Nebraska Law Review

Volume 83 | Issue 1 Article 6

2004

Which Way to True Justice?—Appropriate Dispute Resolution (ADR) and Adversarial Legalism

Dorothy W. Nelson
United States Court of Appeals

The Honorable Dorothy W. Nelson*

Which Way To True Justice?—Appropriate Dispute Resolution (ADR) and Adversarial Legalism

Adaptation from lectures at the University of Nebraska College of Law, November 19–20, 2003

Recently, a former law student of mine sent me a book titled *Adversarial Legalism: The American Way of Law* by Robert A. Kagan, Professor of Law and Political Science at the University of California at Berkeley.[1] Professor Kagan gives an insightful analysis and critique of the American methods of policy implementation and dispute resolution, which are more adversarial, costly, and legalistic when compared with systems of other economically advanced countries. He says that outcomes are often shaped "more by the delays and opportunity costs of extending adversarial legal processes than by authoritative legal judgments about the just result."[2] He suggests that the American adversarial system springs from fundamental features of American politics, particularly the propensity to distrust and fragment government authority. At the same time, the government is asked to become more active in providing justice and reducing risks.[3]

Professor Kagan coined a new term "adversarial legalism," which means policymaking, policy implementation, and dispute resolution through lawyer-dominated litigation. It can be distinguished from other methods of governance and dispute resolution that rely on bureaucratic administration, on discretionary judgment by experts or political authorities, or on the judge-dominated style of litigation common in most other countries.[4]

Professor Kagan defines adversarial legalism as a method of policymaking and dispute resolution with two salient characteristics:

* Judge, United States Court of Appeals; Former Dean and Professor Law, University of Southern California Law School; Chair, Ninth Circuit Standing Committee on Alternative Dispute Resolution; Chair, Western Justice Center Foundation.

1. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).
2. *Id.* at vii.
3. *Id.* at xi.
4. *Id.* at 3.

> The first is *formal legal contestation*—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation and/or judicial review. The second is *litigant activism*—a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers.[5]

Adversarial legalism involves decisionmaking institutions with fragmented authority (for example as between federal, state, and local governments) and with relatively weak hierarchical control (for example where relatively few cases are reviewed). These features lead to a system which is costly and results in legal uncertainty.[6] With its emphasis on individualism, its mistrust of government, its high costs and penalties, and its response to private claims and special interests, adversarial legalism often provides an unfair method of meeting the public's demand for justice and protection.

Adversarial legalism generates both social benefits and social costs. In cases such as the prison reform cases, the desegregation cases, the mental health reform cases, and the sexual harassment cases, we are reminded that even the lowest and most despised of citizens, such as convicted felons, feel entitled to petition the court for relief. Adversarial legalism "encourages Americans, more than residents of other democracies, to regard themselves as rights-bearing citizens."[7]

However, adversarial legalism, honed by the distrust of authority, can also produce injustice when invoked against the trustworthy by the misguided, the mendacious, and the malevolent. In the words of Professor Kagan:

> The complexities and costly delays of adversarial legalism burden commercial disputes, criminal prosecutions, and rule making by regulatory agencies. Adversarial legalism slows down and imposes large expenses on American processes for compensating injured people, drawing electoral district lines, battling discrimination, caring for the mentally ill, choosing labor union representatives, preserving wildlife habitats, financing businesses, running hospitals and schools, and cleaning up chemical waste sites. No other country comes close.[8]

There are literally thousands of lawyers who believe in or profit from litigation and use every opportunity to extend it further. Just consider the United States Superfund program for cleanup of hazardous waste disposal sites. One study noted that by mid-1990, after ten years of program operation, only sixty-three of the more than twelve hundred National Priorities List sites had been cleaned up, because

5. *Id.* at 9.
6. *Id.*
7. *Id.* at 22.
8. *Id.* at 30.

former chemical waste disposers generated so much time-consuming litigation.[9] There also are organized networks of lawyers who focus on particular hazardous products (*e.g.*, asbestos, tobacco, breast implants, *etc.*) and organizations, such as those opposed to affirmative action, that systematically push courts to extend the realm of adversarial legalism.[10]

