

Commentary: Research on Employment Dispute Resolution: Toward a New Paradigm

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The dramatic growth in the use of alternative dispute resolution (ADR) in employment relations over the past twenty-five years has sometimes been called a “quiet revolution.” Before the revolution, the use of techniques such as mediation and arbitration was largely confined to the unionized segment of the American workforce. Some nonunion employers had grievance procedures or other forms of dispute resolution processes, but these employers rarely, if ever, relied on impartial third parties to resolve employment disputes (Lewin, 1987a, 1987b; Foulkes, 1980; McCabe, 1988). It is probably not an exaggeration to state that the landscape of employment dispute resolution has been transformed by the development of ADR over the past quarter-century.

Lisa Bingham’s article is a comprehensive survey of the growing body of research on employment dispute resolution conducted in recent years. We commend her for performing this important service for scholars and practitioners in our field. Undoubtedly, her review of the literature will be a starting point for scholars contemplating new research projects. One of the strengths of her article is her use of a structural framework to organize her review of the research. By focusing on structural elements, Bingham aptly directs our attention to most of the critical—and frequently controversial—issues that have captured the attention not only of researchers but also of practitioners in the field. Her own research on the repeat-player effect in arbitration, the use of transformative mediation in the U.S. Postal Service, and other topics is testimony to the important role that research can play in an evolving field (Bingham, 1997a, 1997b, 1998; Bingham, Kim, and Raines, 2002).

Our argument in this article is greatly influenced by the work of Thomas Kuhn, who famously introduced the concept of a “paradigmatic shift” in his

book *The Structure of Scientific Revolutions* (1962). Kuhn maintained that a paradigm was essential to scientific inquiry: “No natural history can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological belief that permits selection, evaluation, and criticism” (pp. 16–17). He argued that in any era, there is a dominant paradigm that provides the framework for research in a given field.

“Normal science,” Kuhn argues, is devoted to explaining phenomena on the basis of the dominant paradigm (1962, p. 24). Over time, however, normal science uncovers “anomalies” that subvert the existing paradigm. The accumulation of these anomalies leads to a growing awareness that there are profound discrepancies between existing theories and observable facts that cannot be reconciled within an existing paradigm. These mounting “failures” result in a “crisis,” but Kuhn notes that scientists seldom renounce the existing paradigm that led them into the crisis (Kuhn, 1962). Scientists resist abandoning an existing paradigm, even in the face of growing evidence that the paradigm is obsolete, until “an alternative candidate is available to take its place” (Kuhn, 1962, p. 77).

We maintain that the ADR revolution has been, in effect, a paradigmatic shift in the practice of employment dispute resolution. Prior to the shift, the existing paradigm of practice was rooted in an industrial relations framework, specifically the so-called New Deal industrial relations system, which Kochan, Katz, and McKersie (1986) claim was the dominant system of employment relations from the end of World War II to the 1970s. But beginning in the 1960s and 1970s, a combination of factors caused this system to come unstuck: globalization, technological change, deregulation, the decline of the labor movement, the increase in the statutory protection of individual rights, and the emergence of team-based production are some of these factors (Kochan, Katz, and McKersie, 1986; Lipsky, Seeber, and Fincher, 2003). Hindsight allows us to recognize that the ADR revolution was the product of a historic transformation of the American workplace.

Although we believe there has been a paradigmatic shift in practice, we do not believe there has been a paradigmatic shift in research on employment dispute resolution. Instead, the research so ably synthesized by Bingham appears to be an exercise in “normal science.” Research, we maintain, has been conducted within paradigms that existed before the rise of ADR. The paradigm that has guided this research has depended on the discipline of the researcher. Lawyers, for example, use standard legal theory

and doctrinal analysis, and specialists in labor relations use the industrial relations paradigm (influenced greatly by Dunlop, 1958). Although there have been many anomalies discovered in the research on ADR, there has yet to emerge a distinctive ADR paradigm for guiding such research. In sum, the preconditions Kuhn specified for the emergence of a new paradigm have been met by the existing research.

