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# Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades

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# Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades

Robert A. Baruch Bush\*

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## I. Introduction

In the early stages of the alternative dispute resolution (ADR) movement, the most common expectation regarding the effect ADR would have on the courts was twofold: It would relieve court congestion and delay, and it would increase public satisfaction with the justice system, by diverting cases that did not require the formal

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legal process into more suitable, informal fora.<sup>1</sup> In other words, the expectation was not that the use of ADR would lead to changes in legal or courtroom procedures themselves, but that it would enable courts to conduct legal procedures with less pressure, delay, and congestion, and give parties someplace else to go when legal procedures were not necessary or useful. ADR, in this view, was not going to change the nature of what went on in court, but rather support the court system by reducing its caseload burden.

In fact, over the past few decades, ADR, the supporting player, has begun to effect the court system, the star player, in some very significant ways. And, it is quite possible that the influence of ADR on the legal system will grow even stronger in the future. Some regard this as a desirable prospect, others as a danger. One way of stimulating discussion—and preparing to deal with the policy questions raised by this phenomenon—is to engage in an imaginative exercise, envisioning what the legal system might look like in the future, if the use of ADR continues to broaden and to influence the courts.

This Article imagines a number of different visions—some related and some mutually exclusive—of what the future might look like, given continued influence of ADR utilization on the courts themselves.<sup>2</sup> Each of these visions, or scenarios, is premised on the continuation of developments that are already occurring in the ADR field or related sectors. In this sense, each is a realistic future. Laying out these alternative pictures of the possible future enables

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1. See, e.g., Warren E. Burger, Agenda for 2000 A.D.—A Need for Systematic Anticipation, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), in 70 F.R.D. 83, 93 (1976) (stating that the time has come for a new concept that would “resolve minor disputes more fairly and more swiftly than any present judicial mechanisms make possible”); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 269 (1985) (endorsing various methods of ADR each of which “assist in the resolution of a case short of a full trial on the merits”). See generally Warren E. Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274 (1982).

2. The futures pictured in this Article describe possibilities of what the court system might look like in the decades to come, given the influence of ADR. They do not address the possible shape of the ADR field itself, or other social institutions related to the courts and ADR. In other words, broader visions of the future, visions related to the developments described here, might be imagined as well, but these broader visions are beyond the scope of this Article.



us to consider and discuss which of the pictures we want to see become a reality—and which we want to avoid.

In this Article, I largely refrain from offering conclusions about the desirability of the different pictures presented; I try instead to note some of the potential benefits and risks implicit in each picture, leaving conclusions to the reader. However, the other contributors to this Symposium Issue do offer some judgments on particular developments, and the conclusion to this Article offers a few observations on some of their comments. As noted above, the scenarios described in this Article are not all mutually exclusive; some could fit together as parts of a single vision of the future. However, it is useful to view them separately. Since each one stresses particular aspects of possible future development, presenting them independently helps focus attention on each development in its own right.

## II. Scenario I: The Courts Become Expert “ADR Managers”

Two decades ago, in 1976, Frank Sander suggested the idea of courts serving as screeners or gatekeepers for a broader dispute resolution system that encompassed various kinds of ADR processes.<sup>3</sup> The idea of channelling certain types of cases out of courts and into different kinds of ADR processes, according to some rational sorting or diversion criteria, is one that has persisted and grown in popularity over the years.<sup>4</sup> Indeed, this idea has been

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3. Frank E.A. Sander, *Varieties of Dispute Processing*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), in 70 F.R.D. 111, 130-31 (1976).

4. See, e.g., Robert A. Baruch Bush, *Dispute Resolution Alternatives and Achieving the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 896-97 (suggesting the integration of several criteria to assist courts in choosing the appropriate forum); Stephen B. Goldberg et al., *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 296 (1986) (discussing a Dispute Resolution Center to refer disputants to an appropriate forum); Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 3-4 (1985) (exploring the model of a Dispute Resolution Center, or multi-door courthouse); AD HOC PANEL ON DISPUTE RESOLUTION AND PUB. POLICY, U.S. DEP'T OF JUSTICE, *PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION* 23 (1984) (suggesting that “a centralized system be established to screen complaints and refer them to appropriate dispute resolution mechanisms”).



adopted in various forms, including statutes and court rules mandating ADR for certain types of cases and multi-door courthouse projects that screen cases and refer disputants to ADR.<sup>5</sup> In all of these, some sort of analysis is made, at some level, that underlies the decision to refer a certain type of case to a particular ADR process.

