Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics

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Concern with different institutions and methods of dispute settlement has a long history. But the rapid growth in lawyers' interest in 'alternative dispute resolution' (ADR) is widely perceived to have gathered momentum in the late 1960s in the United States.[1] In the past twenty years there has indeed been a remarkable growth in the 'ADR industry,' exemplified by the development of organisations, courses within law schools, continuing legal education and an extensive literature. The main stimuli appear to have been largely pragmatic and political rather than theoretical or 'scientific.' Three particular concerns seem to have predominated: a feeling on the part of the American legal establishment that the court system was becoming intolerably overloaded by an increased volume of civil claims and criminal prosecutions; a felt need, on the part of professionals and others, for specialised private fora to serve particular interests (eg commercial arbitration); and a view that over and above the concomitant increase in congestion, delay and expense, the system was incapable in more fundamental ways of living up to the ideals of 'access to justice' for all.

When a 'movement' relating to law develops in the United States, one outcome is almost invariably a massive, confusing and largely unsystematic body of literature of variable quality.[2] The ADR movement is no exception. In so far as any general patterns can be discussed from the American ADR literature, perhaps three main strands can be differentiated: first, a body of writing that is concerned with institutional design, in which the central questions relate to the appropriateness of different methods of dispute resolution to various types of 'dispute.' The pioneering work of Lon Fuller in the latter phases of his career is a prominent example.[3] Second, there has been a series of essentially political debates about the desirability and necessity of encouraging and developing ADR on a large scale. The diagnosis, prescriptions and the motives of the enthusiasts were challenged by sceptics of varying political persuasions: for example, radical critics such as Jerold Auerbach and Richard Abel, while doubting that 'justice' was routinely achieved in litigation, argued that the alternatives prescribed by advocates of ADR were no more likely to enhance either access to or delivery of justice in practice and that the net effect of the movement

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1 eg S. Goldberg, E. Green and F. Sander (eds), *Dispute Resolution* (Boston: Little Brown, 1985) ch 1. Discussions of ADR in the common law world have hitherto tended to be overshadowed by the American debates.

2 cf the American Realist and Law and Literature 'Movements.'

3 L.L. Fuller, 'Mediation — Its Forms and Functions' (1971) 44 S California L Rev 305; 'The Forms and Limits of Adjudication' (1979) 92 Harv L Rev 353.

would be to discourage the disadvantaged from trying to assert their legal rights.[4] From a rather different perspective, Owen Fiss argued forcefully 'against settlement' not only on the grounds that negotiation and mediation tend to favour the powerful, but also because the development of alternatives would undermine the creative role of the courts in developing public policy and inventing new solutions — an optimistic (and perhaps prototypically American) conception of the political role and importance of courts.[5]

A third strand of literature is specifically educational.[6] While some of the most prominent educational works deal with broad issues of institutional design and its political implications, the main thrust is to prepare lawyers for participation in these alternative modes by developing 'skills' in respect of such matters as counselling, interviewing, negotiation, mediation and non-curial advocacy.

The vast bulk of these three bodies of literature is atheoretical. By and large it represents a series of pragmatic and *ad hoc* reactions to some specific perceived problems in the American legal system at a particular period in history. There are two main exceptions to this broad generalisation: first, quite extensive reference is made to the specialised and generally excellent literature of legal anthropology exemplified by such writers as Malinowski, Llewellyn and Hoebel, Gluckman, Gulliver and Nader.[7] Second, a substantial body of detailed empirical research has been done on criminal process, civil litigation and some alternative processes.[8] Most of this research has been informed by contemporary social science methodology and fits within the kind of theoretical framework that is associated with 'the process school' in American jurisprudence — that is to say, a perspective that views litigation and other legal processes as a largely linear and discrete series of decisions and events involving a variety of participants, arenas, procedures, discourses and outcomes.[9]

This characterisation of a vast and complex body of American literature is, of course, a great simplification.[10] However, in so far as it is broadly correct it suggests that this heritage has two characteristics that need to be borne in mind by outsiders. First, it focuses on concerns, institutions and phenomena that are specifically American, despite the de-parochialising influence of anthropology. Second, it is largely divorced from what is widely perceived to be 'mainstream' Anglo-American jurisprudence as exemplified, on the one hand, by English positivists in the tradition of Bentham, Austin, Hart and Raz, and by their, largely American, critics such as Rawls and Dworkin. The two main exceptions to this are, perhaps, Lon Fuller and Karl Llewellyn. However, there is, or at least there is generally thought to be, a disjuncture between these two jurists' 'sociological' writings about

4 R. Abel, *The Politics of Informal Justice* (New York: Academic Press, 1982); J. Auerbach, *Justice Without Law?* (New York: Oxford UP, 1983).

