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Prologue: Observations of Capitulation to the Routine

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What does it look like when a profession or field starts to capitulate to the routine? What does it feel like to be a participant in that process?

The articles that follow, like the symposium that gave rise to them, are mostly about broad themes. Aggregates of many experiences and streams of data promise a degree of validity unavailable from any one person's anecdotal rendition of experience. Yet there is a role here for a few observations drawn, with suitable disguise, from personal experience; otherwise, this series might be accused of aridity, of too much abstraction from real life. So as a prologue to this issue, I am going to devote a bit of attention to the field's past, in the form of one story each about two of the earlier domains in which our society made serious efforts to provide effective and context-sensitive mechanisms for resolving disputes that were seen as not susceptible to the courts' strengths. They are presented more in a spirit of impressionism than journalism, and with apologies to the late C. Northcote Parkinson, whose comic epic of mismanagement, *Parkinson's Law,*[1] supplies the underlying imagery as well as the satirical style. In admitting the faults of this approach, honor is due also to Robert Dingwall's reservations

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* An experienced labor arbitrator and mediator, the author directs the Broad Field Project, which uses a variety of techniques to influence a critical mass of opinion leaders to incorporate discoveries from a wide range of domains into their own work, and to inspire others in their disparate areas to do likewise. Opinion leaders here are loosely defined as teachers who attract the most able students; theorists whose ideas spark others; researchers whose studies are regarded as well-designed and well-performed; and practitioners who are seen as models by other practitioners. The project convenes interdisciplinary discussions on topics that are seen as "cutting-edge; designs written and other outputs from these discussions that showcase the results of collaboration across disciplines and practice fields; and uses these outputs in turn to develop interest in longer-term and more intensive mutual engagement, particularly research collaborations involving more than one discipline.

1. C. NORTHCOTE PARKINSON, PARKINSON'S LAW, OR THE PURSUIT OF PROGRESS (1958). In the United States, most people are most familiar with the one-liner from the book: "Work expands to fill the time available." *Id.*

about the myth of a golden age in any profession,[2] as well as to other discussions at the symposium that illuminated the subject from other angles. Yet for both of the domains of work I will briefly describe, even if there was never an age in which a golden sheen of distant impression could have survived the harder light of close and detailed examination, there was certainly a better era than there has been lately. Perhaps these sketches will be evocative.

Consider first one of the earliest systems of dispute resolution, which sought to provide a fair and efficient forum for disputes in which the parties had radically different levels of power: workers' compensation. Its background was the roiling and large-scale conflict between economic classes in the United States and other industrialized societies at the beginning of the twentieth century. Workers' compensation was one of the great social reforms of the early 1900s; attorneys who represented workers in this system, in turn, were entitled to see themselves as a voice of the oppressed, and they still may describe themselves in such terms.

But things change. I first encountered workers' compensation casually, in Detroit in 1973 as a field agent for the National Labor Relations Board ("NLRB"). One day a group of my colleagues and I went out for lunch at a watering hole frequented by local lawyers. One of our number spotted a former NLRB colleague, who just before I arrived at the agency had departed for private practice to represent employees in workers' compensation cases. In response to a general question about the work, the newly private practitioner responded, "Workers' comp is great work! I've billed out twenty-six hours this morning."

Some readers may be unreasonably predisposed to think ill of the ethics of Detroit labor lawyers. But our richly rewarded former colleague was doing nothing illegal, nor even anything particularly improper under the rules. He had simply developed a routine of meeting regularly for negotiations with his opposite numbers, who represented the major insurance companies active in workers' compensation in Detroit. Such a meeting had taken place that morning, and each attorney had brought about one hundred files—smokestack industries, after all, dominated the area, and these have always produced a large number of injuries. A couple of cases in the stack might get thirty minutes of hot and heavy bargaining; a few others might get ten minutes or so apiece. But the other ninety cases also get some negotiation attention.

This might involve opening the file, studying it for a moment, and

2. Robert Dingwall & Kerry Kidd, *After the Fall . . . : Capitulating to the Routine in Professional Work*, 108 PENN ST. L. REV. 67, 67 (2003).

one side saying something like, "We'll come down a thousand." The other attorney says, "Our guy saw your guy playing softball last weekend. We think he's recovered. We can come up five hundred, but we don't see any reason to go more." The first attorney replies to such unwelcome information with perhaps, "He's the coach. And it's not much of a league," and adds, "We're still three thousand apart. We have no further movement at this time."

