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SPECIAL EDITION: ALTERNATIVE DISPUTE RESOLUTION AND PROCEDURAL JUSTICE

PREFACE: THE ELUSIVE PROMISE OF LEGAL REFORM

*Kenneth Penegar**

WHEN the legal history of twentieth century America is written, important chapters will be devoted to description and criticism of various ways in which the institutions of the law and the practices of lawyers today are dramatically influenced by increasingly insistent calls for speedier, less expensive, and less formal justice than that provided by the establishment. Important features of these chapters can be written already, those dealing, for example, with publicly funded legal services for the poor (both criminal and civil). No doubt innovations like the class action and court-awarded attorneys' fees, as well as substantive legal changes such as those contained in various civil rights acts of this period will also be prominently treated. At this point it becomes obvious how difficult it will be to keep, assuming for the moment it is important to do so, a very sharp distinction between procedural and substantive justice in such a history.

Of all these changes, or forces and ideas for change, in the established way lawyers and lawyers' institutions have done things up to nearly the end of the present century, it is conceivable that greatest prominence in this history will be given to what lawyers are pleased to call *alternative dispute resolution* (ADR).¹ That it is presently accurate to call the phenomenon a movement

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1. This forecast is made in spite of the very interesting fact that legal histories, published as recently as the 1970s, carried virtually no entries on ADR or its various other names. The major work of Lawrence Friedman, *A HISTORY OF AMERICAN LAW* (1972) contained no index reference to "arbitration," "mediation," or "negotiation." It seems only fair to add, however, that Friedman's 1972 work was self-consciously down-playing any survey of twentieth century legal developments altogether. The material devoted to this period, a scant 30 pages, is styled "Epilogue" and is not a concluding chapter. Even so, in those pages there is nothing about ADR. There is, on the other hand, a good deal of other insight of a more general nature with which we shall presently be occupied. See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1972).

In his 1949 book *COURTS ON TRIAL*, Jerome Frank did mention arbitration in the business context. Moreover, Frank devoted a whole chapter to historical examples of "individualization" of justice, as exemplified in ancient Greece and Confucian China, an ideal Frank associ-

is unassailable. That there is a certain outcome or set of outcomes presently identifiable is far from clear. What is reasonably predictable at present is that whatever changes the movement succeeds in making, the impact will be not only upon the procedures of and for the doing of justice but also upon the ways we think about the challenges to justice. Indeed taking only the baker's dozen articles making up this special edition into account, and they are important contributions to our understanding of the values at stake, it seems fair to say that the influence of the ADR movement can best be understood as intellectual and cultural ferment. We are accustomed to thinking of "movements" mostly in terms of their social and political dimensions. What is suggested here is that "ADR" is about two things — a critique within but about legal culture and an assault from beyond on the dogmas of that culture.

There are four or five pervasive ideas or clusters of concepts with which the articles in this symposium are fundamentally concerned. In them we may glimpse both the force and the direction of the ADR movement as it sweeps before it issues of long standing and stirs up new ones as well. Framed as they are, in institutional or procedural terms, these issues of substance are not all readily apparent in proposals about ADR; but they are present nonetheless.

I.

What is the larger significance of court ordered (or annexed) ADR? Should it be seen as a palliative designed to preserve traditional institutions and professional arrangements? Or should this development be seen as possessing a more powerful concern, one reflecting deeper structural and philosophical change? Is ADR to be the salvation of a hopelessly over-loaded litigation system, or does ADR represent a sea-change in our cultural evolution, whereby we begin more avowedly, or resume with greater confidence, to value other social patterns such as cooperation and compromise as highly as we value traditional attachments to competition, judgment, and authority?

In his vigorous opposition to mandatory court-annexed ADR in federal courts, Judge G. Thomas Eisele invites scrutiny not only of two very obvious and contested issues in the debate, one empirical and the other Constitutional, but he also identifies several contentions that go to the heart of the ideological warfare of the last twenty years or so.² First, is the fuss about over-crowding of court dockets a real issue or is it a cover for more subtle agendas of identifiable segments of the judiciary, bar, and academic lawyers? Second, does the ADR movement, and the promise of greater efficiency and wider access, provide camouflage for efforts to denigrate or even dethrone adversary justice as the central paradigm of America's system of justice?

ates with equity and with arbitration in our own Anglo-American culture. See JEROME FRANK, *COURTS ON TRIAL* 377-91 (Atheneum ed. 1963).

2. G. Thomas Eisele, *Two Judges: Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935 (1993).

Third, who stands to win and who to lose in these fundamental shifts in the very structure and ethos of the federal judicial system?

