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Book Review Essay

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BOOK REVIEW ESSAY

THE PROBLEMS WITH PROCESS BIAS

GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT. By William L. Ury, Jeanne M Brett, and Stephen B. Goldberg. San Francisco: Jossey-Bass Inc. 1988. Pp. XXV + 201.

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I. INTRODUCTION

Getting Disputes Resolved is an important addition to the growing body of scholarly and how-to-do-it literature on disputing and dispute processing. It offers guidelines and advice on designing and implementing dispute resolution systems that are based on the authors' experience as designers of dispute resolution systems in the coal industry. The authors are among the more prominent scholar-practitioners in the dispute resolution field. William L. Ury, associate director of the Program on Negotiation at Harvard Law School, co-authored (with R. Fisher) *Getting to Yes: Negotiating Agreements Without Giving In.* Jeanne M. Brett, J.L. Kellogg Professor of Dispute Resolutions and Organizations at the Kellogg Graduate School of Management at Northwestern University, helped develop dispute resolution teaching materials in use at over 100 business schools. Stephen B. Goldberg, Professor of Law at Northwestern University Law School, co-authored (with E. Green and F. Sander) *Dispute Resolution*, which won the 1985 Center for Public Resources book prize for excellence and innovation in alternative dispute resolution. The authors hope the book will be read by those who handle disputes as part of their profession, those who want to improve the way their organization deals with disputes, organizational consultants who discover that a dispute resolution system is part of a problem they have been asked to solve, and scholars and students interested in alternative dispute resolution systems.

II. ORGANIZATION AND CONTENT OF THE BOOK

The authors are candid and clear in describing the ideas and values on which their framework for dispute systems design is based. They tell us in Chapter 1 that disputes can be resolved by reconciling the interests of the

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parties, determining who is right, or determining who is most powerful. They argue that

> in general, it is less costly and more rewarding to focus on interests than to focus on rights, which in turn is less costly and more rewarding than to focus on power. The straightforward prescription that follows is to encourage the parties to resolve disputes by reconciling their interests wherever it is possible and where it is not, to use low-cost methods to determine rights and power.[1]

Chapter 2 deals with how to diagnose what is wrong with the existing dispute resolution system. It identifies questions that should be asked and provides a model of a dispute resolution system that can be used in finding answers to these questions. Among questions to be asked are: Who are the disputants? What are the types of disputes? How frequently do disputes occur? What is causing the disputes?

Chapter 3, to me, is the most interesting part of the book. It presents six principles of dispute systems design for use in creating an interests-oriented system. They are: put the focus on interests; build in "loop-backs" to negotiation; provide low-cost rights and power backups; build in consultation before, feedback after; arrange procedures in a low-to-high cost sequence; and provide the necessary motivation, skills, and resources. The authors suggest various ways of emphasizing interests rather than rights or power by improving negotiation procedures and the skills and motivations of the negotiators. Loop back procedures are ways of encouraging disputants to turn back from rights or power contests when disputes are not resolved in the first round of negotiations. Advisory arbitration and minitrials are examples of loop-backs from a rights contest. Cooling-off periods and intervention by third parties are examples of looping back from a power contest such as a strike. Principle 3 recommends low-cost rights and power backups for providing a final resolution of disputes if the loop-back procedures fail. Examples of low-cost rights and power backups are conventional arbitration, med-arb, voting, and limited strikes. Principle 4, building in consultation and feedback, deals with ways of enhancing communication among the various participants in the dispute resolution process. The authors recommend notification and consultation before action is taken and systematic efforts to analyze disputes after they have been resolved. Principle 5 suggests that the various procedures in the system should proceed in a low to high cost sequence. The authors assume that this means starting with interests-based procedures, moving to rights

1. GETTING DISPUTES RESOLVED p. 169.

based procedures if necessary, and concluding with a resort to power only as a last resort. Principle 6 admonishes the parties to make sure the various processes work effectively by providing necessary motivation, skills and resources. The authors cite as an example state legislation providing technical assistance to aid negotiations required in disputes over the location of hazardous waste treatment facilities.

