1987

Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation

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I. The Methodology

Over the past decade Alternative Dispute Resolution (ADR)—a term used to refer to the whole range of nonjudicial dispute resolution processes from arbitration[1] and mediation[2]—to negotiation,[3] minitrials[4] and "private judging"[5]—has become the focus of considerable attention in legal scholar-

Robert A. Baruch Bush is Associate Professor of Law, Hofstra Law School. The research and preparation of this article was supported in part by a grant from the National Institute for Dispute Resolution (Small Grants Program), and by the Hofstra Law School, to both of which the author expresses his appreciation. Valuable research assistance was provided by Andrew Horowitz, Marc Ross, Dina Epstein, and especially Howard Poliner. The author is also indebted to his colleagues Professors David Kadane and Robert Douglas, and especially Professor Susan Bryant, for their help in planning and developing the course that is the subject of this article.

1. Arbitration involves procedurally simplified and expedited fact-finding and decision by a neutral third party, which decision is binding only on the parties and in the instant case and carries no precedental effect. See, e.g., Harry N. MacLean, Voluntary Arbitration as an Alternative to Litigation, 10 Colo. Law. 1300, 1302, 1305-06 (1981).
2. Mediation is a voluntary and consensual process in which the disputing parties are assisted in reaching a mutually acceptable settlement by a neutral third party, whose role is to facilitate communications and discussion, but who has no decision-making power. See Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305, 309, 318, 320 (1971); Joseph B. Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 Vt. L. Rev. 85, 88-106 (1981).
3. Negotiation involves direct discussion and bargaining between disputing parties to arrive at a mutually acceptable resolution of contested issues. See H. Laurence Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 136-51 (New York 1980).
4. In the "minitrial," a trial-like adversary proceeding is conducted before the decision-making authorities of the disputing parties themselves, often joined by a neutral advisor or moderator who may be asked for an opinion on how a court would decide the case. The executives themselves then negotiate a resolution in light of this presentation. See Eric D. Green, Growth of the Minitrial, 9 Litigation 12 (Fall 1972).
5. See Barlow F. Christensen, Private Justice: California's General Reference Procedure, 1982 Am. B. Found. Research J. 79. The procedure is similar to arbitration in many respects, but formal rules of evidence apply, as do substantive rules of law, and the decision is appealable in court as though it were the decision of a trial court.

 Cite as 37 J. Legal Educ. 46 (1987).

ship,[6] practice,[7] and education.[8] Many law schools have moved to introduce introductory courses on ADR into their curricula;[9] some have made efforts to "integrate" ADR perspectives into standard courses throughout the curriculum[10] to reach more students and avoid "marginalizing" the ADR subject.[11]

In both ADR courses and ADR segments in traditional courses, the methodology of teaching ADR has generally been similar. While a traditional lecture or seminar-discussion format is retained in part, it has been common to modify this format by including some kind of simulation exercise(s) as a way of giving students a more direct grasp of the workings of ADR processes. This use of simulation to teach ADR is now well established and widespread.[12]

However, while simulation may be a very good way of concretizing understanding of ADR processes, it is not the only way. Moreover, there are other objectives of teaching ADR (discussed below) that neither simulation nor traditional classroom teaching fulfill particularly well. This article describes a different and powerful methodology that accomplishes a number of educational objectives important in teaching ADR, whether in introductory or more advanced courses. This methodology involves sending students to observe actual ADR sessions, by agreement with the agencies conducting them, and then analyzing the students' observations in focused discussion sessions that use analysis of observation in a conscious and deliberate way to improve student insight and understanding of ADR processes. I have used this approach for three years in an introductory ADR course with excellent results, as described below.