For example, will litigants in smaller suits be shoved aside or shunted back to state courts? Will the increase in the number of federal judges be slowed and thereby help maintain the prestige of existing federal judges? And would these incumbent judges be more likely to enjoy a more satisfying work atmosphere by trying fewer cases — with ADR, rather than without it? Will more attorneys become involved in some form of federal justice, thereby expanding the professional “clientele” of the federal courts? And would not such an expanded constituency also contribute to an enhanced sense of professional elan among existing federal judges and others in the administrative super-structure needed to support the new avenues of dispute resolution? Will the whole project take on a kind of benign imperialism designed to draw in more disputants and more controversies, thereby reinforcing government’s continuing claims of legitimacy and omni-competent relevance?

The lead essay by Judge Robert Parker and Leslie Hagin³ anticipates many of the issues which Judge Eisele’s commentary raises. Thus, for example, debate about the constitutional guarantee of jury trials is squarely joined in these two articles. Professor Edward Sherman’s article also contributes significantly to this exchange.⁴ The competing essays are less directly complementary when attention turns to the empirical question of case over-load. Parker and Hagin do offer some evidence in support of their “crisis” theory, yet their effort is really more seized with a concern for identifying the causes than the scope of the problem. “[O]verdiscovery by litigators has been identified as the major saboteur of our traditional adversary system of civil dispute resolution.”⁵ “The bar’s vested economic interest in the *status quo* — with virtually unlimited access to billable hours for over-discovery and over-preparation of cases generally destined to be settled anyway — has effectively silenced the group that should have been the most vocal protector of the interests of litigants.”⁶

Equally strong criticism of trial lawyers is prominent in the essay of Dallas lawyer Louis Weber,⁷ but his point is different. His criticism is not directed at the climate of protracted litigation, but rather at the cynicism reflected in lawyers’ embrace of court-ordered ADR as self-serving, not designed to save clients’ money, but to provide an opportunity to make some themselves. This common feature serves to introduce a second major conceptual feature of the special edition.

3. Robert M. Parker and Leslie J. Hagin, *ADR Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905 (1993).

4. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993).

5. Parker & Hagin, *supra* note 3, at 1907.

6. *Id.* at 1930.

7. Louis J. Weber, Jr., *Court-Referred ADR and the Lawyer-Mediator: In Service of Whom?*, 46 SMU L. REV. 2113 (1993).

II.

As a social phenomenon, is ADR correctly viewed as a strongly-felt, widely-experienced popular reaction to the lawyer-dominated processes of formal authority? If so, what explanations are there for an apparently rising level of support for ADR, including the court-ordered variety, within the legal profession itself? Sometimes viewed as part of the reformist's agenda of elite lawyers⁸ is there something else at work? The secondary question is one in which Weber is vitally interested. While it is not clear that those lawyers who trumpet the merits of ADR are the same lawyers whose practices contributed to the litigation gridlock forming the crisis model with which Judge Parker proceeds, nonetheless Weber's point is instructive. "[P]ublic volunteers willing to aid disputants in settling their differences have been in abundance since the beginning of the ADR movement. . . . [But] significant lawyer interest in this endeavor in Texas did not begin until after passage of the 1987 ADR Act which . . . tied ADR into the court system. The Act also provided that court-appointed or third party neutrals be compensated by the litigants or through court costs."⁹

An integral connection between these two questions — of ADR as part of larger social processes and of the apparent riddle of lawyers' favorable reaction — can be found in the notion of co-option which has surfaced in the recent literature of ADR. Very simply, there is a fear that the soft (or "warm") features of ADR (such as problem-solving by direct human contact with accompanying, individual autonomy and relationship maintenance) will suffer in the service of the harder (i.e., "cool") goals of docket-clearing, or cost and time saving, when ADR is annexed to court proceedings. Louis Weber's point about lawyer self-interest in court-annexed ADR adds additional reasons for anyone to be concerned about the mixture of two arguably very different modes of dispute settlement — litigation (in its classical form) and ADR of any kind, including especially court-ordered ADR.¹⁰

Professor Sherman, in his contribution to this edition, alludes to the idea of co-option¹¹ but asserts the view that "the essence of ADR" can indeed "be reconciled with the objectives of . . . trial-based, adversary litigation."¹² Litigation and ADR have, he argues, "a great deal in common . . . [for]

8. With the notable exception of civil rights oriented substantive reform, and that related to the 1960s "war on poverty" which were, in the view of legal historian Lawrence Friedman, "in open revolt against vertical pluralism in American law and life," law reform has been, during both the 19th and 20th centuries, a project aimed at rationalization and unification with "small social return." FRIEDMAN, *supra* note 1 at 583. "Law reform", in the sense the organized bar uses the term, is really a measure for professional defense, it flows out of the needs, the sense of oneness, the beleaguered fears of the elite of the profession. It is a way of showing the world that lawyers too serve the public interest; and law reform has been historically linked, since the 1870s, with the official organization of the bar." *Id.* at 580-81.

