

WOULD ADR HAVE SAVED ROMEO AND JULIET?©

BY PAM MARSHALL*

Like many disputes, Romeo and Juliet is a story with no winners; the outcome is destined to be lose-lose. Disputes are an inevitable part of human interaction and people need to learn effective and reasonable ways of dealing with their disputes. The question is how can this be done in a way that leaves people intact. The article compares and contrasts two modes for resolving disputes: adjudication and alternative dispute resolution (ADR). The article looks at what happens when disputes arise—how do problems become “disputes” and what do people do about them? The role of lawyers as dispute creators as well as dispute resolvers is examined, as is the current state of the adversary system and litigation. The author problematizes the rush of lawyers into the ADR game and questions whether it is in response to decreased billings rather than from a desire to provide more creative, disputant friendly services. The author argues that ADR is not the great panacea it has been touted to be. It clearly has a place in disputes but it is as imperfect as any other process that exists or could be created. Because disputes arise from human interaction, there may be as many types of dispute resolutions as there are people. Imperfect people will create imperfect and fallible processes. Those who seek to assist in dispute resolution must accept that their role is one of assistance, not control. Lawyers are not necessarily well suited to this role. It is incumbent on those who wish to engage in the service of dispute resolution to recognize their own situatedness and interests.

Comme dans beaucoup d'autres disputes, Roméo et Juliette est une histoire sans gagnants; l'issue est destinée à être une perte pour l'un et l'autre. Les disputes sont inévitables dans les interactions humaines et les gens doivent apprendre des manières efficaces et raisonnables pour résoudre leurs conflits. La question est comment pourrait-on faire cela d'une façon qui laisserait les gens intacts. Cet article compare et contraste deux manières pour résoudre les disputes: le tribunal et la résolution alternative des disputes (RAD). L'article examine ce qui se passe quand les disputes surviennent—comment des problèmes finissent par devenir des “disputes” et que font les gens pour les résoudre? Le rôle des avocats comme à la fois responsables de la création et de la résolution des disputes est examiné, de même que l'état actuel du système adversaire et le litige. L'auteure questionne la hâte des avocats dans le jeu de la RAD et se demande si c'est en réponse à une diminution de facturation plutôt qu'au désir de pourvoir des services plus créatifs qui tiennent compte des parties en litige. L'auteure avance que la RAD n'est pas la grande panacée comme on a voulu qu'elle soit. Elle a évidemment sa place dans la résolution des disputes mais elle est aussi imparfaite que tout autre processus qui existe ou qui pourrait être créé. Du fait que les disputes viennent des rapports humains, il pourrait y avoir autant de genres de solution qu'il y a de gens. Des gens imparfaits finiront par créer des processus imparfaits et faillibles. Ceux qui cherchent à s'impliquer dans la résolution des conflits doivent admettre que leur rôle consiste à assister et non à contrôler. Les avocats ne sont pas nécessairement bien préparés à jouer ce rôle. Il revient à ceux qui désirent s'engager dans le service de la résolution des disputes d'y reconnaître leur place et leurs propres intérêts.

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I. INTRODUCTION

*Two Households both alike in dignity
(In fair Verona, where we lay our scene)
From ancient grudge break to new mutiny,
Where civil blood makes civil hands unclean.
From forth the fatal loins of these two foes
A pair of star-cross'd lovers take their life,
Whose misadventur'd piteous overthrows
Doth with their death bury their parents strife.
The fearful passage of their death-mark'd love
And the continuance of their parents' rage,
(Which but their children's end nought could remove)
Is now the two hours' traffic of our stage,
The which if you with patient ears attend
What here shall miss, our toll shall strive to mend*

Conflict is the stuff of great literature. Shakespeare's work abounds with tragic stories of unresolved disputes; *Romeo and Juliet* is one of his finest and most loved examples. It is popularly seen as a

¹ W. Shakespeare, *Romeo and Juliet* "The Prologue," 1-14 [hereinafter *Romeo and Julie*].

romantic love story, though its central theme is of conflict and failed resolution. The Capulets and Montagues are in the midst of a long-standing dispute whose source or reason is undeclared. The families hate each other and their servants engage each other in battle whenever their paths cross on the street. There seems no hope for resolution. Their children, the star-crossed lovers Romeo and Juliet, fall in love but recognize that their families will never accept their union. In a Shakespearean example of tragic irony, they each commit suicide. It is only after their deaths and the sad truth of their love for each other is made known that the families are able to put aside their long-standing feud. This is a play about extremes and opposites: young love and age-old hate; anticipatory joy and hopeless anguish; the weight of the past and the hope of the future; the promise of union and the pain of loss.

Like many disputes, *Romeo and Juliet* is a story with no winners; the outcome is destined to be lose-lose. Inevitably, disputes are part of human interaction, though fortunately most do not end with the death of the participants. However, the emotional and financial cost can leave the disputants feeling that too much has been lost. Being in the world leads to being in conflict. Arguably, life without conflict would be boring and tedious, though life amid constant dispute and conflict can be cruel and stressful. Since people cannot avoid disputes, unless they choose the life of a hermit, it seems clear that people must learn more about effective ways to deal with the inevitable disputes that arise. And, unlike Romeo and Juliet, they must learn about ways to survive them.

The central question is: “how can people deal with conflict in a way that leaves them intact—how do people resolve conflict without destroying each other in the process?” Personal conflicts and disputes are beyond the scope of this article. Instead, I will look at the conflicts, disputes, and problems that reach a more public awareness—the types of conflicts or disputes that people seek assistance in resolving. In other words, I will examine disputes that end up on the desk of a lawyer and could end up on the road to the courthouse. This article will provide a preliminary look at the nature of disputes—how and why they get labelled as disputes and, once labelled, what people do about them. Once I have examined the typology of disputes, I will look at the processes that people have used to resolve them and the advantages and disadvantages of certain kinds of resolutions. I will also examine how

lawyers are involved as dispute creators and problematize the role of lawyers in dispute resolution alternatives.²

This article compares and contrasts adjudication and ADR.³ It is divided into three parts. Part II looks at what happens when disputes arise, namely how problems turn into disputes and what people do with the disputes. I briefly examine the role of lawyers as dispute-resolvers and creators and provide an introduction into the types of resolutions available. In Part III, I examine and problematize the current state of the adversary system by surveying some of its proponents and detractors. In Part IV, I look at ADR and its claims. I critique the common notion that ADR is a panacea to all that ails the adversary system. I will examine the benefits of ADR in general and mediation in particular. I will argue that just as adjudication is not always wrong, ADR is not always right. I will conclude by noting that ADR is not the great “hype hope” that it has been touted to be. While it clearly has a place in the resolution of disputes, my ultimate claim is that perfect processes cannot be found. I will suggest that because disputes come from human interaction, there may be as many dispute resolutions as there are people. In searching for perfect processes and eagerly jumping from the adjudication/litigation fire, lawyers and others must be wary of ending up in the ADR frying pan. The challenge for potential dispute resolvers is to reduce the destructive heat by channeling disputes and their resolution into cooler and less antagonistic channels.

II. DISPUTES ARE CREATED, NOT BORN

Thou?—Why, thou wilt quarrel with a man that hath a hair more or a hair less in his beard than thou hast. Thou wilt quarrel with a man for cracking nuts, having no other reason but because thou hast hazel eyes

² This article is the beginning of a broader inquiry into the theory of dispute resolution. My broader thesis starts with the belief that disputes are identified by the people that are involved. Often the people charged with the ability to name something a dispute are lawyers. People arrive at a lawyer's office with a problem, they seek a solution and the lawyer may provide one. Once the problems are identified and named as disputes, people seek someone to blame. If a lawyer sees his or her job as naming the problem a dispute, assisting in apportioning blame, and suggesting a legal process that can solve the situation, this is exactly what will occur. Situations that may have been merely problems become not only disputes but legal disputes.

³ Throughout this article, ADR refers to the various forms of alternatives used to resolve disputes other than traditional litigation.

⁴ *Romeo and Juliet*, Act III, Scene i, 18-22 (Mercutio admonishing Benvolio for his propensity to quarrel).

