

Maurice A. Deane School of Law at Hofstra University

## Scholarship @ Hofstra Law

---

Hofstra Law Faculty Scholarship

---

1989

### Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments

Robert A. Baruch Bush

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

#### Recommended Citation

Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 Denv. U. L. Rev. 335 (1989)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/667](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/667)

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

# DEFINING QUALITY IN DISPUTE RESOLUTION: TAXONOMIES AND ANTI-TAXONOMIES OF QUALITY ARGUMENTS\*

ROBERT A. BARUCH BUSH\*\*

## TABLE OF CONTENTS

I. Defining Standards of Quality in Dispute Resolution:	
Setting the Stage for Discussion .....	336
A. <i>Dimensions of the Discussion</i> .....	336
B. <i>Two Assumptions of the Discussions, and Their Relation to this Report</i> .....	337
II. Quality Standards for What Processes?: The	
“Litigation/Alternative Dispute Resolution” Dichotomy,	
and Alternatives .....	342
III. Quality Standards for What Disputes?: Context as a	
Prerequisite to Definitions of Quality .....	345
IV. What Quality Standards?: Defining—and Failing to	
Define—Quality in Dispute Resolution .....	347
A. <i>Sub-objective Statements and General Definitions of Quality</i> ...	347
B. <i>Whose Quality Standards?: The Taxonomy of Interests, and a Critique</i> .....	353
C. <i>Analyzing the Definitions of Quality: Relationships, Ambiguities, and the Problem of Choice</i> .....	357
D. <i>What Quality Standards (Again)?—Problems of Interpretation</i>	358
V. Clarifying Quality Standards: Discussing Definitions of	
Quality, the Problem of Clarity, and Some Alternative	
Approaches .....	367
VI. Which Quality Standard?: The Singularist Viewpoint, A	
Clarified Set of Choices, and My Definition of Quality .....	370
A. <i>Preface: An Anti-Taxonomy of Context</i> .....	370
B. <i>Visions of Quality, Visions of Society</i> .....	374
C. <i>A Closing Conundrum</i> .....	379

---

\* Reporting on 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.

\*\* Associate Professor of Law, Hofstra Law School. B.A., Harvard University, 1969; J.D. Stanford Law School, 1974. The author thanks the sponsors of the workshop for their support, and also thanks Marc Galanter, Judith Resnik, and Janet Dolgin for their comments on earlier drafts of this report.

## I. DEFINING STANDARDS OF QUALITY IN DISPUTE RESOLUTION: SETTING THE STAGE FOR DISCUSSION

### A. *Dimensions of the Discussion*

In anticipating the task of giving a taxonomic perspective on this workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes, I assumed before the event that the discussions would focus heavily on articulating a definition (or definitions) of "quality" in dispute resolution, a specification of the goal(s) being sought in the activity of dispute resolution.<sup>1</sup> For if no definition of quality is articulated, measurement is irrelevant, since no evaluation can measure whether or when quality has been attained. And the workshop agenda seemed to assume that no obvious or agreed upon definition of quality exists; otherwise, the "identification" part of the workshop description would be redundant. Therefore, my task seemed likely to involve describing and interrelating the different definitions of quality proffered and the reasons behind them.

In part, that is what I do below. However, the task was not a straightforward one for a few reasons that bear mentioning at the outset. First, speakers often appeared to assume that there *was* an obvious definition of quality that required no statement of reasons to explain its appeal. More often still, speakers offered comments that carried hidden or ambiguous statements about the definition of quality in dispute resolution. Both of these patterns of non-articulation made it difficult to understand and organize the different quality arguments being made and the reasons behind them.

Second, the effort to define quality touched off arguments about two other major dimensions of dispute resolution. The first argument concerned the proper target of study, in terms of both the dispute resolution processes to be considered and the substantive contexts in which these processes are used. The second argument concerned the identity of the interests or forces at play in defining quality, and then arguing for or against certain dispute resolution processes on that basis. The former argument raised the question of whether, even prior to delineating quality arguments, it was necessary to break down the field of inquiry into discrete process and context segments. The latter argument raised the question of whether definitions of quality must always be considered essentially political.

As a result of these patterns in the discussions, this paper explores three or four separate but related dimensions of arguments about quality in dispute resolution. In each dimension, this article explores what might be called the taxonomies and anti-taxonomies<sup>2</sup> that emerged in

---

1. The notion that "quality" in general is defined in terms of societal goals that are furthered by dispute resolution is discussed in greater detail below. *See infra* text accompanying note 8.

2. The concept of an "anti-taxonomy"—a conceptual framework that competes with the conventionally accepted framework or taxonomy—was suggested by Judith Resnik in a conversation following the workshop.

the workshop discussions, by which I mean the conceptual frameworks that were presented implicitly or explicitly as valid, and alternative frameworks that were offered to challenge their validity. Part II explains how the proceedings revealed and challenged the "litigation/alternative dispute resolution ("ADR")" dichotomy regarding processes to be studied. Part III describes the argument for context-specific analysis of quality in dispute resolution, the challenge to which is discussed in Part VI. Part IV reaches the original target, definitions of quality in dispute resolution, and presents a categorization or taxonomy of definitions implied by the proceedings. In the process, Part IV describes one view of the different interests engaged in defining dispute resolution quality standards and sets against it an alternative view of interests. Part IV also emphasizes the ambiguity of the definitions of quality suggested in the workshop discussions. Parts V and VI speculate on the reasons for this ambiguity, and suggest the beginnings of an "anti-taxonomy" of quality standards, and directions for future work.

The themes and arguments presented in the workshop and described below have considerable significance. In many respects, the workshop was a microcosm of the larger debate over dispute resolution evaluation and practice among academics, practitioners, administrators, and advocates. The arguments and ways of thinking expressed in the workshop echoed, for every dimension mentioned above, almost every significant viewpoint found in the larger world of dispute resolution research, scholarship, and practice.<sup>3</sup> Thus, the results of this workshop signify what is presently understood about quality in dispute resolution and, more important, what is not understood, why the lack of understanding exists, and what must be done to improve our understanding.

#### B. *Two Assumptions of the Discussions, and Their Relation to this Report*

Before analyzing the specific issues raised in the workshop, a few words are needed concerning some foundational assumptions about an-

---

3. The text and notes below will, where appropriate, note how the workshop arguments reflect the arguments made in the now voluminous ADR literature. See, e.g., *infra* notes 18, 28, 33, 47-52, 68-70, and accompanying texts. However, I want to make clear at the outset that this report was prepared not with primary reference to that literature, but rather with primary reference to the workshop discussions themselves. I chose *not* to use this report primarily as an opportunity to comment on major quality themes in the ADR literature, for which the workshop discussions would essentially be a jumping-off point. Rather, I chose to focus my efforts as Reporter on identifying the range of themes and patterns of quality arguments that arose during the workshop itself, with the literature as a background and point of comparison. This seemed an appropriate choice for a "taxonomic" report on the workshop. Moreover, after reviewing the workshop proceedings in considerable detail from written notes and tapes, I found the contents much too rich to set aside in favor of an analysis more focused on the literature.

Therefore, I start from the workshop record and refer where appropriate to the literature. My treatment of the literature is largely confined to these notes. It is referential and suggestive rather than comprehensive and profound because to attempt both a close analysis of the workshop discussions and a thorough critique of the literature was simply beyond the scope of this project. However, I believe the references to the literature are sufficient to establish the proposition of the text and to show how the workshop was a microcosm of the larger debate.

alyzing quality in dispute resolution that seemed to underlie the workshop discussions generally. Not all of us make the same analytical assumptions in approaching the quality issue. Therefore, I hope to make my further discussion clearer and more useful by identifying the analytical assumptions that I perceived underlying the workshop discussion, as well as identifying my relation to them as Reporter.

One assumption concerns the general meaning of the term "quality" as addressed in this workshop:<sup>4</sup> what is meant in general by "quality" in dispute resolution, and what was the general target of the workshop discussions as a whole? I suggest that, even apart from the multiplicity of specific quality arguments and standards I will report on below, the general notion of "quality" in dispute resolution processes might refer to at least two different things, with very different implications for discussion and analysis.

In one sense, the term "quality" may be used to mean that a certain dispute resolution process operates in practice in a way that fulfills the unique and inherent capacities of that particular process. Here, "quality" means fulfillment in practice of the inherent potential or form of the process in question, and therefore the definition of quality will vary from process to process. For example, the classic work of Lon Fuller suggests that quality in adjudication means fulfillment of adjudication's unique capacity to allow participation by presentation of proofs and reasoned arguments,<sup>5</sup> and quality in mediation means fulfillment of mediation's unique capacity to "reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship . . . ."<sup>6</sup> I call this the "process integrity" conception of quality.<sup>7</sup>

In another sense, the term "quality" may be used quite differently to mean that a dispute resolution process, of whatever kind, serves by its operation or outcome to fulfill a private or social goal that the person applying the quality label considers important. Here, "quality" means simply that the process furthers the achievement of the valued end, and therefore the definition of quality will not vary from process to process. If the valued end is, say, distributional equality, quality in *both* adjudica-

---

4. This discussion of quality as "process integrity" versus quality as "goal furtherance" grows out of comments by Judith Resnik on an earlier draft of this report, and in particular her questioning of my argument that the definition of quality is a constant that does not vary from process to process. See *infra* text accompanying note 23.

5. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365, 382 (1978).

6. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

7. Applications or modifications of these processes that frustrate or obstruct the fulfillment of their unique capacities are seen as abuses of the process in question, "perversions" of its pure form or character. See, e.g., Fuller, *supra* note 5, at 407-09. A similar approach to the notion of quality can be found in the work of Owen Fiss and Judith Resnik, among others, on adjudication, see, e.g., Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) [hereinafter Fiss, *Settlement*]; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms*]; Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) [hereinafter Resnik, *Faith*]; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982), and the work of Joseph Stulberg and Leonard Riskin, among others, on mediation, see, e.g., Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 VT. L. REV. 85 (1981).

tion and mediation will be measured in terms of whether, or how much, this goal is furthered by each process. If the valued end is preservation of relationships, quality in both processes will mean the extent to which *this* goal is furthered. Dispute resolution quality, in this conception, is defined entirely in terms of the ultimate goal being sought. I call this the "goal furtherance" conception of quality.<sup>8</sup>

Both the process-integrity and the goal-furtherance conceptions of quality deserve study. Both were evident in the remarks of different speakers at the workshop. For two reasons, however, I address my comments in this report to the goal-furtherance conception of quality and the different specific definitions of quality in this sense that were suggested in the discussions. First, according to my study of the record, the workshop discussions focused more on the goal-furtherance conception of quality than on the process-integrity conception.<sup>9</sup> Second, although I believe that quality in the process-integrity sense is important, I see it as secondary to quality in the goal-furtherance sense. For example, if certain uses of mediation ignore or pervert mediation's unique capacity to heal or transform relationships, the concern is not only for the integrity of the process but also, and ultimately, for the negative effect on a valued goal—preservation of relationships—that could be furthered by "good" mediation.<sup>10</sup> In other words, "bad" mediation is bad not simply because it perverts the process, but because in doing so it obstructs furtherance of a valued social goal. Quality in the goal-furtherance sense thus addresses what is ultimately at stake in the choice to use any dispute resolution process. For this reason, addressing the dispute resolution quality issue on this level is of primary importance in my view, though it may present difficulties.<sup>11</sup> Therefore, in keeping with what seems to

---

8. The goal-furtherance conception of quality, while also implicitly present to a greater or lesser degree in the work of Fuller and others, *see supra* note 7 and *infra* note 33, is more evident in the work of other ADR commentators, such as Lawrence Susskind, Linda Singer, Raymond Shonholtz, and Richard Posner. *See, e.g.,* Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Shonholtz, *The Citizen's Role in Justice: Building a Primary Justice and Prevention System at the Neighborhood Level*, 494 ANNALS 42 (1987); Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569 (1979); Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981). Of course, the views of these and other commentators as to the *specific* definition of quality, that is, the societal goal that dispute resolution should further, are quite divergent, as were those of participants in this workshop.

9. In part this was because the discussion did not focus on any one process closely enough to generate careful consideration of process-integrity quality standards for that process. This might be seen by some as a failing of the workshop, but it meant in any event that for a Reporter there was more material focused on the goal-furtherance conception of quality.

10. *See* R. Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation* (unpublished manuscript to be published in volume 41 of the University of Florida Law Review); Riskin, *supra* note 7.

11. Under this conception of quality, dispute resolution processes are viewed primarily in instrumental terms, that is, as tools for achieving important social or private goals. The corollary is that, since views differ on the relative importance of the different goals that dispute resolution processes might effect, the attempt to define "quality" in dispute resolution inevitably merges into a discussion of the definition of the "good" in society generally. Proffered definitions of quality in dispute resolution, on this level, are really surrogates for positions on the meaning of the good in society generally. Some might

have been the general assumption of the workshop—with which I am in agreement—the term “quality” as used below refers to quality in the goal-furtherance sense, unless otherwise stated.

A second major analytical assumption seemed to be shared by most of the workshop participants, although it runs contrary to my own viewpoint as Reporter. As discussed at length below, the workshop participants suggested, directly and indirectly, a variety of definitions of quality in dispute resolution. This multiplicity of definitions of quality can be approached from at least two viewpoints.<sup>12</sup> According to one viewpoint, this multiplicity is natural and acceptable in a pluralistic society, and it is possible and even desirable to accommodate all of these definitions in using and evaluating dispute resolution processes. It is possible because, according to this view, definitions do not necessarily conflict, or, if they do, some appropriate sphere can be found in which each definition applies. It is desirable because even if definitions do conflict, a single right or true definition of quality does not exist. Therefore, following this view, we should expect and accept a multiplicity of quality definitions, allow quality standards to vary according to choice or on a random basis, employ different quality standards in different contexts, and take other approaches that would accommodate a multiplicity of definitions of quality. I call this the “pluralist” viewpoint on quality standards.<sup>13</sup> From my analysis of the workshop record, as well as from informal comments made to me, most participants seemed to have held this viewpoint.

However, according to a contrary and evidently less popular viewpoint, a multiplicity of definitions of quality is problematic because it is neither possible nor desirable to accommodate all definitions. It is not possible because as a practical matter, according to this view, some or all of the definitions will conflict; and this conflict will not be reconcilable by a “jurisdictional” solution applying different standards in different contexts, because some or all of the conflicting definitions will be seen as universally applicable. Thus, choosing among, or ranking, competing definitions of quality will be a practical necessity. Furthermore, given

---

suggest that discussing quality in this sense therefore has little value, since it simply leads to the broader and insoluble discussion of competing conceptions of the good. My view is that this coalescence of the dispute resolution quality issue and the broader social goal question, whatever problems it entails, simply reflects what is actually at stake in the activity of dispute resolution.

12. This discussion of the pluralist versus singularist viewpoints on multiplicity in definitions of quality grows out of comments by Marc Galanter on an earlier draft of this report, and in particular his questioning of my argument below that choice among standards is necessary and that dialogue is the best path to choice. See *infra* text accompanying notes 45 and 86.

