . . . feeling-value judgments. By 'feeling' I very definitely do not mean emotion, for emotion colors all mental states and functions. I mean the process by which the distinctive worth of an individual is brought into view . . . ."

  \item \textsuperscript{24} Cf. Bazelon, Coping with Technology Through the Legal Process, 62 Cornell L. Rev. 817, 822 (1977) (Judge Bazelon's description of the difficulties that extremely technical issues, or issues that involve either unknown or highly unpredictable consequences, pose for the judiciary).

  \item \textsuperscript{25} See Gelpe & Tarlock, supra note 13, at 373. The legal system most often works by assigning responsibility to named persons. Id.

  \item \textsuperscript{26} Id.

\end{itemize}
the decisionmakers frequently are more “expert” on the problems presented, or have freer access to expert advice or background information. In dealing with certain problems, this direct or indirect expertise may result in greater efficiency and more imaginative solutions.

The free market is the antithesis of legislation in this regard. Just as legislation is almost completely deliberative, the free market is almost completely spontaneous. Free-market decisions are atomistic, with transactions shaped by the personal utility schedules of the sellers and purchasers. Each transaction requires conscious choice, just as each law case requires conscious choice. Even more than in common-law adjudication, however, the edifice of the market and the prevailing prices that set the guidelines of most bargains are the result of thousands of fine adjustments of individual preferences; market prices emerge without planning or deliberation by any superordinate group. Thus, one can expect the market to be the best suited of the three decisional institutions to solving problems that require balancing large numbers of competing variables; conversely, the market is the least suited of the three decisional institutions to solving problems that require the imposition of order or control on contending parties. Errors in market transactions often occur in the sense that one party to the transaction may have paid or received more or less than the prevailing market price. In the ideal market, which assumes large numbers of buyers and sellers, the effects of such errors primarily are confined to the erring parties, and the direct effects on society are negligible.

The problems of economic dislocation resulting from factory closings are, to a great extent, the province of free-market decisionmaking. Attempts recently have been made to shift certain aspects of the problem to legislatures or the courts; however, virtually all such efforts have failed. This failure is best

29. For general descriptions of the relationships between the free market and social decision-making, see M. FRIEDMAN, CAPITALISM AND FREEDOM (1962); F. HAYEK, supra note 27; R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).
30. M. POLANYI, supra note 7, at 160.
31. Economic dislocations of workers laid off as a result of failed or relocated businesses have occurred in the United States since the Industrial Revolution began. The consequences to the worker of such shutdowns traditionally have been considered problems to be solved by the free-market mechanism. Economic dislocation has been widely accepted as an unavoidable corollary of the mobility of capital. As such, it is to be solved by promoting mobility of labor. See generally Aarons, Plant Closings: American and Comparative Perspectives, 59 CHI.-KENT L. REV. 941 (1983) (overview of American, Western European, and European Economic Community laws regarding plant closings); MacNeil, Plant Closings and Workers’ Rights, 14 OTTAWA L. REV. 1, 1-2 (1982) (efficacy of collective bargaining and various legislative attempts to protect workers in Canada and the United States); Millsapugh, The Campaign for Plant Closing Laws in the United States: An Assessment, 5 CORP. L. REV. 291, 291-92 (1982) (examining the progress made and barriers faced by those supporting such laws); Note, Plant Closings and the Duty to Consult Under Britain’s Employment Protection Act of 1975: Lessons for the United States, 5 B.C. INT’L & COMP. L. REV. 195, 195-97 (1982) (comparison of the responsibilities required of English employers and American employers before closing a plant).

