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The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities

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THE QUALITY OF DISPUTE RESOLUTION PROCEDURES AND OUTCOMES: MEASUREMENT PROBLEMS AND POSSIBILITIES*

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In recent years, many members of the legal establishment, including judges, lawyers, and disputants, have expressed concern over perceived inadequacies in traditional adjudicative procedures for dispute resolution. These concerns have led to the development of a wide variety of "alternative" dispute resolution procedures, including settlement conferences, mediation sessions and court-annexed arbitration.[1] Both proponents and skeptics about such procedures for the "alternative" resolution of disputes have recently become interested in examining their quality.

Evaluating the quality of alternative dispute resolution programs involves an assessment of the degree to which such programs achieve the objectives for which they were designed. Such assessments involve a determination of the level of achievement against which alternative dispute resolution programs should be judged and an identification of the appropriate objectives against which to evaluate them.

I. DEFINING THE LEVEL OF ACHIEVEMENT TO USE AS A STANDARD

A key issue in any effort at evaluation is the standard to which the program should be compared. Several standards are possible. One is the operation of the traditional court system which handles disputes through adjudication. In existing evaluations of alternative dispute resolution programs the most typical comparison has been against the way similar cases would be handled in the adjudication procedures of the traditional court system. This standard assumes the status quo as a given and compares innovative procedures to it.

In comparing alternative dispute resolution programs to dispute resolution in traditional court systems, it is important not to assume that alternative dispute resolution programs are being compared to case settlement through trials. Although there is an image of case resolution

* This paper summarizes issues raised at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School, July 13-14, 1987, and co-sponsored by the Dispute Processing Research Program of the Institute for Legal Studies at the University of Wisconsin-Madison Law School and the National Institute of Dispute Resolution. I would like to thank Marc Galanter, Robert MacCoun, Carrie Menkel-Meadow, Margo O'Brien, Sharon Peelor, and Judith Resnik for comments on a draft of this paper.

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1. *See* Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 296 (1986).

through courtroom trials, which is often viewed as allowing for an open and public discussion of the case, cases are most typically resolved through informal negotiations occurring outside of the courtroom. Menkel-Meadow suggests that over ninety percent of civil cases are settled in this way.[2]

Informal negotiations to settle cases often occur without the judge or the affected parties being present. Hence, alternative dispute resolution programs typically replace one type of informal dispute resolution procedure in which cases are settled in discussions between lawyers or between lawyers and the judge with another type of resolution in which they are settled in a mediation session involving the parties, a third party, and possibly the parties' attorneys.[3]

Although alternative dispute resolution programs typically replace one type of informal dispute resolution procedure with another, it is not therefore obvious that those two forms of informal justice should be compared to each other in evaluating alternative dispute resolution. It is also possible to follow the suggestion of some legal scholars and argue that court procedures should themselves be improved or reformed. To demonstrate a case for such reforms, both alternative dispute resolution and current forms of informal case settlement should be compared to a situation in which cases are resolved through formal trials. To the extent that currently existing court practices are themselves a deterioration of the adversary trial model, they may not be the appropriate standard of comparison for assessing the value of alternative dispute resolution programs.

Rather than using traditional or idealized trial-based systems of dispute resolution as criteria against which to evaluate alternative dispute resolution programs, it may be more reasonable to define a set of desired attributes for a dispute resolution program and to compare any program to those abstract standards. Rather than beginning with existing procedures, such an effort would ask what goals the justice system is seeking to achieve and then examine the ability of different procedures to achieve those goals.

A. *Variation within Procedures*

This discussion of standards for comparison has implicitly assumed that "traditional court procedures" and "courtroom trials" are categories which exist in generally similar form across settings. In fact, widespread variation exists within traditional court procedures, as well as in the many types of procedures which have been labelled as "alternative" dispute resolution. As a result, it is very important for a study to establish the actual attributes of both the alternative dispute resolution procedure being studied and of the traditional court procedure to which it is

2. Menkel-Meadow, *For and Against Settlement: Use and Abuses of the Mandatory Settlement Conferences*, 33 UCLA L. REV. 485 (1985).

3. *See* Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Course*, 69 JUDICATURE 300, 303 (1986).

being compared. This can be done by directly observing cases handled in each procedure.[4] In the McEwen and Maiman study the actual attributes of mediation and adjudication, such as the time taken to settle and the extent to which disputants were given the opportunity to speak, were compared in small-claims court cases.[5] Pearson and Thoennes conducted a similar study of divorce mediation.[6]

Studies that observe mediation and adjudication suggest that these procedures, as actually enacted, are more similar than is often suggested in abstract descriptions of their features. For example, Silbey and Merry suggest that "mediation is more formal and less voluntary than its ideal would imply; while adjudication is less formalized and less punitive than its formal description allows."[7] The range of issues considered under different alternative dispute resolution procedures is also more similar than is often recognized,[8] as is the degree of interaction with the third party and the extent to which issues of right and wrong are emphasized.[9]

A neglected comparison group in most studies evaluating alternative dispute resolution programs is "lumping it," i.e. not resolving the dispute. Most research has focused only on those who bring their disputes to a court for resolution, comparing the various procedures which might be used to resolve the dispute. We do not know how many people have chosen not to bring their dispute to court and how they have fared relative to litigants with similar problems.[10]

An interesting analogy to "lumping it" in disputes is "lumping it" with personal problems. Studies of the effectiveness of therapy often assess the relative effectiveness of different therapies by examining whether a person solves the problem for which they initially enter therapy. However, these studies typically ignore those people who have a problem, but do not seek help. When studied, large proportions of such untreated controls are found to resolve their problems on their own, without any third party assistance.