9. Weber, *supra* note 7, at 2114 (citation omitted).

10. The very nomenclature of the subject calls up something of the difficulty of *lawyers'* contribution to the discussion. The basic model, after all, for which *alternative* forms of resolution are being sought is litigation in court. Thus, it seems there is more than verbal clarity at stake when one asks whether it is meaningful to speak of ADR which is court-ordered!

11. Sherman, *supra* note 4, at 2080.

12. *Id.* at 2082.

[b]oth place a high value on a rational approach to dispute resolution, fairness of process, and the centrality of party autonomy. "The claim that ADR is not adversary fails," he believes, "to appreciate that it is 'fundamentally a process of assisted negotiation.'" ¹³

At this point the reader's mind searches for a compelling metaphor to capture succinctly what is happening. That the exceptions have swallowed the rule comes only close. Perhaps it is more accurate to say that the foxes have started chasing the hounds. The secondary question appears to have two kinds of answers, one of lawyer self-interest in the rather narrow (crass) sort, and the other the institutional interest of courts (i.e., judges and advocates who genuinely believe they see a crisis and want ADR to help). Sherman is forceful in his belief that ADR can help and that the "essence" of ADR need not be sacrificed in the hands of judges sensitive to the "fact that obtaining a settlement is not necessarily a sign of successful ADR."¹⁴ It is time to return to the broader of the two questions in this section of the Preface.

It is no secret to many Americans that most of us get through our lives without wanting or needing to go to court, or to lawyers for that matter. It also is well known to sophisticated participants in economic life that our country has long had an array of private mechanisms for party-controlled settlement of differences. The arbitration services of various industries and vocations, as well as such groups as the American Arbitration Association come to mind. In the field of international trade and investment, resort to commercial arbitration (outside the courts of any of the countries concerned) is the mode of choice.

What may not be so widely appreciated is how many such private arrangements have not been limited to the fields of work and exchange. Gerald Auerbach chronicled a rich history of community based practices for the ordinary differences of life,¹⁵ and the examples go back to the colonial period.

Indeed if we take a longer look at this experience, it is arresting to note how really modern our current consciousness of an all-embracing legal culture really is. Lawrence Friedman observes: "In medieval England only a tiny circle of people were really subjects or objects of common law. Since then, the ambit, scope, focus and pretensions of the official law have grown; it now includes practically everybody in the commonwealth."¹⁶ Friedman goes further:

[T]he master trend of American legal history [is] the trend to create one legal culture out of many; to reduce legal pluralism; to broaden the base of the formal, official system of law; to increase the proportion of persons, relative to the whole population, who are consumers or objects of that law. This master trend continues and accelerates in the 20th

13. *Id.* at 2082-83 (citations omitted).

14. *Id.* at 2083. He goes on to probe the more sophisticated issue of whether parties to litigation may properly be ordered to agree or only to *try* in good faith to agree. *Id.* at 2085-86.

15. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

16. FRIEDMAN, *supra* note 1, at 572-73.

century.¹⁷

There is thus ample reason to suspect that the ADR movement may be traced to larger forces than those working within the law and the legal profession. If these historical glances are accurate, they suggest a larger descriptive package of forces at work on and within our legal culture. First, while the legal culture has been continually expanding, it is also true that "official law" and legal institutions have never fully succeeded in eliminating, or even co-opting, all other kinds of arrangements in our society. While the "master" trend in legal history may be toward greater degrees of centralization or unification, to recall Friedman's characterization, this is not to say that counter trends have disappeared. Looking at the larger social and political context of the last twenty years, it seems important that there, the trends in favor of decentralization, community initiative and pluralism of all kinds, all suggest a renewed energy for resisting the centralizing, unifying tendencies of the legal culture itself. This is not to suggest that the opposition is necessarily conscious on the part of anyone, but of course the avowed enemies of the legal profession today are plentiful and vocal.¹⁸

Second, the entire enterprise of the law may have become so large, its ambitions so grand, its constituent members so numerous, its interests so stratified, its voices so conflicting, that centralizing tendencies or not, the structure begins to lose its claimed historic coherence. In such a situation it should not be surprising to see signs of self-help. And they might be seen as signs of positive vitality and not mere negative opposition to professional arrogance. But to speak of an enterprise of the law in this way may be to suggest too much concreteness. Associated with so many different people in different places, even those like judges and advocates metaphorically knit together in common harness to at least a shared language of disputes.