6. See, e.g., Laura Nader, Disputing Without the Force of Law, 88 Yale L.J. 998 (1979); Marc Galanter, Justice in Many Rooms, *in* Access to Justice and the Welfare State, ed. Mauro Cappelletti, 147 (Alphen aan den Rijn, Netherlands 1981); Special Issue on Dispute Processing and Civil Litigation, 15 Law & Soc'y Rev. 391 (1980); Robert A. Baruch Bush, Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 893.
7. See, e.g., Alternative Dispute Resolution, 21 Trial 20 (October 1985); Edgar H. Brenner, Dispute Resolution Movement Gathers Momentum, Legal Times, March 21, 1983, at 27; Center for Public Resources, Corporate Dispute Management 1982: A Manual of Innovative Corporate Strategies for the Avoidance and Resolution of Disputes (New York).
8. See, e.g., Frank E.A. Sander, Alternative Dispute Resolution in the Law School Curriculum, 34 J. Legal Educ. 229 (1984).
9. See, e.g., ABA Special Committee on Alternative Means of Dispute Resolution, 1983 Law School Directory of Dispute Resolution Programs (Washington, D.C.).
10. See, e.g., Sander, *supra* note 8, at 229, 231–33; Leonard L. Riskin, Mediation in the Law Schools, 34 J. Legal Educ. 259, 263–64 (1984).
11. See Howard Lesnick, Paper presented to the Workshop on Alternative Dispute Resolution 3–4 (October 9, 1982).
12. See, e.g., Eric D. Green, A Comprehensive Approach to the Theory and Practice of Dispute Resolution, 34 J. Legal Educ. 24956 (1984); Riskin, *supra* note 10, at 264–66; Gerald R. Williams, Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses, 34 J. Legal Educ. 307 (1984); Sander, *supra* note 8, at 230.

II. The Pedagogical Values

Observation as an "alternative to simulation" has several advantages.

First, even better than simulation, actual observations of ADR sessions balance the more abstract study of classroom work and reading and provide a sense of immediacy and relevance that intensifies student interest in ADR sessions works better than simulation in giving students a concrete and realistic grasp of the operation, and relative advantages and disadvantages, of different ADR processes as they are actually used. Third, the opportunity to sit back and watch critically, rather than be directly involved in an exercise with classmates, allows students a greater chance to be analytical and critical about the operation, and the appropriate uses and limits, of different ADR processes. And the development of analytical skills and a critical perspective should, I believe, be one of the primary goals of teaching about ADR.[13] Finally, actually seeing ADR processes used in a variety of contexts, and meeting and talking with the people who use these processes, gives students direct personal contact with the ADR field, contact that helps to overcome the kinds of biases toward ADR that, it has often been noted, exist among legal professionals. Eradicating those biases is another important goal of teaching ADR, in my view and in that of others.[14]

Thus the observation methodology not only addresses the objectives of stimulating student interest and concretizing ADR study—two objectives of ADR teaching implicitly acknowledged by the widespread use of simulation in ADR courses; it also addresses the objectives of facilitating critical comparative analysis of ADR processes and legitimizing ADR processes and practices to future legal professionals—two further objectives critical to ADR teaching.

III. The Mechanics (In Brief)

For the observations in our course, students are assigned to two-person observation teams. Each team is required to make three observations during the semester: one arbitration, one mediation, and one other process (negotiation or a variant such as advisory arbitration). Prior to initiating the course, we secured the cooperation of over two dozen agencies using different ADR processes to host these observations.[15] The observations take place in three "rounds," with all teams observing first arbitrations, then mediations, then

13. See Bush, *supra* note 6, at 900-04, 946-51, 962-94. See also Fuller, *supra* note 2, at 307, 329, 334; Green, *supra* note 12, at 245-48; Ad Hoc Panel on Dispute Resolution and Public Policy, U.S. Dept. of Justice, Paths to Justice: Major Public Policy Issues of Dispute Resolution 8-18 (Washington, D.C. 1984).

14. See, e.g., Leonard L. Riskin, Mediation and Lawyers, 43 Ohio St. L.J. 29, 43-54 (1982); Riskin, *supra* note 10, at 26062.

15. Agencies visited during the first year of the course included the following: American Arbitration Association (Commercial and Community Dispute Tribunals); Better Business Bureau Autoline Arbitration Program; American Stock Exchange Arbitration Department; Commodity Exchange, Inc. (COMEX) Arbitration Department; Divorce Mediation Processionals; Nassau County District Court Mandatory Arbitration Panels; Mediation Alterna-

negotiation or a variant. Thus all students are exposed to a range of ADR processes, and all are focusing on the same process at the same time and in coordination with our classroom study of that process.

