

ADR and Future Adjudication: A Primer on Dispute Resolution

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I. Introduction

We are summoned to consider what the alternative dispute resolution (ADR) movement has taught us that might affect how we do formal adjudication. What new ideas and what new procedures can or ought to be devised in light of our experience with two decades of ADR?

Alas, there are not as many ideas about law as we would like to believe. Most of what we know was known to those who wrote *The Institutes of Justinian*.¹ Accordingly, most ideas sweeping over the legal academy from time to time are in a sense reinventions of wheels. The ADR movement has not been an exception; Puritan

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1. THOMAS C. SANDARS, *THE INSTITUTES OF JUSTINIAN* (Chicago, Callaghan & Co. 1876).

New England had no use, indeed, no respect for law, lawyers, or any legal process. And those who secured enactment of the Federal Arbitration Act of 1925² and other legal reforms of that generation said just about everything there is to say about ADR.

The most important idea of industrial times bearing on dispute resolution was an expression of the Enlightenment.³ Before the Enlightenment, the modes of dispute resolution were linked to religious ceremonies imploring the deity to decide cases, or were decided by a game of chance, or both. Trials by ordeal were blessed by priests. The Japanese sport of Sumo is a vestige of such a ritual-game, and Shinto priests still participate in its events. There were almost as many such methods as there were tribes.

Since the Enlightenment, there has been a sustained effort, and not just in America, to devise methods of dispute resolution applying previously stated law to facts, facts discerned on the basis of documentary and real evidence, sworn testimony, empirical probability, and the application of rational inference from undisputed reality. Thus, when we speak of law courts and adjudication, we speak of institutions and procedures that aim not merely to resolve disputes, but to do so by enforcing the rights and duties of the parties; rights and duties that they could and perhaps should have known, and may have been relying upon, when they fell into a quarrel.

II. ADR's Role in Enlightened Procedure

No enlightened system of civil procedure is devised to resolve all civil disputes. Although Rule 1 of the Federal Rules⁴ suggests the possibility that every case can be decided justly, speedily, and economically, everyone who has thought about the matter for as many as five minutes must know that all of those traits cannot be achieved simultaneously. In dispute resolution as in all human affairs, there is no free lunch. Good procedure is replete with trade-offs among the three aims of justice, dispatch, and economy.

2. 9 U.S.C. § 1 (1994).

3. This idea was to use reason in the governance of human affairs.

4. FED. R. CIV. P. 1.

Nevertheless, to the extent that those aims can be achieved, enlightened procedure is an inducement to quarreling citizens to settle their differences. Settlement is likely to occur when both disputing parties foresee a particular, official disposition that is imminent. Settlement so induced and thus reached "in the shadow of the law" may be the best possible method of resolving disputes; it is, or at least may be, agreeably just, speedy, and cheap. It is not aptly described as ADR, but is a direct consequence of formal adjudication.

Still better, enlightened procedure, when it works as intended, induces citizens to avoid quarrels by performing their duties and observing the rights of others in order to avoid the lash of the law. In this way, effective, predictable adjudication hopes both to prevent disputes and to limit abuses of power as well as to resolve disputes that must inevitably occur. In this respect, the bickering of litigants can serve the interests of others, including the public interest, by preventing many other disputes from arising and by conforming at least some individuals' conduct to the law. When we think of the social cost of a particular lawsuit, we ought therefore think of it in relation to the bulk of other disputes that were settled in the shadow of the one case that is fully contested, and in relation to the still larger bulk of disputes that never arose because conduct was shaped to avoid them and the consequences of resolution according to law.

When we speak of alternatives to adjudication, we may speak of institutions or methods of resolving disputes having less, or in some circumstances no, concern for the law or its rights and duties. To the extent that ADR methods lack concern for accurate application of law to fact, they resemble Sumo, or trial by ordeal, or other ancient methods. There is nothing novel about deciding disputes without regard for the legal entitlements of the parties. Common sense and a millennia of experience with such methods suggest that they tend to be less effective at inducing parties to settle their differences in the shadow of the law, or to conform their behavior to the law's commands. Thus, in general, if we want citizens to perform their legal duties and settle their disputes in accordance with one another's rights, well-conducted formal adjudication is the method of dispute resolution best suited to that want. If enlightened procedure were functioning as intended, there would be only occasional need for alternative methods of dispute resolution.