The entire elapsed time for the conversation may be forty-five seconds; but each attorney has a fifteen-minute billing minimum, which has been clearly explained in writing to the clients. Thus, a profitable time is had by all, except for the clients. So I remember this story not as an example of unethical or improper conduct by the lawyer who is supposed to be representing employees, often quite indigent employees, but as an example of the way the workers' compensation attorney had *redefined the primary purpose of his work and its value.* To this lawyer, workers' compensation practice still offers the image of representing "the people," but the focus is now more on the opportunity to obtain hefty earnings per hour of effort.

My other example is rather more complex. It is about the *trajectory* of decline, as played out over decades. I hope it will cast a sidelight on a critical question: once it is clear in a certain domain that there has been a decline, are there identifiable key moments, people, or policies that effectuated these changes, that might help us identify a looming threat elsewhere early enough to mobilize resources against it?

Parts of our field are old enough—say, sixty or seventy years—that their general decline is no longer seriously disputed; some dispute resolution agencies that were once thought of as at the cutting edge of dispute resolution work, and even of social change on a grander scale, are simply no longer seen in those terms.[3] I am going to pull together some experiences of a group of such agencies I have known over the years, and construct a hypothetical single agency for convenience. My thesis has several elements:

1. The decline in this particular type of agency primarily took the form of gradual replacement of innovation by inertia or worse.

2. The better among professional staff of these agencies were mostly dismayed, but at least passive participants in this

3. For an early warning about the trend in labor-management mediation agencies, see Christopher Honeyman, The Future of the Labor Mediator, Paper presented at the Annual Conference of the Society of Professionals in Dispute Resolution (1992), *at* http://www.convenor.com/madison/labormed.htm.

trend.

3. The key moments are defined by the shifting character of successive appointments of *board members and especially chairs* of these public agencies.

4. As individuals, those officials generally show little change in orientation or capability from the first to the last day in office.

5. Many of what later turned out to have been key policy decisions were not recognized at the time for what they were.

A significant corollary of this argument is that even though the various political players, in what is inevitably a contentious arena of public policy, have always disagreed on what is important, for a long time that disagreement often enough took the productive form of stringent inquiry as to who would be mutually acceptable *and professionally credible* in the key positions. This, I believe, tended for quite a while to keep up standards generally; but in a sequence played out over many years, once the political players deliberately settle for mediocrity in one appointment to such an agency, the implied decision that quality is no longer a critical factor in an appointment to that agency can begin a slow cascade, in which each successive appointment represents some sort of lurching attempt to react to the most obvious deficiency of the immediate predecessor, while none represents a return to the bracing competition over definitions of quality which characterized the initial period.

My composite agency begins life in the late 1930s, a time when labor unions were rising in power and labor disputes were seen as a major frontier of social relations. About a dozen states in the northern half of the United States enact laws that broadly track the National Labor Relations Act, that establish rights of workers and unions, and that set up mechanisms to enforce these rights as well as to mediate the disputes inevitable to collective bargaining. One of these states—let us call it the State of Endeavor—sets out to create the best agency of this kind and, for a long time, succeeds.

Why? Well, the word on the street in the 1930s is "Labor disputes are getting to be a bit of a problem." But when the Endeavor State Legislature begins to consider state action, the customary legislative battle is colored by a state tradition of civic-mindedness and social improvement shared by both political parties. So the Endeavor Labor Relations Board ("ELRB") is formed with high hopes, though with a less-than-lavish budget; the state has a reputation as a place where people

know how to guard a dollar.

One reason for a modest budget is that there is parallel federal jurisdiction, so everybody knows that the big contested cases will end up before the parallel federal agency or in federal court. The result of the modest legal role for the ELRB, however, is a stress on providing high-quality mediation, as well as arbitration of grievances, which the ELRB offers free of charge, a rarity among agencies of its kind. The result is that the ELRB, which is so small that everybody does everything, acquires a reputation as a training ground for mediators and arbitrators, a place where a young person can acquire a whole lot of case experience as an all-purpose neutral in a short time. Then, as now, this too is a rarity; so the agency has no problem finding able people despite the ungenerous salary and career track. The initial board members, although political appointees, reflect this sense of discovery as well as the high hopes and high profile of the work; they are eminent citizens with significant experience in the rough and tumble of labor disputing, but take their roles seriously and stay for a long time.