13. This view is reflected, sometimes explicitly and sometimes implicitly, in a wide range of ADR commentary. See, e.g., AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, U.S. DEPT. OF JUSTICE, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 8-18 (1984) [hereinafter PATHS TO JUSTICE]; Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 295-96 (1986); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486-90 (1985); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Singer, *supra* note 8, at 571-83.

fundamentally conflicting definitions of quality, it is not desirable to give them all equal weight on the ground that a single right or true definition of quality does not exist. On the contrary, according to this view, a right and true definition of quality does exist and, whether or not it can be known with certainty, common effort to find it will bring us closer to that knowledge and to each other. Therefore, following this view, we should bring proponents of different definitions of quality together, encourage them to clarify their definitions and the reasons underlying them, urge and help them to engage in argument and mutual persuasion over their differences, and take other approaches to search for a single, universally applicable definition of quality in dispute resolution (or a single priority ordering of competing definitions). I call this the "singularist" viewpoint on quality standards.<sup>14</sup>

As noted above, my impression was that most speakers at the workshop held the pluralist viewpoint on quality standards, although it was not always clear. In previous work, I have written from the pluralist viewpoint.<sup>15</sup> More recently, however, I have been persuaded that the alternatives presented in defining dispute resolution quality pose hard choices that demand singular answers and call for common effort to find those answers. Apart from the practical necessity of choice, the value that I place on the common search for a singular definition of quality—by which I mean, in practice, a singular priority ordering of several competing definitions, each of which has some appeal—is twofold. First, this type of searching brings us as close to the truth about quality as human beings can get. Second, the process of searching together for the good binds us together as fellows (or expresses our intrinsic common bond) in a most powerful way, and this binding is itself a primary value for me.<sup>16</sup> Some other speakers at the workshop also seemed to hold what I am calling a singularist viewpoint, although they may do so for different

---

14. This view is rarely if ever expressed explicitly, as I will do in this report. Nevertheless, it does seem implicit in at least some ADR commentary. The clearest example of this is, I think, in the work of Owen Fiss, which, although it focuses on adjudication in particular, speaks by implication to the issue of quality in dispute resolution generally, and does so from an implicitly singularist perspective. See Fiss, *Settlement*, *supra* note 7, at 1085-90; Fiss, *The Social and Political Foundations of Adjudication*, 6 *LAW & HUM. BEHAV.* 121, 122-26 (1982); Fiss, *Forms*, *supra* note 7, at 28-31. In some of her work, Professor Resnik also seems to suggest this view, as in her contrast of "the old order" of "faith in adjudication" to the "new faith" that "proponents of managerial judging and ADR urge upon us," see Resnik, *Faith*, *supra* note 7, at 543-44, and especially her conclusion that "we need to choose one of these views or identify the cases in which to vary our views." *Id.* at 554 (emphasis added).

15. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 *WIS. L. REV.* 893, 932-62.

16. These views, explained more fully below, are the product of my continuing reflection on the field. I have discovered that they are not unlike the views expressed in contemporary "communitarian" political thought, whose vocabulary I find appealing and useful, although I do not necessarily share all its views. See, e.g., M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) [hereinafter R. BELLAH]; A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); Hutchinson, *Beyond No-Fault*, 73 *CALIF. L. REV.* 755 (1985); Macneil, *Bureaucracy, Liberalism and Community—American Style*, 79 *NW. U.L. REV.* 900 (1985); Murphy, *Liberalism and Political Community*, 26 *AM. J. JURIS.* 125 (1981).



reasons. In any event, I write this report from my own singularist viewpoint on quality standards, even though it runs counter to what I see as a prevailing pluralist viewpoint.

## II. QUALITY STANDARDS FOR WHAT PROCESSES?: THE "LITIGATION/ALTERNATIVE DISPUTE RESOLUTION" DICHOTOMY, AND ALTERNATIVES

If the central question is the definition of quality in dispute resolution, one important preliminary question is the general meaning of quality, as discussed above. Another preliminary question is the meaning of "dispute resolution." What is being studied, to determine if it satisfies a specific goal-furtherance quality standard or not? In particular, many speakers opposed what they saw as a tendency of others to treat the field of study as divided into two areas: adjudication in court (litigation)<sup>17</sup> and ADR processes (encompassing everything else from unassisted negotiation to mediation to summary jury trials).<sup>18</sup> Such a "dichotomized and homogenized"<sup>19</sup> process taxonomy was criticized as simultaneously too segmented and not segmented enough. On one hand, it was argued, in-court adjudication itself often involves ADR processes, including negotiated settlement, judicial mediation, mediation by special masters, and so on. Furthermore, much so-called ADR, including summary jury trials, court-annexed arbitration, and compulsory mediation, goes on under the direct authority of the courts. In short, ADR is not an alternative to the courts; it is in and under the courts themselves.<sup>20</sup> So the litigation/ADR distinction is more fiction than fact. Instead, dispute resolution is "all of a piece," all part of one system in which proximity to

17. The interchangeable use of the terms "adjudication" and "litigation" is probably incorrect, since, as Marc Galanter has pointed out, the litigation process includes many steps that only rarely lead to a full-blown adjudicated trial. See Galanter, "... A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States," 12 J.L. & Soc'y 1, 1 (1985). Nevertheless, the use of "litigation" to mean full-dress adjudication continues to be common in ADR commentary. See, e.g., L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 2 (1987); Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 9-11 (1987); Goldberg, Green & Sander, *supra* note 13, at 292; Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 426 (1986); Menkel-Meadow, *Dispute Resolution: the Periphery Becomes the Core*, 69 JUDICATURE 300, 303 (1986). In addition, "litigation" was the term more commonly used at the workshop to refer to adjudication in court, according to my review of the record. Therefore, I use the term "litigation" here to mean, as stated in the text, full-dress adjudication in court. I do not mean to imply by this that the term is a wholly accurate one.

18. This tendency is common in the ADR literature. See, e.g., Brunet, *supra* note 17, at 1 n.1, 9, 11 & n.46; Fiss, *Settlement*, *supra* note 7; Lieberman & Henry, *supra* note 17. However, it has also been criticized in the literature as it was in the workshop discussions. See, e.g., Menkel-Meadow, *supra* note 13, at 499-500.

19. The phrase was used by Carrie Menkel-Meadow in her workshop comments and reflects in part her argument in Menkel-Meadow, *supra* note 13.

20. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 672-75 (1986); Galanter, *supra* note 17; Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 442-49 (1986); Resnik, *Faith*, *supra* note 7, at 536; Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 8-10 (1985).

or distance from court is not the crucial defining factor.<sup>21</sup>

On the other hand, the argument continued, the litigation/ADR dichotomy obscures the many and important distinctions between *different* ADR processes, lumping them together as if ADR was one homogeneous institution set apart from the courts.<sup>22</sup> In fact, to discuss quality in ADR processes in general is meaningless, if not impossible. Discussion must address quality in arbitration, quality in mediation, and so on. Indeed, comments by workshop participants suggested that even such conventional subdivisions of ADR were not sufficient. Distinctions should be drawn, for example, between private and court-annexed arbitration, between professional-conducted and volunteer-conducted mediation. Perhaps the furthest suggestion in this direction, echoed by several participants, was that the focus should not be on processes at all, but on *processors*. Dispute resolution varies so much according to the specific context and participants that quality can only be studied in particular cases, and labels like adjudication, arbitration, and mediation are largely useless.

It is important to clarify the significance of this discussion of "process taxonomy" in relation to the definition and measurement of quality, recalling that the focus of this report is the goal-furtherance conception of quality. Given that conception, the point of distinguishing different dispute resolution processes is not that the definition of quality will change depending on the process under study. The definition of quality, the valued end we are seeking to further in handling a dispute—for example, distributional justice or preservation of relationships—*may* vary depending on the substantive context or character of the dispute, an issue to be discussed in Parts III and VI below. However, in a given context, this definition will not vary according to the process being used. What probably will vary from process to process is the degree to which the quality standard, the goal sought, is achieved.<sup>23</sup> Therefore, distinguishing processes, while not crucial for defining quality, is very important for measuring whether quality, however defined, has been achieved. Misrepresenting ADR and litigation as totally distinct, and all ADR processes as totally indistinguishable, creates false and misleading impressions of the likely effects of each in terms of attaining given quality standards. It suggests that ADR and litigation will have totally different effects on quality, and that all ADR processes will have similar effects on

---

21. Similarly, it was argued, recasting the litigation/ADR dichotomy by dividing dispute resolution into "the formal system" and "informal alternatives" is equally wrong because in-court dispute resolution often involves considerable informality, while out-of-court alternatives like arbitration can be quite formalized. The latter phenomenon is regularly remarked on by students of mine who observe arbitration hearings at the American Arbitration Association and the New York Stock Exchange.

22. See Menkel-Meadow, *supra* note 13, at 499. For examples of this approach, see Brunet, *supra* note 17; Fiss, *Settlement*, *supra* note 7.

23. As noted in Part I, the definition of quality in the process-integrity sense will also almost certainly vary from process to process. However, that conception of quality is not the focus of this report. See *supra* text accompanying notes 4-8.

quality. However, neither proposition is likely to be accurate.<sup>24</sup> The more general point is that imprecise characterizations of processes can distort evaluations in quality, however quality is defined. The "dichotomized and homogenized" litigation versus ADR framework is one major instance of imprecise characterization.

A few important conclusions follow from the above. First, the proper focus of study as to evaluating processes should be the entire dispute resolution system, not just ADR processes.<sup>25</sup> Therefore, however quality is defined in a given context, we should be asking not only how do ADR processes perform in satisfying this criterion, but also how do courts perform, and indeed how do non-freestanding, "embedded" dispute resolution processes perform?<sup>26</sup> The same questions should be asked, in other words, across the entire range of dispute resolution processes.

Second, processes do differ in their capacity to achieve specific quality standards, but conventional process labels, for example, arbitration and mediation, are probably inaccurate indicators of these differences. The corollary here is the need, expressed by many speakers, for a more sophisticated vocabulary of process distinctions, a way to characterize processes that would be more helpful in distinguishing them for quality evaluation purposes. One speaker suggested that the description of process should use a language of process components or characteristics, that is, basic process elements that are joined to construct different dispute resolution processes. In fact, in an earlier article, I actually developed a preliminary version of such a process-characteristic vocabulary and showed how it helps to clarify understanding of how specific processes affect achievement of goals or quality standards.<sup>27</sup> My view then was and still is that the only sound method for constructing a process-characteristic vocabulary is by starting from the ultimate quality standards or goals themselves, and then reasoning backwards to determine what elements of a dispute resolution process would logically tend to make a difference (positive or negative) to the achievement of those goals. Those elements then form a process-characteristic vocabulary, and any specific process can and should be described in terms of its inclusion, exclusion, and combination of these elements.

The workshop proceedings demonstrated not only that there is strong interest in more precise process characterization, but also that there is a great need for it. Despite the general criticism of the litigation/ADR dichotomy, some speakers continued to maintain it as a key concept in their comments, even to the end of the workshop. Moreover, despite agreement on the need for great sophistication in process de-

---

24. For an exploration of some of the kinds of distortions in expectations of process effects that can result, see Bush, *supra* note 15, at 972-94.

25. For an excellent discussion of the breadth, variety, and interrelationship of dispute resolution processes, see Galanter, *Justice in Many Rooms*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 147 (M. Cappelletti ed. 1981). See also Bush, *supra* note 15, at 905-06.

26. On embedded or indigenous processes, see Galanter, *supra* note 25, at 161-69.

27. See Bush, *supra* note 15, at 951-53, 957-62.

scription, disagreements persisted over what one speaker considered another's mischaracterization of a process ("mediators don't 'decide cases'"; "mediators aren't 'passive'"; "arbitration is not 'informal'"; "mediation is not 'conflict suppressing'"). Particularizing and raising the sophistication of process characterization, even though it is crucial to accurate evaluations of quality, probably will not be accomplished easily or soon.

### III. QUALITY STANDARDS FOR WHAT DISPUTES?: CONTEXT AS A PREREQUISITE TO DEFINITIONS OF QUALITY

Yet another, and more important, preliminary question to be addressed before definitions of quality can be explored is whether the definition of quality in dispute resolution necessarily varies according to context, that is, according to the type of dispute being "resolved." In the proceedings, a number of speakers vigorously argued that there is no definition of dispute resolution quality that applies equally to all types of disputes; in different types of disputes—or contexts, or sectors, as some speakers expressed it—the goal to be furthered, the meaning of quality, is different. Or, if quality has several dimensions, if there are several goals to be furthered, the relative priority of those goals will differ in different contexts.

For example, in labor management disputes, finality and closure are high-priority goals, so that when a mediator refrains from stopping workers on their way back into the plant and raising questions about the fairness of the settlement, quality dispute resolution has been achieved. Whereas in family disputes, fairness is a more important goal, so that when a mediator intervenes to stop a couple from reaching a settlement unduly favorable to one side, quality has been achieved. Another speaker argued that the definition of quality for a dispute involving parties of equal power in a single transaction is very different than that for a dispute involving parties of unequal power in a continuing relationship, such as clients of bureaucratic agencies. The definition of quality simply is not the same in these two contexts, nor in any two different contexts.

The implication is that before discussing definitions of quality, it is necessary to somehow subdivide the universe of disputes into distinguishable sectors: labor versus family, environmental versus commercial, public versus private, parties of equal power versus unequal power, and so on. The goals to be furthered differ in these different sectors. Therefore, only within a limited context can a meaningful definition of dispute resolution quality be offered.<sup>28</sup>

It is clear that this question about the definitional venture is more pressing than the one discussed in Part II. As argued above, properly characterizing and distinguishing *processes* is necessary for *measuring* qual-

---

28. See Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 933-49 (1979), for a sustained presentation of this argument. It is also reflected in other ADR commentaries. See, e.g., *PATHS TO JUSTICE*, *supra* note 13, at 8-16; Bush, *supra* note 15, at 946-51; Goldberg, Green & Sander, *supra* note 13, at 295; Sander, *supra* note 13, at 118-25.

ity in the goal-furtherance sense, but not for defining it. However, if it is true that quality has no universal meaning, but differs in different contexts, then characterizing and distinguishing *contexts* is a crucial prerequisite to *defining* quality. If this is so, then much of the work of this workshop must be called into question, because no real effort was made at the workshop, apart from a few speakers, to propose a "context taxonomy," that is, a system of characterizing and distinguishing disputes that would make meaningful goal definition possible.

In the same article referred to in Part II, I actually tried to elaborate such a "context taxonomy," so I am sympathetic to this concern.<sup>29</sup> However, I do not see it as a prerequisite to the quality definition undertaking, for two reasons. First, I am no longer convinced that the definition of quality in dispute resolution is strictly contextual. I am more persuaded that the definition of quality in dispute resolution is constant across the board; the valued goal to be furthered by dispute resolution (in practice, the relative priority of the several goals to be furthered) is the same, independent of context. This position is connected with my adoption of a "singularist" viewpoint toward multiplicity of quality standards, as discussed above, and I will explain this "anti-taxonomy" of context more fully in Part VI.

Second, even for those who believe that definition of quality must be contextual, I suggest that the specification of appropriate context categories itself can be done only *after* and not prior to the articulation of the possible definitions of quality across the universe of contexts. The reasoning behind this point is similar to that offered in Part II regarding the formulation of a useful process-characteristic vocabulary. Context labeling can be as confusing and misleading as process labeling. Are "environmental disputes" and "family disputes"—or any other conventional context differentiations—useful and proper categories, or just labels as misleading about the nature of context as are "mediation" and "litigation" about the nature of process? Accurate context characterization must utilize a basic vocabulary of context characteristics or elements, and the relevant basic vocabulary can only be derived by starting from the ultimate possible quality goals themselves and reasoning backwards to determine what elements in the dispute situation or context would logically tend to make a difference as to the importance of these goals.<sup>30</sup> All of those elements, and only those elements, then form the basic context-characteristic vocabulary, and specific contexts can then be described in terms of inclusion, exclusion, and combination of these elements.

