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Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?

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MANDATORY COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES FEDERAL COURTS: PANACEA OR PANDEMIC?[1]

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INTRODUCTION

It is almost exactly thirty years since the pivotal American Bar Association-sponsored Pound Conference, which heralded the modern era of alternative dispute resolution ("ADR") in the courts. At that Conference, Professor Frank Sander put forward the concept of the multi-door courthouse.[2] Currently, ADR is increasingly an accepted tool of the practitioner both within and outside the court system. Attorneys now market their services in dispute resolution and not solely in trial practice or litigation. Pressure to offer litigation alternatives came initially from

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[1] The title of this article is a "riff" on the title of an 1986 article by Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986). In the article published over twenty years ago, Judge Edwards raised a number of crucial questions and concerns about the goals, promises, and dangers of the institutionalization of ADR and its impact on courts, law, and litigants.

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[2] Frank E.A. Sander, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (Apr. 7–9, 1976), *in* 70 F.R.D. 79, 111–16 (1976). Professor Sander, responding to concerns about congestion in the courts and the burgeoning dockets, proposed entry to the courthouse and routing from there, where appropriate, to various alternative dispute resolution options, i.e., arbitration, mediation, negotiation, or the adjudicative process. *Id.* A courthouse that offers numerous alternative dispute resolution options to parties is now referred to as a "multi-door courthouse."

clients, but now pressure also comes from overwhelmed court systems and legislative mandates.

Given the rapid expansion of ADR in the United States and in international dispute resolution over the last thirty years, one might expect that an obituary for litigation is the only appropriate response to developments in this area, or, to reword a quote by William Shakespeare: "I come to bury [litigation,] not to praise [it]."[3] However, my experience and biases lead me to a more nuanced, less pithy, more equivocal, and certainly less literary, statement:

> I come to report on the purported demise of litigation, but before nailing the coffin shut, we need to reflect on the benefits litigation may provide in some cases and recognize that meshing litigation and ADR may yield unintended consequences that operate to the detriment of both the adversary process and ADR.

What else could one expect from a lawyer/academic? I confess—I am also a recovering litigator; I litigated full-time for eight years. Being an academic has afforded me the luxury of examining procedural rules and litigation processes and behaviors from the vantage point of the ivory tower. For the last decade I have also served as a pro bono mediator in the federal courts for the Eastern District of New York. These different roles and perspectives have not necessarily illuminated answers, but they have certainly provided questions worth further exploration.

Court-annexed ADR is now a settled fixture in federal courts and in many state courts in the United States, as well as in courts in countries around the world.[4] However, just because a process has garnered widespread support does not mean that we should not continue to examine how well the process has worked.

Now that ADR is firmly entrenched in the litigation process, what are the benefits it has brought? Is engrafting ADR onto court process entirely a positive development? Are there any

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[3] The original quote is "I come to bury Caesar, not praise him." WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 2 (S.F. Johnson ed., Penguin Books 1971) (1623).

[4] Other countries are also embracing court-annexed ADR. Some of the developments outside the United States are modeled on the experience in the United States with such programs. For example, the civil justice reform program adopted in the United Kingdom adopts ADR as a key element. LORD HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996).

negatives? Do we have the necessary information to answer these questions?

Our inquiries should not focus on whether ADR is better than litigation. There is no argument that ADR offers much to disputants in a wide range of disputes. The advantages of a process that is more flexible, more party-directed, and does not require a zero-sum solution are readily apparent and do not need defense.[5] Rather, our inquiry should focus on how, *if it is*, the courts are transforming ADR and how, *if it is*, ADR is transforming the court system. If we can address those questions, we will have a better understanding of what is transpiring. If we understand what is happening, we can make rational choices as to future programs and shape processes to achieve desired goals.[6]

This paper addresses the current state of mandatory court-annexed ADR in the United States federal courts. Part I provides a summary overview of how ADR has developed in the federal courts. Part II briefly describes the positions of the proponents of increased ADR in the courts and of those critical of ADR court initiatives. Part III outlines issues that remain to be addressed and suggests possible avenues for empirical research. The conclusion proposes that we maintain continuing oversight and scrutiny of the process and ADR processes designed to operate after the parties enter the courthouse. As others have warned, we may be inadequately factoring in the impact that our ad hoc development and incorporation of ADR practices into the courthouse may have on both the litigation process and ADR.

I. DEVELOPMENT OF ADR IN THE FEDERAL COURTS

A brief examination of the development and growth of court-annexed ADR in the United States federal courts may be

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[5] *See, e.g.*, Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425–31 (1986) (noting that the mediation process as an alternative to the conventional litigation process fosters a sense of trust between adversaries and thus may lead to a mutual resolution unable to be obtained through the usual "zero-sum game of adjudication").

[6] Many commentators have raised similar concerns and warnings. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (1986) ("My principal concern is that, in our enthusiasm over the ADR idea, we may fail to think hard about what we are trying to accomplish. It is time we reflect on our goals and come to terms with both the promise and the danger of alternatives to traditional litigation.").

instructive in our evaluation and assessment of such programs in our federal and state courts, as well as in courts in other systems.

