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INTRODUCTION

COMPARED TO WHAT? ASSESSING THE QUALITY OF DISPUTE PROCESSING

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In the past dozen years, interest in Alternative Dispute Resolution ("ADR") has inspired a burst of creative innovation and experimentation. Compared to earlier crusades for alternatives, the contemporary ADR movement is more informed by empirical learning, more theoretically sophisticated and more ambitious in scope. It advocates change not only for the domains of the minor and marginal but for the legal heartland.

The ADR movement has accelerated and popularized a salutary shift in the discourse about law and disputing, a shift that reflects wider intellectual currents. The notion that current legal arrangements embody a single right way to handle disputes has been drained of credibility. We have learned to see legal institutions as part of larger ecology in which various dispute institutions interact and affect one another. As these interconnections become common knowledge, those who would design or justify legal institutions must accept responsibility not only for the small world of adjudication but for the larger world of disputing and bargaining in which it is set.

That dispute processing arrangements are contingent and malleable has moved from academic insight to practical maxim. But once we accept that dispute institutions might be redesigned to maximize benefits and reduce costs, we are committed to comparative assessment. To evaluate a given dispute institution we have to compare its performance with that of modified and alternative modes of resolving (and generating) particular kinds of disputes. Such comparisons are attended by a host of methodological and conceptual difficulties.[1] The perplexities of comparison are compounded when we realize that an encounter or injury could be crystallized into very different kinds of disputes and could be handled in very different kinds of institutions. But although each strategy of comparison is subject to serious problems, comparative assessments are as unavoidable in practice as they are difficult in theory.

Thus ADR has propelled us into a situation in which policy-makers cannot avoid making deliberate if fallible choices among alternative ways of processing disputes. Can inquiry give us any guidance about how

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1. *See* M. Galanter, Judges and the Quality of Settlements (1989) (working paper JE-1, Center for Philosophy and Public Policy, University of Maryland) (for a specification of these difficulties in the comparison of settlement with adjudication).

such choices should be made? The many reasons for preferring one dispute mechanism over another can be reduced to two basic arguments. The first of these, which we might call the "production" cluster, is that one or another mechanism will produce "more" with less expenditure of resources. Thus we find arguments that a given device will increase the number and speed of resolutions and lower their cost. A great deal of talk about alternatives consists of claims about production effects. Due to the infirmities of selection and measurement that often attend reform undertakings, there is probably a tendency to overestimate the degree to which programs achieve such production effects.[2]

Even where it can be shown that one process is cheaper and faster than another, such a demonstration is necessarily incomplete, for it is necessary to ask whether what is obtained for the lower cost is equally desirable. We arrive at the question of the benefits or qualities that we attribute to the rival arrangements. This brings us to our second great cluster of arguments—assertions about the superiority of alternative processes or the outcomes that they produce. For example, it may be argued that a given process is superior because it increases the parties' satisfaction, encourages the re-establishment of friendly relations, is more suffused by social norms, fosters integrative solutions, leads to more compliance, generates useful precedents, and so forth. These assertions about beneficial characteristics are "quality" arguments. I use the term "quality" as shorthand for the valued aspects of the process, including but not confined to justice, and including but not confined to those aspects that admit of quantification. The term was adopted to summarize and emphasize the wide range of valued characteristics, apart from cost, time and institutional convenience, that are implicated in disputing. Although quality arguments, explicit or tacit, are everywhere in discussions of dispute resolution, much less attention has been given to analyzing and appraising quality effects than to the more readily measurable production effects.

To explore the theoretical and practical issues surrounding these neglected issues of quality, the Disputes Processing Research Program at the University of Wisconsin organized a workshop on "Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes" that was held in Madison, July 13 and 14, 1987.[3] The Workshop brought together practitioners and academics for two days of intensive discussion of beliefs and practices about quality issues in dispute processing. We thought this uncharted territory could best be explored by preserving a spontaneous, brainstorming character. Participants were encouraged to share their perceptions and perplexities, but not to

2. See the classic exposition of this point by Campbell, *Reforms as Experiments*, 24 AMER. PSYCH. 409 (1969).

3. The workshop was supported by the University of Wisconsin's Dispute Processing Research Program, under a grant from the William and Flora Hewlett Foundation, and by the National Institute for Dispute Resolution. The planning committee consisted of Howard Bellman, John Esser, Carrie Menkel-Meadow, Catherine Meschievitz, Judith Resnik, David Trubek, and the present author.

prepare papers. Instead, we commissioned distinguished scholars in several disciplines (law, philosophy, political science, psychology, and sociology) to report on the proceedings from their several perspectives. The present Symposium consists of those reports and John Esser's review of the evaluations literature on dispute resolution. They are neither a record nor a revision of what was said at the Workshop; instead they are individual responses to those discussions. We hope that they in turn will contribute to a richer and more coherent discourse about the assessment and comparison of dispute processes.