The research on employment dispute resolution has moved through three successive generations, and we believe a fourth generation is now emerging. The emergence of a new generation of research does not necessarily mean that the work associated with a preceding generation has been finished. On the contrary, in common with life in general, the work of one generation usually continues throughout successive generations.

We believe that this generational analysis of the evolution of ADR research is helpful in highlighting the avenues explored and those left uncharted. Each generation founded its research on a number of core assumptions about the nature of the phenomenon at hand. Thus, for example, the three generations differ with regard to their assumptions about the forces that influenced the rise of ADR. This variance has led the researchers of each generation to examine different aspects of ADR. One of the challenges facing the next generation of ADR researchers is the integration of these independent insights provided by their predecessors.

The First Generation: Dispute Resolution at the Societal Level

The first generation of research on ADR largely focused on legal questions and the implications of ADR for our legal system and social justice. This is not surprising since the birth of ADR is embedded in the search for extra-judicative procedures that would be superior in their procedural efficiency and their substantive outcomes to litigation.

The early legal literature, dating to the 1970s, did not focus specifically on ADR in the workplace but did deal with the desirability and legality of settling public claims in private forums. In short order, the practical relevance of these developments to workplace dispute resolution was recognized. Especially following the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* (1991), which appeared to sanction the use of mandatory and binding arbitration in employment disputes, the questions addressed by legal scholars (such as the coverage of the Federal Arbitration Act) had obvious relevance for employment dispute resolution.

Since ADR developed as a reaction to procedural and substantive pathologies in the judicial system, the first generation examined the extent to which ADR was in fact a suitable and viable alternative. Legal scholars were divided on this question. On the one hand, many scholars argued that ADR had the potential to increase both procedural and substantive justice in the settlement of disputes. Auerbach (1983), for example, described the effectiveness of private dispute resolution methods in preserving and strengthening community norms and values. Bush (1989) maintained that mediation is unique in its capacity to empower the parties to control their dispute and therefore tailor a settlement to their specific needs and circumstances.

On the other hand, not all legal scholars were convinced of ADR's unequivocal superiority. For example, Abel (1982) objected to the concept of informal justice, arguing that merely settling disputes can be a means of denying the existence of more persistent conflict. ADR opponents maintained that denying conflict is counterproductive and prevents a healthy deliberation over norms in a heterogeneous society (see, for example, Nader, 1993). Critics contended that ADR dealt solely, if effectively, with procedural issues but ignored the question of substantive outcomes. Furthermore, they argued that ADR exacerbated preexisting imbalances of power. Fiss (1984) maintained that ADR procedures assume there is a balance of power between the disputing parties. Since this is clearly not the case in many disputes, Fiss argued that ADR contradicts the notion of equal access to justice regardless of a party's financial resources. Edwards (1986) warned that the substantial perils in the use of ADR had largely been overlooked. He maintained that although ADR may be suitable for "strictly private disputes," its application in disputes involving constitutional issues or public law risked the substitution of nonlegal values for the rule of law. Critics contended that ADR was a method to bypass legislative and constitutional requirements. ADR, as Fiss (1984) wrote, focuses on restoring the peace between the parties "while leaving justice undone."

Despite the debate, it is clear that the first generation agreed that societal forces of influence, exogenous to the specific settings in which ADR was used, gave rise to this paradigmatic shift of practice. Thus, the first generation of ADR researchers focused on important societal issues such as ADR's effect on procedural and substantive justice, the balance of power between disputants, and the appropriateness of using ADR to settle statutory disputes. But the ascendancy of ADR led the next generation of

researchers to shift their focus from societal concerns to concerns at the organizational level.

