

*Spring 1993*

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#### Recommended Citation

Alfred W. Meyer, *To Adjudicate or Mediate: That is the Question*, 27 Val. U. L. Rev. 357 (1993).  
Available at: <https://scholar.valpo.edu/vulr/vol27/iss2/3>

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## Seegers Lecture

### TO ADJUDICATE OR MEDIATE: THAT IS THE QUESTION\*

ALFRED W. MEYER\*\*

The contracts professor sought to establish the proposition that the perfect tender rule does not apply to an installment contract for the sale of goods. He therefore posed the following hypothetical to his class: Two parties entered into a six-month contract for the sale of 6000 units, 1000 to be delivered each month. Conforming deliveries are made in the first two months, but in the third month only 900 units are shipped. The question is: "As Seller, what would you say in response to the angry Buyer's notification that Buyer rejects the shipment and considers himself discharged from any further obligations under

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\* This is the revised text of the tenth Seegers Lecture delivered at the Valparaiso University School of Law on March 17 and 18, 1993. The style and colloquial tone of the original lecture have been retained. Footnotes have been added. The text was prepared while on sabbatical at the Indiana University School of Law—Bloomington. I thank Dean Alfred C. Aman, Jr. and his staff and faculty at I.U. for their hospitality and for the facilities which they provided. Special thanks to Professor Harry Pratter for a close and helpful reading.

I have chosen a topic for this lecture that features the dispute settlement process of mediation because of two experiences. The first was my attendance at a Harvard Law School program seven years ago in which Professor Frank Sander held forth on the projects that had begun at Harvard on alternative dispute resolution processes. At that time I, and I suspect most of us, had not even heard of what is now known by its acronym, ADR, nor had I heard of Frank Sander, the leading guru of the movement.

I returned to Valparaiso a convert—at least a convert to the extent that I thought somebody should do something in our shop about this "new and different" approach to dispute settlement, a kinder and gentler way of resolving disputes. Whether it is the Socratic method in the classroom or the adversary procedure in the courtroom, neither law professors, nor law students, nor attorneys, nor clients are supposed to "feel good all over" (like Little Orphan Annie) as they study, practice, or participate in litigation. "Meeeediation," ugh!, the sound of the word suggests that it is for wimps. It may be appropriate for clinical psychologists and social workers but certainly not for law students or lawyers. Well, I overcame my misgivings with the thought that if Harvard, a battered but still a bastion of conservative legal traditions, was devoting attention to ADR, it couldn't be all bad. So I began to offer a seminar, which led to my second experience.

In the summer of 1988, I joined a delegation of mediators and ADR teachers in a People-to-People sponsored program, visiting cities in China to observe the use of mediation. My reaction from that experience is that, as we enter an age whose buzz words are globalization and multiculturalism, mediation is and will be looked to in increasing measure as one of the leading, if not the most prevalent technique, of dispute resolution. Thus, ADR is a subject whose time has come.

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the contract?" As the professor glanced around the room full of students suddenly staring at their notes and shoelaces, only one hand had risen, it being the hand of a young boy, a class visitor sitting next to his law student-father. With misgivings, the professor, having made eye-contact with the young boy, said: "Well, what would you say?" The response: "I'd say: 'I'm sorry'." Obviously the young boy needed a legal education, because being a lawyer means never having to say you're sorry.<sup>1</sup> Law students learn to be adversarial and competitive, not apologetic. But new methods of dispute resolution have emerged, which the legal profession must closely examine and develop into viable alternatives.

## I. INTRODUCTION

This Lecture attempts a critical examination of two processes of dispute resolution: adjudication and mediation. Adjudication is the time and tradition-honored technique in the Anglo-American jurisprudence of trials, while mediation, although not without ancient and honorable roots in other cultures, is a comparative newcomer on the American scene. In the movement known as Alternative Dispute Resolution (ADR), adherents of mediation promote its virtues as a preferred dispute resolution alternative to litigation and the process of adjudication. This Introduction will seek to polarize the issues by offering a number of pejorative comparisons and contrasts between the two processes. Part II will then describe the analytical framework of the two processes. In Part III, I will address the controversial adversarial ethic of adjudication by exploring its historical development and then by examining the arguments that attack and defend it. In Part IV, I will discuss the extent to which mediation has become a part of our dispute settlement arsenal, the issues it raises, and the claims made on its behalf as a preferred process to that of adjudication. Part V will be a "Man from LaMancha" routine in which I will attempt—and fail—to adequately describe the impact of modern (and post-modern) jurisprudential theories on the value questions involved in the adjudication versus mediation debate.

Adjudication is the process whereby the disputants or their representatives present proofs and reasoned arguments to a third party who is to find the facts and apply an external, normative standard (the law!) to determine the winner and loser. By contrast, mediation is the process in which the disputing parties present their respective versions of the facts of the dispute to a third party who is to help them find a basis for a settlement agreement. The former is adversarial and competitive; the latter, collaborative and problem-solving. The former results in zero sum outcomes (one wins at the expense of the other); the

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1. The story is based on an anecdote reported in KENNEY HEGLAND, INTRODUCTION TO THE STUDY AND PRACTICE OF LAW, 283-84 (1983).

latter results in joint gains (classical contract theory—each party values the other's entitlement more than his own—for example, the seller values the buyer's money more than his goods and the buyer values the goods more than his money). The former is formal, elaborate, and expensive; the latter, conversational, flexible, and cost effective. The former is time consuming; the latter, expeditious. The former is an involuntary imposition of external, abstract, and objective norms (the law of the sovereign); the latter involves internal, personalized, and contextual interests (private law—a contract—made by and for the parties themselves). Finally, and most pejoratively, the former is macho, aggressive, and contentious, while the latter is wimpy, passive, and compromising. While there is some truth in each of these comparisons and contrasts, it is the distorted truth of caricature, the kind of truth one expects in a debate between zealots. Perhaps, however, these characterizations will serve to set the stage and help us to recognize the heroes and villains as they emerge in the analysis that follows.

## II. ADJUDICATION AND MEDIATION: THEORETICAL BASES

One has no justifiable alternative but to begin an analysis of adjudication and mediation with an account of the theoretical work done in the 1960s by Lon L. Fuller, the then Carter Professor of Jurisprudence at the Harvard Law School. At the time of his retirement in 1972, he was generally acclaimed as the preeminent American legal philosopher. He addressed the subject of this Lecture in two articles titled: *The Forms and Limits of Adjudication*,<sup>2</sup> and *Mediation—Its Forms and Functions*.<sup>3</sup> The titles reveal what distinguishes these articles from most of the past and contemporary literature on the subjects. Forms, limits, and functions were the concepts that made Fuller's career a testimonial to a concern for process. He was concerned with distinguishing diverse types of legal processes, identifying their relationships to each other, and articulating the limits which would preserve what he defined as the "internal morality" of each. His purpose was not to show that one process was better than another, but rather to demonstrate that each process served a distinctive purpose; its appropriate use depended on the nature of the problem to be resolved, the resources available, and the values to be realized. In his general approach to what he termed "principles of order," Fuller identified five processes: adjudication, mediation, contract, legislation, and managerial direction.<sup>4</sup>

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2. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) [hereinafter Fuller, *Adjudication*].

3. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [hereinafter Fuller, *Mediation*].