ADR is therefore something of a reproach to the institutions of the law. It suggests a need for reform. It would, however, be a hardy spirit who would deny any such need. Indeed, it can fairly be said that judicial procedure is always in need of wise reform, and useful wisdom may be gained from carefully examining procedures conducted outside the institutions and procedures of formal adjudication. Some ADR methods are more useful for this purpose than others.

Thus, there are at least three different kinds of reform motivating contemporary ADR, and two of these may inform us about efficacious enforcement of rights. Some who speak of ADR consciously seek to liberate certain personal or institutional relationships from what they perceive to be the oppressions of law. Others have an abiding desire to enforce the law, but with less or no involvement of fully trained professional, adversary lawyers. Still others intend to engage the services of fully trained lawyers, but hope to economize on the amount of their services employed by abbreviating, simplifying, or bypassing formal procedures.

The first issue this Article discusses is ADR's foreswearing the enforcement of rights and duties. Such methods must have a role to play in addressing social ills. No sensible lawyer would contend that law is the right remedy for all such ills. For example, to think always of family relations in terms of rights and duties may be destructive of families. Sometimes, it seems that the more rights we have, the more impoverished are our relationships. Maybe post-modern America has broadly overdone the idea of legal rights. Perhaps there are many situations in which better law would step aside.

The extent to which law-foreswearing ADR is useful depends on our cultural assumptions. Puritan New England put almost all relations outside the law. If America is to become a closer community, more like 18th-century New England, the 19th-century Cheyenne, or that of a Jewish ghetto in 20th-century Warsaw or Kiev, diminishing the enforcement of rights is a good idea. Pervasive "rights talk," on the other hand, is not compatible with close community.

This Puritan form of ADR has nothing to say to civil procedure or court administration. It is a rejection of the first principles of enlightened procedure and of the reason for the existence of law courts. Thus, insofar as that is the aim, it is certain that ADR and

civil procedure must go their separate ways. Our forbearers recognized this in drafting the Federal Arbitration Act of 1925.⁵ The draftsmen envisioned and sought to foster commercial relationships to be like those among Puritan brothers and therefore suited to a dispute resolution process that is lawless. For that reason, they made no provision for arbitral tribunals that enforce legal rights or that are in any way accountable for their failure to do so. Civil procedure has nothing to learn from the Federal Arbitration Act. The same is equally true of private mediation aiming to conciliate potential adversaries by inducing forbearance in the assertion of rights.

III. Using ADR to Diminish the Role of Professional Lawyers

The second theme of ADR is to diminish the role not so much of law as of professional lawyers. In this dimension, ADR contemplates institutions and methods that are user-friendly, facilitating self-representation or representation by persons who are not fully trained lawyers. Some well-established forms of adjudication are congenial to this second theme: industrial accident compensation commissions, small claims courts, and the Veterans' Administration are examples.

Traditionally, such methods have been employed to save costs. Nonlawyers generally charge less for their services than do fully trained lawyers. And self-representation is the cheapest form. Cost savings can most often be effected by the nonprofessional approach when the issues of fact are simple or sufficiently repetitive that the forum can acquire factual expertise sufficient to enable it to provide guidance to lay advocates or unrepresented parties.

Today, there may be a second motive in avoiding the use of fully trained professional lawyers. Abroad, there is a disaffection with the adversariness or combativeness of American litigators. That disaffection might be loosely connected to the advent of feminism, which we are told favors nurturing relationships and disfavors confrontation and the imposition of hierarchy. In any case, perhaps if we do not use lawyers, we can enforce our legal rights and duties more amiably and with greater civility, as well as at lower cost.