The Second Generation: Dispute Resolution at the Macro-Organizational Level

In the mid-1980s, industrial relations and human resource scholars began to examine internal mechanisms of dispute resolution in nonunion settings (Foulkes, 1980; Lewin, 1987a, 1987b, 1990; Westin and Feliu, 1988; McCabe, 1988; Ewing, 1989). These researchers relied heavily on the existing industrial relations paradigm, which is associated with the work of scholars such as Dunlop, Kerr, McKersie, Kochan, and others (Dunlop, 1958; Kerr, Dunlop, Harbison, and Myers, 1960; Walton and McKersie, 1991; Kochan, Katz, and McKersie, 1986). Second-generation researchers assumed that what they had learned about dispute resolution under collective bargaining could be transferred to dispute resolution in nonunion settings. Research using the industrial relations paradigm has indeed produced some valuable results, but as Kuhn might have predicted, it has also produced anomalies inconsistent with that paradigm.

For example, in the 1980s, some of the industrial relations researchers cited above examined basic grievance and complaint-filing procedures, which by then had clearly become a more important phenomenon among nonunion employers. These procedures were a fairly unsophisticated version of present-day employment dispute resolution systems, but the studies by this generation of researchers provided an important foundation on which future ADR researchers could build.

Second-generation researchers attempted to gain an understanding of the types of procedures being used by nonunion employers, the types of employers using such procedures, and the situations in which they were used. The evidence suggested, for example, that much greater variety in nonunion dispute resolution procedures existed than was observed in union grievance procedures (McCabe, 1988). A distinguishing feature of this research was its attempt to analyze the effect of dispute resolution procedures on workplace outcomes, such as turnover rates and employee performance. This research demonstrated that although the use of dispute resolution procedures in nonunion settings was in many ways similar to the use of ADR in other settings, the use of ADR in employment relations required the consideration of characteristics uniquely associated with the workplace.

The second generation developed models that could explain non-union grievance procedures. For example, Lewin (1987a) studied nonunion appeals systems in three large companies. He developed a model for understanding grievance filing by nonunion employees that took into account employee characteristics such as age, race, and gender, the issues raised by the complainants, the level of settlement, and the identity of the prevailing party. Lewin also analyzed the effect of the outcomes of these grievance systems on factors such as turnover rates, promotion rates, and employee performance.

The exit-voice model, devised by Hirschman (1971), had proven useful in explaining the effect of unions on workplace outcomes, such as turnover and employee performance (Freeman and Medoff, 1984). But Lewin's analysis suggested that the exit-voice model did not seem to apply to nonunion dispute resolution procedures. For example, contrary to the predictions of the exit-voice model, Lewin found that turnover among employees filing appeals was higher than among their colleagues who did not. Furthermore, Lewin found that supervisors and managers involved in the appeals process also had higher turnover rates, lower promotion rates, and lower performance ratings than those who were not involved (Lewin, 1987a, 1987b). Within the standard industrial relations paradigm, these findings are clearly Kuhn-like anomalies.

In recent years, the macro-organizational perspective has reemerged in a number of studies that examine more complex complaint procedures yet follow in the tradition of the earlier research. Colvin (1999, 2003), for example, examined the factors that have motivated a growing number of nonunion organizations to adopt arbitration and peer review procedures in the workplace. Colvin analyzed the relationship between the adoption of high-performance work systems and environmental pressures (such as the threat of litigation and the threat of unionization), on the one hand, and the specific types of dispute resolution implemented by employers, on the other. Colvin found that the adoption of peer review procedures could be explained by both environmental pressures and the existence of a high-performance work system, but the adoption of arbitration was influenced primarily by the threat of litigation but not by the presence of a high-performance work system.

Following in the footsteps of second-generation researchers, Colvin (1999) also addressed some of the organizational dimensions associated with ADR, such as use rate, disciplinary outcomes, and quit rates. Colvin, similar to Lewin, found no support for the exit-voice hypothesis in the use

of nonunion employment arbitration. He found, however, that the use of peer review was associated with lower quit rates. In a study that examined the relationship between employee voice and quit rates in the telecommunications industry, Batt, Colvin, and Keefe (2002) did not find any significant correlation between peer review procedures and quit rates.

