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Foreword: *Verstehen* and Dispute Resolution

John B. Attanasio *

Over time, people have developed a variety of techniques to resolve disputes through means other than violence.¹ On both national and international planes, some of these techniques have been promulgated into law. For example, in the international sphere, some of the established norms of diplomacy have involved dispute resolution.²

The British and American judicial systems have adopted an adversarial approach to dispute resolution. Essentially, this entails each party before a court putting forward her most powerful arguments—within certain ethical boundaries such as honesty—and having a judge or jury decide who wins.³ Not all courts follow this model. For example, German courts impose much stronger obligations on lawyers to function as officers of the court in helping judges to ferret out the truth, apply appropriate substantive legal principles, and resolve the disputes.⁴

Courts afford only one method of dispute resolution, although one upon which American lawyers have relied to the neglect of others. This point can be exaggerated, however: while American court dockets continue to swell,⁵ most cases do not go

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1 Some of these, such as diplomacy or trials, often operate against the backdrop of a threat of violence.

2 See, e.g., LEO KANOWITZ, *CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION* 909-90 (1986).

3 See generally FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* 4-8 (3d. ed. 1985).

4 See, e.g., Benjamin Kaplan et. al., *Phases of German Civil Procedure* I & II, 71 HARV. L. REV. 1193 (1958). This contrast should not be drawn too sharply, however, as recent reforms in both the German and American systems have drawn each closer to the other. See Arthur T. von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609 (1988).

5 See KANOWITZ, *supra* note 2, at 7.

to trial. For example, recent statistics in the federal courts indicate that as few as five percent of all federal lawsuits proceed to trial; and pretrial motions resolve approximately thirty-five percent of all pretrial litigation.⁶ These developments suggest that American lawyers have embraced alternatives to the adversarial model. They often resolve disputes by negotiation—perhaps against the backdrop or with the spur of litigation. This alleviation of the stark Hegelian clash of the adversarial system may be partly attributable to the high costs of litigation⁷ or to the increasing impatience of overburdened courts with parties who are pressing weak claims or defenses.⁸

Some of these changes, however, may have been catalyzed by a growing movement in the academy called Alternative Dispute Resolution (“ADR”).⁹ Understandably, calling this approach *alternative* dispute resolution has offended some of its proponents. Many scholars and practitioners in this growing area think of what they do as dispute resolution, with judicial process serving as one alternative. Supporting this proposition, courts themselves have incorporated many ADR techniques in their management of cases.¹⁰

While lawyers have a monopoly on representing people before courts,¹¹ they do not have a monopoly on dispute resolution. Many other professionals including diplomats, social workers, police officers, politicians, and counsellors in various areas, all routinely engage in dispute resolution. Indeed, the very point of this Symposium is to bring together scholars from various areas of dispute resolution who normally do not talk with each other.

To lay some groundwork for the ensuing discussion, I would like to sketch one fairly simple typology of dispute resolution.

6 See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511-12 (1986). Indeed, the number of cases going to trial has declined dramatically in recent years. *Id.*

7 See A. Leo Levine & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 248-51 (1985).

8 See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Melissa Nelkin, *Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

9 Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Frank F.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. (1985).

10 Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818 (1988).

11 See generally KANOWITZ, *supra* note 2, at 7-10, 33-38.

Then I would like to briefly explore the basics of Max Weber's concept of *Verstehen* that may help to inform dispute resolution, particularly in certain parts of this typology.

I. ADJUDICATION, ARBITRATION, MEDIATION, AND NEGOTIATION

Anyone interested in describing the realm of dispute resolution would include adjudication, arbitration, mediation, and negotiation.¹² More controversial is focusing on only these as legitimate areas of dispute resolution. After all, one could claim that psychiatric counseling involves a sort of preventive dispute resolution. When a psychiatrist counsels an alcoholic and helps to avert a marital dispute, one could argue that the psychiatrist engages in dispute resolution, or at least prevention.

With specific regard to governmental institutions, one might argue that dispute resolution involves not only courts, but also legislative and executive bodies. For example, one might argue that when a legislative body decides whether to give a special capital gains rate of taxation for investment profits, it is resolving a dispute among the various members of society who would favor or oppose such a tax break. In more general terms, it is resolving a dispute about the generation and distribution of societal wealth. Ideally, the legislature should approximate the confluence of societal opinions in how to resolve the dispute.