In effect, what has already begun to happen is that courts themselves have become managers of a larger dispute resolution system that includes both the courts and ADR processes. Courts allocate some of their resources to deciding which cases belong in which process and implementing the decisions made. This represents one significant way that ADR has affected the courts: It has expanded the courts' involvement in caseload management functions to a new level, beyond managing and scheduling the courts' own resources.

One can envision this involvement of courts in "process management" functions increasing in the future. Judges and court administrators might become increasingly proficient at screening cases and matching them to appropriate ADR processes. Courts might become even more sophisticated, not simply channelling certain types of cases into ADR, but breaking cases up into pieces and directing different pieces into different processes—some issues into mediation, some into arbitration, some remaining in court. That is, the courts might move toward providing a coordinated treatment plan for each type of case (or each case) by utilizing multiple processes, much like a health care organization identifying appropriate treatment options for different conditions. The use by some courts of summary jury trials and settlement conferences as part of the litigation process already suggests this kind of multi-level treatment.

Alternatively, courts might use their administrative power to encourage the parties to develop these kinds of dispute resolution treatment plans, subject to court approval. In his article in this Symposium Issue, Chief Justice Moon describes how this kind of

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5. See Sander, *supra* note 458, at 12 (discussing the multi-door courthouse concept and the pilot phase of the project).



mechanism is presently under consideration in Hawaii, and how other states have already moved in its direction.<sup>6</sup>

In this vision of the future, courts become more involved with ADR management, devoting more of their resources to this task and developing greater expertise. This development might parallel what some have described as a trend toward managerial judging, with judges increasingly involved in managing the flow of cases through the litigation process rather than solely conducting judicial hearings.<sup>7</sup> In Scenario I, judges and court personnel would become process managers, directing the flow of whole groups of cases to and through different dispute resolution processes.

If this first scenario unfolds and courts move increasingly toward the expert-process-manager role, there could be great benefits to both the courts and the public, as dispute resolution resources are both expanded and used more rationally and efficiently. On the other hand, adoption of the managerial role might become a way for the courts simply to divest themselves of certain types of cases that they do not want to handle, even though these cases deserve judicial attention. Professor Carrington's article in this Symposium Issue expresses some concern that this may already be happening.<sup>8</sup>

Thus, whether this scenario holds greater benefits or greater risks depends, in large measure, on whether courts as ADR managers will act on the basis of sound principles or simply out of expediency. This concern is also quite relevant to Scenario IV.<sup>9</sup> Scholars may have a significant role to play in this area, both in

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6. Ronald T.Y. Moon, *Visions of a New Legal System: Could There Be a Legal System That Better Incorporates the Strengths of ADR and Existing Legal Institutions?*, 15 REV. LITIG. 475, 479-80 (1996).

7. Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770 (1981); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982).

8. Paul D. Carrington, *ADR and Future Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485, 495 (1996).

9. See *infra* text accompanying notes 32-37.



helping the courts to develop principled bases for ADR utilization and in evaluating the courts' efforts to employ them.<sup>10</sup>

### III. Scenario II: The Courts Bring ADR Features into Court Procedure

Over the years, commentators have made many proposals for reform of the civil court system. Some of the most notable include the following: shifting from a largely adversarial system to a more inquisitorial or colloquial procedural model involving a more activist judicial role (along the lines of European civil procedure),<sup>11</sup> simplification of substantive law rules,<sup>12</sup> reduction of the number of appeals from lower court decisions,<sup>13</sup> and simplification of procedure.<sup>14</sup>

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10. See Bush, *supra* note 4, at 901-04 (integrating the insights of scholars to develop principles that will assist in the selection of a forum appropriate to the nature of a given dispute); John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499, 500 (1989) (analyzing leading scholars' methods of empirical research regarding the effectiveness of various ADR techniques).

11. See Adolph Homberger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFF. L. REV. 9, 24-25 (1970) (discussing the Austrian model of "trial by colloquy" which involves a high degree of court participation in framing litigation and assembling proof); John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 854-55 (1985) (encouraging the employment of managerial judging specifically in the fact-finding process).

12. See Guido Calabresi, *Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class*, in 3 ACCESS TO JUSTICE 171 (Mauro Cappelletti & Bryant Garth eds., 1979) (explaining reforms directed at substantive law simplification and the effects of choosing to use bright-line rules or flexible rules); Maurice Rosenberg, *Devising Procedures That Are Civil to Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 813-16 (1971) (discussing nonadversarial and nonlitigious methods for resolving certain disputes).

13. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 605-06 (1985) (discussing methods by which judges can decide which cases warrant appeal).

14. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 813-14 (1993) (discussing possible solutions for simplifying procedure, such as ADR, and advocating more judicial control); Robert M. Parker & Leslie J. Hagin, "ADR" *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905, 1914-19 (1993) (proposing a model that includes litigation stages that resemble ADR processes and not traditional courtroom proceedings).



Interestingly, many of the features sought by these reforms are already found in ADR processes. Arbitration, for example, typically involves a more inquisitorial and activist third party, simplified rules of procedure and decision, and limitation of appeals.<sup>15</sup> Mediation and arbitration both permit greater direct participation by parties in the process, and both provide a less adversarial forum.<sup>16</sup> This parallel between ADR features and procedural reform proposals suggests a second scenario of the future: The popularity of these and other features of ADR with disputants, as proven by experience with ADR, may lead to a more favorable view of proposals to incorporate such features into the courts' own procedures. Indeed, some suggest that court rules and practices have already begun to do this in some degree.<sup>17</sup> Adoption of rules mandating settlement conferences, and judicial practice in such conferences—and on other occasions, (including encouraging the parties themselves to attend and act directly to mediate settlement discussions, for example)—have already brought ADR features into the courtroom, if not into trials per se. Chief Justice Moon's article notes these effects in his state and others.<sup>18</sup>

Moreover, the use of ADR has shown that the public places great value on certain kinds of process features. Many party satisfaction studies show that, because of the features mentioned above, ADR processes rate higher than court procedures.<sup>19</sup> This preference may well persuade judges and court reformers to bring more of the same kinds of features into courtroom procedure itself in order to provide greater consumer satisfaction to litigants.

In this vision of the future, the character of our formal legal procedure itself changes, in response to the demonstrated appeal of process features used in ADR. The changes in courtroom procedure might incorporate many of the elements suggested in the past by

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15. See generally Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

16. Bush, *supra* note 4, at 991-94.

17. See Moon, *supra* note 6, at 481-83; Parker & Hagin, *supra* note 14, at 1905-06.

18. Moon, *supra* note 6, at 477-80.

19. See, e.g., Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 1987 NEGOTIATION J. 367, 372 (discussing disputants' preferences for ADR processes over traditional court procedures). See generally ALLAN E. LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).



reformers, as noted above.<sup>20</sup> Such changes in legal procedure might mean that we move toward a less differentiated dispute resolution system overall. Of course, there would still be distinctions among the processes, but all of them—court proceedings, arbitration, and mediation—would share some similarity of character, rather than being so sharply different from one another. The common character of processes in the dispute resolution system would be less formal, less adversarial, less complex, and more participatory than that of our current courtroom procedure.

Just as this vision imagines a shift in the character of court procedures toward ADR features, it also foresees the opposite—ADR processes might shift toward greater formality and legality. To some extent, this tendency is already visible. In certain areas, for example, arbitration is growing increasingly formal and rule bound, and rights of appeal are expanding.<sup>21</sup> In other areas, mediation is being linked to arbitration in the “med-arb” process, in order to provide greater decisional finality.<sup>22</sup> One could read these developments as suggesting that arbitration is becoming more like adjudication, and mediation more like arbitration, as the processes converge.

In effect, the vision here is one of merger—ADR and court procedures move toward one another and blend into a more integrated system. Perhaps this is not a surprising development in our society, where the merger of two large and successful concerns is a common response to competitive struggle. If this scenario were to develop, it could also mean less attention by the courts to screening and channelling cases to different processes as envisioned in Scenario I because the differences between the processes themselves would not be so marked and categorical. Therefore, the courts’ management role might be different. While sometimes channelling cases to specific processes, the courts in this scenario

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20. See *supra* text accompanying notes 11-14.

21. See, e.g., William A. Gregory & William J. Schneider, *Securities Arbitration: A Need for Continued Reform*, 17 NOVA L. REV. 1223, 1228-35 (1993) (surveying the history of Supreme Court jurisprudence on the availability of arbitration for claims under the Securities and Exchange Acts); David A. Lipton, *Mandatory Securities Industry Arbitration: The Problems and the Solution*, 48 MD. L. REV. 881, 882-84 (1989) (criticizing recent decisions upholding mandatory arbitration agreements).

