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For Reconciliation

Andrew W. McThenia
Thomas L. Shaffer

Professor Owen Fiss, in his recent comment, Against Settlement, 1 weighs in against the Alternative Dispute Resolution (ADR) movement. He brings to the discussion his often stated preference for adjudication, which he views as “a tribute to our inventiveness,” 2 to be encouraged because it is a forum for the articulation of important public values. Fiss argues that the entire movement for alternatives to litigation is misplaced. He understands that the movement’s claim to legitimacy turns on the inefficiency of the legal system and on popular dissatisfaction with law as a means for maintaining order, 3 and he challenges this claim.

Fiss attacks a straw man. In our view, the models he has created for argument in other circumstances 4 have become mechanisms of self-deception not only for him but for most of those who write about alternatives to litigation. His understanding that the plea of ADR advocates is based on efficiency reduces the entire question to one of procedures. Fiss’s argument rests on the faith that justice—and he uses the word—is usually something people get from the government. He comes close to arguing that the branch of government that resolves disputes, the courts, is the principal source of justice in fragmented modern American society. 5

Fiss’s view that the claims of ADR advocates arise from a popular dis-

1. Professor Owen Fiss, Against Settlement, 93 Yale L.J. 1073 (1983) [hereinafter cited as Against Settlement].
2. Id. at 1090.
3. Professor Fiss equates settlement with ADR and says that settlement should be treated as a “highly problematic technique for streamlining dockets.” Id. at 1075. His citations to the underlying story of ADR are to the law and economics literature. Id. at 1076 n.11. He attributes to President Bok the view that litigation “is evidence of the needlessly combative and quarrelsome character of Americans.” Id. at 1089.
5. In describing those cases unsuitable for ADR Fiss includes “those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law.” Fiss, Against Settlement, supra note 1, at 1087.

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satisfaction with law reduces the issue to one of order. As his first stated understanding reduces justice to statism, this understanding reduces justice (or, if you like, peace) to a tolerably minimum level of violence in the community. In our view, an appropriate engagement of the Fiss attack on ADR must go all the way back to these two characterizations in his argument against ADR and in favor of court-dominated dispute resolution. We are not willing to let him frame the issue.

Certain themes recur in the ADR literature. Many advocates of ADR make efficiency-based claims. And a plea for ending the so-called litigation explosion, and for returning to law and order, runs through the rules-of-procedure branch of the ADR literature. But the movement, if it is even appropriate to call it a single movement, is too varied for Fiss's description. Rather than focusing on the substance of claims made for ADR, Fiss has created a view of the function of courts that he can comfortably oppose.

In an earlier and provocative article, Fiss called for both a recognition and an affirmation of the expanded role of courts in modern America. He urged an explicit recognition that "[a]djudication is the social process by which judges give meaning to our public values." Further, he argued that a new form of adjudication, "structural reform," be celebrated as "a central—maybe the central—mode of constitutional adjudication." To develop his thesis and to meet Professor Lon Fuller's arguments on the limits of adjudication, Fiss resorted to modelling. He contrasted his preferred view of adjudication, "structural reform," with what he described as a "traditional" model of adjudication. Although it is not clear whether he understood the substance of the two types of adjudication to be fundamentally different, he clearly viewed the form of structural reform litiga-

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6. Id. at 1075: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.


8. Fiss, Forms of Justice, supra note 4.

9. Id. at 2.

10. Id.

11. Professor Fuller's essay, The Forms and Limits of Adjudication, was published posthumously at 92 HARV. L. REV. 353 (1978). Typed versions of it were circulated some years prior to that time. See also Fuller, Adjudication and the Rule of Law, 54 PROC. AM. SOC'Y INT'L L. 1 (1960); Fuller, Collective Bargaining and the Arbitrator, 1963 WIS. L. REV. 3.

12. See Fiss, Forms of Justice, supra note 4. At one point Fiss asserts that the function of adjudi-
tion as "breathtakingly different" from the "dispute resolution" or "traditional" model of adjudication.