One might try to describe the resultant legislation as a kind of negotiation writ large. This is a bit of a stretch, and in any event, I would like to focus on the more traditional, micro-level view of dispute resolution. While one might try to add to or subtract from adjudication, arbitration, mediation and negotiation, I think that these four categories aptly describe the impressions of what both lay people and lawyers typically have in mind when they talk about dispute resolution.

In a fairly widely practiced form of dispute resolution, one of the parties to the dispute brings the matter to a court or an administrative body. Such a tribunal generally has the jurisdiction—which comes from the Latin *jurisdictio*, meaning power—to

12 With the exception of adjudication, lawyers and nonlawyers labor in each of these areas. Nonlawyers are also extensively engaged in adjudication as experts. See, e.g., Bernard L. Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES CRIM. PSYCHODYNAMICS 221 (1959), reprinted in DAVID W. LOUISELL ET. AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE 938 (6th ed. 1989).

summon all parties to a dispute before it.¹³ The tribunal can then resolve the disagreement and enforce its decision whether any of the parties to the conflict like this resolution or not.

Courts and administrative agencies have established rules about what procedures¹⁴ and substantive law they will use to resolve the dispute.¹⁵ Parties to a dispute who have chosen a judicial or administrative tribunal have limited influence in picking the specific adjudicator who will resolve their dispute.¹⁶ In some jurisdictions, particularly in the United States, parties in court may have the option to try their case to a jury, which is a group of ordinary citizens assembled for the purpose of resolving the dispute.¹⁷ The judge still presides over the case and rules on questions of procedural and substantive law. Within these boundaries, the jury resolves the dispute. Often, procedural rules permit the parties substantial sway over who will be the jurors.¹⁸ Consequently, the influence of the parties in a court case may be greatest when they try the case before a jury.

Parties to a dispute who have selected a judicial or administrative tribunal must generally abide by the procedural rules of that tribunal. At times, these rules afford the parties some power to modify certain rules by agreement.¹⁹ The dispute resolution

13 See, e.g., FED. R. CIV. P. 4.

14 For example, the federal trial courts in the United States use the Federal Rules of Civil Procedure supplemented by local rules for individual districts. Federal appellate courts use the Federal Rules of Appellate Procedure. State courts in the United States apply separate sets of rules. Federal and state administrative tribunals apply yet other sets of rules. For instance, the procedures followed by the administrative tribunals of the Social Security Administration are specified in 26 U.S.C. §§ 3101-3128 (1988), as well as the Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1988).

15 For example, in common law systems, statutes, administrative regulations, and judicial interpretations of these all take precedence over judge-made law. In the American system, the law of the national government takes precedence over law promulgated by the states. See U.S. CONST. art. VI, § 2. In civil law systems, courts look to codes; they are not bound by judicial precedents. When interstate disputes arise in federal systems or international disputes arise, courts and administrative tribunals look to conflict of laws principles to determine which substantive rules apply. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1967).

16 Some jurisdictions select which judge will adjudicate a particular case by lot. Even in these jurisdictions, however, there may be limited power in some cases to change venue to a district in which there are few trial judges so as to limit the possibilities.

17 The Sixth Amendment of the United States Constitution guarantees a jury trial in criminal cases and the Seventh Amendment guarantees the right in civil cases when the amount in controversy exceeds \$20.

18 Under federal civil practice in the United States, parties can challenge jurors for cause and can challenge a limited number without cause. See JACK H. FRIEDENTHAL ET. AL., CIVIL PROCEDURE 519-25 (1985).

19 See, e.g., FED. R. CIV. P. 6(d) (allowing parties to modify many time periods speci-

procedures followed by a court are often formal and ritualistic; however, the practice can vary markedly with the jurisdiction and the particular judge. Administrative proceedings can be somewhat less formal than judicial ones. A judicial or administrative tribunal might also require the parties to observe government promulgated substantive law. Alternatively, it may allow the parties to a contract, for example, to create their own substantive rules, or to modify pre-existing bodies of substantive rules.²⁰ Courts and administrative tribunals tend to be powerful actors that can in some degree level the playing field for conflict resolution. One cost of this leveling is less flexibility.