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4. *See* Kressel & Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. Soc. Issues 179, 185 (1985). *See also* R. Wissler, Disputants' Assessments of the Processes and Outcomes of Mediation and Adjudication (1986) (unpublished manuscript available at Boston College Library).

5. McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me. L. Rev. 237, 246-48 (1981).

6. *See* Pearson & Thoennes, *Mediation Versus the Courts in Child Custody Cases*, 1 Negotiation J. 235, 236 (1985).

7. S. Silbey & S. Merry, The Problems Shape the Process: Managing Disputes in Mediation and Court (1982) (unpublished manuscript available from Susan Silbey, Wellesley College).

8. *See* Silbey & Merry, *What Do Plaintiffs Want? Re-examining the Concept of Dispute*, 9 Just. Sys. J. 151, 172 (1984).

9. *See* McEwen & Maiman, *supra* note 5, at 248-49.

10. *See* Felstiner, *The Influence of Social Organization on Dispute Processing*, 9 Law & Soc'y Rev. 695, 705 (1974). *See also* Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Social Change*, 9 Law & Soc'y Rev. 95, 107 (1974); S. Silbey & S. Merry, *supra* note 7. *See generally* Presentation by F. McGovern, Managing Complex Litigation, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

B. *Standards for Evaluating Alternative Dispute Resolution*

An appropriate comparison of "traditional" and "alternative" dispute resolution procedures requires prior knowledge of what "traditional" procedures are like. Unfortunately, from the point of view of evaluation, "traditional" procedures seem to vary enormously, both within and across courts. In part, this is true because traditional systems involve a substantial informal component which functions according to implicit local norms of behavior. In addition, judges have enormous discretionary authority to vary their approach with different cases. Finally, different court systems have different formal rules. Hence, the "control" group against which alternative programs are being evaluated is both highly variable within any given situation and highly variable across situations. As a consequence, it is difficult to make valuative statements concerning alternative dispute resolution versus "traditional" handling of cases.

In addition to the difficulty of defining "traditional" case resolution procedures, evaluation is also complicated by the lack of normative agreement that traditional procedures are desirable. Many scholars dislike informal case settlement and invoke images of the formal trial, even though formal trials are not widely used in case resolution.

Neither of the problems raised is unsolvable. Both require an effort to clearly specify the alternatives to which alternative dispute resolution programs will be compared. Such an effort should identify the actual nature of the alternative and traditional programs which will be compared as they actually exist in operation and focus on differences in the approaches.

C. *Identifying Objectives*

Perhaps the most difficult task involved in assessing the quality of alternative dispute resolution procedures is the identification of appropriate objectives against which to evalute the quality of such programs. While this is a difficult issue in any effort to evaluate social programs, it is especially difficult in the case of alternative dispute resolution programs. Such programs have been advocated by people from widely varying positions in society and have been adopted in different settings by different groups for a variety of reasons. Hence, there is no common agreement as to why such programs should be adopted or what benefits and harms they might produce.

There may not be any single objective against which all alternative dispute resolution procedures should be evaluated. Within different settings, alternative dispute resolution procedures may have been adopted to deal with different problems and may, as a result, be appropriately evaluated against different objectives.

The lack of consensus about the objectives of alternative dispute resolution programs makes evaluation difficult. Before any evaluation can occur there must be a definition of the objectives of a program.

These objectives should define the criteria against which the program will be evaluated. Without such an underlying consensus evaluation is problematic, if not impossible. The lack of consensus about what alternative dispute resolution programs are supposed to be doing has led to the proliferation of standards against which alternative dispute resolution programs can be and are evaluated. McEwen elaborates a variety of such criteria, including success rates, disputant satisfaction, court costs, time spent, the impact of the procedure on the relationship between the disputants, and the broader social and political effects of resolving disputes in particular ways.[11] Galanter provides a similar elaboration of criteria which might be used in evaluating judicial participation in settlement conferences.[12] Given the long list of potential criteria against which to evaluate alternative dispute resolution programs, the process of evaluation can easily become unmanageably complex.

The process of evaluation is further complicated by the recognition that the same procedure may not produce similar effects if used to resolve different types of disputes. Practitioners typically believe that alternative dispute resolution procedures such as mediation and summary jury trials are especially useful for resolving some types of disputes.[13] This proposition has received empirical support in studies demonstrating that the stability of mediation agreements varies across disputes,[14] that the effectiveness of various mediation strategies differs depending on the type of dispute,[15] and that the effectiveness of third-party intervention differs across disputes.[16] Consequently, any evaluation process needs to test not only the general ability of a process to produce "quality," but the possibility that different processes might produce "quality" in some situations, but not in others.