The basic ground rules for observations are that, during the sessions, students are to be silent and not intervene in any way (unless invited to do so by the person conducting the session) and that, in any subsequent discussion of their experience, students are to maintain confidentiality by omitting names and the identifying details of cases. Before and after sessions, students are encouraged to speak with the agency staff and neutrals, and even the parties. The general substantive instructions for the observations are to observe the session with a number of preestablished "framework" questions in mind[16] and to keep an observation journal, to be written after each observation.[17]

Despite the substantial time and effort they demand, the observations are regarded by almost all the students as an "invaluable" and unique opportunity to enter the "real world" of ADR. Students usually have strong reactions—whether positive or negative—to the sessions they observe, as reflected in their often lengthy and detailed journal entries (no length having been prescribed) and their personal comments in and outside of class. The objective of stimulating student interest is thus clearly furthered by providing students direct exposure, as observers, to ADR processes.

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tives Program; New York City Ombudsman's Office; New York City Victim Services Agency, Queens Mediation Center; New York State Division of Human Rights, Conciliation Program; New York State Prison Inmate Grievance Program; New York State Public Service Commission, Consumer Services Division, Informal Hearings Program; New York City Housing Court, Landlord-Tenant Mediation Part; New York Stock Exchange Arbitration Department.

16. Using observation of actual ADR processes to teach about ADR demands a certain structure in the court syllabus, or at least in the introductory parts thereof. If students are going to observe ADR sessions and gain useful insights from their observations, they require some kind of framework for evaluating what they are seeing. They need guidelines to answer the natural question, "What are we supposed to be looking for when we observe these sessions?"

    As noted above, one of my premises is that teaching about ADR must include critical analysis of the comparative advantages and disadvantages of different ADR processes in different contexts. In fact, my belief is that this issue—what I call the issue of process choice—should be a central theme of any ADR course. See Bush, *supra* note 6, at 900-04. The use of observation makes it desirable to introduce this theme immediately, as a conceptual framework for the observations as well as for the course as a whole.

    Therefore, our course quickly introduces the subject of how to analyze dispute resolution processes and questions of process choice. The outcome of our introductory discussion is the identification of three sets of factors to be used as guidelines for both observations and course study: a list of the different goals, public and private, that may be at stake in dispute resolution; a list of factors relating to the nature of the dispute that could help predict what goals are at stake in a particular case; and a list of factors relating to process operation that could help predict whether a particular process can attain those goals. (The lists of goals and factors developed in the course are too lengthy to include here, but they are similar in many respects to the formulation of such goals and factors in Bush, *supra* note 6, at 908-21, 954-61. The methodology I use in class for deriving goals and factors is also similar to that discussed in that article. See *id.* at 948-59.)

IV. The Results

The key to the success of the observation methodology is integrating the insights gained by observation into the body of theory and practice studied in the course as a whole. In our course the primary vehicle for this integration is class time devoted exclusively to discussion and analysis of the observations in relation to the other course material.[18]

The use of the observations as a focus for discussion and a concrete reference point for study has been highly successful. To begin with, student interest and participation in observation discussions are very high. In marked contrast to the normal tendency of second- and third-year law students to be passive consumers of course content, these ADR students actively participate in making up the course content. Students are eager not only to discuss their own observations but to hear and comment on those of fellow students. Furthermore, the pattern of thought and participation generated in the discussion sessions tends to carry over into other class sessions and improves the students' willingness and ability to actively engage the theoretical materials.

In the discussion sessions students raise pointed questions that they probably would not even think of without the concrete stimulus of the observation experience: "Do arbitrators really ignore rules of law, and if so, isn't this a violation of parties' rights?" "Can mediators really remain neutral if they meet with the parties separately, and if not, isn't the process inherently unfair?" Furthermore, since these questions arise out of the students' strong personal reactions to actual sessions they have observed, the students genuinely care about the answers. As a result, I am able to engage them in a much deeper level of dialogue on substantive ADR issues than would ever be

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The student's focus for observations is to use these factors (and others they could identify as useful) to: (1) analyze the case involved and identify the goals at stake; (2) analyze the process utilized and predict its effectiveness in accomplishing those goals; (3) evaluate the usefulness of the process application in light of their analysis and observations; and (4) compare their evaluation and observations to the "experts" assumptions about dispute situations and ADR processes, as reflected in class readings and discussion. This framework, of course, is useful not only for structuring the observations but as a guide to approaching the reading materials and class presentations. Thus the observation component helps to shape the overall presentation of the course in a very productive way.