This last point brings us to what may be one of the most interesting features of this provocative collection of articles and essays on a topic which, as we have seen, cuts across the language of lawyers and the language of ordinary public discourse. It is true of course that the latter has been greatly influenced by the vocabulary of the law, perhaps more so than any other country or culture even those with a healthy sense of the rule of law.¹⁹ At the same time the reverse influence, that is the influence of the wider culture

17. *Id.* at 572. Morton Horwitz has given a particularly detailed account of this tendency in the American legal culture by examining the accommodation, some might say *seduction*, of the commercial arbitration process into common law doctrines of American commercial law in the last decades of the 18th and early ones of the nineteenth century. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). Horwitz goes on to make the larger point, parallel to, but extending beyond that of Friedman: "The judges' unwillingness . . . to recognize competing lawmakers is a product of an increasingly instrumental vision of law. Law is no longer merely an agency for resolving disputes; it is an active, dynamic means of social control and change. . . ." *Id.*

18. The paradigm organization for the detractors may well be Help Abolish Legal Tyranny (HALT).

19. See, e.g., Richard B. Parker, *Law, Language and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 180 (1988): "The Japanese have never given language the central position enjoyed in the West and consequently feel it odd to rely heavily on written language to organize society." *Id.*

on the content of law, is surely as equally powerful, except that the influence is not so easily and epigrammatically captured. Surely one reason why the language of the law carries with it into ordinary English usage, such authority, if you will, is that its language has been deliberately, repeatedly crafted around the specific events of those incidents and transactions which make up the stuff of litigation, of argument, and decision. When, however, the language descriptive of fairly complex social or political ideas is set in terms that only approximate those of authoritative discourse, the resulting dialogue can be confusing and inconclusive, at cross-purposes.

Let me illustrate. One of the imponderables of the unfolding dialogue about ADR, and hence a source of confusion, cross-purposes, and inconclusiveness is that we have no canon for the word *dispute*. We saw earlier there is a comparable threshold difficulty with *alternative*. It is after all not a legal term of the English-American tradition anyway, unlike say *complaint* or *action* or *bill in equity* or *statute* and so on. It does not, yet anyway, have even the semi-legal character of a word like *proceeding*. Two of the essays in this special edition reveal why it is important that we choose our terms carefully in mapping the future of ADR.

In their article, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, Karla Fischer, Neil Vidmar and Rene Ellis argue powerfully for drawing the limits of ADR at applying mediation to instances of domestic violence.²⁰ The problem is that such an application suggests the presence of mere disagreements, rather than pathology, which is likely associated with patterned abuse. "Our view rejects the dominant explanation of battering as conflict; we suggest that in many relationships, conflict has little, if anything, to do with the causes of battering. Rather, when conflict is a triggering event it tends to be only an expression of attempts to control."²¹ Their sober assessment continues as follows: "We take the position that both the theory and practice of mediation poses serious problems for its use as a resolution device when a relationship involves a culture of battering."²² Quite clearly, the implication is that these incidents are for the most formal, public normative systems — the criminal law — and not for the informal, private non-judgmental adjustment process of ADR.

Similarly Alan Rau raises, in his article, a question of conceptual aptness when client and lawyer are locked into a setting which, by its terms, limits attention to but one feature of a sometimes complex relationship where there may be a range of other client dissatisfaction involved.²³ The point is not that there are no such things as disputes over lawyer fees — pure and simple — and we need healthy ways of dealing with those. Rather, the author is

20. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993).

21. *Id.* at 2120.

22. *Id.* at 2141. Interestingly, the authors choose some of their title descriptive words from the lexicon of the criminal law — *battering* from "battery" — and thus claim from the outset, something of the readers' understanding or sympathy for their thesis. *Id.* at 2117.

23. Alan S. Rau, *Resolving Disputes Over Attorney's Fees: The Role of ADR*, 46 SMU L. REV. 2005 (1993).

calling attention to what may be a pitfall of all informal arrangements for settlement, inadequate conceptual precision to define the limits of that arrangement. In so doing, his insight is doubly useful because it serves to remind us that such imprecision has additional baggage when the bar comes to arrange its own settlement devices for its members and their clients.