5 Extracts from these debates are collected in L.L. Riskin and J.E. Westbrook, *Dispute Resolution and Lawyers* (St Paul, Minn: West, 1987) ch 1; and Goldberg, Green and Sander, *op cit* pp 485–503.

6 eg *op cit* n 5; and N. Gold, K. Mackie and W. Twining (eds), *Learning Lawyers' Skills* (London: Butterworths, 1989).

7 A useful survey of the literature is F. Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction' (1981) 8 *Brit J Law & Society* 141. See also S. Roberts, *Order and Dispute* (Harmondsworth: Penguin, 1979).

8 eg the work of Felstiner, Galanter, Miller and Sarat, and the Wisconsin Dispute Processing Program (1979–).

9 See below, n 37.

10 The ADR movement has been treated here as a largely American phenomenon. The ideas generated have been picked up and developed in common law countries, especially the United Kingdom, Australia and Canada. Of course, most of what is now subsumed under ADR antedates the ADR movement.

dispute settlement and their most memorable contributions to mainstream Jurisprudence. Only a tenuous connection is perceived between Fuller's writings on mediation and adjudication and his attacks on positivism; similarly, Llewellyn's reputation as the spokesman and interpreter of Legal Realism, the architect of the Uniform Commercial Code and the author of *The Common Law Tradition* is generally treated as separate from *The Cheyenne Way* and his 'law jobs theory.' I have argued elsewhere that Llewellyn's thought has a greater unity than this interpretation suggests. The same could probably be said of Fuller.

In so far as there is a perceived disjuncture between the literature on ADR and mainstream Anglo-American jurisprudence, this is puzzling because one of the most persistent concerns of our legal theorists has been about the nature of adjudication. Twentieth-century Anglo-American jurisprudence has been extraordinarily court-centred, with many of the main debates focusing on the role of judges and reasoning about questions of law in hard cases.[11] If *alternative* dispute resolution is mainly concerned with alternatives to civil adjudication, it seems strange that mainstream theories of adjudication do not feature prominently in discussions of ADR.

Two related factors may help to explain this disjuncture, at least in part. First, Anglo-American legal scholarship and legal education have tended to focus on analysis, exposition and argumentation about legal doctrine. In respect of this, the most visible and interesting issues tend to surface in atypical arenas, notably appellate courts. This sometimes obscures the obvious point that in only a tiny percentage of litigated cases is an adjudicative decision required; only a small percentage of adjudicative decisions involves disputed questions of law rather than of fact or disposition; and the percentage of cases that are appealed is strikingly small. The vast majority of civil cases is settled or abandoned before trial; and an even greater percentage of criminal cases involves a guilty plea which precludes an adjudicative decision on either the facts or the law.[12] Accordingly, in so far as a great deal of Anglo-American jurisprudence focuses on the roles and reasonings of appellate judges on questions of law, and treats such judges as the centre-point not only of litigation, but of law in general, it treats statistically insignificant and atypical decisions as central. The phrase 'alternative dispute resolution' is revealing. The word 'alternative' implies exceptional or secondary or even deviant in contrast with something that is normal or standard or ordinary. But alternative to what? To litigation? Hardly — for some of the standard alternatives such as negotiation, compromise and mediation regularly feature as phases *within* litigation. To adjudication? If so, it is not just our theorists who are obsessed with the atypical; rather, court-centred thinking and discourse are deeply ingrained in our legal culture.

For closely related reasons, those enclaves of legal theory which have focused more directly on non-curial legal activities and phenomena — sociology of law, legal anthropology and its precursor historical jurisprudence — have generally been marginalised in our legal culture. Thus, the main parts of our theoretical heritage that are seen as relevant to dispute settlement are largely outside the mainstream of jurisprudence. However, there are some exceptions and in this paper I shall draw attention to some works that help to bridge the gap between marginalised sociological theory and orthodox legal scholarship.

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11 The most prominent contemporary example is Ronald Dworkin and his critics.

12 Some statistics on settlement out of court, guilty pleas and appeals in England and Wales are usefully collected in Michael Zander, *Cases and Materials on the English Legal System* (London: Weidenfeld & Nicolson, 5th ed, 1988).