The introduction of ADR into the United States federal courts was an attempt to deal with two related, but distinct, problems. First, court reformers and legislators were seeking ways to reduce the enormous expense and delay of litigation on the parties and courts and the accompanying psychic trauma of the litigation process on the parties. The procedural rules for civil cases in the United States federal courts begin with an exhortation that has been more of an aspiration than a reality since the federal rules first went into effect in 1938. Federal Rule of Civil Procedure 1 provides, in relevant part, that the procedural rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[7] Excessive costs and delays affect how the public views the courts, and result in loss of confidence in court processes.

Second, the enormous pressure on court dockets, as new causes of action have been created by statutory mandate, as disputes became more complex and ramified, and as the criminal docket has absorbed more institutional resources, has contributed to a perceived litigation crisis as dockets expand and civil cases join a longer and longer queue to trial.

ADR was promoted as a panacea for both problems. ADR has been described as a "relatively new name coined to describe an old process."[8] Certain segments of American society and cultures outside the United States have traditionally preferred to settle disputes without litigation.[9] What has changed in the last three decades in the United States is the incorporation, at an accelerating pace, of ADR mechanisms and "ADR-speak" into the

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[7] FED. R. CIV. P. 1.

[8] Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 57 (2002).

[9] *Id.* (including groups such as Puritans, Quakers, Dutch Settlers, Mormons, Chinese, and Jews); *see also* Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 277 (1996) (noting that the Chinese preferred mediation to resolve disputes); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 168–70 (2003) [hereinafter *Our Courts*] (discussing the historical antecedents of the ADR movement that may be traced back to the Puritan, Populist, and Utopian societies); Judith Resnik, *Migrating Morphing and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 783, 814 (2004) (noting that various religious and ethnic groups utilized their own methods of settling disputes).

fabric of our courts—a change in part driven by the increased use of private ADR by repeat players outside of courts and the increasing emphasis on teaching ADR in law schools (or at least talking about teaching ADR).[10]

Using ADR in conjunction with, or as alternatives to, formal litigation processes in the courts is not a totally new concept. In the 1960's, various communities throughout the United States established neighborhood justice centers. State courts experimented with ADR to varying degrees, particularly in certain types of disputes that seemed particularly appropriate for resolution by some form of mediated or negotiated agreement—either because the stakes were too low (e.g., small claims) or because the disputes involved issues that might best be resolved by some result other than a money judgment (e.g., child custody arrangements, support, separation agreements, housing disputes, etc.). Most of these matters are not the bread and butter of federal court cases.

Successful use of ADR in the state courts and its growth in the private sector led to a more expansive use of ADR mechanisms in a wider range of cases in state courts and in federal courts. The rising cost of litigation, burgeoning dockets, and the concomitant strains on the court system began to erode public confidence in the courts and drive those who could afford it to seek "paid" private ADR, including rent-a-judge, mediation, and arbitration. These internal and external pressures forced court systems to consider alternatives within the court system.

The involvement of the federal courts in court-annexed ADR can be dated to about thirty years ago. At the American Bar Association Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Professor Frank Sander ushered in the modern era of dispute resolution with the introduction of the concept of the multi-door courthouse. Professor Sander advocated courts offering parties a range of dispute resolution procedures and helping them to select among them rather than offering a "one size fits all" adversarial process.[11]

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[10] *See, e.g.*, Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 1–2 (1995) (discussing the growth of the ADR movement and noting that "the group of lawyers, arbitrators, academics, and jurists fostering ADR [which] has taken on some of the aspects of a social movement").

[11] Sander, *supra* note 2.

The first court-annexed mandatory arbitration programs in federal courts were established in three districts in 1978 on a trial basis.[12] Ten years later, Title IX of the 1988 Judicial Improvements and Access to Justice Act[13] authorized experimental court-annexed arbitration programs in additional pilot districts.

Other rule and statutory amendments encouraged the use of ADR. For example, the 1983 amendments to Federal Rule of Civil Procedure 16 provided for increased judicial management of cases through the pretrial conference and explicitly required consideration of "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[14] The Civil Justice Reform Act of 1990[15] required every federal district court to at least consider court-sponsored ADR, including mediation, arbitration, mini-trial, and summary jury trial, in its required Civil Justice Reform Act Plan. Additionally, the statute included authorization and funding for at least some assessment of programs.[16]

The Alternative Dispute Resolution Act of 1998[17] states that ADR "has the potential to provide . . . greater satisfaction [for] the parties, innovative methods of resolving disputes, and

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[12] The three districts were the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut. BARBARA S. MEIERHOEFER, FED. JUDICIAL CTR., COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 14 (and accompanying notes) (1990), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/courtannarb.pdf/$File/courtannarb.pdf.

[13] Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[14] See 1983 amendment to FED. R. CIV. P. 16(c)(7) and the accompanying Advisory Committee Notes, which state that "[i]n addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse." Rule 16(c)(7) was subsequently modified in 1993 and is now renumbered as FED. R. CIV. P. 16(c)(9). The 1993 Advisory Committee Notes explain that the revision was made "to describe more accurately the various procedures that, in addition to traditional settlement conference, may be helpful in settling litigation . . . . such as mini-trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual reslution of the dispute without a full trial on the merits."

[15] Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471–482 (2000)).

[16] *See generally* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996).