Implicit in this generation's research is the assumption that although the use of ADR can be attributed to exogenous forces such as the threat of litigation and the potential for unionization (see Colvin, 2003), there are endogenous forces, namely organizational transformation, that are influencing an organization's decision to turn to new methods of resolving disputes (see, for example, Lipsky, Seeber, and Fincher, 2003; Stone, 2001; Cutcher-Gershenfeld and Kochan, 1997).

However, there is relatively little empirical research on the correlation between organizational changes that have taken place over the past three decades and ADR use. In this sense, we maintain that the potential vested in this generation's research direction has not yet been exhausted.

A variety of external and internal pressures have caused organizations to restructure their traditional bureaucratic models in search of alternatives that can increase their competitive viability (Appelbaum, Bailey, Berg, and Kalleberg, 2000; Appelbaum and Batt, 1994). As a consequence of this restructuring, the employment practices in many of these organizations have undergone drastic alterations. In the quest for increased competitiveness, organizations have been shedding their traditional, hierarchical, rigid rule-based practices. This shift is characterized by some as the emergence of a "high-performance" or a "postbureaucratic" organizational model (for a discussion on high-performance work systems, see Appelbaum, Bailey, Berg, and Kalleberg, 2000; in relation to ADR, see Lipsky, Seeber, and Fincher, 2003; for a discussion on the "postbureaucratic" organization, see Heckscher and Donnellon, 1994). As a growing number of organizations move away from the traditional bureaucratic model, it becomes all the more important to study the link between the transformation of organizations and the transformation in the way organizations manage conflict.

Thus, for example, one might explore the relationship between changes in organizational structure, work design, workforce heterogeneity, and the employment relationship and the implementation of internal systems for dispute resolution. In addition, it is important to examine the link between the emphasis on flexibility and reduction in formal rules in nontraditional organizational design and the implementation of formal dispute resolution systems.

The Third Generation: Dispute Resolution at the Micro-Organizational Level

The third generation of ADR research, we maintain, is characterized by a focus on dispute resolution at the micro-organizational level. Bingham's structural analysis (in this issue) encompasses many of the micro-organizational studies. Third-generation researchers focus intently on the operation of processes and procedures and are concerned with their relative effectiveness. For example, some stress the effect of the characteristics of different procedures on the likelihood of disputants reaching settlement. Other researchers deal with the perceptions and behaviors of participants in these procedures. Bingham notes that the literature on ombuds and silo programs is highly descriptive and pays little attention to the effects of such programs on either workplace or macro-organizational outcomes.

Third-generation researchers have enriched our understanding of the significance of the procedural aspects of ADR. This focus can be attributed in part to the third generation's assumptions that various ADR procedures were developed as the result of efficiency considerations and pressures.

Bingham's structural analysis helps clarify the host of procedural considerations that are likely to affect the use of such procedures, settlement rates, and participant satisfaction. For example, as Bingham notes, the use and effectiveness of a given procedure are likely to depend on the timing of the intervention by a third party, the degree of voluntarism permitted by the procedure, and the precise nature of the intervention. This generation of research has also attempted to identify the contextual factors that affect the choice of the specific ADR intervention (Lewicki and Sheppard, 1985). Third-generation research has demonstrated that the type of process an organization uses has significant implications for employee perceptions of justice (Karambayya and Brett, 1989).

The second research generation glossed over the intricacies of specific ADR processes, but the third generation has studied them intensely. For example, the third generation delved into the implications of using different types of mediation (facilitative, evaluative, and transformative) and different types of arbitration (interest, rights, advisory, and others). Bingham's literature review demonstrates that the specific type of intervention affects the course of the dispute. Kolb's work (1983, 1994) also illustrates the effect of different mediator styles on the settlement process. In addition, their intense focus on process has led third-generation researchers to assess the influence of an array of third-party characteristics on dispute resolution.