17. The instructions to students for the journals were: (a) to describe what they had seen; and (b) to comment on what aspect of the case or process seemed most significant to them, how this "striking feature" related to our conceptual list of significant factors, what they saw as the relative advantages and disadvantages of using the process observed in the case presented, why, and any other observations.

18. Beginning in week seven of the course, after observations have been under way for two weeks or so, I allocate an hour of class time each week for observation discussion. Journals are due within one week from each observation, and I review them and select particular comments as revealing good process insights or suggesting underlying assumptions. These comments are used as the partial agenda for discussion, with some time still left for spontaneous discussion so that the sessions do not become overplanned.

possible by relying upon ordinary classroom teaching methods or even simulation exercises.[19]

Once discussion sessions are under way, I constantly refer to the students' observations, and our discussions of them, in classes focused on the readings and theoretical material. In this way the observations are quite naturally integrated into the teaching of the course as a whole, providing realistic and concrete reference points for critical analysis of the more academic and theoretical materials, as well as keeping interest and involvement at a high level. Thus the observation methodology serves very well the two objectives of concretizing ADR study and stimulating student interest.[20]

The observation methodology also helps students to formulate and grasp many critical insights into ADR processes, thus serving the objective of facilitating critical analysis of ADR processes and issues. These insights are of two general types. First, observations lead students to "test" the theoretical material, in some cases finding the theory inadequate and discovering new aspects of a particular process that the theory ignores, and in other cases finding theory powerfully confirmed by reality. Second, observations often evoke powerful, frequently negative, reactions on the students' part which reveal to the students that they hold strong assumptions about what is and isn't acceptable in dispute resolution processes generally. This "surfacing" of assumptions is much more powerful in response to real-life observations than to readings or simulations alone. Once the existence of such assumptions is recognized, the assumptions—many of which are obviously related to the conceptual framework of legal training in which the students are steeped—can be identified and questioned. The result is an opportunity to confront basic assumptions about the proper goals of dispute resolution processes and to generate a wealth of insights about those goals and the biases that law-trained people tend to hold about them. The following are some specific examples that illustrate how observations have generated the two kinds of insights I have just described.

(1) Specific process insights.

—"Arbitration, as the theory suggests, vests tremendous discretion and power in the arbitrator and does not require him to employ any specific rules of decision." While the academic theory of arbitration often makes this

19. Indeed, issues raised during the sessions often provoke extended after-class discussions. These discussions involve deep and intense examination of particular issues raised in class. They are very effective in deepening student insights into the processes being studied and often provide valuable material for subsequent classes.

20. One interesting problem in the discussion sessions is the tendency of students, in discussing observations, to focus heavily on a description of the substance of the case involved in their observation rather than on the workings of the process itself. This preoccupation provides a good opportunity to point out to the students their tendency to be very conscious of substance, to the almost total exclusion of process consciousness—a natural inclination in law-trained students. Recognizing and become aware of this inclination enables the students to become much more sensitive to process issues and insights as the course progresses.

point,[21] the observations really drive it home. On one occasion, students who had observed an arbitration were excluded from the arbitrators' deliberations. During the subsequent class discussion one of the other students suggested, "Perhaps the reason you were excluded was that the arbitrators had 'something to hide' in the way they decided the case." But this comment led to the insight that, after all, the arbitrators could have nothing to hide because they had absolute discretion to decide the case any way they pleased! Another student who *had* observed deliberations then described how the arbitrator had indeed consciously ignored a legal rule and decided the case on the basis of his sense of what was a "fair" result.

—"Mediators, despite mediation theory, are not always neutral as regards the outcome or settlement, but sometimes take responsibility for the overall 'fairness' of the settlement." The issue of mediator neutrality versus accountability is a major controversy in mediation theory;[22] but the more orthodox theory maintains that neutrality requires the mediator to avoid taking responsibility for the fairness of a settlement.[23] One student, however, in observing a divorce mediation, saw that the mediator very clearly assessed whether a certain financial settlement would be fair and adequate for the wife, and that when he found it would not be, encouraged the wife to refuse it and pressured the husband to make a more generous offer. Troubled by the role conflicts inherent in adopting this kind of judgmental posture as mediator, the student grasped much more powerfully the conflict between the neutrality and accountability arguments in mediation theory. He also saw that the orthodox theory may simply not apply when mediators face the practical test of sitting passively by and watching a disadvantaged party willingly accept a grossly unfair settlement.