Although no consensus about appropriate criteria for evaluating alternative dispute resolution procedures exists, there are several identified groups of criteria mentioned in the literature. Four groups seem particularly important: issues of economy and cost, questions of inter-

11. Presentation by C. McEwen, Toward a Multi-Dimensional View of Quality, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

12. Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & Soc'y 1, 11 (1985).

13. *See* Presentation by R. Ensler, ADR: Another Acronym or a Variable Alternative to the High Cost of Litigation and Crowded Court Dockets, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987). *See also* Presentation by S. Steingass, The Mediation of Civil Cases, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

14. *See* Roehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. Soc. Issues 161, 163 (1985).

15. *See* Shapiro, Drieghe & Brett, *Mediation Behavior and the Outcome of Mediation*, 41 J. Soc. Issues 101, 105 (1985).

16. *See* Rubin, *Third Party Intervention in Family Conflict*, 1 Negotiation J. 269, 279 (1985); Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 Psychology Bull. 379, 382 (1980).

personal climate, assessments of outcome quality, and community perspectives.

D. *Issues of Economy and Cost*

Discussions of the court system have frequently criticized its handling of the dispute resolution process on the grounds of economy, suggesting that the resolution of disputes through the courts is too costly. This criticism includes concerns about the cost of court proceedings to the disputing parties, who must hire attorneys, who in turn may engage in discovery and sometimes participate in complex and lengthy pretrial and trial proceedings. Court proceedings are also costly to the state, which must hire judges and other court personnel, empanel jurors, and build and maintain the courts.

The length of traditional court procedures leads to a second, and related, concern with delays in the settlement of disputes. In many courts multi-year delays in the resolution of disputes are not uncommon. To many court administrators issues of delay and cost are two key problems with the court system which alternative dispute resolution procedures can and should be designed to rectify.

Those who are primarily concerned with issues of economy view various forms of alternative dispute resolution as important because they are potentially less costly and less time consuming methods of resolving disputes. This focus accepts the current outcomes of litigation and does not attempt to change them. It attempts to use alternative dispute resolution procedures to achieve those outcomes more efficiently. In fact, one complaint about settlements is not that they occur, or that their form is inappropriate, but that they occur too late in the settlement process and hence are too costly.[17] Evaluations guided by this perspective focus on the cost of settling cases in alternative dispute resolution programs in comparison to traditional courts and the speed with which settlements are reached under these varying procedures.

Evaluations focusing on economy typically presume, as do many judges, that reaching settlements is a positive goal in itself. The "quality" of those settlements is not independently assessed beyond some effort to see that they are not due to fraud, dishonesty or overt coercion.

The ability of alternative dispute resolution programs to reduce the cost and time involved in litigation has been the most widely studied aspect of alternative dispute resolution.[18] One example of such an evaluation effort is the work of the Institute for Civil Justice on court-administered arbitration. The Institute's work examines a variety of effects of instituting programs that require disputants to engage in informal mediation settlement conferences prior to going to trial. While the Institute's evaluations are not limited in scope to studying the economic

17. *See* R. Ensler, *supra* note 13.

18. J. Esser, An Evaluation of Empirical Dispute Resolution Research (1987) (unpublished manuscript available in University of Wisconsin-Madison Law School Library).

effects of such innovations, the study of the economic effects of instituting alternative dispute resolution programs will be the focus of concern in this discussion.

Hensler[19] recently summarized the results of the Institute for Civil Justice evaluations of court-administered arbitration programs already conducted in California[20] and Pittsburgh[21] and similar evaluations currently being conducted in Pennsylvania and New Jersey. Hensler's overall conclusion is that the effects of such programs depend heavily on the way in which they are implemented.

Hensler notes that pretrial hearings are consistently found to be less costly than trials. As a result, if the hearings are conducted in such a way that disputants reach and accept an agreement, the costs of case disposition are lower for the court system than settling the same cases through trials. If substantial proportions of disputants appeal alternative dispute resolution settlements and go on to trial, the alternative dispute resolution hearings represent an additional expense which may or may not be compensated for by the simplification of the trial process.

As will be noted later, it seems possible to design alternative dispute resolution programs in a way that most disputants assigned to them will reach and accept settlements. Hence, well designed, court-administered alternative dispute resolution programs seem able to reduce court costs in comparison to trials. Similar conclusions have been reached in evaluations of divorce mediation[22] and child custody cases.[23]

The effort to estimate potential cost reductions through the use of alternative dispute resolution procedures is complicated by the complex nature of traditional court procedures. While alternative dispute resolution procedures are less costly than many types of trials, most cases are not ultimately resolved by trials. In traditional court systems most cases are resolved through private negotiations between lawyers or between lawyers and the judge.[24] Whether such informal procedures are more or less costly than a mediation session depends on the form which each procedure takes. Attorneys may be present at mediation sessions and are usually present in informal settlement conferences, so the potential costs for attorneys depend on the amount of time involved in different types of sessions. If judges do not negotiate case settlements, but use attorneys or lay mediators to resolve disputes, judges consequently have more time for other duties. This results in a potential cost savings.