Arbitration is a second form of dispute resolution. In contrast to many judicial or administrative proceedings, the parties often select their own arbitrator or arbitrators. The parties may employ a variety of techniques to do this. For example, they may adopt certain methods and criteria for selecting arbitrators, perhaps narrowing the field to arbitrators associated with a particular organization. Arbitrations are less formal than judicial or administrative proceedings, although the degree of formality can vary considerably depending on the arbitrator. Normally, the parties agree in advance that the decision of the arbitrator will be binding even if they do not like the result.

Parties can put the case to the arbitrator and then contractually agree to accept the arbitrator's decision after she has issued it. This approach may, however, more closely resemble mediation, another dispute resolution technique discussed below. In addition to selecting the arbitrator, parties to an arbitration will generally select the procedural and substantive rules that will apply to the dispute. Again, this is easier to accomplish before any dispute actually occurs after which the selection of procedures can become highly result-oriented.²¹

Negotiation is a third dispute resolution technique. In this process, the parties discuss how to resolve the dispute among themselves, perhaps using legal counsel or other representatives. Rather than an adjudicator deciding the case, the parties them-

fied in the Federal Rules of Civil Procedure).

20 See, e.g., *M/S Bremen and Unterweser Reederei v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (upholding forum selection clause that deprived a federal court of jurisdiction over a dispute between citizens of different countries).

21 For further discussion of arbitration, see FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985).

selves agree to the resolution. They may memorialize their agreement in a contract that will be enforceable by a judge or an arbitrator. If both parties are sovereigns, they may memorialize their agreement in a treaty that will likely be more difficult to enforce. As there is no intermediary in negotiation, the parties themselves must resolve their disagreements. Success requires considerable cooperation and good will on both sides. It also requires an unemotional awareness of the overriding benefits of agreement to overcome the disagreements that predictably arise.

Points of negotiation may include results, substantive rules to be applied in reaching those results, and procedural approaches used to consider the dispute. Procedurally, parties to a negotiation may argue over such issues as where the negotiation will take place, who will participate, how long and in what order each can speak, and even the shape of the table at which the parties will sit.

As with arbitration, negotiating procedural rules is easiest to accomplish before specific disputes present themselves. At this point in time, parties are somewhat less likely to be result-oriented in specifying procedures simply because they have more difficulty predicting which procedural rules will lead to which results. Procedures always relate in important ways with the content of substantive rights. Parties recognize this. Consequently, they often seek to gain substantive advantages or to scuttle negotiations altogether using procedural arguments. Particularly if this is done excessively, jockeying for procedural advantage can undercut the trust which is so important for successful negotiation. This method of dispute resolution requires an agreement of the parties or contract at the end of the day. Posturing on procedural rights can also obfuscate substance, and focusing on substance in a rational way with as little pettiness and emotion as possible is often what resolves disputes. When there is considerable distrust between the parties, negotiation can be a difficult approach. In such cases, some neutral third party may have to serve as a judge, an arbitrator, or at least a mediator.²²

Mediation is a fourth method of dispute resolution. This method combines some of the elements of other dispute resolution techniques already discussed. Like court litigation and arbitration, mediation brings into the dispute a third party. Like negotia-

22 For further discussion of negotiation, see ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983).

tion, however, the parties must agree on any resolution of the dispute. The mediator's decisions are not binding. Instead, the mediator serves as a neutral third party who will try to facilitate agreement.

