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ALTERNATIVE DISPUTE RESOLUTION: A SUPERMART FOR LAW REFORM*

THE HONORABLE DOROTHY W. NELSON**

I. INTRODUCTION

Last year, I was invited to sit with the Supreme Courts of Israel and the Federated States of Micronesia. While observing these courts, I discovered that from Jerusalem to Ponape, there is a growing interest in forms of dispute resolution which do not involve actual court adjudication. Indeed, the Micronesian Chief Justice is anxious to implement non-adjudicatory forms as soon as possible to avoid the expense, delays, alienation, and complex procedures that arise from the way in which we resolve many of our disputes in the United States today. In Micronesia, there also is a desire to retain as much of the customary law as possible because it has been developed and applied by the people very successfully.

In indicating my approval of the Chief Justice's goal, I related to him a story of my sabbatical trip to Israel in 1965. I was in Israel to study the laws of marriage and divorce as they are administered by the religious faiths of Judaism, Christianity, Islam, and Baha'i. In Jerusalem, I had the opportunity to attend a court hearing conducted by three Greek Orthodox priests in long black robes and long white beards. Court was conducted in a little quonset hut with paint peeling from the walls, a simple wooden table serving as a judicial bench, and plain wooden chairs for the participants. A wife was suing her husband for divorce. Her lawyer stood up holding a handful of papers from which to plead her case, but was gently waived down by the presiding judge who turned to the wife and asked her to tell her story. She explained simply that, although she loved her husband, she had to divorce him. For five years during their marriage, she had lived in the upper floor of a house, while her mother-in-law, who was too old to climb stairs, resided on the lower floor. As there was only one entrance to the house, the wife had to enter through her mother-in-law's apartment to get to her own. Her mother-in-law, curious as well as bored, questioned her on her activities and gave unsolicited advice.

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The wife sat down and the presiding judge then turned to the husband. The husband's lawyer also rose with a handful of important looking papers, but once again the presiding judge waived the lawyer aside. He asked the husband to tell his story. The husband professed to love his wife, but also his mother. As a good Christian he felt a responsibility for both, but being a poor man, he could not afford two households.

The three judges retired from the courtroom by stepping into the dust outside the quonset hut. They returned five minutes later with their judgment. The husband was to purchase a ladder. When his wife wished to avoid her mother-in-law, she was to climb the ladder directly to her second story window.

Note that the product of this proceeding was situational justice rather than rule-making and refinement of precedent. The judges were concerned with bringing the litigants together again rather than deciding who was right and who was wrong. As I watched the husband and wife leave the quonset hut, hand-in-hand, I could not help but think of what might have happened to this couple under our American system with its Orders to Show Cause, lengthy hearings, and high attorney's fees.

II. CRITICISMS OF THE ADVERSARIAL SYSTEM

Over eight years ago, Chief Justice Burger in his Report on the State of the Judiciary, said:

As the nation enters its third century, we should take a searching look at some of the basic aspects and underlying assumptions and try to determine, not merely how to tighten the "nuts" and "bolts" of the existing mechanisms of the judicial system but whether fundamental changes need to be made.¹

And just this year, at the Mid-Winter Meeting of the American Bar Association, the Chief Justice declared that reliance on the adversarial process as the principal means of resolving conflicting claims is

a mistake that must be corrected. . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.²

The Chief Justice is not crying alone in the wilderness; the critics of our adversary system are many. One of my former colleagues on the United States Court of Appeals for the Ninth Circuit, Marvin Frankel,

1. W. Burger, *Annual Report on the State of the Judiciary* (1976).

2. Burger, *Midyear Meeting, Am. Bar Ass'n.*, 52 U.S.L.W. 2471 (Feb. 28, 1984).

has written a scathing indictment of the system in his book *Partisan Justice*.³ He declares that the adversary system places too low a value on truth telling,⁴ and that "there are other goods, but the greatest is winning. There are other evils, but scarcely any worse than losing."⁵

