
JUSTICE IRRELEVANT: SPECULATIONS ON THE CAUSES OF ADR

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Not many people speak Latin anymore. It has probably been hundreds of years, not just dozens, since firemen were last heard crying *Ubi ignis est?*, or libidinous adolescents whispered *Magni scilicet te mane saciam* in the back seat of a '76 Chariot. ("Why of course I'll respect you in the morning." Or something close.) It is, as a colleague of mine once said, the mark of a gentleman to have *forgotten* both Latin and Greek. But since the Council of Trent decreed it to be so nearly 500 years ago, the Roman Catholic Church everywhere conducted its most important rituals in this thoroughly inaccessible language. It wasn't until our own generation that the Church formally approved of what it now calls the Vernacular Mass—a liturgy spoken in whatever language the folks in each particular church would actually understand.

As the Church itself acknowledged in the prescriptions of Vatican II, for hundreds of years millions of people were involved in their devotions through the intercession of a class of professionals acting, in some substantial part, as interpreters. Then, in 1962, it became legitimate to celebrate the Mass entirely in English, or in what they speak in Boston or New Jersey—languages closely related to English.

There are about as many people in the United States who are fluent in law as there are people who understand classical Roman Latin. Even if we do sometimes feel that the country once overrun with prairie dogs is now equally blessed with lawyers, it is the case that only a small handful of people know what *quasi in rem* jurisdiction is, not to mention actions to

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quiet title and writs of mandamus. And to most reasonable people, a motion to quash is a risky maneuver by a clumsy fat guy on a slippery dance floor. We are, I mean to suggest, very much in need of a Vernacular Justice.

Fortunately, there is a Reformation underway. Its initials are ADR, which stands for Alternative Dispute Resolution. And as incautious as it may be to do a history of a phenomenon that hasn't fully happened yet, some reflections on what the ADR movement is all about may be in order even at this stage in its early years—so long as we are careful to use the inquiry not to learn something about ADR, but rather as a window into some older, wider things to which ADR may just be a secularizing response.

Let's consider an apocryphal case—trivial and unrealistic perhaps, but good enough for the purposes we'll make of it. In early October of whatever year you like, a small-business candymaker ordered some specially manufactured tin boxes from another small business—a metal fabricating shop, I would guess. The tin boxes were meant for the candymaker's Christmas shipments, and had to be a certain size, shape, color and so on.

The candymaker gave the tinsmith a sketch with notes describing exactly the dimensions he wanted. The tinsmith made up the boxes, 10,000 of them or so, following the candymaker's sketch with a very faithful precision. When the boxes were delivered in early November, the candymaker found that the tops, which were supposed to fit over the bottoms, had almost exactly the same dimensions as the bottoms so that instead of fitting over the top edge, they just perched right on it, making the boxes impossible to close and useless to the candymaker.

The candymaker and the tinsmith had, shall we say, vile words pass between them. Stripped of the adjectives and questions about paternity, the arguments boiled down to this: the candymaker accused the tinsmith of making plainly defective products and threatened to hold him responsible for all of the lost profits he could have made had he received acceptable tin boxes on time. The tinsmith in turn said that it was the candymaker who had set out the sketches and the dimensions and that he had just followed exactly the instructions on the order form. It wasn't any of his business why the candymaker wanted the boxes dimensioned in just that way. Here we have an everyday, garden-variety, frequently occurring sort of civil dispute.

So, given the civil justice system we have in the United States, what happens next? Generally speaking, nothing. No one has accurately measured this, so far as I know, but it seems very likely that of all the billions of arguments that occur in the course of an average day, the number that go on to some sort of formal processing is infinitesimally small. Most of the time the candymaker and the tinsmith just work it out themselves, or one of them just walks away from the problem and it's forgotten after a while. That's all that happens, most of the time. The problem is solved, or managed, or not.

Sometimes things do go further. Either the candymaker sues the tinsmith to recover what he thinks he lost by missing out on the Christmas trade because the boxes didn't work, or the tinsmith sues the candymaker because he didn't get paid. We don't yet know all there is to know about why any particular dispute goes to litigation rather than following the path taken by the far larger number of other problems that just get worked out in the normal course of things. But, often enough, the antagonists will bring their dispute to the law.