4. Fuller, *Adjudication*, *supra* note 2, at 363, 398; Fuller, *Mediation*, *supra* note 3, at 338.

We are concerned in this Lecture with the first two, adjudication and mediation. However, we cannot ignore the third, contract, not only because that is the course I teach, but also because, as I hope will become evident, the process of mediation is designed to culminate in a contract—an agreement between the parties. What distinguishes contract and mediation from the other principles of order is their moral force, the force derived from the parties having made law for themselves.

#### A. Adjudication

Fuller argued that the optimum condition for the functioning of adjudication lies in the fact that it confers on the affected party a particular kind of participation—the presentation of proofs and reasoned arguments in a setting that is institutionally defined and assured.<sup>5</sup> Whatever enhances this participation increases its efficacy; whatever detracts from it impairs its internal morality. Several propositions follow from the use of the phrase ‘reasoned argument’. Fuller acknowledged that the reliance on “communication and persuasion” necessarily “presuppose[s] some shared context of principle.”<sup>6</sup> But what is to be the source of the principle? The facile answer is that judges rule and decide by applying the law, thus ensuring the triumph of justice. But it should be obvious that herein lies the rub, a rub which we must confront in Part IV of this Lecture. Our present concern is to compare *processes*, not to examine the claims of value involved in the processes. The process of adjudication assumes the application of an external standard—namely “the law”—as contrasted with that of mediation, which looks to an outcome determined by the agreement of the parties, whereby the parties make the law for themselves.

It may be useful to summarize a number of propositions that flow from the “forms and limits” of adjudication: the process should not be initiated by the deciding tribunal (such would compromise the neutrality or impartiality of the judge);<sup>7</sup> the decision should be accompanied by reasons (the reasoned arguments of the parties deserve a reasoned response from the judge);<sup>8</sup> the decision should not rest on grounds not argued by the parties (such would compromise the integrity of the parties’s participation);<sup>9</sup> the decision should operate retrospectively to the dispute between the litigating parties (the participating litigants represent only themselves, not other members of the public or the public interest);<sup>10</sup> and, finally, the process is inherently unsuited for what

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5. Fuller, *Adjudication*, *supra* note 2, at 363-66.

6. *Id.* at 373.

7. *Id.* at 385-87.

8. *Id.* at 387-88.

9. *Id.* at 388-91.

10. *Id.* at 391-92.

Fuller termed "polycentric" tasks, where the resolution of the issue between the participating parties will have an impact on issues affecting a multiplicity of parties, whether formally represented or not.<sup>11</sup>

### B. Mediation

ADR proponents advance mediation as an ethical antidote for the ills of adjudication. Fuller's treatment of mediation, although cited by all as the pioneering contribution to the literature, offers little solace for this point of view. Describing his essay as "tentative" and "imperfect,"<sup>12</sup> he resorted to narrative and his own experience in union-management disputes to describe the forms and limits of mediation as an unexplored resource for social ordering. The contrast in methodology between the two articles may readily be explained. Adjudication had been subjected to extensive coverage in literature, having won its place in our legal system in the seventeenth and eighteenth centuries. By contrast, mediation was a stranger to our legal system, although it had been explored by anthropologists and comparative sociologists who studied its use in primitive civilizations and in non-western cultures. Fuller's article on mediation broke scholarly legal ground and provided the theoretical framework for the contemporary use and discussion of mediation.

Unlike his article on adjudication, which is analytical and theoretical, Fuller demonstrated the potential attributes (the forms and limits) of mediation by the use of illustrations drawn from three factually specific contexts: an employer-union contract,<sup>13</sup> a marriage contract,<sup>14</sup> and an allocation of an inadequate water supply to farmers.<sup>15</sup> What he found in common among these three problems, and what warranted the non-adversarial process of mediation in the first two and what he called "consultative" techniques<sup>16</sup> in the third, were (1) relationships of heavy interdependence exerting a strong pressure to reach agreements, and (2) an absence of rules requiring, prohibiting, or attaching specific consequences to acts. Thus, Fuller characterized the central quality of mediation to be its unique capacity to "reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>17</sup>

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11. *Id.* at 394-404.

12. Fuller, *Mediation*, *supra* note 3, at 339.

13. *Id.* at 309.

14. *Id.* at 330.

15. *Id.* at 334.

16. *Id.* at 336-37.

17. *Id.* at 325.

For comparative purposes, it may be helpful to repeat Fuller's characterization of adjudication's unique capacity: to allow participation of the parties by the presentation of proofs and reasoned arguments. We need not treat the details of his mediation illustrations except to note that the criteria for their inclusion foreshadow those recommended by modern proponents of mediation, which will be discussed in Part IV of this Lecture. What deserves emphasis here, however, is the prescience of Fuller in warning that the standard American solution for the kind of problems in his illustrations is to move toward "judicializing" or "legalizing" the administrative tasks they involve with the obvious cost in reducing the consultative and mediative elements in the operation.<sup>18</sup> We will return to this concept when we discuss how courts and legislatures have "co-opted" mediation by making it a part of pre-trial procedure in adversary litigation.

### III. ADJUDICATION AND THE ADVERSARIAL SYSTEM

Proponents of mediation argue that the adversarial ethic of adjudication not only impairs its truth-seeking function but is inimical to the ethical standards of the legal profession. Since the adversary system was not the product of a grand design or of purposeful development, a brief history of its evolution aids in framing the issues for discussion.

#### A. *Historical Development of the Adversary Process*

For present purposes, an "Arabian Carpet" treatment should suffice since the historical detail is well-documented elsewhere and will ensure that we are not condemned to repeat the idiosyncratic and culturally conditioned mistakes of the past. The highlights of this history, however, may best be appreciated if we keep in mind what we have identified as the essential attributes of the end product: (1) the neutrality or impartiality of the judge; (2) the presentation of proofs and reasoned arguments by representatives of the parties; and, (3) a formal, institutional setting that is controlled by rules of evidence and procedure.

Procedures for resolving disputes in the eleventh and twelfth centuries were grisly ceremonies relying on divine intervention to determine the outcome. Trial by battle had a short-lived history in England, having been imported from the continent at the time of the Norman invasion. Trial by ordeal and trial by wager of law were its successors. The outcome in each depended on the will of God. Ordeals consisted of carrying a red hot iron bar or being immersed in deep water. If the burn healed within a certain time or if the body briefly sank rather than floated, the accused was declared innocent. In wager of law, the litigant

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18. *Id.* at 337.

presented his case by taking a prescribed oath, attested to by the oaths of witnesses (called "compurgators") from his neighborhood, that he was a truth-teller. Winning depended upon whether the litigant and his witnesses were able to recite the complicated oath forms without mistake. God would twist the tongues of those who were lying. While battle, ordeal, and wager of law suggest a form of adversarialness, they can hardly be cited as influencing what we now describe as the adversarial system. The outcome of the battle, ordeal, or wager was the exclusive basis on which the dispute was resolved. If a law school had existed at the time, a course in evidence would not have been needed because *all* evidence was irrelevant and immaterial.

The events that laid the foundation for our modern adversarial system occurred between the thirteenth and seventeenth centuries. Trial by jury began with jurors being selected from the neighborhood in which the dispute arose. Similar to the inquisitorial systems of the Roman and Canon law, the jurors were expected to play an active role in using their personal knowledge and inquiries to decide the dispute. Slowly and tortuously, adversarial features crept in as counsel were employed, witnesses testified, and counsel made arguments, thereby transforming the jury from an active inquisitorial role to one of passive neutrality. The system remained, however, one of stylized, formal rules with the judges, instead of the jury, now playing the active inquisitorial roles.