Frankel maintains that giving the lawyers so much power and so much incentive to win leads them into adversarial excesses. He gives specific examples. In the selection of jurors,

effective trial lawyers invest hours of hard thought imagining what devices, ploys, dramatic shows, and special hints will appeal to which prejudices of which jurors. . . . To the extent the attempts succeed in distorting the truth, justice is disserved. To the extent the efforts fail, there is much wasted effort and demoralizing contempt of the legal process.⁶

Frankel also declares that wasted time for errors and reversals on evidentiary questions is a problem. "[F]undamental is the fact that our question and answer procedure is hardly a natural, expeditious way of having people tell fully in anybody's own way what they purport to know about the subject of the controversy."⁷ Furthermore, he writes about the abuses of the discovery process during which many lawyers demand as much as possible and give as little as possible.⁸

The American Bar Association Code of Professional Responsibility creates further problems. Canon Seven of the Code dictates: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."⁹ In other words, the lawyer's duty is to maximize the likelihood that his client will win. This raises the question: In what arenas is zealous advocacy inappropriate or even destructive of the values our legal system is intended to promote?

The basic premise of the adversary system is, of course, that the best device in the search for truth is to test the opposing views of disputants by putting each to the proof of his or her claim. Thus, since each litigant is presumed to be equally motivated to investigate the facts and to present the case through able lawyer spokesmen, the theory is that the truth will emerge to the extent it is discernible.¹⁰

However, the theory falls short in its application. It is my experience

3. M. Frankel, *Partisan Justice* (1980).

4. *Id.* at 12.

5. *Id.* at 18.

6. *Id.* at 104.

7. *Id.* at 107.

8. *Id.* at 17.

9. Model Code of Professional Responsibility Canon 7 (1979); see *The Zealous Lawyer: Is Winning the Only Thing?*, 4 Report from Center for Philosophy and Public Policy 1 (Winter 1984).

10. McKay, *Civil Litigation and the Public Interest*, 31 U. Kan. L. Rev. 355, 361 (1983).

that the competence and resources of opposing lawyers are rarely, if ever, equal. It is a mistake to assume that truth will emerge from two highly partisan arguments, mutually exaggerating the strengths and understating the weaknesses of their respective positions. Furthermore, our rules of professional conduct permit conduct that prima facie impedes a search for the truth. For example, it is proper professional conduct to:

1. cross-examine for the purpose of discrediting testimony of a witness known to be telling the truth;
2. exploit an opponent's evidence known to be false; and
3. fail to introduce or advise the opponent of material adverse evidence.¹¹

While no dispute resolution system can be confident of total accuracy, the rules of any system should be designed to maximize the possibility of an accurate result.

We should certainly take steps to provide for ethical and professional controls of excessive partisanship.¹² Professor Murray Schwartz suggests that the Code of Professional Responsibility be revised to circumscribe lawyerly zeal by greater commitment to the truth. He would require such things as having a lawyer report to the court and opposing counsel the existence of relevant evidence or witnesses the lawyer does *not* intend to offer.¹³

Others have suggested that there is something about the structure of our trials that forces lawyers into adversarial excesses. A more direct approach might be to allow judges to question witnesses so the judge could set the tone of the trial while the lawyer could fill in the gaps. The judge would allow the witnesses to explain their answers and even question each other. We might allow opposing witnesses to take the stand *ad seriatim*, and even allow recesses when the court feels more investigation is needed. In short, our trial system could be improved by adopting certain features of trial procedures of civil law countries and blending them with our own.¹⁴

III. THE NEED FOR ALTERNATIVE DISPUTE RESOLUTION

Even if we do all of these things and more, my thesis is that we must also continue to develop alternative means of dispute resolution. Chief Justice Burger explained the need very persuasively:

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional ob-

11. Schwartz, *The Zeal of the Civil Advocate*, 1983 Am. Bar Found. Research Journal 543, 550.

12. M. Frankel, *supra* note 3, at 61.

13. Schwartz, *supra* note 11, at 553.

14. Pizzi, *Judge Frankel and the Adversary System*, 52 U. Colo. L. Rev. 357, 365-66 (1981).

igation means that we should provide mechanisms that produce an acceptable result in the shortest possible time, with the least expense, and with a minimum of stress on the participants. That is what justice is all about.¹⁵