American law professors also have created and defended a body of legal ethics that exalts adversarial legalism. The codes of ethics in the United States endorse zealous advocacy of clients' causes, short of dishonesty. Zealous advocacy often fails to regard the interests of justice in the particular case or broader societal concerns.[11] "American lawyers—unlike British barristers and European lawyers—are trained to believe that their primary responsibility is not to uncover the truth and produce the 'correct' legal disposition but to get the best possible result for the clients."[12]

Judge Marvin Frankel, formerly a judge on the United States Court of Appeals for the Second Circuit, after leaving the bench, wrote a scathing indictment of the adversary system in his book *Partisan Justice*.[13] He declared that it places too low a value on truth-telling.[14] Judge Frankel writes: "There are other goods, but the greatest is winning. There are other evils, but scarcely any worse than losing."[15] Explaining other drawbacks to the adversary system, Professor Jerold S. Auerbach, in his book *Justice Without Law*, describes it as "a chilling Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy."[16]

With respect to the criminal law, the American political structure, lacking a Ministry of Justice such as is found in some other developed democracies, generates more frequent, more punitive, and more uncoordinated changes in the criminal law than in other countries. One consequence is often greater penalties, which in turn lead to more adversarial legalism. One example is my own State of California, where legislators who faced strong incentives to demonstrate that they were

9. THOMAS W. CHURCH & ROBERT T. NAKAMURA, CLEANING UP THE MESS: IMPLEMENTATION STRATEGIES IN SUPERFUND 129 (1993).
10. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1 (1994).
11. Mark J. Osiel, *Lawyers as Monopolists and Entrepreneurs*, 103 HARV. L. REV. 2009 (1990) (reviewing LAWYER IN SOCIETY (Richard L. Abel & Philip S.C. Lewis eds., 1988 & 1989)).
12. KAGAN, *supra* note 1, at 244.
13. MARVIN E. FRANKEL, PARTISAN JUSTICE (1980).
14. *Id.* at 12.
15. *Id.* at 18.
16. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? vii (1983).

not "soft" on crime and who were supported by "law and order" advocacy groups, passed a sweeping "three strikes and you're out" ballot initiative in 1994. It mandates life imprisonment for a third felony conviction, even if the felony is not a violent crime. In Torrance, California, for example, a twenty-seven-year-old man was sentenced to twenty-five years to life in prison for his third felony conviction—stealing a slice of pizza.[17]

It has been suggested, among other things, that we should refer a larger range of criminal prosecutions to less formal, non-jury courts with greatly reduced penalties. These proceedings could do away with sometimes extortive plea bargaining. It has also been suggested that adversarial legalism in jury trials for serious criminal charges would diminish if American judges, like British judges, were vested with greater authority to conduct voir dire and assumed a greater role in questioning witnesses and in summing up the evidence.[18]

On the civil side, the relative prominence of private tort actions, rather than social insurance and other mechanisms, for seeking compensation for personal injury and environmentally-caused illnesses contrasts the United States with other economically advanced democracies.[19] The United States is also distinctive in the severity of the legal sanctions available through tort litigation, namely large money damages. The unpredictability of "lawyer-driven, jury-centered methods of adjudication" is another distinction.[20] Moreover, the United States has a wider array of litigation-encouraging procedures such as contingency fees to finance tort litigation, extensive lawyer-controlled pretrial discovery, large class actions, and the rule that losing litigants need not pay the winners' legal fees.[21] Some studies suggest that many lawyers engage in super-aggressive, manipulative lawyering explicitly designed to increase the other side's litigation costs—and, thereby induce it to compromise its claims or defenses.[22] Equality of parties' wealth and motivation are unlikely in most cases.[23] It is rare to observe lawyers of equal competence and resources in a given case. In class action litigation, the settlement often benefits the attorneys more than the class.[24]

With respect to social justice, adversarial legalism has sometimes brought heroic results. One such success was reducing blatant forms of discrimination. However, it has failed to provide a nationally uni-