Industrial relations scholars had virtually ignored the influence of characteristics such as the race and gender of the neutral on the dispute resolution process, but third-generation researchers began to analyze such effects. Similarly, these researchers have assessed the effectiveness of internal mediation versus external mediation and have also dealt with the relative effectiveness of supervisors versus peers in resolving disputes (Karambayya, Brett, and Lytle, 1992).

An additional item on this generation's research agenda is the examination of the relationship between the perceptions and levels of satisfaction of the users of ADR procedures and the specific nature of those procedures. For example, some of the principal criteria Bingham used to evaluate the effectiveness of REDRESS, the U.S. Postal Service's dispute resolution program, are measures of the satisfaction of individual employees and supervisors with the program. Bingham's evaluation of the USPS program also depicts the influence that different ADR procedures have on the nature of individual-level relationships within the organization. For example, Bingham (1997b, 2003) analyzes the degree to which mediation can bring about the conditions for participants to acknowledge each other and apologize for their wrongdoings.

Third-generation researchers have also begun the intricate task of determining whether arbitration awards are qualitatively or quantitatively different from court awards. Bingham notes that Howard (1995) compared damage awards in discrimination cases decided by litigation and by arbitration and discovered that in many respects, employees did better in arbitration than they did in litigation. By contrast, in a recent study, Eisenberg and Hill (2003) compared arbitrated outcomes with court-tried outcomes for a large sample of employment discrimination cases and found no statistically significant differences in employee win rates and median award levels in this comparison. By analyzing the effect of procedures on outcomes, this research is similar in some respects to the research conducted by the second generation. It is different in at least two respects: first, it does a much more careful job of parsing the effect of specific procedures on outcomes, and, second, it provides evidence that has implications for the societal consequences of ADR.

The third generation, in common with the first, is concerned with the extent to which employees are provided with due process protections. The principal difference between first- and third-generation researchers is that the former approach the topic from the perspective of the law, while the latter have developed models to test empirically the effect of variations

in due process protections on dependent variables such as settlement rates, participant satisfaction, and perceptions of procedural fairness. Bingham's own research (1997a) on the so-called repeat player effect is a leading example of how a researcher can translate a conceptual concern for an imbalance of power in arbitration into concrete and testable hypotheses.

The Next Generation: Synthesizing Across Levels

We believe the next generation of researchers will have the task of synthesizing the disparate theories and empirical findings of the first three generations of researchers. They will need to do a better job of bridging the gap between practice and research and of building and testing empirical models based on sound theory. One of the principal questions frequently debated by first-generation researchers was the potential effects of ADR on the quality of justice in our society. We maintain that one of the principal tasks of the next generation of researchers will be to reexamine the societal implications of ADR, but to do so on the basis of rigorous empirical analysis rather than abstract debate. Has the transformation of employment dispute resolution in the United States strengthened or weakened employee rights and our system of social justice?

We know, for example, that there has been a dramatic shift in the resolution of many types of disputes from public forums to private ones. Some have claimed that this shift represents nothing less than the de facto privatization of our system of justice. One index of this transformation is the declining use of trials to resolve disputes. Samborn (2002), for example, reported a significant decrease in federal trials over the period 1970–2001: thirty years ago, 10 percent of the civil and criminal cases filed in federal courts were resolved after a jury or a bench trial; in 2001, although the number of federal cases had increased by nearly 150 percent, the proportion resolved by trial had declined to 2.2 percent. Samborn attributes “the vanishing of the trial” to the increasing reliance of the courts and the disputants on ADR.

The privatization of American justice is fertile territory for serious researchers, but to date there has been virtually an absence of rigorous, analytical research on the implications of this trend. This picture is not substantially different from the picture one might paint of the evolution of research on the societal effects of collective bargaining. The rise of collective bargaining in the United States, particularly after the 1930s, was accompanied by heated debates and controversies, but serious scholarly

attempts to understand the societal effects of collective bargaining did not commence until the 1960s, when social scientists (aided by the development of computerization) began to analyze large bodies of empirical data (see, for example, Freeman and Medoff, 1984).