In the past, virtually no legislation or common-law rights have intruded into the market decisions to close plants, or into the market decisions by workers to relocate due to economic stress. During the recent recessions, however, free market decisionmaking over the problem of economic dislocations has been questioned strenuously, both by those who would look to legislation for solutions, and by those who would look to the common law. The following are examples of federal legislation that has been proposed, but never enacted: Corporate Democracy Act of 1980, H.R.
explained in the apparent need to apply a spontaneous rather than deliberative decisional process to this highly complex problem that must balance the need for mobility of capital and efficiency against the limitations of, and human suffering entailed in, mobility of labor. As the most spontaneous of the three systems, the free market would seem the most appropriate decisional institution for the problems caused by economic dislocations. Certain defects nevertheless exist in the price mechanism by which the market evaluates plant-closing options. To that extent, the free market is an inappropriate decision system. These defects in free-market procedures arise for several reasons. First, the free-market solution to economic dislocations—the mobility of labor—entails certain costs that are not internalized in the employer's decision whether to close a plant. Thus, employer decisions on plant closings may not be efficient. Under the classic "let labor move to where the jobs are" solution to plant closings, employers need not bear external costs, such as retraining and relocating workers. Moreover, when retraining and relocation efforts fail, the costs to society in increased worker suicide rates, alcoholism, depression, domestic violence, and the sheer wastefulness of unemployment are even higher. Any social gain that results from the higher return on capital freed by the plant closing could be overwhelmed by the attendant social costs.

The second defect in free market procedures arises because, even disregarding social costs of retraining and possible unemployment, a decision to close a plant may not be optimally efficient within the firm. Thus, a profitable branch of a company may be closed so that the capital could be better used by the firm. A more efficient solution than closing the plant, however, would be for the workers


32. See MacNeil, supra note 31, at 4.
and the local community to purchase the viable industry.\textsuperscript{33} Although the transaction costs of a collective buy-out may prevent this solution, legislation could be enacted to facilitate such purchases.\textsuperscript{34}

Attaining an efficient solution to the problem of economic dislocations through the deliberative process of legislation is made difficult by the continual balancing that must occur among the variables. The profitability of the firm, the size of the work force, the proportion of the local work force represented by the plant’s workers, the ages of the workers, the nature of the jobs lost, and the strength and diversity of the local and regional economy all must be given consideration. The difficulty of reconciling these factors is exacerbated because the variables interact differently for each plant closing; therefore, any standardized legislative solution almost always will be inappropriate.\textsuperscript{35}

Common-law adjudication is a decisional system that achieves spontaneity at the system level through the aggregation of numerous deliberative individual decisions.\textsuperscript{36} Therefore, adjudication might adapt better to the nuances of different plant closings and achieve more accuracy in matching needs and solutions than the legislative process. At the same time, adjudication can take better account of the externalized costs and can eliminate certain transaction costs that undermine free-market solutions to this problem.\textsuperscript{37}

Adjudication would recognize in displaced workers or the local community some right or property interest assertable against the employer. Employee suits alleging the existence of such a property right, however, have not been successful.\textsuperscript{38} Courts are wary of protecting such rights against the employer through injunctions, which traditionally would be the proper remedy.\textsuperscript{39} Granting the workers an entitlement to prevent the closure of a plant in all cases would fail to discriminate between plants that are profitable or that could be made profitable, and those plants whose continued operation is wasteful. The property right protected by injunction is too crude; it would eliminate the mobility of capital, which is a socially beneficial goal.\textsuperscript{40}
To resolve the problems of economic dislocation, a decisional system is needed that is capable of dealing with highly variable instances of what is invariably a complex problem. Legislation is poorly suited to such a task. As spontaneous systems, both the free market and common-law adjudication can deal with this issue more capably. Because of certain externalities and transaction costs, free-market decisionmaking is flawed. Such flaws are avoided in common-law decisionmaking. Adjudication, however, may generate different errors and inefficiencies.

C. The Roles of Problem-holders

Wide variation among the three decisional institutions also can be found in the nature and scope of participation by disputants or problem-holders. An amalgam of disputant control and stranger control exists in common-law adjudication. The disputants raise and define the issues. The ultimate decisions, however, are made by objective third parties on the basis of an assessment of the strength of the arguments presented. Generally, participation is limited narrowly to the actual disputants and the judge.