And then what? Charles Dickens had an answer to that, in his retelling of the famous case of Jarndyce and Jarndyce—a simple probate matter that sent two generations of lawyers' children through college and graduate school, and languished in the courts for so long that eventually everybody forgot what the case was originally about. It's a caricature of course, but part of it is true.

Of all the cases ever filed in the civil courts, over ninety-five percent of them never get to trial. Why? They settle. When? Usually on the courthouse steps, at the last minute, and after nearly all of the time and expense required to process the cases has already been invested. After thousands, sometimes tens of thousands of dollars in legal costs spent per case, over ninety-five percent of our cases settle for an amount that they probably could have settled for months or years earlier, at far lower expense.

What is it that keeps that vast bulk of all our civil disputes—the majority that never go to trial anyway—from being resolved without all the expense and delay? To some extent it's the nature of the civil justice system itself. The legal system is an adversarial system. It assumes that truth and accuracy will emerge from each side's zealous pursuit of its own interest. Any premature compromise offered by one of the combatants, any move toward the center rather than toward the extreme, might jeopardize that person's ability to hold out for more.

Because they have to be adverse, people involved in litigation get spun out to extreme positions for the purpose of bargaining. They claim and defend their ground; and the whole effect of the process is one that calls forth strategies to win, and to cause the opposite side to lose. The adversarial process actively impedes collaborative problem resolution.

Even the financial incentives in litigation discourage a more reasonable process. Before a case ever gets to trial, both sides go through a long process called discovery—a system in which each side gets to ask questions of the witnesses and friends of the other side, and to rummage through the other side's documents looking for something that may or may not exist. This is where the real expense of litigation lies. I was involved in one case, admittedly an unusually large one, in which just one of the dozen defendant companies was spending \$50,000 a week on photocopy costs alone, just to answer the plaintiffs' pre-trial discovery requests.

In that sort of a system, each party has reason to believe that it can get the other to settle more favorably if it can credibly threaten to inflict these inordinate processing costs on the other just by way of preliminary discovery. And the other side must respond: "Two can play that game. We'll make it expensive for you, too."

A few months ago, I was at a conference talking about these things with an audience of very sophisticated and experienced people. I offered to play a game called the dollar auction. I agreed to auction off a dollar. Everybody could bid. Whoever bid the most for the dollar when all the other bidding ceased would pay me what they bid, and they would get my dollar. But in addition, I told them, whoever made the second highest bid had to pay me the amount of that bid, and they would get nothing in return. So, for example, if David had bid forty cents when the bidding stopped, and Goliath had bid forty-five cents, then Goliath would give me forty-five cents for which he would receive the dollar. David would give me forty cents and get nothing. I asked if they were willing to play under those rules. They were. Off we went. How much do you think I sold the dollar for? Two dollars and ten cents.

Why did that happen? Think about the auction at some point in the middle: Suppose you've bid \$0.99, and someone else bids \$1.01. What's the rational thing for you to do? If you do nothing, you lose the auction and you lose ninety-nine cents. But, if you bid \$1.05 and win the auction, you only lose a nickel. In the end, you are better off by paying more than a dollar for a dollar. And what's the winning strategy? Bidding so much for the dollar that all the other bidders believe you will always outbid them, so

that they will drop out of the game. Next time I offer the game I'll do it with a \$1,000 bill.

In other words, once you are captured in the game, you maximize your own advantage by acting in a way that would otherwise be irrational. The incentives are all in place to cause an escalation of the war until something happens to end it. To a distressing degree, some litigation-based negotiations are the same: a winning strategy includes making credible threats to inflict costs on your opponent even at the expense of incurring costs yourself.

Most everyone knows by now about the tragedy of asbestos—whereby masses of people were injured by inhaling fibers from asbestos insulation installed in homes and offices and ships and nearly everywhere else. The asbestos lawsuits number in the hundreds of thousands by now, with more coming every day. A few years ago a group of people measured what we all were spending on these lawsuits. It turned out to be appalling. Not counting the cost to the public of maintaining the court system and paying the judges, but looking only at the expenses being incurred by the private plaintiffs and the private defendants, less than forty cents out of every dollar spent made it into the hands of the injured people.