Whether court-administered alternative dispute resolution pro-

19. Hensler, *What We Know and Don't Know About Court Administered Arbitration*, 69 JUDICATURE 270, 272-77 (1986).

20. D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981)

21. J ADLER, D. HENSLER & C. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983).

22. *See* Pearson & Thoennes, *supra* note 6, at 235.

23. *See generally* McIssac, *Mandatory Conciliation Custody/Visitation Matters*, 19 CONCILIATION CTS. REV. 73 (1981).

24. *See* Menkel-Meadow, *supra* note 2.

grams lessen costs to disputants also depends on whether attorneys utilize their potential cost-cutting opportunities and pass those savings on to their clients. Hensler suggests that most attorneys have not changed their billing practices due to arbitration.[25] If they bill by the hour, as defense attorneys typically do, then savings may be realized. For attorneys on contingent fees reduced time does not necessarily translate into reduced costs to the disputant. Thus, the conclusion as to the potential effects of such programs on attorneys' fees is unclear. In a related context, Pearson and Thoennes suggest that divorce mediation can save disputants modest amounts of money.[26]

All calculations of the gains and costs to the parties of a dispute are complicated by potential changes in the amount or nature of what is won or lost under varying procedures. It may be to one party's advantage to spend more on a procedure in which they will receive a larger monetary outcome or prevail on issues that they care a great deal about. Unfortunately, research has not examined how variations in procedure influence outcomes in disputes of various types. Research does suggest, however, that compromise outcomes are more likely in mediation than in trials.

E. *Can Alternative Dispute Resolution Procedures Lower Costs?*

The results of the evaluations outlined suggest that modest cost savings can occur in alternative dispute resolution programs. The important point, however, is that both traditional court procedures and alternative procedures offer tremendous opportunities for cost savings, provided court officials and lawyers want to use those alternatives. It would be possible to save money in many ways that do not involve alternative dispute resolution programs. Similarly, it would be possible to save money through the use of an alternative dispute resolution procedure if the procedure is implemented appropriately. Lowering costs depends on the desire of those involved to do so.

F. *Delay*

There is little evidence in the Institute for Civil Justice studies to suggest that the use of pre-trial settlement conferences necessarily expedites case disposition.[27] While use of pre-trial settlement conferences can reduce the average time to case disposition, such an effect depends upon issues such as court scheduling of conferences. Presumably, courts could also speed the disposition process by refusing to allow trials to be delayed or by encouraging informal settlements. Conferences can, at least in theory, be scheduled more easily than trials, because conferences do not require the presence of a judge and take less time for actual hearings.

It is difficult to imagine that alternative dispute resolution proce-

25. Hensler, *supra* note 19, at 275.
26. Pearson & Thoennes, *supra* note 6, at 241-42.
27. *See* Menkel-Meadow, *supra* note 2.

dures do not offer the potential for speeding case dispositions if the alternative is a complete trial. As previously noted, however, the alternative is likely to be settlement through conferences involving lawyers, or lawyers and judges. Case settlement conferences between lawyers are probably easier to arrange than mediation sessions since they do not require the presence of clients.

As this review of findings suggests, there are often economic gains associated with the introduction of alternative dispute resolution programs. These gains are typically modest.[28] While the impetus for many alternative dispute resolution programs lies in the belief that they will lower the costs of dispute resolution, such gains appear to be small. The greatest gains from such programs fall in the area of disputant satisfaction. As the discussion in the next section indicates, disputants are typically very satisfied with mediation procedures, irrespective of whether or not they reach a settlement in their mediation conference. In addition, mediated settlements are reached in the majority of cases and appear to be adhered to at least as frequently as court settlements.

In considering issues of economy, it is important to recognize that informal dispute resolution is not something which began with the alternative dispute resolution movement. Both criminal and civil cases are typically settled informally in the existing court system. Hence, to many judges and lawyers the alternative dispute resolution movement is a continuation of business as usual. It represents an effort to enhance, and in some cases institutionalize, existing informal dispute resolution procedures so that they can achieve their objectives more economically and quickly.

The formalization of dispute settlement may also represent an effort to impose some procedural order on currently operating informal court procedures. For example, instead of encouraging disputants to settle "voluntarily" by creating a series of obstacles which increase the personal and monetary costs of continuing to seek a trial,[29] an alternative dispute resolution procedure may instead require disputants to attend a mediation session.

G. *Issues of Interpersonal Climate*

A second area of concern about the adversary trial process is its effect on the interpersonal climate of dispute resolution. Critics suggest that the adversary relationship into which parties are thrown by the court system has destructive effects on them and on their existing, ongoing social relationships. A variety of such effects have been suggested, including: failure to see integrative possibilities for resolving disputes, destruction of a positive exchange relationship, and prolongation of conflict in an effort to injure the other party.