—"The commonness of 'compromise decisions' in arbitration derives from the fact that some arbitrators view arbitration as an extension of the negotiation process, 'listening' for the solution the parties can't reach for themselves and articulating it as their award." The tendency of arbitrators to render compromise decisions is well noted, but few have tried to understand it clearly or explain it. One provocative insight is the above-quoted "acceptability" or "projected settlement" thesis, suggested by Professor Getman.[24]

21. See, e.g., Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 861, 865-67 (1961); Christensen, *supra* note 5, at 88.

22. See, e.g., the argument between Susskind, and McCrory and Stulberg, over this issue in the context of environmental mediation. Lawrence Susskind, Environmental Mediation—Another Piece of the Puzzle, 6 Vt. L. Rev. 1 (1981), John P. McCrory, Environmental Mediation—Another Piece of the Puzzle, 6 Vt. L. Rev. 49 (1981), Stulberg, *supra* note 2. The same issue has been raised in other contexts, such as divorce mediation. See, e.g., H. Jay Folberg, Divorce Mediation—A Workable Alternative, in ABA Special Committee on Alternative Means of Dispute Resolution, Alternative Means of Family Dispute Resolution 11, 26-30 (Washington, D.C. 1982); Ann L. Diamond & Madeleine Simborg, Divorce Mediation's Weaknesses, 3 Cal. Law. 37 (July 1983); Thomas A. Bishop, Standards for Family and Divorce Mediation, Dispute Resolution Forum, December 1984, at 3.

23. See Stulberg, *supra* note 2, at 86-87.

24. Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 928-30 (1979).

Having been much influenced by the "decisional school" of arbitration, which sharply disagrees with compromise awards and arbitrator involvement in settlement efforts,[25] I was surprised by students' frequent descriptions of hearings in which the arbitrators repeatedly asked the parties questions such as, "What would you really settle for?", "What's your bottom line here?", and others clearly directed at defining settlement possibilities. These questions were apparently just as common in cases in which it was clear the parties themselves had no stated desire to settle the matter. Even in such cases, arbitrators' questions were openly directed not only to the factual/legal arguments necessary to decide the case but also to the parties' wishes and needs and hence to the *acceptability* to *both* parties of a possible decision. In short, the arbitrators' behavior observed by the students seemed to support strongly the "projected settlement" thesis suggested by Getman. This unexpected confirmation of a provocative and unorthodox thesis about arbitrators' decision making was exciting. In addition, it led to new levels of discussion about the possible reasons for the observed behavior, and focused attention on the structural problems in the arbitrators' decision making role and the tensions created by the arbitrators' broad discretion as to the use of decisional principles. In the course of this discussion, it was made clear to all, myself included, that analysis of this subject by scholars has been woefully and inexcusably deficient. Indeed, observation discussions frequently reveal major gaps in academic and theoretical work.

As the foregoing examples show, observations either reinforce or challenge the process theory in powerful ways that give students much deeper insights into the actual operation of ADR processes as well as a real respect for the need to exercise a strong critical faculty in ADR study—to carefully analyze, investigate and test propositions advanced in theory about the operation and effects of ADR processes.

(2) Insights into assumptions about processes.

—"Negative student reaction to coerced mediation is based on the assumption that voluntariness or preservation of individual choice is the most important value in dispute resolution, but this may not always be so." Observation of neighborhood dispute mediation programs in which parties are essentially coerced to appear by threats from the criminal justice system[26] evoked strong objections from several students. Discussion revealed the assumption underlying these objections: that individual choice is a primary value that must be honored by ADR processes. Once this assumption was recognized, however, it was possible to challenge it in many ways. First, why should choice be honored in ADR processes such as mediation when it is clearly disregarded in the compulsory nature of the adjudication process

25. See Mentschikoff, *supra* note 21, at 860-61; American Arbitration Association, A Guide for Commercial Arbitrators 12, 16 (New York 1984).