Thus, regardless of whether one believes that goal definition is ultimately contextual or not, the necessary starting point for analysis is articulating possible definitions of quality that are meaningful in one context or another. While the preliminary questions raised about process and context definition are serious concerns, they are not as funda-

---

29. Bush, *supra* note 15, at 946-57, 959-62.

30. *Id.*

mental as the concern for articulating definitions of quality in dispute resolution. In Part IV, I summarize and organize the workshop discussions on that issue and suggest where the discussions left ambiguities and points of misunderstanding.

#### IV. WHAT QUALITY STANDARDS?: DEFINING—AND FAILING TO DEFINE—QUALITY IN DISPUTE RESOLUTION

##### A. *Sub-objective Statements and General Definitions of Quality*

Assuming for the moment that it makes sense to offer definitions of quality in dispute resolution processes and outcomes across the board, what kinds of definitions emerged from the workshop discussions? After reviewing notes and recordings of the proceedings, I identified fifty different statements defining quality in the goal-furtherance sense. Other statements merely repeated or varied these fifty. However, I do not believe these statements represent fifty different definitions of quality. Rather, following Larry Mohr's suggestion, echoed by other speakers, I see these fifty statements as identifying "sub-objectives" that cluster around a considerably smaller number of general quality goals or definitions.

As explained in Part I, definitions of quality in the goal-furtherance sense correspond in general to valued social goals that dispute resolution can help to further. Dispute resolution quality is defined in terms of the ultimate social goal that is valued. I therefore refer to definitions of quality also as quality "standards" or "goals." Sub-objectives are either *aspects* of the ultimate quality goal or specific *strategies* for achieving the ultimate goal. The significance of distinguishing between sub-objectives and ultimate goals, apart from clarity and simplification, is that conflicts among sub-objectives may simply present strategic choices regarding how best to satisfy a single quality standard, while conflicts among goals represent a more serious problem of choice between competing and inconsistent quality standards.

Specifically, I perceived six clusters of quality statements in the workshop record, corresponding to six general definitions of quality in dispute resolution processes or outcomes. Each of these definitions addresses quality in the goal-furtherance sense; each purports to capture what it is that we desire, what we consider the valued social goal or "good" to be achieved through the handling of disputes. If the process or outcome furthers this good, it has met our standard of quality. Dispute resolution processes or outcomes achieve quality, according to one of these definitions, when:

(1) they leave disputing parties feeling that their individual desires, as defined by themselves, have been satisfied, in terms of the experience and the outcome of the process (INDIVIDUAL SATISFACTION); or

(2) they strengthen the capacity of and increase the opportunity for disputing parties to resolve their own problems without be-

ing dependent on external institutions, public or private (INDIVIDUAL AUTONOMY); or

(3) they facilitate or strengthen the control of public and private institutions, and the interests they represent, over exploitable groups and over possible sources of social change or unrest (SOCIAL CONTROL); or

(4) they ameliorate, neutralize, or at least do not exacerbate existing inequalities in the societal distribution of material wealth and power (SOCIAL JUSTICE); or

(5) they provide common values, referents, or "texts" for individuals and groups in a pluralistic society, and thereby increase social solidarity among these individuals and groups (SOCIAL SOLIDARITY); or

(6) they provide opportunities for and encourage individual disputants to experience personal change and growth, particularly in terms of becoming less self-centered and more responsive to others (PERSONAL TRANSFORMATION).<sup>31</sup>

The foregoing set of definitions is not an arbitrary categorization, but a reflection of patterns and commonalities implicit in the fifty more particularized quality sub-objective statements. This will be clearer from a listing of the fifty statements themselves, which are presented in Table I. For brevity and clarity, I list the statements in Table I already categorized. However, bear in mind that my process was the reverse; I looked first at the fifty sub-objective statements and then generalized from them to the six general definitions.<sup>32</sup> I believe it should be appar-

31. Marc Galanter suggested, in commenting on an earlier draft of this report, that personal growth may include growth "along efficacy or competency dimensions," not just responsiveness to others. This is so, of course, but I do not believe that this means that the Individual Autonomy standard is really included within the Personal Transformation standard. I see the two as distinct for several reasons. The most important reason is that satisfaction of one may be irrelevant to or even inconsistent with the other. For example, increasing the individual's problem-solving competency and jurisdiction will not necessarily increase sensitivity to others; it may even produce *less* sensitivity as it increases a sense of personal power. On the other hand, increasing responsiveness to others may not be possible except by measures that involve limiting individuals' autonomy to some degree, as occurs in mediation by the very presence of the mediator—without which, however, the parties' mutual responsiveness could be far less. In short, Individual Autonomy and Personal Transformation describe different and, to some degree, competing dimensions of personal growth. The former focuses more on growth in the self-strengthening sense, the latter on growth in the self-transcending sense. The "transformation" or "transformative value," as some speakers put it, involved in the Personal Transformation standard is, as I see it, a transformation from self-centeredness to other-centeredness (or self-and-other-, or relationship-centeredness). This was my reading of the Personal Transformation-associated quality statements made at the workshop. It is consistent with the discussion in the ADR literature that reflects the Personal Transformation standard. See *infra* notes 33 & 51 and sources cited therein. See also Bush, *supra* note 15, at 1027-32; Bush, *supra* note 10. Perhaps, in view of the above, it would be better to call this the Self-Transcendence (or the Relationship/Compassion) standard, but the language of personal transformation was used at the workshop, and I have tried to stick closely to the terms of the workshop discussion. See *supra* note 3. I note also that, as with the Individual Autonomy and Personal Transformation standards, I see each of these six quality standards as ultimately distinct and non-replicative, even if there is, as here, some degree of overlap between them.

32. Note that, of the fifty sub-objective statements, twenty-eight can logically pertain

ent from the statements reported how the six general definitions emerged.

TABLE I  
QUALITY STATEMENTS AND QUALITY STANDARDS

(Statements defining quality [sub-objectives], grouped according to general definitional categories [standards])\*

"Dispute resolution processes or outcomes attain quality when . . . "

A. (INDIVIDUAL SATISFACTION)

1. . . . the process is expeditious.
2. . . . both parties are satisfied with the process and outcome.
3. . . . both parties feel fully heard.
4. . . . both parties feel the outcome was not unduly favorable to the other side.
5. . . . trial in court is avoided. (I)
6. . . . the parties participate directly. (I)
7. . . . creative outcomes are possible and are actually attained. (I)
8. . . . the dispute is resolved finally and comprehensively.
9. . . . the parties comply with the resolution. (I)
10. . . . the parties have the choice whether to participate. (I)
11. . . . the process has a positive impact on the parties' relationship.
12. . . . the outcome meets the parties' needs, subjectively defined.
13. . . . the outcome does not depend on technicalities. (I)

(See also: INDIVIDUAL AUTONOMY 3; SOCIAL CONTROL 2, 3; SOCIAL JUSTICE 22)

B. (INDIVIDUAL AUTONOMY)

1. . . . the process educates the parties in dispute resolution skills.
2. . . . the process or outcome empowers the individual.
3. . . . the parties exercise control over the process or outcome.

(See also: INDIVIDUAL SATISFACTION 6, 10; SOCIAL JUSTICE 19)

C. (SOCIAL CONTROL)

1. . . . the process or outcome reduces social conflict.
2. . . . the outcome serves dominant political interests. (I)
3. . . . the process diverts cases from court so that due process in court can be provided to certain cases. (I)

(See also: INDIVIDUAL SATISFACTION 1, 3-5, 8, 9; SOCIAL SOLIDARITY 4, 5)

to more than one of the six general definitions (twenty to two definitions, and eight to three). I have listed each under the one definition that, given the context of the statement in the proceedings, appeared to be the primary concern of the relevant speaker. The definitions followed by numbers at the end of each definitional section indicate secondary definitional associations for those statements. A further explanatory point is that the letter "I" following a statement indicates that a speaker took this position implicitly, usually in asking or answering a question, rather than explicitly. This, of course, means that the statement as listed represents an interpretation on my part. However, in view of the frequency of such implicit commentary during the proceedings, a point I will discuss further, *see infra* text accompanying notes 46-61, I had little choice but to offer what I hope are fair interpretations of what was implied.

\* The letter "I" following a statement indicates an implicit rather than an explicit statement. *See supra* note 32.



## D. (SOCIAL JUSTICE)

1. . . . the process gives no procedural advantage to either side. (I)
2. . . . the process neutralizes the advantage of a rich (advantaged) party. (I)
3. . . . the outcome is not harmful to a poor (disadvantaged) party. (I)
4. . . . the process assures access on an equal basis to rich and poor. (I)
5. . . . the outcome produces institutional change.
6. . . . the outcome favors a poor party, as an individual. (I)
7. . . . the outcome redistributes goods or power to the poor as a class. (I)
8. . . . the outcome delegitimizes existing institutions. (I)
9. . . . the process challenges power relationships. (I)
10. . . . the process aggregates individual disputes. (I)
11. . . . the process encourages the surfacing of social conflict. (I)
12. . . . the process suppresses and avoids prejudice.
13. . . . the process promotes decent and unprejudiced behavior.
14. . . . the process stops oppressive behavior.
15. . . . the process or outcome empowers women or minorities.
16. . . . the process or outcome validates women's and minority issues.
17. . . . the process or outcome challenges patriarchal values or structures.
18. . . . the process mobilizes the poor as a class.
19. . . . the process avoids extension of state control over individuals. (I)
20. . . . the outcome is based on legitimate norms. (I)
21. . . . the outcome is not harmful to the public interest or interests of affected third parties.
22. . . . injured parties receive compensation quickly. (I)

(See also: INDIVIDUAL SATISFACTION 9, 13; INDIVIDUAL AUTONOMY 2; SOCIAL CONTROL 2, 3; SOCIAL SOLIDARITY 1, 4, 5; PERSONAL TRANSFORMATION 1, 4)

## E. (SOCIAL SOLIDARITY)

1. . . . the process articulates norms or reasons for the resolution. (I)
2. . . . the process creates shared narratives or texts.
3. . . . the process strengthens community.
4. . . . the outcome is determined by rules of law. (I)
5. . . . rules of law are created for the future. (I)

(See also: INDIVIDUAL SATISFACTION 11; INDIVIDUAL AUTONOMY 1; SOCIAL JUSTICE 7, 10, 18)

## F. (PERSONAL TRANSFORMATION)

1. . . . the process stimulates personal growth in the parties.
2. . . . the process causes the parties to recognize or appreciate the situation of the other party. (I)
3. . . . the process stimulates the parties to be more honest, open or truthful with the other party (and with themselves). (I)
4. . . . the process facilitates the expression of emotions. (I)

(See also: INDIVIDUAL SATISFACTION 11; INDIVIDUAL AUTONOMY 1; SOCIAL JUSTICE 13, 17; SOCIAL SOLIDARITY 3)

As noted earlier, this workshop was in most respects a microcosm of the larger universe of dispute resolution practice and study. This was certainly true of the range of statements offered to define quality and the general patterns that they formed. There is a close correspondence between the quality criteria represented by the six definitions above and the range of standards discussed in the dispute resolution literature.<sup>33</sup>

33. The INDIVIDUAL SATISFACTION standard of quality is reflected in different ways in the ADR literature. Numerous judicial commentators stress this standard in the course of advocating judicial involvement in settlement activities. For a sampling of this kind of commentary, see Galanter, *supra* note 17, at 2-4, and sources cited therein. ADR practitioners and advocates who stress the "creative solutions" and "superior results" supposedly available through ADR, by which they generally seem to mean solutions and results that give the disputing parties more satisfaction than a "win or lose" solution, also reflect this definition of quality. See, e.g., Lieberman & Henry, *supra* note 17, at 429-31; Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982). Professor Menkel-Meadow's "problem solving" model of negotiation and its emphasis on "meeting parties' needs" also seems to reflect this quality standard, see Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-806 (1984), although her approach is susceptible of other interpretations. See below regarding the Personal Transformation standard. Finally, the abundance of literature on time and cost savings in ADR could be viewed as partly reflecting this standard (and not just administrative economy concerns), if these savings are viewed as elements of the experience or outcome of the process that may contribute to party satisfaction.

The INDIVIDUAL AUTONOMY standard is fairly directly reflected in some ADR commentary. See, e.g., Nicolau & Cormick, *Community Disputes and the Resolution of Conflict: Another View*, 27 ARB. J. 98, 111-12 (1972); Shonholtz, *supra* note 8; Stulberg, *supra* note 7. See below regarding the Social Justice standard.

Few commentators explicitly adopt the SOCIAL CONTROL standard, but many argue that it is the definition of quality adopted in practice by others, whom they criticize for adopting it. See, e.g., Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 270-95 (R. Abel ed. 1982); Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1005-18 (1979) [hereinafter Nader, *Disputing*]; Tomasic, *Mediation as An Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 246 (R. Tomasic & M. Feeley eds. 1982); Nader, *The Recurrent Dialectic Between Legality and its Alternatives: The Limits of Binary Thinking*, 132 U. PA. L. REV. 621, 637-44 (1984) [hereinafter Nader, *Binary Thinking*] (reviewing J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983)). See generally 1 THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982). Additionally, a substantial body of literature, primarily by judges, stressing the goal of promoting the perceived legitimacy of courts as public institutions, can be read as reflecting this standard. See, e.g., Burger, *Agenda for 2000 A.D.—A Need for Systemic Anticipation*, 70 F.R.D. 83 (1976); Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1 (1976).

The SOCIAL JUSTICE standard is widely reflected in the literature on several different levels. First, it implicitly underlies the position of those commentators who criticize the use of dispute resolution as a tool for social control. See above regarding the Social Control standard and sources cited there. Second, it is reflected explicitly in the work of other commentators critical (in varying degrees) of the "ADR movement." See, e.g., Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Edwards, *supra* note 20, at 677-80; Fiss, *Settlement*, *supra* note 7, at 1076-78; Fiss, *supra* note 14, at 122-24; Singer, *supra* note 8, at 574-81. Third, a sizeable body of ADR commentary that focuses on "rights protection" (whether substantive or procedural rights, see Bush, *supra* note 15, at 913 & nn. 42-43) can also be read as reflecting the Social Justice standard. I say this because the concern of the commentators in question is almost always with the rights of a disadvantaged minority or an individual party facing a corporate adversary or a public bureaucracy. In other words, the implicit underlying concern seems to be for social justice, although the framework for the argument is protection of rights. See, e.g., Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134 (1970); Rubenstein, *Procedural Due Process and the Limits of the Adversary Process*, 11 HARV. C.R.C.L. L. REV. 48 (1976); Resnik, *Faith*, *supra* note 7, at 545-56; Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 609-12, 614-19 (1985) [hereinafter Resnik, *Appeals*]; Resnik, *Tiers*, 57 S.

The corollary of this is that analysis of the workshop discussions of these quality standards has direct relevance to that literature and to the field as a whole.<sup>34</sup>

Before analyzing the workshop discussions regarding the six defini-

---

CAL. L. REV. 837, 1013-15 (1984). I note that some of the work just cited as reflecting the Social Justice standard could also be read as reflecting the Individual Autonomy or the Social Solidarity standard, and this ambiguity parallels a similar ambiguity in the quality standards suggested in the workshop. See *infra* notes 49-50 & 52 and accompanying text.

The SOCIAL SOLIDARITY standard is reflected, more or less implicitly, in the work of some scholars who focus on the role of dispute resolution processes, and especially adjudication, in articulating public values and shared norms. Norm articulation seems to be valued by these scholars not only because the norms promote desired behavior, for example, social justice, but also or primarily because the articulation of norms itself creates social solidarity. See, e.g., Fiss, *supra* note 14; Fiss, *Forms*, *supra* note 7, at 1-2, 29-31, 34-37; Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 413-14, 417-20 (1987); Resnik, *Faith*, *supra* note 7, at 553-54. See also *infra* notes 50 & 52. As with some of the literature cited above as reflecting the Social Justice standard, the work just cited as reflecting the Social Solidarity standard is also ambiguous to a degree and can be read as reflecting the Social Justice standard. See *infra* note 52 and accompanying text.