The greater part of every dollar went to pay for the costs of suing and defending and settling and deposing and conducting discovery. While that ratio might be high, it is hardly unusual. Administrative compensation systems have costs in the range of fifteen to twenty percent of their compensation budgets. In the litigation and settlement system, forty percent is not unusual; fifty percent may not be uncommon. These costs are the conventional explanation for why there has recently developed an interest in this ADR, these Alternative forms of Dispute Resolution.

I would need all the space we have here and then some to offer an exhaustive definition of what ADR is—something other than saying that it's a set of strategies that promotes the resolution of disputes without all of the legal processing costs. But I'll give just one example of an ADR method, an old and familiar one at that. It's called mediation. There are a dozen or more varieties of mediation, but here's what they have in common: some third person, a neutral person who is a stranger to the dispute, calls the candymaker and the tinsmith together and tries to act as a communications facilitator. The mediator allows everyone to vent their feelings and then meets with each side separately and together, exploring ways in which the dispute might be resolved.

Rather than encouraging people to adopt extreme adversarial positions, a mediator tries to get both sides to recognize what their real interests are and how they might be served in a win-win sort of way, rather than by engaging in the tug-of-war of win and lose. This is not the same as seeking compromise; sometimes compromises are not appropriate. In truth, sometimes mediation itself is not appropriate. However, what mediation can be, when used in the right sort of case, is a way of getting better outcomes.

Think about the candymaker and the tinsmith again. If they actually did go to court, all the court could do is decide whether one of them owes the other some amount of money. The winner takes the money from the loser. A mediator, however, might ask the candymaker the real nature of his problem, to which the candymaker might respond: "Well, Christmas is coming and I can't use these damn boxes and I'm about to lose my shirt." And then the mediator listens to the tinsmith: "I spent a lot of money making those damn boxes, and I can't continue in my business unless I get paid."

Ah, here's a solution. Both of these people want to be in business this year as well as next. By opening lines of communication and backing people away from their defensive adverse stances, the mediator helps them recognize a way in which they both can win. Although new boxes can't be made in time for this Christmas trade, the mediator learns that new tops could be. So here's the deal: the tinsmith makes new tops that fit this year's bottoms, and the candymaker pays the full price of this year's contract. They agree that next year the tinsmith will make new bottoms for this year's tops, and the candymaker will pay for those at that time. The mediator gives himself a victory hug and the candymaker and the tinsmith solve their problem in a mutually profitable way—privately, without the involvement of a court.

An apocryphal story? Probably, though common enough in its general form. A simplistic idea of ADR? Absolutely. ADR mechanisms include some very sophisticated devices that go well beyond conventional mediation. But mediation is an ADR device that is extraordinarily successful in resolving legal disputes not just faster and cheaper than the civil justice system can, but, as this story tries to tell, better as well. The fact that ADR is becoming a preferred alternative to litigation for dispute resolution simply cannot be denied. To cite just one bit of evidence, a nonprofit organization in New York, which has been at the forefront of ADR development in this country, drafted a few years ago what it calls the "ADR Policy Statement." The statement, which is meant to be adopted by

corporations and publicly announced, goes something like this: "If we, the XYZ corporation, find ourselves in a dispute with another corporation that has also adopted this policy statement, we agree to pursue some form of ADR to resolve that dispute before we proceed to filing a lawsuit." Those aren't the exact words, but they're close enough.

These companies have agreed among themselves never to be trapped into playing the dollar-auction game. That policy statement, in the few years it has existed, has been signed by a majority of the Fortune 500 companies and by thousands of others—a group comprising over sixty percent of this country's Gross National Product. Think of it: the producers of sixty percent of the Gross National Product have foresworn litigation against each other in favor of taking at least a first crack at their problems through private ADR.