Chapter 4 gives recommendations on how to work with the parties in designing and implementing a dispute resolution system. The authors observe that the dispute system designer's job is as much political as technical, and that it involves balancing the roles of expert, mediator, and negotiator. They provide concrete, practical suggestions for obtaining support for and overcoming resistance to the system recommended. They emphasize throughout the chapter the need to involve the parties from beginning to end.

Chapters 5, 6, and 7 describe the authors' experience in the coal industry in designing and implementing dispute resolutions systems. The framework of dispute systems design described in earlier chapters grew out of this experience. These chapters give the reader an opportunity to consider the ideas advanced in earlier chapters in a concrete context. They also tell an interesting story about one of the most successful and constructive chapters in the contemporary history of dispute resolution. Goldberg, Brett and Ury were asked in 1980 to make recommendations on how to deal with a wildcat strike problem at Caney Creek mine in eastern Kentucky. Miners had engaged in twenty-seven wildcat strikes in the preceding two years. Strikers had been fired, the union had been sued for breach of the collective bargaining contract, 115 miners had gone to jail for a night, and there had been a wave of bomb threats, sabotage, and theft. The dispute system designed by the authors emphasized increasing the motivation, skills and resources for interests based negotiation. In the years following the authors' effort, the company has refrained from going to court, the number of strikes has been about normal for the coal industry, and both sides have reported a significant improvement in their working relationship. The district representative for the union told the authors in 1988 that

> [i]t changed 98 percent just after you were in there. Up to that point, the least little thing caused a strike. Now they don't strike any more than any

> other mine. When they do, it's just for a day, not for a week like it used to be. You really made a difference.[2]

Crucial to the authors' success at Caney Creek was the way the authors dealt with the parties. Especially interesting is the description of Ury's role. He did everything from playing pool and fishing with the local union president to spending three days underground at the mine in order to overcome a credibility problem with rank-and-file miners. His success in winning the confidence of key leaders on both sides appears to have been as important as the quality of the proposals made in bringing about the improvements at Caney Creek mine.

At the same time the authors were working at Caney Creek, Goldberg, frustrated by his experience as an arbitrator in the coal industry, began working on ideas that he hoped would be adopted widely in that industry. Chapter 7 describes the development, promotion and implementation of these ideas. Goldberg had concluded that arbitration in the coal industry was too costly and over-used. The same issues were arbitrated over and over; both management and labor were dissatisfied with arbitration; and frequent arbitration had damaged the parties' relationship. The proposal that he developed provided for informal mediation by an experienced and respected arbitrator who would encourage the parties to consider not only the terms of the collective bargaining contract but also their interests. If the parties were unable to settle the grievances, the mediator would give an oral opinion on the likely outcome in arbitration. If the advisory opinion did not result in settlement and the parties went on to binding arbitration, the mediator would not be permitted to serve as arbitrator. Four union districts tried the proposal on an experimental basis. The authors state that the experiment was a success in every respect, pointing to the high rate of settlements, savings in cost and time, and the participant satisfaction revealed by surveys. No grievant filed a duty of fair representation suit against the union for failing to take a grievance from the mediation step to binding arbitration. The proposal has not been adopted as widely in the coal industry as the authors would like, but it has been used in eight of the twenty-two United Mine Workers districts. The authors state that the use of grievance mediation in other industries is growing.[3] An interesting part of chapter 7 is the description of the various difficulties that arose in selling and implementing the proposal and how these were overcome. For instance, company and union representatives with a highly developed sense

2. *Id.* at 132.

3. *Id.* at 166.

of right and wrong preferred arbitration because of mediation's emphasis on compromise. Goldberg responded by emphasizing that when no settlement could be reached, the mediator would tell the parties who was right and who was wrong.