Finally, the PERSONAL TRANSFORMATION standard is reflected, more or less implicitly, in some dispute resolution literature. See, e.g., Bush, *Traditional Jewish Ethics and Modern Dispute Resolution Choices*, in SIYUMEI RAMBAM CELEBRATIONS (1986); Bush, *supra* note 10; Bush, *supra* note 15, at 1028-31; McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665-68; Millhauser, *Rush to Mediation: Where is the Bandwagon Going?*, LEG. TIMES, Aug. 10, 1987, at 16; Riskin, *supra* note 7, at 332, 353-57; Riskin, *supra*, at 56-57. Professor Menkel-Meadow's "problem solving" model of negotiation can also be read as reflecting this standard rather than (or in addition to) the Individual Satisfaction standard. See Menkel-Meadow, *supra* note 33.

The above illustrates how the quality standards identified in the workshop discussions reflect the ADR literature quite closely.

34. It is also worth noting what quality themes in the ADR literature were *not* reflected in the workshop discussions. (Of course, there is a great deal of attention in the literature to what could be called the administrative economy goal—expeditiousness and low cost. This was not reflected in the discussions because it was not part of the intended scope of the workshop, which focused on standards *other than* administrative economy.) Perhaps most interesting is the absence of reference in the discussions, apart from one passing remark, to the notion that economic efficiency—not in the sense of administrative economy but in the sense of promotion of efficient use of resources in productive activities—should be a quality standard for dispute resolution. This argument is made regularly in the literature, and not only by law and economics commentators. See, e.g., Fuller, *supra* note 5, at 377; Lea & Walker, *Efficient Procedure*, 57 N.C.L. REV. 361 (1979); Nader, *Disputing*, *supra* note 33, at 1018-19; Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973); Singer, *supra* note 8, at 572-73. See also *infra* notes 75-76 and accompanying text.

Second, the discussions also paid only slight attention to the argument that protection of individual rights—seen not simply as an instrument for securing social justice, but as a civil-libertarian value encompassing procedural due process and protective of individuals poor and rich—should be a quality standard. This argument appears with some frequency in the literature. See, e.g., Resnik, *Faith*, *supra* note 7, at 545-46; Resnik, *Appeals*, *supra* note 33, at 609-11. In the workshop, rights protection generally was treated as instrumental to the ultimate goal of Social Justice, see *supra* note 33 regarding the Social Justice standard, and concerns for "process values" independent of outcomes were discounted by many. Moreover, statements associated with the Individual Autonomy standard seemed less concerned with protection of rights in the traditional due process sense than with "citizen empowerment." Finally, at times the literature also suggests norm-creation itself as a quality standard. See, e.g., Brunet, *supra* note 17, at 15-27. In my view, norm-creation is simply a sub-objective of some larger goal or standard of quality, usually either Social Justice, Social Solidarity, economic efficiency, or protection of rights. In the literature, one finds it stressed in all four contexts. In the workshop discussion, it was associated exclusively with Social Justice or Social Solidarity, and economic efficiency and rights protection were largely disregarded as distinct quality standards.

tions and their sub-objectives, it is important to stop and explain why we should take any of this information seriously. The central outcome of this workshop, the data it provided us, is essentially a collection of individual positions, statements, or views on what "quality" means in dispute resolution, or what valued social goals dispute resolution should attempt to further. Why should anyone care enough about this data to spend time analyzing and discussing it, as I am about to do? It is, after all, nothing more than data on opinions about quality. Does it really merit much attention? I will explain why I think it does and, in the process, respond anti-taxonomically to yet another "ordering" that was discussed, at least implicitly, in the proceedings—a taxonomy of interests concerned with dispute resolution and ADR.

B. *Whose Quality Standards?: The Taxonomy of Interests, and a Critique*

Consider two propositions about the definition of "quality" in dispute resolution:

- (1) There is a clear and unequivocal objective meaning of quality readily discoverable in some accepted authoritative "text."
- (2) Quality has no objective meaning at all, and all statements about quality are simply political positions taken to further particular interests.

If the first of these propositions is true, then studying the opinions expressed in our proceedings would have little point. We should, instead, simply open the text and read together. However, proposition (1) is not likely to find much support, since accepted authoritative texts are in short supply today.<sup>35</sup> On the other hand, if proposition (2) is accepted, the workshop results are worth studying, not for what they reveal about the definition of quality—which is indeterminate—but for what they reveal about the political interests and agendas of practitioners and students of dispute resolution.

This second approach was strongly urged by a number of speakers, on two different levels. First, it was argued, identifying the interests behind the ADR movement would disclose a clear political agenda adverse to the welfare of disadvantaged groups.<sup>36</sup> Second, the argument went on, not only do political interests determine attitudes toward ADR, they also determine conceptions of quality in general, so that every definition of quality is essentially a reflection of political self-interest. The usefulness of the opinions gathered at the workshop is that we can use them to disclose the precise interests that lie behind each conception of quality

---

35. But see, e.g., McThenia & Shaffer, *supra* note 33; Bush, *supra* note 33. I note that the singularist viewpoint of this report does not correspond to this proposition, but to another discussed below. See *infra* text accompanying note 45.

36. For a similar argument, see, e.g., Delgado, *supra* note 33; Harrington, *Delegalization Reform Movements: A Historical Analysis*, in I THE POLITICS OF INFORMAL JUSTICE 35 (1982); Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in I THE POLITICS OF INFORMAL JUSTICE 167 (1982); Nader, *Disputing*, *supra* note 33; Nader, *Binary Thinking*, *supra* note 33.

and, with the political dimensions of the quality issue thus clarified, make our political choices accordingly. As several speakers responded when asked to prioritize conflicting definitions of quality, "[i]t is not a matter of priority, but of politics." While it was never stated in wholly explicit terms, the implied conclusion was that any definition of quality other than Social Justice reflected a political agenda of self-satisfaction, accumulation, and exploitation inimical to the interests of the poor and disadvantaged.

Thus, proposition (2) was the basis for a "taxonomy of interests" in dispute resolution, including the general concept that definitions of quality derive entirely from political self-interest, and the specific views that ADR processes and non-Social Justice definitions of quality are expressions of interests inimical to the poor and disadvantaged. I will explain why I reject this taxonomy of interests and introduce my view that the opinions expressed at the workshop have significance apart from interest analysis.

First, some speakers forcefully made the case that ADR processes are utilized in many areas to disadvantage "have-nots." However, as at least one speaker noted in response, the implication that ADR has worsened the overall position of have-nots, vis-à-vis their originally disadvantaged position in the adjudication process, is very much open to question. Debate over this factual issue is necessary and valid: questions concerning impacts on have-nots must be investigated. But I believe the investigation is far from proving, as some comments suggested, that ADR categorically disserves the poor and disadvantaged.<sup>37</sup>

Second, as noted above, there was an implication that definitions of quality other than Social Justice reflected a political agenda of accumulation and exploitation, or at least indifference to the poor. This seems to me to be a great oversimplification, especially in light of the record of the views expressed in the proceedings. According to that record, practitioner speakers, whose statements focused heavily on the Individual Satisfaction criterion, nevertheless also made strong statements, implicit and explicit, reflecting commitment to Social Justice as a quality criterion. For example, practitioners said that quality required: no procedural advantage to either party, measures to neutralize preexisting advantages of stronger parties, outcomes not harmful to weaker parties, accessibility on equal terms to all similarly situated parties, and outcomes that produced institutional change.<sup>38</sup> While practitioners' statements primarily reflected the Individual Satisfaction definition, it would

---

37. For some discussion of this question, see Goldberg, Green & Sander, *supra* note 13, at 293; Menkel-Meadow, *supra* note 13, at 501, 504; Sander, *supra* note 20, at 16; Singer, *supra* note 8, at 575-79. Menkel-Meadow points to Marc Galanter's work describing the limited capacity of court adjudication to further the interests of the disadvantaged. See, e.g., Galanter, *Why the "Have's" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975); Galanter, *The Duty Not to Deliver Legal Services*, 30 U. MIAMI L. REV. 929 (1976) [hereinafter Galanter, *Duty*]. See also Rubenstein, *supra* note 33.

38. Practitioner commentary in the literature also reflects the Social Justice standard in many cases. See, e.g., Getman, *supra* note 28; Singer, *supra* note 8; Susskind, *supra* note 8.

be an oversimplification to label the speakers on this basis as an interest group inimical to the poor. This kind of group labeling can be as misleading as the process and context labeling discussed in earlier sections, distorting the actual character and concerns of the group in question and foreclosing opportunities for dialogue and persuasion among proponents of different quality standards.

My third and strongest objection to the taxonomy of interests also goes to its negative impact on dialogue. The basic assumption behind the interest approach is that, as proposition (2) above suggests, there is no determinate or true meaning of quality in dispute resolution, and all quality statements are simply reflections of political interests. This argument runs parallel to the arguments raised in legal scholarship by some followers of the Critical Legal Studies ("CLS") school, who argue that legal issues cannot be decided in any determinate fashion by objective principles, legal or otherwise, and that instead, "law is politics."<sup>39</sup> According to this argument, "[a]cts and relations possess no intrinsic meaning," "[t]ruth is seen as relative to any particular social or historical group," "society [is] the vulgar and contingent product of interrupted fighting," and law is a "process through which social structures acquire the appearance of inevitability" and objectivity that conceals their real source in social contingency.<sup>40</sup> As applied to the discussion of quality in dispute resolution, in the goal-furtherance sense, this argument supports proposition (2). The corollary is that reasoned dialogue about quality is impossible and pointless; instead, what is called for is the disclosure of positions by "deconstructing" value statements, as the preface to political struggle.

However, the "deconstructionist" program is increasingly questioned, even by its own adherents, as ultimately self-contradictory (or self-defeating). For the strong and consistent implication of the drive to deconstruct existing institutions is the need to establish, at some point, something better.<sup>41</sup> But, according to the fundamental CLS premise, there can be nothing "better" because there is no standard by which to call it so.<sup>42</sup>

Many CLS scholars do seem to have a vision of the good, and at the heart of that vision, for at least some of them, is something like the So-

---

39. See, e.g., Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11, 17 (D. Kairys ed. 1982); Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466, 1470-72 (1983) (reviewing *POLITICS OF LAW*).

40. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 214-17 (1984). See also *id.* at 208-13.

41. See *id.* at 227-30; Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 281-84 (1984).

42. See Hutchinson & Monahan, *supra* note 40, at 233, 235-36. Professors Hutchinson and Monahan observe: "All attempts at constructive theory seek to describe the world as it could and ought to be. Consequently, the major hurdle . . . is to provide some *normative* justification. . . . Yet, the very premises underlying Critical Legal thought appear to *preclude* such a justification: . . . [for this would] renege on their basic commitment to social contingency and historical relativity. CLS is ultimately hoisted on its own critical petard." *Id.* at 233 (emphasis added).

cial Justice definition of quality.<sup>43</sup> The same can be said of those who take the "all is politics" position about quality in dispute resolution. However, there is a fundamental inconsistency in arguing that "all is politics" and also arguing that quality means furtherance of Social Justice. Clearly, the implication of this quality argument is not just that its proponents prefer Social Justice to Individual Satisfaction as a matter of self-interest, but that the former somehow is objectively superior to the latter.

For example, in the workshop discussions, one exchange involved a speaker who took the "all is politics" position and also argued that social justice and "the underlying distributional problem" should be the focus of the quality inquiry. At the end of the exchange, the speaker acknowledged that the insistence on a social justice focus was "a normative position." This was indeed implied by the speaker's remarks as a whole, but it is also clearly inconsistent with the "all is politics" premise.<sup>44</sup> If a "normative position" is taken, then norms and objective standards must exist after all. Either "all is politics" and interests and norms are nonexistent; or norms exist, and there is an objective, determinate definition of quality. Both propositions cannot be true. When asked to choose, even deconstructionists seem to doubt proposition (2) and believe in the possibility of determinate standards. If this is so, however, what is called for is not simply political struggle but reasoned dialogue about why Social Justice should be considered superior to the competing definitions of quality. The problem with the taxonomy of interests is that it impedes and undermines the kind of reasoned dialogue and argument that is necessary to identify quality in dispute resolution.

Therefore, I reject that taxonomy and the underlying view that the opinions on quality expressed at this workshop can do no more than reveal political positions. Rather than subscribing to proposition (2), I adopt a third proposition about defining quality in dispute resolution:

---

43. See, e.g., Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982); Abel, *Torts, in POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 185 (D. Kairys ed. 1982); Gabel & Feinman, *Contract Law as Ideology*, in *POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 172 (D. Kairys ed. 1982). See generally Johnson, *supra* note 41, at 282-85. I note that the Social Justice definition is not the only one that CLS scholarship reflects. Individual Autonomy, Social Solidarity, and Personal Transformation are also major themes in CLS work. See, e.g., Hutchinson & Monahan, *supra* note 40, at 230-33, 240-42; Hutchinson, *supra* note 16. The point of the text nevertheless holds: whatever vision, and whatever definition of quality, it implies a normative and not just an interest-based stance.

44. My colleague Janet Dolgin has pointed out to me that by the statement "all is politics," a speaker might actually mean to say that "all is ideology," that is, that all of our assertions about the meaning of quality are tainted with point of view and conditioning, so that one can never be sure if one's position reflects the objective truth or not. The implication of such a statement is that, while there is an objective truth or reality, we can never be certain of having found it. If this is the intended meaning, then "all is politics" is a call to compare and argue over distinct points of view and thus try to come closer to the truth. It is then necessary not only to reveal positions but to articulate reasons and engage in dialogue and persuasion. If this is what was meant by "all is politics" at the workshop, then it corresponds closely to my singularist viewpoint as discussed earlier, and I am in full agreement. However, my perception was that in the workshop discussions, the statement carried the meaning discussed in the text, see *supra* text accompanying notes 39-40, rather than the meaning suggested here.

- (3) Quality has a determinate, objective meaning, but one that is discoverable only by reasoned dialogue and argument among holders of different opinions.<sup>45</sup>

This proposition reflects and corresponds to the singularist viewpoint I described in Part I, just as proposition (2) reflects and corresponds to the pluralist viewpoint. I believe that the opinions about quality expressed in this workshop merit careful analysis precisely because they provide the starting point in the dialogic search for a singular definition of quality in dispute resolution, a search that I value for reasons stated above.

C. *Analyzing the Definitions of Quality: Relationships, Ambiguities, and the Problem of Choice*

Returning then to the quality standards suggested in the workshop and summarized in Section A, probably the most useful place to begin analysis is with the insight noted first by David Luban: that the different definitions of quality cannot be treated as complementary criteria, which should all be applied together to evaluate any dispute resolution process. Rather, they are, to some extent at least, mutually inconsistent and must be regarded as alternative, competing definitions of quality, among which we must choose or at least establish an order of priority. This insight echoes the singularist viewpoint on multiplicity of quality standards, especially the argument of the necessity of choice as a practical matter.

This necessity is evident from examining the quality standards and sub-objectives in Table I above. Thus, if Individual Satisfaction is the quality standard, meeting all of its sub-objectives would make it impossible to meet simultaneously many sub-objectives of the Social Justice definition. Satisfying the first criterion precludes satisfaction of the second. The same would apply to the Social Justice and Social Control definitions. In other cases, while mutual satisfaction might not be impossible, it could be extremely difficult, as is evident from comparing the relevant sub-objectives: satisfying Social Justice could make it quite difficult to satisfy Individual Autonomy or Personal Transformation; satisfying Social Solidarity would make it difficult to satisfy Individual Satisfaction or Personal Transformation.