Modern day life is not unlike fair Verona. Conflicts continue to be part of everyday existence. Some people, like Mercutio, are more prone to them than others and will find a dispute in even the most minor of situations. However, conflicts do not spring to life as full-blown disputes; their development is more gradual. They are quarrels, problems, concerns, issues, or troubles. But, what begins as a quarrel or minor disagreement can and often does escalate into something more. To turn a problem into a dispute, people must see the situation as important enough that they will not “let it go” or ignore it and it must affect them in more than a minor way. A helpful typology is offered by Roger Miller and Austin Sarat:

Disputes begin as *grievances*. A grievance is an individual's belief that he or she (or a group or organization) is entitled to a resource which someone else may grant or deny People respond to such beliefs in various ways. They may, for example, choose to “lump it” so as to avoid potential conflict They may redefine the problem and redirect blame elsewhere. They may register a *claim* to communicate their sense of entitlement to the most proximate source of redress, the party perceived to be responsible.⁵

Disputes involve the recognition by the parties involved that they are entitled to some kind of resolution or solution to the dispute. For something to be called a dispute, it must have moved past the solitary awareness of one person to a joint recognition with at least one more person. Both parties need not agree on the nature of the dispute, its origin, or its substance, but they must at least agree that there is a dispute. If only one person sees a problem, it is not yet a dispute.

However, a dispute may arise specifically because the other party does not recognize the existence of a problem or does not perceive that the other party is entitled to any redress. According to Miller and Sarat, if one party accepts the entitlement of the other, there is no dispute. It is only when there is partial or total rejection of the other party's claim that a dispute is born.⁶

A. *Second Cup Dispute*

The following personal experience of mine will help to illustrate the typology of disputes. On many Sunday mornings during the fall of 1996 when I was enrolled in the core course of my LL.M. in ADR, I would do my weekly reading over coffee in a local coffee shop. On one

⁵ R.E. Miller & A. Sarat, “Grievances, Claims, and Disputes: Assessing the Adversary Culture” (1980-81) 15 L. & Soc’y Rev. 525 at 527 [emphasis in original].

⁶ See *ibid.*

particular Sunday, early in the course, I was distracted by a group of six women sitting at a table close by. As the tables in this particular coffee shop are quite close together and these women were animated in their conversation, I could not help overhearing what they discussed. It transpired that they were teachers at a local public school and were involved in a “situation” with a parent. It was not completely clear what the nature or substance of the problem was, but that is not material.

As the discussion progressed, I realized that each of the women was proposing a solution or resolution to the problem and each of them had a somewhat different answer. One of them was prepared to “let it go.” “If we ignore Mr. X,” she said, “he will get tired of complaining and go away and bother someone else.” Another woman favoured a one-on-one confrontation, though she framed it as a “chat.” She was convinced that she could “talk sense to Mr. X” and explain the school’s position and that this would resolve the situation.

The third woman was convinced that a one-on-one would be useless and that Mr. X was too unreasonable to listen to woman number two and that something more was required. She suggested that a couple of people from the school, including someone in a position of power (*i.e.* the principal or vice-principal), should arrange a meeting with Mr. X and present a unified front to outline the school’s reasonable and unyielding position. The fourth woman thought that number three’s idea would escalate the situation. She was convinced that Mr. X would not take such a tactic lightly and would not accept the edict of the school. She was convinced that a “more formal” process was required because “this guy is trouble; he is not going to go away.” She suggested a variation of the third woman’s suggestion. While she agreed that a meeting should take place, she thought that the school should involve not only their own representatives, but a third party who would be seen by Mr. X as impartial or fair. Mr. X would not be required to attend the meeting, but the school would inform him about the neutral party who was to attend and encourage him to participate in an attempt to resolve the situation. Mr. X would be advised that the meeting was not binding but that the parties would be working toward a resolution of the situation that both could accept.

Woman number five thought that all of the other suggestions were “too nice” and that everyone was underestimating Mr. X. “He will not agree to anything unless someone makes him,” she said and continued: “We should involve the school board. They can arrange a meeting between Mr. X and the school. We should let them decide the situation.” Woman number six was having none of this. She thought that all of the suggestions were reasonable attempts at facilitating

resolution. However, she declared, "Mr. X is an idiot and a bully. He will not listen to any of this. We are in the right anyway, we do not need to deal with him. If he has a problem with what we are doing, let him sue us!"

Clearly this group could not come to agreement about how this "situation" should be resolved. In fact, they were not in agreement about whether there was a dispute. They continued talking and eventually agreed to talk to some other teachers involved before deciding which course of action to follow. The various members of the group had identified a number of possible ways to deal with or resolve the matter. They ranged from avoidance, through discussion, to negotiation, mediation, arbitration, and finally, adjudication. Without realizing what they were doing, they had outlined most of the possible methods of resolution, discussed some of their advantages and disadvantages, and determined that more information and dialogue was needed before any action would be taken.⁷

It was clear to me as the listener that the group did not have a common understanding that they were involved in a dispute. If I had entered the conversation and asked each of them what was happening, I would probably have received as many names for the situation as there were women. For some, all that was going on was a "problem;" for others it was less than that, more of a "situation;" for still others it was not concretized as either a problem or situation. Few of the women would have described what was going on as a dispute.

This episode helps to illustrate that disputes are in the eyes or minds of the beholder. They do not develop or exist in a vacuum. They do not have an independent definition or context. Disputes exist when someone labels them as such. As William Felstiner, Richard Abel, and Austin Sarat have argued, disputes are not independently realizable things that exist outside of the context in which they arise; they are social constructs.⁸ Their "shapes reflect whatever definition the observer gives to the concept."⁹ In many instances, much of a dispute exists solely in the minds of the disputants. Disputes emerge and are transformed, mutating from experience to grievance to dispute. They assume various

⁷ Oddly enough, at the time, I was reading L. Greenhalgh, "Managing Conflict" in R.J. Lewicki et al., eds., *Negotiations: Readings, Exercises and Cases* 2d ed. (Boston: Irwin, 1993) 7.

⁸ W.L.F. Felstiner, R.L. Abel & A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1980-1981) 15 *L. & Soc'y Rev.* 631 at 631.

⁹ *Ibid.* at 632.

shapes, follow certain paths toward resolution and “lead to new forms of understanding.”¹⁰

Since the publication of the Felstiner, Abel, and Sarat article in 1981, the ideology of disputes has been frequently examined. The ADR movement has flourished and disputes and the methods for their resolution have been analyzed, dissected, and categorized. Though the literature has increased, it is not clear that there has been a concurrent increase in understanding. People are still confused about disputes: what they are, where they come from, and what to do about them.

In *Romeo and Juliet* the Capulets and the Montagues dealt with their dispute by engaging in battle whenever the two families got together. While this method was aimed at resolution, it only served to ensure that the dispute continued to exist and escalate. Whatever the reasons underlying their family feud, no attempt at resolution was made. Each party had obviously rejected whatever claim the other had made. Instead of looking for non-violent ways to resolve the situation, the Capulets and Montagues used a method not uncommon in today’s world of human interaction. They avoided dealing with the conflict and used violence as a means towards forced resolution. Many people, when faced with conflict, respond in a similar manner.

It may be helpful here to discuss what is meant by the term “resolution.” Roderick A. Macdonald notes that resolution can be defined as “constancy in the pursuit of a purpose; resolution as the progression from discord to concord; ... resolution as the act of resolving.”¹¹ These definitions can be grouped into three categories: (1) resolution as outcome; (2) resolution as process; or (3) resolution as symbolism.¹²

There is clearly overlap between the three categories. One cannot speak of resolution as outcome without having progressed through resolution as process or, to a lesser degree, resolution as symbolic of the constancy of purpose in striving to resolve. Each category weaves in and out through the other. My project is to place the notion of resolution inside the process of dispute resolution, to refer to resolution as outcome or solution. Once people name their situation a dispute, a resolution of some kind is usually sought, and the variety of

¹⁰ *Ibid.* at 623.

¹¹ R.A. Macdonald, “High Resolution Dispute Resolution: Finding A Focus” (Seminar, Osgoode Hall Law School, York University, Part-Time Programme in ADR, 22 August 1996) [unpublished].

¹² See *ibid.* at 5.

efforts toward resolution will be as different as the disputes and the people resolving them.

To categorize resolution is as difficult as categorizing disputes. Paul Emond agrees that to do so is somewhat problematic: “disputes are seldom ever static; like the factors that give rise to the dispute and the parties to the dispute, they are continually changing.”¹³ The characteristics interact within and around a dispute in ways that are constantly changing and unique. No two disputes are the same; no two disputants are the same. Therefore, no consistent mode of resolution will be appropriate. Others have noted that disputes are difficult to quantify or measure. They are not always easy to identify or count:

Disputes are not discrete events like births or deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them.

