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Dispute Resolution

Alternatives to conventional courtroom dispute resolution have recently received enthusiastic support from a surprising array of proponents, ranging from Chief Justice Warren Burger[1] to consumer advocate Ralph Nader.[2] The Ford Foundation[3] and the Department of Justice[4] are promoting various alternate avenues for resolving conflicts. The American Bar Association,[5] scholarly journals,[6] and the

1. *See* Address by Chief Justice Burger at the ABA Conference on the Resolution of Minor Disputes (May 27, 1977), *quoted in* Wall St. J., Oct. 27, 1978, at 48, cols. 5-6 ("The notion that ordinary people want black-robed judges, well-dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes isn't correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible.")

2. *See* Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC'Y REV. 247, 255 (1976) ("The [legal] system must be designed to encourage the non-legal resolution of disputes, and public participation in planning processes, as well as more traditional legal activity like litigation.")

3. *See* FORD FOUNDATION, MEDIATING SOCIAL CONFLICT 4 (1978) (third-party intervention efforts supported by Ford Foundation include mediation, arbitration, facilitation, fact-finding, and conciliation); Ford Foundation, Current Interests of the Ford Foundation: 1978 and 1979, at 6-7 ("The [Ford] Foundation plans to support investigations of new ways of settling disputes that may be more equitable, cheaper, and less divisive than the adversary process.")

4. Neighborhood Justice Centers have been sponsored by the Law Enforcement Assistance Administration of the Department of Justice. *See Neighborhood Justice Centers to be tried*, LAWSCOPE, Jan. 1978, at 29 (announcing program, Attorney General Griffin Bell said he hoped centers would provide " 'an avenue to justice for many persons now shut out of the legal system' ").

5. *See* ABA Report on the National Conference on Minor Disputes Resolution 11-12 (May 1977) (prepared by F. Sander) (discussing origin of Neighborhood Justice Center idea) [hereinafter cited as ABA Report].

6. *See* Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966); Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 41-48 (1973); Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675 (1975); Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 LAW & SOC'Y REV. 225 (1976); L. Susskind, J. Richardson & K. Hildebrand, Resolving Environmental Disputes (M.I.T. Environmental Impact Assessment Project June 1978).

Scholars are also beginning to criticize the movement. *See, e.g.*, Abel, Delegalization: A Critical Review of Its Ideology, Manifestation, and Social Consequences (on file with *Yale Law Journal*).

popular press[7] have endorsed such efforts; Congress has considered authorizing more experiments along these lines.[8] In this issue, the *Yale Law Journal* joins in devoting attention to this trend. Yet the pieces presented here take a critical perspective by considering, in varied ways, the goals underlying these alternatives, the practical and theoretical barriers that may prevent achievement of their goals, and the costs or risks that may warrant reconsideration of the entire endeavor.

"Alternative dispute resolution" is a label ascribed to an increasingly broad range of options that share few characteristics aside from their common departure from traditional courtroom procedures. Thus, the alternatives include newly created forums, such as Neighborhood Justice Centers[9] and complaint departments in the offices of state attorneys general.[10] Others, such as the innovative use of masters in federal district courts,[11] expand the traditional judicial role. Some entrust the powers and functions of a judge to a different actor, such as a magistrate.[12] Other experiments, more detached from the official legal system, arrange incentives for parties to settle their differences out of court,[13] train neighborhood residents to mediate local disputes,[14] and urge prison and school administrators to adopt grievance procedures within their institutions.[15]

On a general level, advocates for the different alternatives declare that they are pursuing similar purposes. Chiefly, the innovations are intended to alleviate the persistent inaccessibility of judicial relief for poor and middle-class people by providing cheaper and less formal methods for resolving disputes. These purposes echo the goals of law-reform efforts that produced the small claims court and legal services for the poor earlier in the century. Then, as now, observers of the judicial system identified crowded dockets, burdensome delays, and mounting expenses as factors eroding public confidence in the ability of the courts to function as the primary means of dispute resolution.[16]

7. *See, e.g.*, Cattani, *From courthouses of many doors . . . to third-party intervention*, Christian Sci. Monitor, Jan. 17, 1979, at 12, col. 1.

