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INTRODUCTION: ADR: AN APPROPRIATE ALTERNATIVE?

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This is the *Willamette Law Review's* second symposium issue on Alternative Dispute Resolution (ADR). A nascent movement just fifteen years ago, ADR is now imbedded in the curriculum of most law schools and is stock-in-trade for accomplished legal practitioners. Willamette's Center for Dispute Resolution, founded over a decade ago, has been imitated (but rarely duplicated) in dozens of academic centers around the country and abroad. Courts, legislatures, and administrative bodies increasingly have incorporated alternatives to traditional litigation into dispute resolution procedures. Numerous training opportunities for neutrals exist. Not-for-profit and for-profit dispute resolution emporia provide an array of services. No longer a cottage industry, ADR has arrived—big time.

To some degree, ADR has been a victim of its own success. Charlatans abound, touting sure-cure nostrums for every dispute. Instant mediators—veterans of weekend mediation training workshops—advertise their services as "expert" neutrals. Meanwhile, experienced neutrals and consumers contemplate

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the need for ethical standards and certification. As several articles in this symposium issue suggest, it is time to cast a critical eye on some of the practices in the dispute resolution field.

Nagging questions pervade the world of alternative dispute resolution. The very term "Alternative Dispute Resolution" is problematic. "Alternative to what?," we are asked, conscious of the fact that the vast majority of disputes long have been resolved by means other than trial. The word "alternative" suggests a deviation from the accepted paradigm, and perhaps a second-class status for methods of resolving disputes outside the courtroom. Thus, some have suggested that the term "appropriate dispute resolution" better describes the array of devices available for the resolution of conflict.[1]

This is no mere semantic argument. Some speak of ADR only as an afterthought, an option to be resorted to only when the "preferred" approach of traditional litigation is just too expensive or somehow does not work. At the other extreme, some conceive of "appropriate" dispute resolution as applying only to nonlitigation alternatives, rejecting the possibility that controversies remain, for which the most effective resolution lies in the courtroom.[2] Several years ago, I attended the annual conference of a dispute resolution organization composed primarily of community-based mediators. The keynote speaker, hoping to deliver a devastating critique of a mediation program with which she was familiar, stated, "This program was so bad that some of the participants actually said they would have preferred to go to court!" Gasps emitted from audience members momentarily unmindful that the conference was being hosted by a law school with an interest in the full array of dispute resolution alternatives. The misguided premise that ADR promises a world without lawyers is matched only by the suspicion with which some litigators greet the prospect of a dispute that concludes short of

1. *See* Albie Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEGOTIATION J. 55, 62 (1988). *See also* Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 685 (1995); Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509, 510 (1989).

2. For a thoughtful discussion of criteria for the selection of dispute resolution methodology, see Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

the total annihilation of their opponents.[3]

Happily, there is plenty of common ground on which we can build. May we speak of "dispute resolution alternatives," recognizing that an array of processes, including litigation, can be employed to resolve disputes? Can we use "appropriate dispute resolution" to describe the choice to be made among these alternatives so that the dispute at hand can be resolved in the most effective manner? Could we agree that, under some circumstances, the involvement of legal experts (i.e., lawyers) can advance the efficient, humane resolution of disputes, even as an "alternative" method is being employed?

Might we also recognize that dispute resolution methods can be designed to address both communitarian ideals *and* the interest of efficiency? In their breakthrough work, *The Promise of Mediation*,[4] Bush and Folger suggest that settlement alone should not be the objective of mediation. Instead, empowerment of the parties and their mutual recognition of each other's legitimate interests can be an important, and even overriding, objective. Some will debate this. There are certainly instances in which mediation can be used appropriately for the sole purpose of achieving the utilitarian goal of settlement. I would suggest, however, that processes designed only to settle superficial, "presenting" problems sometimes fall short of people's need to connect with one another and to feel as if they are part of a community, rather than merely players in an atomized world in which each person seeks only to maximize his or her own well-being.

The articles in this symposium issue provide a rich collection of views on alternative means of resolving disputes. For example, Barbara Phillips examines the effectiveness of various models of mediation, questions the effectiveness of each, and considers the role of the legal profession in ensuring balanced approaches to dispute resolution. Barbara Gazeley asks whether the mediation process can be effectively applied to sexual harassment cases. Roselle Wissler uses empirical data to compare the effectiveness of mandatory and voluntary mediation. Both Sam

3. *See, e.g.*, Charles W. Rubendall II, *I Hate Settlements: A Defense Attorney's Lament*, PA. LAW., December 1988, at 13.

4. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994).

Imperati and Donald Weckstein consider ethical issues arising in ADR practice. Critical to each of these articles is the recognition that mediation is not a one-size-fits-all process, and that there are a variety of styles and interventions. Mr. Imperati proposes that mediators disclose their particular style of conflict resolution; Professor Weckstein suggests that mediators be prepared to engage in a variety of interventions. Both thereby recognize the importance of empowerment and autonomy on the part of participants. Likewise, Ann MacNaughton recognizes the importance of empowerment, focusing on the use of collaborative problem-solving to overcome cultural differences.

Together, the articles in this issue demonstrate that ADR has moved to a new level of sophistication. We write now not merely to describe a process or to establish legitimacy; rather, we write to question the appropriateness of techniques, to determine the most appropriate forum and methodology, and to consider ethical standards. In short, the ADR movement has come of age. We hope that you will enjoy the breadth of thought represented in this issue and that you will agree that ADR continues to provide fertile ground for intellectual inquiry.