The dramatic changes that occurred during the eighteenth century in both England and the United States and that formed the basis for our modern system have been documented in research published by Professor Stephan Landsman.<sup>19</sup> He identifies three periods of the eighteenth century as especially significant.<sup>20</sup> In the first period, the early 1700s, the judges became inquisitors by default because counsel were not regularly present to represent the parties. Witnesses would produce narrative testimony, which would be followed by vigorous and "sharp-tongued" questioning by the judges. Even with counsel present, a manifestation of "zeal" on their part was viewed during this period as a breach of decorum. The beginning of the second stage dates from the 1730s, as individual cases revealed party initiative in the production and interrogation of witnesses coupled with increasing regularity of participation of counsel. By mid-century, the presence and assertiveness of counsel in the production of evidence signified the impending demise of inquisitorial procedure. In the final stage, the late 1700s, the hallmarks of the adversary system were well in place: rules of evidence, strategic use of evidentiary objections, cross-examination of

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19. This historical summary is based upon and the quotes are taken from STEPHAN LANDSMAN, *ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* 1-21 (1988); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990) [hereinafter Landsman, *Adversary Procedure*].

20. Landsman, *Adversary Procedure*, *supra* note 19, at 502-03.



witnesses, use of solicitors in the preparation and investigation of cases, and, of great significance, the neutrality of judges.

The preceding factual account of the eighteenth century documents the rise of the adversarial system but does little to account for why it took place during this particular period. A variety of political, social, and economic forces influenced the development: the French and American revolutions, industrialization, expansion of trade and commerce, shifting of power from the landed gentry to the rising middle class, democratization of the electorate, etc. The newly prized political and economic freedoms called for new procedures in the courts. Disputes multiplied, and a desire grew for a legal device that could solve the current problems facing the court without completely breaking from the past. A “demonstrably neutral mechanism” was needed: disinterested fact finders, party control over the proceedings, decisions based on the presentation of the parties, and counsel trained and skilled in the arts of advocacy—ideas and an institution whose times had come. One early example of the new “rights-based” thinking may serve as an instructive harbinger of what was to come.

In 1692, Parliament passed a statute establishing a reward for the apprehension and conviction of highway robbers. A professional class of “bounty hunters” sprang up almost overnight. One in particular, Jonathan Wild, became notorious not only for his success in apprehending the dastardly felons, but also for his courtroom skills in procuring their convictions. As recounted by Landsman from four early trial records, the prosecutions bore a remarkable similarity.<sup>21</sup> Lacking corroborative factual support (except from alleged accomplices who were, more likely than not, his own assistants), Wild was both the witness and the advocate relying on confessions, admissions, and hearsay to “stage-manage” the prosecutions. The nefarious activities of Wild and others of his ilk led to procedural reforms providing counsel with the opportunity to use adversarial techniques to expose the fraudulent basis of the charges.

Landsman concluded his account of the historical evolution of adversarial procedure with other instances of individuals using the courts to restrain abuses by those in power. Treatises on the law of evidence written in the nineteenth century were important allies to those seeking courtroom vindication of rights. Wigmore referred to this period as the “spring-tide of the [evidence] system.”<sup>22</sup> Of particular interest for the subject of this Lecture is the conclusion in Landsman’s “Epilogue”:

[P]roposals [which would put an end to the excesses of

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21. *Id.* at 573-77.

22. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 26 (2d ed. 1923).

contentiousness] strike at the heart of the adversarial approach to adjudication. . . . The association between contentious methods, procedural fairness, and liberty make anti-adversarial reforms a risky business. Change should not be undertaken without the greatest of care and in the light of the historical foundations of the adversary system. What is lost may be both precious and irreplaceable.<sup>23</sup>

Whether “what is lost” might be worth losing will occupy our attention in Part IV.

### *B. Adversarial Justice: The Critics*

An imposing array of critics have attacked the adversary system on both pragmatic and ethical grounds. The charge that adversary procedures are too slow, unwieldy, and costly to respond to the needs of modern society has prompted numerous empirical, time-and-motion studies that, as you might expect, have not resolved the validity of the charge. Important as these efficiency issues are, they are beyond the scope of this Lecture. Of primary concern here are the attacks based on moral and ethical grounds.

Roscoe Pound, Jerome Frank, and Marvin Frankel, illustrious names in the history of American jurisprudence, represent three generations of critics of the adversary system. Pound, the legendary dean of the Harvard Law School and founder of the school of sociological jurisprudence; Frank, Yale Law School professor, a leading exponent of American legal realism both as an academic and later as a federal jurist; and Frankel, Columbia Law School professor who, like Frank, became a federal judge, each leveled attention-getting broadsides at the ethics of adversarial procedure. Pound delivered his indictment in a speech that was said to have “shocked” the American Bar Association in 1906.<sup>24</sup> He derided the “contentious” procedure as based on a “sporting theory of justice,”<sup>25</sup> one in which “the inquiry is not, What do substantive law and justice require? Instead the inquiry is, Have the rules of the game been carried out strictly?” The effect, he said, is to give “the whole community a false notion of the end and purpose of law.”<sup>26</sup>

Two generations later, Jerome Frank titled a chapter of his book, *Courts on Trial*,<sup>27</sup> “The ‘Fight’ Theory versus The ‘Truth’ Theory.” He likened the

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23. Landsman, *Adversary Procedure*, *supra* note 19, at 604-05.

24. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REPORTS OF THE A.B.A. 395 (1906).

25. *Id.* at 404.

26. *Id.* at 406.

27. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

system to a “battle of wits and wiles,” the equivalent of “throwing pepper in the eyes of a surgeon when he is performing an operation.”<sup>28</sup> With literary references to the bitter and sarcastic observations of Kafka, Jonathon Swift, and Damon Runyon, Frank called for new measures of reform to diminish what he called the “martial spirit” of litigation. He called the “fight theory” a “legal laissez-faire” with the “litigious man” replacing the “economic man.”<sup>29</sup> The individual enterprise of individual litigants would ensure that the social policies of the legal rules would be applied to all of the relevant and actual facts. Without denying the partial validity of the economic theory and the legal analogy, Frank considered the postulates inadequate for both economics and law in that observation of social and legal realities revealed the injustices produced by each.

Finally, among this trio of adversaries of the adversary process, Judge Frankel, in 1980, authored *Partisan Justice*,<sup>30</sup> in which he lamented:

Excessive reliance on the adversary process has come to permeate our legal institutions. The fundamental conception of rules of warfare as the route to peace characterizes our approach to both civil and criminal disputes. Our reliance upon adversary premises and techniques has led to an array of disorders and dissatisfactions—from glutted courts to the travesties of plea bargaining to the rituals and endless tinkering attending the *Miranda* warnings, and the injustices that result because effective access to justice depends too heavily on the wealth necessary to pay for effective lawyering.<sup>31</sup>

According to Frank, “[W]e have fashioned a regime of individual competitive struggle, freeing the contestants to war against each other, decreeing in large measure that the state or its judicial representative should serve as passive umpire to keep the conflict within broad limits.”<sup>32</sup>

Considerations of time and audience patience preclude a further elaboration of the above critics’ arguments. Nor should it be necessary to list others who have added their voices to the chorus; representatives of three generations should suffice. The critics have had an impact on the adversary system. Procedural reforms too numerous, too detailed, and, with apologies to those who teach civil procedure, too boring to describe, have blunted some of the “fight theory” criticisms. What is especially ironic, however, is that many of the well-

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28. *Id.* at 85.

