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COMMUNITY COURTS: OFFERING ALTERNATIVE DISPUTE RESOLUTION WITHIN THE JUDICIAL SYSTEM

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INTRODUCTION

With the growing interest in new mechanisms for resolving disputes, including the notion of neighborhood justice centers,¹ four tasks commend themselves. First is to describe the range of techniques for the resolution of disputes now available. Second is to sort out, among the numerous themes, exactly why some new type of decentralized, neighborhood forum would be preferable to, better, or more effective than our current situation. Third is to determine whether such a local forum should be part of or independent from the existing judicial system. Fourth is to describe realistically how such an approach would operate in association with the existing judicial system. It is the purpose of this article to undertake these tasks by initially clarifying in general terms what goals or values would be served by establishing alternative dispute resolution mechanisms (ADRM's) at the neighborhood level, and then describing in detail how such a forum would work as a part of the judicial branch of government.

It is the author's contention from his experience as a municipal court judge in a setting utilizing some alternative approaches that

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1. See generally D. MCGILLIS & J. MULLEN, *NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS* (1977) (publication of U.S. Dep't of Justice, Off. of Dev., Testing, & Dissemination, Nat'l Inst. of Law Enforcement & Crim. Just.); see also, Sander, *Varieties of Dispute Processing*, *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 111 (1976); Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (Supp. 1978).

the existing judicial system of municipal, district, and police courts is fully capable, with some amount of adjustment and stress, of becoming a *community court system*.² While many of the notions that follow are rooted in the author's experience in the essentially decentralized urban court system in Boston, the author is well aware that such judicial decentralization is not the prevailing situation in many of the cities of our nation. Consequently, the limited attention that is given to the difficult political task of breaking up large, downtown municipal courts into neighborhood districts is not intended to disregard the problem. Rather, it is hoped that the effort spent here in elaborating the ideology and mechanics of a community court will help others in attempting the necessary boundary changes.

I. FIVE GROUPS OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

What are the actual alternative mechanisms currently under consideration? What is the operational framework or working model by which the judiciary would utilize them to create the community court? The initial question has been addressed by many offering the virtues of their approaches,³ but the latter has to date gone unanswered. This, of course, is largely due to the reluctance or disinterest of most to examine the strengths and weaknesses of a judicial association. It is also due, I am sure, to the inherent difficulties of such a structure, including the problems of creating alternatives, select-

2. For a contrary view see, Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973). Danzig argues against the likelihood of being able to transform the existing system and proposes a system of mediation to operate distinct from currently functioning institutions like city courts.

3. See, E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* (1977); MCGILLIS & MULLEN, *supra* note 1; Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966); Danzig, *supra* note 2; Johnson, *State Courts: A Blueprint for the Future*, in *COURTS AND THE COMMUNITY* (1978) (prepared for the National Center for State Courts); Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L.L. REV. 48 (1976); Sander, *supra* note 1; Smith, *supra* note 1; Statsky, *Community Courts: Decentralizing Juvenile Jurisprudence*, 3 CAP. U.L. REV. 1 (1974); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975) [hereinafter cited as *Procedures*]; Comment, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 AM. U.L. REV. 1253 (1975) [hereinafter cited as *Community Courts*]; Comment, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. C.R.-C.L.L. REV. 180 (1975) [hereinafter cited as *Pretrial Diversion*].

ing the appropriate disputants for them, supervising their operation, and providing fair trials when they fail. As the alternatives are described, it will help to clarify whether they can operate within the judicial framework. A more unified, holistic approach to their operation then follows the descriptions.

Professor Sander has described a "spectrum . . . of the available [alternative] processes arranged on a scale of decreasing external involvement."⁴ It is a useful chart, the general outlines of which I shall, with his kind permission, use for this article. I have added, however, additional detail in order to adequately portray both the existing and the realistic possibilities within each of his general categories. Although consistent with Professor Sander's scale of decreasing external involvement, the notions of negotiation and avoidance are not actually third-party operated ADRMs, and I shall stop short of them in my discussion.⁵

A. *Adjudication*

The features of the due process-adversarial-adjudicatory approach are well known. The presumed equality of adversaries, the detachment of the judge, the fixed rules of procedure, the trial by examination of proofs, the reliance on precedent, the coercive impact of a definitive decision, the availability of appellate review on a full and complete record—all are well ingrained in the life and imagination of our legal system.⁶ Professor Lon Fuller, in his classic examination of adjudication, gives a concise view of its essence:

Within this frame of thought we may say, then, that adjudication is a process of decision in which the affected party—"the litigant"—is afforded an institutionally guaranteed participation, which consists of the opportunity to present proofs and arguments for a decision in his favor. Whatever protects and enhances the effectiveness of that participation,

4. Sander, *supra* note 1, at 114.

5. The use of private negotiation may be enhanced by the availability or increased status of the other mechanisms. It may, on the other hand, like avoidance, diminish with the availability of so many other options. In fact, it is likely that the appeal of the new mechanisms will be so great that the role of avoidance will be diminished.

6. Rubenstein, *supra* note 3; *Procedures*, *supra* note 3.

advances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity.⁷

It is, of course, precisely this question of advancing or detracting from the integrity of adjudication which is posed by establishing ADRMs. As we move away from the characteristics of adjudication, care must be paid to the losses and questions must be asked about the alleged gains.

B. *Less Formal Adjudication*

The notion of adjudication less formal than the adversary process with its offers of proof, examination and cross-examination, neutral and detached arbiter, and other characteristics, presents the potential for other subspectra running along lines from rigidity to flexibility in several dimensions. The small claims court, for example, was intended to be an adjudicative forum with the basic change that traditional rules of evidence would not apply, thus making it easier for citizens to present their proofs in their own ways. Specialized courts and administrative tribunals were created to establish as decisionmaker someone who knew the subject matter in detail and could be flexible in process and decision, thereby reflecting the special needs of the field of law involved. One extreme in this regard is the notion of people's courts or popular tribunals, adjudicatory bodies at the local level in socialist countries in which the detached magistrate is replaced by citizen judges who enforce the largely political norms of the community.⁸ Of these many variations of the adjudicatory approach, three are potential components of the community court.

1. *Specialized Courts*

Small claims, traffic, housing, and even juvenile courts are all examples of the types of specialized sessions which a court may establish to adjudicate a unique set of grievances under special

7. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 19, reprinted in part in *ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS* 364 (J. Robertson ed. 1974) [hereinafter cited as *ROUGH JUSTICE*].

8. Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969), reprinted in *ROUGH JUSTICE*, supra note 7, at 404; Crockett & Gleicher, *Teaching criminals a lesson: a report on justice in China*, 61 JUDICATURE 278 (1978).

rules. A legally trained judge or specially trained layman presides. The parties present their proofs as in any adjudicatory forum, but the rules of evidence regarding what proofs may be presented, the standards for evaluating those proofs to reach certain conclusions, and the range of sanctions are generally more flexible than in standard court proceedings because of certain overriding policy goals inherent in each type of court.⁹

The criticism of these courts is twofold. If operating by themselves, they tend to become highly idiosyncratic, separated from the mainstream of judicial and even general legal life.¹⁰ More importantly, because they remain adjudicative and coercive in result, but alter the procedures to get to that result, critics condemn their lack of traditional due process of law.¹¹ The fatal flaw of the juvenile court movement, if one might venture to summarize hundreds of articles, is that it is neither fish nor fowl, neither a truly alternative mechanism nor a real court. As a hybrid it satisfies few, especially when important issues are at stake and the forum is exclusive.¹² What this tends to suggest then is that specialized courts like small claims are a useful component of the community court when the amount in controversy (dollars or social harm) is low, the possibility of review is high, the option to participate is reasonably voluntary, administrative control in the overall court system is clear, and the value considerations behind the specialized court procedures are generally perceived as valid in the society at large.¹³

9. For example, in juvenile court the safety and welfare of the child is the statutorily prescribed hallmark, while in small claims court simple, speedy, and inexpensive justice is the goal.

10. GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS, REPORT ON THE STATE OF THE MASSACHUSETTS COURTS 6-17 (1976).

11. In his article, Professor Griffiths deals with the failure of the juvenile court movement in his discussion of the Family Model, and stresses that a considerable part of the failure to treat children with dignity arises from the neglect of their due process rights. Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 399 (1970).