It is not at all clear, judging from the research canvassed by Rau, that the use of bar-sponsored arbitrators (i.e., panels composed of lawyers) is necessarily a prejudicial forum for clients. "No evidence seems to exist that suggests any dramatic difference in the patterns of decisions of courts and arbitrators with respect to [fee] disputes," Rau concludes.²⁴ On the other hand, Rau concedes that there is a paucity of data on the actual track record, in part because bar sponsors have declined to keep score.²⁵ Nonetheless, there is a discernable national trend toward expanded use of fee arbitration, and there are several states in which the attorney is now required, at the client's election, to submit fee disputes to binding arbitration. These developments warrant comment of a different sort from the preceding discussion about conceptual aptness and will thus be deferred to the next section.

In choosing to speak of the language of law and to contrast its vaunted clarity with that of the fledgling vocabulary of a reform (some might prefer to call it revolutionary) movement, one runs the risk of bringing all sides in as enemies. For, on the one hand, it will be said that it is merely the self-service of the establishment to put down the upstarts by invoking the Mandarin quality of what is traditional over that which is new, vague, incomplete, or incomprehensible. And it will be said by others that the entire exchange is bogus and beside the point because the appeal to language and to concepts is, by its very nature, to misplace (not misconceive), misperceive, or ignore the more fundamental promise/threat of ADR. And that is the prospect of weaving a fabric of socially nuanced forms of self and group control which are at once consistent, with a high degree of dignity and autonomy and removed from the formality, authority, and even rationality of state sponsored justice.

Yet there does appear to be a kind of post-rationalist flavor to the claims being made on behalf of ADR. For instance, Professor Rau has drawn this succinct picture about arbitration: "[T]he relative informality of arbitration means that pre-trial procedures, elaborate pleading, motion practice, and discovery are substantially streamlined or in many cases completely eliminated."²⁶

"In commercial cases, arbitrators will usually not devote time to writing reasoned opinions that explain and justify their decisions; it is well understood that the lack of a reasoned opinion will help to insulate an award from judicial scrutiny."²⁷ "There is, in short, likely to be much less 'lawyering' in

24. *Id.* at 2050-51.

25. *Id.* at 2057 n.163.

26. *Id.* at 2027-28.

27. *Id.* at 2028.

arbitration than in litigation.”²⁸

The implications are clear as to the progressive gains of these simplifications, less time, cost and so on — the so called cool advantages of ADR. There is more than that. It is claimed that the *quality* of decisions can be better when the parties may, for example, choose their own decision-makers. Thus, in commercial arbitrations it is said that the expertise and competence of panels, drawn from the industry, profession, or craft, concerned improves the predictability of the process.²⁹ Presumably, the confidence in the parties that the decision-makers understood their case more fully would be present in cases of any technical complexity as well.

It is of course far too simple to divide the social world into the rational, state-centered, and lawyer-specific, on the one hand, and the non-rational, community-based, and episodic, on the other. And it is quite possible that the fate of modern man is to live in a variety of limbos and that one of these may well be the half-way house of law and nonlaw. That is, we shall have to recognize the permanence of the tension between the rational and the felt. In recognition there is acceptance. In acceptance there is legitimacy. And with equivalence in legitimacy, there is pluralism. Horizontal pluralism³⁰ implies an outer bond, and not mere fragmentation and mutual antagonism. Perhaps at bottom this is what ADR is really all about — a renaissance of the organic quality of social life, a reawakening of the spirit of pluralism, of all kinds, but especially a pluralism of institutions.

This idea of the legitimate presence and utility, even rightness perhaps, of a variety of kinds of institutions through which we pattern our social lives in liberal democracies, brings with it at least two other ideas of historical importance which are more or less dependent on it. One of these faces directly toward the tradition of a kind of spatial separation between those patterns thought to be proper for collective responsibility or accountability and those patterns of life thought to be more properly beyond or outside the realm of collective accountability. Finally, there is another derivative idea of our experience of liberal democracy, especially strong perhaps in the common-law world, which perhaps more than any other single artifact, characterizes the rationalistic tendencies of law in the West: the concept of the person in law, expanded so as to apply with powerful social consequences to aggregates of individuals and resources. Both of these ideas have significant, if subtle, voices through several of the special edition articles.

III.

Many disputes in modern life do not arise between real people. When they arise between two corporations, for example, or between a person and a corporation, it becomes very difficult to see the warm advantages of ADR

28. *Id.* at 2028.

29. *Id.* at 2029.