Legislation can resolve a given problem with only minimal participation by the actual disputants or the problem-holders. Unlike adjudication, in which the opportunity to make arguments directly to the decisionmaker is guaranteed, the legislative process does not ensure such participation. Instead, actual participation depends on the legislators' need for information from the problem-holders. In contrast to the general prohibition against participation by nondisputants in adjudication, the scope of participation in legislation is variable. Legislative participation may be limited to the legislators themselves; alternatively, the legislators could involve the entire community by holding widely dispersed public hearings or a popular referendum.

The participatory structure of the free market is more definite. Each free market transaction directly involves only the bargainers. Participation is consensual throughout the decisional process, including the formulation of the solu-

existence of the workers' property rights, because any closing would become more expensive; however, a closing decision would not be prohibited.

41. See supra notes 32-34 and accompanying text.
42. See supra note 24 and accompanying text.
43. Compare Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1283 (1976) (adjudication is both party-initiated and party-controlled) with Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rule Making, 89 HARV. L. REV. 637, 655 (1976) ("[T]raditional adjudication is characterized by the central role given to a stranger. The impact of the stranger's role makes itself felt dramatically . . . "). The participatory role of the disputants in adjudication perhaps is characterized more accurately as one of uncontrolled initiatives within confines strictly defined by the judge, an outsider.
44. Chayes, supra note 43, at 1283.
45. Id.
47. See supra note 45 and accompanying text.
tion; no third-party judge appears.\textsuperscript{48} Thus, although participation in decisionmaking is restricted, it is assured and complete.

Participation by the problem-holders in resolving their problems is more important in certain contexts. For example, to ensure accuracy of decisions and acceptability of the decisional process, disputants in most domestic problems must be allowed substantial opportunity to participate. This need to participate limits the usefulness of legislation as a problem-solving device to only the most egregious of such conflicts, such as wife beating, in which the individual justifications for the behavior are unlikely to excuse the behavior. Although adjudication provides a large measure of disputant participation, the formalized adversarial nature of such participation is likely to be destructive of the underlying relationship; therefore, adjudication is an unacceptable procedure for resolving many domestic conflicts.\textsuperscript{49} The direct bargaining and self-determination of the free market would best suit the participation needs of domestic disputes. Reducing all variables in market decisionmaking to the common denominator of money, however, would, in the domestic context, be unrealistic at best and dehumanizing at worst. None of the three decisional institutions are adept at resolving problems at the heart of an important relationship.

For many other problems, self-determination or participation by the problem-holder is not as important. Parties to a dispute often would prefer the issue to be resolved by a stranger. Resolution by an outsider may lessen the strain on a relationship by removing the responsibility to reach full agreement; adjudication therefore may suit such a context. Alternatively, the relationship of the parties may be deemed of little value—as when the litigation stems from the single transaction by which the parties are related—and adjudication again would be well suited. Other problems arise in which disputant participation does not seem feasible. Some problems affect such a large portion of the population that participation by each problem-holder is unworkable. Self-determination and disputant participation in the solution of other problems are inappropriate as a result of high transaction costs or free-rider difficulties. Adjudication, however, may be feasible, especially when class action procedural devices are employed. In other cases, general legislative treatment is the only decisional alternative.

The allocation of energy supplies illustrates the importance of this participation factor in choosing among alternative decisional institutions. Although a plethora of government taxes and subsidies influence energy transactions,\textsuperscript{50} allocation currently is determined by the market. This mix of free market and legislative decisionmaking can be explained as follows. In free-market decisionmaking the appropriate use of resources is decided in a highly fragmented series of transactions, with no direct connection among decisions and

\textsuperscript{48} See M. Friedman, supra note 29, at 13-15.

\textsuperscript{49} Fuller, supra note 1, at 331. The efficiency of using adjudication to resolve domestic problems also is questionable. Id.