12. It may well be true that despite its lofty ideals the problems of the juvenile court really stem from the startling rise in juvenile crime and its impact on society. The recent changes in New York State juvenile justice statutes requiring that a different division of the Family Court try those between thirteen and sixteen charged with crimes of violence reflects this reality that alternate systems only work well with the consent of both the participants and the larger society.

13. The growth and success of the consumer movement in the United States has been the largest single force confirming and sustaining the small claims court movement, in nota-

2. Arbitration

Arbitration, because it leads to a binding decision by a neutral third party through the production of proofs by the disputants, falls within this category. Its informality, once again, comes in the way the guiding principles are set, the proofs presented, and the adjudicators chosen. Usually this is all set out and provided for in a contractual agreement between the parties, but it is now increasingly being required by state legislation in certain types of disputes.¹⁴ The strength of arbitration for the community court concept is that while its results are coercively imposed upon the participants, they themselves have usually chosen by a private process of negotiation, the manner and means by which the decision will be reached. This gives them a sense of participation in the results and less reason to complain about them. While a community court would not be the proper forum for many types of arbitration currently being handled outside the courts, the principles and methods of arbitration would be suitable for resolving certain of the disputes brought into a community court.

3. Screening

This covers the range of more informal processes by which a third party—usually a judge, but possibly a magistrate, clerk, or master—narrows the issues for trial. Some of these techniques are required by statutes, rule, or local custom.¹⁵ Others are available should the parties or the court wish to use them. Although this approach does not by itself lead to the definitive resolution of a dispute as do specialized courts and arbitration, the aid it provides to the task of formal adjudication is significant. In fact, its results can well be the catalyst to out-of-court settlements or dismissals. Frequently known as pretrial conferencing or reciprocal discovery,

ble contrast to the destructive influence of the growth of juvenile crime on the juvenile court philosophy. A recent nationwide study of fifteen small claims courts confirms that 62% of the consumer-buyer plaintiffs won their small claims cases, and they were awarded 68% of what they sought. Rhunka & Weller, *A Preliminary Report on an Empirical Study of Fifteen Small Claims Courts*, Tables 8 & 9 (May 1977) (prepared for the ABA National Conference on Minor Disputes Resolution) (to be published as NATIONAL CENTER FOR STATE COURTS, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION).

14. Sander, *supra* note 1, at 116.

15. *Id.* at 129.

the creative possibilities in screening, particularly by nonjudicial or expert third parties, are just beginning to be explored. Some schemes, such as the Massachusetts medical malpractice statute, raise serious constitutional questions.¹⁶ Nevertheless, the educational value of screening in letting parties know something of the true nature, cost, and likelihood of success of their proposed litigation is impressive.¹⁷

In the context of the community court, screening implies both that described above and the necessity of determining whether any of a number of ADRMs would be appropriate for a dispute. While this latter task is quite complex and of major concern in developing a working model of the community court, the former is also important since those disputes which initially are handled by one of the alternatives can and do return to court. Judges in the community court will need screening mechanisms prior to trial simply to clarify issues, to expand discovery, and to resolve preliminary disputes such as the admissibility of evidence. If those mechanisms can also work to terminate the litigation, all the better. A simple, frequently encountered example in municipal courts is the misapprehension, rarely cured by counsel, about the range of possible nonharmful penalties for youthful first offenders charged in certain incidents. Once counsel for the accused and the prosecutor, and possibly the judge,¹⁸ screen the evidence in the case and review the nonpunitive, open-ended dispositions which give the court some social control over the perpetrators, a more conciliatory approach is often taken by all parties and the charges can be quickly resolved.

16. The constitutionality of the Massachusetts statute, MASS. GEN. LAWS ch. 231, § 60B (West Cum. Supp. 1977), was recently upheld in *Paro v. Longwood Hospital*, ___ Mass. ___, 369 N.E.2d 985 (1977).

In the first eighteen months of the statute's operation, slightly over half of the malpractice claims taken before the screening tribunals were rejected. Of those only 25% posted the required bond to proceed further into litigation. *Malpractice: 2-Year Report on New System*, Boston Globe, Mar. 6, 1978, at 1, col. 6.