30. Here, we must distinguish the hierarchical or *vertical* pluralism which Lawrence Friedman has claimed characterizes the social dominance and dependence of older social orders. See FRIEDMAN, *supra* note 1.

playing any role at all. If that is so, support for ADR loses some force, surely. Thus, suppose the dispute is about coverage under an insurance policy. While the claimant under the policy may appreciate the face-to-face quality of the settlement or mediation conference, it is not as clear that for the other party, the "XYZ Insurance Company, Inc.," the session has any purpose at all. Indeed to require, as some courts have been asked to do, the attendance at a settlement conference by an executive officer of the insurance corporation with authority to settle for the corporate party, could make what is an easier part of litigation, a relatively more time-expensive undertaking in ADR.³¹

Surely one of the ways ADR is supposed to be taking us is not that of greater time, expense, and duplication of process. At least in the classical litigation system the advocate can speak, legally, for the corporate client. Why would we want to bring in other surrogates for the corporate party unless there is clearly to be some gain in the other dimensions of the relationship between the parties? Where are those gains to be found in this kind of encounter? One can imagine some such promising encounters. For example, in collective bargaining or class-actions sessions when the claimants are a group of employees challenging the working climate of the corporate employer, it could be productive of a fuller understanding of the human dimensions of the claim for the entire board of directors, and not merely the CEO, to be present for the ADR session. In a great number of disputes deflected from litigation, however, there may well be no such promise of such an exchange taking place.

There are two rather distinctive ways of understanding what is at work in this paradox. It has doubtlessly been said that ADR is not a panacea for all the shortcomings of litigation. Moreover, to insist upon a stretch of the ADR cloth to fit this extended range of settings is to distort its true nature and social value. And to try to force a limitless variety of disputes within its scope would be a disservice to the legitimate ambitions for reform of existing systems of justice.

Less obvious perhaps, but present nonetheless in this seeming mismatch of problems and solutions, is a nagging fear that the idea of corporate legal personality is itself a part of what it is that needs reform. If the ADR movement at its core contains elements of despair, or at least serious reproach of collective arrangements for promoting the common good, one of the objects of concern could likely be the ways in which we have institutionalized the symbolic and abstract use of the person. How much better a fit for the corporate person to have its rights and duties decided by rules of law, for after all it is a creature of law in the first place. And, moreover, how much more efficient for everyone concerned if the affairs of the corporate person are handled by a relatively few human agents; and this is no less true in legal

31. Professor Sherman makes the point this way: "ADR places great importance on having in attendance the person who will make the ultimate decision to settle so that she can hear, see, and participate in the proceedings, thus being capable of being affected by . . . interaction with the other side." Sherman, *supra* note 4, at 2106.

proceedings than in the market place. The human agents, then, represent not themselves but the larger enterprise. And it is here, at this point of moral division, where the critical social theory of the ADR movement may have its most telling impact.

This is a concern not merely about disparities in power, important as that phenomenon is throughout a range of challenges to procedural justice. O. Thomas Johnson has reminded us of how pervasive this challenge can be, extending as he does the focus to the trade relations of three very different neighbors on the North American continent, and to how the NAFTA will address these disparities when it comes to structuring the composition of arbitration panels called for in the treaty.³² It is a concern rather about the practicality of individual accountability in a social world "populated" both by corporate actors and human agents. We have not yet found satisfactory ways of accommodating the over-riding economic importance for the material side of modern life to the latent claims of community based on individual human accountability. Seen from this perspective, ADR challenges us to address the contradiction. It is a contradiction at the point where the formality of legal equality of entities subject to the law comes into contact with the realities of daily existence of persons who are accountable not only in law, but also as participants in a host of morally nuanced communities. The very abstractness which so well has advanced the legal security of the corporate person in the legal culture of the United States has served, ironically or not, to diminish our political capacity for addressing the heightened insecurity of persons, families, and places under a market system driven by forces harnessed principally through the corporate form of enterprise.³³

It is not merely of a kind of internal conflict of interest in which the material well-being of the larger number over-rides the individual interests of the few or even the social interests of the many. The matter is of course open to debate, but it seems more a matter of being blinded by our own categories or forms of thought. The idea that a person before the law is the holder of rights and duties, separate from his/her status, place, or connection with significant others, was so long in coming and so continually struggled over that we are loath to consider any tinkering with it — even when it means merely reviewing a corollary added somewhat recently. Now of course, the corollary has its own powerful friends and the fruits of its enormous material success in the modern world are plentiful. Hence even the suggestion that "we may have gone too far" is rarely heard and less frequently debated.³⁴

32. O. Thomas Johnson, *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, 46 SMU L. REV. 2175 (1993).

33. "During the last 150 years there has been a fundamental redistribution of *economic* power in our society. Individuals and families have become relatively less powerful, and corporate actors, especially corporations and labor unions, have become much more so." RICHARD LEMPERT & JOSEPH SANDERS, *LAW AND SOCIETY* 309 (1986) (chapter 10, "Corporate Actors and Social Justice . . ."). See generally ROBERT BELLAH ET AL., *THE GOOD SOCIETY* (1991) (especially chapter 3, "The Political Economy: Market and Work").