On the other hand, comparison of sub-objectives also shows that some of the criteria conflict little, or even overlap to some degree. As noted earlier, some sub-objectives relate to more than one goal. There is considerable overlap, for instance, between the Individual Satisfaction and Social Control criteria, suggesting that these two standards may be largely complementary. One interpretation of this could be, as some speakers implied, that the Individual Satisfaction standard is simply a screen for a Social Control agenda. There are, however, other interpretations, as will be discussed below. With other goals, overlap is less ap-

45. I see support for this proposition in the account of the good offered by Sandel in his critique of the liberal theory of justice. See M. SANDEL, *supra* note 16, at 165-83.



parent, but sub-objectives do not necessarily appear inconsistent. Individual Autonomy and Personal Transformation sub-objectives do not seem to conflict completely; Social Solidarity and Social Justice sub-objectives may reinforce rather than conflict. This pattern raises the possibility of describing mutually competitive sets or coalitions of criteria: for example, Individual Satisfaction and Social Control, Social Justice and Social Solidarity, Individual Autonomy and Personal Transformation.

However, a major difficulty in clarifying the relationships between and among sub-objectives and quality standards is that the discussions simply left many important questions unanswered, and even unasked. For example, do overlapping sub-objectives indicate complementary standards, or just an imprecise understanding of which standard is the target of the sub-objective in question? Where sub-objectives were stated implicitly (twenty-seven of fifty cases), do they mean what they seemed to mean, and (whether explicit or implicit) are sub-objectives properly associated in this report with the general standard originally intended by the speaker? In other words, when someone made a particular statement about quality, did it mean what it appeared to mean, and what general definition of quality did the speaker really have in mind? In attempting to find patterns in the discussions, it is first necessary to confront the many ambiguities left in the record. In the following section, I analyze more closely the extent of the ambiguity about quality standards left by the workshop discussions.

#### D. *What Quality Standards (Again)?—Problems of Interpretation*

The six general quality standards articulated in Section A, as inferred from specific statements about quality sub-objectives, appear at one level to present distinct and intelligible alternatives (although certain interrelationships are also evident). However, on closer examination, each of the standards is far more ambiguous than first suggested. The reason is that, despite the logical inference of these standards from specific quality statements made by different speakers at the workshop, the real intent of the speakers was hardly ever completely clear from their statements. As a result, different interpretations of intent are possible, with quite contradictory implications about the definition of quality actually being proffered by the speaker. Two detailed examples follow that focus on the two quality standards most commonly discussed during the workshop—Individual Satisfaction and Social Justice.

Identification of Individual Satisfaction as a quality standard, as inferred from specific sub-objective statements, might actually rest on one of three very different grounds, each of which is consistent with the various sub-objective statements interpreted in Table I as identifying quality with furtherance of Individual Satisfaction. First, and most obviously, concern for Individual Satisfaction might be based on a belief that satisfaction or pleasure is the greatest good in life, so that where dispute resolution produces Individual Satisfaction, it achieves the highest good.

In the workshop, David Luban described this as the hedonistic assumption and saw it as the implicit basis of the Individual Satisfaction standard as maintained by many participants. Dispute resolution, according to this standard, is good when it gives the disputants the greatest possible pleasure (or the least possible pain) that the situation allows.

However, this is not the only possible basis for proffering the Individual Satisfaction standard. A second basis is a very different argument based on the value of individual autonomy or sovereignty. That argument, common to liberal political theory and classical economics, holds that the good cannot be defined collectively because every individual is a sovereign and inviolate being.<sup>46</sup> Therefore, the highest good, in the political sense, is respect for individual choice and autonomy so that each individual will be allowed to realize his or her own self-determined concept of the good. Maintaining the Individual Satisfaction standard in dispute resolution is similar to maintaining the Pareto-optimality standard in economics, with its assumption of the impossibility of interpersonal comparisons of utility. Identification of Individual Satisfaction as a quality standard, on this interpretation, does not rest on belief in pleasure as the highest good, but on the belief that only the individual can define the good, in his or her own terms. Refusal to adopt any standard other than Individual Satisfaction reflects a commitment to allowing individuals to define the good for themselves, a refusal to impose on the individual any external definition of value. Thus, the basis for the Individual Satisfaction standard might be not hedonism, but the value of individual autonomy.

The ambiguity goes further, for there is a third possible basis for the Individual Satisfaction standard: concern for Individual Satisfaction may stem from an interest in "satisfying" individual disputants purely as a way of buying their acquiescence (whether they know it or not) to a structure or system in which one holds, and wishes to keep, a certain degree of power.<sup>47</sup> Since satisfaction is a matter of perception, not objective value, concern for satisfaction has nothing to do with giving disputants the greatest possible pleasure or respecting their autonomy, either of which might change the existing distribution of power; instead,

---

46. Murphy summarizes the argument as follows: "Society is composed of individuals. It has no reality independent of its members . . . [T]he group is not a source of value in its own right. For the good is relative to the wants of distinct persons." Murphy, *supra* note 16, at 126. In Nozick's words, "There is no *social entity* with a good [of its own] . . . There are only individual people . . . with their own individual lives. Using one of these people for the benefit of others . . . does not sufficiently respect and take account of the fact that he is a separate person." R. NOZICK, *ANARCHY, STATE AND UTOPIA* 22-23 (1974). According to Rawls, "[e]ach person possesses an inviolability . . . that even the welfare of society as a whole cannot override." J. RAWLS, *A THEORY OF JUSTICE* 3 (1971).

47. Abel, for example, argues that "with respect to grievances that arise out of injury to the consumer . . . , the goal of state and capital is to defuse the anger of those injured and forestall public sympathy by satisfying claims through the payment of small, predictable amounts." Abel, *supra* note 33, at 281. Marc Galanter pointed out to me, in a comment on an earlier draft of this report, that the desire to buy acquiescence may not be limited to "state and capital," but may extend to anyone who is better off in the existing order than they fear might be the case in any potential reordering of power.

the concern is simply with giving the disputants enough of perceived value to keep them content, docile, and agreeable to the continuation of the existing order. The basis of the Individual Satisfaction standard might be neither hedonism nor respect for the individual, but the desire to preserve the status quo.

What should be evident from the above discussion is that quality statements appearing to identify Individual Satisfaction as a quality standard actually may be intended to identify Individual Autonomy or Social Control as standards. The Individual Satisfaction standard itself may be merely a confused or non-explicit version of one of these other two. In fact, this sort of reinterpretation of ambiguous standards seems to have occurred to participants during the workshop discussions. While David Luban characterized the Individual Satisfaction standard as a distinct, hedonism-based standard, others, like Judith Resnik, seemed to see it as deriving from the reluctance of authorized decision makers such as judges to set forth some collective definition of the good that might oppose and override the individual's autonomous definition.<sup>48</sup> In short, the Individual Satisfaction standard was really an Individual Autonomy standard. Still others, like some researcher panelists, implied that they saw the Individual Satisfaction standard as a mere front for the Social Control standard. Given the ambiguity of the record, all three of these interpretations are plausible.

As a second example of the ambiguities latent in the quality standards as earlier defined, consider the possible bases for sub-objective statements interpreted in Table I as proffering the Social Justice standard. The most obvious reason for such statements might be a belief in the value of reducing suffering wherever it exists. On the assumption that the suffering of the poor in an unequal society vitiates the value of the pleasure of the rich, the desire for equity in distribution could be based on a version of the pleasure/pain principle applied to society as a whole, focusing on the elimination of suffering where it is greatest. The elimination of suffering is the good on which the Social Justice standard rests.

However, this argument itself implies another basis for identifying quality as furtherance of Social Justice. The focus on the suffering of disadvantaged *groups* in particular implies that concern for social justice does not stem from valuing pleasure (abhorring suffering) *per se* and wanting everyone to have as much pleasure and as little suffering as possible. Rather, it stems from valuing the individual as such, not his expe-

---

48. I should clarify that I saw this view as implied by Judith Resnik's remarks, but it was not explicitly stated by her. Professor Burbank does make an explicit suggestion along similar lines. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1486-87 (1987) (reviewing R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)). Second, I do not construe Professor Resnik's implied suggestion on this point as an endorsement by her of an Individual Autonomy quality standard (or an autonomy-based Individual Satisfaction standard). In fact, her writing suggests to me that she would probably incline more to a Social Justice or Social Solidarity standard, or to the view that rights protection in the traditional due process sense is the meaning of quality in dispute resolution. See *supra* notes 33-34 and sources cited therein.

rience of pleasure or freedom from pain. The concern is that no person should be subjected to *class* discrimination, in access to material goods or otherwise, because such discrimination, whenever it occurs, not only causes suffering, but undermines respect for and degrades the individual as such. Discrimination denies its victims not only pleasure but, worse, recognition of their basic worth as individuals—their individuality.<sup>49</sup> Thus, respect for the individual as such is the greatest good. And, in order for the individual as such to be assured respect, autonomy, and dignity, protection against class discrimination, whether based on wealth, race, gender, or otherwise, must be guaranteed for all. According to this interpretation, the Social Justice standard is proffered not because of a concern for improving the material well-being of some individuals, but because of a concern for preserving the autonomy and dignity of all individuals.

On the other hand, the identification of Social Justice as a quality standard may be based on a third reason concerned not with individuals at all, whether their suffering or their autonomy, but with the social fabric as a whole. If strengthening that fabric, that is, overcoming the centrifugal tendency of an individualistic and pluralistic society and creating some measure of commonality and connection among individuals, is considered a good, then this good may be a separate and distinct reason for proffering the Social Justice standard. Articulating a general public value of helping, or at least not hurting, the disadvantaged and encouraging group identification and solidarity, with or among the disadvantaged, are important because they increase social cohesion and balance the centrifugal force of individualism.<sup>50</sup> Furthering Social Justice means quality not because it helps the poor or protects the individual, but because it binds us together as a people.

---

49. This type of argument for social justice seems to underlie, for example, Rawls' argument that the basis of equality is the individual human being's "capacity for moral personality," such that class discrimination would violate the equality of "human beings as moral persons." J. RAWLS, *supra* note 46, at 511, 504-12. It also seems implicit in Dworkin's suggestion that the "right to equal concern and respect," or the "right to treatment as an equal" is the "central concept" of his theory of political rights, such that arbitrary class discrimination is "treating a man as less than a man, or as less worthy of concern than other men." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 199, 180-81, 198-99, 272-75 (1977). In short, the idea that social justice is necessary to protect individual dignity is central to the egalitarian branch of liberal political theory. See Murphy, *supra* note 16, at 131-35. Richard Delgado's explicit concern for controlling prejudice in dispute resolution processes, that is, disregard of an individual's unique qualities because of stereotyping, can be read as an expression of this individual dignity-based argument for a Social Justice standard. See Delgado, *supra* note 33, at 1360 n.8, 1380-84.

50. For example, Owen Fiss argues in favor of "structural reform" litigation, see Fiss, *Forms*, *supra* note 7, by which he seems to mean efforts to improve social justice through litigation and judicial intervention in restructuring a variety of public institutions. However, this social justice-related argument seems based, in some of his writings, on an even deeper concern for balancing "individualism" and the "privatization of ends" in our society by placing more emphasis on "the existence and importance of public values" through the articulation of norms that express and give shared meaning to such values. In other words, it is the creation of shared meanings and solidarity, and not the attainment of social justice in itself, that is the fundamental concern and value. Fiss, *supra* note 14, at 122-28. See also *infra* note 52.

Finally, a fourth argument could underlie the Social Justice standard. That standard could be proffered because of a concern not for the suffering of the poor, the dignity of the individual (rich or poor) or the solidarity of the society as a whole, but for the transformation of the character of the rich. In other words, the Social Justice standard might rest on the belief that it is good for individuals to overcome their selfishness and be concerned with the welfare of others, especially those less powerful, whom they could have no ulterior motive for helping. Getting the "haves" to share with and help the "have-nots" is important because it accomplishes, at some level, a weakening of selfishness and a strengthening of sensitivity to and compassion for others.<sup>51</sup>

Once again, these four alternative interpretations suggest that subjective statements appearing to identify Social Justice as a quality standard actually may be intended to identify Individual Autonomy, Social Solidarity, or Personal Transformation as standards. Again, there is some recognition of this in the workshop proceedings. For example, Lucinda Finlay's remarks suggested that her interest in social justice stems in part from a belief in the importance of personal transformation. Joel Handler's remarks clearly expressed the elimination of suffering rationale; nevertheless, he implied in discussions afterward that "transformative values" also motivated his interest in social justice. Richard Delgado implied, especially in his reference to the importance of maintaining a "Rawlsian perspective," that his support for the Social Justice standard rested at least in part on a belief in the importance and value of individual dignity, rather than the elimination of suffering rationale alone.

The discussion here has illustrated the ambiguous meanings of, and alternative interpretations of statements appearing to proffer, the Individual Satisfaction and Social Justice standards. A similar analysis could be made regarding statements that appear to proffer each of the other standards described earlier. Statements apparently identifying Social Control as a quality standard may actually be intended to identify Individual Satisfaction or Individual Autonomy as standards. Statements appearing to identify Personal Transformation as a quality standard may

---

51. Such an argument is suggested by McThenia and Shaffer in their response to Fiss' critique of ADR. See McThenia & Shaffer, *supra* note 33, at 1664-66; Fiss, *Settlement*, *supra* note 7. They tie their argument to traditional religious value systems. I note that, beyond the sources cited by McThenia and Shaffer, traditional Jewish sources regarding the obligation of protecting and helping the weak suggest a similar theory of social justice. For example, one oft-cited commentary explains that, "The poor man [who receives charity] does more for the master of the house than the latter does for him," one implication being that the opportunity to exercise compassion is an even greater value than the alleviation of the suffering of the poor. MIDRASH RABBAH (LEVITICUS) 34:8 (H. Freedman & M. Simon eds. 1939) (commenting on *Ruth* 2:19). See generally, Bush, *supra* note 33. There is also an implicit suggestion in Riskin's argument regarding fairness in mediation that the value of fairness is tied to the even deeper value of mutual recognition and compassion. See Riskin, *supra* note 7, at 331-32, 354-57. This implication is strengthened by Riskin's reference to the work of developmental psychologist Carol Gilligan on the "ethic of caring" contrasted to the "ethic of justice." See C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 2 (1982).

actually be intended to identify Social Solidarity as a standard, and vice versa. I emphasize that this problem of ambiguity of standards is by no means a problem limited to the workshop discussions. It is another important way in which the workshop is a microcosm of the field, in which precisely the same kinds of ambiguity abound.<sup>52</sup>

However, some readers may ask why I consider ambiguity of stan-

---

52. The ambiguity of quality standards in the literature has already been partly suggested in the earlier review of the range of quality standards found in the literature. See *supra* note 33. However, the point is worth elaborating. Some of the work reflecting the Social Justice definition of quality, for example, rests fairly clearly on an elimination of suffering rationale that relates unambiguously to the Social Justice standard. See, e.g., Nader, *Disputing*, *supra* note 33; Singer, *supra* note 8; Tomasic, *supra* note 33. However, other work relates to the Social Justice standard on one level, but seems on closer inspection to rest on other rationales that relate to other quality standards. The effect is to create the same kind of ambiguity in the meaning of the Social Justice standard that is described in the text.