III. DOUBTS ABOUT DISPUTE RESOLUTION DESIGN PRINCIPLES

Although Ury, Brett, and Goldberg come from different disciplines, they share a common perspective. They assume that it is desirable to reduce the number of disputes,[4] that disputants are best served by a rational effort to reconcile their interests in the fastest and cheapest way,[5] that there are dispute resolution "design principles that apply across different contexts,"[6] and that it is the role of dispute resolution professionals to discover these principles and try to persuade their clients to use them.[7] The core emphasis of the design principles is the superiority of an interests based approach over a rights or power based approach. Although *Getting Disputes Resolved* will be very helpful to dispute resolution professionals, I have two reservations about the book. First, it strikes me as misleading for the authors to assert that their recommendations are principles which apply across different contexts. Second, I believe that professionals who have such a strong preference for particular processes that they think they are sanctioned by "design principles" may not always respond as well as they should to a particular client's unique needs. Professionals serve clients and should have a client bias rather than a process bias.

When the authors say that there are principles that apply across different contexts, they seem to be suggesting something more than a useful check-list of issues to consider or practical suggestions for busy professionals. They seem to be describing what they perceive as objective reality and laying the groundwork for a program of reform grounded in scientific principles. I do not believe the design principles espoused by the authors are a description of objective reality grounded in scientific research. They strike me instead as summaries of the authors' policy and value preferences, preferences which I share. If this is true, it seems misleading to describe

4. GETTING DISPUTES RESOLVED p. xi.

5. *Id.* at xi. Sally Merry concluded that similar assumptions underlay S. GOLDBERG, E. GREEN AND F. SANDER, DISPUTE RESOLUTION (Little Brown, 1985). Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2062 (1987).

6. GETTING DISPUTES RESOLVED p. XIX and XX.

7. *Id.* at xii.

them as design principles. I suspect that choosing processes and designing dispute resolution systems will always be a practical art rather than an objective science because each disputant, each dispute, and each third party neutral is different in some respect.[8] The multitude of variables produced by these differences makes generalizations suspect. I am not asserting that we cannot learn from experience and experimentation. I am simply asserting that a professional is less apt to make a mistake if she is sensitive to the uniqueness of each client and each situation.

Some of the reviews of another book co-authored by Goldberg have increased my skepticism of broad generalizations about process choice issues. In *Dispute Resolution*,[9] a book intended for use in a basic course on dispute resolution, Goldberg and co-authors Eric Green and Frank Sander asserted that "the central question is what dispute resolution process or combination of processes is effective for resolving different types of disputes."[10] One of the themes of the book was the search for the right match between categories of disputes and appropriate dispute resolution techniques. The assumption that disputes can be objectively matched with appropriate dispute resolution processes was vigorously challenged by three social scientists: Sally E. Merry,[11] Austin Sarat,[12] and Barbara Yngvesson.[13] Merry argued that *Dispute Resolution* presented processes "in overly simplified and static ways that highlight only their formal structure,"[14] and faulted the book for not showing that "[a]ppropriate resolution is shaped by the culture of those who practice it,"[15] "dispute resolution processes exist within a sequence of events unfolding over time,"[16] and "disputes . . . change over time and change as they are processed."[17] She also asserted that the book "ignores the political nature of the fitting process."[18] Austin Sarat labeled the approach of *Dispute Resolution* as "The New Formalism."[19]

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8. *See* Riskin and Westbrook, Dispute Resolution and Lawyers 11 (West, 1987).

9. LITTLE, BROWN (1985).

10. *Id.* at 7.

11. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987).

12. Sarat, *The "New Formalism" In Disputing and Dispute Processing*, 21 LAW & SOC. REV. 695 (1988).

13. Yngvesson, *Disputing Alternatives: Settlement as Science and as Politics*, 13 LAW & SOCIAL INQUIRY 113 (1988).

14. Merry, note 10 *supra*, at 2064.

15. *Id.* at 2064.

16. *Id.* at 2065.

17. *Id.* at 2066.

18. *Id.* at 2067.