29. *Id.* at 92.

30. MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980).

31. *Id.* at 86.

32. *Id.* at 11.

intentioned reforms have exacerbated rather than curbed the abuses of adversary advocacy.

Rules of discovery, designed to enable one side to find out crucial facts from the other, become a powerful weapon in the arsenal of the resourceful advocate whose word processors and printers churn out reams of standard form inquiries to harass, to delay, and to impose added expense on the opponent. The party responding to the discovery order may likewise frustrate the objective by inundating the opponent with a flood of paper that may or may not include the sought-for information. Thus, the procedural reforms thrust and the adversary system parries to produce more costly litigation and the obvious injustice to the litigant with lesser resources. It is not surprising that we hear with increasing frequency of litigators who are leaving the practice, having become disenchanted and "burned out" from a system that exacts a heavy toll on their personal and professional satisfaction.

### C. *Adversarial Justice: The Defenders*

In Part II, Lon Fuller was portrayed as an analytical "process" scholar whose primary concern was to describe the forms and limits of the dispute settlement processes. He was, however, on record as a "true believer" in the adversarial ethic of adjudication. He emphasized that a non-adversarial procedure risks prematurity of judgment:

An adversary [procedure] seems the only effective means for combatting this natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.<sup>33</sup>

In addition, Fuller did not see the contentiousness of the process as an unmitigated evil because it offered a salutary outlet for pent-up emotions. He believed that even though litigation, in a sense, appeared to waste human resources, it was less wasteful than the consequences of alternatives in which parties were unable to work off their animosities.

Thus, it is the observance of the process and its "limits" that ensures that it will not be abused. And the adversarialness becomes a virtue. Fuller thought

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33. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

that statesmanlike advocacy could see to it that the process of adjudication achieves its most useful and least hurtful form. Attorneys, by vigorously asserting their clients' positions, can give clients a sense of moral satisfaction. Through concessions and a broad treatment of the case, claimed Fuller, the attorney conveys to the court a true insight into the interests involved and leads the court to a reasonable solution of the conflict involved.

The cynic will deny and the skeptic will question the extent to which Fuller's use of the phrases, "statesmanlike advocacy," "moral satisfaction" of clients, and "concessions and broad treatment of the case" are operational in the contemporary practice of litigation.

Before leaving Fuller's views on the adversarialness of adjudication, we should note his remarks on another and rather unique occasion. In 1959, his colleague on the Harvard law faculty, Harold Berman, was invited by the United States Information Agency to arrange for a series of "talks" on American law to be broadcast by the Voice of America to audiences in Europe, Asia, and Africa. Fuller participated in the series with a talk entitled "The Adversary System."<sup>34</sup> He warned at the outset that the title phrase should be understood in "a narrow sense," a sense in which the roles of the actors are clearly circumscribed. A context in which the judge and jury must be excluded from any partisan role, believed Fuller. And arguments must be presented by advocates with partisan zeal in such a way that the case appears in the aspect most favorable to their clients. Thus:

[The] advocate is not like a jeweler who slowly turns a diamond in the light so that each of its facets may in turn be fully revealed. Instead the advocate holds the jewel steadily, as it were, so as to throw into bold relief a single aspect of it. It is the task of the advocate to help the judge and jury to see the case as it appears to interested eyes, in the aspect it assumes when viewed from that corner of life into which fate has cast his client.<sup>35</sup>

Fuller spoke of a "tolerant partisanship," referring not only to a tolerance for opposing viewpoints, but a tolerance for a partisan presentation of those viewpoints.

In the end, the justification for the adversary system lies in the fact that it is a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through

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34. Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 2d ed. 1971).

35. *Id.* at 35-36.

eyes other than his own, where he is able to become as impartial, and as free from prejudice, as the lot of humanity will admit.<sup>36</sup>

Scholars, especially jurisprudes, are not prone to characterizing a legal institution with such a ringing endorsement. Recalling the nature of the audience may furnish the explanation for this aberration. Civil law systems feature inquisitorial procedures with magistrates making findings without the aid of advocates and without the fanfare and publicity of a trial. To the Voice of America radio audience attuned to their own systems' susceptibility to official tyranny and political abuse, Fuller is to be forgiven a bit of hyperbole in trumpeting the individual and human rights virtues of adjudication.

Other proponents of the adversary system respond more directly to the criticism that the "fight theory" does not produce "truth." In the grandiloquent prose of Law Day rhetoric, a trial may be described as a "search for truth." And no less an authority than John Stuart Mill has supplied the epistemological rationale:

Since there are few mental attributes more rare than that judicial facility which can sit in intelligent judgment between two sides of a question, of which only one is represented by an advocate before it, truth has no chance but in proportion as every side of it, every opinion which embodies any fraction of the truth, not only finds advocates, but is advocated as to be listened to.<sup>37</sup>

In language less prolix, Justice Handler of the New Jersey Supreme Court supplied the judicial rationale: "Because we do not know which side truth has taken, we let the sides fight it out. . . . In this contest, the truth will out."<sup>38</sup> The Pilates (and the Doubting Thomases) of this world will still want to know what "truth" we are talking about. How can we compare the results of the adversary system with the "true results" unless the true results are known? And how can we know the true results except by intuition and anecdotal reports?

It may be a more helpful analysis to distinguish the goals of litigants and their attorneys from the goals of the system. Disputes are framed by lawyers arguing to win for their clients. One can argue that the desire to win is both the virtue and the vice. The desire to win prompts the lawyers to develop the strongest and most persuasive evidence in support of each position. The result

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36. *Id.* at 46-47.

37. JOHN S. MILL, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 301 (M. Lerner ed., 1961).

38. Alan B. Handler, *The Judicial Pursuit of Knowledge: Truth and/or Justice*, 41 *RUTGERS L. REV.* 1, 4 (1988).

is that the decision maker will be in the best position to decide the controversy. But the competitive desire to win may tempt the litigator to “cheat” by suppressing relevant evidence, introducing misleading (if not untruthful) testimony, or misrepresenting applicable law. Here the goal of the system is to develop rules of evidence and procedure that will prevent, or at least frustrate, such behavior. By avoiding the simplistic slogan of “a search for truth,” this analysis focuses on the more meaningful inquiry of what process is best calculated to produce the truth. That manifestations of the truth do not invariably represent truth is not the fault of the adversary system but is rather a result of human fallibility.

Alan Dershowitz, the attorney on appeal for Mike Tyson, argued recently that the jury should have been given an instruction regarding the possibility that Tyson mistakenly believed that the complaining witness had consented to sex. As Dershowitz put it: “The practical reality is that the truth often lies someplace in between [rape and consent]” and that “the jury could have believed he was telling the truth and she was telling the truth and they saw it differently. Perceptions matter.” The point is well taken. Whether it be Mike Tyson, a jury, a judge, or you or me, we are all limited by our human condition to a perception of truth as opposed to a discovery of “the truth, the whole truth and nothing but the truth.”