22. See, e.g., Dean G. Pruitt et al., *Process of Mediation in Dispute Settlement Centers*, in *MEDIATION RESEARCH* 368, 370 (Kressel, Pruitt & Associates eds., 1989).



might devote more attention to supervising a uniform, sequenced process in which most cases move through a standard series of steps as needed—for example, from mediation, to nonbinding arbitration, to adjudication.<sup>23</sup>

As is evident from the comments in Chief Justice Moon's and Professor Carrington's articles, this possible future will probably seem problematic to many, especially those who see unique value in the features of the adversary system of civil procedure.<sup>24</sup> The concern is that the courts' ability to define and protect rights would be seriously compromised if adversary procedures were modified. Since this concern is deeply held by both the bench and the bar, it might appear unlikely that this scenario would develop at all, because the courts would never allow it. However, critiques of adversary procedure have also been quite persistent, and it is possible that the influence of ADR may give those critiques more salience, even among judges and lawyers.<sup>25</sup> Public satisfaction with the justice system continues to be a major concern within the court system, and the ability to produce such satisfaction, by borrowing features from ADR processes, is something that many within the court system are likely to value highly. Therefore, Scenario II qualifies as a possible vision of the future.

#### IV. Scenario III: The Courts Become More Purely Adjudicative

A third picture of the possible future of the court system contrasts sharply with that just drawn in Scenario II. Some observers argue that if our experience with ADR has taught us anything, it is that every dispute resolution process has its strengths and limits. Asking any process to be all things to all people is

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23. See Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 19 (1989) (exploring the integration of adjudicative and ADR decisionmaking processes).

24. Carrington, *supra* note 8, at 497-501; Moon, *supra* note 6, at 481-83.

25. See, e.g., G.L. Davies & J.S. Leibhoff, *Reforming the Civil Litigation System: Streamlining the Adversarial Framework*, 25 QUEENSL. L. SOC'Y J. 111, 113-15, 121 (1995) (arguing that using ADR and modifying adversary procedure is necessary to ensure existing system does not become irrelevant to civil dispute resolution); Franklin P. Strier, *Major Problems Endemic to the Adversary System and Proposed Reforms*, 19 W. ST. U. L. REV. 463, 465 (1992) (discussing remedying attorney domination by giving judges more control).



futile. For example, mediation in divorce cases can avoid enmity and promote harmony, but it cannot simultaneously guarantee protection of legal rights. Conversely, adjudication of job discrimination cases protects legal rights, but it cannot simultaneously foster cooperative work relationships.

Furthermore, measures that would modify ADR processes in an effort to avoid the downside of ADR procedures—such as requiring mediators to advise parties of their legal rights, or requiring arbitrators to apply substantive legal rules—are an exercise in futility. The very modification that cures the problem simultaneously destroys the benefit that made the ADR process attractive to begin with. Formalizing arbitration vitiates the advantages of speed, economy, and finality. Giving mediators protective obligations makes it impossible for them to serve as effective facilitators of parties' settlement efforts.<sup>26</sup>

The lesson learned from using ADR processes, in short, is that each process can provide certain benefits, but only when left relatively pure in form, and not modified to incorporate the features of other processes. As applied to court procedure, this lesson cuts in the opposite direction from the suggestions made in Scenario II. Instead of seeing ADR features as valuable models for the courts, it suggests that if courts incorporate ADR-like features, they will wind up being less effective at doing that which only courts can do, and which is crucial in many cases: protecting rights and articulating norms. Thus, the ADR experience itself teaches us to keep courts, like all dispute resolution processes, pure in their character—in this case, the character of adjudicators of legal rights.

It is this view of the value of existing, adversary court procedure, and the need to preserve it pure and unmodified, that both Justice Moon and Professor Carrington express in their articles.<sup>27</sup>

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26. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 260-61 (1989) (noting that safeguarding procedural and substantive legal rights is in conflict with the efficiency value of settlements and that both are in conflict with fostering party self-determination and mutual respect).

27. Carrington, *supra* note 8, at 497-501; Moon, *supra* note 6, at 481-84.



Many others clearly share their views.<sup>28</sup> The point to be made here is that the ADR movement may actually support this view, rather than work against it, as foreseen in the merger vision of Scenario II.<sup>29</sup> Thus, depending on how we read the lessons learned in using ADR, they might contribute to the development of either of the very different futures described in Scenarios II and III.

If the lessons of ADR are read according to Scenario III, what might the future court system look like? There are a few different possibilities. First, Scenario III might merge with the managerial vision of Scenario I. Thus, a concern for preserving adversary procedure might itself motivate courts to get involved in process management. For example, courts might be more apt to channel certain cases that seem unsuited for adversary procedure to other processes of different character. However, the impact on the courts emphasized in Scenario III also suggests a quite different course of development. Scenario I imagines the ADR phenomenon leading the courts to appreciate the value of nonjudicial mechanisms, and thus to expand their process management functions. Scenario III, by contrast, envisions the ADR phenomenon leading the courts to value even more strongly the purity of the adjudication function itself—and thus to resist proposals to water down judicial procedure, irrespective of court involvement in process management.

