NOTE: "NEW COURTS" AND NEIGHBOURHOOD JUSTICE IN THE UNITED STATES

BY EARL JOHNSON, JR.* AND
WILLIAM L.F. FELSTINER**

A woman complains to the police that her boyfriend attacked her with a tire iron. Her arm was broken and facial lacerations required 42 stitches. The man is arrested and charged with assault and battery with a deadly weapon. If convicted, he could be sentenced to five years in prison. But he is not convicted - no trial is even held. Instead, two weeks later the man and woman, now complainant and respondent rather than defendant and victim, are mediating their *respective* grievances before two lay mediators: a school teacher and an unemployed carpenter. If the disputants can come to an agreement about the consequences of past quarrels and the terms of their future relationship, the criminal charge is dropped. This form of mediation is one of the "New Courts", and the New Courts are the latest effort to make justice cheap, efficient and appropriate.

These courts are not, like small claims courts and housing courts, watered-down versions of "real" courts. Their roots are not in Anglo-American jurisprudence, but in African and Melanesian moots, in socialist comrades courts, in psychotherapy and in labour mediation. Their alleged virtues are their differences from regular courts. They meet in informal settings. They try to avoid professionals who patronise, schedules which inconvenience and delays which transform useful responses into meaningless ones. They are prepared, even anxious, to indulge digression and emotion. They are concerned with the particular problems of these particular disputants, and they are not at all concerned about general rules, consistency and predictability. Above all, they try to set the immediate surface complaints aside and to confront, instead, the underlying issues.

The "New Courts" come in several different models. Most involve mediation as an alternative to prosecution in criminal cases where the defendant and victim are not strangers. The existence of a prior relationship between victim and defendant is a common feature in criminal prosecutions. Cases in which victim and defendant knew each other constituted 83% of rape arrests, 69% of assault arrests, 36% of robbery arrests, and 39% of burglary arrests in New York City in 1971. Sometimes reserved for misdemeanors only, sometimes used for more serious crimes, mediation programs were first sponsored by the American Arbitration Association in Philadelphia and Rochester and by a prosecutor and law school in Columbus, Ohio. Since 1974 locally-sponsored programs have sprouted across the country - in Cincinnati, Orlando, Boston, Manhattan, Brooklyn, Pittsburgh, Minneapolis.

---

* Earl Johnson, Jr. is a Professor of Law at the University of Southern California and director of USC's Program for the Study of Dispute Resolution Policy.

** Professor William L.F. Felstiner is a Senior Research Associate at the USC Social Science Research Institute and an associate director of the Program for the Study of Dispute Resolution Policy. Professor Felstiner formerly taught at the Yale University and the University of California, Los Angeles Schools of Law.

In mediation, the defendant and victim meet and talk through complaints and requests under the control of mediators who are community citizens trained in short mediation courses (typically 40-50 hours) or professional counselors or lawyers. The criminal case against the defendant is dismissed if he and the victim agree on a way to amicably sort out their problems. The complaint lodged with the court may be, for example, that the defendant threatened the complainant with a gun. The defendant may allege that he fired the gun because the complainant's dog had harrassed his daughter. When the complainant agrees to improve the controls on his dog and the defendant agrees to dismantle and dispose of the gun, the gun charge against the defendant is dropped. The parties may, or may not, have learned better how to communicate with each other; they may, or may not, solve problems in the future without engaging in criminal behavior. But this particular quarrel is more effectively behind them than if the criminal process had run its course. Above all, the agreement is the parties' agreement: it is more likely that they will heed it than if a decision were imposed by a third party.

The growth of these mediation programs reflects frustration with the present court system. Many people from Chief Justice of the Supreme Court to ordinary litigants have complained that the judicial process is needlessly complex, overloaded, slow and expensive: they have asked whether other institutions could not better respond to many cases now submitted to courts, thus freeing court dockets for disputes inappropriate for mediation or arbitration. And so they have begun to look to mediation programs as an alternative to litigation.

Mediation, however, is not *the* answer to court congestion or court costs or court frustrations. Because adequate caseloads have, somewhat surprisingly, been a problem for many mediation programs, an adequately-staffed service may cost $400 per case. But even if costs can be reduced, mediation has limitations. It seems to work where the disputants need help in sorting out practical problems of urban living. Mediation can assist neighbours in controlling pets, children and noise. It can help strike bargains in restitution for property damage and "borrowing without permission" cases. It has proved to be effective where familiars want to separate. Mediation then works to reduce the likelihood of abrasive encounters, to divide property and sometimes to set acceptable terms of child visitation and support. But mediation appears to be a failure when it confronts criminal problems rooted in emotional dysfunctions; alcohol-related problems are particularly intractable. Where he hits her when she nags, when she nags when he drinks, when he drinks to ease the pain of living, and when living is continually painful, a three-hour mediation session is unlikely to unwind the patterns established in years of coping. Mediation is simply not an adequate response to community mental health problems, and it obviously has little effect on social and economic conditions which may have produced those problems.

