

Dispute Resolution: A Foreword

Robert M. Cover[†]

I

The essays in this issue of the *Law Journal* have been written and presented as work in "dispute resolution." Consider the occasions for using this term in legal scholarship. Almost all commentary on law can plausibly be said to relate to disputes in one way or another. Yet, the term "dispute resolution" is most often used to refer to social scientific work that typically assumes a functional perspective cutting across formal and institutional lines. One writes in the area of "dispute resolution" as soon as one decides that no single institution, rule, technique, or role is the subject of the work, but rather the "dispute" or "disputing" that might confront many different institutions or components of them. Indeed, the term has sometimes been quite explicitly chosen to avoid having to decide whether phenomena do or do not occur within some formal institution or system of institutions.¹ Because dispute-resolution work focuses on the social processes and events with which institutions cope rather than on the institutions themselves, the approach is naturally suited to situations in which an institutional structure cannot be taken for granted. Cross-cultural studies, ethnographic work, and reformist endeavors all provide such occasions.

Any existing institution—a court, an administrative agency, the judiciary, the jury—is necessarily only *one* way to resolve or process the "dispute." Dispute-resolution work begins with the premise that there are many techniques and institutions for performing a single social function.² And it is the function that is the unit of analysis.

[†] Professor of Law, Yale Law School.

1. See, e.g., Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC'Y REV.* 217, 225-27 (1973). Abel's account of the dispute-resolution focus is an illuminating one. He suggests that it avoids the inevitable morass of semantic conflict that accompanied attempts by anthropologists to define "law" or legal phenomena in preliterate societies.

2. See *id.* at 226 ("My purpose is to understand the great variety of ways in which disputes are handled within every society and across different societies.") See Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63, 63 (1974) ("Institutionalized responses to interpersonal conflict . . . stretch from song duels and witchcraft to moots and mediation to self-conscious therapy and hierarchical, professionalized courts.")

I am using the terms "function" and "functional" in the sense of "anthropological functionalism." For a description of this usage and other, sometimes confusing usages of the same term in social science, see R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 19-25 (1965).

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Attending to this elementary characteristic of typical work in “dispute resolution” may be useful in alerting ourselves to the dominant characteristic of another kind of legal academic work that, for lawyers at least, is more familiar. The unit of analysis in traditional legal scholarship is commonly an institution or some system of institutions and the range of its functions. Most institutions of any importance are multifunctional.³ A court not only resolves disputes, but also allocates resources,⁴ confers legitimacy,⁵ administers other institutions,⁶ promulgates norms,⁷ allocates costs,⁸ and records statistics, to mention but a few of its more commonly recognized functions. Analysis that focuses upon an institution—accepting a formal, legal definition of its bounds—tends to stress the complex interplay of the functions performed simultaneously within the institution. Consider a most familiar example of well-worked terrain in American legal scholarship: federal courts. The best of the traditional work attends to the subtleties of relations among the dispute-resolving, norm-promulgative, allocational, and ideological functions of the single institution.⁹ Such old-time favorites of federal-courts teachers as “standing,”¹⁰ “the *Erie* Doctrine,”¹¹ and “the right to a federal forum”¹² remain complex and persistent questions because the many functions served by the institution combine in so many interesting and often unforeseeable ways.

To forsake formal, institutional analysis for a functional approach

3. An institution often has multiple “manifest” functions, any or all of which may be ascribed to it with varying degrees of formality. In addition, many sociologists and anthropologists have called attention to the tendency of functional analysis to discover latent as well as manifest functions for social phenomena including institutions. See, e.g., R. MERTON, *supra* note 2, at 60-84.

4. See, e.g., POSNER, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400 (1973).

5. See, e.g., S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 14 (1974) (courts uniquely empowered to confer legitimacy by declaring rights; other governmental branches viewed with distrust).

6. See, e.g., O. FISS, *THE CIVIL RIGHTS INJUNCTION* 87 (1978) (courts use civil rights injunction to specify prospective reform and supervise restructuring of dual school systems); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (judicial management of relief in school desegregation, employment discrimination, and prisoners' rights cases).

