

7-1-2003

Let's Put Ourselves Out of Business: On Respect, Responsibility, and Dialogue in Dispute Resolution

Jonathan R. Cohen

University of Florida Levin College of Law, cohenjr@law.ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Ethics and Professional Responsibility Commons](#)

Recommended Citation

Jonathan R. Cohen, *Let's Put Ourselves Out of Business: On Respect, Responsibility and Dialogue in Dispute Resolution*, 108 Penn St. L. Rev. 227 (2003), available at <http://scholarship.law.ufl.edu/facultypub/38>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

Let's Put Ourselves Out of Business: On Respect, Responsibility, and Dialogue in Dispute Resolution

Jonathan R. Cohen*

I. Introduction

This Essay works in two steps. I want to daydream with you about the future, or what I hope will someday be the future, of our dispute resolution movement. I want to then use these imaginings to reflect upon where we are today.

Many of you, especially those who examine tensions between empathy and assertiveness in negotiation, are aware of Rabbi Hillel's three famous questions from roughly two thousand years ago: "If I am not for myself, who is for me? When I am for myself only, what am I? And if not now, when?"¹ His questions come from a work of wisdom literature titled, *Pirkei Avot, The Ethics of the Fathers*. In thinking about the development of our movement, it is helpful to consider another triad of questions offered in that same work by one of his contemporaries, Akavya ben Mahalalel. "Concentrate on three things . . . [k]now from where you came, where you are going, and before Whom you [ultimately] will have to give account and reckoning."² It is his third topic that I would like to take up, albeit in secular paraphrase. When we—and here I mean "we" in a very broad sense—look back at our movement generations from now, what would we like to be able to say

* Associate Professor of Law, University of Florida Levin College of Law; Associate Director, Institute for Dispute Resolution, University of Florida Levin College of Law. I thank Karen B. Cohen, Roger Connor, Alison Gerencser, Christopher Honeyman, Don Peters, and especially Nancy Welsh for their helpful suggestions, the organizers of the conference for a delightful symposium, and the members of the Penn State Law Review, especially Amy Bowser, for their fine work as editors. I appreciate Cindy Zimmerman's excellent secretarial support. All errors are mine alone.

1. MISHNAH, PIRKEI AVOT 1:14, *translated in* ETHICS OF THE SAGES: AN INTERFAITH COMMENTARY ON PIRKEI AVOT 39 (Ronald W. Pies, trans., 2000).

2. MISHNAH, PIRKEI AVOT 3:1, *translated in* ETHICS OF THE SAGES: AN INTERFAITH COMMENTARY ON PIRKEI AVOT, *supra* note 1, at 127.

about it? Put differently, what is the ideal vision for which we who practice and teach dispute resolution should strive?³

I want to suggest something that may at first seem odd: Our ultimate goal should be to put ourselves, or virtually put ourselves, out of business. Eventually, I hope the time will come when we live in a society where the expert services of dispute resolution professionals, including not only lawyers and judges but also mediators and arbitrators, are rarely needed.⁴ Think by analogy to the field of medicine. The best scenario from a medical viewpoint is *not* that a doctor helps you to heal quickly when you get sick, but that you do not get sick in the first place. Preventative rather than remedial medicine is the ideal.

The same can be said about our field. The ideal is to have a society where: (A) members avoid injuring one another so there is little conflict to begin with; (B) when injuries do occur, injurers actively take responsibility and seek to make amends; and (C) when conflicts arise, the parties attempt to resolve their differences themselves through direct dialogue and reasonable accommodation. (A) and (B) can be thought of as pure conflict prevention; (C) represents private conflict resolution by the parties. Invoking professional conflict handlers, necessary as it may be in some cases, should be extremely rare.

A society such as ours with enough conflict to employ roughly one million lawyers is running a high fever.⁵ Even if we decrease our reliance on litigation and increase our reliance on mediation, which will be better, there will still be a fever, just a lower fever.⁶ Ultimately, what we want is a healthy society with little need for both lawyers *and* mediators. Though adverse to our professional economic interests, one of our ultimate goals should be to make ourselves largely dispensable.