Bentham's Theory of Judicial Organisation and Adjective Law

Jeremy Bentham (1748–1832) is, of course, England's most famous jurist. More written about than read, the general outlines of his thought are well known: a particular version of utilitarianism that is the foundation and driving force of all his thought; his 'theory of fictions' which contains both his general epistemology and his main methods of analysis; his account 'of laws in general' which provides the framework for his jurisprudence; his grand design for a 'pannomion', a complete body of codified law, including a Constitutional Code, a Penal Code and a Civil Code; his theory of punishment and rewards, and so on. Less well known, but among the most extensive of his writings, are his theories of procedure and evidence (adjective law) and of judicial organisation, which deal with what he saw as a crucial part of his grand design, the *implementation* of the whole system of laws founded on utility.[13]

Despite its extent, this aspect of Bentham's work can be summarised quite succinctly. The object of adjudication is the implementation and application of positive law made by the legislator to promote utility. The direct end of adjective laws is rectitude of decision, that is, the correct application of substantive law to true facts. The collateral or subordinate end is avoidance of vexation, expense and delay. Conflicts between the direct and the subordinate ends are to be determined on the basis of utility. The system of procedure best calculated to further these ends is 'the Natural System' as contrasted with the 'Technical System.' The former is characterised by an almost complete absence of artificial (ie man-made) and technical devices, including formal binding rules of evidence and procedure. Rectitude of decision is to be secured by making provision for the forthcomingness of witnesses and the completeness and accuracy of testimony, backed by sanctions; by placing responsibility for each decision on the shoulders of a single judge who is adequately remunerated; the main securities against misdecision are simplicity and, above all, publicity. Questions of fact and the weighing of evidence should be governed by ordinary principles of common sense reasoning. The legislator should provide guidance to judges in the form of 'instructions' addressed to the understanding rather than by general binding rules addressed to the will.[14] The court system should be organised to provide cheap, simple, accessible, local, public justice.[15]

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13 For details see W. Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985) ch 2.

14 See generally *Theories of Evidence*, cited in n 13. There is currently a debate among Bentham scholars as to whether Bentham thought that the judge should also treat all substantive law (including the codes) as being subject to the overriding principle of utility in the particular circumstances of each case — in short, whether Bentham had a direct or act-utilitarian theory of adjudication. The main proponent of this view is Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford UP, 1986); three different interpretations have been advanced by J. Dinwiddy (Review of Postema) (1989) 1 *Utilitas* 283; P. Kelly (Review of *id*) (1989) *History of Political Thought* 366; and W. Twining, 'Reading Bentham' (1989) LXXV *Proc Brit Academy* 97, at n 31.

15 Bentham's list of the evils of procedure as he perceived them to be, in the England of his day, is interesting in this context:

In the penal branch,
1. Impunity of delinquents.
2. Undue punishments, *viz* punishment of non-delinquents, or punishment of delinquents otherwise than due.

In the non-penal branch,
3. Frustration of well-grounded claims.
4. Allowance of ill-grounded claims.

A great deal of Bentham's energy was directed to attacking the complexities and expense of procedure and the confusing technical rules of evidence, which were, he believed, sustained mainly by the sinister interests of lawyers and of judges (who also depended for their income on fees). In the two centuries since he wrote, almost all changes in procedure, evidence and judicial organisation have represented moves in the general direction that Bentham advocated, without going as far as he proposed and in a piecemeal and slow manner that he would have deplored. Similarly, the underlying basic assumptions about what is involved in rational adjudication and in proving facts have been almost universally adopted by specialist writers on the law of evidence. This is in spite of the fact that many of them have defended some of the technical rules that he attacked and even though this ideal type of 'The Rationalist Tradition of Evidence Scholarship' sits less comfortably with adversarial than with inquisitorial modes of procedure.[16] Bentham favoured a system of procedure that cut across the standard distinctions between 'inquisitorial' and 'adversarial' systems: many of his ideas fit the former model better (eg active questioning by the judge), but he also favoured confrontation of parties and witnesses face-to-face in oral proceedings and considered that cross-examination was the redeeming feature of the English tradition.[17]

One reason for Bentham's continuing significance is that he tended to take clear, unequivocal, often extreme positions on fundamental issues. His models of rational adjudication and of the Natural System of Procedure provide useful and rich 'ideal types' for contrasting 'alternative' methods of dispute resolution to adjudication. His attitude to compromise and conciliation are especially suggestive in this context. He studied the Danish Courts of Reconciliation and similar experiments in France, and viewed them with some ambivalence. He recognised some value in the conciliative function, especially in cases in which each side complained of a series of supposed wrongs.[18] But this was rigidly limited by the importance he attached to full implementation of substantive laws, deemed to be consistent with utility. He assumed that reconciliation is best achieved by adjudication in conformity to law: 'The increased facility of extinguishing ill-will, *and at the same time rendering complete justice*, is among the advantages possessed by the natural system of procedure in comparison to the system of technical procedure.'[19]