17. Sander, *supra* note 1, at 129 n. 46.

18. Judicial participation in such screening in lower courts is frequent, often more to move the docket than to honestly try to clarify misapprehensions. Judges vary tremendously in their approach to screening, some participating fully, offering the option to send the case elsewhere for trial if their efforts fail, others giving signals and then withdrawing to preserve the purity of their function. The dilemmas involved are not unlike those associated with judicial participation in plea-bargaining as described in Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

C. Fact-Finding

Fact-finding, or the investigative approach, has not generally been a component of our judicial system, except to the very limited degree that bodies like grand juries and boards of inquests are related with the courts. In fact, a sweeping contrast is usually drawn between the Anglo-American adversary system and the continental "inquisitorial" system. The debate over which determines facts more accurately and reliably in criminal cases is continuing.¹⁹ Proponents of fact-finding stress the singular unimpeded task of the fact finder:

It is easy to see what lies at the core of the described manner of presenting evidence. The decisionmaker is active; he uses the informational sources himself. Information does not reach him in the form of two one-sided accounts; he strives to reconstruct the "whole story" directly.²⁰

Of equal importance is the fact finder's status. If selected by the consent of the parties, the likelihood that his or her findings will be carefully weighed by both sides is increased.²¹

In the increasingly popular notion of the ombudsman, such a person assists the individual in investigating large, powerful institutions (*e.g.*, state agencies, private businesses, the courts themselves), and his or her authority in the eyes of the complainant derives from that demanding role.²² An ombudsman's status in the eyes of the organization being investigated, however, is often subtly affected by maneuvering within and outside the bureaucracy. Nonetheless, the role is promising when the relevant agencies, corporations, or individuals agree to this form of preliminary inquiry and give the ombudsman full access to records, files and all levels of personnel. As previously noted in the case of screening, a detailed explanation, or an explanation accompanied by an apology or by corrective action, can resolve many specific complaints. Studies indicate that large businesses are much more comfortable with, and

19. Damaska, *Presentation Of Evidence And Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975).

20. *Id.* at 1090.

21. Sander, *supra* note 1, at 116.

22. Verkuil, *The Ombudsman And The Limits Of The Adversary System*, 75 COLUM. L. REV. 845 (1975); see also Sander, *supra* note 1, at 116.

better able to resolve satisfactorily, specific rather than general complaints from customers.²³ The popularity and apparent success of newspaper write-in columns (e.g., "Tell it to Joe") further attests to this.

The limitations of fact-finding should be apparent from its position midway in our spectrum. The fact finder has no coercive power or sanctions, operates without rules, procedures, or precedents, and is motivated solely by his or her own internal motivation to find all relevant proofs.²⁴ On the other hand, where the dispute is factually complex, the relevant data available, and the parties themselves consent to have an outsider with some competence intervene, fact-finding can be of great benefit in encouraging early settlements.

One example of this is a dispute in which numerous cancelled checks, envelopes full of assorted receipts, or complex tally sheets are produced on both sides. A fact finder is especially useful in sorting all this data, especially when it involves obtaining duplicates from other sources or proposing alternate explanations for the confused data about which the witnesses may then be questioned.²⁵

Given the potential efficacy of fact-finding in resolving disputes and complaints, fact-finding by a trained ombudsman, clerk, or community volunteer would be an important component of the community court.

23. Nader & Singer, *Dispute Resolution*, 51 CAL. ST. B.J. 281, 313 (1976).

24. Some fact finders have limited subpoena and contempt authority, and the fact that no advocates participate to help produce relevant material is modified, as Professor Damaska indicates in his description, by the parties participating in argument after the judge finishes his questions:

After the proof-taking phase of the trial is over, the predominantly unilateral style of proceeding comes to an end. Then summations of facts and legal argumentation must be presented. Each side makes his own one-sided assessment of the evidence heard and advances his legal arguments. Exchange is permitted, but the defense must have the last word. Before the bench retires, the defendant is given the chance to make a final statement, which usually contains a potpourri of what can be classified as testimonial statements and exhortations to render certain decisions.

Damaska, *supra* note 19, at 1090.

25. Such a preliminary evaluation or report would be similar to the *docia* prepared prior to court in the inquisitional system. *Id.* at 1089.