8. *See* Note, *"Mastering" Intervention in Prisons*, p. 1062 n.104 *infra*.

9. *See* notes 4 & 5 *supra*.

10. *See* Nader, *Disputing Without the Force of Law*, p. 998 *infra*.

11. *See* Note, *supra* note 8, at 1068-72.

12. *See* Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, p. 1023 *infra*.

13. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, p. 950 *infra*.

14. *See* Danzig, *supra* note 6, at 41-48 (community moots).

15. Note, *supra* note 8, at 1086-88 (prisons); W. Lincoln, Mediation: A Transferable Process for the Prevention and Resolution of Racial Conflict in Public Secondary Schools (A.A.A. Case Study June 30, 1976) (schools).

16. *Compare* Pound, *The Limits of Effective Legal Action*, 27 INT'L J. ETHICS 150, 151 (1917) (attributing dissatisfaction with judiciary to decline of other social institutions and

Similarly, the early reformers, like more recent critics of the judicial system, argued that easing access to court would not remedy all the weaknesses of judicial conflict resolution. They blamed the formality, technicality, and adversarial nature of courtroom proceedings for producing results ultimately unsatisfactory to many parties.[17]

What prompts the current resurgence of interest in innovative methods for resolving disputes? One cause may well be the pressure of ever-increasing judicial caseloads, yet the current movement may also indicate a new phase in a larger cycle of reform efforts. Reform, consolidation, entrenchment, and revived reform are stages in a familiar pattern in the history of social institutions.[18] Reformers alternate between building institutions and taking them apart,[19] between urging regulation and calling for deregulation.[20] The current push for less formal methods for resolving disputes may reflect waning faith in established institutions and professions. The distinctly populist cast of the movement for alternative dispute resolution rests on an implicit belief in neighborhoods, private bargaining, and decisionmakers less

heavy reliance on legal system to impose order) *with* ABA Report, *supra* note 5, at 2 (noting decline of family and church and greater reliance on courts as one cause of overburdened caseloads; "[a]long with the frustration engendered by the unresponsiveness of the legal system there has come a perceptible disenchantment with the increasing complexity and remoteness of the traditional dispute resolution process").

17. *Compare* Pound, Book Review, 33 HARV. L. REV. 621, 624-25 (1920) (procedural and administrative reform advocated to reduce "expense and irritation" of court proceedings; new small claims courts, conciliation courts, and domestic relations courts lauded for changing "purely contentious conception of a judicial proceeding") *with* ABA Report, *supra* note 5, at 2 ("Sometimes the legal process appears to be so cumbersome that it develops a life of its own and loses sight of the underlying problems it was designed to resolve. Disputants appear to yearn increasingly for a simple, and accessible procedure that permits them to tell their story and get prompt and constructive assistance . . . .") Golding distinguishes between the "original conflict," meaning the dispute which precedes the dispute-resolution process, and the "persuasive conflict," meaning the presentation of evidence and arguments in support of one's side of the case once the procedure has started. When the persuasive conflict supersedes the original dispute, as in adjudication, the resolution typically depends more on technical procedures than on the particularities of the parties, and the result is generally a remedy or award rather than a reconciliation. Golding, *Preliminaries to the Study of Procedural Justice*, in LAW, REASON, AND JUSTICE 86-90 (G. Hughes ed. 1969). To the extent that a procedure shapes and solves a "persuasive conflict" that differs from the "original conflict," party dissatisfaction can be expected.

18. One example is the fluctuation between centralization and decentralization in school administration. *See* D. RAVITCH, THE GREAT SCHOOL WARS (1975).

19. Deinstitutionalization is the current watchword among prison and mental-health reformers. *E.g.*, COMMUNITY-BASED CORRECTIONS: THEORY, PRACTICE, AND RESEARCH (P. Boesen & S. Grupp eds. 1976) (prisons); *Civil Commitment*, 2 MENTAL DISABILITY L. REP. (ABA) 77, 114-17 (1978) (least-drastic-alternative standard in mental-health treatment). This position brings ideas, at least in the field of mental health, full circle to a position espoused by reformers 150 years ago. S. SEGAL & U. AVIRAM, THE MENTALLY ILL IN COMMUNITY-BASED SHELTERED CARE 1-13 (1978).