A mediator may use a variety of methods to facilitate agreement. The mediator might simply converse with the parties, perhaps to nudge the parties into thinking more clearly about their positions, or the mediator may offer her own observations. The mediator may actually draft agreements based on her conversations with the parties, they can then choose whether to sign this proposed agreement. Proposals put forward by a mediator might go through a number of drafts before the parties can actually agree to them.²³ Certain mediators may have some power to force agreement and subsequently to enforce the agreement. An example would be a powerful international actor. Such a mediator can be the initiator and prime mover of bringing the parties to the table and even to eventual agreement.²⁴

II. MAX WEBER, RATIONALITY, AND *VERSTEHEN*

Max Weber, one of the founders of modern sociology, was a most astute observer of human behavior. Among his many areas of interest was law.²⁵ One of the overarching themes of Weber's writings on law is the rationalization of legal authority.²⁶ For him, what distinguishes law from morality or convention is a specialized enforcement staff that administers the law.²⁷

Weber spoke of the ascendancy of legal rational authority descriptively. Normatively, he viewed the growing predominance of rationality with considerable ambivalence, sometimes praising it and sometimes lamenting it.²⁸ Still, the rational systematization of law decreased the exercise of arbitrary power and elevated the rule of law over the rule of human beings. In this way, the law

23 See *id.* at 171-73.

24 For further discussion of mediation, see ROGER FISHER & WILLIAM URY, *INTERNATIONAL MEDIATION: A WORKING GUIDE* (1978); FRANK F.A. SANDER, *MEDIATION: A SELECTED ANNOTATED BIBLIOGRAPHY* (1984).

25 For further discussion of Weber's observations on legal phenomena, see ANTHONY T. KRONMAN, *MAX WEBER* (1983).

26 *Id.* at 4.

27 *Id.* at 30.

28 *Id.* at 56. While Weber views the rational systematization of modern legal systems as freeing them from arbitrary decisions, he also views the increasing bureaucratization entailed as shackling human creativity and autonomy. *Id.* at 166-88.

could grow more fair in regulating the behavior of all citizens, including the law giver.²⁹

For Weber, the concept of rationality is inherent to, and indeed interchangeable with, the formalization and systematization of the law.³⁰ At times, he described formalization as simply government by general rules of law. At other times, he ascribed to formalization such characteristics as the "independence or self-containedness" of the legal system.³¹ He also placed great importance on the "comprehensiveness and organizational clarity" of the legal order.³² Indeed, his formal, systematic, rational view of law prompted him to criticize the common law system as being somewhat primitive. It did not convey the calculability that Weber thought so important to facilitate market economics. The common law doctrine of *stare decisis* ameliorated some of these difficulties³³ as did the identification of the English bar with commercial interests.³⁴

Weber saw a great divide between highly formalistic, rationalized forms of justice, and more *ad hoc* forms of arbitration practiced on the household level in more primitive societies. For him, the limited utility of *ad hoc* arbitration was largely confined to resolving disputes among people who are familiar with each other, such as the members of a household. Particularly when practiced on impersonal levels, dispute resolution had to be formalized and systematized.³⁵

As Weber's highly rationalistic approach criticizes even common law adjudication, it would appear to reject—or at least be more deeply critical of—the noncourt models of dispute resolution discussed in the previous section. Essentially, he would seem to argue for greater systematization of arbitration, at least by stricter adherence to the principle of *stare decisis*.

While I note Weber's views on rationality for background, I am not suggesting either that court adjudication in common law systems or arbitration be more formalized, systematized, or rationalized. I am primarily interested in the applicability of another

29 *Id.* at 56.

30 *Id.* at 78.

31 *Id.* at 92.

32 *Id.* at 89.

33 *Id.*

34 *See id.* at 120-24; *see also* MAX WEBER, SELECTIONS IN TRANSLATION 352-57 (Walter G. Runcimin ed. & E. Matthews trans., 1978).

35 *See* KRONMAN, *supra* note 25, at 98.

concept in Weber to negotiation and mediation. This concept is *Verstehen*. In German, *Verstehen* means "to understand."³⁶ Weber would view mediation and negotiation as less systematic forms of dispute resolution which are less advanced than formal, rational bureaucracies—particularly when dispute resolution is impersonal and not among members of the same household.³⁷ Nevertheless, if one accepts the validity of these other methods of dispute resolution, *Verstehen* can render their methodologies more precise.

Verstehen is central to Weber's methodology as a social scientist and, more specifically, a sociologist. In the tradition of the scientific method, *Verstehen* entails a certain neutrality, objectivity, and dispassion. Weber was deeply interested in ferreting out the purpose or intention behind people's actions. Sometimes this intention is fairly plain. Under these circumstances, intention may be readily ascertained through the investigator's normal patterns of thought and observation. At other times, actors behave in ways that an observer may find difficult to comprehend using thought patterns that are familiar to the observer. Indeed, the meaning that an actor gives to her acts may be false according to the norms held by the observer.³⁸ Particularly in this case, Weber wishes the observer to shed her own values and assume a value neutral position. In this way, the observer can truly understand the acts of the subject being observed.