Therefore, there is a second possibility inherent in Scenario III: Exposure to ADR might convince courts that their unique and most valuable function is judging and that they should therefore concentrate their limited resources on that function and resist both the move to deformalize adjudication and the move to transform courts into process managers. In this vision, the courts would choose to limit their functional domain, but strengthen operations within it, declining to become process managers altogether. ADR would be left to develop, in effect, independently of the courts, whether under the auspices of another governmental agency or through private

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28. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1088-89 (1984) (arguing that settlement and ADR are not acceptable substitutes for adjudication); Resnik, *supra* note 7, at 380 (criticizing the increasingly managerial role of judges); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 544-46 (1986) (arguing that traditional adjudicatory procedure, while needing reform, is still preferable to managerial judging).

29. See *supra* text accompanying notes 21-23.



arrangements. The courts, however, would assert (and defend) their jurisdiction—and exercise their core function—whenever parties sought to protect their legal rights in the adjudication process. Some of the strongest academic critics of ADR have at least implicitly argued for this vision of the future.<sup>30</sup> What is ironic, as noted above, is that the ADR experience itself may lead to it.

Looking beyond the courts, in the future imagined in Scenario III, the principle of “process purity” would apply to ADR processes as well. Like adjudication, arbitration and mediation would be preserved in their strong forms and not watered down by formalization and the like. Thus, in this vision, the experience with ADR leads to an overall system that is more differentiated, not less so. Judges judge, mediators mediate, arbitrators arbitrate. Cases go, or are assigned, to whichever process best meets the primary needs of that type of case. The result may not be perfect satisfaction, but everyone realizes that perfection is not attainable. And, over time, each process becomes more expert and effective at producing the results that its particular, differentiated features enable it to uniquely produce.

Interestingly, this scenario corresponds fairly closely to the vision of the future that runs through the work of one of the truly seminal figures in ADR scholarship—Professor Lon Fuller. In a series of articles, Fuller implied that each dispute resolution process has its own unique form and its own jurisdiction and argued against watering down or mixing the different forms of dispute resolution.<sup>31</sup> It is not clear what he thought about the idea of courts serving as the managers of an overall system utilizing all the forms, but he might well have considered the managerial function better served by an independent entity.

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30. See, e.g., Fiss, *supra* note 28, at 1084 (defending the use of adjudication to resolve disputes); Resnik, *supra* note 28, at 546 (criticizing managerial judging and stating it redefines our standards of what constitutes rational, fair, and impartial adjudication).

31. See Lon A. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 356 (1978) (criticizing the modern notion that pure adjudication cannot exist); Lon A. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 312 (1979) (listing characteristics of a model situation for mediation).



## V. Scenario IV: The Courts Divest Cases to Bureaucratic Entities

Another lesson learned from the experience with ADR is to think broadly about what a dispute resolution process might look like. It need not be a process where two individual parties meet to argue, or even discuss, their claims or problems. Disputes can also be resolved by establishing entities or offices that mediate—in a different sense—between classes or groups of parties, and transfer resources from one party to the other by some bureaucratic process. The obvious example is a claims compensation system, funded by levies on some class of contributors, which then distributes the funds to some class of qualified claimants.<sup>32</sup>

However, ADR experience has shown us that such systems need not be permanent institutions; they can also be processes set up to deal with discrete disputes, or bundles of disputes, such as the Asbestos Claims Facility.<sup>33</sup> In class action situations, this type of process has become increasingly appealing. In fact, court procedures in some of these cases have begun to look like claims compensation systems. This development has been troubling to many observers and judges.<sup>34</sup> Therefore, imagining a fourth scenario of the future, the ADR experience may reinforce the courts' impulse to divest themselves of cases which seem more suited to administrative claims-handling systems.

In this vision, the courts decide to shrink their domain, by divesting themselves of mass-claims cases. This divestment might be achieved in a number of ways: by court orders directing that these cases be resolved under a claims compensation system, like the one described above; by courts pressuring legislatures to establish appropriate agencies; or, as suggested by Professor Carrington in his article, by courts endorsing (or engineering) class action settlements

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32. See Bush, *supra* note 4, at 976-77.

33. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1387-89 (1995) (describing the Asbestos Claims Facility as "an industry-wide consortium" dedicated to the "expeditious resolution[] of claims in order to avoid the expense of litigation").