20. *See* ABA COMM'N ON LAW & THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM (Exposure Draft Aug. 19, 1978).

detached than judges and lawyers; but it may also stem from growing distrust of accumulated centers of power, especially governmental power. The emphasis placed upon negotiation, bargaining, and compromise elevates party control of the process by the disputants and reduces the importance of pre-established authority and rules.

To fulfill their promise, the alternatives have to increase the satisfaction of parties while resolving disputes no less effectively than traditional techniques. Practical limitations may interfere with this task: the resources necessary to train third parties and to establish independent forums may be either unavailable or available only from sources that limit the efficacy or availability of relief.[21] Techniques that effectively resolve disputes in one context may not be easily transferred to another,[22] and parties may grow disappointed during the time it takes to develop new methods. Some alternatives may never be effective unless backed up by judicial enforcement that, in turn, entails hidden costs in time, money, and coordination.

Further, alternative dispute-resolution techniques may achieve the goal of satisfying the parties by reducing their expectations about the kinds of relief to which they are entitled. This risk becomes a serious danger if an individual loses a federal constitutional right by participating in a nonjudicial alternative. For example, rights to counsel, to trial by jury, and to be free from compulsory self-incrimination, may be unavailable to a criminal defendant participating in a restitution program.[23] In addition to the intrinsic deprivation, this loss might expose the individual to greater risk than would a judicial hearing.

In a sense, the danger of temporary or permanent interference with individual rights derives from an essential difference between many of the alternatives and conventional judicial dispute resolution. The judiciary, and to some extent the alternatives that simply add flexibility to its operations, adhere to the rule of law; they base their decisions on legally validated procedural and substantive norms.[24] The less formal alternatives rely instead on implicit community values, compromise,

21. *See* Nader, *supra* note 10, at 1009-10 (businesses exert control over consumer complaint mechanisms).

22. *See* Getman, *Labor Arbitration and Dispute Resolution*, p. 916 *infra* (labor arbitration teaches us little about usefulness of arbitration in other contexts).

23. *See* Stanley, *The Resolution of Minor Disputes and the Seventh Amendment*, 60 MARQ. L. REV. 963 (1977) (discussing risk posed to right of trial by jury by informal dispute tribunals). It might be possible, however, to maintain traditional trials and introduce informal restitution techniques only at the sentencing stage.

24. A classic discussion of the rule of law is L. FULLER, THE MORALITY OF LAW (rev. ed. 1969). Fuller argues that the notion of "law" itself entails the consistent application of clear norms announced in advance of a particular case. *Id.* at 39.

and individualized discretion. These approaches may be uniquely suited to the satisfactory resolution of many of the conflicts that reformers would send to alternative forums. Disagreements between neighbors, disputes within a family, and conflicts among individuals with ongoing institutional relationships may best be resolved if the adversarial combat of a judicial confrontation is avoided and the parties reserve control over the terms of the settlement. But compromise may be ill-suited to the vindication of legally protected rights, and compromise may be impossible when a dispute involves several strongly held, but inconsistent, community values. Some controversial problems handled by courts involve just such issues. Although extraordinary decisions in difficult times may cause some to question a court's legitimacy, the judicial process of applying and declaring law is more likely to survive such challenges than are fledgling alternatives.

What is needed is a set of "jurisdictional" principles that delimit those areas in which informal dispute-resolution techniques are both workable and permissible. These principles should identify the particular kinds of disputes that lend themselves, in a practical sense, to resolution through negotiation or through relatively unstructured adversarial presentations to arbiters. They should also specify when we should be willing to forsake our traditional respect for the rule of law by allowing parties or arbiters to resolve a particular case without reference to preexisting rules. A key consideration, of course, is the extent to which we may rely on the possibility of taking a dispute to court to add structure, consistency and authority to its resolution in an informal forum. The present process of experimentation would benefit from a greater sensitivity to these thorny issues.