7. See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 28 (1949) (judge determines “the path or direction along which the principle is to move and develop”).

8. See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* 3-4 (1970) (judicial trend toward nonfault liability).

9. For dazzling juggling of these considerations, see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), and Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974).

10. See, e.g., Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

11. See, e.g., Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953).

12. See Hart, *supra* note 9.

is to risk losing the appreciation of the ways in which an institution executes its functions in an interrelated pattern and, in so doing, provides a distinctive response to problems that other institutions with their different mix of functions might address quite differently.¹³

If so much is risked by turning to the functional perspective of dispute resolution, what if any are its compensating advantages? Two kinds of answers might be given. Some enthusiasts have offered the opportunity to learn expertise and technique as the compensating advantage.¹⁴ They would uproot skills and tools from one context to transplant them in another.¹⁵ The true believers in this technology of dispute resolution have frequently neglected the "thick"¹⁶ context in which "resolution" occurs. And it is likely that frequent "errors" in transplanting have not been the product of stupidity or ignorance. Rather it may simply be the case that the "technical" problem of dispute resolution is inseparable from the philosophical and more comprehensive problem of creating and maintaining just, fair, and decent institutions.¹⁷

Most dispute-resolution work now promises something deeper than technology. There is a growing realization that, just as no important institution serves only one function, so no important function in a society is performed by a single institution. Just as the interesting work with an institutional focus emphasizes the complex interplay among the many functions of an institution, so the most interesting work in dispute resolution stresses the complex interplay among institutions performing the function.

13. Perhaps the best—and certainly the best known—exploration of the effects of a range of "latent" functions of an institution upon its formal, manifest function is the "passive virtues" debate. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169 (1968); Gunther, *The Subtle Vices of the "Passive" Virtues—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1 (1964).

14. Compare Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 *STAN. L. REV.* 1 (1973) and Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 *LAW & SOC'Y REV.* 675 (1975) with Felstiner, *supra* note 2 and Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 *LAW & SOC'Y REV.* 695 (1975) (debating possible success of mediation and decentralization).

15. The most enthusiastic of the technologists of dispute resolution have been arbitrators, see, e.g., Shulman, *Reason, Contract and Law in Labor Relations*, 68 *HARV. L. REV.* 999 (1955), and, in a different way, social psychologists, see, e.g., M. DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973); J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE* (1975).

16. See C. GEERTZ, *THE INTERPRETATION OF CULTURES* 1-30 (1973) ("thick description" of culture involves interpreting many layers of social expression).

17. For unusual works that combine reflections upon technique with aspiration to create just institutions, see M. GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* (1965); K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941).

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Once it has been acknowledged that the important functions performed by a legal institution are performed in many other formal and informal contexts, the stage is set for consideration of the arrangement and interaction of the relevant institutions. Institutions may, for example, compete to perform a function. They may be redundant in performing the function. And redundancy may simultaneously perform the functions of back-up and control.¹⁸ Thus the functional perspective should illuminate interinstitutional factors just as the formal perspective illuminates interfunctional ones.

Of course, traditional legal scholarship has long recognized a few areas in which the focus of study is the relation among several institutions performing a single function. Whenever formal institutions have required explicit adjustment principles in dealing with one another's overlapping claims, such a focus is inevitable. Certain traditional subjects, including jurisdiction, conflict-of-laws, and administrative law—especially judicial review of administrative action—have necessarily recognized multiple institutional performance of the function of “adjudication.”¹⁹ However, the traditional treatment of such areas has been sadly deficient in certain respects. It has by-and-large proceeded with what might be characterized as an implicit preference for one-to-one correspondence between forum and dispute. Scholars have assumed that it would be most “natural,” “rational,” or “appropriate” to have a unique, determinate relation between disputes and forums in which, within some given domain, there is plenary and exclusive authority to settle any particular dispute. This assumption is often implicit because the foreground of analysis is occupied by some exception to the assumption. The presence of diverse sovereignties in the international realm and the qualified autonomy of the states in American federalism are generally thought to be reasons for tolerating or living with a multiplicity of agents and institutions performing the same function. Specialization and expertise—in administrative law and such special tribunals as family courts—are also acknowledged as bases for departure. But what remains implicit is that, but for federalism, sovereignty, expertise, or whatever, the appropriate system would be one that assigns a unique tribunal to any given dispute. And legal analysis accordingly occupies itself with adjustment rules that minimize conflict.