For example, Fiss' explicit emphasis on the importance of "structural reform" litigation on behalf of weak and disadvantaged groups strongly suggests the Social Justice quality standard. See Fiss, *Settlement*, *supra* note 7, at 1076-90; Fiss, *supra* note 14, at 121-32; Fiss, *Forms*, *supra* note 7, at 2-5. However, consider his recurring reference to the elaboration of public values, the "meaning-giving enterprise," and especially his argument that judges "enforce and create society-wide norms . . . as a way . . . of giving meaning to public values." Fiss, *Forms*, *supra* note 7, at 2, 29, 31, 36 (emphasis added). The implication is that the creation and enforcement of norms, including those that promote social justice, is important not only or primarily because of the content and effect of the particular norms, but because of the sense of public, shared meaning—the social solidarity—that the articulation of shared norms itself creates. See *supra* note 50 and accompanying text. Fiss himself writes, at one point, "equality only had [in the sixties] a representative significance: it stood for an entire way of looking at social life. It emphasized what I have called public values, the values that define a society and give it its identity. . . . Rights . . . were an expression of our communality rather than our individuality." Fiss, *supra* note 14, at 128 (emphasis added). Thus, while Fiss' work is not wholly clear on this, his deeper rationale for valuing norm-creation that promotes social justice seems to be a concern for constructing shared meaning—a rationale that relates more to the Social Solidarity than to the Social Justice standard of quality.

Similarly, when Riskin argues that "the ultimate issue in mediation [is] fairness," Riskin, *supra* note 7, at 349, his ultimate concern may not actually be the Social Justice standard, despite initial appearances. In "fairness," Riskin includes both subjective fairness—outcomes (and processes) seen as fair by both parties—and objective fairness—outcomes (and processes) that meet external standards of fairness to the parties and affected outsiders. *Id.* at 354. Thus, he seems to adopt a quality standard of Individual Satisfaction constrained by Social Justice, making Social Justice the ultimately controlling standard. However, a closer reading reveals that "the most important part of the fairness standard is the subjective fairness notion," *id.* at 356, and that the main value of this notion is that "[it] is aspirational and . . . subjective . . . [and] could encourage the kind of dialogue that would help make a perspective of caring and interconnection available to the participants." *Id.* at 353. If this is the main value of fairness, then Riskin's apparent concern for Social Justice turns out, on closer examination, to rest on a rationale that relates much more closely to the Personal Transformation definition of quality. See also *supra* note 51.

Thus, in Fiss' work the Social Justice standard rests on a social solidarity rationale and may in fact be a Social Solidarity standard, while in Riskin's work the Social Justice standard rests on an expression of compassion rationale and may thus be a Personal Transformation standard. These two examples are discussed in some detail to show how, to the quality taxonomist, ambiguity of quality standards is as much a feature of the literature as it was of the workshop discussions. These are merely examples, however, and, as suggested by these examples and by the discussion of note 33 *supra*, the problem of ambiguity of quality standards is widespread in even the most challenging and thoughtful dispute resolution commentary.

dards a "problem" at all.<sup>53</sup> They may argue that my concern over ambiguity of quality standards is misplaced.<sup>54</sup> I assume, in responding to this argument, that the above discussion has adequately demonstrated that the quality standards identified at the workshop *are* ambiguous. In fact, I think the discussion has shown that the standards as identified in the workshop are unclear in three crucial and related aspects: (1) it is unclear *what* is really meant by each of the six quality standards and *why* each is proffered; therefore (2) it is unclear whether they are really distinct from one another, and if so, how; and therefore (3) it is unclear what ultimate choices are posed between them and what is really at stake in the choices posed.<sup>55</sup>

These elements of ambiguity surely pose serious problems for anyone interested in the measurement and definition of quality—the two

---

53. This question was raised by, among others, Judith Resnik in the course of her comments on an earlier draft of this report.

54. Such an argument might rest on three points. First, ambiguity is endemic in discussions of social policy. Second, ambiguity is in any event unavoidable in this type of inquiry, so there is no point wasting energy in a futile effort at clarity. Finally, ambiguity of quality standards causes no serious negative consequences, so it is not really problematic anyway. The first point really rides on the other two because if the ambiguity of quality standards is a serious and avoidable problem, the fact that ambiguity also characterizes discussion of other problems is hardly a reason to accept it here. The last point requires a fuller response. If the kind of ambiguity illustrated above is not a serious problem, why indeed should it concern us? I respond in the text here to this question. I will return to the second point in the following section, explaining why I believe that ambiguity is not an unavoidable problem.

55. Similar ambiguities cloud the conceptions of quality found in the literature, as discussed above. See *supra* notes 33 & 52. Given the ambiguity of the standards, one suggestion might be simply to forget about the standards and revert, for identifying and measuring quality, to the original sub-objective statements themselves. After all, the standards are simply generalizations from the more particular sub-objective statements. If the generalizations are too ambiguous to be useful, why not focus directly on the particular quality statements?

There are a few reasons why this suggestion will not solve the problem. First, if each of the fifty quality statements is taken as a separate quality standard, the number is already quite unwieldy for evaluation and measurement purposes. Second, the ambiguity discussed in the text is not simply a problem of the general quality standards. It is equally problematic at the level of the sub-objective statements themselves, as is clear from the fact that many are associated with more than one standard. See *supra* note 32. For example, sub-objective statement 13 under *Individual Satisfaction* says that quality is attained when "the outcome does not depend upon technicalities." This statement is grouped under *Individual Satisfaction* but is also associated with *Social Justice*, as is statement 9 under *Individual Satisfaction*, stating that quality is attained when "the parties comply with the result." The joint association means that we do not know whether the speakers' quality concern here was really *Individual Satisfaction* or *Social Justice*. In fact, depending on the circumstances, fulfillment of these two sub-objectives would in some cases further *Individual Satisfaction* at the *expense* of *Social Justice* (and in other cases vice versa). But if the speakers' real concern was *Social Justice*, he or she would not then *want* these particular sub-objectives to be met. Therefore, ignoring the standards and focusing on sub-objectives does not help us to identify or measure quality because the crucial question is still the deeper reason *why* particular sub-objectives—and standards—are considered important. In short, there is ambiguity at both levels. Thus, the solution to the problem of ambiguity of the general standards is not to focus on sub-objectives instead, but to probe more deeply into, and clarify, the rationale and values underlying *both* the standards and the sub-objectives. For an attempt to do so, see *infra* text accompanying notes 73-80. The above argument does not suggest that definitions of quality are context-dependent, only that context may affect how a particular quality standard can be met. See *supra* note 23 and accompanying text, *infra* note 72 and accompanying text.

major concerns of this workshop. First, if quality standards are unclear, it is difficult to use them in evaluation, that is, to know whether and when a given standard has been met. Second, if standards are unclear, then the relation between them is unclear, and it is difficult to know whether two standards are conflicting, reinforcing, or simply independent. Of course, if none of the quality standards suggested here conflicted—if all could be met simultaneously—then distinctions would not matter. However, as David Luban suggested, it is unlikely that all the standards can be satisfied at once, or that all are equally important. Therefore, choices must be made about which standard to satisfy, or which to put first. If this is so, understanding the distinctions between them, and the reasons behind them, is crucial. Ambiguity obscures these distinctions and reasons, and frustrates the exercise of choice.

Of course, according to what I have called the pluralist viewpoint on quality standards, this kind of frustration of choice might not seem a major problem. Since the pluralist assumption is that no objective grounds exist in any event for making such choices—that is, since choices are based on preference rather than reason—lack of clarity in definition may not seriously frustrate the exercise of choice. (Although even pluralists would probably consider it important to define standards with enough clarity to permit *informed* choices to be made, even if the choices are not based on objective grounds.)

However, as noted earlier, this report assumes the singularist viewpoint on quality standards. Given this viewpoint, ambiguity in suggested definitions of quality is a serious problem because it obstructs the dialogue that is a necessary preface to choice.<sup>56</sup> The singularist view is that choice among (or prioritization of) competing definitions of quality is necessary and *can* be exercised on objective grounds, and that dialogue among holders of different views is the best tool for discovering which of the competing definitions of quality (or which priority ordering of definitions) is objectively best. Therefore, obstruction of dialogue destroys a crucial tool for making crucial choices. Furthermore, as stated earlier, I believe that the revelation and expression of individuals' connectedness to one another is a primary value, and that dialogue to define quality in dispute resolution presents in itself an excellent opportunity for realizing this value. Therefore, obstruction of dialogue destroys that opportunity.<sup>57</sup>

---

56. Ambiguity in the formulation of suggested quality standards is a problem because it frustrates the very initiation of the dialogue and debate. It prevents the engagement of different positions that begins dialogue because there *are* no clear positions with which (or from which) to become engaged. Ambiguity in the articulation of the reasons supporting the adoption of different suggested definitions of quality is a problem because it frustrates the continuation of any dialogue that was started. It limits the engagement of positions that began the dialogue because it makes it impossible to pursue the engagement to a deeper level.

57. This last point is closely connected with my own identification of quality in dispute resolution as some combination of the Social Solidarity, Personal Transformation, and Individual Autonomy standards, a position I discuss more fully in Part VI below. See *infra* text accompanying notes 77-78.



My characterization of ambiguity of quality standards as a problem therefore rests both on my singularist viewpoint and on the value I place on manifesting interconnection.<sup>58</sup> Those who reject this viewpoint and this value may well view ambiguity with less concern. Nevertheless, I believe that others, including some speakers at the workshop, share this concern about ambiguity, whether for the same or other reasons. One other important reason to be concerned about ambiguity of quality standards lies in the problem that prompted this workshop in the first place, as noted in the workshop precis. As stated there, the tendency has been for arguments based on administrative efficiency—time and cost savings, and numbers of cases processed—to dominate discussion of ADR and judicial reform.<sup>59</sup> The need to focus attention on other arguments based on “quality,” rather than numbers and cost alone, was apparently a key purpose of this workshop. However, as long as quality arguments are vague and ambiguous, they will have scant hope of attracting attention away from efficiency arguments, which—even if they are sometimes factually erroneous—always appear very clear and concrete. In short, quality arguments must be extraordinarily clear and concrete if they are to compete with efficiency arguments in influencing dispute resolution policy. Otherwise, efficiency arguments probably will prevail by default, even if their “clarity” is deceptive and their factual premises questionable.

The foregoing should help to explain why I regard ambiguity of quality standards as a serious problem. Nevertheless, another point remains. If the kind of ambiguity illustrated above is simply *unavoidable*, then it is futile to struggle against it, no matter how serious a problem it creates. However, in my view, ambiguity of quality standards in dispute resolution is not an inevitable problem. In the following Part, I explain why I take this view.

#### V. CLARIFYING QUALITY STANDARDS: DISCUSSING DEFINITIONS OF QUALITY, THE PROBLEM OF CLARITY, AND SOME ALTERNATIVE APPROACHES

As illustrated in Part IV, many ambiguities surround the definitions or standards of quality in dispute resolution suggested in the workshop discussions. Was this level of ambiguity simply inevitable, given the nature of the subject? In my view, the answer is both yes and no; that is, given the structural constraints of this workshop, such ambiguity may have been largely inevitable. However, there may be alternative approaches that could, in future work, produce greater clarity in the quality discussion. Examining some of the ways in which the workshop discussions created ambiguity can help to suggest ways of achieving

---

58. In fact, these two are connected at some level, as I will suggest below. See *infra* text accompanying note 86.

59. See INSTITUTE FOR LEGAL STUDIES, UNIVERSITY OF WISCONSIN/MADISON LAW SCHOOL, WORKSHOP MATERIALS 1 (1987); Brunet, *supra* note 17, at 11, 17, 27; Galanter, *supra* note 17, at 8-10; Menkel-Meadow, *supra* note 13, at 487-88, 496-97. The argument in the text here grew out of a conversation with Professor Elizabeth Schneider.

greater clarity in future work. With this purpose, I submit the following observations based on my study of the record of the proceedings.

First, as noted earlier, of fifty specific quality sub-objective statements made by different speakers, over half were only implied by the speakers' remarks or by questions they directed to others, rather than stated directly or explicitly. For example, one practitioner panelist explicitly stated his quality standards as efficiency and party satisfaction. However, in telling an anecdote concerning a personal injury case handled by a summary jury trial, he stressed the general problem of individual plaintiffs seeking compensation from corporate defendants with time and economic leverage on their side. Through summary jury trial, the victims in this case received significant compensation within a short time. One implication was that this—neutralization of unequal power and the consequent result of fast compensation of needy victims, not simply the speed and low cost or party satisfaction—was the good to which he was pointing.<sup>60</sup> In short, while this speaker made explicit quality statements focused on party satisfaction and expeditiousness, he also made implicit statements suggesting Social Justice as an important quality standard. Many other speakers also identified quality standards implicitly as well as, or rather than, explicitly.

Second, on several occasions, implicit statements about quality were followed, naturally enough, by questions seeking to clarify the precise meaning of the implication. However, the opportunity for clarification was frequently not exploited, and the original ambiguity remained. For example, some speakers suggested what should be considered important research questions about quality, which themselves carried possible implications about the definition of quality. However, specific questions asked by others to clarify these implications were left unanswered.

Third, even when speakers made quite explicit quality statements, the statements were often about particular quality sub-objectives, and it was not entirely clear why the sub-objective was considered important and hence which quality standard the speakers were ultimately advocating. As illustrated above, specific quality statements can often be interpreted as supporting one or another of several quality standards, and this ambiguity is a major problem in understanding what standards mean and what conflicts really exist among quality standards. For example, one speaker's statement that the "Rawlsian perspective" should be kept on the list of quality standards implied that his explicit quality statements might be read as supporting an Individual Autonomy as well as a Social Justice standard of quality; other speakers' explicit quality statements relating to redistributive impacts and neutralization of power advantages, or empowerment of women, could rest on an elimination of

---

60. Later, in his response to a question about how to handle a case in which the time delay involved in a mandatory pre-litigation ADR device might prejudice a poor litigant's situation, the same panelist commented that, while adjudication does not guarantee the poor litigant a quick victory, "it would be unjust to submit a poor plaintiff to a system that would hurt him." Another panelist's response to the same question was that the court would have to do something "to preserve the equal position of the parties."

suffering rationale implying a Social Justice standard, or on an attitude modification rationale implying a Personal Transformation standard. Without further clarification of the reasons behind these explicit quality statements, the ambiguity remains; but the discussion did not reach this additional level of clarification.

Finally, some speakers made explicit quality statements clearly tied to particular quality standards, but did so without explaining in any depth the reasons underlying their advocacy of the standard in question. A good example of this was my own statement of my view that the evocation of recognition for the other party is the highest "good" to be sought in dispute resolution, a statement closely connected with the Personal Transformation standard. While the statement and standard were clear, no reasons were offered to explain why this view makes sense or why others should be persuaded of it, although articulation of such reasons is crucial to dialogue over quality standards. The same could be said about statements made by other speakers.

Thus, the record of the workshop discussions shows primarily implicit rather than explicit expression of quality statements, lack of clarification of implicit or ambiguous quality statements, and articulation of explicit statements and standards unaccompanied by reasons.<sup>61</sup> In my view, these different kinds of indirect and incomplete communication were largely responsible for the ambiguity of quality standards discussed in Part IV and the consequent obstruction of dialogue as a tool for choice and an opportunity for interconnection.<sup>62</sup> If this is so, however, then it cannot be said that this ambiguity was *unavoidable*. It could have been avoided at least in part, if speakers had been more direct and clear in their remarks. Of course, this assumes that ambiguity represented either indirectness or imprecision of expression by individual speakers. This was at least sometimes the case, according to my study of the record, and to this extent ambiguity could be avoided by greater directness and clarity on the part of individual speakers. However, I think that an equally significant reason for ambiguity was the presence of certain structural constraints on the discussion. Hence, apart from individual efforts at clarity, it is also possible that the overall structure of a discussion on quality could be arranged in a different manner, likely to produce greater clarity and more dialogue.