17. Fox Butterfield, *'3 Strikes' Law in California Is Clogging Courts and Jails*, N.Y. TIMES, March 23, 1995, at A1, B11.
18. KAGAN, *supra* note 1, at 234.
19. *Id.* at 127.
20. *Id.*
21. *Id.*
22. *Id.* at 119.
23. *Id.* at 121.
24. *Id.* at 120.

form, broad-based regime of social and health insurance, public housing, employee benefits, and the like.[25]

With respect to government regulation, United States public policy is quite formal and open to interest group participation. It is adversarial and subject to judicial review.[26] It is inefficient and inflexible in comparison to other economically developed countries, because it undermines the kind of government and business cooperation necessary to answer the public's needs.[27]

While adversarial legalism can result in improved public policy, it can also result in extorting particular benefits. Additionally, political responsiveness can be skewed in favor of intense political factions.[28] For instance, in an environmental case in California, the threat of litigation not only enabled a particular group to win a seat at the bargaining table, but it also gave the group enough leverage to demand and obtain its preferred "environmental mitigation" measure. In order to break free of a lawsuit that had blocked a proposed pipeline from central California to Los Angeles refineries, an oil company agreed to a plan to pump oil two hundred miles north to San Francisco and then ship it by ocean tanker to Los Angeles, thereby tripling the risk of oil spills from tanker operations.[29]

Suggestions for improving the civil justice system are many and include: extending social insurance for such things as health and disability claims; extending no-fault insurance for motor vehicle claims; having more informal tribunals such as small claims courts, which reduce delay in hearings and cost; determining the circumstances under which the loser in a lawsuit might be required to pay attorney's fees while not chilling appropriate lawsuits; letting all participants affected by the regulation of industry, labor, the environment, and the like participate in policy through use of qualified groups consulting regularly with government instead of through litigation or threat of appeal.[30]

While there are certainly many virtues to adversarial legalism, it has serious deficiencies as a system for meeting the day-to-day challenge of providing justice in contemporary society. In addition to the suggestions already commented upon, Appropriate Dispute Resolution—ADR (sometimes referred to as Alternative Dispute Resolution)—is one way out of excessive adversarial legalism. By ADR, I am referring to processes such as: negotiation; early neutral evaluation, where a neutral third person evaluates a case's worth before trial; me-

25. *Id.* at 175.
26. *Id.* at 188.
27. *Id.* at 182.
28. *Id.* at 224.
29. *Id.* at 225.
30. *Id.* at 235–41.

diation, where a neutral third person helps the parties to arrive at a mutually agreeable solution; and arbitration, where a neutral third person is selected to resolve a dispute.

The critics of ADR have focused on the issue of adjudication versus settlement through ADR. They include Professor Owen Fiss, whose heroic view of adjudication is revealed by saying: "[w]hen one sees injustices that cry out for correction . . . . Someone has to confront the betrayal of our deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition."[31] Others have questioned whether informal processes are unfair to disempowered and subordinated groups.[32] Still others have suggested that too much settlement decentralizes dispute resolution and the making of public law.[33] However, I agree with Professor Carrie Menkel-Meadow:

> [T]he question is not "for or against" settlement (since settlement has become the "norm" for our system), but *when, how, and under what circumstances* should cases be settled? When do our legal system, our citizenry, and the parties in particular disputes need formal legal adjudication, and when are their respective interests served by settlement, *whether public or private*?[34]

Let me offer two examples. In March of 1985, I arrived in New Delhi, India, to begin a visit sponsored by the United States Department of State to speak to law associations and university students about our American justice system. This was just a few months after the Union Carbide disaster at a pesticide plant in Bhopal, India. Thousands of persons were killed or injured in the worst industrial accident in history. When I arrived at the airport, I was met by a group of reporters who had interviewed a San Francisco lawyer the week before. When asked by the reporters why he had come, he replied "M-O-N-E-Y," spelling out the word. He went on to explain that these victims had received serious injuries and deserved the large amounts of damages he could get for them by suing Union Carbide in the United States. The reporters asked me: "Judge, what would you do to resolve the cases of the Bhopal victims?" I replied that I would follow the procedure adopted by the European Commission on Human Rights. First, I would establish an international factfinding commission to undertake a thorough investigation of the facts and to determine what the issues were. Second, I would attempt a friendly settlement with all of the parties concerned. If this failed, I would refer the case to arbitration or to the European Court on Human Rights. Later, the State Department handed me literally hundreds of