18. See, e.g., Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-68 (1977) (redundancy of federal court habeas corpus proceeding gives special concern to federal rights implicated in state criminal process).

19. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353-54 (1978) (adjudication exercised by father over combative children, by Senate in impeachment proceeding, by Supreme Court, by Congregation of Rites of Roman Catholic Church).

Looking beyond our own parochial institutions and beyond the limited range of *formal* institutional arrangements, the dispute-resolution focus suggests that in virtually no area of life is such a one-to-one mapping of disputes onto forums found. And that should at least give us pause. Doesn't the traditional assumption avoid a critical question? Doesn't the very fact of the multi-institutional potential and its particular shape for a given dispute constitute the social response to a conflict? And would we not advance the study of "jurisdiction" by redefining it as the study of the structure and dynamics implicit in the ordinary case of multiple institutional responses to conflict?

II

All of the essays in this issue present warnings against the easy assumption that a dispute-resolution technique can be isolated and applied successfully without untoward, often unforeseen, consequences. There may indeed appear to be, in some of the essays and in this introduction, an element of pseudo-Burkean conservatism. It is as if one were to say, "Institutions are so complex, after all, that tinkering may simply lead to disaster." I do not intend that such an inference be drawn. It is not reform that is the target, I believe, but shallow reform that proposes a remedy to substantial indecency or injustice via technique. Again and again this theme is sounded. Professor Getman points out the larger, complex power relations within which grievance arbitration in the unionized sector "works."²⁰ He persuasively suggests that it will "work" differently where power and authority are distributed differently. Professors Mnookin and Kornhauser consider the negotiated settlement of marital-dissolution cases, and demonstrate how thoroughly and precisely the available potential for decision via the infrequently used formal institution affects the way in which the all but universally employed informal devices will behave.²¹ Again, the potential or actual power that may be employed in a dispute by virtue of any set of factors, *including* the array of dispute-resolution institutions itself, must be counted as central even in the context of an informal negotiation "technique."

Professor Nader in the third essay in this issue considers processes for consumer complaints.²² She stresses the political limitations upon techniques of many different kinds in processing such complaints. Pro-

20. Getman, *Labor Arbitration and Dispute Resolution*, p. 916 *infra*.

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

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

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fessor Nader also considers the options available when individuals with certain classes of complaints do not have access to formal institutions for dispute resolution. Her article suggests, once again, that it is the power and authority relations, and, in some larger sense, the substantive justice of institutions, rather than technique, that ultimately determine success.

Mr. Kraakman's Note considers new proposals for use of magistrates in the federal courts.²³ Mr. Kraakman suggests that this represents a classic, if quite complex, instance of "technology" ignoring institutional context. He considers the two primary "technical" changes—adjudication by consensual reference to the magistrate in civil cases and compulsory preliminary evidentiary hearings by magistrates in post-conviction relief cases. He suggests that they ignore the real political, ideological, and norm-promulgative dimensions of traditional federal-court adjudication (*i.e.*, they violate Article III!).

Ms. Sturm's Note examines the use of special masters in prison-reform litigation.²⁴ Ms. Sturm considers the ways in which this device contrasts with other plausible dispute-resolution tools, especially grievance mechanisms and mediation. She analyzes the ways in which any device chosen will be affected by, and will in turn affect, the formal and informal power and authority relations in the prison and in the larger political and administrative systems within which the prison operates. Once again the emphasis is on the complexity of context for technique.

Certainly the authors of the essays in this symposium write from different perspectives and draw differing conclusions from their observations. But their work is unified in its insistence on recognizing the interdependence of dispute processing and institutional justice, the interdependence of the many institutional contexts for dispute resolution, and the interdependence of technique and politics.

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

24. Note, "Mastering" *Intervention in Prisons*, p. 1062 *infra*.