28. Kressel & Pruitt, *supra* note 4, at 181-82.

29. *See* M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

This second area of concern about dispute resolution in the courts is related to the previously discussed question of economy. To the extent that the adversary process promotes and prolongs conflict, it creates inefficiencies. Furthermore, the destruction of positive exchange relationships has economic costs for both the parties and for society.

The adversary climate of the courts may also lessen the likelihood that the parties to a dispute will accept and comply with decisions reached by judicial authorities, since agreements often require one party to give resources to another party with whom they have had a conflict. If the parties return to court repeatedly concerning the same matter because one or both refuses to abide by the agreement, additional court time and resources must be used, in addition to the time and money of the parties.

The potentially damaging effects of litigation on ongoing relationships has been widely recognized among businesses. In his classic study of contracts, Macaulay noted that businesses typically do not take their disputes to court even when they have a legally compelling case.[30] Only when the parties to a dispute do not anticipate continued interaction is the dispute taken to court.[31]

One important argument in favor of alternative dispute resolution is that techniques such as mediation can resolve disputes in ways that are less conflicting than the normal court procedures. This leads to better feelings among the parties concerning the settlement and toward the court system. Such arguments emphasize different aspects of alternative dispute resolution, with some focusing on the process of dispute resolution and others on the outcome or settlement reached.

Process arguments focus on the greater opportunities which disputants have to participate in solving their dispute in the context of informal alternative dispute resolution settings. This increased participation both creates commitment to the solution and enhances satisfaction. Because the rules of evidence and trial procedure are relaxed, disputants have a greater opportunity to explain their problem and to participate in trying to solve it.

Outcome arguments emphasize the greater likelihood that the parties will reach a compromise settlement in informal dispute resolution settings. In the court situation one party is more likely to win all or most of what they want, while alternative dispute resolution procedures focus on seeking a compromise settlement. As a result, alternative dispute resolution is more likely to produce a settlement with which both parties feel at least somewhat satisfied.

If a mediated settlement flows from a discussion of the underlying problems in a conflict it may be a much "better" solution to the problem than could be achieved by a trial. As Menkel-Meadow notes: "What set-

30. Macaulay, *Noncontractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61-2 (1963).

31. R. LEMPERT & J. SAUNDERS, LAW AND SOCIAL SCIENCE (1986).

tlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication."[32]

Research supports the suggestion that mediation in small claims settings is more likely than litigation to lead to compromise agreements for an intermediate amount of the initial claim.[33] This difference should not, however, be exaggerated. McEwen and Maiman found that one-fourth of the mediated settlements they studied were basically "all or none,"[34] while one-third of judges' decisions were intermediate.[35]

Beyond issues of cost, discussions of the interpersonal dimensions of dispute resolution introduce user satisfaction as a potential criterion for evaluating a dispute resolution procedure. The above discussion has implied that the parties to a dispute might feel better about the dispute resolution procedure, as well as the settlement itself, if an alternative dispute resolution procedure were used to resolve the dispute. Such satisfaction has been viewed as both good in and of itself and likely to enhance acceptance of and compliance with decisions.

Studies of various forms of alternative dispute resolution have found that people typically express satisfaction with mediation experiences. Pearson and Thoennes studied divorce mediation and found that ninety percent of those who reached agreement and eighty-two percent of those who did not reach agreement in mediation expressed satisfaction with mediation as a procedure.[36] This finding accords with other evidence that satisfaction with alternative dispute resolution procedures is typically high.[37]

It is in the area of disputant satisfaction that much of the compelling evidence in favor of alternative dispute resolution has been found. A wide variety of evaluations have concluded that people like alternative dispute resolution procedures, even when those procedures do not result in a settlement of their case. People appear to value the opportunity to present their case in a less constrained manner than is often possible in courts, to have an informal discussion with the third party which suggests to them that their views are being listened to and considered, and to participate more directly in efforts to resolve their conflicts. Since those involved in dispute resolution focus heavily on the question of disputant satisfaction in judging the value of dispute resolution procedures[38] the general popularity of alternative dispute resolution

32. *See* Menkel-Meadow, *supra* note 2.

33. Pearson & Thoennes, *supra* note 6, at 236-38.

34. *See* McEwen & Maiman, *supra* note 5, at 248. For example, seventy-five percent of the settlements were compromises.

35. For example, thirty-three percent were compromises. For a further discussion of these issues, see Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155, 156-58 (1987) and Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 538 (1984).

36. Pearson & Thoennes, *supra* note 6. Those who did not reach agreement are equivalent to those whose case went on to trial or to a post-mediation settlement.

37. Kressel & Pruitt, *supra* note 4, at 180-82.

38. *See* R. Ensler, *supra* note 13.

procedures is a strong point in their favor.