[17] Pub. L. No. 105-315, 112 Stat. 2993, 2993–98 (1998) (codified at 28 U.S.C. §§ 651–658 (2000)).

greater efficiency in achieving settlements"[18] and mandates that every district court establish an ADR program that provides litigants with at least one ADR process. The Act authorizes the federal courts to compel participation in mediation or early neutral evaluation. Each district court must, by local rule, require litigants in civil cases to consider using ADR at an appropriate stage in the case. As a result of this statute, as well as trends in the private ADR marketplace, mediation programs have become the fastest-growing category of court-annexed ADR program,[19] but, as discussed below, mediation, as offered in the courts, can mean many different things.

Similar ADR initiatives were promulgated by statute and executive order and put into effect in the executive and administrative branches of the federal government.[20]

Thus, federal courts offer some ADR in all civil cases, but there is significant variation in what that means in different federal courts. First, offering a program or promulgating rules does not mean that a robust, viable program exists and is utilized. There is often a significant disconnect between what rules authorize and what is actually available and operative.[21] Second, there is ADR and there is *ADR*. What is now labeled ADR in some courts may be what courts have by and large always offered—some variation of a judicial settlement conference. Other courts may offer a panoply of ADR options from which parties may choose.

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[18] *Id.* § 652(a).

[19] In 1996, prior to the 1998 Alternative Dispute Resolution Act, a joint Federal Judicial Center and CPR Institute for Dispute Resolution project reported that "[m]ediation has emerged as the primary ADR process in the federal district courts . . . ." ELIZABETH PLAPINGER & DONNA STIENSTRA, FED. JUDICIAL CTR., ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 4 (1996); *see also* Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 77 [hereinafter *ADR Research*] ("[S]tate and federal courts have turned away from non-binding arbitration and towards mediation.").

[20] The Administrative Dispute Resolution Act of 1990 required federal agencies to consider using ADR in all phases of their work, including adjudication. 5 U.S.C.A. § 571 cmt. Promotion of Alternative Means of Dispute Resolution, sec. (a) (1996) (original version at 5 U.S.C. § 581 (Supp. 1990)); *see* Exec. Order No. 12,778, 58 Fed. Reg. 55,195 (Oct. 23, 1991) (calling for increased use of ADR in the executive branch).

[21] *See, e.g.*, Gina Viola Brown, *A Community of Court ADR Programs: How Court-Based ADR Programs Help Each Other Survive and Thrive*, 26 JUST. SYS. J. 327, 328 (2005).

Court-annexed ADR is not a single process or program; rather, it encompasses many different varieties, variations, and "flavors" of ADR mechanisms. ADR in the federal courts includes arbitration, mediation, early neutral evaluation,[22] summary jury trial,[23] mini-trial,[24] judicial settlement conference, and additional iterations, such as med-arb.[25]

We might categorize the programs in different ways as well. Some of the programs are voluntary; some are mandatory. Whether a program is voluntary or mandatory fundamentally affects the operation of that program and how it is perceived by the participants.

Another categorization might focus on the extent to which the programs resemble traditional litigation. Programs can be placed on a continuum where one end point is a traditional judge or jury trial and the opposite end point is transformative party-directed "appropriate" dispute resolution. All of the court-annexed ADR programs, except for mediation (and arguably much of the mediation conducted under court auspices), have characteristics of the typical litigative, adversarial process—or as described by one commentator, "alternatives to the courtroom that resembled the courtroom . . . ."[26] Perhaps, for that very reason, the growing trend in court-annexed ADR appears to be mediation, which at least in theory may offer greater opportunities for party involvement and flexible results.[27]

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[22] In early neutral evaluation, the lawyers present their cases to a neutral, usually an attorney, who "evaluates" the value of the case and the likelihood of success on the claims and defenses. Early neutral evaluation may lead to settlement negotiations or help focus the claims, defenses, and discovery. *See* PLAPINGER, *supra* note 19, at 63–65.

[23] In a summary jury trial, lawyers for both sides present their positions to a sample jury panel, which renders a nonbinding decision. The jury verdict often is a catalyst for realistic settlement discussions. *See id.* at 67–69.

[24] In a mini-trial, lawyers for each side present their positions, occasionally through key witnesses and documents, to one or more neutrals and the parties. The neutrals may evaluate the case and the presentations provide a basis for the parties to begin negotiations. *See id.* at 63.

[25] *See* Calkins, *supra* note 9, at 287; Hensler, *supra* note 9, at 166 (and accompanying notes).

[26] Kenneth F. Dunham, *The Future of Court-Annexed Dispute Resolution Is Mediation*, 5 T.G. JONES L. REV. 35, 40 (2001). Hensler points out that empirical studies of arbitration found that "parties whose cases were arbitrated felt they had been treated more fairly than parties whose cases were resolved through . . . negotiation or judicial settlement" *because* arbitration looked more like trial than settlement. *Our Courts, supra* note 9, at 179.