31. Owen M. Fiss, *Against Settlement,* 93 YALE L.J. 1073, 1086–87 (1984).
32. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 WIS. L. REV. 1359.
33. *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process,* 1994 WIS. L. REV. 631.
34. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases),* 83 GEO. L.J. 2663, 2664–65 (1995).

clippings from Indian newspapers saying in one way or another: "Mediation for Bhopal says U.S. Judge." This demonstrated to me that the people of India, as in the United States, are crying for a faster, less painful, and better way to resolve disputes.

This case exemplifies why much of the conventional wisdom underlying litigation strategy and lawyering in general needs to be examined in light of incorporating ADR into the pretrial process. Lawyers and other providers can utilize ADR to expand the parties' tools for dealing with the psychological, social, and economic dynamics that drive litigation. Their role should be that of constructive problemsolvers and peacemakers rather than zealous advocates. They should tailor the approach in each case to the context in which it evolves, with particular attention to the cultural forces at work.

For instance, in the Bhopal incident, rather than the millions of dollars promised, which have yet to be delivered to the clients of the San Francisco lawyer, most potential litigants would have been satisfied with death costs plus a $500 per year annuity for family members of those who did not survive. This would be in addition to health care for those who were injured. If all of the parties had been given a voice and had been heard by a nonpartisan neutral who was acceptable and accountable to all, the end result would probably have been much fairer and more productive. The lawyer, as a problemsolver, must examine the true needs and interests of those involved in a dispute, rather than looking only to the parties' legal positions.

My second example comes from my trip to Israel. I was on sabbatical leave to study the laws of marriage and divorce as administered by different religious groups: the Jews in the Rabbinical courts, the Christians in the Christian courts, the Muslims in the Sharia courts, and the Baha'is through their administrative system. In Akka, I attended a hearing conducted by three Greek Orthodox priests with long white beards and in long black robes. Court was conducted in a Quonset hut with paint peeling from the walls. It was furnished only with a plain wooden table and chairs. A wife was suing her husband for divorce. As her lawyer rose to his feet with a handful of papers from which to plead her case, the presiding priest gently waived him aside. The priest turned to the wife and asked her to tell her own story. She explained that for five years of marriage she has shared a house with her mother-in-law. The older woman, too old to climb stairs, occupied the ground floor and the wife lived upstairs. Since there was only one entrance to the house, the wife had to enter through her mother-in-law's living quarters to get to her own. Her mother-in-law continually questioned her about her activities and offered unsolicited advice. The wife said she loved her husband but the situation was intolerable. The wife sat down. Then the presiding priest, waving aside the husband's lawyer as he had the wife's, asked to hear the husband's side of

the case. The husband said that he loved his wife but also loved his mother. As a Christian, he felt responsibility for both, but he was a poor man and could not afford two households.

The three priests retired by stepping into a dusty street outside and then returned five minutes later with their judgment. The husband was to build a ladder. When the wife wanted to avoid her mother-in-law, she could climb the ladder to her second floor window.

As I watched the husband and wife leave the Quonset hut hand-in-hand, I could only wonder what might have happened to this couple in the Los Angeles Family Court with its adversary system, its orders to show cause, and its high attorney's fees. A binary or win/loss solution could have produced a solution but would not have served the parties' real interests. Non-binary solutions may produce more justice and allow the parties to craft solutions with a greater variety of remedial possibilities for complex social and legal problems.[35] These problems need intricate, not binary solutions. Although judges provided the remedy in this case, it was the type of remedy that might have emerged from a mediation.