Bentham considered that the use of the pardon in criminal cases was only justified in exceptional circumstances and it is almost certain that he would have opposed institutionalised plea-bargaining. He was even more uncompromising about compromise. In *Scotch Reform* he wrote: 'Another mode of termination is by what is called *compromise*: which, being interpreted, is *denial of justice*.'[20] This follows from the high value he placed on implementation of law and vindication of rights (expletive justice — ie justice under the law). Compromise, even in situations of equality of bargaining power when parties freely consent, involves the sacrifice of rights and hence a cost, which is only ever justified as the lesser of two evils. He

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5. Expense.
6. Vexation.
7. Delay.
8. Precipitation.
9. Complication. (ii *Works* 19, Bowring edition).

16 *Theories of Evidence* ch 2; RE ch 3.
17 *id.*
18 For details see *Theories of Evidence* 94–95, 213, ns 40 and 41.
19 J. Bentham, *Principles of Judicial Procedure*, ii *Works* 47 (Bowring edition) (Italics added).
20 *Scotch Reform* (v *Works* 35).

anticipated modern commentators in doubting whether bargaining is ever really equal or consent truly free. On this interpretation, it seems likely that Bentham would have looked with deep suspicion on modern efforts to promote mediation, negotiation or arbitration (especially in private), and other alternatives to the kind of open, cheap, simple, speedy implementation of the law that would be achieved in his ideal court system.

Some of Bentham's concerns have resurfaced in modern debates, typically divorced from the comprehensive framework of his grand design. For example, Lon Fuller in developing his famous distinction between 'monocentric' and 'polycentric' tasks and arguing that courts should, as far as possible, not take on the latter, assumed a similar conception of courts to Bentham.[21] He saw them as institutions with specific characteristics only suited to applying and implementing law in respect of 'monocentric' tasks. Some critics have challenged this 'traditionalist' view, arguing that courts are much more flexible institutions that have a crucial role to play in adapting laws and politics to changing conditions and in creative problem-solving generally. It is partly because of this 'adaptationist' view of the role of courts that Owen Fiss has argued forcefully 'against settlement,' taking almost as strong a position as Bentham on the basis of a view of the role of courts that Bentham categorically rejected.[22]

Bentham's picture of the Natural System of procedure and his recommendations for access to justice may seem to be simplistic, Utopian and unworkable to some modern eyes; but they contain the clearest and most coherent example of a design theory that vests responsibility for implementation of law and vindication of rights almost exclusively in state courts, and his reasons for this need to be taken seriously in considering alternatives.

Llewellyn's Law-Jobs Theory and Some Successors

Karl Llewellyn's 'law-jobs' theory is rather better known than Bentham's writings on adjective law, but like the latter it represents a relatively neglected part of his thought.[23] It is relevant in the present context because it places dispute prevention and dispute settlement at the centre of a general sociological theory of law-government. The outline of the theory can be summarised as follows[24]: All of us are members of groups, such as a family, a club, a teenage gang, a school or commercial organisation, a trade union, a political party, a nation state, the world community. In order to survive and to achieve its aims, in so far as it has aims, *any* human group has to meet certain needs or ensure that certain jobs are done. The first, perhaps the most important, of these jobs is to channel behaviour and expectations of members of the group in order to avoid conflicts or disputes within it. Second, when disputes arise, they have to be resolved or, at least, be kept at a tolerably low level, or else the group will disintegrate or its objectives will be frustrated or impaired. Third, as the circumstances of the group change, so the behaviour and expectations of members of the group have to be adjusted to such

21 Fuller (1979) *op cit*, cf Goldberg, Green and Sander, *op cit* ch 2.

22 O. Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073. The most important modern defence of compromise is by Stuart Hampshire, *Innocence and Experience* (London: Allen Lane, 1989).

23 See especially K. Llewellyn, 'The Normative, the Legal and the Law-Jobs' (1940) 49 Yale LJ 1355.

24 This formulation is adapted from W. Twining and D. Miers, *How to Things With Rules* (London: Weidenfeld & Nicolson, 3rd ed, 1991) pp 159–160.

changes in order to avoid conflicts and disappointments. Fourth, decision-making in the group needs to be regulated both in respect of who has power and authority to participate in decisions and in respect of the procedures by which decisions are arrived at. This allocation of authority and power is typically the primary function of a 'constitution' of, for example, a club or a nation state. Fifth, in any group, but especially in complex groups, techniques, practices, skills and devices need to be developed for satisfactorily meeting the first four needs. Channelling behaviour, settling disputes, making smooth adjustments to change and providing for acceptable ways of reaching decisions can often be difficult tasks, involving high levels of skill or quite refined or sophisticated devices and institutions.