#### *D. The Morality of the Adversary System*

The Lawyer, who has made not only the scales of right but also the sword of justice his symbol, generally uses the latter not merely to keep back all foreign influences from the former, but, if the scale does not sink the way he wishes, he also throws his sword into it, a practice to which he often has the greatest temptation because he is not also a philosopher, even in morality.<sup>39</sup>

I suspect that the pro and con arguments made by members of the legal profession—be they academics or practitioners—do not lead to a satisfying conclusion about the morality of the adversary system. Since the Kant quotation suggests that the “swords” in the legal arena may be insufficient analytical tools, distinctions drawn from moral philosophy may be helpful. In much of what follows in this section, I am indebted to a moral philosopher, David Luban, who, without the benefit, or perhaps detriment, of a formal legal education, has been a prolific and thoughtful author and speaker on issues of legal ethics.<sup>40</sup>

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39. IMMANUEL KANT, PERPETUAL PEACE (1795)

40. The following discussion is based on DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50-103 (1988).

First, a distinction must be made between the civil and criminal justice systems, a distinction that many of the above arguments have glossed over. The goal of zealous advocacy in criminal defense is to curtail the power of the state. Criminal procedures "overprotect" the rights of the accused to guard against the danger that those in power will persecute the innocent. Thus the purpose of the adversary system is different in the criminal and civil justice systems. In the latter, the purpose is to achieve legal justice by determining facts, applying norms, and awarding remedies. In criminal justice, the rules and the system are designed to protect the accused against the state, the powerless against the power wielders. If excessive zeal results in the acquittal of a guilty defendant, we do not criticize the system for its failure to produce the "truth." Rather we see the value of "truth" to be subordinate to the value of stacking the deck in such a way as to minimize the risk that the state will persecute the innocent. Zealous advocacy in the defense of the accused can therefore be justified on grounds not present in the civil system. To focus on the adversary system in criminal procedure is misconceived as a justification for its use in civil litigation.

Luban classifies the arguments for the adversary system in civil litigation into two general categories: consequential and nonconsequential. The former are goal-oriented and the latter intrinsic. Goal orientation arguments would include that the adversary system is: (1) the best way to get at truth, (2) the best way to vindicate rights, and (3) the best way to safeguard against excesses, for example, zealous advocacy that may be morally questionable by itself is subjected to the checks and balances of the other side being represented by a zealous advocate with the further check of the impartial arbiter. Intrinsic arguments are: (1) the lawyer-client relationship established by the adversary system is intrinsically valuable, (2) the adversary system is necessary to honor human dignity by granting every litigant a voice in the process, and (3) the adversary process is so much a part of the fabric of our society that it would be unjust to disturb it. In the interest of time, I will examine only the first two of the goal-oriented arguments while providing only conclusory comments about the others.

### 1. Truth

It is an empirical question whether the adversary system is the best way to uncover truth. Alas, because we can never find out what the "true" facts were except as the court has determined them to be, we can never answer the question. So we must rely on non-empirical resources, a mix of a priori theories and armchair psychology. One such argument draws an analogy to the rationalist tradition in science which asserts that the best way to get at scientific truth is through the dialectic of conjecture or assertion and refutation. The analogy deserves short shrift as soon as one asks whether the scientific dialectic would tolerate using conjectures known to be false or using procedural rules to



exclude probative evidence.

A different argument is made in the ABA's official endorsement of the adversary system in a conference report. The key paragraph posits the case of the arbiter who attempts to decide a case without the benefit of partisan advocacy. To do so, the arbiter would have to play three roles: as an advocate presenting the most effective case for the plaintiff, as an advocate presenting the most effective case for the defendant, and as the neutral or impartial judge who in the process would necessarily be viewing with distrust the fruits of his prior identifications and efforts. The report concludes that no *one* can successfully play these inconsistent roles. Luban dismisses the argument rather summarily, pointing out that it begs the question—that *if* it is true that facts are best discovered by a battle between two conflicting points of view, then one person will not do it as well as two adversaries. The report thereby makes the premise the conclusion. Even the premise becomes questionable if one asks whether any litigator thinks that the best way to get at the truth is through the clash of opposing points of view. Would a trial lawyer prepare for trial by hiring two investigators, one taking one side of every issue and one taking the other? To ask the question is to answer it! To conclude on the basis of the foregoing that self-interested investigation has not been proven to be the best means for getting at the truth does not warrant abandoning the adversary system. But more of this later.

## 2. Vindication of Rights

The vindication of rights argument depends not on "truth" claims but rather on reasoning used to support the adversary system in the criminal setting; namely, that the rights of a litigant, like the need to stack the deck for the accused when prosecuted by the state, are a more important value than "truth." The clash of two adversaries, under this theory, will in fact defend legal rights most effectively. To the extent that the theory relies on analogy to eighteenth century "invisible hand" economic theory, Luban dismisses it summarily as myth and question-begging. The more serious issue, however, involves the conception of "rights." If "rights" are whatever you can win in court (American legal realism?), zealous advocacy and the adversary system may be defended. In other words, zealous advocacy in the courtroom is designed to "win," not to vindicate rights that should be won. Luban recognizes that his rebuttal relies on a distinction between what a person is legally entitled to and what the law can be made to give, a distinction that he maintains is crucial to any argument that seeks to justify the adversary system on the ground that it vindicates "rights."

### 3. Luban's Conclusion

As promised, I will not address the other "goal oriented" argument and the three "intrinsic" arguments except to observe that Luban examines each and finds each wanting. But just as one expects him to conclude that he has effectively demolished the arguments for the adversary system, he invites the reader to ask the question as to what he would propose putting in its place. The answer: "Nothing." Luban would retain the system, finding the justification in American pragmatism. "The adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting rights." He observed that none of the existing rivals, the inquisitorial or socialist systems, are demonstrably better. Even if one of the other systems were considered somewhat better, it would not be worth the human costs of disrupting that which has become so intertwined in the fabric of our society.

With the Luban conclusion that the adversary system is justified on pragmatic grounds, you may wonder why I have spent so much time with the arguments refuting its justification on goal-oriented and intrinsic grounds. As long as it is justified on the pragmatic ground, what difference should it make that it cannot be justified on the other grounds? I trust the answer to this question will become apparent if the proponents of mediation are right in contending that it is a process which can frequently be used as an alternative to adjudication and which does not carry the unwanted baggage of adversary procedure.

## IV. MEDIATION

A movement begun some twenty-five years ago has come of age with its credentials established by the widespread use of the acronym: ADR—Alternative Dispute Resolution. Misconceptions abound as the title both misleads and confuses. It misleads by suggesting that we have discovered procedures that are "alternative" to the normal or standard process of adjudication by courts. The vast majority of disputes have always been resolved without court litigation. Actually, court litigation is not only the alternative but the *last* alternative to other dispute resolution techniques. Secondly, ADR confuses by suggesting that it encompasses procedures which, although different from each other, may be grouped together for the purpose of distinguishing their processes from the adversary nature of court litigation—that they provide "kinder and gentler" means for resolving disputes than the combatant procedures of courtroom adjudication. ADR includes, however, arbitration, mini-trials, summary jury trials, private judging (appoint-a-judge), and other procedures that may be more expeditious and therefore responsive to complaints about congestion in the courts. But these procedures are just as adversarial as

courtroom trials. What unites them is that they are non-traditional—not that they are non-adversarial. For the purpose of this Lecture, I want to concentrate on the non-adversarial process of mediation.