Why are these companies, as well as lots of individual candymakers and tinsmiths, avoiding the courts? Why are they investing heavily in the development of these private justice alternatives? More to the point, why are they doing it *now*? Lawyers have been vilified since at least Shakespeare's day; there's nothing new in that. Even Dickens and Kafka weren't the first to point out the inefficiencies and absurdities of the formal civil justice system. So why now? That's the question I want to explore. Whether, in other words, the modern expansion of interest in and usage of alternatives to the courts tells us anything interesting about the courts, or about the law, or about ourselves.

Why now? There are a number of possibilities. Savings of time and expense alone aren't enough to be the explanation, because those possibilities have always been present. There has to be more to it than that.

One idea might have to do with the globalization of the Earth's economy. While America is probably not any more litigious today than it was thirty or even fifty years ago, it is today, and for fifty years has been, far more litigious than other industrialized societies. It is commonly believed by the managers of American businesses that they pay a larger portion of their total operating expenses for legal costs and fees than their overseas counterparts do. A few years ago, the chief executive officer of one of the largest and best-managed companies in the world said: "Our legal expenses are the only costs we have that aren't limited by a budget, and they are the only costs in this company that regularly exceed their limits."

If our technology is superior, we can stand some excess costs. If we compete with protectionist policies in our favor, then the forces of

competition make our inefficiencies less troublesome. But when the world's economy becomes global, when we compete on a technologically level playing field, when we compete without the protections of trade barriers, then whatever costs we have to incur that our competitors don't create a disadvantage. Imagine two otherwise identical computer companies. If the one here spends millions more on legal costs than the one in Japan does, then the U.S. company must sell their computers at a higher price. They therefore sell fewer. You can't compete that way. Maybe this globalization phenomenon has something to it. Something to answer the question, "Why now?" for ADR.

A second idea: we've outgrown our judicial system. The United States not only has a few tens of millions of people more than it had forty years ago, it is also a vastly more complex place. Way back when, there were no environmental regulations, almost no consumer finance regulations, and very little by way of domestic welfare, employment, economic, and social programs (at least as measured by today's standards). Government generally was just a smaller part of our everyday life.

Every time Congress or a state legislature passes some new law to regulate some new area, it creates new business for the courts. In terms of industrial safety, we are undoubtedly better off now than we were before the Occupational Safety and Health Act was enacted a generation ago. The Act created justiciable rights and legal obligations—along with numerous new opportunities for people to claim that these rights have been trampled. Yet neither Congress nor the states regularly provides their court system the additional resources needed to handle the increased litigation that their new laws inevitably create.

It is interesting to think about the fact that Congress requires the private sector to do environmental-impact studies whenever a business wants to do something that might increase the burden on our environmental resources. Yet Congress has never done a similar litigation-impact study of its own when it passes a new law or creates a new regulatory scheme. These costs, both public and private, can be substantial. We have simply not invested in the civil litigation system's resources at a level that is adequate to handle the business that increasing legalization inevitably creates.

In some states today, it takes two to five years before a simple lawsuit comes to trial. In some states, the court's resources are so meager and the criminal caseload is so great that some civil cases might *never* get to trial! So we get all of the preparatory expense and finally a settlement at the

courthouse steps anyway, years after things first began. In a phrase, the civil justice system was designed in a simpler time. We haven't paid the price to keep it up to date, and therefore it no longer responds to our needs. ADR procedures, by contrast, can be wholly private; the parties control them. Maybe the increasing gap between our accelerating social complexity and our stagnant investment in the judicial infrastructure is the explanation for "Why now?"

Here's a third idea. The things that courts are asked to do have changed. In response, courts have changed in ways that make them less attractive to at least some interests that used to use them more readily. I should explain this in steps; there are actually two points.

The first point has to do with the fact that courts are largely nonmajoritarian institutions. If some group with a particular social agenda wants to change the way the country works in some respect, it might be able to get a statute passed. In order to do so, however, it would have to persuade a substantial number—probably even a majority—of the members of a legislature to go along with what it wants. Lobbying legislatures is inordinately expensive and seldom successful. Legislatures have many things to do and many interests lobbying and counter-lobbying them. Moreover, the members do have to care about what at least a majority of their constituents think about a question that has come to public attention.