This last category, which Llewellyn called the 'Job of Juristic Method,' focuses attention on institutional design (eg constitution-making), specific inventions and devices (eg the letter of credit, the trust, mini-trials), individual skills (eg in negotiation, advocacy, fact-management) and more general craft traditions. In bare outline this looks like a fairly orthodox functionalist sociological theory, which provides a convenient characterisation of the main tasks of law, but can hardly be claimed as particularly original except perhaps in repect of the focus on juristic method or legal technology. Moreover, it has been suggested, this is an example of 'extreme functionalism' and hence is vulnerable to standard criticisms of old-fashioned functionalism of the kind associated with Talcott Parsons and Robert Merton.[25]

This is not the place to consider such criticisms in detail. I believe that the theory can be interpreted in a way which exonerates it from the most damaging criticisms and that aspects of it are suggestive and have been fruitfully developed by Llewellyn and others. Here, however, I wish to advance some reasons why this provides a particularly helpful perspective from which to consider dispute settlement.

First, the theory boldly claims to apply to all human groups, from a two-person unit (such as a motor-racing team or a one-parent family) to the world community. It includes submarines, prisons, clubs, tribes, villages and multinational corporations, and regional groupings as well as nation states. Controversy has surrounded how useful it is to treat all human groups as comparables,[26] but in so far as one can ask certain standard questions about how disputes are avoided and handled in any group its claim to comprehensiveness is particularly significant. For example, it helps to free legal theory from focusing exclusively on the nation state and it thus provides a starting point for theories of legal pluralism and 'non-state law.'[27] Second, the theory provides one escape route from obsessive concern with the definition of law. For Llewellyn, 'the institution of law-government' was the main, but not the only, institution specialised to performing the law-jobs in those groups we choose to call 'societies'; conversely, the law-jobs are the main, but not the only, functions of that institution. In specific contexts for particular purposes, it may be useful to distinguish between the 'legal' and 'non-legal,' but these are merely secondary issues of taxonomy. From this perspective it matters little whether, for example, the Kpelle moot, a university disciplinary committee, an Ifugao 'go-between,' a marriage guidance bureau, or a 'rent-a-judge trial' are labelled as 'legal' or not — they are all institutionalised dispute-processing mechanisms that can be compared and

25 A. Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978) ch 3. For a balanced discussion of functionalism in the sociology of law, see R. Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 2nd ed, 1992) ch 3.

26 eg Cotterrell, *op cit* pp 80–83; J. Frank, *Courts on Trial* (New York: Atheneum, 1963) p 77.

27 J. Starr and J. Collier (eds), *History and Power in the Study of Law* (Ithaca: Cornell UP, 1989); Twining (1989) *op cit* n 14, at pp 129–133.

contrasted within a single framework. Third, Llewellyn claimed that all of the law-jobs are essential to group survival and successful achievement of collective goals.[28] But any particular task can be done by a variety of means, singly or in combination. Dispute prevention in most societies, for example, is served by a complex mixture of formal and informal norms, education, rewards and incentives, hedges, barbed wire, physical force and other means of social control. Similarly, in any group, one should expect dispute settlement to be achieved by a variety of means. In a famous passage, Llewellyn summed up the basic insight, which he credited to Max Weber:

> The jobs to be done are jobs to be done: modern complexity of institution serves merely to highlight processes which require to be gone through, in some fashion, in any group. *The jobs, therefore, get themselves done after some fashion* always — or the group simply is no more. Hence if the officially announced imperatives fail to put themselves over, one must look elsewhere for the doing of the jobs ... Hence to see a Legal regulation which is not working is promptly to face a problem of further inquiry: What *is* working and how?[29]

Finally, as this passage suggests, the law-jobs theory is a contextual theory which requires that any particular institution, device, 'case' or other phenomenon should be viewed in the context of a larger whole. Any decision or event in a process such as litigation should be viewed in the context of the process as a whole. Thinking in terms of total pictures and total processes was part of the basic methodology of Llewellyn's 'realism'. This leads naturally to one of the basic insights and truisms of modern dispute settlement theory: that in any given society only a tiny proportion of all disputes are likely ever to reach those institutions we choose to call 'courts' or even those processes which might be included within the sphere of 'litigation.' A natural starting point for the consideration of any particular dispute settlement method or institution is a realistic demographic total picture of all disputes in the society or group in question and how they are presently being resolved.