5. 9 U.S.C. §§ 1-14, 201-208 (1994).

The use of less highly trained professionals is an idea that is scarcely new to America. It is pure Jacksonianism. Jacksonian populists did a fair job of demolishing elevated professional pretensions in the first half of the 19th century. Beginning in 1870 or so, we have done a fair job of rebuilding them, and we continue to erect ever higher standards, as the MacCrate Report attests.⁶ Maybe it is time for the pendulum to swing back. Maybe we should devise more roles to be played by persons of less pretentious professional status. This form of ADR is Jacksonian ADR. The idea may gain support from the increasingly strong subprofession of paralegals, who may be emerging—much as registered nurses emerged in the health care field—to exercise limited forms of professional autonomy. If this should happen, I will be able to claim some prescience as one of the authors of a 1971 study conducted under the auspices of the Association of American Law Schools that suggested the social utility of having less highly trained lawyers who might deliver services that more people could afford. That idea is now being voiced by Attorney General Reno.⁷

It is quite possible that making greater use of less fully trained professionals will marginally reduce legal costs. It is also possible, although not necessarily likely, that the practice may diminish combativeness and increase civility. On the other hand, it seems likely, but not inevitable, that the use of less fully trained lawyers will diminish the effectiveness of dispute resolution as an engine of rights enforcement. These are empirical questions that should receive more of our attention.

I have acquired some experience in devising such roles in my vicarious participation in the arbitration of claims in the A.H. Robins bankruptcy.⁸ The assets of A.H. Robins Company were sold to create a trust fund to pay claims for personal injuries alleged to have been caused by defects in the Dalkon Shield intrauterine birth control device.⁹ We have been conducting those arbitrations in the Private Adjudication Center, an organ of the Duke Law School, where I

6. THE MACCRATE REPORT, BUILDING THE EDUCATIONAL CONTINUUM CONFERENCE PROCEEDINGS (Joan S. Howland & William H. Lindberg eds., 1994).

7. Maureen Stapleton, *Make Room for Non-Lawyers in Justice System*, *Reno Urges ABA*, CHI. DAILY L. BULL., Feb. 5, 1996, at 1.

8. *In re A.H. Robins Co. Inc.*, 88 B.R. 742, 750-51 (E.D. Va. 1988).

9. *Id.* at 751.

have been a sometime officer of the Center. Many of the Dalkon Shield claims were of modest dimension, compensable at the level of five to twenty thousand dollars. We gave special training to our arbitrators, all of whom were experienced litigators. This special training enabled them to deal with the scientific evidence without the aid of fully trained, experienced professional counsel. In the United States, we identified suitable arbitrators near each cluster of claimants; but we sent some American arbitrators as far as Adelaide, Australia to conduct hearings at a place convenient to claimants.

The trust routinely defends against claims and is represented by counsel who are not lawyers, but who have acquired experience in the defense of Dalkon Shield claims. Many of the claimants have appeared pro se, and our arbitrators have been prepared to help them through the process. In Australia, most of the claimants were represented by a registered nurse in the employ of a lawyer who did not attend most of the hearings. By this method, we have been able to decide claims about as fast as the trust could make settlement offers.

We are presently holding about four hearings a day in cities wherever Dalkon Shields were sold. The cost of these proceedings is not cheap, and it eats into the funds available for distribution to the claimants. But the cost is far less to both the claimants and the trust than full-blown adjudication would be. All claimants desiring a day in court are getting one. Our arbitrators explain their decisions in writings addressed to the parties and to the federal court, which retains the power to review our decisions. The fact that this kind of arbitral process is available gives some assurance to other claimants who did not pursue their claims, but who settled on the trust's terms. They were empowered to resist a proposed settlement they thought inadequate. The feedback we are receiving from the claimants who chose to reject the trust's settlement offer and proceed to arbitration has been heartening. Those who accepted the trust's settlement offers also received something of value: the right to have one's rights recognized and enforced.