Satisfaction with alternative dispute resolution procedures is usually higher than is satisfaction with case handling in traditional courts. For example, McEwen and Maiman found that small claims disputants were more satisfied with their "overall experience" in court if their case was resolved through mediation.[39]

Evidence also suggests that those whose cases are resolved through alternative dispute resolution procedures are often more likely to feel committed to accepting the solution.[40] The commitment created by mediation has been found to lead to higher compliance rates following mediated solutions.[41] For example, McEwen and Maiman found compliance in seventy-one percent of successful mediations, and fifty-three percent of unsuccessful mediations.[42] Similarly, Vidmar found eighty-four percent of awarded amounts are paid in mediation and fifty-four percent are paid in adjudication.[43] Finally, Pearson and Thoennes found that sixty-six percent of those arranging child support in mediation paid it regularly, as compared to fifty percent in adjudication.[44] This general finding in civil cases has not, however, been replicated in criminal cases.[45]

H. *Measuring Satisfaction and Compliance*

From an evaluation perspective litigant satisfaction and compliance with decisions are ideal criteria against which to evaluate dispute resolution programs. Both can be easily measured and have compelling face validity. Hence, a focus on such issues in assessing the "quality" of dispute resolution procedures, however appropriate, would make the task of program evaluation much easier.

I. *Concerns About the Quality of Outcomes*

A third perspective on alternative dispute resolution programs focuses on the outcome of the dispute resolution efforts which occur in such programs. From this perspective, the key issue in evaluation is how the nature of dispute resolution settlements differs between traditional courts and alternative dispute resolution programs. One level of concern is with the impact on the disputants themselves. Alternative dispute resolution programs are viewed as possibly providing a "second class" of justice which lacks the protections of the formal justice system.

39. McEwen & Maiman, *supra* note 5, at 246-48. *See also* Pearson, *Child Custody: Why Not Let the Parents Decide*, 4 JUDGES J. 5, 10 (1981); McGillis, *The Quiet Revolution in American Dispute Settlement*, HARV. L. SCH. BULL. 20-25 (Spring 1980).

40. *See* McEwen & Maiman, *supra* note 5, at 248-49.

41. *See* Pearson & Thoennes, *supra* note 6; Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 135-44 (1985).

42. *See* McEwen & Maiman, *supra* note 5, at 248.

43. *See* Vidmar, *The Small Claims Court: A Reconceptualizati on of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 538-40 (1984).

44. *See* Pearson & Thoennes, *supra* note 6, at 236-37.

45. *See* Roehl & Cook, *supra* note 14, at 164-65.

One key characteristic of informal justice programs is their emphasis on compromise. Because these programs focus more heavily on reaching accord than is true in a formal trial, the parties are encouraged to "split the difference" and settle. A party with a legitimate claim may not feel that they should be encouraged or required to compromise. Instead, they may feel that the court system should enforce their claim by making an all or nothing judgment favoring them. Alternative dispute resolution programs may lessen the opportunities for pressing claims by encouraging parties to reach a settlement.

Because of the possibility of denying disputants the protections associated with formal courts, alternative dispute resolution programs are particularly likely to be harmful to disputants if those disputants lack power. In divorce cases, for example, the court may take the role of protecting wives and children against husbands with greater economic power.[46] Such protections may be lacking in cases settled in mediation.

Some general social science research suggests that informality might lessen the restraints to the expression of prejudice and the use of power.[47] There is, however, little empirical evidence currently available to suggest that this problem actually occurs in alternative dispute resolution programs.[48] On the other hand, systematic evidence is not available to reassure those who worry that alternative dispute resolution programs might lead to abuse or to assure critics that such abuse does not occur. Given that lawyers who handle cases for people lacking power have expressed reservations about the use of mediation,[49] this is an important area for exploration in future studies evaluating alternative dispute resolution.

Lehrman details a number of harms which might occur through the use of mediation in spousal abuse cases.[50] In such cases women lack power vis-a-vis men and could profit from court procedures protecting their legal right not to be abused. Since mediation programs often try to find a compromise settlement that restores the status quo within a family rather than help one party assert rights, such programs may harm women whose efforts to assert their rights have provoked violence from men seeking to maintain the status quo.

In studying potential harm to disadvantaged parties through the use of alternative dispute resolution programs, the issue of reasonable comparison groups is of great importance. Given that most court cases themselves are settled through informal negotiation there is ample opportunity for powerful parties to exercise subtle and not-so-subtle coercion, using the delays and costs of litigation as one source of pressure on weaker parties. Hence, simply finding that disadvantaged parties may

46. *See* Pearson & Thoennes, *supra* note 6, at 238-39.

47. *See* Delgado, Dunn, Brown, Lee, & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1395.

48. *See* Roehl & Cook, *supra* note 14, at 171-72.

49. *See* Lehrman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L. J. 57, 62 (1984).

50. *Id.*

suffer under alternative dispute resolution procedures does not suggest that these procedures are more problematic than adjudication. It has been widely recognized that "powerful parties" also come out ahead in adjudication. The issue is whether or not the position of disadvantaged parties is worsened when the "safeguards" associated with adjudication are removed or weakened. If weak parties are unable to use current safeguards to their advantage, then legal protections may only be theoretically beneficial.