Courts, on the other hand, can usually pronounce a rule of law without caring very much what the voting majority thinks. So, from the point of view of a political movement, it can be vastly cheaper and easier to get a court to issue a rule than to get the same outcome from a legislature (which is where such issues actually belong).

Of course there are limits. Courts don't like to legislate. But consider just one example—one new type of case. Most medical insurance policies exclude coverage for "experimental procedures." Insurance companies won't pay for them. The reason is simple enough: experimental medicine changes so fast that if its costs were to be covered, an insurance company could never underwrite the costs and price its policies rationally, because the financial exposure would change unpredictably over the term of the policy. That's no way to run an insurance company. Therefore the companies exclude experimental procedures.

One procedure now much in the news is called autologous bone marrow transplant, or ABMT. There are some diseases, some cancers, that require high-dose therapy, which itself can be deadly because bone marrow cannot tolerate what might be tolerated by the affected tissues. Thus, the

patient cannot take the high-dose treatment unless the marrow or blood-borne stem cells are first harvested and removed, and then put back after the high-dose therapy is administered to the body. It is a horrendously expensive procedure, one still regarded by most medical cost insurers as experimental.

Consider the case of a patient who can't afford the procedure, yet who is at the point at which ABMT is the only procedure that still holds any hope. Without it, the patient may well die. The patient's medical insurance excludes the procedure because the employer who pays for that medical insurance won't cover such excessive costs, and the insurers can't do the underwriting for reasons just explained. Moreover, almost no legislature, federal or state, has fully come to grips with the vexing question of universal medical coverage, and with the concomitant questions regarding how to ration scarce resources in medical care.

The desperate patient sues the reluctant insurance company, and the case looks on the surface like a simple question of how to interpret the insurance policy. Now imagine yourself the judge. If you say "no," the plaintiff in all likelihood dies. If you say "yes," this plaintiff might live and the world of medical insurance is turned bottom-end-up. Private markets can't act and legislatures won't. Courts, however, quite often do. Courts have been, in our lifetime, among the principal engineers of social change. We bring to them problems unlike those that have come to them before, and we ask them to do what other social institutions refuse to do. Their behavior has changed in turn.

Candymakers and tinsmiths (remember them?) generally like to avoid the unexpected. They are not big fans of having nonmajoritarian social engineering done at their expense. Has this changing role of the courts altered some people's perceptions of the courts—their predictability, and their reluctance (or penchant) to overturn stable rules for the sake of social change? If we seek answers to the question of why some sectors of society—the corporate and the commercial in particular—have, more today than ever before, come to shun the services of courts in favor of private justice contraptions, we might look for some part of the story in the changing roles of courts in a changing social fabric. Courts might simply appeal to different people now than they did before, and may be held in less respect by others.

I said, however, that there are two parts to this institutional point—this idea that the nature of the issues with which courts wrestle has changed

over the past fifty years. What we've been talking about thus far is still within the private dispute realm. There is another realm.

When the Dalkon Shield, an intrauterine contraceptive device, was accused of causing pelvic inflammatory disease in women, the number of people affected reached the hundreds of thousands. When a Chicago food store chain found that salmonella had entered its milk production facility, the number of people who claimed that they got sick exceeded 100,000. When a chemical company spilled DDT into a Mississippi river, the entire population of three counties was at least potentially affected. Asbestos, as I have already suggested, may affect a million people. And so on through the MGM hotel fire, the Hyatt skywalk collapse, the adverse reactions to flu vaccinations, Agent Orange, and even the incidence of the AIDS virus in the nation's blood supply which caused, until testing became possible, a substantial number of all the hemophiliacs in the Western World to be infected with HIV.

Our judicial system and our laws were designed historically to deal with cases of one-on-one; an auto accident involving one driver and one pedestrian; one tinsmith and one candymaker. We do have ways of joining multiple defendants and multiple plaintiffs, of course, but mere party complexity is not the real problem. Each of the mass disasters that I mentioned and many others like them raises questions not limited to deciding how to administer large numbers of compensation claims. What is more deeply implicated in these cases is the question of what obligations society itself might owe to whole classes of people who are injured by events that are not anyone's actual "fault." The tort system with its civil juries and its individually crafted justice works well for individual claims where the assignment of fault is relatively simple. It is, however, about the most inefficient system imaginable for problems involving large questions of risk redistribution in an environment where "fault" and "responsibility" are themselves but tangentially relevant. Who, I would ask, really is responsible for the use of asbestos in nearly everything?