Recognising these limitations, most mediation programs provide some facility for social service referral. Follow-up, however, is sporadic and one program reports that only one in fourteen referrals actually seek the recommended service. Any other expectation would be naive: despite the pain, most people do not like strangers intervening in their problems, especially when the intervention is somewhat coerced.

Whatever its promises and limitations, mediation is to form the core of a widely-heralded experiment recently launched with the personal blessing of Attorney General Griffin Bell - the Neighbourhood Justice Centre. Los Angeles, Kansas City and Atlanta have been selected by the Justice Department to test the notion that many interpersonal and small economic disputes can be settled without law, lawyers and courts. In an area of each of these cities, citizens will be able to take disputes involving small amounts of money or reflecting problems with relatives or neighbours to an office in the community funded by the government, but operated unlike a court house. Intake personnel will interview complainants to determine if their problems are suitable for mediation or arbitration, or ought to be referred to a social service agency, to another government office, to a lawyer, or to the prosecutor. Some cases will go to arbitration directly if the parties are willing to be bound by a third party's decision. Most will be mediated first and if no agreement is reached, may then proceed to arbitration. As in some of the existing mediation programs, the aim is to have hearings run by panels of local people who do not have any special occupational qualifications except that they will have participated in brief mediation training programs.

The Neighbourhood Justice Centres may represent a step beyond the mediation programs operating in other cities. The Centres may *actively* seek civil as well as criminal disputes rather than passively accept the few civil disputes which trickle into mediation programs inadvertently. The Centers may more frequently use arbitration. Some planners also expect neighbourhood justice centres eventually to become decentralised "one-stop" intake points for large sections of the justice system. They may become a place where court actions are filed when less formal resolution techniques are inappropriate, saving a long trip to the down-town court house in cities which do not have satellite courts. Small claims and housing court judges might hold night sessions at a given centre every other week to hear cases between residents of the area. Other methods of resolving disputes - fact finding, ombudsmen, and some yet to be designed or labelled - may be folded in as neighbourhood justice centres gain a firm footing in a community.

Planning for these Centres is incomplete. The path to mediation has been defined by the existing programs, many of them funded by the same Justice Department source as is backing the Centres. But the ways in which arbitration will differ from litigation in the small claims courts has apparently not been fully considered. One type of problem amenable to arbitration is the typical consumer dispute. The challenge is to design a process which will be perceived as fair and effective by both consumer and businessman. Too many legal rules, too much due process and too many lawyers will depress consumer use. Too many consumer notions of how to conduct retail businesses, too much concern for particular cases and too little for general rules may persuade businessmen to retreat to traditional courts. One step toward a workable compromise would be to arbitrate by panels which include both business and consumer representatives.

Researchers in the field of conflict control believe that there are many more disputes occurring which are serious enough to upset people's lives than come to any kind of public attention. The non-complaining battered wife is just one example. The Neighbourhood Justice Centers would make a major contribution to community mental health if they attracted a substantial number of these disputes which now fester

untreated. Yet the level at which the Centres are to be funded and the staffing patterns which are currently contemplated suggest that no special effort to capture these disputes will be mounted, or even that the planners are aware that securing an adequate number of cases has plagued many existing mediation programs.

If mediation programs, Neighbourhood Justice Centres and other 'New Courts" are expected to save an ailing American justice system, we almost surely will be disappointed. In some respects, they are merely the latest in a progression of fads that has characterised judicial reform. Small claims courts, simplified pleading, systematic screening of potential judges, unified trial courts and government-funded legal services for poor people are among the remedies that at one time or another have taken centre stage as responses to litigation characterised as slow, overly-complicated and technical, alienating, biased and costly. All of these initiatives have some value; some, such as free legal services for the poor, represented dramatic improvements. But none solved the fundamental problems or questioned the underlying assumptions of the present judicial system.

Since organisation of the Office of Economic Opportunity's Legal Services Program in the 1960's, we have, however, been asking better questions. No longer absorbed with how to make the system more efficient and pleasant for judges and lawyers, we have begun to ask how it affects the consumers of justice. Now experimentation with informal modes of dispute resolution exposes a new set of questions. Should government only offer citizens one way of settling controversies - expensive, cumbersome, legalistic adjudication in the courts - or should it sponsor a variety of approaches tailored to different kinds of cases and different kinds of disputants? It is necessary to use professional, law-trained judges for all disputes or can ordinary citizens do just as well, or better, in many situations? Must we apply uniform, technical legal rules to every problem between two people or can common sense often produce a satisfactory, if not a superior, solution?

The Neighbourhood Justice Centre and its close cousins are not the last step in a chain of legal evolution. Eventually, they will make way for other approaches and better institutions. Nevertheless, this development suggests that we are beginning to ask the right questions. That may not seem to be much of an achievement to the average citizen. But in the tradition-bound world of the administration of justice, it is revolutionary. As consumers of justice, we all have an important stake in how well these issues are posed and how carefully the Neighbourhood Justice Centres and other experimental programs are designed, operated and evaluated.