\textsuperscript{50} See generally G. Brannon, Energy Taxes and Subsidies (1974) (discussing how energy production, allocation, and consumption patterns are affected by taxes and subsidies).
with participation confined to those persons engaging in each individual transaction. Ultimately, the resources go to those willing and able to bid the most for them. Such a system is efficient in avoiding both transaction costs and waste in the use of the resources; however, the resulting distribution is beyond social control. When the supply of a commodity is plentiful or when many substitutes exist, this may be of little concern, particularly if the commodity is not a necessity.

Because the energy supply in the United States historically has been abundant and available from diverse sources, the distribution resulting from free-market choices generally has been accepted. During the 1970s, however, a combination of the dependence on oil and the soaring price of that commodity resulted in widespread dissatisfaction with market methods of allocation. Those calling for the government to regulate allocation expressed a desire to inject social participation into energy transactions. Society may participate in allocative decisions in one of two basic ways: through subsidies or taxes that influence transactions within the market, or through prohibition of market exchange in favor of a more deliberative and socially participatory decisional device such as bureaucratically administered legislation or common-law adjudication. Each of these alternatives is an appropriate decision system depending on the different conditions of the scarcity and the social importance of the commodity.

Subsidizing an industry provides a minor but broad social participation in each transaction conducted by that industry, and makes the commodity with which it deals more available to the public. The purpose of a subsidy program is to alter the resource distribution pattern that would emerge under a free-market allocation. A tax on a particular commodity is a similar device of minor social participation in market transactions that seeks the opposite goal—encouraging the use of substitutes by making the taxed commodity less attractive to the public. Taxes and subsidies do not substantially increase the transaction costs of resource allocation; they can be legislated centrally and applied as a constant to each subsequent market transaction. Thus, they are appropriate when the market distribution pattern needs minor reshaping to reflect social goals.

The method of public participation in allocative decisions is likely to change as the allocated resource becomes more scarce or the consequences of maldistribution become more serious. In such circumstances the spontaneity of market decisions that result in uncontrolled distribution patterns will be perceived as unacceptable. Public participation in allocative decisions then will be increased sharply, at the expense of individual choice. When the seriousness of maldistribution stems from extreme scarcity, a specific, deliberate allocation may be legislated. When the seriousness of maldistribution is caused instead by the extreme social importance attached to the commodity, allocations may be transferred to common-law adjudication. Because each legal decision can give a full hearing—

51. See id. at 3.

52. Cf. G. CALABRESI & P. BOBBIT, TRAGIC CHOICES 21-24 (1978) (describing techniques of allocating goods and services—such as kidney machines and military service—that entail life-saving or death).
at considerable transaction cost—to the merits of the claimants, adjudication is an appropriate method for allocating goods of extreme importance. Extreme scarcity problems are not well suited to the common law, however, because it is difficult for a spontaneous system to fashion a comprehensive social allocation. The common law cannot consider the relative merit of allocating a good to one of the disputants rather than to some third person not involved in the lawsuit; such decisions are feasible only for legislation. In the energy supply context, concerns about scarcity and the critical social importance of fuel necessarily led to a flurry of legislative and judicial activity.

In summary, certain relationships between problems and decisional procedures can be identified along this participation dimension. When a problem arises from an important, continuing human relationship, it is important to ensure the ability of the problem-holders to participate in the problem-solving, preferably in private with minimal social involvement. Structurally, the free market is suitable; however, as a formal mechanism it does not assume the existence of a continuing relationship between the bargaining parties. The parties therefore must be united through the medium of money. Most relational problems are negotiated essentially in a market fashion without the formal exchange. Because of the inherent social involvement and loss of privacy, neither legislation nor adjudication is fully appropriate in the resolution of relational problems.

As exemplified by energy distribution, allocative problems are most efficiently addressed in the free market. When the commodity becomes scarce or socially important, a decisional mechanism allowing social participation is appropriate. Such participation may be minor, as in legislated taxes and subsidies that merely influence market decisions without removing the problem from the province of the market. When concerns of scarcity or the consequences of mal-distribution grow, legislation and adjudication become the more appropriate decisional institutions.