Although there are many legal experts and laypersons who claim that there is an explosion of law in this country, the real problem does not appear to be excessive litigation. The number of litigated cases is not increasing at a rate faster than the population is growing. Present levels of litigation are not historically unprecedented but may be seen as a relatively conservative adaptation to changing conditions—the recognition of rights of women and minority groups, the creation of public interest groups, and the changes in our perceptions and our knowledge about injuries are but a few of the conditions.¹⁶

What the data clearly supports, however, is the proposition that costs and delays associated with some types of cases in some jurisdictions have made the full adjudication of disputes an unaffordable luxury for many disputants, even institutional ones.¹⁷ Although the United States has the largest bar and the greatest number of lawyers per capita of any country in the world—the number having more than doubled since 1960, to over 612,000—it is estimated that one percent of the population receives ninety-five percent of the legal services provided.¹⁸ This means that many poor and middle class victims must accept inadequate settlements or “lump it,” that is to say, give up any attempt to vindicate their legal right.¹⁹ They are effectively deprived of access to justice.

An equally important fact indicating the need for alternative forms of dispute resolution is that the biggest users of legal services—corporations and wealthy individuals—pay an enormous price for legal services. Legal expenditures are growing at a rate faster than increases in the gross national product.²⁰

As we search for a wider range of dispute resolution options, we should view them not as a substitute for the courts, but rather as a part of a single but composite system of remedies for people in trouble.²¹ We may hope that they will relieve court congestion, undue cost, and delay, but so far there is no convincing evidence that such programs have succeeded

15. Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274, 276 (March 1982).

16. Galanter, *Reading the Landscape of Disputes: What We Know (and Think We Know) About Our Allegedly Contentious Society*, 31 U.S.L.A. L. Rev. 4 (1982).

17. See Center for Public Resources Dispute Management Manual (1980).

18. U.S. Dept. of Justice, *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy 1, 7-8 (Jan. 1984) [hereinafter referred to as *Paths to Justice*].

19. *Id.*

20. *Id.*

21. Gallanter, *Q and A*, 1 Dispute Resolution Forum 5 (Jan. 1984).

in this task.²² Notable exceptions may be found in new private modes of dispute resolution, such as mini-trials for disputes between big businesses.²³

It is far more likely that we will find that alternative dispute resolution forms are superior processes for many cases. The United States is behind many other societies, including those we regard as relatively primitive, in providing relief for routine grievances that typically are not well served by the paraphernalia of our system, including elaborate pleadings, discovery, evidence, and complex rules of review.²⁴ The studies show, for instance, that while mediation and arbitration programs fail to achieve many of the performance goals related to court congestion and cost savings, they consistently rate very favorably on user satisfaction, perceptions of fairness, compliance with determinations and, in most cases, reduced levels of relitigation.²⁵ They may strengthen local communities by decentralizing social control functions in neighborhood dispute resolution fora.²⁶ They may also serve process values such as participatory governance, procedural rationality, peacefulness, humaneness, individual dignity and privacy, as well as timeliness and finality.²⁷ Furthermore, these options offer a means for achieving sustained communication among potential adversaries and for reducing the stridency that distorts the debate on so many public policy choices.²⁸

It has been suggested that the alternative movement is an attempt to push the powerless out of the courts into second class fora. While we should certainly avoid creating such a result, this view is inconsistent with another view held by some of these same critics that the courts have been a primary institutional tool of the power elite. Moreover, the recent upsurge in interest on the part of the supposed power elite in modes of alternative dispute resolution indicates that non-judicial, private, and "soft" forms of dispute resolution are not necessarily second class justice to be imposed on the powerless.²⁹ As the Ad Hoc Panel of Dispute Resolution of the Department of Justice said so well:

In fact, the search for new ways of managing our differences can be seen as signaling a shift in public values. With increasing awareness

22. McGillis, *Who Should Pay*, 2 *Dispute Resolution Forum* 6 (Mar. 1984).

23. *Id.* For a discussion of mini-trials, see *infra* text accompanying notes 47-48.