Are these Dalkon Shield arbitrations accurately described as a form of ADR? Or, are they a product of the influence of ADR on civil procedure? I am not sure. Our system of dispute resolution is a process of law enforcement operating within the jurisdiction of the bankruptcy court. It is an adaptation of civil procedure, using methods that look much like devices used wholly outside the

courthouse. What we have done is divert tens of thousands of minor hearings out of the bankruptcy court in Virginia into more convenient offices and conduct them without vigorous lawyering. There are no new ideas in this scheme. We have just rearranged law's familiar furniture to supply the needs of the moment. We hope and expect soon to commence a systematic empirical evaluation of what we have done. Meanwhile, such procedures are suited to a growing number of situations involving repetitious claims of modest or moderate dimensions, including even such stock items as fender benders, to the extent that such matters merit any form of dispute resolution. Silicon gel implant litigation or polybuteline plumbing disputes seem well-suited for these procedures.

IV. Streamlining Civil Procedure Through ADR

This leads to the third dimension of ADR: the practice of streamlining civil procedure by omitting some of its stages or steps. This variant of ADR assumes the use of the same highly trained and adversary counsel, but hopes to reduce cost by preventing needless steps that some parties use, not to protect their rights, but to wear down their adversaries. Typically, this kind of ADR is connected to formal adjudication. We speak of many of its forms as "court-annexed." To connect it to our past, we might denote it as Equitable ADR because it generally entails aggressive use of judicial power more suited to the customs of Chancery than to those of traditional law courts. But also included in this category of ADR is commercial arbitration as practiced in those countries or by those parties who conduct arbitration before arbitrators who are accountable to courts for their fidelity to the legal rights of the disputants.

The Civil Justice Reform Act of 1990¹⁰ was enacted in the apparent belief that we might have much to learn from experimentation with such forms of ADR. The statute itself calls for evaluations of experiments of this kind. It would be premature to draw final conclusions about the worth of those experiments, but not too early to say that there is currently little to report of promise. An obstacle that is difficult to surmount is the reality that each of the steps or stages of contemporary civil procedure serves the purpose of rights

10. 28 U.S.C. §§ 471-482 (1994).

enforcement; one cannot eliminate any of them without diminishing the ability of the process to achieve that enlightened aim.

It is inviting to consider fitting the procedure to the fuss, eliminating only those steps that seem unnecessary or even counter-productive in a particular case. Many judges have been trying to do that for about a quarter of a century; we call that "managerial judging." Some courts try to fit the procedure to the fuss more crudely by having regard for the dimensions of the stakes at issue; we call that tracking. Some scholars have advocated separate tracks for different categories of cases identified by the substantive character of the issues in dispute;¹¹ we could call that the reinvention of the forms of action. None of these approaches entails the use of anything that could be described as ADR.

However, another mode of fitting procedure to the fuss may. Methods used to induce the parties themselves to do the fitting with little or no formal participation by a court seem to entail ADR elements. A crude form of this approach is fee-shifting which compels litigants to count more closely the costs of superfluous procedural gambits. Draconian sanctions force parties to settle, but often at the sacrifice of their legal entitlements. Less crude is the intrusion of an additional step in the process of adjudication that provides parties with a better forecast of the likely outcome of formal adjudication, thus making settlement in the shadow of the law more likely. Nonbinding, court-ordered arbitration is one such example. Court-annexed mediation is another, and early neutral evaluation is a third. All these devices are presently in use, and some of them may sometimes produce positive results. However, the evidence currently available is inconclusive.

A. The Problems as Demonstrated by Court-Annexed Mediation

Some of the problems faced can be seen most clearly with respect to court-annexed mediation, that is mediation required by a court. I count at least four problems. The first is that a court-annexed mediator has no means to induce a settlement between parties who did not choose to mediate. What does the presence of an uninvited third lawyer add to the value of a settlement confer-

11. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1915 (1988).

ence? But what else does the mediator have in his or her bag of tricks? To earn their keep, mediators have to improve the settlement rate. One way to effect such an improvement is to derogate the worth of the parties' contentions; another way is to derogate the worth of the court that will hear them. It is unseemly that a court should be responsible for either of those activities. In the vernacular, the court using court-annexed mediators is likely in the business of "dissing" itself.