A second perspective on outcomes emphasizes the important role of using the courts to air public issues and establish legal rules for dealing with those issues.[51] From this perspective, alternative dispute resolution threatens the ongoing process of establishing legal precedents and dealing with issues of public policy. Alternative dispute resolution procedures typically privatize a dispute by resolving it in a private agreement reached outside of a public forum. Consequently, the reasons for the decisions made are not articulated and no public record is available. As a result, the public airing of disputes occurs only to the extent that cases currently end up in public courts.

Discussions of outcome "quality" present particular difficulties for evaluators. The discussions require making a judgment about what the best solution to some dispute is. In other words, they imply a standard about how a dispute "ought" to be resolved. What, for example, is a just solution to a divorce case? What evaluations can do is to try to test for some of the more obvious types of unfairness that underlie this line of concern. For example, do disadvantaged parties in a dispute fare more poorly under alternative dispute resolution programs than under traditional adjudication? Unfortunately, these questions have not been systematically addressed.

A second aspect of the concern with outcome quality is a distrust of participant satisfaction as a measure of the quality of a procedure. As has already been noted, judges and court administrators often focus on the satisfaction of disputants. In fact, criticisms of alternative dispute resolution procedures have been met with the rebuttal argument that the disputants usually express satisfaction with the settlement.

It is important to note that disputant satisfaction has a dangerously seductive quality as a criterion of evaluation. It is easy to measure and seems to have face validity. Reliance on satisfaction may not, however, be objectively justified. Disputants may not be aware of the rights to which they are entitled and may, as a result, not realize what they are giving away in an alternative dispute resolution procedure. In addition, disputants may not have experienced the alternative procedures which might have occurred, so the disputants have no basis for knowing if they could have received more under a different procedure. Finally, satisfaction with a mediocre outcome may simply reflect disputants' beliefs that they expected to get even less of what they were entitled to than they

51. *See* R. Ensler, *supra* note 13.

actually received. If people expect little from the legal system they may be happy to get anything. This is not an endorsement of the legal system.

The question of the comparison group is particularly important in discussions of outcome quality. Although the formal trial is often put forward as the comparison group for alternative dispute resolution, most cases are not settled in formal trials, but through informal bargaining. Bargaining is motivated, at least in part, by the costs of formal trials. Disadvantaged parties are driven to settle their cases by the costs of litigation, so that their issues are seldom adjudicated and their case settlement may be "second class justice" even in the traditional courts. It is possible that people are more likely to receive a hearing at which they can present their case in their own words in an alternative dispute resolution procedure than in the traditional courts.

II. COMMUNITY EDUCATION

A. *Community Organizing as a Goal*

Another perspective on alternative dispute resolution programs views them as a tool for community organizing and the empowerment of the disadvantaged. This perspective emphasizes social change. Many early alternative dispute resolution efforts were community based. By providing forums for community members to discuss and resolve disputes it was hoped that community groups would be created, community leaders would be produced, and community members would feel empowered and be better able to work on their own behalf. Hence, communities were viewed as benefiting from taking control over the resolution of their own disputes. These gains require that the community have some control over the forum of alternative dispute resolution.

As the formal court system has increasingly adopted its own alternative dispute resolution programs some of those involved in social change efforts have come to view court-controlled alternative dispute resolution programs with suspicion. Traditional courts are one institution which citizens can approach with grievances and the courts can, as a result, be part of an effort to organize disadvantaged groups and push for political and social change. From such a perspective alternative dispute resolution programs can be viewed as good or bad. By diverting the cases of the disadvantaged out of court settings into informal settlement procedures, lacking in public forums, the political potential of community grievances is being defused. While individual litigants may fare well in such forums, the overall impact of their availability is to individualize disputes. Thus, court-controlled alternative dispute resolution programs may undermine social change strategies which seek to build groups and a sense of common identity and grievances among the disadvantaged.

Edelman has articulated the key value difference which separates those operating from a community perspective and those concerned

with issues of efficiency or interpersonal harmony.[52] The community perspective emphasizes that society is composed of different social groups, each with different interests. The purpose of organizing is to reveal those differences and build political groups which articulate the common interests of disadvantaged groups. This runs directly counter to the ideology of much of the alternative dispute resolution movement. Alternative dispute resolution programs typically seek to build consensus around compromise solutions that resolve disputes between particular parties. Such forums can also focus on process instead of outcome, operate on the level of individual problems rather than group interests, and regard satisfaction with settlements as a criterion of success. In all of these ways many alternative dispute resolution programs are motivated by a set of values which are fundamentally different from those motivating social activists.

B. *Community Education as a Goal*

In addition to being viewed as a potential tool for community organizing, alternative dispute resolution can be viewed as a more general strategy for educating adults about how to handle conflict. This perspective is articulated by Millhauser, who argues that the traditional adversary system of dispute resolution connects easily with a particular view of conflict, a view which focuses only on short term outcomes.[53] Unlike alternative dispute resolution procedures, the adversary system does not promote an effort to find integrative, mutually beneficial solutions. Furthermore, the adversary system does not focus on the harm which conflict, aggressiveness and dishonesty cause in interpersonal relationships.