In his book about Weber, Professor Anthony Kronman describes the appropriate attitude for *Verstehen* as being "detached" or "uncommitted."³⁹ According to Professor Kronman, achieving this state requires suspending one's own values. Such suspension requires a positive act of will.⁴⁰ One might argue that this normative agnosticism suspends the observer's powers of understanding remedies. Weber believed, however, that values are chosen as an act of willing. The observer can separate her knowledge from the value structure that she has chosen or willed.⁴¹ This separation is

36 THE OXFORD-DUDEN GERMAN DICTIONARY: GERMAN-ENGLISH 772 (1990).

37 Weber's critique of these methods of dispute resolution would have certain parallels with a more recent critique by Owen Fiss. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Compare Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985) with Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985).

38 MAX WEBER, THE INTERPRETATION OF SOCIAL REALITY 28 (J.E.T. Eldridge ed., 1971).

39. KRONMAN, *supra* note 25, at 14-15.

40 *Id.* at 22.

41 *Id.* at 21.

necessary to achieve the detachment from the observer's own values and to understand the values of her subject.

Verstehen extends beyond understanding the purposes and intentions of an actor. Weber's sociology focuses on isolating individual purposive behavior. This is behavior oriented toward a particular end or idea, where the actor picks out the means or methods of achieving this end or idea.⁴²

Weber understood that human behavior is more than the product of the actor's intentions or purposes. Actors may be constrained by the actions of others, including those in preceding generations. By understanding the context or milieu in which purposive behavior occurs, however, the observer actually may understand the actor's behavior better than the actor herself.⁴³

Weber believed in cause and effect explanations of human behavior. Part of the methodology of *Verstehen* entails a critical explanation of history. Weber would critically look at events to build an evidentiary understanding of what train of causality led to a particular action.⁴⁴ In some sense, his systematization of understanding behavior amounts to applying the scientific method to the social sciences. He was not, however, so naive as to believe that cause and effect in the social sciences follows in the same way as the principles of classical mechanics order causality in the natural sciences.⁴⁵ Human behavior is constantly evolving new cultural forms that defy such mechanical explanations.⁴⁶

One can understand human behavior as a series of decisions to follow particular rules that in turn lead to a particular action. Different degrees of regularity would correspond to different rules. Moreover, there is the regularity with which one might attempt to conform to a rule and the regularity with which one actually manages to conform to the rule despite outside impediments.⁴⁷ For example, in his critique of Rudolf Stammler, Weber talks about a rough sequence of rules that a worker follows in the process of making decisions toward a particular end:

The "worker" has certain ideas in his head: he knows empirically that his food, clothing and heating "depend" on his utter-

42 *Id.* at 27-28.

43 *See* WEBER, *supra* note 38, at 32.

44 *Id.* at 28-29.

45 In modern physics, chaos and similar theories have replaced the routine explanations that events in the rational world repeatedly conform to a particular pattern.

46 *See* WEBER, *supra* note 34, at 65.

47 *Id.* at 4.

ing certain formulae or giving other tokens of himself in the "office" (such as are customary for what the "jurists" call a "labour-contract") and on his then also becoming a physical part of that mechanism and so performing certain muscular movements; he knows further that, if he does all this, he has the chance of periodically receiving certain metal discs of a specific form or pieces of paper, which, when placed in the hands of other people, bring it about that he can take for himself bread, cabbages, trousers and so on and indeed that the result will be that if anyone thereafter tries to take these objects away from him again, there is certain probability that men with spiked helmets will appear in response to his cries for help and will assist him to regain possession of them. This whole sequence of highly complicated trains of thoughts . . . can be counted on to exist in the workers' heads with a certain probability and is taken into account by the factory owners as a causal determinant of the cooperation of human muscle-power in the technical process of production in exactly the same way as the weight, hardness, elasticity and other physical properties of the materials made up by the machines, and the physical properties of those by whom they are set in motion.⁴⁸