Secondly, because of the impotence of the mediator, court-ordered mediation invites abuse by an aggressive party. Abuse can occur because the worth of a mediator to the court is measured by his or her ability to bring the parties together. If one party takes irrational bargaining positions, the professional incentive of the mediator is to induce the parties to split the difference. If one party is indifferent to the moral suasion of mediation and the other is swayed by that influence, the mediator can become an instrument used to bludgeon an adversary into making an improvident settlement. Thus, we should not be surprised at Lenore Weitzman's findings that divorcing fathers often bargain in family court mediation for minimal support obligations to mothers desperate to maintain custody of their children.¹² The implications of her findings in other contexts remains an open question that needs an empirical answer, but her conclusion should be confirmed as a broad insight into the consequences of court-annexed mediation.

Third, there is the prospect that official mediation may actually delay settlement of some cases. While such mediation may accelerate some settlements, in other cases, parties otherwise inclined to accept a settlement offer will await a scheduled mediation conference to see if it improves their bargaining position. Parties may be saved some costs in cases in which earlier settlement is achieved, but there is room to question whether these savings are enough to balance the added expense of the mediation itself and of the cost of delay resulting from its use. We must remember that the meter is running for everyone involved in the mediation, and this cost is an added cost in every case in which the mediation fails. For example, appellate courts are increasingly attracted to the use of mediators to

12. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 244, 310 (1985).

resolve pending appeals. Of course, many cases are settled at appellate mediation conferences, but many of those would be settled anyway before final submission. Whether the net savings equal the cost of the mediation procedure is still uncertain. It is possible that the appellate judges who favor this device assign a very high value to very modest savings of appellate court energies and very little value to increased costs to the parties associated with the addition of yet another step in the litigation.

Fourth, there is a question of who should bear the cost of administering court-annexed mediation. In part, we socialize a cost that is traditionally borne by private parties—the cost of settling their differences privately. This is out of step with a national policy that seeks to privatize public services. There may be an answer to this dilemma if indeed we are settling many disputes that would otherwise result in long, costly trials administered at public expense. But public trials with firm results have secondary consequences for other settlements and for the conduct of other persons that mediated settlements do not have. And the evidence is not yet convincing that many long, costly trials are in fact being avoided through court-annexed mediation.

An alternative to the court-appointed mediator is the judicial mediator. Some of the foregoing problems can be avoided or minimized if the mediation is conducted by an officer of the court. But this solution is especially perilous to rights. It is too easy for a judge with the power of decision to oppress a party, and even to do so unintentionally. Parties are seldom equal in their ability to withstand intimidation, and judges, especially district judges, are intimidating. For this reason, George Wharton Pepper, the noted Philadelphia lawyer who was a member of the committee that drafted the 1938 Federal Rules, desired to make it a crime punishable by impeachment for a federal judge to suggest settlement.¹³ In Pepper's lights, a grievous mistake was made in the 1993 amendment of Rule 16 allowing the court to require parties to be available by telephone at the time of a final pretrial conference for the purpose of discussing settlement.

13. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1980 n.38 (1989).

B. The Benefits of Court-Annexed Mediation

Despite its limitations, we may yet learn to make good use of court-ordered mediation. One situation which has untested promise is in the resolution of issues arising in discovery. Numerous provisions in the federal rules are designed to induce the parties to settle discovery issues. The idea of the notorious disclosure provision inserted in Rule 26 in 1993 was to provide parties with the information they need to develop a mutually agreeable discovery schedule, as they are encouraged to do by the requirement of a discovery conference.¹⁴ It might be useful and cost-justified to make official mediation available at the discovery conference required by new Rule 26(f).¹⁵ Some mediation of such issues is presently performed by magistrate judges and even by district judges. Experimentation with other mediators might be in order.