[27] Hensler also suggests that courts began looking to other dispute resolution

Even if we examine solely mediation programs, we find tremendous variation in different courts.[28] Some mediation programs are mandatory; some are voluntary. Some litigants receive the services of a mediator from the court without cost; some litigants pay for mediation at market prices or at reduced prices. Some mediators are court staff; others are volunteers or private providers. Some mediation sessions are limited to a single short session; others, especially those for which litigants pay, may continue as needed. Some mediators use evaluative techniques; some mediators favor facilitative or transformative approaches. Many mediation sessions operate as settlement conferences. Variations occur among districts, and within districts, raising concerns that the process may not provide equal treatment to all litigants.[29] This is particularly of concern because ADR processes that result in settlements provide no opportunity for review and most programs do no more than perfunctorily attempt to assess mediators' skills or performance.[30]

The wide variety of programs, dockets, and local legal cultures makes comparability of program assessments across courts extremely difficult and unreliable. The problem is compounded because terminology describing programs is inaccurate and misleading.[31]

Different jurisdictions choose one or more of the programs, vary the procedures to suit local cultures and preferences and resources, and offer an ADR menu. A further complication is that even within individual districts there may be tremendous variation in how programs are utilized. Some judges are more comfortable with one type of ADR over others; parties or their counsel may be more familiar or comfortable with a particular

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alternatives as they learned "that non-binding arbitration was not producing the sort of caseload reduction they had hoped for." *Id.* at 185.

[28] *Id.* at 189–92.

[29] *See, e.g.*, Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1619 (2005).

[30] *Id.* at 1619–20.

[31] *See, e.g.*, Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 249 (2006); Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 94 [hereinafter *Challenging Ideology*] (referring to "experimental studies that found people prefer mediation to binding and advisory adjudication," but "used descriptions of mediation that look more like non-binding arbitration than like mediation as practiced by evaluative or facilitative mediators").

type of ADR; sometimes cases are assigned to a particular ADR process automatically.[32]

Research is increasing, but still is sparse, and empirical research done in a particular jurisdiction may reflect only the operation of a fairly unique program operating in a local legal culture at a particular point in time.[33] Even if a study is well-planned and reliable, the focus on particular programs and jurisdictions may make extrapolation of results to other court programs problematic. Additionally, inferences drawn from such research may or may not have wider application. This difficulty may help explain the variation in results reported as well as the sharply differing conclusions that different scholars draw from the available data.[34]

One particular difficulty has been the continued dearth of solid information about which ADR measures work and what side effects they produce. Controlled experiments can provide the most reliable data about the impact of remedial measures on quality and efficiency standards, but for various reasons are

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[32] As an example, the website for the U.S. District Court for the Eastern District of Missouri publishes a table listing the procedural preferences of each district judge and magistrate judge. *See* Procedures for ADR Referral (District Judges) (Feb. 2000), http://www.moed.uscourts.gov/adr/adrdistrict.pdf; Procedures for ADR Referral (Magistrate Judges) (Feb. 2000), http://www.moed.uscourts.gov/adr/ADRMagis.pdf. For example, this table lists, by judge, which cases are to be referred to ADR, whether unwilling parties are to be referred, when the decision regarding ADR is made, the length of time allowed for completion, and other helpful information.

[33] *See, e.g.*, Julie MacFarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 277–301 (explaining variations in mandatory mediation programs and the response to programs in Toronto and Ottawa); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 647–73 (2002) (reviewing empirical research gathered for Ohio mediation programs and data on other programs).

[34] Scholars are still debating whether there has been or was a "litigation explosion" so to speak and whether trials are "vanishing" and what that might mean for our legal system. The ABA Litigation Section sponsored the "Vanishing Trials Project" and held a symposium on that topic in December 2003 that focused on empirical data collected by Marc Galanter. Patricia Lee Refo, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. v, v (2004). Papers from the symposium were published in the November 2004 issue of the Journal of Empirical Legal Studies. *E.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter *The Vanishing Trial*]. For a counterpoint, see generally John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191 (2005).

rarely undertaken.[35] Findings produced by the studies that are most frequently done—surveys and analyses of statistical reports or other archival data—are of uncertain validity because of the problem of screening out the impact of extraneous factors in the absence of a rigorous control group.[36] Legal scholars still hotly debate the reliability and interpretation of results.[37]

So, comparisons and conclusions are tentative, and somewhat speculative. Empirical research is still in its infancy—we know more than we used to, but we still know relatively little about the litigation process.[38] Results of some studies are encouraging in some respects and discouraging in others. For example, studies indicate that although ADR may increase party satisfaction, ADR may not necessarily reduce costs or disposition time.[39] Data is not consistent and can be interpreted in a variety of ways. Whether there are time and cost savings may depend on whether the dispute was resolved during ADR and the timing of ADR. It may also depend on the type of ADR available and used and the program structure and monitoring. Are cost savings enough? Do savings and efficiency necessarily result in better quality or fairer results?

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[35] *See* Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198–202 (1989); Maurice Rosenberg, *The Impact of Procedures—Impact Studies in the Administration of Justice*, 61 LAW & CONTEMP. PROBS. 13, 14–16 (1988); *ADR Research*, *supra* note 19, at 71–78. *See generally* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

[36] *See supra* note 35.

[37] *See Challenging Ideology*, *supra* note 31, at 85–95; *Our Courts*, *supra* note 9, at 194–95; John Phillips, *Mediation as One Step in Adversarial Litigation: One Country Lawyer's Experience*, 2002 J. DISP. RESOL. 143, 143–44, 150–53.

[38] *See* Gillian K. Hatfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) (finding an error rate as high as 70 percent in the Administrative Office's data on federal civil case dispositions in 2000 and coding inconsistencies for different periods that make it difficult to compare trends over time); Michael Heise, *Justice Delayed: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 816 (2000).