This quotation illuminates Weber's view that an actor follows a series of rules that influence his actions. The actor may follow the rules or maxims because they are normative in the sense that he expects that all actors should follow them. Alternatively, the actor may follow them as a means to a certain end because he thinks that they will influence another actor to act in a particular way.⁴⁹

For Weber, *Verstehen* is a method of sociological inquiry. He did not conceptualize it as a means of advancing social policy.⁵⁰ The goal of the sociologist is different from that of the dispute resolver. Both are interested in understanding facts. However, the sociologist pursues observation as an end in itself, while the dispute resolver seeks to understand the principles as a means to the end of resolving the dispute.⁵¹

Yet, of precisely what importance is *Verstehen* for the dispute resolver? The answer may vary with both the type of dispute and

48 *Id.* at 101 (quoting MAX WEBER, *GESAMMELTE AUFSATZE ZUR WISSENSCHAFTSLEHRE* (2d ed. 1951)).

49 *Id.* at 108-09.

50 *Id.* at 67.

51 See KRONMAN, *supra* note 25, at 14.

the type of dispute resolver. For judges applying a body of substantive rules to established facts, *Verstehen* may often be less important or even unimportant. Weber himself would see such dispute resolution as a formal, rational application of law to facts. *Verstehen* may be useful in discerning factual information, particularly if factors like the intention of one of the parties are at issue. Even in this fact-finding context, however, *Verstehen's* requirement that the judge suspend her own values during litigation is controversial. One might take the position that a judge ought to be detached and suspend her own value predilections. Some would argue, however, that the judge's own values should always inform her thinking about a case. Without attempting to resolve these complex questions, I simply note that to the extent that one believes that the judge ought never put to one side her own values, this view only adds another strong objection to a judge's use of *Verstehen*. Regardless of how a judge should reference her own values, she arguably ought not suspend, even for a short time, the values enshrined in the legal principles governing a particular case. These principles are filters that inform everything that the judge does in connection with the case—from pretrial motions, to fact finding, to final judgment. I only note these potential objections to the use of *Verstehen* by a judge; I do not attempt to resolve them.

Verstehen may be more useful for the arbitrator—in part because she has less searching fact-finding mechanisms than the judge. Moreover, arbitration is sometimes contractually selected as a method of dispute resolution, in part to preserve a long-term relationship between the parties. Examples can include arbitration of labor contracts between employers and employees, and arbitration between two parties to a long-term, commercial contract. Under these circumstances, the arbitrator may use *Verstehen* to understand the purposes of the parties in preserving a continuing relationship and to adjudicate the dispute with a view toward preserving that relationship. As with judges, objections about arbitrators suspending the value commitments of governing legal principles may present themselves. The force of these objections may be somewhat alleviated if the contract itself renders preservation of the relationship a value with legal content that the arbitrator must take into consideration.

Verstehen may be particularly appropriate for mediation and negotiation. In these areas, the binding force of relevant legal concerns may be somewhat relaxed, affording the parties the op-

portunity to suspend not only their own value commitments, but also those of the law. Against this backdrop, the mediator might attempt to better ascertain the positions of the competing party or parties. *Verstehen* may be critically important for the mediator as a trained neutral observer searching for common ground.

Mediators with substantive expertise in the area of the dispute may have greater difficulty using this technique—for example, a business person mediating a business dispute, or a family counselor mediating a family dispute. Mediators with expertise are often attractive to parties. Their expertise affords them respect prompting the parties to listen to them. Moreover, mediators can sometimes apply their expertise to find solutions that the parties themselves may not have discovered. Employing *Verstehen* can greatly benefit such mediators with expertise; using *Verstehen*, they can suspend the value commitments flowing from their expertise to thoroughly understand the respective positions of the parties. Without such understanding, the mediator may have difficulty finding any true common ground and may propose solutions that one or both parties reject. At some point in the dispute resolution process, the mediator should probably re-introduce her substantive expertise to advance and refine the fact-finding process. Expertise can help the mediator to ask more penetrating questions, understand documents, and otherwise further the fact-finding process. Once she understands the respective positions of the parties, a mediator with substantive expertise can use this expertise to let the parties understand difficulties with their respective positions or propose solutions. While I have discussed the use of *Verstehen* by mediators, similar points could apply to its use by negotiators, including those with special expertise. Truly understanding the interests and limitations of the other party is often crucial to successful negotiation.