We also believe researchers should attempt to synthesize micro- and macro-organizational approaches to the study of employment dispute resolution systems. Specifically, efforts should be made to examine more carefully the effects of microvariations in dispute procedures on macrolevel outcomes, such as recruitment, retention, employee performance, productivity, employee satisfaction, and even profits and other bottom-line measures. Would the more precise specification of procedural variables help us confirm the predictions of the exit-voice model regarding workplace outcomes? Or would more careful specification uncover anomalies of the type discovered by Lewin and Colvin?

Similarly, we believe that researchers should begin to grapple with the divergent assumptions concerning the driving force behind ADR's diffusion in the workplace. Throughout our analysis of successive generations of research, we have emphasized the link between these different assumptions and each generation's primary focus. It is now time to develop a multidimensional framework for understanding the emergence of ADR, which will lead to a broader and more complex agenda for researching the phenomenon.

We also need to learn more about the effects of dispute resolution systems in one organization or sector on the behavior of employers and employees in other organizations or sectors; in the industrial relations literature, these are called spillover effects. Many employers engage in benchmarking the experience of other employers, and there are distinct patterns of ADR usage across industries (Lipsky and Seeber, 1998). Our understanding of cause and effect in this regard, however, is limited. At some point in the recent past, it appears that a so-called tipping point was reached in the use of ADR in employment relations (Lipsky, Seeber, and Fincher, 2003). Gladwell (2002) has analogized the diffusion of social innovations to an epidemic. We do not have a clear understanding of the factors that led to an ADR "epidemic" in the 1990s, and in the absence of an understanding we cannot predict whether ADR is likely to become institutionalized or will be just another passing management fad.

To address such questions, the next generation of researchers will need to do a better job of building multidimensional models and using multivariate statistical techniques to test hypotheses. A considerable amount of

the research reviewed by Bingham consists of either qualitative analysis (such as case studies) or, if quantitative in nature, simple tabulations and correlations between variables of interest. To advance our knowledge of the effect of ADR procedures on outcomes of interest, multivariate models that control for the influence of organizational and environmental factors will need to be developed (see, for example, Lipsky, Seeber, and Fincher, 2003). The influence of ADR procedures on workplace outcomes is probably sensitive to the settings and contexts in which it is used, as Bingham indicates. But social scientists usually require a higher level of statistical proof of this proposition than has yet been provided by researchers.

Finally, an additional methodological challenge facing the next generation of ADR researchers is the need to develop a richer body of comparative studies that can serve to validate or refute the very foundation on which these procedures have been instituted—that they are a preferable alternative to traditional dispute resolution methods. We already noted that there is some third-generation research comparing ADR and litigation outcomes. Comparative ADR research, however, is still in its infancy and must be applied to first- and second-generation concerns as well. In addition, the ADR path must be compared to the traditional path as a coherent set of alternatives rather than merely as a specific procedure. To do this, researchers will need to develop a clear and structured set of criteria for evaluating and comparing ADR processes and outcomes. We believe that by doing so, ADR researchers will begin to bridge the generational gaps discussed throughout this commentary.

Toward a New Paradigm?

Our call for the next generation of researchers to engage in a synthesis of the work of earlier generations and to build more rigorous models requiring more sophisticated statistical techniques would be characterized by Kuhn (1962) as a recommendation consistent with the course of normal science. As we have noted, however, existing paradigms have not been able to explain many phenomena of interest in employment dispute resolution, and the number of anomalies continues to accumulate. We cannot discern the contours of a new paradigm, nor can we predict how soon it will arrive. We believe it is safe to predict, however, that when a new research paradigm emerges, it will permit “the prediction of phenomena that had been entirely unsuspected while the old paradigm prevailed” (Kuhn, 1962, p. 158).

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