[39] *See* Dunham, *supra* note 26, at 39 (noting that the Rand Study "found that [early neutral evaluation] and [court-annexed ADR] did not dramatically reduce costs, save time or significantly reduce caseloads"); Heise, *supra* note 38, at 817; *Our Courts*, *supra* note 9, at 178–79 (noting that empirical studies found court-annexed arbitration programs did not save time or money in most instances); *see also* Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1785–86 (2001) (discussing disputant satisfaction).

ADR studies often report on the satisfaction of the parties with the process and the result. It is often not entirely clear what the results on party satisfaction actually mean. Can we measure "satisfaction" on some objective basis? Is it satisfaction with the process or with the result or both? Some of the studies note that parties value process; court-annexed ADR is more likely to provide process that parties can understand. Can we reliably measure satisfaction with a particular ADR program as compared to either other alternative dispute processing or litigation? Is an assessment of "fairness" the same as satisfaction?[40] Although ADR is often lauded for its potential to produce "better" quality outcomes, we have not yet determined how to define "better quality" or "fairness", much less to measure those qualities reliably.[41]

Different programs labeled ADR are not fungible. This complicates formulating general conclusions about ADR as compared to litigation. For example, one cannot conclude that because parties evidence high satisfaction after voluntary mediation, that similar results apply to mandatory mediation. Nor can one conclude that because parties evidence high satisfaction after arbitration that similar results apply to mediation. They might, but we cannot make that assumption.

For every study, there is a countervailing study; so, just as some studies give high marks to ADR, other studies have shown that Americans like the adversarial adjudicatory processes.[42] Although it is easy to argue that we have been socialized to that process and that people tend to favor the familiar, the pull to the adversarial process seems to be more deeply ingrained. Additionally, some studies seem to demonstrate that parties simply prefer process[43]—whatever *that* means.

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[40] Edward A. Dauer, *Justice Irrelevant: Speculation on the Causes of ADR*, 74 S.C. L. REV. 83, 98 (2000) ("The trade-off between efficiency and justice is not in itself necessarily a bad thing. . . . The far bigger problem comes . . . from the difference between justice and satisfaction. . . . What seems fair depends upon what one expects.").

[41] *See* Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 117–18 (2004); Phillips, *supra* note 37, at 151.

[42] For a survey of the literature, see *Challenging Ideology*, *supra* note 31, at 85–95.

[43] *See Our Courts*, *supra* note 9, at 179 (exploring the proposition that satisfaction with ADR derives from a sense of "procedural fairness"); *id.* at 179 n.63; Phillips, *supra* note 37, at 149–51.

Two possible explanations for the satisfaction of participants with the adversarial process are that disputants are more likely to be satisfied with results when: (1) they have greater control over the decision-making process, especially in the identification and presentation of evidence; and (2) they perceive the process as fair, especially in the sense of the perceived openness of the procedures and the opportunity to have "voice" in the proceedings.[44] Interestingly enough, it is exactly these factors, aside from the openness of the procedures, that ADR proponents argue are better provided through ADR. It may be though that *mandatory* court-annexed ADR will have more difficulty meeting these benchmarks. As some commentators argue, "ADR's legitimacy is eroded by its association with compulsion."[45] Parties (and/or their counsel) who have chosen court process rather than private ADR and have not voluntarily opted for court-assisted ADR may be acting out of ignorance or hostility to the process, but the single session ADR (averaging three to four hours) that most compulsory court-annexed programs offer disputants may not sufficiently satisfy the process and fairness expectations of litigants.

A separate but related concern is that the less formal ADR resolution procedures might increase the risk of race, gender, or class-based discrimination in adjudication.[46] ADR providers as a group are predominantly white and male.[47] Although race, class and gender bias is not absent from court process, the confidentiality of the ADR process, the informality of procedures and absence of any transcript or record, and the lack of reviewability contribute to these concerns, as does the fact that any coercion in the process may have a magnified effect when disputants are women or minority-group members.

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[44] *See* Landsman, *supra* note 29, at 1623–24.

[45] *Id.* at 1625.

[46] *See id.* at 1625 (discussing the seminal article on this point by Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359); *see also* Eric Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 360 (1990) (arguing that "[f]or those on society's margins . . . ADR raises problems of considerable importance without ensuring fairness").

[47] *See* Landsman, *supra* note 29, at 1626–28 (discussing the consequences of the lack of diversity within the ADR provider industry).

II. CRITIQUES OF THE LITIGATION PROCESS AND THE ADR RESPONSE

The last thirty years have seen a tremendous growth of both private ADR and court-annexed ADR. Of the factors leading to this development, some are based on critiques of the adversarial process and others are based on more general institutional and societal developments that have impacted the courts as well. It is useful to outline these critiques to help explain why court-annexed ADR suddenly seemed such an attractive and viable option. Many of the arguments against traditional litigation and in favor of a shift to ADR process may be summarized in the following four points:

1. The adversarial process is perceived as too costly, too time-consuming, and too stressful. To echo Chief Justice Burger, there has to be a "better way."[48] Judges are increasingly socialized to the concept that "the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement."[49]

2. Most cases settle anyway; less than two percent of federal civil cases get to trial.[50] ADR is a way to process cases earlier and quicker so that less judicial intervention is necessary and settlement can occur earlier.

3. ADR provides additional settlement weapons in the arsenal of the managerial judge model. The concept of the judge as case manager developed gradually, and was institutionalized in the federal courts in procedural rule reforms beginning in

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[48] Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 273 (1982).