One objection to negotiated settlements is that they are unprincipled because negotiators and mediators do not look to legal principles as the basis for settling disputes. Others argue that settlements are in fact rule- and norm-based.[36] They are also norm-creating and made in the "shadow of the law," a term coined by Professors Robert Mnookin and Lewis Kornhauser to describe divorce negotiation.[37] Repeat play arbitrations and mediations are sensitive not only to the "norms" created by numerous repeat cases but increasingly to published reports of settlements in important "public" cases, including mass tort and consumer class actions. The breast implant[38] and asbestos[39] cases are good examples.

Even if not legally-based, negotiated settlements are principle-based. Parties may have a wide variety of interests in a given case, of which legal principles may be just one set. They may decide that social, psychological, economic, political, or religious principles should govern. This does not mean that such dispute resolution is not principled—it is just not law-principled.[40]

---

35. *Id.* at 2674.

36. *See* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

37. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

38. *See* David R. Olmos & Henry Weinstein, *Breast Implant Settlement in Peril*, L.A. TIMES, May 5, 1995, at 1.

39. *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (1996).

40. Menkel-Meadow, *supra* note 34, at 2677.

Moreover, dispute resolution, such as settlement, serves an important critical and democratic function. In the words of Professor Carrie Menkel-Meadow, it "serves to criticize, avoid or correct laws that some find unjust, inefficient, or just plain inapplicable."[41] Thus, people may choose settlement because legislatively enacted law fails to meet the underlying needs or interests of parties in particular cases.[42] Professor Menkel-Meadow gives the example of joint custody in divorce cases, which began as a settlement "compromise" to the draconian and severe effects of single physical custody.[43] It was later enacted into law. Therefore, settlement, with its occasional rejection of law, can be seen as a democratic expression of individual justice whenever rules made for the aggregate would either be unjust or simply irrelevant to the achievement of justice in individual cases.[44]

Some argue against private settlement because of its secrecy. They assume that only defendants, such as those in products liability litigation, want to keep information secret. In fact, many types of plaintiffs, such as those suing for sexual harassment, defamation, and employment cases, have strong interests in not publicizing the underlying facts of their cases.[45] But, to the extent that a good settlement requires the revelation of nonlegally relevant facts, nonprivate settlement processes will severely limit the willingness of parties to settle cases for nonlegal factors.[46] These factors include emotional needs and motives, future business needs, financial data, trade secrets, psychological and social issues such as risk aversion, and precedential effects for other employees or family members.

With respect to court-annexed ADR, some judges, lawyers, and court administrators suggest that we must continue to mine the advantages of settlement for caseload reduction.[47] Reducing costs and delay through increased efficiency appear to be the values that account for much of the courts' interest in the ADR process.[48] While these values are important, the potential for creative solutions and

41. *Id.* at 2676.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 2684.
46. *Id.*
47. *See* Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows,* 24 J. LEGAL STUD. 87 (1995); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure,* 23 J. LEGAL STUD. 627 (1994).
48. DONNA STEINSTRA ET AL., FEDERAL JUDICIAL CENTER, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997).

the ability of parties to participate in the outcomes should not be underestimated.[49] Other values include:

> increasing the rationality, the fairness, and the civility of the disputing process; expanding the information base on which parties make key decisions in litigation and settlement; reducing parties' alienation from the justice system; expanding parties' opportunities to act constructively and creatively; helping parties understand and vent emotions; and expanding the parties' tools for dealing with the psychological, social, and economic dynamics that accompany and sometimes drive litigation.[50]

The purpose of court-annexed ADR should not be defined as permitting courts to unburden themselves of unwanted classes of cases. Its purpose is not to make life easier for judges and administrators by eliminating cases but to provide respect for the courts by providing dispute resolution tools that really give the parties an opportunity, successful or not, to try to solve their problems with some help from the neutral third party provided by the court.[51]

In sum, ADR allows parties to decide how they want their disputes to be resolved. They can, with the help of their lawyers, use either private or court-annexed ADR, depending on how much public discourse or confidentiality they need and how much consultation or direct confrontation they want with the other side. As Professor Menkel-Meadow suggests: "If settlements do not track the law because other interests are more important to the parties, then we should not intrude upon private settlement, unless that settlement violates a law of public importance."[52]