24. Address by Robert B. McKay to the Farrah Law Society of Alabama (Nov. 7, 1975).

25. Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 *Just. Sys. J.* 420 (Winter 1982).

26. *Id.* at 424.

27. Summers, *Evaluating and Improving Legal Process—A Plea for Process Values*, 60 *Cornell L. Rev.* 1 (1974).

28. Reilly, *Who Should Pay*, 2 *Dispute Resolution Forum* 3 (March 1984).

29. Green, *Avoiding the Legal Log Jam—Private Justice, California Style* in *Dispute Management* (1981).

that "we are all in this world together," traditional win-lose, adversarial processes may be personally and socially less satisfactory than more participative, collaborative problem solving that reconciles the interests of all involved parties.³⁰

IV. METHODS OF ALTERNATIVE DISPUTE RESOLUTION

The field of alternative dispute resolution is diffuse and rapidly expanding. Two years ago, Mr. Ronald Olsen, Chairman of the American Bar Association Special Committee on Alternative Means of Dispute Resolution, stated that there were more than 400 private and governmental agencies currently providing alternative dispute resolution services. In addition, 188 communities in thirty-eight states had established "neighborhood justice centers."³¹ The creation of the National Institute for Dispute Resolution has enhanced the development of the alternatives movement.

An ad hoc panel appointed by the Institute has suggested that no one approach is best for resolving all disputes. It may depend upon: (1) the disputants' desire for privacy and control of the dispute resolution process; (2) whether the relationship among disputants is of a continuing nature; (3) the disputants' financial circumstances; and (4) the urgency of resolving the dispute.³² Professor Frank Sander of the Harvard Law School has suggested that we develop a Dispute Resolution Center, subsequently denominated as either a multi-door courthouse or a neighborhood justice center, which recognizes that the multiplicity of problems mandates a multiplicity of procedural responses.³³ Although alternative forms need not be under the shadow of the courthouse, the fact that the ultimate adjudicatory mechanism of a full blown trial is available may enhance the effectiveness of other forms of dispute resolution. At such a multi-door courthouse or neighborhood justice center, a grievant would be channeled through a screening clerk who would then direct him to the process or sequence of processes most appropriate to his or her type of case.

The grievant might be directed to an ombudsman who is knowledgeable about public resources and who serves as a referral agent or as a fact finder. The Swedish Public Complaint Board, which is a government-funded and controlled agency, provides one model. It accepts complaints, primarily consumer and landlord-tenant problems, by telephone and written communication. It conducts investigations largely through corre-

30. *Paths to Justice*, *supra* note 18, at 8.

31. Forward to Monograph, State Legislation on Dispute Resolution 1 (A.B.A. Special Committee on Alternative Dispute Resolution, June 1982).

32. *Paths to Justice*, *supra* note 18, at 9.

33. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

spondence and telephone calls. It attempts to mediate a resolution of the dispute and, if successful, it will issue a recommended decision. The decisions are not coercive, yet they report an eighty percent rate of compliance, perhaps because they often use television to publicize the fact of non-compliance. In addition, when there is non-compliance, cases are referred to a newly established Small Claims Court.³⁴

The screening agent in our multi-door courthouse also might refer the disputant to a mediation panel. Mediation, like negotiation and conciliation, is designed to find ways of bringing the parties to voluntary agreement.³⁵ Although, like adjudication, mediation requires one or more third-party intervenors, unlike adjudication, it is not coercive, formal, or narrowly focused. It does not demand a win/lose decision. It is most concerned with the underlying relationship between the parties. It may give disputants a sense of accepting and owning their eventual settlement, and also may mitigate tensions, build understanding and trust, and provide a basis by which parties may negotiate their own dispute settlements in the future.³⁶