26. See Roman Tomasic, Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement, *in* Neighborhood Justice: Assessment of an Emerging Idea, eds. Roman Tomasic & Malcolm M. Feeley, 215, 225-27 (New York 1982).

itself? A kind of double standard for ADR is revealed, perhaps stemming from a law-oriented suspicion of ADR processes.[27] Second, perhaps some coercion is necessary to overcome public ignorance and suspicion of ADR processes that are themselves the result of "legalization" of dispute resolution over the past several decades.[28] Third, if coerced mediation can still "work" and accomplish important objectives (such as preserving or restoring a relationship),[29] and if parties are still free to walk away from the process if an acceptable settlement is not reached, what has been compromised by the exercise of coercion to bring parties "to the table"? Thus exploring the negative reaction to coerced mediation led students to a fundamental reexamination of both the reaction and the assumption underlying it, and helped them discover in the process several new insights about mediation and the effects the legal "world view" has on attitudes toward the use of this process.

—"Negative student reaction to the mediation and arbitration processes as 'lacking substance', because they operate without regard to rules or principles of decision, is based on the assumption that goals such as increasing social justice are of primary importance, and that such goals are furthered by a rule-based process such as adjudication and not by any other process." Several students reacted to the arbitration or mediation sessions they observed with dismay at the lack of concern for deciding cases according to rules.[30] Divorce mediation and consumer and compulsory civil arbitration evoked these reactions most strongly. Examination of the reaction revealed the students' underlying concern for ensuring social justice in these cases and their assumptions that social justice was the most important goal involved and that it could be served only by applying appropriate rules.[31]

27. See, e.g., Riskin, *supra* note 14, at 43-51.

28. See Frank E.A. Sander, Family Mediation: Problems and Prospects, Mediation Q., December 1983, at 3, 11.

29. For evidence that coerced mediation can work, see Craig A. McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Maine L. Rev. 237 (1981); and Jessica Pearson & Nancy Thoennes, Mediating and Litigating Custody Disputes: A Longitudinal Evaluation, 17 Fam. L.Q. 497 (1984). It should be noted that the research of the latter study was subsequently challenged. See Robert J. Levy, Comments on the Pearson-Thoennes Study and on Mediation, 17 Fam. L.Q. 525 (1984); and Jessica Pearson & Nancy Thoennes, Dialogue: A Reply to Professor Levy's Comments, 17 Fam. L.Q. 535 (1984).

30. Students are not alone in this concern. Legal scholars and legal practitioners alike have voiced similar fears. See, e.g., Owen M. Fiss, Against Settlement, 93 Yale L.J. 1085-90 (1984); Diamond & Simborg, *supra* note 22.

31. In fact, the same concern seems to underlie the objections of most scholars and practitioners who have voiced opposition to mediation and other ADR processes on this ground. See Fiss, *supra* note 30, at 1076-78; Owen M. Fiss, The Supreme Court 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2, 28-33 (1979); Nader, *supra* note 6, at 1019-21; Richard L. Abel, The Contradictions of Informal Justice, *in* I The Politics of Informal Justice, ed. Richard L. Abel, 267 (New York 1982); Linda R. Singer, Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor, *in* ABA Special Committee on Alternative Dispute Resolution, Consumer Dispute Resolution: Exploring the Alternatives, ed. Larry E. Ray, 353 (Washington, D.C. 1983); Diamond & Simborg, *supra* note 22, at 37.

Once identified, these assumptions were challenged in further discussion that identified other important goals in the kinds of cases mentioned, including those of preserving valuable relationships and concluding the dispute expeditiously. Thus the goal of ensuring social justice could not necessarily be seen as the one controlling goal.[32] Equally important, we reexamined the assumptions, first, that application of rules through adjudication necessarily helps achieve social justice, and, second, that other processes do not, and found these assumptions far less justified than the students originally believed.[33]

Again, as the examples show, examination of the students' reactions to observations provides students with the opportunity to develop a critical approach not only toward process theory but toward their own (attitudes) toward ADR processes, as they investigate and question deeply held, but not necessarily wellfounded, assumptions about the goals of dispute resolution and the comparative capacity of adjudication and alternative processes to achieve those goals. On two levels, then, the observation methodology helps fulfill the objective of facilitating critical analysis of ADR issues.

A further result of engaging in such analysis is, for at least some, a greater openness to the potential usefulness and legitimacy of ADR processes on the part of students who previously held strong, if unarticulated, biases in favor of adjudication and against alternative processes, except as vehicles for resolving disputes more cheaply and diverting cases from the courts to reduce congestion.[34] It seems likely that the personal contact with ADR practitioners also plays a part in this shift in attitudes.[35] Thus, directly and indirectly, the observation methodology helps to fulfill the objective of legitimizing ADR processes for these future legal professionals.