34. See Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1503 (1986) (noting hostility among courts and commentators to the shift from individual to group responsibility).



that transform the settlement process itself into a kind of privately managed claims-handling device.<sup>35</sup>

Regardless of the specifics, the point of this scenario is that the ADR experience might persuade the courts that mass-claims cases belong elsewhere. Indeed, this impulse for divestment might extend to other kinds of cases as well. And whether the alternative forum is court ordered, party designed, or legislatively sponsored, it is likely to have a bureaucratic character very different from that of the traditional adjudicative process.

In one sense, Scenario IV is a special case of Scenario I, in which the ADR experience inspires the channelling of a certain type of case to a certain process. However, Scenario IV suggests a somewhat different view of the possible impact of ADR on the courts. The emphasis of Scenario I was how the ADR movement might lead courts to invest effort and resources in the process management function itself, as a systematic, positive endeavor. In Scenario IV's vision, by contrast, the experience with ADR leads courts not to a systematic commitment to process management, but rather to specific decisions that take advantage of (or create) opportunities for courts to divest themselves of certain groups of cases. In Scenario IV, the courts do not adopt a new administrative function; rather, they refrain from exercising their core adjudicative function because they decide other processes are more appropriate.

As noted above regarding Scenario I, this divestment scenario may be viewed as positive or negative, depending on one's assumptions about the quality of the courts' rationales for divestment.<sup>36</sup> Principled and well-reasoned divestment, like principled process management, offers significant benefits both to the courts and to private parties. Unprincipled divestment, like unprincipled process management, poses serious risks. In his article, Professor Carrington describes examples of both possibilities.<sup>37</sup>

As noted in the discussion of Scenario I, the countervailing potentials for both benefit and harm suggest the need for the courts

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35. Carrington, *supra* note 8, at 498-99.

36. See *supra* text accompanying notes 8-9.

37. Carrington, *supra* note 8, at 490-92 (advancing a positive view of the A.H. Robbins claim procedure and a critique of several industry-wide arbitration programs).



to develop sound principles for deciding when divestment makes sense and when it does not.<sup>38</sup>

## VI. Scenario V: The Courts Encounter the World of Private Ordering

Some observers of ADR have suggested, in various ways, that ADR represents more than just an alternative to litigation. Rather, the suggestion is that ADR is a manifestation of a widespread impulse by citizens to reclaim responsibility (and power) for ordering their own affairs, rather than depending on, and being subject to, public authorities for such ordering. The "private ordering" theory takes the view that ADR is part of a larger social phenomenon.<sup>39</sup> In the ADR movement, as part of this phenomenon, the point is to obviate, as much as possible, the need for resort to public, governmental authority. In other words, ADR need not and should not be court centered; it should be created and chosen by disputants themselves as their own, independent means of ordering their affairs.<sup>40</sup>

Whether or not current ADR activities and practices really represent this kind of self-reliant and self-determined private ordering is debatable. What is much less debatable is that this philosophy of ADR is often expressed and supported.<sup>41</sup> The

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38. See *supra* text accompanying notes 8-10.

39. See Peter Adler, *The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement*, in *THE POSSIBILITY OF POPULAR JUSTICE* 67 (Sally E. Merry & Neal Milner eds., 1993); Peter Adler et al., *The Ideologies of Mediation: The Movement's Own Story*, 10 *LAW & POL'Y* 317, 333 (1988).

40. See, e.g., LAWRENCE SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUS APPROACHES TO RESOLVING PUBLIC DISPUTES* 13 (1987) (examining the best methods for approaching ADR in various situations); Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure and Guiding Principles*, 5 *MEDIATION Q.* 3, 18-24 (1984) (discussing Community Boards Program, a neighborhood-based justice system).

These authors, as well as others, connect the use of ADR processes with the public participation and democracy movement that has grown both within and beyond the United States in recent years. Shonholtz, *supra*, at 9; SUSSKIND & CRUIKSHANK, *supra*, at 13.

41. See Adler, *supra* note 39; Adler et al., *supra* note 39, at 317; Shonholtz, *supra* note 40; Susskind & Cruikshank, *supra* note 40, at 246-47.



question can be asked: What will be the effect on the courts if this philosophy of ADR penetrates and has practical impact?