The 'law-jobs theory' was developed in a number of directions by Llewellyn and others but, in my view, it has by no means fulfilled its potential. Apart from its direct influence on legal anthropology, four particular developments are of particular interest in the present context.

Law-Crafts and Legal Skills

Llewellyn in his later years elaborated a general theory of the crafts of law, which had both sociological and educational dimensions. It has been particularly influential in respect of the modern emphasis on direct teaching of legal skills (such as negotiation, interviewing, counselling and advocacy) based on systematic job analysis and skills analysis of lawyers' operations and the role of law-trained people in a given society.[32]

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28 This claim can be interpreted as a useful tautology, if the concept of 'group' is defined in terms of co-ordination and absence of conflict; W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicolson, 1973), at pp 180–182.

29 Llewellyn (1940) *op cit* at pp 1381–1382 (Llewellyn's italics).

30 Twining, 'Talk about Realism' (1985) 60 NYU L Rev 329, at pp 375–380.

31 eg W. Felstiner, R. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming' (1980–81) 15 Law & Society Rev 631.

32 See *Karl Llewellyn and the Realist Movement*, pp 353–356, 505–512. See especially I. Rutter, 'A Jurisprudence of Lawyers' Operations' (1961) 13 *J Legal Education* 301; Mackie, Gold and Twining, *op cit* n 6.

The Parental Model of Law-Government

Llewellyn also developed a typology of dispute settlement (parental, adversary, inquisitorial), initially in connection with the Pueblo Indians of New Mexico and subsequently in planning a project on Soviet law that was never executed.[33] The idea of 'the parental' was later used by Professor Harold Berman in his writings on Soviet law[34] and may indirectly have influenced Mirjan Damaska's analysis of comparative procedure, which more directly links different ideological structures to systems of legal procedure (see below).[35]

Arbitration

Llewellyn's wife, Soia Mentschikoff, used the law-jobs theory (including the 'parental' concept) in her work on commercial arbitration, including the ambitious Chicago Arbitration Project that was never fully completed.[36]

Theories of Litigation

Llewellyn was also directly and indirectly influential on subsequent theorising about litigation. Perhaps the most sophisticated example of work in this tradition is by John Griffiths, who has developed a total process model that takes account of modern developments in the sociology and anthropology of law.[37] His concern was to construct a general sociological theory of litigation, external to any particular legal system, for the purpose of conducting 'scientific' empirical research, specifically into divorce proceedings and administrative appeals in Holland.

Griffiths usefully draws together some of the main lessons to be gleaned from the sociological and anthropological literature. For example, that concepts such as 'dispute' and 'case' are problematic; that it is a common fallacy to assume that social processes are typically unilinear; that terms like 'dispute settlement' and 'dispute resolution' give a false impression of finality, whereas a particular agreement or decision may be just one phase in a longer process, or feud or story or series of stories; and that 'ADR' is often part of rather than an alternative to litigation. This is just one example of the sociological literature providing salutary reminders of complexities, which are sometimes forgotten in the optimistic discourse of a new movement.

A Comparative Theory of Procedure: Mirjan Damaska

Bentham's theory of adjective law and rational adjudication was an integral part of a prescriptive design theory. It belongs to censorial rather than expository jurisprudence. Llewellyn and the other writers mentioned in the preceding section largely adopt perspectives drawn from social anthropology and sociology. My next

33 *ibid* pp 363–365, 475–476.
34 eg H. Berman, *Justice in the USSR* (Cambridge, Mass: Harvard UP, 2nd ed, 1963), esp at pp 421–423.
35 M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure' (1973) 121 U Pa L Rev 506; *The Faces of Justice and State Authority* (New Haven: Yale UP, 1986).
36 S. Mentschikoff, 'Commercial Arbitration' (1961) 61 Columbia L Rev 846.
37 J. Griffiths, 'The General Theory of Litigation — A First Step' (1983) 5 *Zeitschrift für Rechtssoziologie*, Heft 2, 145, discussed in detail in RE ch 11.