Another area in which court-annexed mediation may be of special use is in the management of scientific and technical issues. Again, the Dalkon Shield experience may be informative.¹⁶ An important achievement of the Dalkon Shield arbitrations was to reduce the use of expert testimony. Expert testimony was not excluded, but neither was it required. Because our arbitrators were knowledgeable about the medical aspects of Dalkon Shield injuries, no claimant needed to offer proof on issues of gynecology. Reports of treating physicians were examined by arbitrators, but contested medical facts were severely narrowed, and in some cases eliminated.

The most troublesome feature of contemporary civil litigation is the overuse and misuse of opinion testimony. It is expensive to prepare and expensive to resist. Far too many cases are now fairly characterized as barking-seal contests, with adversary seal trainers lining up their teams of highly paid witnesses to make their trained utterances to a jury asked to determine which team's sounds are prettiest. While there are many genuine scientists who give able, disinterested testimony as expert witnesses, they are far too often matched with, and sometimes drowned out by, hired gun witnesses or discredited by their lack of forensic talent. Whether these experts

14. FED. R. CIV. P. 26.

15. *Id.* 26(f).

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

are often actually educating jurors is doubtful; there are likely many cases in which the competition of experts is a complete waste.

There is far less of this extravagant mischief in ADR. Hence, it is at least possible that broader use of ADR in large commercial disputes will accustom lawyers to more economical resolution of some issues presently resolved by the costly barking-seal method. Perhaps parties might usefully be required to mediate such issues in the hope that they might be disinterestedly resolved, or at least that the need for a battle of experts be verified by a mediated process. Such a reform might eliminate many scientific disputes and enable us to reduce the cost of necessary scientific or technical investigation. We might then abbreviate civil trials, which have been growing steadily in length over the last forty years as triers of fact have been asked to evaluate the utterances of ever larger and louder teams of barking seals. The potential cost savings are of an important magnitude.

V. Evaluating the Consequences of Adopting ADR

Before any such reforms are embraced, there should be much more careful study of the effects of our experiences. We now have methodologies that enable us to learn quite a lot about the efficacy of procedures. These methods should be employed to evaluate ADR as well as to evaluate methods of formal adjudication. Some of the things we can expect to learn and relearn, if only we could remember, are that there is no free lunch and that most reforms have unintended consequences that are sometimes unwelcome, and occasionally very unwelcome.

Good intentions, even the best intentions, are no guarantee of success in law reform, and that rule applies to the ADR movement as much as any. Remember the tragic experience of Henry Brougham, the great English law reformer of the last century. Brougham made a very long and very passionate address on the floor of Parliament in 1836 in support of a radical procedural reform, the Hilary Rules, that were proposed in the hope of making civil justice

in England more certain and less expensive.¹⁷ His words still resonate and express some of the aims of the ADR movement. "It was the boast of Augustus," he concluded,

that he found Rome of brick and left it of marble. . . . But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it a patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.¹⁸

Alas, Brougham uttered these florid words in support of a procedural reform that eventually made the English law of his time more dear, more a sealed book, and more a patrimony of the rich than it was at the time he spoke. Brougham was an outstanding victim of the law of unintended consequences.

Two innovations made in the name of the ADR movement seem at best questionable. The first is the settlement class action. The 1966 revision of the class action rule stands out as a premier American example of the law of unintended consequences.¹⁹ It was first abused by courts making extravagant claims to power, then by many class counsel securing awesome fees for services of doubtful benefit to their clients, and now by defendants in mass torts seeking to buy *res judicata* defenses.

Perhaps many ADR scholars are not acquainted with the settlement class action, an instrument exclusively associated with the phenomenon of mass torts and, some would say, the devil. Defendants in mass tort cases are now permitted, perhaps even encouraged, by some federal courts, to cut a deal with lawyers representing some claimants.²⁰ They may then be allowed to file a class action on behalf of all claimants with the lawyers selected by the defendants serving as class counsel. The deal, already cut, is then submitted to the federal court for approval with the end goal being to bring to repose the claims of all members of the class. In some cases, the settlement even includes members who cannot be

17. Henry Lord Brougham, *The Present State of the Law*, Speech Before the House of Commons (Feb. 7, 1828), in *SPEECHES OF HENRY LORD BROUGHAM*, VOL. II, 485 (Adam Black & Charles Black eds., 1838).