Critical questions remain, such as: when and how should settlements become public? And what scrutiny should be given to them? Professor Menkel-Meadow suggests that there are some measures when review is appropriate: first, when the parties seek court imprimatur and approval; second, in the case of class action settlements requiring court approval under Federal Rule of Civil Procedure 23(e), which requires courts to engage in some scrutiny of the adequacy of counsel and the reasonableness of settlement;[53] and third, when a case so implicates the interests of those beyond the "dispute" that some "public" exposure may be a necessary part of our democratic process, such as mass tort cases.[54] The difficult question that remains to be explored is what should happen when the parties consent to a pri-

49. Linda R. Singer, *Future Looks Bright, but Challenges Include Retaining Our Core Values*, DISP. RESOL. MAG., Spring 2000, at 29.
50. Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 37–38.
51. Dorothy W. Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 10 (2001).
52. Menkel-Meadow, *supra* note 34, at 2694.
53. FED. R. CIV. P. 23(e).
54. Menkel-Meadow, *supra* note 34, at 2695.

vate settlement—and a third party seeks to disrupt party consent because of interests the negotiating parties may have chosen to avoid or ignore.[55]

Finally, it is clear to me that with the proliferation of new techniques for ADR, there is a need to educate and train more justice-producing persons. Next to the Federal Courthouse in Pasadena is a nonprofit corporation called the Western Justice Center Foundation. Its purpose is to promote the peaceful resolution of conflict. It identifies and evaluates models of conflict resolution in the schools, the community, and the courts.[56] It has been working with elementary schools, primarily with children in the fourth and fifth grades who receive peer mediation training and serve as peer mediators in their schools. The reward for the children who serve as peer mediators during the semester is to come to the Pasadena courthouse and meet with a federal judge, usually me. They recount their experiences and then litigate and mediate a case (with the help of the judge and their teacher).

The case they have recently "litigated" involves a suit against a teacher who has given a child an "F" when the child feels she deserves at least a "C." In one instance, one fifth-grader represented the child, another represented the teacher, and three were selected to serve as judges. They were told to make up the best possible case for their clients. "May it please the Court," said the "lawyer" for the child, "My client got an 'F' because the teacher is a racist." The "lawyer" for the teacher replied with: "The teacher gave the right grade, because the child comes to school, doesn't do her homework, and falls asleep in class." The "lawyer" for the child responded with: "The child falls asleep in class because she comes to school without breakfast." The judges decide who "wins" with the help of the associate judges who are the other members of the class.

Then the same disputants mediate the case. They use the skills they have been taught such as setting the stage, introducing themselves, defining the problem, identifying the problem using active listening skills, finding solutions, and coming to agreement. In this most recent case, the fifth-graders decided that the teacher should stay after school to help the child earn at least a "C" and thereby prove that the teacher was not a racist. In addition, somebody should write to the school P.T.A. and tell them that kids were coming to school without breakfast. They had other solutions, but what pleased me most was at the end they hugged each other. This was a make-believe case, but the children had identified the facts, determined what the issues were, and came up with solutions. There were no winners and losers. Instead everyone won. Even more touching to me was a thank you

55. *Id.* at 2696.

56. *See* Western Justice Center Foundation website, *at* http://www.westernjustice.org (last visited May 7, 2004).

note I received from a student named Herbie. He wrote: "Dear Judge Nelson. Thank you so much for teaching us more about mediation. But why don't you teach it to adults too, so we won't have war anymore?"

The law schools have an important part to play in teaching their students about ADR as well as adversarial legalism. Derek Bok, former Dean of the Harvard Law School and former President of Harvard University, wrote in 1982:

> [L]aw schools train their students more for conflict than for the gentler arts of reconciliation and accommodation . . . . Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration . . . rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.[57]

Finally, it should be understood that the challenge is to determine whether adversarial legalism or some other appropriate form of dispute resolution will provide the right process, the right remedy, and the fairest and most just result in a given case.

57. Derek C. Bok, *A Flawed System*, HARV. MAG., May–June 1983, at 38, 45.