example also involves Weberian 'ideal types,' used as tools of analysis and explanation in the comparative study of legal procedure. Mirjan Damaska's important *The Faces of Justice and State Authority*, published in 1986, adopts the perspective and style of a comparative lawyer, but it has potential significance for many specialists whose concerns are more parochial. The author is exceptionally qualified to undertake the task, for he writes with authority and firsthand knowledge of the administration of justice in socialist, civilian and common law systems. A Yugoslav by birth, education and training, Professor Damaska taught and practised law in his own country before moving to the United States in the early 1970s. He is able to draw on literature in several European languages and from several disciplines. Students of Evidence and Criminal Procedure, and many others, will be familiar with Damaska's outstanding article on 'Evidentiary Barriers to Conviction,' published in 1973. The present work is more ambitious and more abstract. It is an attempt to construct a systematic theoretical framework for the study and comparison of 'legal process' in modern Western legal systems.[38]

Throughout, Damaska adopts the standpoint of the *civis peregrinus*, an outside observer who is relatively detached from particular internal debates and disagreements. One of his concerns is to expose some common errors and pitfalls in the discourse of comparative procedure: for example, the conflation of functions of state with structures of government; simple determinist attempts to correlate socio-economic organisation with procedural forms; the equation of Anglo-American procedure with the notion of adversarial 'contest' and civilian procedure with 'inquisitorial' proceedings, when most actual procedural systems are hybrids embodying mixtures of 'inquest' and 'contest' that need to be carefully differentiated; the related error of treating 'contest' and 'inquest' as different means to shared ends, rather than as representing procedural structures which are mainly designed to serve different ends.

Damaska's method is to set up 'ideal types' which are sufficiently precise and detached from historical contingencies to serve as general tools of analysis. The focus is on the design of procedural systems and institutions, their structures, functions and architecture. The treatment is fairly abstract; even the extensive illustrative material is treated at a fairly high level of generality. Damaska sets up three sets of polar models or 'ideal types' relating to systems of government, structures of authority and systems of legal procedure respectively. His three sets of distinctions can be briefly restated as follows[39]: *Systems of Government* can be characterised by the extent to which they approximate to or diverge from pure versions of '*the managerial state*,' in which the role of government is to manage all important aspects of social life, and '*the reactive state*,' in which the role of government is limited 'to provide a framework for social interaction.'[40] This corresponds with familiar distinctions between 'interventionist' and '*laissez-faire*' ideologies of government. Most modern Western societies have hybrid systems of government (and mixed economies) which lie somewhere between the two extremes. Even the United States departs in important respects from the 'ideal type' of the *reactive state*; whereas the United Kingdom, despite recent incursions on the welfare state, is in important respects somewhat closer to the managerial model.

Structures of State Authority can similarly be characterised in terms of a distinction

38 Damaska (1986), *op cit* p 2. Damaska focuses almost entirely on 'Western' systems, but deals with some aspects of the situation in the Soviet Union and the Chinese People's Republic prior to 1985.
39 This summary is adapted from RE, at pp 180–182.
40 Damaska (1986), *op cit* p 71.

between *hierarchical* and *co-ordinate* authority. A reasonably clear example of the former is a bureaucratic state apparatus run by *professionals*, who are in a *hierarchical* relationship to each other, and who purportedly make most important decisions according to *precisely defined standards*. Co-ordinate authority is characterised by extensive *lay* (non-specialist) *participation*, *single levels* of 'horizontal' authority and resort to *undifferentiated community standards* rather than formal rules. Again, most actual systems of authority are hybrids. However, there are clear examples in particular spheres: for example, the English jury closely fits the co-ordinate model in that it is composed of ordinary citizens, its findings are only exceptionally subject to review or appeal ('the sovereignty of the jury') and its decisions, within its allotted sphere, are governed by 'common sense.' Significantly, juries do not, indeed cannot, give reasons for their decisions. This contrasts significantly with the lower judiciary in countries like Italy and France, where the personnel are trained officials, whose decisions even on questions of fact have to be reasoned and are subject to regular review by and appeal to higher authority.

The third distinction, between 'inquisitorial' and 'adversarial' *systems of procedure*, is also commonplace. But Damaska departs from common usage, which tends to be both ambiguous and vague, by distinguishing these categories in terms of purposes rather than treating them as different means to shared ends.[41] The purpose of an 'inquest' is implementation of state policy in order to solve a problem; the purpose of a 'contest' is the legitimated resolution of a single dispute between identifiable parties. It is a truism of procedural scholarship that it is misleading to equate Anglo-American procedure with 'adversary' proceedings or systems influenced by Roman Law with 'inquisitorial' proceedings. English Criminal Procedure, for example, viewed as a total process, can be interpreted mainly in terms of the model of 'inquest' with a few 'adversarial' glosses, especially at the stage of a contested trial — an event which occurs in only a small minority of cases. Damaska goes further than this: he argues that it would be surprising to find any modern state which had only one kind of procedural arrangement and, indeed, that examples of particular institutional arrangements which fit the 'ideal types' exactly are quite exceptional.[42] Most procedural arrangements, let alone most 'systems' of arrangements, are hybrids. Nevertheless, these concepts, if used precisely, have considerable explanatory power.