After about fifteen years, however, the ELRB has been around long enough that it is no longer seen as "politically sexy." Upon the retirement of one of the original members, there is lessened interest among the more prestigious possible candidates. Still, the result is not bad; one of the agency's able and youngish civil service staff members, a political nonentity, is able to secure the appointment, first as a board member but later as chairman. "The Chairman," as he subsequently becomes known industry-wide, is a fortuitous choice. Energetic, even-handed, and adroit at sidestepping the politics still inevitably involved in many of the disputes at issue, his accession to leadership raises the day-to-day professional level of the ELRB further, and it becomes known as the "go-to" place when other similarly situated agencies need policy advice. In Mihaly Csikszentmihalyi's terms, you might say the whole organization is experiencing "flow."[4]

Over a number of years that follow, the Chairman's fierce independence from partisan politics and his professional competence lead to increased confidence in the ELRB as a whole, to a corresponding rise in the number and variety of submitted disputes, and to a rise in the number of staff. The salaries continue to be below what many of the staff could expect to receive elsewhere, partly because one of the Chairman's tactics for maintaining political independence is to be conspicuously indifferent to his own salary, while the normal rules of

4. *See* HOWARD GARDNER ET AL., GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET (2001). This book was one of the recommended readings for participants in the symposium and its ideas permeate several of the other writings here.

hierarchy mean that everyone else at the agency must be paid even less.

Yet not all aspects of this success are regarded with equal warmth by everyone. One aspect is that the Chairman's longevity, competence, and doggedness gradually result in other board members deferring to him on all those messy administrative details. After nearly three decades of his dominance, the language of the rules and regulations, as well as custom, assume that the agency chair is "the boss" where a problem is administrative in nature. The other board members retain a full vote in contested cases, but gradually their original voice in daily management is muted. The significance of this becomes apparent only later.

Also, even in the State of Endeavor with its bipartisan tradition of public-spiritedness, a political imbalance becomes more evident as the air of innovation surrounding the ELRB fades; while one political party tends to see high standards and efficiency in this public service *as* a public service, the other party suspects that this particular public service is helping to lend credibility to, and therefore buttress, a major supporter of its opponent. The Chairman's time of dominance, meanwhile, cannot be infinite; among other issues, his conservatism on matters of gender and ethnic representation in hiring, forged in an earlier age, are getting to look a bit out of date. By the late 1970s, trouble is brewing on these as well as other fronts. Certain influential politicians, not all from the same party by any means, wish the ELRB would have been more accommodating on matters their key contributors saw as pressing. The board and staff's vaunted expertise starts to lead to "we know our stuff" complacency. The composition of the staff starts to reflect a desire for the comfortable familiarity of "people like us," rather than the bracing impact of diverse sources of wisdom and point of view. And even as the dispute resolution industry in the larger sense begins a phase of rapid development and experimentation, the parochial and situation-specific doctrines, which led to the ELRB's early success, begin to look like eternal verities to people "inside." They are no longer paying so much attention to what is happening "outside."

It comes as a shock to the system when frustrated politicians arrange for a more amenable successor. Because multiple constituencies of the agency have also become frustrated by an environment so dominated by one individual, no one puts up much of an effort to secure an equally strong successor to the Chairman, and the lucky winner is a bit down-market. Although generally well-meaning, honest enough, and superficially more modern in approach than the Chairman, the new chairman never seems quite up to the job; the disparity between the expertise still embodied in the staff and the other two board members and the provincialism of the ELRB's head becomes too obvious for the governor to ignore, and the new chairman is not reappointed to a second

term. The staff and many of the ELRB's repeat-players breathe a sigh of relief at the appointment to the chair of the old Chairman's "favorite son."

Yet this appointment too proves a disappointment; favorite sons rarely display the dynamism of a dynasty's founder. Over the several years that follow, some policies and practices are promptly restored to those of the former regime; but beyond this limited concept of progress, not one ancient doctrine gets reexamined and not one encrusted policy undergoes the scrutiny appropriate to a changing age. Most dangerous of all, a sense of reversion to a familiar norm starts to breed a sense of indolence. The ELRB's performance slips, in terms of both quality of output and sensitivity to the need for timely action. This gets around.

Thus weakened, the organism falls prey to a virus. A technically highly competent and ambitious staff member, whose energy level conspicuously exceeds that of superiors, is able to elbow aside the somewhat somnolent leader and become the new chair; the former chair continues as a board member. But the new chair's energy reflects, in addition to a lean and hungry demeanor, some more unfortunate personal tendencies; let us lump them together as raising "ethical concerns." There have, of course, been hints, and more than hints, during the new chair's long rise through staffdom. But indolence at the top has led to inattention among those who might have averted the appointment. The new chair's several-year tenure is marked by a continuous series of upheavals, including the ELRB's first public scandal.