Disputes are drawn from a vast sea of events, encounters, collisions, rivalries, disappointments, discomforts and injuries Some things . . . become disputes through a process in which injuries are perceived, persons or institutions responsible for remedying them are identified, forums for presenting these claims are located and approached, claims are formulated acceptably to the forum, appropriate resources are invested, and attempts at diversion resisted. The disputes that arrive at courts can be seen as the survivors of a long and exhausting process.¹⁴

The vast sea of events that Marc Galanter describes varies from person to person and lived experience to lived experience. However, everyone experiences the storms that are inevitable and searches for a way to stabilize and calm the rough seas of life. An injury is perceived, a grievance is voiced, and a claim is made. If the claim is rejected, people reach a stage where they become aware that a dispute exists. They then attempt some measure of resolution. They realize that their attempts are unsuccessful or inadequate and they look for help.¹⁵

It is important to point out that dispute awareness, transformation, and resolution are experienced differently by people. The particular social position that people occupy will impact on not only their personal perception of whether a dispute exists but other peoples’ acceptance of their perception. Marginalized people will not be given

¹³ D.P. Emond, “Alternative Dispute Resolution: A Conceptual Overview” in D.P. Emond, ed., *Commercial Dispute Resolution* (Aurora: Canada Law Book, 1989) 1 at 12.

¹⁴ M. Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society” (1983) 31 U.C.L.A. L. Rev. 4 at 12 [hereinafter “Reading the Landscape”].

¹⁵ Or, as William Felstiner, Richard Abel and Austin Sarat have noted, people move through perception of injurious experiences (grievances), they voice these to the offending party (claims) and, if the claim is not granted, it becomes a dispute: see Felstiner, Abel & Sarat, *supra* note 8.

recognition of a dispute's existence as readily as will someone in a majority group. If disputes are not recognized as disputes, then there is no requirement for any action to resolve them. If the existence of a problem is not accepted, there is no reason to look for resolution. It is clear that people in marginalized groups, such as the poor, minority groups, and the disabled, are less likely to have their problems recognized, less likely to have them labeled as disputes, and less likely to be seen as having a legitimate claim to redress.¹⁶ Lawyers' complicity in this process of dispute naming deserves a brief examination.

B. *Lawyers' Role in Dispute Resolution*

ADR is touted by lawyers and others as useful in equalizing access to justice. However, lawyers' role in the early stages of disputes places them in a position of great responsibility and opportunity. Their role includes their complicity in identifying problems as legitimate, their involvement, linguistically as well as concretely, in transforming problems into disputes, and their interest in turning disputes into claims for redress. Lawyers can do as much or as little as they choose. They can use ADR as a means to improve access or merely as a means to improve their income.

Traditionally, lawyers' involvement in disputes and the resolution of disputes is seen as less than positive. This is evidenced, at least to some degree, by the overwhelming dissatisfaction which people express about the justice system in general and adjudication in particular. Lawyer jokes abound; courts are seen as places to avoid rather than places where one could seek justice. Despite the proliferation of television shows that glamorize lawyers, most people avoid involvement with the justice system at all costs.

Enter ADR. The justice system is in trouble and the response from the legal community was not to fix the mess that they had helped to

¹⁶ The issue of access to justice in general, and to alternative dispute mechanisms in particular, for people in differing social positions and ethnic groups, is a topic beyond the scope of this effort. See R. Delgado *et al.*, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) *Wis. L. Rev.* 1359 (suggesting that ADR disadvantages minority participants); T. Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) *Yale L.J.* 1545; P.E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) *40 Buff. L. Rev.* 441 (arguing that mediation is dangerous for women in family law cases involving women); E.K. Yamamoto, "Efficiency's Threat to the Value of Accessible Courts for Minorities" (1990) *25 Harv. C.R.-C.L. L. Rev.* 341 (arguing that the push towards ADR is an effort to constrict court access and expedite case dispositions, and that minority rights assertion allows minorities to use judicial power to gain entry into the polity).

create, but to look for an alternative. The claim is that the alternative is not just different but better. ADR is transformative, egalitarian, and restorative.¹⁷

[T]he A.D.R. movement challenges traditional modes of dispute resolution and invites disputants to search for new and more effective ways of resolving disputes. ADR breaks down preconceived and largely outmoded notions of how disputes are best resolved. It challenges the dominant role of judicial litigation in the dispute resolution process and legitimizes alternative processes and alternative ways of resolving disputes, particularly in the private sphere.¹⁸

For Emond, ADR has a role in assisting parties to dissect disputes, as well as, or even instead of, resolving them. He holds out great hope for the proponents of ADR. He argues that the challenge for ADR providers must be to assist parties to determine the real nature of their dispute and then fit the appropriate resolution process to it. He fantasizes that this could mean that

disputes will not necessarily march toward the court-house steps and the opportunities for settlement will not necessarily be confined to reaching agreement on what the parties expect the court to do. Creativity and innovation become the hallmark of the process, and not tradition and preconceived structure.¹⁹

A number of years have passed since Emond wrote this hopeful and encouraging call to ADR practitioners. Even as a relatively new student of the movement, I have observed that the call has gone mainly unheeded. I do not see the innovation and creativity in the process that he had hoped for. I see lawyers jumping on the ADR bandwagon in response to the public's rejection of litigation and lawyers. And the rejection comes not because they want ADR necessarily, but because they want anything but law and lawyers. The irony is that with the co-optation and legalization of ADR, the public has landed very close to where it began. The alternative looks a lot like a first cousin rather than an unrelated stranger.

Emond is not alone in his vision of ADR as a harbinger of a better world for dispute resolution. Other writers have also envisioned the move to ADR as creating a climate that would inspire "a burst of creative

¹⁷ See, for example, R.A.B. Bush & J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994). The authors suggest that mediation can transform the parties into more psychologically and morally aware individuals.

¹⁸ Emond, *supra* note 13 at 24.

¹⁹ *Ibid.*

innovation and experimentation.”²⁰ Galanter positively gushes with what he sees as the promise of ADR:

Compared to earlier crusades for alternatives, the contemporary ADR movement is more informed by empirical learning, more theoretically sophisticated and more ambitious in scope. It advocates change not only for the domains of the minor and marginal but for the legal heartland.²¹

For Galanter, the idea that there is one right way of managing disputes is “drained of credibility”²² and he argues that legal institutions should remain a part of the dispute resolution process, but in a way that interacts and intersects with other processes. He challenges those who are designing legal institutions to recognize that they are responsible not only for the narrow world of adjudication, but that they must also incorporate a broad range of dispute resolution possibilities. Problems, experiences, or injuries may be turned into very different disputes depending on who the parties are, what type of dispute it is, and the institutions and processes available for resolution. Galanter notes that sorting disputes by their suitability to particular processes are political choices, and that these choices are reflective of our ideological commitments about society.²³

The political choices that Galanter recognizes lead to certain types of disputes being assessed as appropriate for ADR while others are not. This has led to so-called “soft” cases being steered into ADR: family law, landlord and tenant, and neighbourhood disputes for example. ADR was not seen as appropriate for “real law” cases like corporate contractual disputes, constitutional, or other so-called “public disputes.” ADR was acceptable as long as people used it for the “garbage cases” and saved the courts for the more important cases. It was not seen as a realistic or acceptable alternative in cases where real legal decisions were required. And as lawyers are in the front line of assessing disputes as needing real law or not, they must be recognized as not only complicit in but responsible for the decisions that they make.

Some writers have argued that ADR presents encouraging and hopeful possibilities as long as it is used appropriately. Harry Edwards favours the use of ADR in resolving private disputes, but warns against its

²⁰ M. Galanter, “Introduction—Compared to What? Assessing the Quality of Dispute Processing” (1989) 66 Den. U. L. Rev. xi at xi.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* at xiv.

use in cases that implicate important public values.²⁴ He argues that it is acceptable for settling minor grievances between neighbours or simple contract disputes, as this may result in higher rates of resolution. Arguably, it is also because these matters are not important in the “real world of law” in which he presides. He is concerned that ADR could be extended to resolve difficult and complex issues like constitutional or public law issues and in this way, its use could lead to the use of non-legal values to resolve important social issues. He cautions that such usage of ADR could delimit public rights and duties.

For Edwards and others, ADR can be an alternative to, but clearly not a replacement for, the judicial process. This argument reaffirms the belief that the adversary system has a significant and irreplaceable role to play in our society. Many writers have reiterated this view and have argued that the move to ADR as a means to increase settlement prior to or without referral to the court system is a dangerous road to travel. The issue seems to have become divided into two very clear camps: settlement or adjudication. However, as Carrie Menkel-Meadow has noted, the issue is not as clear cut as it seems.²⁵ As she describes, the writing in the area tends to focus on the subject as if there are two distinct processes—ADR or adjudication—when in reality they frequently meld into each other. In addition, writing on ADR tends to be written as if it was one process rather than recognizing that there are many diverse qualities within the different forms: negotiation differs from mediation which has different characteristics from arbitration, while settlement conferences or mini-trials differ again from mediation-arbitration situations. Therefore, when writers such as Edwards discuss the notion that ADR is appropriate for certain cases, it is often unclear which form of ADR is meant.