D. The Substantive Justifications of Decisions

The substantive justification employed by the three decisional institutions also may be compared. Specifically, decisional justification may be based on the needs or desires of groups beyond the immediate problem-holders, or confined to the individual requirements of the disputants; decisions also may be justified by appeal to general rules or doctrines, or may stand discrete from past or future decisions.

Within the boundaries of the Constitution, legislation need not be justified against any general rules, doctrines, or even previous legislation.53 Legislation may change directions radically and frequently, or may move in different directions simultaneously. Legislative decisions may be grounded in broad utilitarian

53. Freeman, Standards of Adjudication, Judicial Law-Making, and Prospective Overruling, 26 Current Legal Probs. 166, 179 (1973); see also Friendly, The Courts and Social Policy: Substance and Procedure, 33 U. Miami L. Rev. 21, 23 (1978) (in contrast to court-made rules, which should be consistently principled, legislative rules may be pragmatic).
concerns for the citizenry or in narrow concerns for the protection of a minority group or an individual problem-holder. Such flexibility encourages imaginative solutions and permits quick responses to changes in political philosophy.

The free market is similar in this respect, but with even less ideological or doctrinal constraints. No substantive justification must attend a market transaction. A seller or purchaser may indulge irrational or even pathological preferences and may dispose of the proceeds of the bargain as he chooses. Although economists assume a net gain in utility from every voluntary and informed transaction, this gain is part of the theoretical construct of the ideal market, not a standard that must be applied to a transaction as a prerequisite to decisional legitimacy. On the one hand, such rationality implies great flexibility, as in the case of legislation; on the other hand, legislation is constrained by the need for justification. To acquire legitimacy, legislation must bear some rational relationship to a purpose allowed under the Constitution, while social policy or goals are virtually the antithesis of market decisions.

The structure of substantive justifications for common-law decisions is far more rigid than the justification structure of either legislation or the free market. Theoretically, all legal decisions must be justified against prevailing rules and doctrines. In practice, however, substantial latitude exists, and deviation from, or even overruling of, previous holdings is acceptable. Nevertheless, such deviation also should be accompanied by careful substantive explanation. Similar latitude characterizes the degree to which the justifications for legal decisions may be confined solely to the immediate parties. The common-law rules represent policies that are considered beneficial to society. Individual decisions, however, must be justified as consistent with social judgments. Thus, they constrain the extent to which a single decision can be substantively discrete.

Certain observations about matching problems to procedures follow from these wide variations in the structures of decisional justification. Certain problems, such as protecting civil rights, inherently demand that all problem-holders situated similarly be treated similarly. Similar treatment in turn demands that the decisions be consistent with general rules or doctrine. For such problems, a free market solution is manifestly unacceptable. Civil rights decisions also must be justified by the needs of groups, not solely by the desires of individual problem-holders; also, no decision should be divorced wholly from past or future decisions. Legislation may be an appropriate decisional vehicle, since it may adopt whatever substantive justification fits the nature of the problem. The efficiency with which legislation can be applied in one stroke to every

54. M. Polanyi, supra note 7, at 159-60.
56. F. Hayek, supra note 27, at 32-42; M. Polanyi, supra note 7, at 159-60.
57. M. Polanyi, supra note 7, at 162; see also Friendly, supra note 53, at 23 (comparing legislatures' ability to focus on the pragmatic with courts' need to focus on logic); Galanter, The Modernization of Law, in Modernization: The Dynamics of Growth 153, 155 (M. Weiner ed. 1966) (contrasts levels of consistency required in the rules of modern, rational legal systems with those required in the legal systems of traditional cultures).
citizen also commends its use to general civil rights problems. Closer refinements of the interactions between majority and minority populations, however, cannot be accomplished feasibly through legislation. Such a task, calling for flexible arrangements within the general constraint of equal protection, is better suited to common-law adjudication.