Using *Verstehen* in the dispute resolution process brings up large ethical questions. As I have already indicated, dispute resolvers differ from sociologists in having to propose practical solutions to problems. All dispute resolvers operate in a sea of legal and ethical norms that impact to varying degrees on analyzing conflicts. For example, the negotiator or mediator may be operating against the backdrop of anticipated litigation or international sanctions. Therefore, when a negotiator or mediator uses the methodology of *Verstehen*, she must understand that this technique can at most be one stage in the dispute resolution process. Mediators and negotiators may suspend only for a time the value commitments of the substantive legal and ethical principles that they

understand to be applicable. Eventually, such principles should inform a solution to the dispute. This is particularly true if such legal and ethical principles protect the common good, that is, the interests of members of the larger society who are not parties to the negotiation or mediation. Such principles may also protect the interests of each party to the dispute from being unwittingly trampled.

The *Verstehen* process of discovering what is at issue in the dispute may influence what legal and ethical principles mediators and negotiators deem relevant to resolving those issues. However, in preferring particular ethical or legal principles in this determination, they should recall the Categorical Imperative of Immanuel Kant and not select a solution that effectively uses one of the parties or another group merely as a means to achieving a solution.⁵² This guiding principle should inform not only the substantive resolution of a dispute, but also the procedural methods employed.⁵³ Conflict resolution ought not resort to gamesmanship that fails to respect the rights or humanity of the participants or other groups.

Onora O'Neill demonstrates the real limits of instrumental rationality in protecting such rights in the dispute resolution process.⁵⁴ Her Essay in this Symposium, illuminates the necessity for some principled rudder, such as the Categorical Imperative. Some may argue that such a principled approach to dispute resolution is not always possible.⁵⁵ Again, such questions are large ones for this brief Essay. Let me at least say that Kant intended the Categorical Imperative to be exactly what its title suggests, a universal rule. If one can put forward instances in dispute resolution where it ought not apply, they, at a minimum, should be a last resort.

My assertion here is only that the Categorical Imperative, and other value commitments regarding the substance of the dispute,

52 See IMMANUEL KANT, *THE METAPHYSICS OF ETHICS* 40 (J. Semple trans., 1869). Although there are several formulations of the Categorical Imperative, the one to which I specifically refer is: "So act as that humanity, both in thy own person and that of others, be used as an end in itself, and never as a mere means." *Id.* Kant's four other formulations of his Categorical Imperative are summarized in HERBERT J. PAITON, *THE CATEGORICAL IMPERATIVE* 129 (1948).

53 See John B. Attanasio, *A Duty-oriented Procedure in a Rights-oriented Society*, 63 *NOTRE DAME L. REV.* 597 (1988).

54 See Onora O'Neill, *Practical Reasoning and Dispute Resolution*, 67 *NOTRE DAME L. REV.* 1365 (1992).

55 See Thomas M. Franck, *Is Justice Relevant to the International Legal System?*, 64 *NOTRE DAME L. REV.* 945 (1989).

ought to be suspended for a time during mediation and negotiation to make the process more likely to succeed. This does not, on the basis of utility in achieving true understanding of a party's position, permit manipulation, harassment, and other procedural techniques that fail to respect the parties to the dispute. My use of *Verstehen* only relaxes one's imposition of the Categorical Imperative on another party. It does not relax one's own obligations to continue to observe the Categorical Imperative to respect the rights and humanity of others throughout the dispute resolution process.

III. THE SYMPOSIUM

In this Symposium, we are privileged to feature a group of internationally renowned scholars to discuss the topic of dispute resolution. The Symposium combines the talents and resources of three different groups, the Notre Dame Center for Civil and Human Rights, the Joan B. Kroc Institute for International Peace Studies, and the *Notre Dame Law Review*.