Other writers have recognized that the issue is not so binary in nature and that a more individualized approach is required; one must look at the dispute and the disputants. To contextualize both of these factors will aid in the discussion and ultimate determination as to what process may be the most appropriate. It is short-sighted and patronizing to decide what type of resolution is best for certain types of disputes or disputants. The people involved in the dispute should have input into the manner in which they want the matter resolved. As Menkel-

²⁴ See H.T. Edwards, “Alternative Dispute Resolution: Panacea or Anathema?” (1986) 99 *Harv. L. Rev.* 668.

²⁵ See C. Menkel-Meadow, “Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)” (1995) 83 *Geo. L.J.* 2663 [hereinafter “Whose Dispute Is It Anyway?”].

Meadow has noted, there are many processes to consider as well as many relevant factors that should be taken into consideration.²⁶ Some of these factors include the fact that “[t]he diverse interests of the participants in the dispute, the legal system, and society may not be the same.”²⁷ In addition, “[i]ssues of fairness, legitimacy, economic efficiency, privacy, publicity, emotional catharsis or empathy, access, equity among disputants, and lawmaking may differ in importance for different actors in the system, and they may vary by case.”²⁸

For Menkel-Meadow, there are no easy answers to the questions about which settlements are good and which are not or when adjudication should be preferred over settlement. She argues that it is difficult to specify criteria in advance that would allow certain cases to be slotted for adjudication and others to be channeled into settlement. For Menkel-Meadow, there are “philosophical, as well as instrumental, democratic, ethical and human justifications for settlement.”²⁹ She also points out that many who criticize settlement suffer from what she calls “litigation romanticism.”³⁰ As Menkel-Meadow accurately identifies, many who are against settlement privilege adjudication and focus on its structural and institutional values while ignoring the participants. It is of little comfort to the participants that certain institutional values may be met. Individuals may have little concern about the precedential or public value of their particular dispute but may be very concerned about the psychological and financial cost of the proceedings. There are important values that should be considered in the debate for and against settlement: “consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice.”³¹ Compromise may mean that both parties have lost, whereas settlement may allow both parties’ interests to be met, if not completely, at least in a satisfactory way that indicates agreement; a win-win outcome rather than lose-lose.

This article is not focused on the settlement versus litigation debate. However, it is important to note that the debate exists before I move to the next section, which reviews the current state of adjudication. My position throughout this article is closer to Menkel-Meadow than

²⁶ *Ibid.* at 2666.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.* at 2669.

³⁰ *Ibid.*

³¹ *Ibid.* at 2669-70.

not. However, I do not wholeheartedly adopt her arguments. I do agree that what is required is a particularized and contextualized examination of the dispute and the parties involved. The people involved must be provided with accurate, reasonable, and useful information in order to make an informed decision about the process they choose. This information has commonly been absent from lawyer-client discussions. People are routinely steered into the adversary system because this is where lawyers make their money. However, if lawyers take over and run with the ADR system, the same problem may result. People will be directed into certain processes by their counsel, based on the lawyers' needs or preferences rather than being given a choice of processes. Lawyers must have the disputants involved in the resolution of their dispute. This can only be done by providing accurate, comprehensive information on all the options and the relative advantages and disadvantages of each. This requires lawyers to educate themselves about the options, separate their interests from those of their clients', and seek dispute resolution that is particularized and contextualized to each disputant's individual needs.

III. SO WHAT'S SO WRONG WITH THE ADVERSARY SYSTEM ANYWAY?

*Rebellious subjects, enemies to peace, ...
 Throw your mistemper'd weapons to the ground
 And hear the sentence of your moved Prince.
 Three civil brawls, bred of an airy word,
 By thee, old Capulet and Montague,
 Have thrice disturb'd the quiet of our streets
 And made Verona's ancient citizens
 Cast by their grave beseeming ornaments
 To wield old partisans, in hands as old,
 Canker'd with peace, to part your canker'd hate.
 If ever you disturb our streets again
 Your lives shall pay the forfeit of the peace*

In Shakespeare's Verona, the solution to any problem was simple. The Prince ordered the parties to cease and desist or forfeit their lives. If only dispute resolution were so easy—royal decrees

³² *Romeo and Juliet* Act I, Scene i, 84-100.

instead of lawyers, judges, and courtrooms. However, since the tyranny of royal decree is thankfully missing from our current way of life, other methods of resolution must be sought.

A. *Sure We Have Problems, But ...*

After the naming, blaming, and claiming is complete, a dispute remains to be dealt with. If one chooses not to “let it go,” a solution is sought. Many disputes are resolved without the involvement of lawyers, courts, and the judicial system. People often try to resolve situations on their own. The majority of disputes do not end up in the civil justice system and those that do rarely reach a court. Even though few disputants resort to litigation, and fewer still end up in court, the public is of the view that there is a litigation explosion. As Galanter notes:

Public discussion of our civil justice system resounds with a litany of quarter-truths: America is the most litigious society in the course of all human history; Americans sue at the drop of a hat; the courts are brimming over with frivolous lawsuits; courts are a first rather than a last resort; runaway juries make capricious awards to undeserving claimants; immense punitive damage awards are routine; litigation is undermining our ability to compete economically.³³

Despite public perception to the contrary, only a very small percentage of people’s problems ever become disputes and even fewer of these become lawsuits.³⁴ Galanter borrows the term “hyperlexis syndrome” to describe the “alleged high rates of disputing and litigation.”³⁵ He argues that all of the myths about the civil justice system are false, though “in a complicated way.”³⁶ He outlines how little empirical data exists about the legal system and concludes that the critics of the system have falsely portrayed its deficiencies so as to encourage the search for, and embracing of, alternatives. He concludes that despite the deficiencies that exist, “American institutions provide influential

³³ M. Galanter, “News From Nowhere: The Debased Debate on Civil Justice” (1993) 71 Den. U. L. Rev. 77 at 77 [hereinafter “News From Nowhere”].

³⁴ See “Reading the Landscape,” *supra* note 14 at 5 where Galanter notes that “only a small portion of troubles and injuries become disputes” and “only a small portion of these become lawsuits”; “of those that do become disputes the vast majority are abandoned, settled or processed without adjudication.” He admits that current numbers show a slight rise but that the United States per capita rates are similar to those of England, Australia, and Ontario. In Canada, between 95-97 per cent of civil suits do not advance to litigation. See also G.A. Chornenki & C.E. Hart, *Bypass Court: A Dispute Resolution Handbook* (Markham, Ont.: Butterworths, 1996).

³⁵ “Reading the Landscape,” *supra* note 14 at 6.

³⁶ *Ibid.* at 77.

models for the governance of business relations, the processing of disputes, and the protection of citizens.”³⁷

Galanter and others trace at least some of the genesis of the myths about the civil justice system to comments made by then United States Chief Justice Burger and others at the 1976 Pound Conference.³⁸ Justice Burger suggested community panels could be used to resolve small claims and that greater use of arbitration should be considered. It was also at the Pound Conference that Frank Sander gave his well-known speech calling for a “multi-doored courthouse.”³⁹ Though Sander called for alternatives, he was not proposing the replacement of courts but rather a better use for them, arguing that we should “reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.”⁴⁰

This clearly begs the question: what are the courts’ unique abilities? For many who have experienced the court system, the answers would not be those Professor Sander was referring to. The current court system seems to be uniquely adept at producing unreasonable delay, exorbitant cost, unhappy disaffected participants, uneven and often unfair results. Though Galanter is right to dispel the myths of the litigation explosion, the truth is that there is a litigation implosion. The adversary system is clearly not meeting the needs of many of the participants. The only people who seem to be profiting are the lawyers and judges, and it is a profit derived from the dissatisfaction and dismay of litigants. While many writers accept that the system has its problems, they are able to maintain a positive and hopeful outlook. Emond says that “confrontation and the adversarial system have served North America well and will continue to do so. There are few better ways of

³⁷ “News from Nowhere,” *supra* note 33 at 102.

³⁸ The 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration came to be called the Pound Conference because it invoked the 1906 speech given by Roscoe Pound: see R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (Chicago: American Judicature Society, 1970). For further explanation on the significance of the Pound Conference to the development of ADR, see also L. Nader, “The ADR Explosion—The Implication of Rhetoric in Legal Reform” (1988) 8 Windsor Y.B. Access Just. 269.

³⁹ F.E.A. Sander, “Varieties of Dispute Processing” in *The Pound Conference* (1979) 70 F.R.D. 111 at 131. Sander did not actually coin the term “multi-doored courthouse” but called for a lobby where disputants could be channeled through a screening clerk to one of seven doors.