19. Sarat, *supra* note 11, at 695.

Building on some of the same empirical research as Merry, he concluded that, "it may not be wise to approach the study of disputing and dispute processing as the search for the ideal fit between a fixed dispute and a fixed array of dispute processing techniques."[20] Comparing the descriptions of dispute processing techniques in *Dispute Resolution* with the picture which he said emerged from empirical research, Sarat faulted the authors for failing to make clear that the various processes, "are flexible and adaptive, their boundaries are blurred, and their capacities are uncertain."[21] Barbara Yngvesson criticized *Dispute Resolution* for failing to point out that disputes and dispute resolution processes are indeterminate and dynamic.[22]

Merry, Sarat, and Yngvesson seemed to be targeting the authors' treatment of individual disputes rather than their treatment of dispute system design. It may be easier to generalize about systems design than about specific disputes. I suspect, however, that the difference is one of degree rather than kind. There are so many variables involved in either designing systems or dealing with particular disputes that broad generalizations should be suspect.

Several questions come to mind in asking whether the design principles advocated by the authors will work well in all contexts. Will they work well where there is a significant disparity in bargaining power?[23] How often will it be more important to clarify and enforce rights than reconcile interests?[24] Is it true, as the authors assume, that the principles are as valid for government offices and nations as they are for corporations and families?[25] Were the coal industry successes described in *Getting Disputes Resolved* as attributable to the authors' skill and commitment as to the validity of the

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20. *Id.* at 709.

21. *Id.* at 709.

22. Yngvesson, *supra* note 12, at 120.

23. In Getman, *Labor Arbitration and Dispute Settlement*, 88 YALE L.J. 916, 933 (1979), the author asserted that "Disparities of power in the relationship that is the focus of a dispute are bound to be reflected in the mechanism used to resolve the dispute. When labor arbitration has been successful, it is because collective bargaining has established a rough equality and mutual respect between the parties."

24. It has been suggested, for example, that formal legal remedies are more likely to prevent subsequent wife abuse than mediation. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 113 (1984).

25. *See* GETTING DISPUTES RESOLVED at p. xiv. Judge Harry Edwards has argued that different policies are appropriate when alternative dispute resolution is being proposed as an adjunct to the courts than when it is proposed as a separate system, and that different policies are appropriate when dealing with significant public rights and duties than when dealing with private rights and duties. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986)

principles they advocate? Are there advantages in a rights based system when the parties involved are incompetent, neurotic, or unscrupulous?

As I said earlier, my second reservation about *Getting Disputes Resolved* is grounded in a belief that professionals who serve clients should have a client bias rather than a process bias. I will illustrate my misgivings about a consistent advocacy of an interests based approach by discussing the lawyer's role in dispute resolution, but I believe that the same point could be made for non-lawyer dispute resolution professionals. When a lawyer advises a client on process choice, I believe that her professional responsibilities require her to consider the client's unique situation and combination of values and preferences. Individual clients vary in temperament, economic status, value orientation, and in many other ways. Vidmar and Schuller have found, for example, that some people are more inclined than others to perceive problems and make claims and that there is a statistically significant relationship between claim propensity and a preference for adjudication over mediation.[26] Institutional clients also vary greatly in significant ways. Lawyers too often operate on the basis of stereotypes of what clients want or should do rather than on the basis of what a particular client wants and needs.[27] This frequently involves steering the client toward litigation instead of one of the alternative processes. Process choice should instead be the product of a dialogue between lawyer and client, a dialogue that focuses on which process is most consistent with or would best promote that particular client's values, needs, and preferences. It would be as wrong for a lawyer always to steer clients toward an interests based process as always to steer them towards a rights based process.

Professor James White made a similar point when he reviewed a book co-authored by Ury. In *Getting to Yes: Negotiating Agreement Without Giving In*,[28] Ury and co-author Roger Fisher made the case for interests based negotiation and laid out a blueprint for engaging in such negotiation. Professor James White praised the book but asserted that the authors pushed their case too far by arguing that interests based negotiation could be used effectively in all situations. To Professor White, there are distributional bargaining situations in which "benefits to one come only at significant cost to the other."[29] He thought Ury and Fisher were "naive" in assuming that all distributional situations can be dealt with successfully by

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26. Vidmar and Schuller, *Individual Differences and the Pursuit of Legal Rights*, Vol. II, No. 4 LAW AND HUMAN BEHAVIOR 299 (1987). *Compare* Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEG. J. No. 3, 367 at 369 (Oct. 1987).