In sum, the observation methodology works powerfully to serve the four objectives that I originally articulated as important in teaching ADR: stimulating and maintaining a high level of student interest and involvement; providing students with a realistic and concrete understanding of ADR processes; provoking students to analyze critically the implications and consequences, both positive and negative, of decisions to use or reject use of ADR processes; and encouraging greater openmindedness among legal professionals toward ADR generally. Our experience provides strong evidence that critical observation of actual ADR sessions as an alternative (or supplement) to the more common use of simulation is a viable and valuable methodology for teaching ADR.

32. See Bush, *supra* note 6, at 968–72 and accompanying notes.

33. *Id.* at 973–75, 978–86 and accompanying notes.

34. Again, the student attitude is paralleled by that of many practitioners and commentators. See Riskin, *supra* note 14, 41–42, 51; Owen M. Fiss, Out of Eden, 94 Yale L.J. 1669, 1670 (1985); Warren E. Burger, Isn't There a Better Way?, 68 ABA J. 274 (1982).

35. This change in attitude to ADR was evident in student responses to an evaluation questionnaire in which nearly 90 percent of the students responding indicated that they now saw the present court system as inadequate for resolving many disputes, and felt that their understanding and acceptance of ADR processes had improved.

V. Limitations

While integrating an observation component into ADR courses through structured discussion sessions can be highly effective in the above respects, it is not without problems. First of all, methodologically, the discussion process itself is problematic. The primary problem is maintaining the interest of the entire class while the focus of discussion is on only one or a few students. While students maintain that they are highly interested in their classmates' comments, in fact the discussion sessions often seem to engage a core of students, with the rest only peripherally involved.

Second, despite the success of the observation discussion in generating insights about ADR, some students have grave reservations and suspicions about the legitimacy and usefulness of ADR processes as opposed to adjudication. In addition, to the extent that they are interested in ADR processes, their interest remains superficial and descriptive, without extending much into the theoretical level and therefore without real recognition that, to make effective practical use of ADR processes, a lawyer must have a good conceptual grasp of what those processes involve and what they can accomplish in the way of dispute resolution objectives.[36]

In response to the first problem, I have experimented with alternatives to discussion by the class as a whole, in a few different ways. For some sessions, I take a dozen students and concentrate upon their observations in a "fishbowl" discussion, which the rest of the class has a chance to comment on afterwards. For other sessions, I break the class up into even smaller groups and have them conduct simultaneous discussions; each group then selects a few points to present to the class as a whole in general discussion. Of these methods, the small group discussions are most effective at getting every student actively involved, although some degree of coherence is sacrificed in the process.[37]

The second problem with the observation methodology is connected to the larger issue of how to establish a rigorous substantive theme, or perspective, for approaching the subject of ADR in a course for law students. Many law students regard ADR as a shallow subject, not demanding of deep analysis and not based on values of such importance as those underlying the legal process.[38] The observation methodology can raise questions that challenge such attitudes. However, no methodology by itself is sufficient to change them. Only a strong substantive dimension in the ADR course can do this.

In the first year in which I used the observation methodology, I stressed rigorous analysis of process choice as a substantive theme, and I have written

36. See Green, *supra* note 12; Riskin, *supra* note 14.

37. I am still undecided as to the best method of strengthening student involvement and stimulating depth of insight in the observation discussions, but since the discussion process is so crucial in integrating the observations with the class study, I believe it is worthwhile to search for the best possible vehicle for that process.

38. Some commentators seem to share this view. See, e.g., Fiss, *supra* note 30.

on this subject elsewhere.[39] In the second and third years, I also stressed, as a substantive theme, the shift in values reflected in the ADR movement as a whole and the conflicts between the values underlying ADR and those underlying traditional adjudication.[40] This more explicit treatment of the values issue helped to decrease students' suspicions of ADR and increase their intellectual respect for the subject. Law students have an intuitive—and accurate—sense of the importance of the values issue, and this sense must be addressed if the course is to have a significant impact on their attitudes to ADR.

Even with these limitations, the observation methodology is a powerful tool for exploring the issues I have discussed here, as well as other important issues, in any ADR course.

39. See Bush, *supra* note 6.

40. See Riskin, *supra* note 14, at 54–57; Fiss, *supra* note 30; Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 Yale L.J. 1660 (1985); Fiss, *supra* note 34.