18. *Id.*

19. FED. R. CIV. P. 23.

20. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1349 (1995).

identified and notified, who may not yet have ripe claims, who may not be aware that they will ever have claims, and who may be yet unborn. The need for global peace is said to be the public interest warranting the use of such a procedure. In its more extreme forms, this is ADR with a vengeance. There is now a rich literature on the subject, but it is chiefly known to the *cognoscenti* in the field of mass torts. I urge ADR advocates to become acquainted with it.

The second innovation is the recently enlarged use of binding arbitration pursuant to adhesion contracts. Filled with the spirit of ADR, the Supreme Court of the United States has in the last decade rewritten the Federal Arbitration Act of 1925 in ways that seem entirely unjustified by the text or history of the Act or by any appropriate public policy.²¹ Those who secured enactment of that legislation sought to displace common law made by federal courts in the days of *Swift v. Tyson*.²² That law disfavored enforcement of arbitration agreements binding parties to submit to private resolution of future disputes. Many states enforced such agreements. Federal jurisdiction was being used to defeat state law and frustrate commercial traders desiring to create arbitral forums to enforce their contractual rights.

As noted earlier, the idea of arbitration in the minds of the reformers of 1925 was a process that would be quick, cheap, and amiable. Like the Puritans of yore, those individuals of commerce did not relish the involvement of lawyers or the enforcement of legal rights and duties other than those created by the contract of which the arbitration agreement was generally a part. Nonlawyers were often designated as arbitrators. Lay advocates were welcome. Arbitrators were permitted, and in some venues encouraged, to apply the principle known in international circles as *aequo et bono*, which means deciding cases gently, on the equities, and not harshly, on the legal entitlements of the parties. In keeping with this American tradition, arbitrators are not required to explain their decisions.²³ In fact, the American Arbitration Association discourages any such

21. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 9-11 (1984).

22. 41 U.S. (16 Pet.) 1 (1842).

23. *See, e.g., Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410 (5th Cir. 1990); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529 (D.C. Cir. 1989); *Craig v. Barber*, 524 So. 2d 974 (Miss. 1988).

utterances lest they reveal the nonlegal considerations influencing arbitral results.²⁴ There is no requirement that a record be made of the evidence submitted to an arbitrator, so it is often impossible to tell whether an arbitral award is supported by reasonable findings based on evidence. This does not matter under the 1925 Act because an award made by arbitrators acting within the terms of their contractual jurisdiction is almost nonreviewable. There is no federal jurisdiction to enforce awards unless there is diversity of citizenship or the arbitrated dispute was one arising under federal law.²⁵ However, if either condition is met, a federal court is required by the Act to compel the parties to perform the arbitration agreement and can only set aside an award for bias or fraud.²⁶

Until recent times, no one envisioned that a process so immunized from accountability for its fidelity to law could be employed as a substitute for adjudication of claims seeking to enforce rights and duties created by Congress or state legislatures for the purpose of adjusting perceived imbalances in economic power between contracting parties. Especially when legislation explicitly provided that the rights conferred are nonwaivable, it seemed apparent to many courts that the stronger party could not be allowed to use superior bargaining power to draw the protected party into a dispute-resolving tribunal having no obligation to enforce statutory rights, or at the very least, no accountability for its failure to do so.