⁴⁰ *Ibid.* at 132.

rigorously testing facts, witness credibility and evidence than in the adversarial setting of the courtroom.”⁴¹

A critique of Emond’s love affair with and faith in the adversary system is fodder enough for another article at another time; an examination of each of his claims is beyond the scope of this article, but I will comment briefly on some of his assertions. First, the notion that the adversary system has served North America well can only be true if Emond is referring to lawyers, judges, corporations, and the like. For these overwhelmingly male and white participants, the adversary system has provided well-paid employment, power, prestige, status, and outcomes that preserve and maintain the status quo. On the other hand, the adversary system has a poor record when it comes to women, people of colour, Aboriginal peoples, the poor, and other marginalized and oppressed groups. These people have been either excluded from the system altogether or legal insult has been added to their personal injury.

Secondly, if Emond really believes that the courtroom is the best place for testing facts, witness credibility, and evidence, then he has little experience with other fora. What is tested in the courtroom is a lawyer’s ability to obscure and obfuscate the facts, manipulate and manhandle witnesses, and withhold or conceal evidence. The adversary system does not test facts, it merely chooses between the two sets of facts presented to it. And often the facts it has chosen have deprived people of rights rather than recognized them. In the past, courts have accepted facts like these: women are not people; people of colour are not equal to white people; Aboriginal people do not have a claim to the land that they had founded, cared for, and preserved for centuries. This very brief list of the court’s fact finding ability provides little evidence of a “well served North America.” I do not share Emond’s belief that the adversary system can be trusted to be fair or just.

Finally, Emond believes that Wigmore’s “legal engine”⁴² that could” will find the truth. Even if there were an identifiable, distinguishable, non-situated “truth” available to be found, the courtroom would be the last place to find it. It is precisely because of truth’s situatedness, malleability, and perpetual movement that the adversary system works so well for the usual and traditional players. Courtrooms, lawsuits, and litigation are not about “truth;” they are about winning (and losing). And the way to win is to get “your truth” accepted rather than the other side’s. Tomorrow, “your truth” may be

⁴¹ Emond, *supra* note 13 at 4.

⁴² *Ibid.* at 4, where Emond refers to J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 3d ed. (Boston: Little, Brown & Co., 1940).

exactly the opposite of what you argued today. This is what lawyers do despite their claims to the contrary. They argue what will win, not necessarily what is “true.” And this presentation of “truth” leads many people to have little faith in the system that Emond and others extol. The disputants involved in the adversary system would have very different responses to the question “how has the adversary system served you?”

Emond does admit that the adversary system is not the place to solve all problems. He recognizes that the process tends to turn all disputes into “legal disputes” and that rather than resolving problems, the adversary system may actually make things worse. He argues that the “search for alternative dispute resolution processes is ... a search to more precisely locate adjudication and in particular judicial adjudication on the continuum of dispute resolution mechanisms.”⁴³ This search would, according to Emond, increase the available options for resolving disputes and ensure that they are better suited to the particular needs of the dispute and the disputants. In addition, moving towards alternatives would allow the role of adjudication to be limited, remedy some of adjudication’s problems, and encourage the use of less adversarial techniques. Even though there is “nothing inherently wrong” with the system, Emond embraces and encourages a movement away from it. On closer reading though, it is clear that what he envisions is not two separate features but more of a double bill. ADR will not replace adjudication or litigation but will be more of a full-length trailer. However, my concern is that if lawyers continue to be the authors, producers, directors, and stars of both productions, seeking glamour, glory, and glitter, the public will continue to pay the price. Clearly, the “truth” is rarely found where lawyers abound.

Other writers expand on and adopt Emond’s faith in the adversary process while also agreeing that alternatives should be used. Galanter argues that “contemporary patterns of disputing” are “an adaptive (but not necessarily optimal) response to a set of changing conditions.”⁴⁴ Technology has created increased opportunities for injuries to occur and social knowledge has improved people’s awareness that they may have a right to seek redress. As government regulation increases, its involvement in remedying harm also increases. As a result, legal remedies become more widely available. Even though “there is more law,” mediation and bargaining resolve most disputes; further, “the

⁴³ Emond, *supra* note 13 at 4.

⁴⁴ “Reading the Landscape,” *supra* note 14 at 69.

courts occupy a larger portion of the symbolic universe and litigation seems omnipresent.”⁴⁵

If the “litigation explosion” is more in the minds of the public than in the reality of the numbers, where did this misperception come from? The statistics indicate that the rates of litigation, while rising, are not as high as advertised and reported. According to Galanter, much of the responsibility for the dissemination of this exaggerated information lies with “the weakness of contemporary legal scholarship and policy analysis.”⁴⁶ He argues that the statistics that have led to the public perception and acceptance of a “litigation explosion” are the result of poor research. The situation is not as it has been promoted nor as people widely believe. Galanter calls on legal scholars to remedy the misinformation that has been disseminated.

Clearly, it is a message that should be heeded. However, it is unclear why the people who benefit from this misinformation would be willing to correct it. Lawyers as well as legal scholars are well served by a public that perceives there to be a crisis. The boon for lawyers comes on many fronts: it allows them to increase their hourly rate because there is such competition for their time, to bill for the increased hours it takes to wade through the crowded courthouse, and to gain increased prestige and status for the profoundly arduous work they do. On the other hand, legal scholars have increased material for their intricate and lengthy examinations of the rise in the litigious state of the public and the concurrent need for alternatives. Indeed, ironically, Galanter himself has benefited from the very situation that he describes.

The fact that the adversary system has its problems is accepted and admitted by Galanter. He encourages the use of alternatives. However, his aim is to ensure that the movement towards alternatives is based on accurate information. On this view, it is not necessary to trash the current system to look for alternatives. Galanter argues that viewing litigation as “a destructive force, undermining other social institutions [is] misleadingly one-sided.”⁴⁷ He views litigation as not only an “assertion of individual will” but also a “reaching out for communal help and affirmation.”⁴⁸ Old notions of practice should be challenged and new ones allowed to enter in order to acknowledge and embrace

⁴⁵ *Ibid.* at 70.

⁴⁶ *Ibid.* at 71.

⁴⁷ *Ibid.* at 70.

⁴⁸ *Ibid.*

“multiple, partial and emergent” communities.⁴⁹ In this way, alternatives are additions, not replacements, and litigation may not be regarded as an “antagonist of community.”⁵⁰

Clearly, ADR proponents should not, and need not, demonize the adversary process in order to justify the need or desire to seek out alternatives. At the same time, however, the turn towards alternatives should not be done at the expense of remedying the problems with litigation and adjudication. It is incumbent on those who have created or added to the problem to help in determining and implementing appropriate remedies. ADR cannot fix the problem; it is one method by which some of the problems may be eased. However, the problems remain. It is a system in need of repair and the repair can only come from within. Lawyers, judges, government, and legal scholars must look at the underlying premises that have informed and influenced the system as it now exists. And they must not turn away to alternatives without ensuring that the problems with the adversary system are addressed. Those who have benefited immensely from the system, through financial gain, power, status, and prestige are charged with the reparation of a system that has served them well. The adversary system was created by and continues to be driven by those who work within it and benefit from it. It is incumbent on these same people to assist in its remediation at the same time as they seek alternatives.

B. *Looking For Justice in All the Wrong Places*

As Emond has noted, the problems with the adversary system are wide-ranging. He lists the problems as cost, process, and result.⁵¹ This list leads one to ask what, if anything, is going right? Maybe it should be considered that the adversary system has outlived its usefulness. Maybe the search should not be for an alternative but for a total replacement. One well-known scholar suggests that the system may have outlived its time and that it is inappropriate in a “post-modern, multi-cultural world.”⁵² Menkel-Meadow proposes the “heretical notion that the

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See Emond, *supra* note 13 at 5.

⁵² C. Menkel-Meadow, “The Trouble With the Adversary System in a Post-Modern, Multi-Cultural World” (1996) 38 *Wm. & Mary L. Rev.* 5 at 5 [hereinafter “Adversary System”].

adversary system may no longer be the best way for our legal system to deal with all of the matters that come within its purview.”⁵³ She argues:

[T]he adversary system is inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system ... we should rethink both the goals our legal system should serve and the methods we use to achieve those goals. For those who cleave to the adversary system ... the burden of proof [must shift] to them to convince us that the adversary system continues to do its job better than other methods we might use.⁵⁴

Courts may not be the best institutional setting for resolving some of the disputes we continue to put before them. According to Menkel-Meadow, the “[b]inary, oppositional presentation of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.”⁵⁵ Clearly, as noted above, many cases do not lend themselves to binary solutions and many problems are not easily turned into win-lose or right-wrong solutions. Often there is no accurate way to determine the facts because frequently both parties have some entitlements or because the human equities cannot be easily or equally split. Modern life presents people with complex problems which require complex solutions. Because courts have what Menkel-Meadow calls “limited remedial imaginations,”⁵⁶ they are ill-equipped to resolve the difficult disputes that come before them.⁵⁷

These comments merely serve to reinforce my earlier arguments. Clearly, the commonly-held assumptions that encourage the use of the adversary system should be more rigorously examined and questioned; the court’s claims of objectivity, neutrality, and fairness are not borne out by the results. As Menkel-Meadow points out, multiculturalism and the debates surrounding it should be a reminder that “there is demographic, as well as epistemological ‘positionality.’”⁵⁸ All people do not see all things in the same way. What Menkel-Meadow reinforces is that, as people gain more and more knowledge about knowledge, there is a resulting need to look at the way things get done. A postmodern approach illustrates that there is no “truth” that stands alone,

⁵³ *Ibid.* at 5.

