Donald Kendig
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Take-Home Midterm Law & Society 150

This midterm is divided into two sections. The first section I discuss in this paper involves the Harvard model. I use a hypothetical case to describe and criticize the Harvard model pointing out its strengths and weaknesses. The second section involves the history of ADR (Alternative Dispute Resolution), and the processes of VOM (Victim Offender Mediation) and conferencing. I will expand upon the history of ADR, describe the two processes of VOM and conferencing, and evaluate the roles of the two processes in the ADR movement. The second section also requests my views on the tensions between substantive and procedural justice as illustrated by the above processes, and on ADR as a viable alternative to the formal system. I will discuss the various issues raised in class regarding the above tensions, and I will give support to my opinion that ADR is a viable alternative. My ultimate goal will be to demonstrate above average knowledge of the course material.

BACKGROUND

Before I answer the questions raised in the take-home midterm, I would like to briefly discuss my readings and lectures and how each chapter and class topic relates to the two sections of the midterm and mediation in general.

Getting to Yes was the most pleasurable reading. The whole book described in layman's terms the Harvard and Concession Convergence models. *The Journal of Social Issues* also had a chapter talking about the Harvard (mutual gains) and Concession Convergence models making several references to *Getting to Yes*. The same chapter also discussed the limitations of third party intervention. Other Chapters, read so far, in the journal relate to mediation but, not the

midterm. They covered two studies; one, studied "settlement orientated" vs. "problem solving" mediation practices; the other studied conflict management and coping strategies of adolescents in homeless families. *The Possibility of Popular Justice* discusses the future of ADR and reflects upon its history. It also contains a study relating to non-stranger conflicts not asked about on this midterm. *Settling Disputes: Conflict Resolution in Business, Families and the Legal System* covers just what the title implies. Other than issues written about from the title; the primary chapter talks about the origins of the ADR movement. It also discusses various forms of ADR, from negotiations one-on-one to adjucation by the courts or arbitrators. Two other readings, *Reading 1* which dealt specifically with conferencing and *Reading 2* which dealt specifically VOM, were assigned as well.

Class itself progressed in a linear, yet dynamic, fashion. First, the Harvard model was explained and demonstrated and then critiqued. At the end of this topic, a Cobb model was given as an alternative. To follow was the history of ADR along with court reform, their benefits and criticisms. Various forms of ADR were described as well: summary juries, mediation, arbitration, ombudspeople, neutral experts, and several others. The informative lectures have been spiced up with guest speakers, class particitpations, videos and the professors professional experiences.

DISCUSSION ONE: HARVARD MODEL

With all of the above in mind, lets begin. Used to illustrate the Harvard model, is The Case of the Chain Smoker in Apartment 25. I went to a mediator to complain about my neighbors living on the floor below me who smoke. . The smoke rises through the heater vents and the floor boards. Our relationship has deteriorated rapidly with each confrontation about the smoke. Before mediation, my neighbors were filthy pigs for all I cared and they were making me

miserable. They thought I was a complaintative troublemaker. Our session was as follows (borrowing from *Settling Disputes* p. 45-50, *Getting to Yes*, class videos and handouts).

We were explained the mediation process and purpose, and encouraged to interrupt with questions at any time. We were encouraged to say all that we wanted but, in a managed fashion. We met together with the mediator and separately. All was kept in strict confidence. No attorneys were present since it was a relatively menial problem. We were encouraged to discuss our interests, not our positions. During the process my neighbors suggested an air freshener or covering my heater. I suggested they quit smoking all together but conceded smoking outside doesn't seem to be a problem. Smoking outside clicked with us so, the mediator helped us draw up a binding contract. After the process, I saw my neighbors as human beings with particular habits that could be lived with and they saw me as reasonable.

As demonstrated above, the Harvard model insists that participants separate the problem from the people; focus on interests, not positions; invent options for mutual gain; and create objective criteria. We didn't have any objective criteria to work with.. It had to be created between my neighbor and I what was fair. This is but one weakness (critiques) of the model. Some issues are non-measurable and have no objective criteria. Another weakness included the definite aspects of politics in objective criteria. I found it hard to separate filthy from neighbor and pig from smoke. Separating them takes away from the history of the relationship and is difficult to do. Furthermore, it may be immoral to do so in a case involving a rape victim. Interests are not easily identified. They are created through interaction and based on the past (not always the future). When we invented options, it was hard for us not to only look for personal gain. This is usually the case that some political motive is involved. An alternative model was given in class. It was the Cobb model, and its main goal is legitimization of both parties. It

recognizes and accepts the above weaknesses of the Harvard model (no separation, not concerned with interests, people give the options, no objective criteria).

DISCUSSION TWO: VOM & CONFERENCING

Are we going around in circles when it comes to criminal justice? Jennifer G. Brown who wrote *Mediating in the Shadow of the Criminal Law*, seems to think so. I would agree. She mentions in "ancient" days criminal disputes were settled by the victims. We have evolved to make criminal justice a public affair and now we are going back to giving the victims the power to settle the disputes. We can term this new type of dispute settlement victim offender mediation (VOM), named after its primary participants. Community conferencing, another name for and observation of VOM, is just beginning to take hold in the west having started in New Zealand (Retzinger and Scheff). Brown's article goes too far back in history. *Strategy for Community Conferences* . . . is a unique aspect of the identical evolution. Our class and two of our readings, *Settling Disputes* and *The Possibility of Popular Justice* discuss the history of ADR starting in the early 1900's. I will utilize the later three sources as the basis for my discussion.

Our culture is one of enormous confrontation and conflict. Mediation institutions of the distant past have been churches, influential family members, and a homogeneous culture. With their corrosion, the courts have been a central location for settling early yesterday's problems. Today we are moving away from the courts back to the community, churches, victims, and family members. The advent of ADR has often been called the reform movement of the court system. Courts tend to break relationships, but ADR usually maintains them. The courts main problem was their increasing workload. It began to take years to settle remedial disputes. Efficiency was promoted by changing the judge's role, by unifying the court docket, and by creating specialized courts such as small claims and probate court. Court still had and has the

problems of costly resolutions of conflict and unequal access to justice (especially for the poor or under educated). ADR formally exists as of 1980 with the Dispute Resolution act of 1980; however, it is only one part of the progressive era starting in the early 1900's. Instead of making the courts better, ADR avoids them as much as possible or all together. Some forms of ADR currently in existence today are negotiation, mediation, arbitration, summary jury hearings, and renta-judges, to name only a few. Community boards and neighborhood justice centers are in place as well. VOM and Conferencing fall under a form of mediation and include the help of a facilitator/mediator.

ADR as with any change cannot be tension free. ADR has to carefully integrate itself with the courts to provide public order, promote social harmony, and offer equal justice. This is a hard task. Specific tensions have been raised due to the demoralization of violent and civil crimes such as race and discrimination. The feminists have argued it takes away from women's rights or legal advantages all together in the areas of rape, child custody/support, and divorce. Other tensions arise simply because it is different from the norm. Brown brings up good criticisms regarding victim's participation, and the everyone's "voluntaryiness".

ADR is a viable alternative. It has a very high satisfaction rate compared to the courts. This satisfaction or success could lead to more efficiency (less court time and more lasting resolutions), and fewer repeat offenders (conferencing study).

CONCLUSION

I hope I have accomplished my ultimate goal of demonstrating an above average knowledge of the course material.