34. See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); see also John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Duncan Kennedy, *Form and Substance in Private*

IV.

What may be very useful in all of this ferment over the process values of ADR is that we could very well rediscover the lines of thought which have led us down the tangled paths we have taken. A commercial corporation is not the same moral stuff out of which persons are made. One idea has a very limited function in the design of our social life. The other, has the foundational place in any notion of social life. We have, in the legal culture anyway, chosen to forget that the function of an artificial legal entity is to advance common social and human interests, not necessarily all or many or at the same time, but social and human interests nonetheless. In pressing our practices which screen this lapse from view, the ADR movement may well force us to rethink the ways in which the concept of the commercial person might be redesigned and limited or provided with more explicit social responsibilities.³⁵

In thinking of the corporation as an instrumental value rather than a good in and of itself, we are reminded that the distinction between ends and means, between substance and procedure, is often an illusive one. And sometimes the distinction, though clear in original design, becomes lost in practice. So it is with ADR. Our emphasis about it, and our intense interest in it, tends to be characterized as procedural even when our less obvious impulses are driven by a vision of a better, different set of outcomes. Is less stress merely a matter of the procedures which burden the participants? The relationship of the parties in mediation is often said to be a prime concern: is that merely procedural or one of the main aims of the reform? These of course are on the warm side of the ADR value set. But even the cool values of efficiency, time, cost, and predictability are not merely incidental, but major gains, gains in the quality of social life which has become strained by and with the burdens of the formalities of the traditional system.

Being able to see these features of the ADR movement as not totally (even if they are primarily) procedural is a first step towards being able to re-envision the roles and limits of artificial persons. Seen as a lively irreverent catalyst the ADR movement in the legal culture of America may stir us to re-examine an even broader intellectual terrain. Another opening is provided in the two articles devoted to controversy over ADR as it might apply to the work of governmental agencies.³⁶ And this is a very well-travelled discourse in American law about the ideal of separation of the private from the public realms.

Law Adjudication, 89 HARV. L. REV. 1685 (1976). "The corporation must . . . be held accountable to larger constituencies — the communities that have given it tax advantages and public facilities, suppliers and customers, a general public that expects from it ecological responsibility, ethical practice and fair dealing in return for its exceptional powers." BELLAH, *supra* note 33, at 102.

35. A good example is provision of employee health care benefits currently under debate in national political forums.

36. Will Pryor & Robert M. O'Boyle, *Public Policy ADR: Confidentiality in Conflict?*, 46 SMU L. REV. 2207 (1993); Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. REV. 2221 (1993).

The First Assistant Attorney General of Texas, Mr. Will Pryor, believes that "[n]on-binding mediation is an appropriate and, indeed, preferable alternative to the traditional court system resolution in many public policy circumstances."³⁷ He cites as a principal justification for this view a declining public confidence in civil litigation controlled by private advocates. Attorneys Leatherbury and Cover counter that the very secrecy of the informal processes of ADR is not appropriate for the conduct of the public's business. They invoke statutory innovations such as the Open Records and Open Meetings laws. What a curious stand-off: efficiency and public confidence could be enhanced by taking some if not all public policy disputes out of the mess of the courts; but public confidence is on the side of openness. There is ample legal authority to go around on both sides of the claims.

What is striking here is that each side of the controversy resorts to those various reactions, on the part of one era or another, to counter-balance the excesses or failures of public institutions deemed prominent in those eras. Thus, the government-in-the-sunshine movement of the Vietnam era is pitted against the anti-lawyer mania of the 'HALT' generation. Resort to the relevant virtues of ADR (presumably mostly on the cool side) is a tacit concession to the failure of the state to control the integrity of (some) of its institutional processes, notably the courts and its "officers." On the other hand, the opponents to this flight into the arms of privacy take advantage of the state's embarrassment by reminding us that government cannot be government if it is not public. This of course would be a more convincing position if it were not so obvious that the principal architects of the government in-the-sunshine movement, and some of its more obvious beneficiaries, were associations of the commercial purveyors of news.