In every one of the mass-injury cases I described, the parties chose to employ a mechanism other than that of conventional litigation, ranging from court-appointed special masters to private claims resolution facilities. But these mechanisms had in common one thing: they were all negotiated mechanisms and administrative facilities unavailable within our court system.

Taken together, these two observations make up the third hypothesis—courts are no longer well adapted to the problems we are

asking them to solve. In that vacuum, we create structures apart from the formal justice system. We call them ADR.

Those are three of the more or less conventional explanations of “Why now?” for ADR. As I promised, they all have less to do with courts and with ADR itself than they do with the larger social movements in which those public and private institutions are embedded. The growth of ADR, at least in the corporate sector, is an interesting window through which to view some other parts of the world.

I would like, however, to engage in some speculation now, and to return eventually to my invocation of the Vernacular Mass. I suspect, you see, that something else may be going on. Perhaps we are simply growing cautious of being tended to by a class of juridical priests.

Recently I attended a meeting of lawyers and corporate executives where the themes of litigation and ADR were being debated. One of the panelists was a senior vice-president of one of America’s largest corporations. Speaking on the subject of why his company was avoiding the public courts in favor of private alternatives to resolve its commercial disputes, this man—a very powerful figure in American business and within his own company, someone who could affect the lives of thousands of people just by snapping his fingers—said plaintively: “When I am in litigation, I am out of control of the events that affect me.” What a suggestive remark!

Let’s go back to the candymaker and the tinsmith, and think further about what happens when their dispute becomes grist for the mills of the courts. At the outset, the whole problem gets translated into another language. Remember that what happened was the boxes and the tops didn’t fit together. From the candymaker’s point of view, the problem was: “Christmas is coming and I’m going to be ruined if I can’t get these candies into the stores.” From the tinsmith’s perspective it was: “I have to get paid for what I did—I put in the labor and the materials and I can’t go forward without recouping those costs.”

From the point of view of the law, however, those aren’t the issues at all. The issue, as a court would frame it, might sound something like this: “Is the implied warranty of merchantability imposed by U.C.C. section 2-314 necessarily excluded under section 2-317 by the constructive agreement of conformity to specifications supplied by the buyer?” No exaggeration—not much anyway.

People interact in an infinite variety of ways and create an infinite variety of problems; but there cannot be an infinite variety of rules of law,

at least not if we care about predictability and fairness and the like. The law accordingly has only a few categories of rules, stated in characterizations abstracted from the palpable realities of people and injury and candy and Christmas. Among the first things that can happen when a lawsuit begins is that the candymaker's case gets translated into this other language. The conversations among the priests—the lawyers and the judges—thereby become inaccessible to the parishioners, the people for whom the whole enterprise is supposedly being run. How many candymakers understand the question about the meaning of Uniform Commercial Code section 2-317? Probably none.

The legal process, then, estranges people from the rituals that affect their lives. It's a Latin Mass. Congregants approach the curia only through professional translators—the lawyers, the priests of a strange and forbidding church called the civil justice system.

But that's not all. Two other things also happen. One is that the procedures themselves, beyond the substantive issues, are controlled by the lawyers with little participation by the lay parties. Lawyers make motions to dismiss; lawyers make opening arguments; lawyers draft and file the pleadings and conduct the depositions. Lay people can't possibly appreciate all of the strategic nuances and the options and are, therefore, even when included in the major decisions, not in control of the ritual.