[49] Hubert L. Will, Robert R. Merhige, Jr. & Alvin B. Rubin, The Role of the Judge in the Settlement Process (Sept. 15, 1976), *in Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89, 203 (1977) (Judge Will's portion of the speech).

[50] *See The Vanishing Trial*, *supra* note 34, at 463 tbl.1. Professor Galanter's data shows that trials and trial rates have been declining for the past four decades, particularly in the federal courts. The civil trial rate in federal courts dropped from 11.5 percent in 1962 to 1.8 percent in 2002. *See id.* at 462–63 tbl.1. Although this is part of a longer trend, the pace seems to have accelerated. In a much earlier work, Professor Galanter reported a decline in the percentages of cases reaching trial from 15.2 percent in 1940 to 6.5 percent in 1980. *See* Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, *in* LAW AND THE SOCIAL SCIENCES 151, 226 (Leon Lipson & Stanton Wheeler eds., 1986).

the 1980s[51] and reinforced in statutory mandates such as the Civil Justice Reform Act of 1990.[52]

4. ADR provides an opportunity to improve the quality of the results achieved in litigation.

A few observations about these four "motivations" are in order. The arguments favoring ADR over traditional litigation sometimes focus on the interests of the parties and sometimes on institutional and societal interests and pressures. The concerns about the impact of ADR on the courts similarly sometimes focus on party interests and sometimes on institutional concerns. What no one seems to mention, however, is that advancing party interests may not benefit institutional or societal interests and vice versa. For example, a process that reduces a *party's* costs may require greater expenditures *of judicial* and other *institutional* resources. Similarly, an *institutional* efficiency may require *parties* to assume additional costs. We do not necessarily focus on which interests ought to have priority.[53]

Has ADR met its promise? The answer is not so clear and depends on what is used as the measure of success. I have already indicated that empirical data is spotty, difficult to use for comparisons across programs, and not necessarily reliable, but what information can we draw from the studies?

First, ADR may not have reduced costs and time for parties.[54] Indeed, if litigation is too costly and time-consuming, it is difficult to evaluate the impact of court-annexed ADR.[55] A *resolution* by court-annexed ADR is undoubtedly cheaper than adjudication through trial, but only a small percentage of cases

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[51] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982); *see, e.g.*, FED. R. CIV. P. 16 and accompanying Advisory Committee Notes.

[52] Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471–482 (2000)).

[53] As Judge Higginbotham observed in another context, "[i]f judicial reform benefits only judges, then it isn't worth pursuing." Leon Higginbotham, The Priority of Human Rights in Court Reform (Apr. 7–9, 1976), *in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 134, 138 (1976).

[54] *See* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843, 843 (2004) ("Although there is clear positive evidence of cost and time savings and numerous other benefits . . . it is evident that much depends on the shape and structure of such programs."). *But see, e.g.*, Phillips, *supra* note 37, at 153.

[55] *See The Vanishing Trial*, *supra* note 34, at 514.

resolved through court-annexed ADR would have ultimately reached trial.[56] Although the number of cases tried continues to fall, it is not so clear that ADR has had a significant impact on that number.[57] For cases that would not have reached trial in any event, ADR may add a layer of cost and process that the parties would not otherwise have encountered.[58] A significant percentage of cases have historically settled without any judicial intervention;[59] preparation and participation in ADR sessions requires expenditures of time and money. Use of ADR may delay settlement in some circumstances and accelerate it in others. Further, some programs require parties to pay for court-annexed ADR either directly or as a potential sanction for rejoining the queue to trial. It is ironic that parties who opted to litigate rather than to pay for private dispute resolution may be required to pay in any event before being allowed to use the public "free" dispute resolution traditionally offered by courts. For cases that are unresolved by court-annexed ADR and continue to trial, parties incur additional costs.[60]

Second, studies also fail to demonstrate a reduction in institutional costs and time by some measures. For example, cases that go through ADR, as compared to litigated cases, do not necessarily have fewer motions decided. It may simply be that cases are not referred to ADR early enough.

Third, although we can assess ADR programs and determine how many ADR referrals are settled,[61] we do not know the extent to which, or whether, court-annexed ADR has improved settlement rates. Again, neither the results nor the measure is clear. Most cases settle with or without ADR. Should our goal be to have more and earlier settlements? Are ADR-assisted settlements necessarily better than privately negotiated ones? These and similar questions begin to illuminate the problem.

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[56] *See id.* at 463 tbl.1.

[57] *See id.* at 514–15.

[58] *See* Shavell, *supra* note 10, at 4 ("[M]andatory ADR can have the perverse effect of increasing the cost of litigation, by adding another layer to it, without promoting settlement.").

[59] *See The Vanishing Trial*, *supra* note 34, at 514.

[60] In some cases, however, even a "failed" ADR may result in some narrowing of issues and claims, which may result in cost-savings.

[61] Even this is difficult to determine as ADR processes may not result in immediate settlement but may reduce the scope of subsequent litigation or establish a basis for additional discussions that facilitate settlement.

Fourth, it is almost impossible to measure whether ADR has improved the quality of the results. Parties do not publicly disclose settlements, so, we cannot survey the results. We do know, however, that the vast majority of ADR dispositions involve monetary exchanges rather than the more "flexible" alternatives that ADR dispositions may offer in the private sector.