In dealing with a problem like energy allocation, however, it is not necessary that all persons similarly situated be treated equally. The prevailing decisional process on this problem is to atomize the decisionmaking into millions of self-interested market transactions. The resulting allocations in no way are consistent with any substantive rule or ideology; they are justifiable decisionally only under the principle of maximizing individual choice. If a collectivist goal is desired—such as ensuring a certain level of warmth, conserving fuel, stimulating energy use, or encouraging the use of certain energy sources—then some decisional alternative to the market, or at least some tinkering with market variables (as through taxes or subsidies), would have to be made.

The problem of economic dislocation differs from civil rights problems in the degree of consistency demanded in decisionmaking. One factory closing can be treated differently from another closing for small reasons such as the age of the physical plant or the current national inventories of the commodity produced in the plant. Differential treatment also could be justified for speculative reasons, such as the projected future demand for a given commodity or the demand for unskilled labor in a particular region. In contrast, civil rights decisions that attempt to differentiate among people based on similar factors would be unacceptable. The need for consistent appeal to general rules or doctrine is much higher in civil rights matters than in decisions about economic dislocation.

The problem of economic dislocation differs from energy allocation problems in the ease with which utilitarian concerns can be raised. The prodigious complexity and sheer volume of energy allocation decisions require that such decisions be made spontaneously, relying on the interplay of individual choice. Utilitarian concerns clearly can be made a part of market decisionmaking through devices such as taxes and subsidies. This method, however, is relatively crude; the same public influence is felt similarly in each transaction, regardless of differing circumstances that may significantly affect the wisdom of the imposed public policy. The number and complexity of economic dislocation decisions that must be made are fewer by far than the decisions that must be made to allocate energy. Therefore, a more deliberative decision system—one free to choose or plan decisions according to criteria that embrace particular groups or even the general welfare—would become feasible.

The range of possible decisional justifications for economic dislocation problems is unusually broad. At least some individual workers and their fami-

59. See supra text accompanying note 50.
60. See supra text accompanying notes 51-52.
61. See supra text accompanying note 51.
62. See supra notes 7, 17-30 and accompanying text.
63. See supra note 51 and accompanying text.
lies will be disadvantaged severely by any factory closing. These adverse effects often are multiplied throughout the community, particularly when the closed factory is a major employer. On the other hand, free mobility of capital is vital for the efficient allocation of productive resources in any society, and the ability of any society to tolerate inefficiency is constrained by international competition. This breadth of potential influences in a given economic dislocation problem suggests greater use of common-law adjudication in dislocation decisionmaking. Expanded use of adjudication is suggested because of the weaknesses inherent in the other two systems in reconciling individual hardship and social goals. Legislation necessarily ignores individual need as a decisional justification, and the free market overemphasizes individual choice when the choices are constrained severely by economic necessity and transaction costs. In contrast, one particular strength of common-law adjudication is its capacity to consider in each individual decision the relative strengths of many radically different, contradictory decisional justifications. Therefore, in resolving such problems, common-law adjudication is the system most likely to articulate a substantive justification that is comprehensive, realistic, and accurate.

II. CONCLUSION

All decisional institutions are social constructs.64 As such, the allocation of problems among various problem-solving systems is subject to social control. That potential control, however, remains largely unexercised. At issue is whether social decisionmaking could be improved through a more conscious, intentional method of problem allocation. This Essay demonstrates, through an analysis of three existing systems together with an examination of several current social problems, that better allocation and decisionmaking is possible. Allocation must be made more deliberatively by institutional personnel who comprehend the strengths and weaknesses of the devices by which they attempt to solve problems, and who operate within systems capable of excluding problems that the system handles poorly. The lack of institutionalized personnel suggests that the free-market decisional system never will admit of significant control in problem allocation to, or from, the system. The courts and legislatures, however, are staffed by persons who often have extensive experience in resolving a variety of problems. To make their institutions more efficacious they must apply more rational and selective criteria to the question of which problems they attempt to resolve.

64. Fuller, supra note 4, at 1026, 1032.