Moreover, the result of a lawsuit, if it goes the whole formal distance, is a decision by a detached third party—a judge or a jury. The candymaker has no responsibility for the outcome if the matter goes to court. Other people decide what will become of his life. In an ADR process, however, all of these effects can be changed. Consider again only mediation, the simplest and most well-known of the ADR devices. The mediator tries to help the candymaker and the tinsmith reframe the question so that instead of there being a question that calls for an answer, there is again a business problem that calls for a solution. Mediators don't care much about section 2-317 and warranties of merchantability. They try to get the parties away from that nonproductive debate and to focus on looking into how their real interests can be identified and accommodated: Christmas is coming, but the tinsmith needs his money. That's the real problem. ADR thus translates the inaccessible legal question of a lawsuit back into the accessible problem of two real people operating in a very real world.

The language in ADR can be the parties' own—their vernacular. They discuss candy and money and misery and Christmas and anger and disappointment. And, because there is no decision imposed by a third party

upon the problem, the parties not only retain control over the process, they also retain the responsibility for its outcome. In a lawsuit, what happens can be blamed on the judge. In a mediation, and in other forms of nonbinding ADR, what happens is entirely up to the participants. There is no one to blame or credit with an outcome except yourself. Mediators don't decide things, they help people resolve things. People in ADR control a process that they can understand. It is a vernacular justice.

There are confirming echoes of this speculation in other places. In the good old days of American culture, the greatest measure of respect bestowed on any adult was that afforded to the medical doctor. Today, with the degree of specialization and the conflicts of managed care, physicians are the priests of another unfathomable machinery. We seem willing to sue as often as we are to curtsy. Although we still respect physicians, it may be that they too are regarded as secular priests who have overplayed their hand. We seem to want, as we collectively become more sophisticated ourselves, to have a greater degree of control over the things that affect our lives, or at least more opportunity for participation in the control of those things. We are less willing, perhaps, to accept an outcome, whatever it might be, that proceeds from someone else's interceding between us and the things that matter to us, and thereby keeping us away from their meaningful workings—good health, justice, the religious life. “Trust me, I'll take care of you” is what parents say to children. Perhaps what we see when we look through the window of ADR is a homemade attempt to vernacularize the legal Mass—to cease being, vis-à-vis our professionals, children. Maybe, as a society, we are growing up.

I promised that I would use this mid-adolescence history of ADR not as a way of talking about ADR, but rather as a way of talking about to what ADR might be a reaction. My metaphor has been the shift from the Latin to the Vernacular Mass. I meant to invoke by that much more than a mere shift in language. The question is one of accessibility and of inclusion, of which the foreignness of the language is only one dimension. ADR is, I think, a shift from the inaccessible and uncontrollable to the accessible and the relevant, in much the way that the Vernacular Mass invited more authentic participation by the Catholic laity.

The metaphor turns out to have some other interesting facets—in fact, the joys and the pains both have their parallels. Some of the letters and essays that appeared in popular magazines—both Catholic and secular—around the time Vatican II was considering the shift from Latin to the vulgate are reminiscent of the early debates about ADR. I recall how one member of the Catholic clergy, who favored the vernacular reform,

described the Latin Mass—as something external to most worshippers, something that did not demand their personal involvement because of their belief that they could neither add nor detract from its value. Worshippers, in his view, were removed completely from what was happening at the front of the church, and followed their missals out of piety rather than involvement.

The whole point of Vatican II, you will recall, was to make the Church's liturgy accessible to the congregants and, thereby, to make the Church once again relevant to the parishioners. The key was participation—arranging things in such a way that ordinary folks could actually be part of what was going on. There were, of course, contrary editorials and debates during that time as well. One of the more interesting suggestions, made in response to the allegation that celebrants could not understand the Mass in Latin, was not to say the Mass in the vernacular, but rather to say it more *distinctly* in Latin. Ah, I see. People lose the drift of a Latin conversation only if somebody starts to mumble. Speak up, Antonius!

The *Boston Sunday Globe* once ran a story headlined, *Britain's Anglican Church Gets Working-class Leader—Some Traditionalists Fear Vulgarization*.¹ The then-new Archbishop of Canterbury, it seems, had described the Church of England as “an elderly lady muttering ancient platitudes through toothless gums.”² When he was installed as Archbishop, many believed that Dr. George Carey would introduce rock-and-roll and other sorts of jollities into the very rite of installation. In fact, and I quote the news story: “In the end, the nontraditional musical interlude—a couple of rock gospel songs with synthesizer and saxophone—only occupied five minutes of the two-hour ceremony The cathedral spire did not collapse, and many of the 2,000-member congregation broke into applause.”³

The translation from the formality of law to the vulgate of ADR has also had its champions and its naysayers. That is, of course, a substantial story of its own, which in its fullness would exceed the bounds of this brief essay. Still, adolescence is nothing if not just one damn thing after another, and so some few words are in order, just to bring the ontogeny up to date.

