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MINIMIZING UNNECESSARY VIOLENCE IN LITIGATION AND OTHER DISPUTE RESOLUTION PROCESSES

John Lande

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FEBRUARY 25, 2015 | JOHN LANDE | 1 COMMENT

Jen wrote a comment about my post that built on Prof. Vincent Cardi's new article, "Litigation as Violence," describing some effects of "violence" even from non-physical acts. She wrote:

> We in ADR should not undervalue, when analyzing the dispute resolution landscape, the regulatory function of litigation in the United States. A business executive may feel morally affronted by litigation, but that doesn't mean that the litigation (and its attendant ADR processes) isn't warranted or socially beneficial. Our system has externalized many of the responsibilities and costs of regulation/oversight to private litigants. Perhaps the "violence" problem that Cardi notices comes not only from process or personality issues, but also from these larger system attributes exacerbating conflict and disputes.

I absolutely agree with Jen's statement. I think that in our community we sometimes too-glibly criticize the legal system without acknowledging the benefits it produces, which we often take for granted.

A wonderful article by Robert Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 Law & Social Inquiry 1 (1994) compares the legal system in the US and European democracies. Kagan argues that because of our political history, structure, and culture in the US, we generally are skeptical of government regulation and thus we rely on the legal system to regulate matters that Europeans typically manage through executive government action.

In my writing, I try to provide a balanced analysis, acknowledging benefits as well as problems. In an article entitled How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice, I wrote:

> Professor David Luban catalogues a variety of public goods produced through the court system including opportunities for intervention by persons not party to lawsuits, discovery and publication of important facts, facilitation and enforcement of private settlements, development of legal rules and precedents, and structural transformation of large public and private institutions. … . There should be no doubt that having trials produce considerable social benefit. As a policy matter, however, the question is not whether to have trials. Rather, policy issues focus on such matters as whether to have more or fewer trials, what kinds of cases and litigants should get to trial, who should make those decisions, how to design litigation and trial procedures to maximize the benefits and minimize the problems, etc.

In a recent post, I provided a lengthy discussion describing how courts sometimes function as "tools of cooperation." In one article, I wrote:

> Rather than making procedures the protagonists in these stories [about litigation and ADR], we should celebrate humans and their wise and caring actions when working with conflict. This includes judges and lawyers who choose between the various procedural options (including, but not limited to, trials) to promote appropriate goals for litigants and societies. Judges can make some of their best contributions by helping design and manage disputing systems as well as trying cases. We should celebrate prosecutors and other government officials who investigate and prosecute wrongs including the full range of illegal acts including human rights abuses, corruption, discrimination, and violence. Mediators and arbitrators are often heroes, helping people work through conflicts. So are inside counsel who mediate between business executives and outside counsel to manage conflicts effectively. And so are many unsung heroes who manage conflict every day with little outside recognition. These include military and police officers, legislators, organizational, community, and religious leaders, teachers, parents, and countless others.

I think that Cardi's article provides a balanced analysis of harm caused by litigation. He writes:

> Dr. Gutheil states, "[C]ritogenesis ["litigation-caused emotional injury"] relates to the intrinsic and often inescapable harms caused by the litigation process itself, even when the process is working exactly as it should." After all, each party is asking the court to order the other to do something the other does not want to do.
>
> A serious approach to lessening the critogenic / LRS ["litigation response syndrome"] harms would likely examine each step and practice in the litigation process, attempt to gauge the serious psychological injuries caused by each step and practice, and then

> think of ways to reform them to lessen the harm while still meeting the needs of the step and practice. (Footnote omitted.)

So I agree with Jen that litigation often is necessary and beneficial and the fact that a litigant feels aggrieved by the litigation process does not necessarily mean that the process is inappropriate.

I think that it is also indisputable that the litigation process sometimes does produce unnecessary harm.

How often does this happen and how much harm is unnecessary? I don't know. It is probably impossible to know because of the subjective definitions of "unnecessary" and "harm," great variations in practice, and difficulties in empirical measurement.

But, as I wrote in my original post, my sense is that too often, unnecessary injury is a by-product of litigation (including negotiation and mediation conducted in the litigation process).

In another post, I mused inconclusively about what (A)DR is about. This discussion about unnecessary harm helps me consider that question.

I think that members of our community generally empathize with disputants' pain and want to minimize unnecessary harm in all DR processes. Thus we not only criticize and recommend improvements in adversarial litigation but also in ADR processes. This is reflected in powerful critiques of hardball negotiation, coercive mediation, and adhesion contract arbitration, among many other DR processes.

Of course, this is probably not true of everyone in our community and some of our ideas and prescriptions are problematic, impractical, and/or ineffective. And certainly some people who are not considered as part of our community share our concerns, including many lawyers, judges, and other court officials.

But let me suggest a working hypothesis that a very common (and perhaps defining, though not necessarily universal) feature of our community is a strong impulse to minimize unnecessary violence in all dispute resolution processes.

ARBITRATION DISPUTE SYSTEM DESIGN EMPIRICAL RESEARCH FOR TEACHERS AND STUDENTS MEDIATION NEGOTIATION PUBLIC POLICY

ONE THOUGHT ON “MINIMIZING UNNECESSARY VIOLENCE IN LITIGATION AND OTHER DISPUTE RESOLUTION PROCESSES”

Jordan

FEBRUARY 26, 2015 AT 11:21 AM

Definitely very interesting discussion here. I believe I agree in that a lot of the benefits of the legal system are sort of taken for granted by many. Thanks for sharing your thoughts.