What will it take to bring about this idealistic vision? If reading, writing, and arithmetic are the three basic skills we teach children, *respect, responsibility, and dialogue* are three essentials that must be promoted within our society when it comes to conflict prevention and

3. Professor David Sally calls this our field's ultimate "aspiration point." Professor David Sally, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review).

4. This is a long-run goal. I am not arguing for reducing the use of mediators in the short-run. Increasing the use of mediators in the short-run may well be a helpful intermediate step toward decreasing the long-run need for them.

5. See BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE LEGAL PROFESSION IN THE 1990S I (1994) (projecting approximately one million American lawyers by 2000).

6. "Better" is a very broad term. For differing philosophical assessments of litigation and mediation, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995).

private resolution. Here I refer not just to children, but to adults. Let me explain each.

II. Respect, Responsibility, and Dialogue

By respect, I do not mean the fear of power or authority. Rather, I mean respecting people as people, that is, as seeing and treating them as beings with fundamental dignity.⁷ Most apparently, it means the “negative” practice of refraining from harming others. There is no more basic cross-cultural value than not injuring others. When asked which was the greatest of the commandments, Jesus responded first to love God and second to “love your neighbor as yourself. On these two commandments depend all the law and prophets.”⁸ When asked to summarize the Torah, Rabbi Hillel responded with the “negative” Golden Rule: “What is hateful to thee, do not unto thy fellow; this is the whole law. All the rest is a commentary to this law; go and learn it.”⁹ When asked whether there was a single word that could serve as a principle of conduct for life, Confucius replied, “Sympathy . . . what you don’t want [done to] yourself, don’t inflict on another.”¹⁰ Similar examples exist within other religious and ethical traditions. As the psychologist Jean Piaget wrote: “[A]uthors of the most diverse inspirations find themselves in agreement on one point . . . the sentiment most characteristic of moral life is the feeling of respect.”¹¹ The more people respect one another, the fewer injuries and hence fewer conflicts there will be in the first place.¹²

Next comes responsibility. By responsibility, I do not mean a broad set of moral duties. Rather, I mean a specific course of action, namely, an injurer actively taking responsibility after harming another. If the basic moral axiom is “[d]o not harm others,” surely the first corollary to that axiom is to take responsibility if you do. Apologize for the harm

7. See Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 760, 768 (2001).

8. *Matthew* 22:39-40 (Revised Standard Version).

9. BABYLONIAN TALMUD, *Tract Sabbath* 31a, translated in BABYLONIAN TALMUD 50 (Isaac M. Wise ed., 1918).

10. CONFUCIAN ANALECTS 103 (Ezra Pound trans., 1933).

11. JEAN PIAGET, *SOCIOLOGICAL STUDIES* 169 (Leslie Smith ed., 1995).

12. The analysis of conflict here begins prior to the “injurious experience” often taken as the starting point for analysis. See, e.g., William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 633 (1981); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 13 (1983). I understand conflict prevention as beginning with injury prevention. While often for analytical purposes the existence of injury or conflict is quite properly taken as a “given,” and the question then becomes how to handle that injury or conflict, I do not take it as a simple “given” here.

and seek to make amends.¹³ Frequently this will include *offering* fair compensation.¹⁴ To see how far astray from this moral practice we are now, consider the contrast between how we teach children and how we teach adults to respond to harms they commit. If a child injures another, good parents will teach the child to take responsibility for her actions. If an adult injures another and goes to a lawyer, the usual focus is on precisely the reverse: denial.¹⁵ The goal is to avoid responsibility, or if that is not possible, minimize liability. This pattern is not only morally bizarre, but it is likely psychologically and spiritually harmful to the injurer in the long run. Unlike the defense attorney, a minister or psychologist would typically urge an injurer to face the results of the injurious conduct and to take responsibility for it. Ultimately, we must change from being a society where denying the injuries we commit is the norm, to one where taking responsibility is the norm. Injurers need to learn to place morality above money. The moral lesson we teach children is also the one we should practice as adults.