A model experiment was established in 1971 in the Bronx as part of a Neighborhood Youth Diversion Program. Volunteer, non-professional neighborhood residents mediated disputes between adults and youths in the community. In one case, three spirited, leather-jacketed youths were charged with disturbing the peace and creating a public nuisance by "hanging out" in front of a record shop each afternoon. When the shopkeeper and youths were brought before the mediators, the shopkeeper wanted to know why these youths did not have jobs and why they didn't play their records at home. "Sir, are you offering me a job?" asked one of the youths who had actively sought work in the community. Another youth invited the shopkeeper to his tenement, which housed eleven members of his family, to show why he didn't play his records at home. The end result was that a number of businesses formed an association, rented a recreation room in the basement of a bank, and hired the youths to run it.

The model for mediation is the family model rather than the so-called "battle model" of the adversary system. It has some of the attributes of a tribal moot as described by Professor Richard Danzig.³⁷ Instead of social distance between judge and disputant, there is an emphasis on the bond between responsible members of the same community. Rather than utilizing narrow rules of evidence, the mediators encourage wide consul-

34. See King, *Consumer Protection Experiments in Sweden* (1974).

35. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971).

36. *Paths to Justice*, *supra* note 18, at 14.

37. Danzig, *Toward the Creation of a Complimentary, Decentralized System of Criminal Justice*, 26 Stan. L. Rev. 1 (1973).

tation so that parties discuss all relevant tensions and viewpoints. Instead of assessing blame retrospectively, the emphasis is on resolving problems by consensus. Rather than a courtroom studded with symbols of power which tend to intimidate and inhibit participants, proceedings take place in familiar neighborhood surroundings, in a community hall or in a private home.

More importantly, a neighborhood system overcomes the "out of sight, out of mind" syndrome that has long been society's main theme regarding the inner workings of police stations, "downtown" courts, and isolated jails. Neighborhood residents, who become cognizant of the problems through direct participation in the hearings, as in the Bronx example, begin to seek solutions to the problems. This suggests the importance of using laypersons in the system in roles other than as jurors.

Mediation is especially recommended for family disputes. Family mediators have recognized that divorcing spouses should be given broad power to determine their own post-dissolution rights and responsibilities.³⁸ However, it is essential that the mediator possess skills in the areas of human dynamics, interpersonal relationships, and conflict management. Additionally, the mediator must possess the requisite legal knowledge in divorce-related cases such as tax and finance.³⁹ Recognizing, as Professor Frank Sander has maintained, that family mediation has developed into "an extremely difficult science or art," it is important to note that the Harvard Law School is offering for the first time this year a Master of Law degree in family mediation.⁴⁰

Our screening clerk would also have the option to refer a grievant to some form of adjudication. These forms include arbitration, an administrative agency, a rent-a-judge plan, or other mechanisms that utilize third-party adjudicators with authority to impose their decision on the parties.

The great success of compulsory arbitration in the Pennsylvania state courts has led to the adoption of court-annexed arbitration by several federal district courts there, as well as in Connecticut, Washington, and California.⁴¹ Arbitration, which has been widely accepted and used in labor and management grievances and in some commercial settings, has special advantages over the courts:

1. Arbitration can be initiated without long delays, the procedure is relatively short, and a decision can be reached promptly;

38. Comment, *The Best Interest of the Divorcing Family—Mediation not Litigation*, 29 Loy. L. Rev. 55, 69 (1983).

39. *Id.* at 70.

40. *Id.*

41. Nejjelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 Md. L. Rev. 787 (1983).

2. Arbitration utilizes relaxed rules of evidence which enhance flexibility;
3. Parties to arbitration may agree on the particular body of law to be applied;
4. Parties to arbitration can choose the arbitrator and the site of the arbitration;
5. An arbitrator can be required to be an expert in the subject matter of the dispute;
6. Arbitration allows a resolution to be tailored to the circumstances;
7. Arbitration may allow a dispute to be private;
8. Arbitration may be less expensive to the parties and may not require use of public facilities; and
9. An arbitration award in binding arbitration may be enforceable by a court with little or no review.⁴²