Consider the following. One of the major areas of activity in the ADR field has been training and involving school-age children (beginning in elementary grades) in mediation and dispute resolution programs.<sup>42</sup> Thousands of children have been taught in such school programs that disputes can and should be resolved through negotiation and mediation, and these children have had experience with actually participating in these processes. The same thing is occurring with students on many college campuses.<sup>43</sup> And through community mediation centers in hundreds of cities, many thousands more are trained as volunteer mediators.<sup>44</sup> Meanwhile, future lawyers learn about the benefits of ADR in almost every law school today; and in skills courses, many law students learn mediation and dispute resolution skills, rather than adversarial advocacy skills.<sup>45</sup>

What significance will this educational phenomenon have for the court system of the future? As these numbers grow, and as the students of today grow to adulthood, will their exposure to ADR practices and ideals lead them to view adversarial legal procedures as unsatisfactory? Will they demand that legal procedures become more informal and less adversarial? Will they consciously eschew using legal procedures to a greater degree than disputants today? Will the positive experiences of large numbers of disputants with actual ADR utilization, over several decades, have similar effects on their preferences in dispute resolution?

This vision may seem farfetched. But there are societies in which resort to formal legal procedures is uncommon, not because it is difficult, but because it is seen as inappropriate and counterpro-

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42. See EDUCATION AND MEDIATION: EXPLORING THE ALTERNATIVES (Prudence B. Kestner et al. eds., 1988); David Singer, *Teaching Alternative Dispute Resolution to America's School Children*, 46 ARB. J. 33, 33 (1991).

43. See Cindy Fazzi, *Today's School Days: Readin', Writin', and ADR*, 49 DISP. RESOL. 73, 74 (1994).

44. See LINDA R. SINGER, *SETTLING DISPUTES* 111-24 (1990).

45. See Janet Weinstein, *Teaching Mediation in Law Schools: Teaching Lawyers to Be Wise*, 35 N.Y.L. SCH. L. REV. 199, 199 (1990); Fazzi, *supra* note 43, at 73.



ductive.<sup>46</sup> Indeed, some maintain that our own society is not all that different despite our alleged "litigiousness."<sup>47</sup> In any event, it is at least worth considering that one effect of ADR, as it becomes more of a core element of public education and civic experience, might be that people come to accept the view that formal legal action is not only difficult and unproductive, but even somehow improper—and that private dispute resolution is not only easier and more satisfying, but also somehow virtuous and praiseworthy.

What might be the response of the legal system itself to this kind of development? Perhaps it would be cheered as bringing welcome relief from the perceived overburdening of, and over-reliance on, the legal system. On the other hand, it might be viewed as a dangerous prelude to a balkanization of our highly pluralistic society, which requires common and public norms to retain its coherence, not private ordering. The second view is reflected in Professor Carrington's comments about the effects ADR may have in diminishing the role of law itself—and the public, social interests it represents—in our society.<sup>48</sup> Of course, he is by no means alone in expressing such concerns.<sup>49</sup>

It is interesting to observe that concerns like these arise in relation to many of the scenarios. If Scenario I develops, the concern is that process management may, intentionally or unintentionally, deny certain claimants the protection of legal rules and procedures. If Scenario II develops, the fear is that watered-down legal procedures will be insufficient to protect legal rights even for those who do get into court. If Scenario IV develops, divestiture of

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46. See LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* 181 (1990) (concluding that the Riconeros, a Native-American tribe in Mexico, prefer autonomy and flexibility of internal village resolution as opposed to the local district court).

47. See William L. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y REV. 631, 652 (1981) (noting that "Americans are slow to perceive injury" due to the "individualism celebrated by American culture"); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983) (noting that "only a small portion of troubles and injuries become disputes; only a small portion of these become lawsuits").

48. Carrington, *supra* note 8, at 488-89.

49. See, e.g., Fiss, *supra* note 28, at 1085-89 (arguing that adjudication of disputes is needed to maintain public values and determine important social values).



certain types of cases may, like Scenario I, serve to undermine the development and application of legal rules. And, in Scenario V, private ordering may put matters of crucial public interest into private hands unconcerned with social consequences.

This recurring image of the risks arising from ADR's possible impacts on the courts, across several visions of the possible future, should certainly not be ignored. Wisdom lies, according to a traditional saying, in foreseeing the possible consequences of one's actions. The risks that are foreseeable in the scenarios sketched here are too significant to dismiss. At the same time, consciousness of risk should not blind us to the potential for good, or keep us from pursuing it, though with appropriate caution.