*A. Mediation: Emergence on the American Scene*

Until the last several decades, mediation was a well-kept secret in our country as a technique for private dispute settlement. Its prior use in resolving labor-management disputes was not conceived as an alternative to litigation but rather as a device to end the disruptive consequences of strikes when settlement negotiations failed. In other lands and other cultures, mediation has been the preferred dispute settlement mechanism for centuries, but it was not until the 1970s that it became of any significance in this country. Two concerns spurred its beginnings, one pragmatic and the other idealistic. The first (supported by the prestige of eminent federal judges) saw mediation as a cost-effective remedy for the problems associated with congestion in the courts—delay, denial of access, expense, etc. The other concern viewed mediation as a preferred alternative to litigation in resolving community or neighborhood disputes.

To respond to these dual concerns of efficiency and community values, the federal government funded pilot neighborhood justice centers in Atlanta, Kansas City, and Los Angeles. Despite divergent assessments by critics of both the efficiency and community value claims, the movement has accelerated to the point that public mediation centers are operating in every major city of the United States. In addition to the public and foundation-sponsored centers, a second and growing part of the mediation network is that which is operated by private, for-profit corporations of local, regional, and national scope. The operations and the funding vary, but the process of mediation has become a widespread alternative to the judicial process of adjudication. Ironically, it has become so successful as an alternative to litigation that statutes and court rules have co-opted it and made it a part of the judicial process. As you may suspect, this development is not without a great deal of controversy and will deserve our critical attention.

*B. Mediation: Its Scope*

Mediation is not for everyone and is not for every type of dispute. We need to remember the Fuller analysis that the virtue of mediation is its usefulness in resolving disputes between parties having relationships of heavy interdependence. Its informality and flexibility make it especially appropriate for allowing the participants to bargain and make compromises that could not be accommodated within the formal structures of adjudication. The motivation for both the willingness to bargain and the performance of the bargain stems from the relationship of the parties. External standards and rules play minor roles.

Individual circumstances shape the outcomes. The process emphasizes problem solving, not winning and losing. Relationships conducive to the process would include divorcing couples who have a joint interest in establishing financial and custodial arrangements for minor children; neighbors for whom reconciliation is essential for the good of the neighborhood; and parties to long-term contracts who need each other to avoid disruptions in their respective businesses: landlords and tenants, employers and employees, business partners, co-workers, consumers and local merchants, homeowners and building contractors, etc.

Disputes for which mediation is contra-indicated would include the typical tort case where the parties have not had and will not have any relationship before or after the dispute; cases in which it is important to determine the legal rights of the parties (mediation does not set precedents); cases in which there is a power imbalance between the parties, such as most cases of spouse abuse; and cases in which one party opposes the use of the process (mediation must be a voluntary process to achieve its desired end). To list the above categories is to indicate the need to match different processes with different kinds of disputes. Whether attorneys are a reliable source for advice on such issues may well be questioned on the ground that their training and practice have produced an occupational mindset of hardball negotiating and adversary litigating.

The coming of age of alternative processes is recognized, however, in the 1992 ABA *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap*.<sup>41</sup> In the statement of "Fundamental Lawyering Skills," one section is devoted to "Litigation and Alternative Dispute-Resolution Procedures."<sup>42</sup> The complete text of the provisions relating to ADR is too lengthy to quote verbatim, but the requirements noted in the section headings are instructive: "(a) An awareness of the range of non-litigative mechanisms for resolving disputes, including mediation," "(b) Familiarity with the basic concepts and dynamics of these alternative mechanisms," "(c) An understanding of the factors that should be considered in determining whether to pursue one or another alternative-dispute resolution mechanism," and "(d) Familiarity with the means for acquiring additional knowledge about the availability, relative merits, processes, and procedures of the various alternative dispute-resolution mechanisms."<sup>43</sup> Would an attorney be guilty of malpractice for failing to advise a client about the availability of mediation in an appropriate case? Armed with this statement, the client would have a good case. Damages might be a bit

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41. SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

42. *Id.* at 138 (emphasis added).

43. *Id.* at 196-98.

of a problem, but they could be awarded on the difference between what the lawyer charged for the services rendered in an adversarial capacity and what the charge would have been if mediation had been utilized.

### C. Mediation: Confidentiality

Mediators will argue that confidentiality is essential if the process is to achieve its desired ends. The mediator cannot facilitate a satisfactory agreement between the parties unless the full facts and interests of the parties are known. Without the assurance that the information disclosed to the mediator will be held in confidence, parties are unlikely to be candid and open during the course of the mediation. Unfortunately for mediators and the parties, the legal situation is murky. A leading casebook reports that there are over 200 state and federal statutes and scores of reported decisions which relate to mediation confidentiality.<sup>44</sup> There is no consensus in the decisional law of a common law privilege as there is between attorney and client or priest and penitent. And decisions granting such a privilege are not always clear on who holds the privilege: the parties, the mediator, the parties and the mediator, or each participant as to statements made by that participant. Evidentiary rules preclude admissibility of negotiations concerning a disputed claim to prove the claim or its amount. But this exclusionary rule is a rather narrow protection because it does not apply to pre-trial discovery and administrative proceedings, nor does it preclude the use of the evidence when offered for other purposes, for example, to prove bias of a witness or guilt of a defendant. The mediating parties may agree to confidentiality, but this, too, offers inadequate protection because the agreement may be construed to be as against public policy as one which suppresses evidence.

Most mediators blithely ignore the uncertainty of the applicable law and assure the parties at the outset of the mediation that they will hold the parties' statements in confidence. Like reporters who go to jail to protect their sources, mediators are imbued with what they consider an ethical duty to respect the confidence. The need for legislation is exemplified by a Florida case and statute. A Florida "Citizens Dispute Settlement" mediator was subpoenaed to give deposition testimony in an attempted murder prosecution that during the course of the mediation, the person who became the victim of the alleged attempted murder made life threatening statements to the accused.<sup>45</sup> The State sought to quash the subpoena on the ground that the statements made to the mediator were privileged.<sup>46</sup> The trial court denied the motion and the appellate court affirmed, stating that "privileges in Florida are no longer creatures of

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44. STEPHEN B. GOLDBERG, ET AL., DISPUTE RESOLUTION 179 (1992).

45. *State v. Castellano*, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984).

46. *Id.*

judicial decision.”<sup>47</sup> Although the mediator had advised the parties that their communications would be confidential, the court held that there was no legal basis for the assurance: “If confidentiality is essential to the success of the [mediation] program, the legislature is the proper branch of government from which to obtain the necessary protection.”<sup>48</sup> Responding to the court’s invitation, the legislature enacted a statute providing: “Any information relating to a dispute obtained by any person [during a mediation] is privileged and confidential and shall not be publicly disclosed without the written consent of all parties to the dispute. . . . Each party . . . has a privilege . . . to disclose and to prevent another from disclosing communications made during such proceedings, whether or not the dispute was successfully resolved.”<sup>49</sup>

#### *D. Mandated Mediation*

Mandated mediation sounds like an oxymoron. How can you mandate a process whose internal morality rests on its being voluntary? I suppose the answer is that nothing exists in the Constitution that prevents a legislature or court from enacting or promulgating an oxymoron. But we should be clear that the phrase does not mean that a *result* is mandated; only a good faith effort to *try* to reach a result is required. In the last decade, courts in many states operate under statutes and court rules that require, or that authorize courts to require, mediation as a prerequisite to initiating litigation in specified types of cases. The contexts vary widely and include a bewildering array of exceptions and discretionary powers. A number of states have adopted a blanket statutory requirement of mediation for contested divorce matters when the parties have minor children. An increasing number of state supreme courts, including Indiana’s, have adopted rules of civil procedure incorporating mediation as part of pre-trial procedure. These developments have even acquired a generic title: “court-annexed mediation.”