Education is one important aspect of the alternative dispute resolution movement. It involves training people to focus on the possibility of integrative solutions to conflict rather than on winning at all costs. One example of such an effort are recently developed high school education programs teaching students how to handle conflict. Although such programs teach students to be mediators, many gains are found irrespective of whether students actually function in that role. What students learn is a new approach to conflict, one which emphasizes an openness to the possibility of mutual gain through creative, integrative conflict resolution. Rather than being destructive to interpersonal relations, conflict resolution of this type can actually strengthen the ties between people involved in ongoing social relationships.

52. Presentation by L. Edelman, Dispute Processing in Work Settings, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

53. Presentation by M. Millhauser, The ADR Bandwagon: Where is it Going?, at a workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes held at the University of Wisconsin-Madison Law School (July 13-14, 1987).

III. SUMMARY

It would vastly simplify the task of evaluating alternative dispute resolution programs if there were a general consensus about what those programs were supposed to achieve and the alternatives to which they should be compared. Unfortunately, no such consensus exists. As a result, the possibility of conducting evaluations of alternative dispute resolution programs that will satisfy all of those concerned with the quality of such programs depends on the success of a prior effort to define the key measurement concerns of the different constituencies in the alternative dispute resolution debate.

The measurement problems which have surfaced in recent disagreements about quality of alternative dispute resolution procedures reflect underlying differences in values. Different groups have approached the purpose of alternative dispute resolution procedures from different perspectives and, from these varying perspectives, have found different issues to be of primary importance in assessing the "quality" of dispute resolution efforts. This is not only a difference of opinion about how alternative dispute resolution procedures should be evaluated, but a reflection of value differences about the goals of dispute resolution. Similar differences in opinion would also emerge if the measurement problems of concern involved evaluating traditional court procedures.

In addition, differences in perspective about alternative dispute resolution reflect different roles within the legal system and, to some extent, political differences. Court administrators are directed by their official roles to be concerned with issues of efficiency and case settlement. Administrators also tend to be supportive of the administrative structure within which they work. Many of the practitioners discussing alternative dispute resolution are interested in improving the way that they solve the interpersonal, labor, and business disputes which they handle in their work. Other practitioners view the legal system as failing to provide some groups or individuals with the help that they need and should be receiving. Finally, some writers view the legal system from a perspective which is critical of its basic assumptions and modes of operation. The legal system reflects the values of our culture and those critical of our cultural values are also, not surprisingly, critical of the legal system.

Given basic differences about the goals of a dispute resolution system, traditional or alternative, disagreements about how to evaluate the quality of dispute resolution procedures seem natural. However, despite differences of the type outlined there does seem to be a general interest in understanding "the facts" about alternative dispute resolution programs. A detailed examination of many of those "facts" is available elsewhere[54] and suggests several basic points. First, alternative dispute resolution programs can be implemented in ways that will lower costs to disputants and to the court system. Such gains, when found

54. *See* J. Esser, *supra* note 18.

however, are small. Of central importance to the cost question is the desire of those in positions of authority to cut costs. If there is such a desire, many approaches can be taken to achieving that objective. Alternative dispute resolution procedures are one such approach.

The timeliness of dispute resolution can also be enhanced by the use of alternative dispute resolution procedures and through changes in adjudication procedures. It is not clear whether one of these approaches is intrinsically better than another. In addition, such gains will not occur automatically. Rather, whether such gains occur depends on the effective implementation of innovative programs.

Perhaps the most striking aspect of alternative dispute resolution programs which emerges from evaluations is the general popularity of ADR programs. People typically seem satisfied with informal dispute resolution efforts, often more so than with traditional adjudication, and generally feel committed to the decisions reached in them. Compliance is also as high or higher with decisions following such sessions, as with decisions reached in adjudications. Having the opportunity to present one's complaints and work toward a solution in an informal setting is clearly highly valued by disputants and leads to positive feelings. This finding emerges in both the comments of judges and mediators and in evaluations of alternative dispute resolution programs.

There are also a number of potential concerns about alternative dispute resolution programs. These concerns include whether disputants receive second-class justice and whether alternative dispute resolution programs are disruptive of community efforts to build programs that empower citizens and heighten their understanding of their collective interests and shared grievances.[55] These concerns are important, but have received less attention in evaluation efforts. As a result, it is not possible to reassure those concerned with such issues that their concerns are unwarranted. On the other hand, currently available evidence does not provide support for the suggestion that alternative dispute resolution programs hurt the disadvantaged to a greater degree than does the traditional process of adjudication. The resolution of these controversies requires the collection of additional information concerning the effects of alternative dispute resolution programs.

Finally, there are clear dangers in treating either adjudication or alternative dispute resolution as a single entity. Both are umbrella terms for a wide variety of programs, many of which are very similar. Distinguishing between "trials" and "alternative dispute resolution procedures" creates conceptual abstractions which obscure the wide variety of ways in which disputes are dealt with under either procedure.

55. *See* J ADLER, D. HENSLER & C. NELSON, *supra* note 21.