The intellectual quest of the Symposium is to explore methodological and value questions underlying dispute resolution. We have invited scholars who are interested in these theoretical questions and who represent diverse styles and realms of dispute resolution. The categories of participants include internationalists, judges, philosophers, and mediators. We have purposely sought to bring together people who do not normally talk with each other to see if they can glean new perspectives. Specifically, we brought together Dayle E. Spencer, Director of the Conflict Resolution Program at the Carter Center; Roger Fisher, the Samuel Williston Professor of Law at Harvard Law School; Douglas M. Johnston, Executive Vice President and the Chief Operating Officer of the Center for Strategic and International Studies; Jorge Correa, former dean of the School of Law at Diego Portales University in Santiago, Chile; Peter Wallensteen, the Dag Hammarskjold Professor of Peace and Conflict Research at Uppsala University, Sweden; Onora O'Neill, an ethicist and Principal of Newnham College, Cambridge; and Joseph F. Weis, Jr., Senior Judge of the United States Court of Appeals for the Third Circuit and Chairman of the Federal Courts Study Commission.

Dayle Spencer and Honggang Yang depict a mediation case study, focusing on the assistance of the Carter Center's International Negotiation Network in resolving Ethiopia's "forgotten war"

with the Eritrean Peoples' Liberation Front. They indicate that these types of "intra-national" conflicts are the next challenge for dispute resolution, and that a successful approach will be interactive and flexible.

Roger Fisher seeks to develop a working theory for solving the problem of ineffective dispute resolution (war, strikes, drawn-out litigation). He proposes a result-oriented approach to mediation, focusing not on making the outcome conform to "objective" normative principles, but on accommodating the goals and internal ground rules of the parties.

Douglas Johnston attempts to establish guidelines for approaching the resolution of conflicts in which religion is a factor. Surveying situations in Northern Ireland, Mozambique, Sri Lanka and the Punjab, he advises mediators of such disputes to emphasize common ground without threatening the singularity and dignity of the religions involved.

In his critical look at courtroom adjudication, Judge Joseph Weis asks whether its process and remedies remain effective. He concludes that courts with interpretive authority and enforcement power serve a unique and necessary function, but could more promptly and justly resolve conflicts given more sensitively crafted procedures and substantive law.

Jorge Correa explores the unique dispute resolution challenges faced by new democratic governments in addressing the human rights violations of predecessor dictatorships. He suggests that where full criminal sanctions are politically infeasible, total disclosure of the truth can aid in establishing the society's disapproval of past horrors, in healing the dignity of the victims, and in effecting the reconciliation necessary for effective transition.

Peter Wallensteen outlines emerging patterns of armed conflict and the resultant developments for conflict resolution. He sees the end of the Cold War causing a shift to smaller, ethnic or religious internal conflicts, giving rise to more international third-party dispute resolution organs.

Onora O'Neill discusses the distinct limits of instrumental rationality in contributing to the resolution of disputes. Ultimately, to resolve the most intractable disputes requires the construction of points of agreement by an enterprise that moves beyond instrumental rationality to encompass such enterprises as re-education.

IV. CONCLUSION

In this brief Essay, I have tried to illustrate the efficacy of a constrained form of *Verstehen* to help advance dispute resolution methodology. I only give an impressionistic account of *Verstehen*. I am not trying to develop anything approaching an account of this complex concept that may be used by dispute resolvers. Indeed, I am only attempting to give some flavor of the idea to convince dispute resolvers of its potential usefulness and to inspire further exploration. I also try to urge some caution in transplanting this sociological concept into the realm of dispute resolution.

I wish to thank all those associated with the Center for Civil and Human Rights, the Joan B. Kroc Institute for International Peace Studies, Notre Dame Law School, and the *Notre Dame Law Review* who made this Symposium possible. The tireless efforts of the students of the *Notre Dame Law Review* in organizing this and other symposia have been truly remarkable. I would also like to thank the distinguished participants who presented papers, moderated sessions, and otherwise contributed to this conference. I only hope that the printed page begins to convey the sense of intellectual excitement that they brought to this gathering. Finally, as I leave Notre Dame, I would like to pay special tribute to my collaborator in this enterprise, Rev. William Lewers, C.S.C., for his wise counsel, gentle spirit, and his smile.