In the federal courts, the situation lacks clarity because of different interpretations of a trial court’s discretion in the application of Federal Rule of Criminal Procedure 16,<sup>50</sup> a rule that authorizes a court to “direct the attorneys for the parties to appear before it for a conference . . . [for purposes including] facilitating the settlement of the case.” SPIDR, the acronym for a national organization of professionals in dispute resolution, has issued a lengthy report with a guarded approval of mandated mediation, concluding that participation should only be compulsory where the program is more likely to serve the parties, the justice system, and the public. Critics are less sanguine about the

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47. *Id.*

48. *Id.* at 481-82.

49. FLA. STAT. ANN. § 44.201(5) (West 1988).

50. FED. R. CRIM. P. 16.

desirability of mandating a process whose empowering dynamic of self-determination is fundamentally altered when it is imposed rather than sought.

Mandatory mediation becomes even more controversial when the rules or statutes impose direct or indirect pressures to settle. As indicated at the outset, it is participation that is mandated, not agreement. But how is participation to be enforced? The Woody Allen aphorism that attributes ninety percent of success in life to merely showing up is surely not applicable to merely showing up for the mediation. Presence at the mediation proceeding can be enforced by the contempt power. But what must you do to be in compliance after you have shown up? The concept of "good faith bargaining" required in labor law is not as attractive an analogy as it may appear, because the public interest and the narrow context of labor-management disputes are distinguishing features. A better analogy might be drawn from contract and commercial law, but we look in vain for an explicit requirement of good faith bargaining in either the Uniform Commercial Code or the Restatement of Contracts. Although good faith is one of the pervasive concepts of the Code, it is explicitly required only with reference to "performance and enforcement" of contracts.

In addition to good faith participation, many of the statutes and court rules include formalized pressures to settle on terms proposed by the mediator. Where a party has refused to settle, the rule may authorize transmittal of the mediator's recommendation to the court. With the pressures of crowded dockets, judges may be expected to accept the recommendations rather uncritically. Other provisions contain financial disincentives to a party refusing to agree to the mediator's proposal, such as the requirement that the refusing party pay the other party's attorney's fees or other expenses if the result after trial is not substantially better than the mediator's recommendation. Constitutional provisions of trial by jury and due process are implicated when pressures to settle so burden the right to trial that parties are not likely to pursue it. And even if constitutional, it seems unwise to pressure parties into foregoing their rights to a hearing guaranteeing basic legal protections.

#### *E. The "Law" of Mediation*

As mediation has grown, prospered, and become the subject of legislative regulation, court rules, and judicial decisions, it may have sown the seeds of its own destruction. It is the ultimate irony that a system lauded for its anti-adversarial structure became co-opted by the adversarial process. Mediation had the promise of quality solutions—solutions that the formal, adversarial judicial process could not accommodate. Carrie Menkel-Meadow, a feminist and legal process scholar, has sounded the alarm loudly and clearly:

[C]ourts try to use various forms of ADR to reduce caseloads and

increase court efficiency at the possible cost of realizing better justice. Lawyers may use ADR not for the accomplishment of a "better" result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage. Legal challenges cause ADR "issues" to be decided by courts. An important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may be counterproductive to the transformations proponents of ADR would like to see in our disputing practices.<sup>51</sup>

The concerns expressed by Menkel-Meadow extend well beyond the scope of our preceding discussion about mediation and the adversary system. They go to the heart of our justice system. Many scholars would consider the ADR movement too mundane to deserve their attention. But the issue that demands critical thought is the process-substance debate, which is pervasive in concerns about justice. If mediation is pure "process," how can it ensure that results will be in accord with substantive, normative standards (the "rule of law")?

## V. ADJUDICATION VS. MEDIATION: THE IDEOLOGICAL DEBATE

### A. *Against Mediation*

Much of the spreading success of the ADR movement must be attributed to perceived efficiency concerns: to save public and private expense and to relieve court congestion. I have not dwelt on these issues for several reasons. First, the empirical studies are inconclusive, and second, even if they were conclusive, they would not carry the day against the substantive attacks made by critics. The charge was led by Owen Fiss in an article titled *Against Settlement*.<sup>52</sup> In varying degrees and with different emphases, Fiss and other critics view the informal, private "justice" of mediation as a threat to public values, values of such stature that they should not be sacrificed simply to save time and money. In other words, are we sacrificing the justice of public norms for the sake of agreement? They argue that public, rule-based adjudication protects fundamental, individual rights; promotes justice by reducing the advantage of the rich over the poor and the strong over the weak; and develops a body of precedent essential for the settlement of disputes in a pluralistic society. The word "pluralistic" needs emphasis here. We do not have a homogenous culture or a national community of shared values. Law is the glue that is necessary to hold us together.

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51. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991).

52. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).



The rhetoric of the critics is compelling. Whether it conforms to reality may well be questioned. Despite celebrated cases won by legal services attorneys using the adversarial procedures, the judicial system has not been distinguished in its protection of the disadvantaged and minorities. And the "rule of law" means little to those who have no realistic access to the cumbersome and expensive machinery of litigation. Legal service programs are limited in funding and freedom to litigate. It has been estimated that one percent of our population receives ninety-nine percent of the legal services provided.<sup>53</sup> Crowded court dockets cause delays, and litigation delayed is justice denied for those who do not have the resources to wait. It remains true, however, that mediation lacks the coercive power to rectify bargaining imbalances and that the compromises struck in a settlement agreement frequently reflect the disparity of resources rather than a responsible resolution of differences. The dilemma is posed by the observations of Judith Resnik, who voices harsh criticism of the existing system's inadequacies, but who also expresses mistrust of replacing it with informal, unconstrained settlement mechanisms.<sup>54</sup>

### *B. Response to the Critics*

The "public values" argument of the critics cannot be satisfactorily countered by concerns of expediency. If the argument is to be met, it must be on grounds of other public values. And perhaps we should not stress the word 'public', because the public-private distinction breaks down rather quickly with the realization that the resolution of private disputes is a public issue. Value-based responses have come from communitarian and feminist scholars. Before discussing them, however, I should explain why I do not devote significant attention to the Critical Legal Studies literature. First, I am not aware that the CRITS have developed any passion for mediation and ADR. Having been frustrated in trying to understand the CRIT literature, I admit the possibility that I have simply not understood the way in which the CRIT scholars have articulated their position. Certainly, they cannot agree with the Fiss-type preference for adjudication and its reliance on the application of legal rules and doctrines to protect public values. At least two "in's" characterize the critique of the "law" by CRITS—the indeterminacy and incoherency of the present system of rule and standard-based adjudication. Logic would seem to dictate that they would prefer a system of dispute resolution that would draw upon shared, community-based values, as mediators assist the parties to find collaborative solutions to their disputes.