1. William Miller, *Britain's Anglican Church Gets Working-class Leader—Some Traditionalists Fear Vulgarization*, BOSTON SUNDAY GLOBE, Apr. 21, 1991, at 10.

2. *Id.*

3. *Id.*

In the neonatal days of ADR, the most trenchant critiques were of two kinds. One, the more reflective, argued that depriving the courts of even some of their business would reduce the opportunities the courts otherwise would have to make wider social products out of the management of only superficially narrow individual cases. (What would have happened to America if *Brown v. Board of Education* had been privately mediated?) The other, the more reflexive, argued that litigation's clash of adversaries was the optimal procedure for determining truth, and truth was the nourishment of justice. ADR would substitute a supposed efficiency for a proven quality (and reduce the influence of the bar to boot, though of course that wasn't any critic's real motivation). While none of that powder has been fully stored, the challenges ADR faces today, as it grows up, are different. They arise from an amazingly widespread embrace of ADR by the courts, and by the now nearly inescapable use of ADR in the consumer sector of the private economy.

The trade-off between efficiency and justice is not in itself necessarily a bad thing. Efficiency for some cases in an overcrowded court system can mean more justice possible for other cases. The far bigger problem comes, I believe, from the difference between justice and satisfaction. The parties to a mediation, for example, craft their own solution. They accept what they negotiate if it serves their needs better than some next-best procedure would. Few people have absolute measures for assessing their own needs. Many people will be satisfied with what seems "fair." What seems fair depends upon what one expects. Those who expect little-to-nothing may think fair something the rest of us would not. In the law there are some absolutes—some things are, we have decided collectively, unfair. Mediation is negotiation and, to the extent the parties frame their own outcomes, their pre-existing inequalities may be replicated in their deal. Their differing perceptions of what is fair are among those inequalities. In these cases, ADR can produce less justice, not more. But how are we to know which cases are these cases?

In the commercial sector, corporations that deal with consumers have latched onto arbitration with a zeal late in coming but now irrepressible. Consumer arbitration in practice is redolent of the famous quip about America being a land of equality—both rich and poor are forbidden to sleep under bridges. The fact is that some of the features of arbitration affect differently situated parties differently, and the effects are systematic. For instance, discovery is absent or much reduced in arbitration. This benefits parties who tend to have information the opposing party needs, and hurts parties who need information the opposing party has. Consider health

care, employment, and consumer cases—all circumstances in which it seems that consumers are systematically likely to be in the class that needs information and corporations are systematically likely to be in the class that has it. The problem is that, in an economy marked by systemic inequalities of power and authority, a private adjudication system created by “freedom of contract” runs the risk of incorporating those same inequalities into what would otherwise be the balance wheel that is needed to police them. For their own reasons, courts keep their distance. The future, it might be guessed, will include a good deal of pushing and shoving, in an effort by some to make the courts observe the process from a row closer to the front. But how do we know *which* cases are in need of that scrutiny, and will providing it destroy the otherwise useful advantages of the private dispute resolution arena?

Adolescence is a very difficult time. Ungainly, uncertain, raging hormones looking for balance. The need to be accepted. The need to be distinctive. Learning how to behave in adult company. New languages, too, are hard to learn. We keep translating the new words into the old familiars for processing. Only when we are fully comfortable with the new can we let their sounds be graded on their intrinsic rather than their comparative worth. These are some of the challenges awaiting alternative dispute resolution as it matures into adulthood. The vernacular means the vulgate. Will we be cautious as well, lest it become the vulgar?

Quam optimam tibi fortunam volo, ADR. Or perhaps it would be better just to say, “Good luck.”