Those examining litigation statistics cannot help but notice the large number of court filings at one end and the very small number of trials at the other end.[62] Logically, court reformers and others have focused on trying to figure out how to move the bulk of cases that will never reach trial out of the system more efficiently. Court reforms have tried to address this issue from various perspectives, including shifting judicial responsibilities and roles from an adjudicative model to a managerial model,[63] manipulating the flow of information so that parties are in a better position to evaluate cases earlier,[64] and offering different options for settlement discussions at various points in the litigation process. Legal scholars have documented the shift of judicial attitudes as federal judges increasingly are trained to see themselves as managers and problem-solvers rather than adjudicators.[65]

Courts see alternative dispute resolution mechanisms as a way to relieve unrelenting docket pressures.[66] Particularly as legislatures have continued to create new rights and obligations and have left it to courts to address certain complex social issues, and as criminal dockets have expanded, there is unrelenting institutional pressure to move cases through the pipeline. ADR may siphon off cases that do not need much judicial attention by diverting settlement to other actors, often practitioners acting as

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[62] *See The Vanishing Trial*, *supra* note 34, at 463 tbl.1.

[63] *See* Resnik, *supra* note 51, at 376; *see, e.g.*, FED. R. CIV. P. 16.

[64] *See, e.g.*, FED. R. CIV. P. 26(a) (concerning mandatory disclosure). This was part of the impetus for the 1993 amendments to the Federal Rules, especially the changes to Rule 26(a).

[65] *See* Resnik, *supra* note 51, at 376–77; Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 192–93 (2003).

[66] *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 7 (2006) (noting that ADR methods commonly used in recent years "include negotiation, conciliation, mediation, minitrials and mini-arbitration, and consensual references, often known as rent-a-judges. The use of the summary jury trial, neutral experts or fact finders, and ombudsmen is also recognized.").

arbitrators, mediators, or early neutral evaluators. Cases that settle leave time and resources for cases remaining in the system.

What is not considered though is the impact on the courts of shifting the types of cases and parties that get adjudicative treatment and those that do not. What is the long-range impact? Does it have a disparate effect so that certain types of cases and parties are no longer able or likely to get court adjudication? If so, how does it affect the legitimacy of courts and court decisions?[67]

III. UNDERSTANDING AND TWEAKING THE SYSTEM: WHAT'S NEXT?

What academics and practitioners are beginning to consider, and need to consider more systematically, is the interrelationship between ADR and traditional court processes. Nothing operates in a vacuum.

In grafting ADR process onto courts, are we changing courts or ADR?[68] Are we changing either for the better?

Is a particular ADR process fundamentally different if it is in the private or public sector? Should it be? Perhaps, the answer to both questions is (and should be) "yes." Court-annexed ADR is likely to be more process-oriented and rule-bound, and less flexible than private party-controlled ADR. Parties cannot have the same control over a court-annexed process as they might in a privately-arranged process for several reasons. Among the most significant of these reasons: (1) a court's limited institutional and administrative resources tend to mandate less flexible arrangements for the participating parties; (2) whether a fee is involved or not, the sessions are often limited as to number and duration; (3) the court has an institutional obligation to ensure fairness within the limits of confidentiality so some oversight is

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[67] *See, e.g.*, Edwards, *supra* note 6, at 677, 679 (noting the two concerns that ADR will replace rule of law with nonlegal values and diminish the development of legal rights for the disadvantaged); *Our Courts*, *supra* note 9, at 195–97; *see also* Jackson Williams, *What the Growing Use of Pre-Dispute Binding Arbitration Means for the Judiciary*, 85 JUDICATURE 266, 267 (2002) (suggesting that courts will become "less a force for the rule of law in general, and more of a forum for resolving individual disputes among the privileged.").

[68] *See, e.g.*, *Our Courts*, *supra* note 9, at 194 ("There is little evidence that jurists who have embraced these new visions of the courts have carefully considered their institutional implications.").

warranted; and (4) lawyers and court professionals generally control and dominate the process.[69]

Additionally, there is increasing acknowledgement that at least some court-annexed ADR is morphing into yet another version of the traditional settlement conference.[70] Many court-annexed mediations are *not* models of party empowerment and the search for creative resolutions. Rather, attorneys are assuming greater roles in selecting the mediators, shaping the sessions, and negotiating for the parties. Attorneys overwhelmingly prefer mediators who will evaluate claims and conduct "reality testing" with the parties.[71] As described by one commentator:

> In sum, court-connected mediation has evolved from a process that focused on enhancing individual citizens' voice, control and assurance of accountability into a mechanism that resolves cases by reconciling these citizens to the institutional reality (or at least mediators' and attorneys' perception of the reality) of the courts and litigation.[72]

Another commentator describes court-annexed mediation as "one tool or step in an adversarial process that usually culminates in a negotiated settlement and less often results in the litigants proceeding to adjudication."[73] If true, then the court system has largely co-opted the promise of ADR and turned it into a dispute resolution mill for efficiency purposes.

Finally, if mediation in the courts is sometimes just another type of judicial settlement conference, then the transformative effects of mediation are eliminated.[74] Does it suffice that a case

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[69] *See* Resnik, *supra* note 9, at 809.

