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# RHETORIC AND REALITY IN THE DISPUTE SETTLEMENT MOVEMENT

FREDERICK E. SNYDER\*

Efforts to demystify and simplify the way disputes are settled in American society seem to have congealed into a nationwide movement within less than a decade: neighborhood justice centers, arbitration, divorce mediation, no-fault auto insurance, do-it-yourself probate, "plain English" land and rental agreements, government ombudsmen, consumer hot lines, community mediation of minor criminal cases. A growth industry, if there ever was one.

Legal history is virtually littered with the debris of broken dreams of reformers whose visions of a world uncluttered by law and lawyers were not meant to be. Small claims courts were supposed to deliver no-frills justice to the little guy who was unable to afford the time and expense of a lawyer and a lawsuit. Instead they frequently operate as inexpensive collection agencies for retailers and landlords. Merchants and tradesmen once thought that commercial arbitration would help cut their legal costs in certain contract disputes, but lawyers managed to acquire control of arbitration. Family courts were going to offer an informal but multi-dimensional approach to the disposition of problems involving youths accused of crime, yet we have all sensed that juvenile justice in the United States has about as much to do with justice as military music has to music.

There really is something different about the latest preoccupation with developing non-adversarial alternatives to courts, litigation, lawyers, and judges. First, the goal of "dispute settlement" activists appears to be systemic change of the legal system rather than piecemeal reform. When people who promote alternative dispute settlement programs today talk about their ideas of the future, they have in mind changes not only in the way certain kinds of legal cases are processed, but in the legal process itself. Some are so ambitious as to entertain nothing short of the reconstruction of not only the way lawyers behave, but the way lawyers "think" about the way they behave. Lawyers should learn to think mediation and negotiation in law school, just as they have traditionally learned to think litigation and adjudication.

Second, today's tillers of the dispute settlement field represent an array of unusually disparate occupational groups and social classes. We are familiar with the pleas of the Chief Justice of the United States for the cultivation of

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mechanisms that will help free the courts from the needless litigation threatening to short-circuit our judicial networks. The American Bar Association has taken its cue, throwing its support behind "multi-door courthouses" and other experiments designed for situations where a more adversarial posture had always seemed appropriate.

The dispute settlement movement is not a mere conversation piece for legal elites. Grassroots organizations like the San Francisco Community Board and anti-lawyer groups like the Organization of Americans for Legal Reform have led campaigns to provide opportunities outside the courts for greater popular participation in the administration of justice. The 200-odd "dispute resolution centers" that have opened in approximately thirty states during the past several years have created a multitude of career opportunities for lay mediators and program administrators.

Finally, let's not forget the crucial role of the grant-givers. The Law Enforcement Assistance Administration, the National Science Foundation, and a baker's dozen of private foundations and institutes have made it possible for social scientists and legal scholars to feather their academic nests collecting and interpreting information about formal and informal methods of dispute processing.

Does all of this add up to a movement? If so, where is it taking us?

Among the rather diverse constituencies that are making dispute settlement noises, there seems to be agreement on at least one important threshold issue: the manner in which disputes arise and proceed to resolution is somehow different from the way it was in recent memory, and that this difference has profound implications for the future of political and institutional life in this country. People who are concerned about the state of dispute settlement are worried that while the machinery of formal dispute settlement—courts, lawyers, and the facilities and monies that support them—is expanding exponentially, its ability to yield some quantum of social satisfaction is severely shrinking.

Not everyone would claim that people living in the United States in the 1980's have become more litigious by nature than they or their forebears were in the past. Still, there is little doubt that there has been a steady increase in the use of courts since the turn of the century, and that this rate began to gallop during the 1960's. Public expenditures have kept pace: the annual budget of the federal district courts was more than ten times in 1980 what it had been only twenty years before. The legal profession has not been standing idle in the face of these developments. There are more than twice the number of lawyers in America today than there were in 1960. Some say there were far too many even then.

The arm of the law is surely longer and more visible today than it ever was. It is reaching out in many different ways into many areas of American social and economic life: the son suing his parents for the "parental malpractice" he believes to be the cause of his social ineffectuality today; the wife suing her husband for injuries from a fall on the sidewalk brought on by his

failure to shovel the snow; a man suing a woman for the time and expenses he loses when she stands him up for a date; a worker suing the boss for refusing to pay as high a salary as is paid to another worker of another sex doing the same job; children suing their school district to require it to provide education in a social climate radically different from what had always been available in the neighborhood high school; inmates suing the warden for the right to freely complain about prison conditions; city residents suing the mayor for a police force that will enforce the law with a friendly face.