⁵⁴ *Ibid.* at 6.

⁵⁵ *Ibid.*

⁵⁶ C. Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem-Solving” (1984) 31 U.C.L.A. L. Rev. 754 at 754.

⁵⁷ See “Adversary System,” *supra* note 52 at 6-7.

⁵⁸ *Ibid.* at 9.

independent of the knowers and the known: truth is illusive, partial, interpretable, and dependent. The adversary system is based on a belief that there are “truth and justice” criteria that have somehow escaped historicization, contextualization, and influence. There can be no such independent or unaffected state. Problems will be created in every system or process.

After her postmodern reflections, Menkel-Meadow advises that she has not come to bury the adversary system, but to improve it. *Et tu Carrie!* She notes that any system that could be devised to replace the adversary system will have its own faults. In effect, she concludes that any system will be impacted by the people that inhabit it and will be affected by external and internal forces. In short, the factors that have led to the problems with the current system cannot fail to be replicated to some degree in any other system. No system can be devised in isolation of what has gone before. Any process is created from the collective input of people. The knowledge, experience, values, prejudices, and biases of those people will impact on the result. Process cannot be created without being affected by the process of creating it. This does not mean that there can be no change because things will always end up the same. What this requires is that people and process creators must be aware of, and open to, their own particular contingent and situated state. The right process is not out there waiting to be discovered. There is not one answer to the problems with the adversary system and its players but many. Postmodern thought leads to options, not solutions and to possibilities, not pronouncements. In Menkel-Meadow’s postmodern legal system, parties will have a greater choice about how they will resolve their disputes. As her numerous articles attest, she sees ADR as providing some of that choice. In the next section, I will examine Menkel-Meadow’s and others’ claims about the promise of ADR.

IV. JUSTICE AND HARMONY FOR ALL

*Where be these enemies? Capulet! Montague!
See what a scourge is laid upon your hate
That Heav’n finds means to kill your joys with love.
And I for winking at your discords too
Have lost a brace of kinsmen. All are punish’d.*

...

*A glooming peace this morning with it brings,
The Sun for sorrow will not show his head.*

*Go hence to have more talk of these sad things:
Some shall be pardon'd and some punished.
For never was a story of more woe
Than this of Juliet and her Rome⁵⁹*

Romeo and Juliet die before their families end their bitter feud. It is only after the families recognize what has been lost forever that they are able to come to a sadly empty resolution. The terrible sacrifice of their children allows them to put aside the anger and hostility that has consumed them for years. It is unclear whether adjudication would have been able to resolve the Capulet-Montague feud. There is insufficient information about what sparked the long-standing dispute. However, one can speculate that the adversary nature of litigation would not have helped dispel the anger and hatred that consumed these families. But would ADR have done any better? Would negotiation have been able to flesh out a resolution that the parties could live with or would mediation have been a better choice? Perhaps an arbitrator would have been required to bring a measure of formal fact-finding and decisionmaking to the process. The outcome is speculative at best, but it is not impossible to imagine that some resolution short of the death of their children could have been reached. The situation is not unlike that in the biblical story of Solomon. When deciding which of two women should be given the child over whom both were claiming ownership, he ordered the baby cut in half with one half being given to each woman. In the story of Solomon, the real mother relinquishes her claim to the child, as she would prefer it to live with someone else rather than see it die. In *Romeo and Juliet* if the Capulets and Montagues had known the eventual outcome, they would have reached some resolution in order to avoid their tragedy. Surely they would have realized that any resolution would have been better than the one that resulted.

The unyielding bitterness of the Capulet-Montague feud is replicated far too frequently in today's courtrooms or law office battles. Parties, with the assistance of their eager lawyers, vigorously assert their claims, vehemently deny liability and vow to fight to the death.⁶⁰ Unlike the tragic ending in *Romeo and Juliet* the threat remains mainly

⁵⁹ *Romeo and Juliet* Act V, Scene iii, 291-310. The prince tells of how the feud between the Capulets and Montagues has led to the deaths of Romeo and Juliet. Montague and Capulet forswear their hostility and vow to erect statues in memory of the young lovers.

⁶⁰ Images of battle, sports, and sex are pervasive in the adversary system. See E.G. Thornburg, "Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System" (1995) 10 Wis. Women's L.J. 225.

metaphorical. However, the pain endured by the parties is often all too real. Relationships are irrevocably damaged. People are emotionally and financially destroyed. And the reputation of lawyers and the civil justice system continues to decline. Lawyers and their role in the adversary system have been under fire in recent years. Public antagonism toward the system is widespread. People believe in the myth of a litigation explosion. The public openly reviles lawyers and blames them for much of the trouble with the system. As a result, calls for change began to be heard. People were fed up with the emotional, psychological, and financial cost of litigation. The search for alternatives began.

Accordingly, in this section I will examine the birth of ADR and discuss whether it has fulfilled the promises that accompanied its creation. Is it better, kinder, gentler, more empowering, and satisfactory to its participants? My critique of ADR falls into three broad areas: first, that it was developed on the basis of incorrect and inaccurate notions about the failures of the adversary system; second, that it is particularly problematic as a mandated process in certain cases; and finally, that the ADR movement is at risk of being co-opted and taken over by the very people who have created the problems in the adversary system—lawyers.

A. Where Did ADR Come From and Why Do We Need It?

Even though it may appear that the call for alternatives began with the public, some writers have outlined the complicity of the legal profession in not only answering the call for alternatives but creating the need for them in the first place. Lawyers recognized that the public was seriously disenchanted with the adversary system and was turning away from it. In response, the ADR movement was born. Some have traced the beginning of the movement, or at least a turning point in it, to the Pound Conference in 1976.⁶¹ According to Laura Nader, this conference was one result of the public debate that began in the 1960s when opposing groups began to voice dissatisfaction with the state of the legal system.⁶² One group wanted to reform the system by including previously excluded groups, whereas another group's agenda was to find alternative processes outside of the adversary system.

⁶¹ See *supra* note 38.

⁶² See L. Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology" (1993) 9 *Ohio St. J. on Disp. Resol.* 1 at 5.

The Pound Conference picked up on the public dissatisfaction with the adversary system. Speaker after speaker lamented the terrible state of the legal system. Alternative processes were portrayed as “agencies of settlement or reconciliation, peace rather than war.”⁶³ In this way, the first step in the call for alternatives began with the false portrayal of the adversary system’s deficiencies. According to Nader, this rhetoric, pervasive at the Pound Conference, was designed to manipulate “men’s beliefs for political ends.”⁶⁴ Once people believed that the adversary system was in crisis, the impetus to search for alternatives was created. Nader believes that many scholars (she identifies Galanter as one) have now come to realize that the ADR movement was built on a foundation of sand. According to Nader, “the years following the Pound Conference saw the public immersed in ADR rhetoric, which by the end of the decade had the quality of discursive cement.”⁶⁵ Members of the judiciary, leading lawyers, and alternative dispute professionals propounded the need for alternatives; they reiterated the problems with the legal system and the positive and healing aspects of ADR. Nader says:

The rhetoric was restricted and formulaic, and its users were assertive and repetitive. They made broad generalizations, invoked authority and danger, and presented values as facts. The Chief Justice [Warren Burger] warned that adversarial modes of conflict resolution were tearing the country apart, and that there had to be a better way. He claimed that Americans were inherently litigious, and that ADR was more civilized than the adversary process.⁶⁶

Thus, according to Nader the framework for a “harmony law model” began.⁶⁷ Clearly, many people were drawn to ADR out of frustration with a system that had serious problems.⁶⁸ It appeared as a solution to the mess that was the adversary system. People hoped that ADR would allow for a more respectful, humane, and caring approach to people’s problems. Many people were eager to jump, and did so without examining their leap of faith. Nader problematizes this leap for its lack

⁶³ *Ibid.* at 6. The metaphors of battle once again.