The organization and its professional community, however, retain enough dignity to gather themselves together and insist on the chairman's removal. Still, the agency's reputation has been significantly weakened. And in the interim, the sitting governor has found it expedient to appoint to the board's third seat an old pal and political ally, whose experience in the relevant type of disputes is just enough that his resume can be read as claiming labor-management expertise. A measure of the ELRB's diminished status is that the real reason for this selection is the earnest desire of the higher-ups in his current, much larger department to promote him into high-level employment somewhere else—because with great energy and goodwill, he has led his present sub-department into chaos.

Come scandal time, this dramatis personae leaves the governor with a three-way choice for a replacement chairman, at a critical juncture when it may be hard to find someone both qualified and willing to clean up the mess: (1) to identify and appoint an unknown to the top job, with all its administrative complexity; (2) to re-elevate the same previously demoted individual; or (3) to give his old political pal an unexpected treat. Few governors would be so wise as to resist the temptation.

A period of utter confusion follows the new appointment, with a new and unworkable policy created every week on every subject.

Through all of this, a mostly professional staff has labored on, in proud but underpaid obscurity. Not wishing to sully their hands with politicking, they have long seen no route to a general pay raise, to a better promotional track, or to other such perks. Now they see their opportunity. The new and inept chairman needs the support of the professional staff like no previous predecessor. They make an implicit deal. The new chair's influence with the governor will be used to the staff's benefit; salaries will be raised and promotional positions created. In return, the staff will cover for the new chairman.

This, however, requires an all-but-explicit conspiracy; the state's salary system was not designed to give existing employees opportunities to claim more money, but rather, to create administrative roadblocks to any such desires. So it will be necessary to demonstrate that the knowledge and skills required for the job have undergone significant change, in the direction of a comparable group of state employees who happen to be paid much more. Thus, what had been long coded in the state's personnel system as the job of *mediator* and long considered a job for the specially qualified is refitted into the bureaucratic pay scales by redefining the core of the job's requirements as *legal* expertise. Although the professional staff, eighty-five percent lawyers by original training, professes to remain a distinct class of specialists in dispute resolution, all those who will fit are now re-graded into one of the existing salary grades of attorneys. It takes a while for the professionals to register that in bureaucracy, the paperwork actually counts for quite a lot and that their lifelong claim to specialized expertise and distinction has been effectively obliterated by this act.

During the same period, the governor must fill the scandal-maker's position on the board. But the apparatus of "Personnel," the governor's most closely held fiefdom within state government, has been invoked by the ELRB's salary machinations. The resulting information flow to the governor is quite sufficient for him to recognize that the ELRB is now in no position to object to a truly cynical appointment. This is handy; the governor has yet another political ally who has worn out his welcome in his present state management post and needs a new job. This one lacks *all* of the previous key requirements of effective performance in the agency; but he is, demonstrably, a lawyer, and one who has held a senior state management position. On paper, the ally is well qualified to manage less senior state "attorneys," and the paperwork now controls. The new appointee to the Board combines most of the less attractive qualities of his predecessors, all put together in one dismal package. And, for readers who have not been mentally keeping track of the

dramatis personae, when the governor can no longer put up with the chaos of the incumbent chair, the succession is obvious.

Thus we arrive almost, but not quite, at a state of repose for an agency which, for quite a while, had performed as well as any around. I leave to the reader's imagination the effects on productivity, quality of work, public reputation, internal morale, and innovation of such a series of events. There is, however, one further step yet to fall. The gradual demonstration of organizational fecklessness comes home to its final roost in a year, some time later, when budgets are being slashed all over. The governor of the day must make "hard choices," but one of them is no longer all that hard, nor must much of a political penalty be paid. The ELRB is zeroed out in the budget in its entirety, and its functions are transferred to another state agency with a vaguely related-sounding name and an existing staff of attorneys.

Politics, budgets, personal ambition, and sheer accident all play their parts in such a tale, and while one element or another of this particular tale may strike a chord with people familiar with any of a number of similar agencies, my hypothetical example does not fully reflect any one agency. Yet these elements also[5] exist in real organizations that survive these phases and continue to do good work. The articles that follow, in their different ways, examine how we may yet avert the possibility of a long succession of stories much like the ones I relayed above.

5. A moment's attention should be paid to the candidates for best supporting actor; the hack, the martinet, the toady, the apparatchik, and the careerist have all had their influence. But these are the cockroaches of organizational life; always around somewhere, they are impossible to stamp out entirely, but are easily enough kept at bay with ordinary good housekeeping. They deserve mention, but no more.

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