While Fiss was initially content to construct contrasting models of adjudication simply in order to accentuate his position and argue against Fuller's, he has in more recent writings asserted that one of these models, that of traditional dispute resolution, has a life of its own, a life that has "long dominated the literature and our thinking." In fact, Fiss's later, positive description of structural reform continues to flower, while his negative description of traditional adjudication has become abstract and lifeless. Fiss's response to the imperfections of life that lay bare the difficulties with his model of structural reform has been, it seems to us, to provide a shrill description of traditional judicial dispute resolution.

Fiss's description of traditional dispute resolution is a story of two neighbors "in a state of nature" who each claim a single piece of property and who, when they cannot agree, turn to "a stranger" to resolve their dispute. He asserts that traditional dispute resolution depicts a sociologically impoverished universe, operates in a state of nature where there are no public values or goals except a supposed "natural harmony" of the status quo, and calls on the exercise of power by a stranger. That was never Fuller's position. Nor do we find much support in the literature or in reality for such a view of traditional adjudication. If there ever
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was such a world we expect it was “nasty, brutish and short.” However, we don’t really believe that traditional adjudication ever bore much resemblance to that story. Yet this is the view of the world that Fiss attributes to the advocates of ADR; his attack on ADR is premised on that notion.21

Models are, of course, human creations. The good ones contain elements of the creator’s perception of the world and of the reality he seeks to perceive.22 They are designed to invite conversation and to appeal to the reader in a search for understanding. They are abstractions; but to be effective, they have some connection either with the creator’s view of reality or with what he wants the world to be like. Fiss’s model of structural reform is, in this way, an effective model.23 While it may not depict the world that many of us observe, it does reflect his view of the world he wishes he could find. It reflects, we suspect, more his hope than his actual belief. We honor that. The model is rich. It leads to conversation and debate.

But Fiss’s model of traditional dispute resolution is flat; it is only an abstraction, and is therefore also a caricature. It has no relation to the world as it is; it does not appeal to the reader as a convincing way to understand adjudication or its alternatives. It does not permit one to express hope in alternatives to adjudication.

In any event, after setting up his “state of nature” model of dispute resolution, Fiss attributes that view of the world to the advocates of ADR. He understands pleas to consider alternatives to current means of resolving disputes as turning on the inefficiency of traditional adjudication (his negative model), and popular dissatisfaction with it. He equates the ADR movement with those who urge settlement more than judgment and who seek a “truce more than a true reconciliation.”24 He argues that settlement is “a capitulation to the conditions of mass society,” a capitulation that “should be neither encouraged nor praised.”25 He assumes that the ADR movement is one that wants peace at any price and treats settlement

21. “They [advocates of ADR] act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help.” Fiss, Against Settlement, supra note 1, at 1075.
23. While one might disagree with Professor Fiss’s description of structural reform, one must acknowledge the eloquence of his language. Criticism of his scholarship rests more on logic than formulation. One of the major criticisms of his 1979 work, Forms of Justice, supra note 4, was that by setting up his either/or worlds, Fiss had exaggerated the discontinuity between past and present, see supra note 12. In effect, he had cut the model of structural reform free from history. To suggest that something radically different was under way in adjudication made structural reform suspect and vulnerable to attack. Eisenberg and Yeazell also criticized Fiss for exaggerating the differences in form between traditional litigation practices and remedies, and the model of structural reform. See Eisenberg & Yeazell, supra note 12, at 516.
24. Fiss, Against Settlement, supra note 1, at 1075.
25. Id.
as "the anticipation of the outcome of trial,"\textsuperscript{26} that is, trial in his stranger-judge, negative model of adjudication.

Fiss is against settlement because he views the matters that come before courts in America, and that are inappropriate for ADR, as including cases in which: (1) there are distributional inequities; (2) securing authoritative consent or settlement is difficult; (3) continued supervision following judgment is necessary; and (4) there is a genuine need for an authoritative interpretation of law.\textsuperscript{27} Fiss characterizes disputes in this limited way—as arguments between two neighbors, one of whom has vastly superior bargaining power over the other. It is then easy for him to prefer litigation to settlement, because litigation is a way to equalize bargaining power.