⁶⁴ *Ibid.* citing K. Burke, *A Rhetoric of Motives* (Berkeley: University of California Press, 1969) at 41.

⁶⁵ Nader, *supra* note 62 at 6.

⁶⁶ *Ibid.* at 7.

⁶⁷ *Ibid.*

⁶⁸ When Nader refers to ADR, she is speaking generally of the movement towards alternatives to the judicial process. However, later, she refers more specifically to mediation rather than other forms of ADR. My focus in this section is similar. Many of my comments are directed to ADR in general as an alternative process, but I will focus on mediation more specifically in parts.

of critical thinking. ADR proponents were so zealous in their embracing of an alternative that they did not engage in any serious critical inquiry into the process they were propounding. She suggests that some of the reasons for this lack of critical questioning comes from the existence of the “harmony ideology” that was internal to the movement. However, in Nader’s view, this harmony was coercive in nature, and resulted in the discouragement of critical thinking as people embraced the notions of agreement and accord. Many embraced ADR in response to the competitive, win-lose mentality of the legal system. They sought alternatives that appeared to provide an escape from discord and dissonance. In essence, they sought peace. Some lawyers were tired of the adversarial nature of the adversarial process. They were disenchanted with the system they had embraced and had grown to dislike the people they had become from working in it. They no longer wanted to be the kind of lawyers that they had been taught to be and had, at least at some point, accepted they must be in order to succeed. What they had accepted as required behaviour and attitudes for being a “good advocate” was now making them miserable.

It is important to note that lawyers are created, not born. Arguably, the creative process begins in law school where students are encouraged to think and act a certain way. Most accept this indoctrination as a necessary requirement. It has been said that this discouragement of critical thinking and individualism begins in the hierarchical structure of law school. Duncan Kennedy’s comments are well-recalled:

You will come to expect that as a lawyer you will live in a world in which essential parts of you are not represented. ... And you will come to expect that there is nothing you can do about it. One develops ways of coping with these expectations—turning off attention and involvement ... participating actively while ignoring the offensive elements of the interchange, even reinterpreting as inoffensive things that would otherwise make you boil. These are the skills that incapacitate rather than empower, skills that will help you imprison yourself in practice.⁶⁹

Kennedy’s comments presage the continuance of a disempowering and incapacitating reality. Many law students’ goals upon graduation are to work in large law firms. In the corporate world, law is big business, money is the bottom line, and fitting in is required for success. Lawyers are rewarded for following and doing rather than leading and thinking. No one is interested in what the young lawyer may think; they are interested in how many billable hours can be charged to

⁶⁹ D. Kennedy, “Legal Education as Training for Hierarchy” in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982) 50 at 57.

the client. What counts are results. Anyone who criticizes the working conditions or prevailing attitudes is admonished to remember that this is what big firms are about. This awareness and acceptance of the big firm culture is common among law students. It is a common topic of conversation, and is seen as a natural, normal expectation of “real-life law.” If you criticize it, you are told that you are clearly not “cut out for the big time.” If you had any critical thoughts when you entered law school, and you hope to succeed, you learned to keep them to yourself or forget them altogether.

Lawyers who have been discouraged from thinking critically do not criticize any system they are in. And they will bring this lack of critical awareness, this tunnel vision, goal-oriented, and win-lose mentality to the process of ADR. In order for there to be any possibility for an alternative process, the creators must be able to envision something different; in short, they must be able to imagine. In order to ensure that ADR comes close to realizing its many promises, the participants in its creation must learn to suspend old beliefs and habits and embrace a newer, more aware, and responsive way of looking at dispute resolution. Old thinking will recreate old ways.

B. *Are There Some Places ADR Should Not Go?*

One offshoot of the lack of critical thinking is that people forget to inquire whether certain processes work well for specific people. In the embrace of ADR as a more harmonious, caring, and responsive process, assumptions are made that it is universally acceptable and usable. However, for many, some of the attributes that ADR proponents extol are the very things that make it unacceptable in certain cases. Specifically, the lack of formal process and accountability in mediation leads to a concern about the potential for abuse. Nader has commented:

Mandatory mediation abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view. The situation is much like that in psychotherapy, little regulation and little accountability. Mind control activities operate best in isolation, and those who have read the literature on influence understand that people in life crises are vulnerable to coercive influence.⁷⁰

Mandatory mediation's coercive and abusive potential is highlighted and clarified by Trina Grillo.⁷¹ Grillo is clear and

⁷⁰ Nader, *supra* note 62 at 12-13.

⁷¹ Grillo, *supra* note 16.

unequivocal in arguing that mediation is a dangerous process for women. For Grillo, family mediation operates as control: control in defining the problem, control of speech and expression, and control over the public record. Of particular concern is that these controls operate in a confidential, private forum rather than in a public open courtroom. Grillo is especially critical of the presumed equality of the mediation process and its ignorance of the real inequality that is overwhelmingly present. She notes that mediators frequently frame cases as between equal parties and yet refuse to recognize that there is unequal responsibility and power between the two. In addition, mediators often refuse to allow women to express anger during mediation sessions, as this is characterized as contrary to a search for resolution. The result is that women's real issues are ignored, their participation is controlled, and their behaviour is modified to fit the expectations of the mediator. For Grillo, mandatory mediation is a dangerous environment in which patriarchy and prejudice are allowed to flourish.⁷²

Grillo's comments deserve thoughtful consideration. A full examination of her position is beyond the scope of this article. Clearly, women have historically been in relationships of unequal control and power. The history of women's engagement with the law and legal systems is for the most part a story of oppression, unequal treatment, discrimination, and disenfranchisement. Family law, civil law, property law, constitutional law, and criminal law abound with unfair results. However, when Grillo calls for a rejection of mediation, it must be recalled that the vast majority of this sad history took place within the adversarial process. Courts have not been friendly or welcoming places for women, and as Grillo points out, mandatory mediation may be no better. This illustrates my thesis throughout that the process is as good or as bad as those who have the power to control it. Litigation is not necessarily bad, just as mediation is not necessarily good. What is required is an individualized approach that fits the person and the problem to the process.

Grillo is not the only vocal critic of the undelivered redemptory promise of ADR for certain cases. Many scholars have expressed concern about the impacts of informal and private dispute definition and resolution on the traditionally and historically disadvantaged. Like Grillo and Nader, these critics are particularly troubled by situations in which the parties are of unequal power, the issues involve some facet of "public rights" (*i.e.* child custody), and the decisionmakers or outcome directors are free from public scrutiny and public record. In these cases,

⁷² See *ibid.* at 1600-07.

the discussion usually results in a call for an individualized approach to dispute resolution, allowing adjudication when desirable and ADR when an alternative mode of resolution is both requested by the parties and of equal benefit to both.

Eric Yamamoto argues that “for those on society’s margins ... ADR presents problems of considerable importance.”⁷³ His concerns are similar to those expressed by others: ADR removes disputes from public scrutiny, undermining the values of deterrence and public education, and transforming public debates about rights into private judgements about needs, which allows hidden arbitrators to decide disputes according to personal perceptions of minority needs.⁷⁴ The fear of many of these critics is that the informality which at times is a welcome part of ADR may heighten the danger for minority groups. These critics argue that there is a danger in relinquishing the formalized adjudication process which requires adherence to the rule of law. And they worry that when formalism is abandoned, the rule of law is avoided or overlooked and bias is more likely to creep into the process.

In an effort to determine the effect that ADR could have on certain groups, Richard Delgado and others examined ADR’s informal structure and determined that the risk of biased treatment for racial minorities, women, and the poor did increase in an informal process.⁷⁵ Drawing upon social-psychological theories and studies, they concluded that people are more likely to act on their prejudices in an informal setting like ADR produces, whereas the formal style of adjudication tends to suppress biases. According to Delgado’s study, the risk of prejudice is greatest when there is direct confrontation between disputants of disparate power; there are few rules governing the interaction, the setting is closed, and the issue is highly personal.⁷⁶ These concerns are similar to those expressed by Grillo and others with respect to women in family law disputes. I suggest that this debate can be summarized as a concern about the parties being able to assert their rights in a climate of unequal power. This inequality of power is clearly a feature in many disputes, whether resolution is sought through adjudication or ADR. Arguably the power imbalance itself may even have an impact on

⁷³ Yamamoto, *supra* note 16 at 360.

⁷⁴ For similar arguments that ADR shifts the focus from a rights-based analysis to a needs-based one with the result that existing power imbalances are reinforced, see D.M. Trubek, “The Handmaiden’s Revenge: On Reading and Using the Newer Sociology of Civil Procedure” (1988) 51:4 L. & Contemp. Probs. 111 at 131; and see Delgado *et al.*, *supra* note 16.