## VII. Enlightened Dispute Resolution for the Future: Can ADR Qualify?

The vision of Scenario V, as noted above, raises questions about the effect of ADR, as a form of private ordering, on the glue that holds our public life, our society, together: the law. These questions relate to Professor Carrington's comments about the effects of ADR in diminishing the role of law and about the significance of law and legal procedure as "enlightened" dispute resolution.<sup>50</sup> For Professor Carrington, enlightened dispute resolution assigns a central role to reason, through "the application of rational inference from undisputed reality"<sup>51</sup> and "concern for accurate application of law to fact."<sup>52</sup> Insofar as ADR diminishes the role of law, and thus the role of reason, he suggests, it resembles premodern ritual procedures rather than enlightened dispute resolution.<sup>53</sup> It is very likely this perspective that leads him, and others, to focus so heavily on the risks ADR poses, no matter which alternative future we envision.

However, there is another perspective that might be used to look into the future. The view that law and legal procedures are the glue that binds society together, and that they are the paradigmatic instruments of reason, and therefore enlightened, is a familiar point

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50. Carrington, *supra* note 8, at 486-89.

51. *Id.* at 486.

52. *Id.* at 487.

53. *Id.*



of view.<sup>54</sup> Nevertheless, it is not the only possible view of law, society, reason, or enlightenment. It is possible to conceive of a kind of social glue, and a kind of reason, quite different from those embodied in the legal process.

Imagine the effects of social processes that, in situations of conflict, involve citizens directly in engaging one another in discussion, presenting their interests and perspectives to each other, clarifying their commonalities and differences, and exploring the possibilities for constructing a common order that interrelates their needs and outlooks in the situation at hand. Such processes in themselves, by their very operation, constitute a glue that can bind citizens together in a common society. Indeed, this binding power may be greater than that of the law. Moreover, such processes allow, even require, consideration of facts through a type of exchange that communicates not only empirical information but also interpretive perspective; and they allow for a use of norms which is accommodative rather than binary, pluralist rather than singularist.<sup>55</sup> Such fact and norm consideration certainly constitutes a kind of reason. Indeed, this kind of reason may be seen by some as deeper and richer than that commonly employed in legal procedures.

The point, of course, is that ADR processes like arbitration and mediation are—or at least can be—the kind of processes just described. They are social processes for dispute resolution that can, by nature of their mode of operation, employ a very rich form of reason and supply a very strong form of social glue. To suggest that ADR, by definition, cannot qualify as enlightened dispute resolution ignores this view of reason and social cohesion. It also ignores some important parts of what we have learned about ADR processes.

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54. See Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 127-28 (1982) (arguing that the judicial function of interpreting and articulating legal norms is a crucial means of translating public values into social reality); Resnik, *supra* note 28, at 502 (discussing Charles Clark's view that lawyers are important contributors to the public welfare).

55. The reference here is to a distinction made by Professor Melvin Eisenberg in clarifying that nonadjudicative processes do indeed utilize norms, though in different ways than the legal process. Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638-39 (1976).



I therefore respectfully disagree with the suggestion that only legal procedures qualify as enlightened dispute resolution.

This is not to say that I disagree with all of the concerns about ADR mentioned in this Article and in the other articles in this Symposium Issue. On the contrary, I believe that many of these specific concerns are well warranted. Indeed, my characterization of ADR processes, in the preceding paragraph, stresses that they have the potential to be socially cohesive and richly reasonable. I recognize, however, that this potential is frequently unfulfilled in actual practice; and when this is the case, the kinds of concerns that Professor Carrington expresses—about some forms of court-ordered mediation, for example—are well justified.<sup>56</sup> Nevertheless, while the failure of ADR practice to fulfill its potential shows that greater care and effort are needed, it does not prove that the potential is not there. The conclusion that follows is not to severely restrict or abandon the use of ADR, as some would do, but rather to be more demanding about the quality of practice whenever ADR is used.

Translating ADR's potential for enlightened dispute resolution into practice is no small task. Elsewhere, I have written at length about the steps I believe are needed to do this with one ADR process, mediation.<sup>57</sup> If that potential is captured, then the future could be bright under any of the scenarios described in this Article, or still others that might be imagined. On the other hand, if ADR in practice ignores or loses that potential, the forecast for the future may be quite different. With the dispute resolution system as with government, the quality of result will probably be proportional to the effort we make to secure it. Or, to paraphrase the political nostrum, the future we get will be the one we deserve. Envisioning the future should, therefore, spur us to greater effort in the present.

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56. Carrington, *supra* note 8, at 493-95. I have explored similar concerns, in relation to the mediation process specifically, in much of my own work. For the most recent and extensive of these efforts, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 55-116 (1994) (describing the problems of the settlement-driven approach to mediation used widely in current practice, and suggesting an alternative approach).

57. See BUSH & FOLGER, *supra* note 56, at 261-71.