To put these reports in perspective I would add a few observations on the context of the quest for quality. First, the discussion of "quality" is not to be subsumed under the discussion of ADR, as if whatever it is alternative to (presumptively, adjudication) can be taken as unproblematic in quality. Although the issue of assessing performance was raised by the claims of ADR's proponents and the challenges of its critics, the thrust of the quality discussion is not to put ADR in the dock but to challenge the quality credentials of every dispute institution, including the most established "traditional" ones.

Second, it is important not to be distracted by the fiction of a radical split between ADR and "traditional adjudication." Most ADR is not located in autonomous institutions that operate independently of the norms and sanctions of the legal system. Instead ADR is typically situated near legal institutions and dependent upon legal norms and sanctions. Correspondingly, most of what goes on in and around courts is not "traditional adjudication" if that means the decisive application of legal norms to fully presented specific cases. Instead we find maneuvering, bargaining, and (often) mediation in the shadow of possible adjudication—and the expense and risk of obtaining it. That ADR and adjudication reside in distinct normative worlds is a persistent element in the mythology of the partisans of each, in spite of ample evidence of the pervasive continuities.

Third, curiously those dispute institutions that flourish and enjoy relative autonomy tend to be omitted from discussions of ADR. Our social institutions are honeycombed by indigenous forums that elaborate and enforce complex codes of conduct—in hospitals, schools, condominiums, churches, the NCAA and a multitude of other settings.[4] Far more disputing is conducted within these indigenous forums than in all the free-standing and court-annexed institutions staffed by arbitrators, mediators and other ADR professionals. This profusion of indigenous law reminds us that the world of disputing includes much more than traditional adjudication and the new ADR institutions.

Fourth, we should resist the pervasive mischaracterization of ADR as informalism. The displacement of bi-lateral negotiation by court-annexed arbitration or a summary jury trial marks not a decrease but an increase in proceeding through prescribed forms. Nor does it mark a

4. The significance of these forums is discussed in Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

decrease in the involvement of professionals or the reliance upon state coercion. ADR is not so much informalism as "short form formalism;" not so much deprofessionalization as a change in professionals. But it is a species of de-regulation: the tie of procedures and sanctions to decisive application of public rules is loosened.

Fifth, once we appreciate that an encounter or injury may be crystallized into very different kinds of disputes and may be handled in very different kinds of institutions, we recognize that sorting disputes by their suitability to particular dispute processes is not a technical exercise but a political choice of which kinds of disputes deserve which kinds of response, which in turn reflects our commitments about the good society and the good life.

Sixth, if disputes are contingent and malleable, what kind of knowledge is possible about the quality of their processing? Strikingly, the evaluation experts at the workshop made no claim to provide definitive objective answers to quality questions, but offered their technology as a resource for competing programs inspired by different politics of justice. But if talking quality is ultimately talking politics, it doesn't follow that talking politics is talking quality. We still have much to learn by the arts of systematic comparison and measurement.

We seem to be entering a period of intense debate about which disputes should be addressed in the courts and which diverted elsewhere. For example, should social security disputes be removed from the courts? Should major business disputes be encouraged to depart to private forums? What kind of "alternative" tracks should be attached to the courts? And what kind of supervision and review of alternatives should the courts undertake? All of these questions turn on what we have called the quality issues. Debate about quality is inevitable.

Even though these issues are complex and multi-dimensional, they can be advanced though not resolved by careful analysis and by empirical measurement. We can bring a whole repertoire of quality concepts and techniques of inquiry to bear on specific kinds of disputes. We need specified and contextualized studies in which institutional alternatives are compared not in terms of the supposed unvarying characteristics of dispute methods, but in terms of a relevant array of "quality" issues. If our choices are inevitably political we should aspire to a politics about real alternatives not imaginary ones.