⁷⁵ See Delgado *et al.*, *supra* note 16 at 1375-91.

⁷⁶ *Ibid.* at 1402.

whether a dispute ever reaches the adjudicative stage. The adversary system is a costly process in which to participate. Power's inexorable link to money privileges those who have more of it.

While many critics hail the "safety" of the rule of law within the adjudication process, I question their reliance on the adversary system to address minority group concerns. The history of the adversary system is not littered with many successes in these areas but has for the most part perpetuated the status quo. This has meant that male, white viewpoints are recognized more often than others. Clearly what is required of any process is representation by as many diverse groups as possible. An increase in diversity does not necessarily mean a resulting positive response for minority groups, women, or the poor, but it can certainly begin the process towards more equitable and relevant outcomes.⁷⁷

Other criticisms of ADR address more general concerns. In a recent article, Yamamoto briefly reviews some of its most well-known criticisms.⁷⁸ He notes that even though there has been ongoing study and critique of ADR by mainstream scholars, there has been a withering in the last few years of criticism of the impact of ADR on society's outsiders. He reviews the work of Delgado, Grillo, Bryan, and others and wonders why the critiques, eagerly and welcomingly begun, have disappeared. He notes that there appears to be little attention paid now to the race and gender critiques of the late eighties and early nineties. His questioning is reminiscent of the concerns expressed by Nader about the lack of critical thinking within the legal profession. Perhaps the proponents of ADR are so eager to extol its virtues that they are unwilling or even unable to notice its faults. The problem seems to be that neither adjudication nor ADR are being adequately examined or evaluated. In my view, it may not be surprising that little criticism is coming forward about the latter. The following section may shed light into why there is a veritable critical darkness about the problems of ADR.

C. The Law of ADR

The main challenge that ADR must overcome if it is to fulfil its promise of being truly alternative is to recognize the real and present danger that co-optation presents. It was created out of the adversary

⁷⁷ For a discussion about the issue of representation in law, see M.L. Minow, "From Class Actions to Miss Saigon: The Concept of Representation in the Law" (1991) 39 *Clev. St. L. Rev.* 269.

⁷⁸ See E.K. Yamamoto, "ADR: Where Have the Critics Gone?" (1996) 36 *Santa Clara L. Rev.* 1055.

system by many of the same players who created the problems that they seek to leave behind. How can an alternative process be created by the people who have inhabited the current system? Can the people involved in the adversary system leave behind their adversarial thinking, their competitive natures, and their self-interest and truly create something different? How does an alternative prosper if the people involved, lawyers and judges, continue to act in their traditional, adversarial, competitive, win-lose mode? Can an alternative be mandated or does the action of mandating remove the principal purpose and aim of an alternative process?

Menkel-Meadow has contributed a great deal to this debate. In her view, there is no doubt that ADR has been institutionalized and legalized:

[A] critical challenge to the status quo has been blunted, indeed co-opted, by the very forces I had hoped would be changed by some ADR forms and practices. In short, courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice. Lawyers may use ADR not for the accomplishment of a "better" result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage.⁷⁹

Evidence of the co-opting of ADR abounds. Courts have adopted many of ADR's processes including negotiated settlements, arbitration, mediation, mini-trials, and private judging. Courts are increasingly using settlement conferences and mandatory mediation. In addition, private consulting firms and professional entities promote ADR; public dispute resolvers are privatized.⁸⁰ Law school curricula now include courses in negotiation, mediation, and other alternative dispute processes. Law societies have amended their rules of conduct to include the

⁷⁹ C. Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'" (1991) 19 Fla. St. U. L. Rev. 1 at 3.

⁸⁰ In Toronto, Ontario, a group of retired judges operate what they advertise as "An Alternative Dispute Resolution Group" and call it "ADR Chambers." Law firms offer workshops in negotiation and mediation skills, others advertise themselves as ADR firms providing expert mediators or arbitrators in any number of substantive areas of law in which a dispute might arise. Other firms advertise their service as process design experts who will assist in setting up dispute resolution processes for other businesses. All of these services use lawyers and/or judges as dispute resolvers.

requirement that lawyers consider ADR in all cases.⁸¹ Courts are instituting mandatory ADR programs.⁸²

Clearly ADR is in vogue. My questions are simple. What is or can be alternative about it? What can be expected by these new ADR providers? What is their motivation; their qualifications? When the people involved are the same lawyers and judges who have operated in the adversary system and adversarial mode, does the alternative look any different or act any different than what is already in practice? Lawyers offer ADR services because they are obligated to under their rules of professional conduct. However, they are not obligated to get any training in how to provide these services. Lawyers are experiencing the same tough economic climate that all other businesses are. They are losing clients and business. They will embrace the notion of ADR as a new service that can be offered and in so doing increase their business. That is not to say that some lawyers will not educate themselves and seek training in ADR. Many will. However, many more will not. Many lawyers will jump on the ADR bandwagon as a means to increase their billings, not necessarily as a means to provide more creative, disputant responsive services.

⁸¹ In April 1996, the Law Society of Upper Canada amended Rule 10(6.A.) of the *Rules of Professional Conduct* to include this requirement: "[t]he lawyer should consider the appropriateness of ADR to the resolution of issues in every case and, if appropriate, should inform the client of ADR options and, if so instructed, take steps to pursue those options." See Law Society of Upper Canada, *Rules of Professional Conduct: Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1996).

⁸² The ADR Centre of the Ontario Superior Court of Justice was introduced in the Toronto Region as a pilot project in 1994. Four of every ten cases filed at the courts were offered to the ADR Centre, excluding family matters, motor vehicle claims, and construction liens. It was the first court-connected ADR program in Canada. In an evaluation done by an external team led by Dr. Julie Macfarlane of the University of Windsor, the project was found to be successful in providing cheaper, faster, and more satisfactory results for many of the cases referred: see Ontario Ministry of the Attorney General, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Court of Justice, Ministry of the Attorney General, 1996) (Co-chairs: R.A. Blair & H. Cooper). In February 1997, Attorney General Charles Harnick announced that as a result of the success of the ADR Centre, mandatory mediation would be introduced for all civil cases, except family law matters, starting in Toronto in 1997. After much discussion and consultation, the Ontario Mandatory Mediation Program came into effect in January 1999. It will refer civil, non-family, case managed actions to mediation on a mandatory basis. The program is fully implemented in Ottawa, and partially implemented in Toronto, where currently 25 per cent of cases are subject to case management: see Ontario, *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, as am. by O. Reg. 453/98, r. 24.1 (mandatory mediation), and O. Reg. 555/96, r. 77 (case management). Under the program, litigants will be able to select a mediator from an approved roster, a directory of private-sector mediators who will provide mediation services for a set tariff.

The rise in popularity of ADR comes at a time when anti-lawyer, anti-government rhetoric is pervasive.⁸³ Possibly the interest in and popularity of ADR might have been different in a different social climate. It is possible that if it had emerged at a time when lawyers were not perceived as greedy, when people were eager for government regulation, and when adjudication was less reviled, the move towards ADR would appear less suspect. However, when adjudication is demonized and announced as outmoded and inefficient, alternative processes become more acceptable. In my view, the alternative must not usurp the important public functions that adjudication can and should serve. The problems with the adversary system should be dealt with in addition to the search for and use of alternatives. Courts still have a purpose and role to play in society and this role need not be removed in order to allow for adjuncts to it.

Finally, if ADR is mandated, the alternative nature of the process is lost. The point of an alternative should be to encourage access based on the recognition by the parties that it serves a useful purpose. To mandate participation merely recreates the adversary system and gives it another name. The players are the same, the choice is removed and the outcomes are driven by the lawyers rather than the parties. In a strange reversal of process, people can choose to sue and be told they must mediate.

V. CONCLUSION

The fact that the question that serves as the title of this paper—*Would ADR Have Saved Romeo and Juliet?*—cannot be answered with any certainty serves to illustrate my thesis. In the realm of dispute resolution, as with all else in life, there is no certainty, there is no “truth,” and there is no one answer. Disputes have no singular point of creation, no one mode of expression, and no uniform method of resolution. Conflict resolution in each case must be tailored to meet the specific needs of the individual. Those who seek to assist in dispute resolution must recognize their role as one of assistance, not control. Lawyers are not necessarily well-suited to that role. Those who wish to engage in the service of dispute resolution must recognize their own situatedness and interests. They must resist the urge to turn disputes

⁸³ See J. Resnik, “Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication” (1995) 10 Ohio St. J. on Disp. Resol. 211 at 257.

into modern tales of woe that perpetuate the “glooming peace”⁸⁴ that was the fate of the Capulets and the Montagues.

⁸⁴ *Romeo and Juliet* Act V, Scene iii, 305.