Discussions to identify quality in dispute resolution, where the participants hold different and even contrary views, will almost inevitably leave much unresolved ambiguity where time is short, the number of

---

61. Some participants commented on these points during the workshop itself. For example, one speaker, voicing frustration with the discussion, said that she wanted to hear why the different standards suggested by different speakers were important to them, to hear "any question pursued in depth." Another echoed this desire, commenting that discussion of "quality" implies personal judgments, and if so, more explicit discussion was necessary of "what do you want to know, and why is that important to you?" Others made similar observations.

62. In a sense, then, the ambiguity of quality standards was both the result of limitations in the dialogue that did take place and the cause of obstruction of further dialogue. See *supra* note 56 and accompanying text.

voices is large, and an audience is watching.<sup>63</sup> All three of these things were true of this workshop—although I understand that this was not the original design<sup>64</sup>—and I believe that this goes a long way to explaining the patterns of communication illustrated above and the resulting level of ambiguity of quality standards. In short, while greater individual efforts at clarity could have made *some* difference, a good deal of ambiguity probably *was* largely unavoidable in this workshop because of structural factors like those mentioned. However, the structural factors *themselves* are not unavoidable. It is possible to imagine, and plan in the future, a discussion with more time, fewer voices, and more privacy, and such an environment would stand a good chance of producing considerably more clarity about the different quality standards and their relationship. It is similarly possible to imagine, and plan in the future, a discussion where, whatever structural constraints are present, a facilitator is present to help, if necessary, focus discussion, clarify positions and differences, surface reasons for positions, and otherwise overcome the effects of those constraints.<sup>65</sup> Again, such an approach could help produce more clarity about quality standards.

In sum, one important outcome of this workshop, apart from substantive insights about quality standards themselves, can be methodological insights about how to continue and improve efforts to identify and measure quality. The observations of this Part regarding the workshop discussions are intended, and included here, as the basis for this methodological conclusion: ambiguity about quality standards is *not* an unavoidable problem, but avoiding it depends both on individual efforts at clarity and, equally if not more so, on controlling certain structural features of the discussion—time, numbers, publicity, and perhaps others—and providing for a facilitative agent to help overcome these and other problems in discussion.

---

63. Consider an analogy. Parties to negotiations often begin by making ambiguous opening statements in which goals and priorities are buried at considerable depth. They do so not necessarily by design or lack of care, but because at the beginning of discussions parties are often genuinely unclear about their positions and naturally hesitant about revealing themselves to one another. Clarity and communication often improve as the process progresses. Whether this occurs may depend on factors such as the time available, the number of parties, and the degree of publicity. Clarity and rapport require time to achieve, discussions are usually freer and more direct without an audience, and effective interchange is easier with smaller numbers. But, if the time is short, the number of parties is large, and the discussions themselves take place before an audience of nonparticipants, the likelihood of getting stuck at or near the initial level of ambiguity, and facing impasse, is high.

64. The original intent was, as I understand it, to have a smaller group in which all would be full participants and there would be no nonparticipating observers. The degree of interest in the workshop was so high, however, that it was understandably difficult to avoid the expansion that occurred.

65. To return to the above analogy, even where negotiations flounder because of structural factors, a facilitator or mediator can often reinstate dialogue by various means. In fact, after the workshop, one of the practitioner panelists actually suggested that a mediator could have made a big difference to the discussions, despite the structural factors. The point here is not to suggest that agreement would necessarily be reached on any one definition of quality. However, greater clarity could be produced about the *different* definitions proffered and the reasons underlying them.

As noted above, ambiguity of standards is as characteristic of the larger field as it was of the workshop discussions. The methodological conclusion here, while derived from the workshop experience, can also be applied to the larger discussion of quality, for example in the ADR literature. In the literature, the phenomena of implicit, unclear, and unexplained quality arguments are also common.<sup>66</sup> Since the structural features of the discussion in the literature are relatively fixed, this makes it all the more important to insist on the greatest possible clarity on the part of every individual contributor to the discussion in stating what it is that he or she considers quality in dispute resolution and why. Despite the proliferation of literature on ADR, I think we can go much further in this direction than we have gone thus far. Indeed, for reasons explained above, I think we must.

Ambiguity about the definition of quality in dispute resolution is thus, in my view, an avoidable and, as discussed above, serious problem. My reason for calling attention to it in this report is, as explained above, my belief in the importance of engaging in dialogue to identify the meaning of quality in dispute resolution. In the final Part of this report, I try to respond to my own call for greater clarity, by laying out some thoughts, suggested in part in earlier comments, on how I would articulate and define quality and how my definition appears to differ from what I *think* I hear others saying, despite the ambiguity left by the discussions.

## VI. WHICH QUALITY STANDARD?: THE SINGULARIST VIEWPOINT, A CLARIFIED SET OF CHOICES, AND MY DEFINITION OF QUALITY

### A. *Preface: An Anti-Taxonomy of Context*

Before discussing my own definition of quality, it is important to clarify one more implication of the singularist viewpoint of this report, an implication referred to but not fully discussed above. I therefore introduce this final Part with a question framed in the singular: *Which quality standard?*

As discussed in Part III, a number of speakers argued that quality cannot be defined, or standards prioritized, except in reference to specific contexts or “sectors” of disputes. The argument that quality standards differ according to context is logically appealing, and I, myself, have taken this view in the past.<sup>67</sup> As noted earlier, this view does not obviate the need to articulate supracontextual quality standards, as a matter of sound analytical methodology. However, apart from methodology, I believe today that the definition of quality in dispute resolu-

---

66. The earlier review of quality standards and ambiguities in the literature, and other references to the literature, *see supra* notes 33 & 50-52, have already offered examples of this. Again, the works cited there are intended merely as examples of how to approach the literature, like the workshop discussions, with an eye toward greater clarification of quality standards. The same approach could be applied to many other works, but, as noted above, *see supra* note 3, this report is not intended as an exhaustive review of the literature.

67. Bush, *supra* note 15, at 946-51.

tion—in the goal-furtherance sense—is a constant, independent of contextual differences. I do not mean by this that people do not differ about the proper definition of quality, or ordering of standards. Obviously, they do. What I mean is that when a particular definition of quality is proffered, its adherents probably do not believe that it applies in some cases only, depending on context. If someone accepts the Social Justice standard of quality, or considers it superior in any ordering of standards, then social justice is probably their highest concern across the board, in all types of situations. Thus, my view is that each of us ultimately has, in the terms I have adopted here, a singular and universal definition of quality.

Recall the example cited earlier from the workshop discussions: if workers are on their way back to the plant after the settlement of a strike, no mediator would stop them and urge them to rethink the contract package because they did not get a fair wage. While if a divorcing couple were on the verge of finalizing a separation agreement, a mediator might well “slow down” the process if it looked like the agreement was grossly unfair to one side. The implication of the example was that the standards of quality are different in these two contexts: in the former, closure (a sub-objective of Individual Satisfaction) is the priority standard; in the latter, fairness (a sub-objective of Social Justice) is more important. I disagree both with the scenario of the example and with its implications.

My analysis would go like this: One possible argument is that the scenario is just wrong. A mediator would have the same quality standard in either context, whether that standard were Social Justice or Individual Satisfaction. Therefore, if there were, in fact, gross injustice present in both cases, a Social Justice-standard mediator would intervene in both cases, and the closure goal would not take precedence in either; while an Individual Satisfaction-standard mediator would intervene in neither, as long as both parties appeared to understand the settlement and accepted it. In fact, in the mediation literature, one finds advocates of both of these positions, and neither view is presented as context dependent.<sup>68</sup>

On the other hand, assume that the scenario is right, and that most mediators would intervene to block “unfair” settlement in the family context, but not in the labor context. Does this mean that the accepted quality standard differs in each context—Individual Satisfaction in labor,

---

68. Stulberg, and Nicolau and Cormick, for example, all agree that mediators must remain neutral as to outcome, regardless of the type of dispute, implicitly suggesting the Individual Autonomy standard. See Stulberg, *supra* note 7, at 86-88, 96-97; Nicolau & Cormick, *supra* note 33, at 111-12. However, Riskin argues that the mediator has an obligation to ensure, to some degree, the substantive fairness of any agreement, implying the Social Justice standard of quality. See Riskin, *supra* note 7, at 354-57. The same argument underlies many recently adopted codes of mediation practice. See e.g., Schneider, *A Commentary on the Activity of Writing Codes of Ethics*, *MEDIATION Q.*, June 1985, at 83, 89 & app. A. None of these commentators presents their position as limited to a particular type of dispute or context. See also Bernard, Folger, Weingarten & Zumeta, *The Neutral Mediator: Dilemmas in Divorce Mediation*, *MEDIATION Q.*, June 1984, at 61.

Social Justice in family? I do not think so. I suggest that the standard is the same in both and that what differs is the way in which the process itself works to meet, or fail, the quality standard. In other words, the context makes a difference as to how processes must work to achieve the same ultimate goal. In the family context, given the inequality between the parties, the achievement of social justice depends on the mediator's substantive intervention. In the labor context, the original inequality of power has been changed by worker organization, which can itself be seen as part of the dispute resolution process, through which social justice can thus be achieved without the mediator's substantive intervention.<sup>69</sup> In other words, assuming that it is important in general, social justice is no less important in labor disputes than in family disputes. However, the process options for achieving this goal are different in the two contexts because of contextual differences.<sup>70</sup>

Joel Handler suggested something like this at the end of his remarks when he noted that for identifiable and potentially cohesive groups, collective organization was probably the best strategy for social justice, while for nonorganizable individuals, some other process, such as "pro-active" mediation, was possibly a better strategy. Handler's quality standard is Social Justice, whatever the context or dispute; only the strategy or process varies. I suggest that the reason the standard remains constant, not only for Handler but for all of us whatever our standards, is that positions about quality standards in dispute resolution stem from deeply held and coherent world-views that relate our response in any context or situation to the same fundamental value ordering. A believer in the Social Justice standard will see social justice implicated everywhere; a believer in the Personal Transformation standard will see transformative potential everywhere. And both will be right. Their proposed responses will differ, of course, but because of value and vision differences rather than contextual differences.

Despite all of this, however, isn't it clear that contextual circumstances do affect priorities of standards? For example, when the parties are of wholly equal bargaining power, how can the Social Justice quality standard be as important as when they are of unequal power? The answer is evident from another example discussed in the workshop: the dispute between Wisconsin Electric and American Can, described by Robert Gorske.<sup>71</sup> Although neither party was disadvantaged and the parties had relatively equal bargaining power, many questioners immediately had social justice concerns about the case and the minitrial resolution process. The concerns pointed not to the parties at all, but to the public interest and affected third parties, including rate payers, consumers, and environmental interests, who might well be "disadvantaged" by comparison to both of the actual parties. The Social Justice standard

---

69. Galanter, *Duty*, *supra* note 37, at 940-44.

70. This explanation is in accord with the literature on the problems of using labor mediation as a model for community or family mediation. See, e.g., Getman, *supra* note 28.

71. Gorske, *Alternative Dispute Resolution: The Minitrial*, WIS. B. BULL., Feb. 1985, at 21.

was certainly implicated in this dispute and was the primary concern for its adherents, but it was implicated in a different way. In fact, several speakers commented in passing that the "public-private" dispute distinction is probably a fiction because of the pervasiveness of potential external impacts like those in the Wisconsin Electric case. This is another way of saying that the Social Justice standard is always implicated and is always important to its adherents, regardless of context. This example also suggests that while context does not determine whether a given standard is important, it may determine *how* the standard is implicated. Another way of saying this is that context may affect which sub-objectives of the standard are involved.<sup>72</sup>

In sum, even if differences of context are relevant and important in some respects, they do not affect the answer to the fundamental question of what is the definition of quality in dispute resolution (or the priority ordering of quality standards). The answer each of us gives to this question will not vary according to context because it derives not from circumstances, but from the vision each of us has about the nature of society. These visions will not change as we cast our attention from situation to situation, and neither will our standards of quality. Therefore, we will not solve the problem of identifying quality by segmenting the discussion, as some suggested, on the assumption that a single, noncontroversial definition of quality will emerge for each sector or context of

---

72. For example, in the original table of quality definitions and statements, see *supra* Table I, at 415, the Social Justice standard included, among its sub-objectives, these two sub-objectives: "the process attains quality when outcomes are not harmful to poor (disadvantaged) parties," and "the process attains quality when outcomes are not harmful to the public interest or interests of affected third parties." In the Wisconsin Electric case, only the second sub-objective is relevant as a standard. In the family dispute scenario cited earlier, only the first sub-objective is relevant. In the labor scenario, both may be relevant. Yet, in all three cases the Social Justice standard is relevant and will probably be seen by its adherents as the main measure of quality.

The focus on sub-objectives as variable in relation to context might seem to suggest that quality analysis should focus primarily on them; that is, since sub-objectives do change according to context, why is it necessary to define general standards at all? Why not just specify sub-objectives, determine which are implicated in a particular context, and evaluate process quality accordingly? The answer to this question returns us to the problem of ambiguity and choice, even at the sub-objective level, which was discussed at length above. See *supra* note 55 and accompanying text.

The central point to be added here is that, even if sub-objectives vary according to context, relative priority of different quality standards, according to my argument, does not. Thus, in the Wisconsin Electric, labor and family examples above, the different Social Justice sub-objectives may be of differing levels of importance, and this is important to know. However, it is even more important to know whether the Social Justice standard itself is more or less important than, for example, the Personal Transformation standard, which is also implicated in all three cases. Context can tell us which of the various Social Justice sub-objectives are implicated more in a case, but it cannot tell us whether any of these are more or less important than Personal Transformation sub-objectives (or those of some other standard), some of which are also bound to be implicated. Such a decision rests on a comparison and ranking of the general standards themselves, which can be understood properly only in terms of their overall character and rationale, and not simply as the sum of various sub-objectives. In addition, as discussed earlier, it is difficult to tell which sub-objectives pertain to which standard until the governing standards of sub-objectives are themselves fully understood. Therefore, without clarification of standards, we have no reliable way to compare the importance of different sub-objectives. See *supra* note 55.



disputes. This is not to say that segmented study is unnecessary. On the contrary, segmented and focused discussion may well be necessary to reach ultimate conclusions about quality, given the impact of context on sub-objectives. However, before we can reach that level of analysis, even in a segmented discussion, we must confront precisely the same issues posed by the general discussion of quality in this workshop: what are the different candidates for the meaning of quality in dispute resolution in general, and, assuming the singularist view that choice is necessary and desirable, what is the priority among them? Answering these questions might be easier if the discussion were made more concrete by focusing on a given context. However, it still would be necessary to generalize and, especially, to articulate not only the possible quality standards, but also the reasons why each is maintained. This means relating the competing standards to the visions of society that they reflect. In this workshop, we barely scratched the surface of this discussion for reasons described in Part V. In the next section, I offer some ideas on how quality standards are linked to visions of society, as an example of some of the dimensions we need to explore, and suggest my definition of quality and its underlying vision.

#### B. *Visions of Quality, Visions of Society*

Given the ambiguities surrounding quality standards that were described in Part IV, it may seem futile to try again here to identify clear and distinct quality arguments based on the workshop discussions. However, I believe that those ambiguities themselves may suggest a way of understanding what different quality standards the speakers were implicitly suggesting and for what reasons. If the workshop discussions had reached greater clarity, perhaps they would have confirmed my present interpretation. As it stands, what follows can be read as a thesis proposed for further examination in future work.