If people respected one another more, the level of injuries, and hence the level of conflict, would decrease. If injurers took, rather than denied, responsibility for their actions, the level of conflict would also decrease. Yet some conflicts would still remain. Sometimes conflicts arise without injury, as when a divorcing couple whose marriage fails through the fault of neither must reach a child custody arrangement. Sometimes the parties are unclear about who was at fault or precisely to what extent. Sometimes parties are simply angry at one another. What the parties typically then ought to attempt is to engage in a respectful *dialogue* in which they listen to one another and seek a fair solution to their predicament.¹⁶ Though this would not resolve all such disputes, it would resolve many of them. Only if such a private process failed would the services of dispute resolution professionals then be invoked.

The three steps of respect, responsibility, and dialogue would not fully eliminate the need for dispute resolution professionals, but they would greatly reduce it. If followed, the lion's share of disputes that

13. See Jonathan R. Cohen, *Advising Clients To Apologize*, 72 S. CAL. L. REV. 1009, 1036-39 (1999).

14. For examples of the practice of offering fair compensation, see Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1453, 1460 (2000).

15. See Jonathan R. Cohen, *The Culture of Legal Denial* (forthcoming).

16. I write "typically" because many see private dispute resolution as inappropriate in certain cases, including those with gross power imbalances, such as domestic violence, or important constitutional or public law dimensions. See Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

require professionals for resolution would disappear. The need for dispute resolution professionals is deeply interwoven with our underlying culture, in particular with our cultural lack of respect, responsibility, and dialogue.¹⁷ The spread of respect, responsibility, and dialogue would represent not only a significant advance in dispute resolution practice but also in the moral consciousness and development of society.

III. Dispute Resolution Today

This brings me to my second topic: reflecting upon our current dispute resolution practices through these idealistic lenses, that is, through the lenses of respect, responsibility, and dialogue. The caution against seeing the world through rose-colored glasses notwithstanding, donning tinted lenses can sometimes assist us by reducing glare, thus allowing us to focus on essential features of what we now do and should attempt to do.

Consider a few examples. Hiring calm attorneys to negotiate can help disputants who cannot speak without shouting to reach a settlement.¹⁸ The respect they cannot show on their own, they can sometimes show through their agents. Mediators often foster respect (think of cautions against name-calling), responsibility taking (think of "reality checking" and efforts to facilitate apologies),¹⁹ and most basically dialogue. Observe also the emphasis on voice (being heard) and respect in the procedural justice literature.²⁰ On a practical level, the idealistic lenses of respect, responsibility, and dialogue can help us better understand what dispute resolution professionals are doing and should do.

Such lenses may also help us better see what dispute resolution professionals do on a deeper, conceptual level. I would hypothesize that a core function of dispute resolution professionals, in particular mediators, is to promote those very traits—respect, responsibility, and

17. For one fine cross-cultural comparison see Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology*, 20 LAW & SOC'Y REV. 461 (1986) (contrasting the prevalence of apology to help resolve disputes in Japan with its rare use in America).

18. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 542-43 (1994) (discussing the potential of detached attorneys to add value to the negotiation process).

19. See Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

20. For references, see Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 887, 891 (1997). On the application of procedural justice concerns to mediation, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787 (2001).