It should be noted that arbitration may become so formalized that it may, as in labor relations, develop some of the problems of procedure and delay present in the judicial process. It may also be more expensive than a negotiated settlement might have been.⁴³

There are literally hundreds of administrative remedies that might be offered in our multi-door courthouse or neighborhood justice center. An innovative suggestion has been made by Professor Maurice Rosenberg of Columbia. He proposes that a Department of Economic Justice be established to handle small consumer cases.⁴⁴ Such a department could dispense quick remedies in cash or in kind to complaining customers who have been unable to get satisfaction from a merchant or manufacturer responsible for a defective product. Rather than referring a person to a neighborhood lawyer when that person's television tube has failed prematurely, the department might give him the cash value on the spot up to a maximum of \$200 or so. Through a national network of offices, and with the help of a computer, the Department of Economic Justice would learn quickly whether a class action should be brought if a manufacturer has been making defective tubes on a grand scale. To discourage cheating by consumers, spot checks might be conducted similar to those conducted by the Internal Revenue Service.⁴⁵

We should consider further experimentation with neighborhood courts manned by volunteers. In many areas today, neighborhood courts adjudicate complaints and penalize offenders by assigning neighborhood service tasks. This form of punishment suggests that we might look beyond

42. *Paths To Justice*, *supra* note 18, at 12-13.

43. *Id.* at 14.

44. *No Access to Law—Alternatives to the American Justice System* 84 (L. Nader ed. 1980).

45. *Id.*

the Anglo-Saxon experience when thinking in terms of the neighborhood concept. In a number of Native American tribal codes, the form of punishment typically is restitution and forced labor for the benefit of the tribe or the victim, rather than imprisonment.

Finally, the grievant in a multi-door courthouse might be referred to some alternative form of court adjudication. Even here, innovative approaches have been developed. In Ohio, Judge Thomas Lambros has developed what he calls the Summary Jury Trial, which has been used in products liability, personal injury, contracts, age/sex/racial discrimination, and anti-trust cases. Acting on the belief that the sole bar to settlement is the uncertainty of how a jury might perceive the liability and damage issues, he designed a system to let the parties obtain the jury's evaluation of issues without affecting their right to a full trial on the merits.

Parties are allowed opening and closing statements, and an opportunity to give proof supporting their positions but only in written summaries based on depositions, stipulations and the like. The six person jury is given abbreviated instructions and an evaluation of the evidence by the court. The jury returns a consensus verdict which is not formally recorded nor are the proceedings open to the public. Ninety-four percent of the cases have settled without a trial *de novo*. As a result, courts including those in Michigan, Pennsylvania, Oklahoma, and Massachusetts are experimenting with this approach.⁴⁶

In addition to public alternative dispute resolution methods, many private dispute resolution forms are developing. Some corporations and other business institutions are adopting a "mini-trial" approach. After a shortened period of pretrial preparation, lawyers make informal and abbreviated presentations of each party's "best" case before representatives of the parties with settling authority. Usually, a neutral, third-party advisor, not a judge or arbitrator, is present to advise the parties' representatives, if necessary, but the advisor's opinion is non-binding, private, and inadmissible at any later trial.⁴⁷

For example, in 1979, after several years of trying to resolve certain contractual disputes, Shell Oil Company filed an action against Allied Corporation for breach of contract. In mid-1983, pretrial discovery was near completion, with trial expected later the same year. At that point, counsel for both companies decided to make a final attempt to resolve the dispute using a mini-trial approach. After several discussions among counsel, a fairly simple format was agreed upon in writing. Each party designated one business representative to attend the mini-trial and seek

46. Cook, *A Quest for Justice: Effective and Efficient Alternative Dispute Resolution Processes*, 4 Det. C.L. Rev. 1129, 1133 (1983).