These distinctions are, of course, potentially controversial; there is also scope for differences in interpreting and applying them to particular examples. That serves to underline the point that it is not possible to give an ideologically neutral account of a legal system. However, Damaska's central thesis may be less controversial. He argues that these different ideal types can combine in practice in a variety of ways: some combinations one would expect to be more 'comfortable,' while others would almost inevitably give rise to serious tensions. For example, the managerial state, hierarchical authority and inquest fit together quite naturally; conversely, there is likely to be regular tension between adversary proceedings and hierarchical authority. However, and this is the central point, there are many more workable combinations of relatively pure types than one might expect; many particular arrangements, as well as whole systems, represent mixes or compromises. For example, there is no necessary incompatibility between 'inquisitorial' procedure and a largely reactive state, on the one hand, or a largely co-ordinate system of authority on the other.[43] Many English tribunals are concerned with implementa-

41 *id* pp 3–6, 10–12; cf 69.
42 *id* pp 224–225.
43 *id* p 69.

tion of law relating to such matters as welfare, tax and immigration: cases typically come before them when a decision is challenged. There is in a sense a 'dispute' and hearings have some 'adversarial' characteristics. We live in a world of hybrids.

Damaska's book has been aptly described as 'a political analysis of Procedural Law.'[44] It brings to the fore questions about the relationship between procedural arrangements and political structures and goals. Damaska deals only incidentally with non-curial proceedings, but his sensitive analysis of the complexities of the relationships between types of political organisation and legal procedures has important implications for broader issues of dispute settlement.[45]

The Faces of Justice and State Authority is undoubtedly the most significant recent contribution in the English language to the comparative study of legal procedure. It contains a number of controversial theses and interpretations which are likely to be debated for many years. Its immediate relevance is that it provides a useful bridge between the specialised and localised Anglo-American literature on dispute settlement and the comparative study of common law, civilian and socialist legal systems; it also provides a broad framework within which to discuss particular institutional arrangements in different political systems. Although Damaska rightly points to the variety of feasible institutional arrangements, he emphasises that the archetypal pattern for the pursuit of the goal of conflict resolution is a system of co-ordinate authority in a reactive state. In this view, alternative dispute resolution institutions will tend to fit uneasily within a managerial regime with a hierarchical structure of state authority.

Conclusion

From this highly selective survey of the stock of Anglo-American theorising that bears on dispute settlement, one might extract the following general obvious and not-so-obvious propositions:

(a) Concepts such as 'alternative,' 'dispute,' 'resolution,' 'case' and even 'adjudication' are problematic and need to be used with caution in particular contexts.
(b) In common law countries not only is a tiny proportion of all disputes litigated, but also only a very small percentage of litigated cases is 'resolved' by adjudicative decisions (on questions of fact or law).
(c) In so far as ADR is concerned with designing institutionalised alternatives to litigation or adjudication in order to reduce vexation, expense and delay, it should not be taken for granted that the benefits of such institutions will necessarily outweigh the costs.
(d) Most systems of legal procedure are hybrids in which a great variety of institutions and procedural forms can be accommodated more or less 'comfortably,' because the relationship between systems of government, systems of state authority and procedural systems is more complex than might be supposed. The same probably applies to institutions of dispute resolution.
(e) A total process perspective underlines the value of looking at particular

44 A. Stein, 'A Political Analysis of Procedural Law' (review of Damaska) (1988) 51 MLR 159.
45 See especially Damaska, *op cit* at pp 78–79.
46 A more comprehensive survey would include, *inter alia*, writings on procedural justice, economic analysis of law, the sociology of the legal profession and recent discussions of the reform of judicial administration and civil procedure.

decisions and events in the context of those that precede and succeed them in time. So-called 'resolutions,' 'settlements' or 'terminations' are frequently not the end of the story of a particular dispute or case, especially in a situation of continuing relationships.

(f) The great bulk of the English language literature on dispute resolution has been stimulated by specifically American concerns and perceived problems. The literature of social anthropology provides some powerful warnings about the complexity of social processes and their relationships to specific cultural and historical contexts.