The soundest and deepest part of the ADR movement does not rest on Fiss's two-neighbors model. It rests on values—of religion, community, and work place—that are more vigorous than Fiss thinks. In many, in fact most, of the cultural traditions that argue for ADR, settlement is neither an avoidance mechanism nor a truce. Settlement is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation. Instead of "trivializing the remedial process,"\textsuperscript{28} settlement exalts that process. Instead of "reducing the social function . . . to one of resolving private disputes,"\textsuperscript{29} settlement calls on substantive community values. Settlement is sometimes a beginning, and is sometimes a postscript, but it is not the essence of the enterprise of dispute resolution. The essence of the enterprise is more like the structural injunction, about which Fiss has written so eloquently, than like an alternative to the resolution-by-stranger described by his negative model.\textsuperscript{30}

The "real divide"\textsuperscript{31} between us and Fiss may not be our differing views of the sorts of cases that now wind their way into American courts, but, more fundamentally, it may be our different views of justice. Fiss comes close to equating justice with law. He includes among the cases unsuited for settlement "those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law."\textsuperscript{32} We do not believe that law and justice are synonymous. We see the deepest and soundest of ADR arguments as in agreement with us: Justice is not usually something people get from the

\begin{itemize}
\item[26.] Id. at 1076.
\item[27.] Id. at 1087.
\item[28.] "The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process." Id. at 1082.
\item[29.] Id., at 1085.
\item[30.] See Riskin, Mediation and Lawyers, 43 Ohio St. L.J. 29 (1982).
\item[31.] This is Professor Fiss's phrase. See Fiss, Against Settlement, supra note 1, at 1087.
\item[32.] Id.
\end{itemize}
government. And courts (which are not, in any case, strangers) are not the only or even the most important places that dispense justice.  

Many advocates of ADR can well be taken to have asked about the law's response to disputes, and alternatives to that response, not in order to reform the law but in order to locate alternative views of what a dispute is. Such alternatives would likely advance or assume understandings of justice (or, if you like, peace) that are also radically different from justice as something lawyers administer, or peace as the absence of violence. They assume not that justice is something people get from the government but that it is something people give to one another. These advocates seek an understanding of justice in the way Socrates and Thrasymachus did in the Republic: Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence: Justice is what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.

Most of us who have gone to college know something about Socrates. Many more of us who grew up in the United States know something about Moses and Jesus. It is from Torah and Gospel, more than from Plato, that we are most likely to be able to sketch out radical alternatives to the law's response to disputes. As a matter of fact, our religious culture contains both a theoretical basis for these alternatives and a way to apply theory to disputes.

In the Hebraic tradition (as in the Islamic), scripture is normative. Judaism, for example, does not merely seek to follow Torah; it loves Torah, it finds life in Torah, it celebrates Torah as one might celebrate the presence of a lover, or of a loving parent, or of a community that nourishes peace—commitment to common well being, and even a feeling of being well. (Salvation is not too strong a word for it.) Justice is the way one defines a righteous life; justice does involve according other persons their due but, more radically, in the Hebraic view, it involves loving them. Such


Professor Milner S. Ball, who discussed this comment with us, suggested that Fiss is not arguing so much against religious or community-based ADR as against DR (deregulation). Fiss may, Ball suggests, be asking us to consider whether an overly enthusiastic support of settlement is not another form of the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms. We may, Ball suggests, be reacting to Fiss's overly inclusive statements about ADR; he may have over-stated, and we may have over-reacted. Thus, we may have more common ground than we think. Ball's suggestion is one we will enjoy pursuing. When we do, we will want to tell Ball that the powerful economic interests are as much members of the fragmented but also reconciling community as the oppressed are. And we will want to tell Fiss that it may make a general and important difference that, in almost any kind of ADR, (a) the parties talk to one another, rather than to the government; and that (b) the third party, if there is one present, comes not as a resolver of disputes but as a neighbor.
a justice is the product of piety, to be sure, but not piety alone; it is the product of study, of reason, and of attending to the wise and learning from them how to be virtuous. Quare fidem intellectum.