Yet since 1985, the Supreme Court has undermined one federal statute after another by allowing the party on whom the statutes imposed duties to bargain with those on whom the statutes imposed rights for the resolution of their future disputes in a forum having no obligation to enforce legal rights. In each of these decisions, the Court has reaffirmed an assertion made by Justice Frankfurter in 1952 that can be traced to an earlier utterance of Jerome Frank. The assertion is that arbitration under the 1925 Act is merely an alternative method of law enforcement.²⁷ Frequent repetition of that assertion has not made it true. Unless the parties otherwise

24. CODE OF PROFESSIONAL RESPONSIBILITY OF LABOR-MANAGEMENT DISPUTES § 6(D)(1) (Nat'l Academy of Arbitrators, Am. Arbitration Ass'n, and Fed. Mediation & Conciliation Serv. 1974).

25. 9 U.S.C. § 4 (1994).

26. 9 U.S.C. § 10 (1994).

27. *Wilko v. Swan*, 346 U.S. 427, 439-40 (1953) (Frankfurter, J., dissenting).

agree, rights and duties are enforced in arbitration only when it suits the pleasure and discretion of the arbitrators. Thus, to say, as the Court has, that a San Juan auto dealer will have his rights under the antitrust laws of the United States determined by a Japanese arbitrator²⁸ stops just short of saying that the rights under antitrust laws may be waived completely in an adhesion contract drafted by the party whom Congress intended to restrain. A similar fate has now befallen rights under the Securities Act,²⁹ the Securities Exchange Act,³⁰ RICO,³¹ the Age Discrimination Act,³² and the Carriage of Goods by Sea Act.³³ The same fate may await even the Automobile Dealers' Day in Court Act.³⁴ By these decisions, the Court has seriously impaired private enforcement of federal law.

Worse, the Court has also transmogrified the 1925 Act to preempt the state law that it was enacted to protect. This decision was made in 1987³⁵ and reaffirmed in 1995³⁶ despite the vigorous protest of twenty state attorneys general. Thus, even state legislatures are disempowered to provide that the laws they enact may be enforced in court notwithstanding adhesion contract clauses calling for arbitration.³⁷ Parties having superior bargaining power are empowered to shield themselves from a broad expanse of private enforcement of both state and federal laws. All this has been done in the name of ADR, seemingly based on the casual assumption that any and all uses of ADR are good and ought to be encouraged.

VI. Conclusion

Of course, it is possible to devise an arbitration practice that is a legal process. The California rent-a-judge procedure offers a

28. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

29. 15 U.S.C. § 77a (1994).

30. 15 U.S.C. § 77 (1994).

31. 18 U.S.C. § 1961 (1994).

32. 42 U.S.C. § 6101 (1988).

33. 46 U.S.C. § 1300 (1988).

34. 15 U.S.C. § 1221 (1994).

35. *Perry v. Thomas*, 482 U.S. 483 (1987).

36. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 115 S. Ct. 834 (1995).

37. *Id.* at 838; *Southland v. Keating*, 465 U.S. 1, 11 (1984).

paradigm.³⁸ International commercial arbitration is also often conducted as a legal process. We have tried to devise such a system in our Private Adjudication Center at Duke, but have found no great demand for it. What the Court has done may result in accommodations being made in the review of arbitration awards, but such accommodation would deprive traditional American commercial arbitration of features that make it attractive to commercial users. Generally, the champions of ADR did not intend to deprive our fellow citizens of hard-won protections from the private power of economic brutes. But that is what has happened in at least one important respect, and perhaps others, as a result of their efforts.

This point is not made with condescension. I share responsibility for some unintended consequences effected by changes in the Federal Rules of Civil Procedure, as do all who were responsible for the 1938 Rules and many of the significant changes since that time. The contemporary ADR movement is simply not exempt from the iron laws of law reform. For ADR, as for the rest of us, there is no free lunch, and every reform has unintended consequences. This is, of course, not an argument for continuing practices that are manifest failures. I do not voice the dictum of Macaulay that all reform should be resisted because things are bad enough as they are. I argue for care based on close observation of the realities of dispute resolution. I cheer that we are making progress in empirical study of our dispute-resolving institutions, but there is still too little such work done within our law schools and too little attention paid to the useful work done by others.

38. CAL. CIV. PROC. CODE § 638 (West 1990).