As discussed in Part IV, statements appearing to suggest a Social Justice quality standard could be interpreted instead to suggest the standard of Individual Autonomy, Personal Transformation, or Social Solidarity. The same interpretive ambiguity could be found in statements appearing to support the other standards. Perhaps the reason for this ambiguity, which was not clarified at the workshop for reasons discussed above, is that there are actually several competing *priority orderings* of quality standards implicit in the discussion, in each of which the same six standards occupy different positions *and* conform to different interpretations, because the underlying vision of society is different. Therefore, each quality standard *does* have different interpretations, depending on which ordering and organizing vision is adopted. Specifically, I see three such orderings and three visions.

The first ordering rests on an Individualist vision of society in which the greatest good is the fulfillment of the individual's freely self-deter-

mined desires.<sup>73</sup> In the related ordering of dispute resolution quality standards, the Individual Autonomy and Individual Satisfaction standards are most important, although the Social Justice standard may be considered an equally important or constraining standard. In this vision, the Social Justice standard has a dual character, encompassing both the elimination of suffering and the protection of individuality interpretations. The latter probably gives it greater importance, as a constraint on the Individual Autonomy and Individual Satisfaction standards.<sup>74</sup> The Individual Satisfaction standard here encompasses both its hedonism and autonomy interpretations, although the latter is more important in keeping with the vision's stress on self-determination. The Social Control standard is important, but only as a facilitating agent for the first three; that is, order is valued only because it facilitates individual choice and fulfillment, not for some collective or partisan purpose. Finally, the Personal Transformation and Social Solidarity standards are relatively unimportant in this vision since each carries connotations of other-directed social interaction which, unless freely chosen and thus relegated to facets of the Individual Satisfaction standard, would violate the vision's emphasis on the liberated and unconstrained (as far as possible) individual self.

The second implicit ordering of standards rests on a diametrically opposed Collectivist or Corporate vision of society in which the greatest good is the maximization of the welfare of society in the aggregate. As a corollary to aggregate welfare, this vision values the preservation of an existing regime of private or public institutions, such as private markets or social administrators, which is seen as uniquely capable of channeling or suppressing individualism and assuring maximum societal welfare.<sup>75</sup> In this ordering of dispute resolution quality standards, the Social Control standard comes first, interpreted here not as facilitator of the Individual Autonomy and Individual Satisfaction standards, but as a

---

73. This is the vision of rights-based liberal theory in its libertarian and egalitarian forms. See, e.g., Hutchinson, *supra* note 16, at 759-60; Murphy, *supra* note 16, at 130-41; Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15-16. See also *supra* note 46 and accompanying text.

74. As noted earlier, social justice in the protection of individuality sense is central to egalitarian individualism, operating as a constraint on unrestrained liberty to pursue individual ends. See *supra* note 49 and accompanying text. One implication of the text here is that advocates of the Social Justice, Individual Satisfaction, and Individual Autonomy standards may have much more in common than they generally recognize, and articulating this common commitment to protection of individual dignity might suggest measures of dispute resolution quality on which all would agree.

75. This is the vision of utilitarian political-economic theory. See, e.g., M. SANDEL, *supra* note 16, at 3-7; Hutchinson, *supra* note 16, at 758-59; Sandel, *supra* note 73, at 15-16. Its most influential current incarnation is law and economics theory. See, e.g., England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 33-34, 48-51 (1980); Wright, *Actual Causation v. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 436 (1985). The latter theory, despite roots in liberal individualism, has all but abandoned concern for individual autonomy and adopted an essentially collectivist viewpoint according to which aggregate welfare is the primary concern. See Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1505-06 & n.107 (1986).

surrogate for aggregate welfare.<sup>76</sup> The Individual Satisfaction and Social Solidarity standards follow in importance, interpreted in both cases as devices for securing acquiescence and acceptance of an established collective or corporate order. The Individual Autonomy and Social Justice standards are both relatively unimportant in this vision, if not inimical to it. The Personal Transformation standard may also be similarly ranked, unless it can be interpreted as promoting acquiescence in some way.

The third ordering rests on a Communitarian or Relational vision of society in which the greatest good is the connection of the individual self to others in interpersonal and communal relations.<sup>77</sup> In this ordering of standards, the Personal Transformation and Social Solidarity standards are most important since both focus, according to their plainest interpretations, on the effectuation of interpersonal connections. The Social Justice standard is also important, interpreted in all four senses.<sup>78</sup> First, according to the modification of attitudes and social solidarity interpretations, it fits directly into this vision. Second, according to the protection of individuality interpretation, the Social Justice standard is also important, despite the de-emphasis on individuality in this vision. The reason is that, in order for the recognition of and connection to the other to have the greatest value, the self must have substance and value as well.<sup>79</sup> For the same reason, Social Justice interpreted as elimination of suffering is also important in this vision. Therefore, both the Social Justice standard—in the protection of individuality and elimination of suffering senses—and the Individual Autonomy standard are important here in the same kind of constraining or conditioning role that the Social Justice standard plays in the Individualist vision. The

---

76. As noted above, *see supra* note 34, the workshop discussions paid little attention to the question of whether allocative efficiency—as distinct from administrative economy—was an important quality standard. However, it is viewed in the literature as an important standard, which might be called the Aggregate Welfare standard. *See supra* note 75. For those who advocate this standard, it certainly would be foremost in the Collectivist vision's ordering of standards, and the Social Control standard must therefore be seen as a surrogate for the Aggregate Welfare standard. I also note that it is possible to see this vision as assigning the greatest good to maximizing the aggregate welfare of a particular class, rather than that of society generally, in which case the Social Control standard is a surrogate not for aggregate welfare but for class privilege.

77. This is the vision of communitarian political theory, at least in part. *See, e.g.*, M. SANDEL, *supra* note 16, at 62-65, 143-54, 168-83; Bush, *supra* note 75, at 1537-42; Macneil, *supra* note 16, at 934-39, 944-45. This vision is reflected presently in a variety of fields besides political theory. *See, e.g.*, J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (history); R. BELLAH, *supra* note 16 (sociology); C. GILLIGAN, *supra* note 51 (developmental psychology); J. LYNCH, *THE LANGUAGE OF THE HEART* (1985) (research medicine).

78. The importance of so many interpretations of the Social Justice standard in this vision suggests to me that advocates of the Social Justice standard may hold a Communitarian rather than an Individualist vision of society, and may thus have much in common with advocates of the Personal Transformation and Social Solidarity standards. Articulation of the commitment to interpersonal recognition and connection common to all three standards might suggest measures of dispute resolution quality that all could support. As for the idea, implied above, that visions are mutually exclusive, *see infra* text accompanying notes 81-82. *See also infra* note 80.

79. *See* M. SANDEL, *supra* note 16, at 143, 150, 154-61; Bush, *supra* note 75, at 1552-53.

Individual Satisfaction and Social Control standards are least important in this ordering.

I believe this outline of the three orderings of quality standards and their underlying visions, while necessarily sketchy, helps to make sense of the conflicting and ambiguous interpretations of quality standards described in Part IV.<sup>80</sup> According to my thesis, there are operating underneath the discussion three quite different and powerful visions that shape three different orderings of the same quality standards, and in each ordering the six quality standards are given very different interpretations. However, since none of these orderings, and certainly not the underlying visions, was articulated in the workshop discussions, clearly or otherwise, the standards by themselves were fraught with confusion and ambiguity.

Clearly, to go back to David Luban's insight, these three orderings are competing and not complementary definitions of quality, and a clear problem of choice is posed. It is also clear, according to the discussion in Section A, that the choice cannot be avoided by segmenting the universe of disputes and applying different standards in different contexts. Each of the three orderings rests on a vision that encompasses society as a whole, and each, therefore, would be seen by its proponents as applicable across the board. Therefore, the problem of choice of standards is very real. If, as I argue, the best tool for choice is dialogue, then the dialogue must encompass the articulation and discussion of not only the standards and priority-orderings themselves, but also the underlying societal visions. My definition of quality in dispute resolution, as implied by comments throughout this report, is the ordering of standards based on the Relational vision, in which interconnection of individuals is the guiding principle.

Whichever of these three standard-orderings is accepted, the implication of Section A is that it would apply across the board irrespective of context. Does this imply further that each standard-ordering would dictate one ideal dispute resolution process to be used for all disputes? This would run counter to the strong view expressed by many at the workshop that diversity of process was a good thing. The answer to the question posed is probably no. Whatever the quality standard or order-

---

80. The typology of visions laid out in the text is, as stated, sketchy and preliminary, and can certainly be questioned and improved. It is presented here as a starting point for discussion, not a developed theory. I note, for example, that there is no reference to a possible Socialist vision. The reason is that, in my view, the attempt to describe a Socialist vision and conception of the good winds up repeating one of the visions already suggested: a vision in which individual dignity is the highest good, or one in which collective welfare (or workers' welfare) is the highest good, or one in which interpersonal connection is the highest good. That is, the Socialist vision, where it is expressed, seems to rest on one or the other of these three conceptions of the good, which I see as primary competitors. Others also have suggested that the Socialist vision is not distinct, but rests on some other more fundamental vision of self and society. See, e.g., Levinson, *supra* note 39, at 1480-82; Macneil, *supra* note 16, at 939-43. However, I am open to argument on this point, as on other aspects of the suggested typology of visions. My main point is to suggest that whatever they may be specifically, such competing visions exist, and heavily influence, perhaps determine, positions on dispute resolution quality standards.

ing of standards, contextual differences will, as noted above,<sup>81</sup> affect the way the standard is implicated, and hence require different processes to respond appropriately.<sup>82</sup> At the same time, however, the concept of a broadly applicable single ordering of standards does suggest that, even with specific process differences, there might be reason to contemplate a certain uniformity in what might be called process priorities. For example, if the Individualist vision standard-ordering were adopted, it would make sense to require, in every case, some type of process element designed to guard against discriminatory operation or impact, although the specific design would certainly have to vary according to context.<sup>83</sup> Similarly, if the Relational vision were adopted, it would make sense to require, in every case, some process element designed to evoke mutual recognition between the parties in the most effective way possible.<sup>84</sup> Again, the specific design would and should vary according to context. Thus, while there would still be process diversity under any of the three visions, there would also be a degree of commonality of general process priorities.

Finally, the picture of three underlying societal visions and three quality-standard orderings suggests an explanation for another ambiguity reflected in the workshop proceedings: the ambiguous character of the ADR "movement" as a whole. Depending on who is speaking, the trend toward greater interest in and use of diverse dispute resolution processes, whether out of or in court, can seem like three entirely different phenomena: ADR is an opening up of new avenues for individual choice and fulfillment of individual needs—the consumer movement of dispute resolution; or ADR is a highly effective and therefore dangerous strategy for tightening social control over, and expanding opportunities for exploitation of, the weak by the powerful; or, ADR is the manifestation in the legal system and its surrounding structures of an expanded interest, in the larger society, in changing the basis of our social life from acquisition to relation—the "dawning of a new age," as one speaker at the workshop sardonically put it.

Clearly, these three interpretations, or stories, of the ADR movement stem from the three underlying societal visions mentioned above. Each is plausible, given the corresponding societal vision. Each is separated from the others by a wide gulf of difference in vision.

In keeping with my belief in the Relational vision, with its accompanying quality standard-ordering, I interpret the ADR movement—and especially its expansion of mediative and party-connecting activity in various forms—as a *potential* move in this direction. However, I stress

---

81. See *supra* note 72 and accompanying text.

82. As for the notion of a process-context grid, suggested by some at the conference and advocated by me in the past, I am not now sure that, given the number and complexity of relationships between contexts and sub-objectives, it would be a feasible task, although Larry Mohr may convince me otherwise.

83. Some authors come close to suggesting this. See, e.g., Brunet, *supra* note 17, at 47-56; Delgado, *supra* note 33, at 1402-04.

84. See, e.g., Bush, *supra* note 33.

the word "potential" in my interpretation of ADR because I am not sure that the ADR movement's potential to express a larger shift to relational values will be realized. There are many reasons to believe that ADR will be swept into the gravitational field of the Individualist or Corporate visions, the one arguing for greater emphasis on protection of rights in ADR and the other arguing for efficiency and party satisfaction as the only concerns. Some workshop participants expressed similar concerns, although perhaps for different reasons than mine. One way to keep relational values alive, I believe, is to articulate more fully the Relational vision of ADR and of justice itself—to identify appropriate quality standards and to demand that ADR in practice fulfill its potential to live up to these standards.<sup>85</sup>

Beyond this concern for the fate of ADR, there is another reason to encourage clearer articulation of the Relational vision. The Individualist and Corporate visions of society and of dispute resolution have been articulated much better than the Relational vision. Clearer articulation of the Relational vision, in contradistinction to the other two, is important if the ultimate choice between competing definitions of quality is to be a sound one.

### C. *A Closing Conundrum*

The last comment suggests a conundrum that I cannot really resolve, but that has been running beneath the surface of my analysis and that I want to acknowledge before closing this report. Two notions have permeated my analysis: the view that definitions of quality are inconsistent and that choice among them is necessary and desirable, and the view that dialogue is a crucial tool for clarifying the options and reaching this choice. I have identified both of these as aspects of the singularist viewpoint on quality standards. In these last few paragraphs, following my sketch of the three visions, these notions reappear several times: "the three orders compete, and a problem of choice is posed," "the best tool for choice is dialogue," and "whichever order is accepted would apply across the board." In short, I continue to conclude that, confronted with the three visions, the appropriate response is to apply the singularist approach of dialogue, choice, and universal application. However, others may conclude that the appropriate response to the different visions is to appreciate the diversity they represent, encourage bargaining or exchange with holders of different visions, combine elements from the three into a kind of eclectic vision, or the like. In es-

---

85. To some extent this is beginning to happen. See, e.g., Bush, *supra* note 10; Menkel-Meadow, *supra* note 13; Millhauser, *supra* note 33; Riskin, *supra* note 7. Nevertheless, much more can be done in this direction. It is important, for example, to avoid the tendency to adopt "codes of practice" for mediators and others that establish without much discussion standards reflective of the Individualist rather than the Relational vision. See Bush, *supra* note 10; Riskin, *supra* note 7. On the other hand, it is equally important to demand, for example, that mediators both strive to evoke mutual recognition between the parties and guard against oppressive overreaching, rather than simply preside over (and push) the "march to agreement" that many have rightly criticized. See generally Bush, *supra* note 10.

sence, they may take what I have called a pluralist response to these three visions.<sup>86</sup>

The conundrum is that this methodological difference over how to *approach* visions of quality and society is itself *part of* the larger difference in visions. Thus, it appears to me that the singularist methodological prescriptions are products of, and dependent on adoption of, the Relational or Communitarian vision, which posits that a common good exists, in dispute resolution as in other areas of social life, and that it can be discovered or revealed by dialogue, which is also good in itself. In contrast, the pluralist prescriptions are products of the Individualist vision, which sees the good as necessarily individually defined and subjective. As a singularist, I want others to clarify and make choices among societal visions and definitions of quality; but to suggest this is to ask others to begin by adopting a Relational vision, which is itself the subject of argument. On the other hand, a pluralist will want to emphasize eclecticism and individual choice in identifying quality; but to suggest this methodology is to ask others to begin by adopting the Individualist vision. If this connection between methodological assumptions and larger societal visions exists, the conundrum is that singularists and pluralists may have trouble even talking to each other about quality, unless one adopts the vision of the other in the first place!

To solve this conundrum is not only beyond the scope of this paper, but also, at the moment, beyond my ken. I invite suggestions on this point from both singularist and pluralist readers. Of course, the conundrum suggests that pluralists may have considerable difficulty accepting some of my singularist analysis. I can only hope that their commitment to pluralism extends far enough to allow for a few singularists to stick their oar in from time to time.

---

86. This point was raised by Marc Galanter in his comments on an earlier draft of this report, and it suggested to me the conundrum described in the text.