The law has emerged as the most accessible instrument for adjusting ever-enlarging classes of conflicts for which one had previously supposed the courts offered no solution. Lawyers today hear more of the problems we would once instinctively have brought to a paterfamilias, parish priest, rabbi, neighborhood ward-heeler, cop on the beat, shop steward, or fixer down at City Hall. Problems we would once have stoically absorbed as part of the natural order are now laid at the doorstep of the federal district court. Problems that we once assumed to be "private" now seem "public" and ripe for review in a house of law.

There are differences of opinion among dispute settlement advocates as to the explanations of these events and their implications for understanding what is happening to the character of social life. One view, held by many of our "legal elites," blames these developments for precipitating a crisis in the ability of our judicial system to operate with optimal efficiency. Its proponents maintain that too much "frivolous" litigation is "clogging the courts," threatening a caseload congestion that may cause a breakdown in our judicial machinery. The situation is due largely to the "omnipresence" of government in areas of American life where it does not belong: we have all been overrun by regulation.

Their solutions are cast in an almost wistful subjunctive mode: if only there were less regulation, but more judges and more alternatives to the courts for the resolution of disputes, then the "right" kinds of cases, the kinds of cases the courts were meant to hear, would proceed to formal adjudication. Other disputes would take care of themselves through other kinds of processes. People would think twice before "legalizing" a dispute which could be resolved through a mechanism which is less formal, public, expensive, and powerful than a court. Then the level of intensity of conflict in American life would decline, and our judicial institutions could proceed once again to discharge their responsibilities with a facility awesome to behold.

Others have a different interpretation of the dispute settlement crisis. We see in it a challenge to society to provide effective access to institutions formally designed to deliver justice. The legal events of the past twenty years do not in themselves constitute a "social problem" that needs to be "solved." It is not the ability of the various mechanisms for the settlement of disputes to perform some preternaturally defined function in some predetermined way that is at stake. Indeed, to characterize the discourse about social conflict in terms of the "settlement" of "disputes" is to obscure the more systemic con-

flicts that lie at the deepest structures of our social order and of which the apparent breakdown of legal process is but a surface reflection. What is more important about recent dispute settlement activity is not what it has to say about lawyers and courts, but what it says about the life and hard times of the ordinary American—consumer, worker, welfare recipient, taxpayer, citizen. His world is dominated by law, but it is a world over which he exercises remarkably little control when he seeks the benefit of law to organize the boundaries of own social life. It isn't the average American who determines who will sit in judgment over cases involving the distribution of personal property and public resources; what kinds of people will go to law school, what they will learn when they are there, and who will teach them; how many lawyers the schools will produce and the bar will certify, how and for what price they will deliver their services; the priority for settlement of disputes in court, which cases are more "important" than others and deserve more judicial time and energy; or how these cases will be decided and how the law will be applied. These decisions are in the hands of others, remote from the average person's case, detached from the situation, "neutral," "objective," and "professional." Lacking is any real opportunity for popular participation in the administration of justice. The development of alternative methods for the settlement of disputes may be one way to constructively respond to this average American's sense of disengagement from social, political, and legal processes. Will such a strategy enhance her power over these processes in any meaningful way? Will it help her change her life? Isn't that the real "issue"?

The dispute settlement movement is many things to many people. Indeed, there really is no "dispute settlement movement" as such, with an agenda, a leadership, and beliefs about institutional life that all its constituencies hold in common. There are, rather, several dispute settlement movements and several different ways of thinking about how to respond to the dispute settlement "crisis." Whether a clear direction will take shape in the thick of the discussion remains to be seen. Many believe the outcome is foreordained: the mere demonstration of a keen interest in dispute settlement on the part of the leaders of the bar, with all the ideological and material resources at their disposal, is sufficient basis for a prediction of yet another triumph of legalism in its most recent struggle with the popular will. The great advantage of such a forecast is that it seems to have history on its side. Yet it is possible that opportunities for the development and refinement of new and more productive forms of social discourse and media for the articulation and unravelling of social conflict will manage to rise to the surface of community life in America as a byproduct of this activity. Therein may lie the seeds of a more serious future discussion of the roots of such conflict, the moral basis of the machinery in place for its perpetuation, and the true "alternatives" that are available for meaningful ventilation of human woe. There is little history behind that forecast, only hope.