47. See Green, *The Mini-Trial Approach to Complex Litigation in Dispute Management* (1981).

a fair resolution of the dispute. Parties exchanged written statements, after which there was a one hour presentation, in this case without a neutral advisor. The business representatives met to decide the issues which had previously been outlined for them by counsel. They reached agreement immediately, on a matter that might have taken many months of trial time.⁴⁸

In contrast to the purely private, non-binding qualities of the mini-trial, the use of a private judge or "referee" pursuant to a general reference statute, the so-called "rent-a-judge" program, has been established in some states.⁴⁹ It permits disputants to obtain a fast, private, efficient, and competent resolution of their dispute while maintaining the benefits of a final, binding adjudication.

It is uncertain how all of these programs will affect our legal system. Some of them might promote collusion, secrecy, and combinations which might promote violations of public policy. There are those who fear the elimination of the right to jury trial, the weakening of the rules of evidence, and the elimination of judicial supervision of lawsuits.⁵⁰

What is clear to me is that if rights are not to be sacrificed, if justice is not to be rationed in the interest of relieving pressure on the courts, we need other justice-dispensing institutions which can supplement, and in some cases supersede, the old ones.

V. THE NEED FOR EDUCATION

With the proliferation of new techniques of dispute resolution, there is a need to educate and train many more justice-producing persons. There is certainly a place for lawyers in their traditional roles representing clients in court, arbitration, and other adjudicatory proceedings. Other lawyers will want to be trained or retrained to play roles as dispute resolvers. The new master's program in Family Mediation at the Harvard Law School is a positive step in that direction.

We must educate other types of justice-producing persons. Paraprofessionals might be trained as screening clerks for multi-door courthouses. Other laypersons may be trained as arbitrators, mediators, and ombudsmen. Perhaps the best approach is to be flexible, using volunteers and professionals as the occasion requires. In the process, the legal profession will be required to re-examine its rules on the unauthorized practice of law, some of which may become outdated as these alternatives come into full flower.

48. *Mini-Trial Settles Ten Year Old Quarrel Between Shell and Allied Corp.*, Alternatives to the High Cost of Litigation 1 (1983).

49. See Cal. Civ. Proc. Code §§ 638-645.1 (West 1976).

50. See L.A. Daily Journal, March 3, 1983.

Some fear the onslaught of volunteer "do gooders" who, though well intended, are really exporting their own brand of justice. We certainly should not disregard fundamental values protected by procedural safeguards in the current court system. These values must not be sacrificed in the name of speed, efficiency or even harmony—goals which all too readily may be converted into rationales for favoritism, paternalism, or majority tyranny. The appropriateness of involving community volunteers depends upon the nature of the dispute involved. There have been some extraordinary results from these "non-pros." As one commentator has noted: "If one of the goals of mediation is to help people resolve their own conflicts, is it not often better to have that help provided by persons of similar background and experience who have had the additional advantage of training in mediation skills and technology."⁵¹

The role of law schools in the alternative dispute resolution movement is very important. As President Bok of Harvard wrote recently:

[L]aw schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. . . . Over the next generation, I predict, society's greatest opportunities will lie in tapping the human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.⁵²

Law students should be made familiar with the advantages of various alternative forms of dispute resolution. Their training should include a beginning ability to represent clients in many of these different modes of resolution. In addition, our law school clinics must begin to include some of these alternatives. A fine example is the Small Claims Mediation Program at Harvard, a student-run project offering mediation services to people in nearby communities.⁵³ The law schools have a responsibility to assist in the training of other types of justice producing persons—the paraprofessionals who might be screening clerks in a multi-door courthouse, the mediators, the arbitrators and the ombudsmen who may be volunteers or paid professionals.