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53. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES ON DISPUTE RESOLUTION* 8 (1983).

54. Judith A. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

### 1. Communitarian Jurisprudence

The ideological dimension of the adjudication versus mediation debate is mirrored in contemporary discussions of political, moral, and legal philosophy. It is a debate about the vision of the society that we hold, a debate between the individualist and the communitarian. Bellah and his associates in *Habits of the Heart*<sup>55</sup> examined the disenchantment of many persons in the struggle to survive and prosper in our competitive social and economic environment. They wanted to know: "Is this all there is?" They were not speaking to the need for a different form of dispute resolution, but they were emphasizing the transformative capacity of involvement in community as affecting the quality of life style and in converting people from inner-directed self interest to outer-directed concern for the common good. Competition and community have always been in tension, but our society seems to have given the nod to individual rights as being a more significant value than community responsibility.

Signs exist, however, that this view is changing and schools of philosophical thought have developed under the banner of communitarianism. No attempt will be made here to distinguish the variant strands of communitarian philosophy. An illustration may suffice, however, to depict one of the values attributed to it. In a report of a landlord-tenant mediation, an observer noted that during the course of the mediation, the parties realized their power to resolve the dispute by themselves, even if a court's resolution might have been different.<sup>56</sup> They did not have to appeal to an outside institution. And as the parties realized their own power, they were able to let go of their preoccupation with individual concerns. "Each was able to transcend his narrow self-interest, to realize and recognize—even if only fleetingly—some element of legitimacy in the other side's position, some element of common humanity with the other party."<sup>57</sup> The observer saw the mediation as a "direct education and growth experience," which, in a democracy, warrants classification as a crucial public value, one which could not have been realized from an adjudication.<sup>58</sup>

Thomas Shaffer and Andrew McThenia have responded directly to Fiss' charge that mediation lacks a public value base. According to them, mediation "rests on values—of religion, community and work place. . . . Settlement is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but

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55. ROBERT N. BELLAH, ET AL., *HABITS OF THE HEART* (1985).

56. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989-1990).

57. *Id.* at 11.

58. *Id.* at 11-12.

confrontation . . . it calls on substantive community values."<sup>59</sup>

The Shaffer-McThenia thesis finds a parallel in Jewish law. According to the Code of Maimonides, in every civil case the rabbinical court must attempt to persuade the parties to agree to a compromise settlement rather than seek formal adjudication.<sup>60</sup> The rationale for the rule emphasizes the value of encouraging individuals to expand their narrow self-centeredness and reach out to a level of consideration for others. The observations of a commentator are of special significance to the Fiss' criticism:

As for sacrificing other values like social justice, societal welfare, and so on—values that are indeed important in that Talmudic system too—the implication is that those values are nevertheless secondary. Like the adjudication process that secures them, they are fallbacks to be sought when self-transcendence cannot be directly accomplished in the mediation process. Or maybe more accurately, they are less direct and slower ways of accomplishing the ultimate goal of self-transcendence: they force people to behave as if they have concern for others . . . more than or as much as for themselves.<sup>61</sup>

With reference to mediation and religious communities, I would be especially derelict in this time and place if I did not call attention to the fact that the Lutheran Church-Missouri Synod at its last convention completely amended its adjudicatory dispute settlement mechanisms with an elaborate system of mediation procedures.

The virtues of community are patent, but the concept is illusive. We live in different communities. As academics, we talk of a university community. But we also belong to the communities of our different disciplines. And our loyalties to each are frequently in competition with each other. Time spent in campus-wide committees and concerns competes with time for research, writing, and teaching in one's discipline. Building a sense of community is more difficult than exercising one's individuality. How does this relate to mediation? A true community depends on shared values. When the members of a community share values, they, by definition, exclude those who do not subscribe to those values. So communities exclude each other and a pluralistic society has a pluralism of communities. My China experience<sup>62</sup> may demonstrate the point. After witnessing mediation in China, a number of my fellow travelers

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59. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1667 (1985).

60. *Id.* at 17.

61. *Id.* at 17-18.

62. See *supra* note \*.

were ecstatic with the prospect of employing their mediation techniques in our country. What they had witnessed, however, was mediation being conducted in a society far more homogeneous than ours. The admonition, "We don't do things that way," addressed to one of the parties to a dispute has a special meaning and force when the party is one of the "we." It is therefore no surprise that mediation flourishes to the extent that it can be employed in a distinctive constituency such as a religious organization, neighborhood, or community of racial or ethnic homogeneity.

## 2. Feminist Jurisprudence—A Different Voice?

In the decade since the publication of Carol Gilligan's *In a Different Voice*,<sup>63</sup> feminism has spoken with many different voices. But the Gilligan thesis remains influential and bears special significance to our philosophical debate. It has similarities to the communitarian response in that it challenges the individual, rights-based values upon which Fiss and others rely. It does so, however, with an emphasis on the gender-based and therefore gender-biased nature of an individual rights philosophy. Gilligan told us that women see moral issues not in terms of rights and rules, but in terms of relationships and responsibilities. They are by nature more concerned with nurturing, caring, and problem solving than with competitive situations and personal achievement. A legal system incorporating the Gilligan thesis would place less emphasis on rules and precedents, would search for solutions based on contexts and relationships, and would encourage disputing parties to work out their differences after seeking to understand each other's point of view. Also, the attorneys would be less oriented toward advocacy and more toward problem solving. The analogy of this version of feminism to the adjudication-mediation debate is too obvious for comment. What requires emphasis is that the Gilligan thesis has not won many converts in feminist jurisprudence. As a matter of fact, the feminist critics see Gilligan as the problem rather than the solution in remedying the injustice of a male-dominated culture. By attributing a different "nature" to women, Gilligan has played into the hands of those who would perpetuate the male domination that has pervaded our cultural institutions. I am thankful that I do not have the time to get into this controversy. I would only observe that its merits should not affect the adjudication-mediation debate. Neither mediation nor adjudication should be preferred because of gender considerations.

## VI. CONCLUSION

This Lecture has been titled, "To Adjudicate or Mediate: That is the

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63. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

Question.” There is only one thing wrong with this title—I left out a “not.” It should have been, “To Adjudicate or Mediate: That is *Not* the Question.” The two are not mutually exclusive. One is not better than the other; both are necessary and desirable methods of dispute settlement. Adherents of adjudication are right in heralding the process as the best method yet contrived for discharging the state’s responsibility to resolve a dispute. When called upon to do so, judges and juries must decide and apply the coercive power of the sovereign to enforce their judgments. Coercive power is always subject to abuse, but what better protection against abuse can there be than a process that grants to the disputing parties and their representatives a public opportunity to participate in the process by presenting evidence and reasoned arguments to an impartial decision-maker. The adversary system is not the culprit; it is the abuse of the system that needs constant surveillance and indicated reforms. The ADR movement is ill-advised when it argues for supplanting adjudication with mediation. It is well-advised to argue that all disputes should not require adjudication and that communities, both public and private, should institutionalize procedures and opportunities for the utilization of mediation where a dispute involves parties with ongoing relationships. From the messianic fervor that attended the beginnings of the movement, ADR now confronts the reality of making the idealism of the founders workable in the crucible of the real world—which, despite occasional references to the “academic world,” is the only world we’ve got.