27. *See* Menkel-Meadow, *The Transformation of Disputes By Lawyers: What The Dispute Paradigm Does And Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 31.

28. Haughtin-Miflin 1981.

29. White, *The Pros and Cons of "Getting To Yes,"* 34 J. LEG. ED. 115, 116 (1984)

turning them into a problem solving effort.[30] Fisher vigorously resisted White's criticism.[31] If White was right, and there is some empirical basis for suggesting that he was,[32] a lawyer who refuses to engage in hard bargaining in some distributional bargaining situations may not serve her client well. The point is that a lawyer should focus on a particular client's needs in a specific situation rather than promote a single approach to dispute resolution. Process bias can reduce the effectiveness of a professional designing a dispute resolution system, advising on a choice between available processes, or choosing an approach to negotiating for a client in a specific dispute.

V. CONCLUSION

Getting Disputes Resolved should be read by a wide audience. It will help dispute resolution professionals think systematically about their responsibilities. It will provide these professionals with many useful ideas and much sound advice. I am convinced on the basis of my own reading and experience as a labor arbitrator that the policies and approaches espoused in the book could be used constructively in a wide variety of situations. It would be good public policy to promote increased reliance on an interests based approach to dispute resolution. I believe, however, that the ideas summarized in chapter 3 of the book should not be described as principles. To do so suggests a certainty and stability which I do not believe exists in the real world of disputes and dispute resolution. In the final analysis, I suspect that there is no substitute for weighing and choosing on a case-by-case basis and that we will never agree on fundamental principles that will make these choices any easier.

I also believe that the dispute resolution professional should orient herself primarily toward the particular needs of her clients rather than one kind of dispute resolution process. There is a place, of course, for the professional who provides assistance or advice about only one kind of

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30. *Id.*

31. Fisher, *Comment*, 34 J. LEG. ED. 120 (1984).

32. *See* for example, the footnotes accompanying the discussion of the competitive strategy in Gifford, *A Context-Based Theory of Strategy Selection In Legal Negotiation*, 46 OHIO ST. L.J. 41, 49 (1985). In D. LAX AND J. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1987), the authors assert there is a constant tension between strategies designed to create value (an interests based, problem-solving approach) and strategies designed to claim value (a competitive approach). An interesting part of the Lax and Sebenius book is their description of R. AXELROD, THE EVOLUTION OF COOPERATION (1984), which suggests that the best negotiating strategy is to begin by seeking to create value, to retaliate if the other party responds by trying to claim value, and to forgive and again offer an opportunity to create value (a Tit-For-Tat strategy).

process. But that professional should not assume that all clients in all situations should use that process. The client is entitled to know about the various alternatives and how they may meet the client's needs in the particular situation under scrutiny.

FUND FOR RESEARCH ON DISPUTE RESOLUTION

Program Announcement

The Fund for Research on Dispute Resolution, an independent research fund affiliated with the National Institute for Dispute Resolution, has announced a request for proposals for studies in dispute resolution. The Fund will make awards, in two separate funding cycles, totalling approximately $800,000. The deadlines for submission of concept papers are March 15, 1989 and September 15, 1990.

The Fund will support a broad range of research that connects the study of disputing and dispute handling to social, psychological, economic, political or legal theory, and which seeks to promote understanding of the conditions under which individuals, groups, and organizations do or do not express grievances and become involved in disputes. The Fund hopes to support research that examines how different patterns of disputing and dispute handling affect the rights of disputants and others, how they enhance or diminish opportunities for democratic participation, and how they speak to the needs or powerless or "at-risk" groups. The Fund seeks to begin exploration of these questions and move to beyond program driven evaluation. It encourages researchers to engage in critical examination of disputing and dispute handling and will support studies that are both theoretically grounded and socially useful.

For a copy of the program announcement and the request for proposal write the Fund for Research on Dispute Resolution, 1901 L Street, N.W. Suite 600 Washington, D.C. 20036. For more information regarding the program and the application process contact, The Fund for Research on Dispute Resolution at the same address. The telephone number is (202) 785-4637.