[70] *See* Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 335 (2003). Conversely, it has been suggested that "a good case can be made for treating . . . judicial settlement conferences as a form of ADR," especially as some judges are trained as mediators. *See* Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 JUST. SYS. J. 343, 348 (2005).

[71] *See* Welsh, *supra* note 41, at 137.

[72] *Id.* at 138–39.

[73] Phillips, *supra* note 37, at 152.

[74] *See, e.g.*, 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) ("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."); *see also* Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29 (warning of

is settled or are we trying to change the quality and nature of settlements? Is it the role of courts to be "transformative?" Should it be? Is that why parties come to courts?

Does it make a difference whether court-annexed ADR is voluntary or mandatory? Probably so. Parties can always choose to negotiate or resolve problems without litigation. Despite our perception of a litigation explosion, research has determined that most potential disputes never reach litigation—some claims are resolved in other ways and other claims are simply ignored or abandoned. Yet parties who choose court adjudication for their disputes are often now required to participate (sometimes at significant monetary cost) in ADR processes that they could have chosen to use, but did not. With respect to ADR mechanisms that are more like court adjudication, such as arbitration, there may be less of an impact on the ADR process. Arbitration, for example, traditionally operates under fairly rigorous rules and court-annexed arbitration has adopted those rules and procedures. Courts and lawyers are comfortable with arbitration process and can easily adapt to it. For ADR mechanisms like facilitative or transformative mediation, enforcing good faith participation is more of a problem, and "good faith" requirements and sanctions for lack of good faith have raised concerns about the effects on a process that is supposed to be based on cooperation between the parties and confidentiality of discussions.[75]

Confidentiality constraints also raise concerns about how court-annexed ADR is conducted. Is there appropriate oversight over neutrals? How do we protect parties from coercion and discourage coercive behavior?

These questions raise a host of related concerns. Even firm supporters of court-annexed ADR have recognized that appropriate oversight of neutrals has been spotty and needs improvement.[76] The difficulties are, in part, economic—court-annexed programs are not well-funded and often rely on volunteers with varying levels of training, experience, and commitment. Some programs have full-time administrators, but

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potential corruption of the mediation process by "litigizing" it); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 860–61 (2001).

[75] *See, e.g.*, Landsman, *supra* note 29, at 1607.

[76] *See* Brazil, *supra* note 74, at 24–25.

often there is little staffing and little opportunity for oversight beyond the submission of perfunctory questionnaires to participants. The confidentiality of negotiations and settlements also tends to insulate mediation, in particular, from judicial oversight of either the behavior of the mediator or the quality of the settlement.

Coercion to settle undermines how parties view the entire process and the ultimate result. Some commentators have even noted that the effect of arguments by ADR advocates, who posit that facts and law are of limited value in resolving cases and who denigrate court processes as expensive and unpredictable, may be to erode the legitimacy of courtroom processes.[77]

If, in fact, court-annexed ADR does not reduce costs to parties or move cases through the system faster, is it enough that there are perceived institutional benefits?

Is court-annexed ADR simply low-budget ADR for those who cannot afford either better quality private ADR or trial? Is it the best we can do? The answer depends on the program. Even strong advocates of court-annexed ADR programs recognize that many of the programs are flawed.[78]

There has not yet been a systematic study as to what types of cases and litigants get shunted out of the courthouse.

The bottom line is that we have much more work to do—and some of that work requires that we, as a society, make fundamental decisions about fairness and process in dispute resolution and allocation of resources to the courts.

CONCLUSION

The continuation of the Shakespearean quotation which I earlier reworded is also apt, if rephrased, to conclude:

> The evil that [fill in the blank based upon your own predilection—courts, lawyers, legislatures, litigation, ADR] do lives after them; The good is oft interred with their bones.[79]

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[77] *See Challenging Ideology*, *supra* note 31, at 96.

[78] *See* Brazil, *supra* note 74, at 24–25.

[79] "The evil that men do lives after them; The good is oft interred with their bones." SHAKESPEARE, *supra* note 3, at act 3, sc. 2 (quoting Marc Antony's funeral oration for Julius Caesar).

And to quote, rather than reword, the Bard just one last time:

> The fault, dear Brutus, is not in our stars,
> But in ourselves . . . .[80]

Rather than simply reacting to perceptions of crisis in our institutions, we should examine those institutions, determine appropriate goals, devise methods aimed at reaching those goals, and allocate the funds to do so. Rather than acting based upon incomplete and inaccurate information and political expediencies, we should act based upon reliable information.

Among the issues we must continue to explore:

1. How do we determine which ADR method is best suited to a particular dispute?

2. And, if we can make that determination, does it make a difference if certain programs are unavailable or disfavored by players in the system?

3. To what extent has ADR transformed the litigation process? Has it changed the expectations of parties and their attorneys?

4. To what extent has the court system transformed ADR? Has it become more generally evaluative, more formalized, and/or more procedure-bound?

5. Does making ADR mandatory under the court's auspices, especially mediation, transform ADR inappropriately?

Mandatory ADR requires careful oversight to ensure it is not coercive and does not impose too much of a barrier to trial for those parties who want or need judicial determination. Shifting cases from the court's adjudicative processes necessarily changes the mix of cases left for court resolution and may impact the development of case law and the role of the courts in a common law system based on precedent and stare decisis.

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[80] *Id.* at act 1, sc. 2.