This situation, somewhat like our earlier discussion of the indeterminacy of concepts like *disputes*, calls to mind what Roberto Unger has identified as "the effacement both in organization and in consciousness of the boundary between state and society, and . . . between the public and private realm."³⁸ Unger goes on to claim: "The deepest and least understood impact of corporatism is the one it has on the very distinction between the law of the state and the spontaneously produced normative order of nonstate institutions."³⁹ "As the state reaches into society, society itself generates institutions that rival the state in their power and take on many attributes formerly associated with public bodies."⁴⁰ Seen in the light of this effacement of the line between the public and private realms, the quarrel over the legitimacy of ADR in the service of public purposes can be seen as a latter-day manifestation of the gradual surrender of the claim that the state's rule of law should

37. Pryor & O'Boyle, *supra* note 36, at 2210-11.

38. ROBERTO M. UNGER, *LAW IN MODERN SOCIETY* 200-01 (1976).

39. *Id.* at 201. By "corporatism," Unger means a tendency in "post-liberal democracies" for private organizations increasingly to be treated as entities with the kind of power that traditional doctrine viewed as prerogatives of government. *Id.* at 200. "[S]ociety consists of a constellation of governments, rather than an association of individuals held together by a single government. The state that has lost both the reality and the consciousness of its separation from society is a corporate state." *Id.* at 193.

40. *Id.* at 201.

be, or is, omnipresent, the "only game in town."⁴¹

V.

Finally, the special edition takes us to the seat of legal culture from which there is so much abandonment, toward which there is such antipathy or ambivalence by so many both within and beyond that culture. In the pair of articles by Roger Fisher and William Jackson,⁴² and by Carrie Menkel-Meadow,⁴³ a glimpse is provided of the many ways in which litigation is held up as the paradigm through which lawyers in America have, and should, serve their clients, and through them the greater collective good. "Too often our students learn only the skills of battle. Just as important to them, to their clients, and to the world are the skills of making peace."⁴⁴ So much of this is so well known to us there is a chance we shall miss subtler connections with broader themes, some of which have been examined in preceding sections of this Preface. Professor Menkel-Meadow, for example, identifies multiple goals for ADR in law schools, only some of which spring from the realist critique of limited modalities (especially in light of the growth of administrative law agencies and the like). Her fourth goal is, she says, to "facilitate[] a . . . normative agenda as well. Students can understand when and why adversarial conduct is inefficient and generates non-Pareto optimal solutions . . . , how it can be hurtful to parties and create long-term wear and tear on lawyers."⁴⁵ Thus, there is the promise that ADR training could produce a greater good for a greater number and that it could produce a legal culture in which both parties to disputes, and those who serve and represent them in this connection will suffer less from the psychic (and presumably ethical) stress of litigation. There is also a hint of the communitarian vision in her paper, thus: "Focusing on solving problems in cooperative teams teaches students to work productively in groups rather than to exclusively defeat or outmaneuver individual opponents . . . demonstrat[ing] a richer set of ways for lawyers to do their work."⁴⁶ If this were not evidence enough of the larger social thrust of the ADR movement that goes beyond and comes from further afield than the culture of law, then it is clearly borne out toward the end of her paper when she alludes to the twin sources of understanding or explaining the ADR movement: "Whether or not the use of ADR is ultimately justified by instrumental needs to reduce the caseload pressure on

41. There is, in another of the contributions, a parallel claim on the failure of yet another feature of the state's program for a unitary system of justice: that of the "retributive" criminal justice system which has, according to the author, failed. Its replacement, at least in part, for property crimes and among youthful offenders, would be called "restorative justice" and would place victim and offender at the "center" rather than at the margins of community efforts. Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191 (1993).

42. Roger Fisher & William Jackson, *Teaching the Skills of Settlement*, 46 SMU L. REV. 1985 (1993).

43. Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993).

44. Fisher & Jackson, *supra* note 42, at 1985 (emphasis added).

45. Menkel-Meadow, *supra* note 43, at 1997.

46. *Id.*

courts, or by more transformative aspirations to provide more tailored and better quality solutions for the parties. . . ."⁴⁷ The transformative possibilities, of course, are not merely directed to the broadening of the skills of lawyers but imply a much different social vision from that comprehended by the traditional law school curriculum and ethos. The possibilities are not merely for a difference in the design of procedural justice, but also for the outcomes as well, of the disputes with which we lawyers want to be associated. Whether, when these possibilities are more fully realized, the choices of institutional role and scope, as well as the character of professional education, will remain within the practical grasp of lawyers is the question this special edition ultimately leaves open before us.

47. *Id.* at 2004.