Law schools must teach law students how to avoid or minimize disputes through a greater emphasis on preventive law. This means keeping people out of trouble by anticipating various eventualities, and seeking, through careful drafting of instruments and planning, to provide for them in

51. Letters to Editor, 2 Dispute Resolution Forum 11 (March 1984).

52. Bok, *A Flawed System, The President's Report to the Board of Overseers for 1981-82*, Harvard Magazine (April 1982).

53. *Small Claims Mediation Program*, Harvard Negotiation Newsletter (Fall 1983).

advance. There has been surprisingly little written on the "planning" and "preventive" role of lawyers.⁵⁴

Further, law schools must train their students in the problems of the legal system—in "Judicial Administration and the Administration of Justice," as I title my course at U.S.C. Law students should discuss how we might "de-adversarialize" and "de-judicialize" matters that do not require the full panoply of court process. All over the country we find probate courts, a very large part of whose work is uncontested. Why should we employ judges as filing clerks? Why impose the adversary system on those who are not adversaries? The British don't; they have developed a system of probate whereby wills are filed as deeds are in this country and there is no court proceeding unless there is disagreement among the claimants. More attention should be given to dejudicializing some claims through no-fault insurance or to the removal of criminal sanctions in some types of cases. Law students should learn how our judges are selected and removed and what suggestions for reform have been made by the experts. Unfortunately, courses on problems of the legal system are almost always relegated to elective slots which only a handful of students attend.⁵⁵

Law faculty must engage in more education and research in the area of dispute resolution. We need systematic evaluation of the various models in progress so that poor ones may be discarded and new ones suggested. Almost no other university departments have shown the inclination nor demonstrated the expertise to perform this function. To reach its full potential the dispute resolution movement needs to develop into a partnership with research that will sustain a learning process to support cumulative development of a differentiated system of remedies needed in our society.⁵⁶

Finally, and perhaps most importantly, the legal manpower supply must invoke, increasingly, the capacity of each individual in society to cope independently and preventatively with situations posing the possibility of legal injury. As Edgar and Jean Cahn have said so well:

[W]e would propose teaching legal concepts in grade school as a means of protecting that fragile sense of morality and fair play with which children enter the wider world. We submit that the child's moral sensitivity and basic sense of fair play and reciprocity can be reinforced and strengthened both as a defensive and offensive weapon for the child's well-being in a manner that will enable him to cope more effectively with his environment, to sort out real from fancied

54. The most significant work is L. Brown & E. Daver, *Planning by Lawyers; Materials on Non-Adversarial Legal Process* (1978).

55. Bok, *supra* note 52, at 7.

56. Galanter, *supra* note 16, at 71.

injuries, to honor obligations, and to hold both his peers and seniors to standards of conduct which are equitable and rooted in reasonable expectation.⁵⁷

Children should know and understand the principle of "institutionalized settlement." For example, in experimenting with a group of first graders, you may throw a balloon into the air and ask the children to "play." Usually the most aggressive boy or girl ends up with the balloon. When you ask them what might make a better game, they intuitively respond that there must be rules to keep the boys from pushing the girls, or the girls from scratching the boys. They should be encouraged to recognize that they have just opted for the "rule of law." The Cahns are correct in asserting:

[L]aw ought to be taught long before children begin to accept it cynically merely as a set of technical rules for dealing with the police and avoiding responsibility for illegal actions. [This] entails restructuring fundamental cognitive processes to include basic values, standards and concepts—freedom, justice, reasonableness, free speech, due process, honoring promises, deciding like cases alike and respecting the rights of others.⁵⁸

The law schools should assist in this field of law-related education as well.

VI. CONCLUSION

As we broaden the role of the layperson in the justice system, it is not too much to hope that this will broaden the commitment of most to the rule of law, will increase voluntary law abidingness, and will save much time and hardship through the expeditious handling of disputes.

Let us also recognize that the fair and expeditious handling of disputes will not be sufficient to bring about true justice in society. Even the perfect system can only be the servant of a just society. Justice-producing individuals and justice-dispensing institutions must inevitably confront the axioms that:

We shall never have true justice without the abolition of poverty.

We shall never have true justice without universal education.

And we shall never have true justice without the abolition of racism, the recognition of the equality of men and women, and the acceptance of the principle of the oneness of mankind.

57. Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 *Yale L.J.* 1005, 1021 (1970).

58. *Id.* at 1022.

I close with the words of Holmes:

Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.⁵⁹

59. O.W. Holmes, *Collected Legal Papers* 194 (1920).