The Christian side of the Hebraic tradition has, or should have, all of this. It also has a unique procedure established in St. Matthew's Gospel—a system backed up by stern condemnation of Christians who turn from the Gospel and seek instead the law's response to disputes. In this system—as well as in Judaism—the religious community claims authority to resolve disputes and even to coerce obedience. The procedure involves, first, conversation; if that fails, it involves mediation; if mediation fails, it involves airing the dispute before representatives of the community. If the dispute goes so far as judgment, the system—as is also the case in Judaism—permits pressure: "(I)ce he refuses to listen to the community, treat him like a pagan or a tax collector. I tell you solemnly, whatever you bind on earth shall be considered bound in heaven; whatever you loose on earth shall be considered loosed in heaven."

Thus, the procedure gives priority to restoring the relationship. Hebraic theology puts primary emphasis on relationships, a priority that is political and even ontological, as well as ethical, and therefore legal. And so, most radically, the religious tradition seeks not resolution (which connotes the sort of doctrinal integrity in the law that seems to us to be Fiss's highest priority) but reconciliation of brother to brother, sister to sister, child to parent, neighbor to neighbor, buyer to seller, defendant to plaintiff, and judge to both. (The Judge is also an I and a Thou.) This view of what a dispute is, and of what third parties seek when they intervene in disputes between others, provides an existing, traditional, common alternative to the law's response. The fact seems to be that this alternative has both a vigorous modern history and a studiable contemporary vitality (Jerrold Auerbach to the contrary notwithstanding).

34. See Passamanek & Brown, The Rabbis—Preventive Law Lawyers, 8 ISRAEL L. REV. 538 (1973). We use "Hebraic" here, as Will Herberg does, to mean the ethical tradition common to Christians and Jews. See W. HERBERG, JUDAISM AND MODERN MAN: AN INTERPRETATION OF JEWISH RELIGION 139 (1980).

35. "Faith seeking understanding."


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Contemporary manifestations of the Hebraic tradition claim adherence to a moral authority that is more important than the government.40 The Torah is the wisdom of God; the Gospel is the good news that promises a peace the world cannot give. From one perspective, theology makes such religious views of dispute and resolution seem peripheral. That impression is deceptive, though: In the aggregate these views of what a dispute is are consistent with one another and, as such, consistent with the moral commitments of most people in America. The numbers of people in this country who might find them so is not declining; it is increasing. “In the aggregate” is an appropriate consideration, as one assays radical alternatives to the law’s response to disputes, because there is substantial commonality among the practitioners of this radical, Hebraic alternative. Religious systems of reconciliation rest on a substantively common theology and on a substantively common argument that, contrary to the implications of Fiss’s view of justice, the government is not as important as it thinks it is.

Professor David Trubek ends a recent and pessimistic essay on alternative dispute resolution41 with a paradox: “[N]o one,” he says, “really seems to believe in law any more.”42 The “elites” who complain of a litigation explosion—Chief Justice Warren Burger and others “who champion alternatives”43—“question the law’s efficacy.”44 But so do those who criticize the law as political and oppressive, most notably scholars in the Critical Legal Studies movement. The elites exalt an informalism they don’t believe in, Trubek says; and the radicals exalt a formalism they distrust. Apparently the new legal-process school—or at least one of its eloquent spokesmen, Owen Fiss—still believes in law. Fiss’s writing on structural reform is powerful. It may not reflect the way the world actually is, but it is a statement of hope. And that is important in an age of nihilism. But we suspect those who believe in law and in nothing else; we hope Fiss is not among them. Informalism of the Chief Justice’s formulation45 may deserve distrust. But informalism has some contemporary man-

42. Id. at 835.
43. Id.
44. Id.
45. Burger, supra note 7.
manifestations—many of them resting on the most ancient and deepest of our traditions—that deserve trust and even celebration. These manifestations too are statements of hope. Suggestions for alternatives to litigation need to be critically examined—no doubt many of them are hollow. What they do not need, and what the legal community does not need, is an argument that reduces these alternatives to a caricature.