dialogue—the *absence of which* helped trigger or escalate the dispute. Broadly speaking, dispute resolution efforts like mediation may be understood as society's way of introducing behaviors that should have been there in the first place.²¹ At its best, mediation is a form of moral "civic education" providing "for both parties, a direct education and growth experience, as to self-determination on the one hand and consideration for others on the other" thereby fostering in participants "*responsibility* for themselves and *respect* for others."²² (Of course, mediators do other things too; most apparently, they often help achieve settlements, the central goal of many court-annexed mediation programs.)²³ Traditional litigation too can be seen as responding to deficits. If lawful behavior is the ideal, judges and juries can be viewed as helping to impart a value, lawfulness, the absence of which triggered the case. Such agents can be seen as conduits for fostering those ideal values in a less-than-ideal world. The response mirrors the actor's deficiencies. As when disciplining a child, one hopes that the external discipline will help to impart to that child the internal discipline the child lacks. In criminal law, there is a slogan of making the "punishment fit the crime." In dispute resolution, we often speak of "fitting the forum to the fuss."²⁴ We should understand this not only narrowly, that is, as selecting the most appropriate dispute resolution mechanism for a

21. A proactive variant of this is ombuds practice, where an organization seeks to institutionally embody the value of problem solving. Note, however, that ombuds offices are often *formed* in response to organizational problems.

22. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 11-12, 18 (1989-1990) (emphasis added). See also Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) ("[T]he central quality of mediation [is] the capacity to reorient the parties toward one another . . . [to] redirect their attitudes and dispositions toward one another."). Note that Bush identifies the two key values of respect and responsibility with mediation; he does not explicitly mention the value of dialogue. Bush, *supra*. However, it seems fully in keeping with his transformational approach to mediation. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

23. At the symposium, many, but not all, lamented the common settlement focus in court-annexed mediation programs. For critiques, see Bush, *supra* note 22; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001). For those who think the term "assisted settlement conferences" more aptly describes the happenings within such court-annexed programs than does "mediations," part of the distaste may stem from the possible failure of such mediations, or assisted settlement conferences, to significantly foster values like respect, responsibility, and dialogue. See, e.g., Bush, *supra* note 22, at 20 ("If we argue for [court-annexed] mediation now solely on the grounds of efficiency and private benefits, then even if mediation succeeds in these dimensions, the educational dimension may never fully develop.").

24. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

particular case, but also broadly. The dispute resolution institution embodies, and thus may impart, the traits in deficit that helped give rise to the dispute.

In analyzing dispute resolution mechanisms, we should consider not only the first-order, immediate questions of conflict resolution, but also the second-order, long-run questions of conflict prevention. For example, when assessing mediation, we should ask not only, "Was a settlement reached?" but also, "Did the parties find a way of relating to one another that will help prevent future conflicts (with either one another or others) and help them handle those conflicts that do arise?"²⁵ Similar issues apply to other dispute resolution processes.²⁶ As Nancy Welsh so aptly writes:

Ultimately . . . [dispute resolution] processes are meant to do more than resolve discrete disputes. They are meant to resolve disputes in a manner that will serve the goal of dispute prevention. The courts do this through the provision of a procedurally-just process and the creation of precedent. Perhaps mediation (at least facilitative, dialogue-based mediation) does it through the assertion of and training in appropriate ways for people to relate to each other when they find themselves in a dispute.²⁷

IV. Conclusion

While some level of conflict within most any society is inevitable, I do not think we should take the level of conflict within our society as a mere given. When we look back at our field generations from now, we will not be able to say that we have truly succeeded unless our services are rarely needed, unless we have been largely put out of business. Key to that is the growth of respect, responsibility, and dialogue within our society. Before that time, however, we can view a dispute resolution mechanism like mediation in part as a form of social education, seeking to introduce respect, responsibility, and dialogue where they are lacking. The lens of the ideal can help us see that for which we should ultimately strive and help us understand what we now do, and should do.

25. More colloquially, the question is not just whether an agreement was reached, but whether it will last.

26. For example, a judge who disposes of a case disrespectfully would be rightly criticized as compared with one who does so respectfully. Though the immediate disposition is the same, the second-order lesson is quite different.

27. Email from Nancy A. Welsh, Associate Professor of Law, The Pennsylvania State University Dickinson School of Law, to Jonathan R. Cohen, Associate Professor of Law, University of Florida Levin College of Law (Apr. 23, 2003) (on file with author).