D. *Diversion*

Diversion programs come in many packages and are now well established nationwide.²⁶ Common to most is the intervention of a third-party screener or counsellor if the accused disputant (*i.e.*, the one complained about) is willing to forego the traditional adjudicatory process and participate in a prescribed path of treatment, counselling, job-training, and so on. Basic to diversion is that one party to a dispute should consider changing his or her behavior rather than pursue the particulars of the dispute to a clear-cut resolution. A precise definition is that found in a recent law review comment:

In the context of the criminal law, diversion means the suspension of formal criminal proceedings before conviction on the condition that the accused will do something in return. Diversion programs use the threat of possible conviction to encourage an accused to participate in a rehabilitation program, undergo psychiatric treatment, modify his behavior, or hold certain employment.²⁷

In essence, diversion as an ADRM is related less to the court's traditional role as ultimate settler of disputes and more to its troublesome role as final resort for solving social ills. For the disputant in question here is in actuality the drug or alcohol abuser, the defendant in a criminal case, the child under petition as delinquent or in need of services, the landlord of purported sub-code housing, or the alleged child or wife abuser.

Among the other characteristics of diversion is the underlying philosophy that many violations of the criminal law are, in fact, more indicative of illness (*e.g.*, drug addition or alcoholism) or other disabilities (*e.g.*, lack of employment, schooling, or job skills) than of a purposeful, dangerous criminality. The availability of treatment, counseling, education, and similar options is therefore of greater value to the individual and the larger society in which he or she lives than the symbolic act of his or her conviction.

A logically related characteristic of diversion thus is specifying required behavior to meet perceived social needs. In other words, a court or court-related agency may operate several diversion pro-

26. R. NIMMER, *DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION* (1974).

27. *Pretrial Diversion*, *supra* note 3, at 180.

grams each specially tailored to current community problems such as drug abuse, alcoholism, car theft, bad checks, or housing code violations.²⁸ Consequently, while the process may be generally described as one of choosing "treatment" rather than prosecution, the specific course of treatment is not mutually determined, but is pre-determined, often quite rigidly, by the court and the intervenor. Failure in that course of treatment means return to the court for its normal processes.

A third characteristic of diversion is that the intervenor (such as a program representative, counsellor, or social worker) who offers his or her substantive skills must at the same time monitor the participant's progress along fairly well-established lines, tolerating only minimal backsliding, and must report definitively to the court on success or failure at the end of the specified time period. This can push the intervenor into the awkward position of having to meet conflicting demands of several roles and loyalties. Rigid disciplinary and reporting tactics may not be the most appropriate method to meet the need of a troubled client.

Finally, a characteristic which varies dramatically from program to program is the nature of the reward given the successful participant. Some diversion programs, particularly those established for youth, eliminate not only all contact with the court, but any record of the initial contact with the police that led to diversion. Others of this "pure diversion" variety eliminate all court proceedings and result in the early termination of charges. Less pure approaches may require stipulations as to evidence, but still give a favorable termination in the end, or may simply guarantee a lesser penalty. This spectrum running from no record/no court to some record/some punishment surely plays a major role in how many participants choose diversion over trial.

It should at this point be quite apparent that diversion programs suffer from a major gap between the motivations of those who establish them and those of the persons who enter them. The incentive to beat the charges may never find common ground with the

28. One well-documented example is found in Laszlo & McKean, *Court Diversion: An Alternative for Spousal Abuse Cases* (Jan. 1968) (paper presented to the U.S. Civil Rights Commission).

rehabilitative notions inherent in diversion. Some argue that this approach is as coercive as conditioning probation on treatment and, despite the elimination of a conviction and sentence, is just as ineffective. Others say it robs the accused of any meaningful choice to go to trial and prove his or her innocence.²⁹ However, there is some vitality in the concept of free choice, if only legal.³⁰ Moreover, there is the notion that "a little bit of Sunday school won't hurt you, . . . and some might rub off." The issue is not whether diversion should be offered in the community court, but for what disputes and with what safeguards.

Because diversion programs have been operating longer than most of the ADRMs under consideration, a somewhat greater body of data is available both to describe and to evaluate them. The programs basically fall into four categories: (1) treatment; (2) employment; (3) counselling; and (4) monitoring of behavior. Treatment programs include all those approaches in which the accused attends or undergoes a medically determined course of action including treatment for drug addiction, alcoholism, sexual deviance, hostility, depression, or other forms of mental illness. Employment programs are those which offer or require vocational assessments, job training, skill updating, employment referrals, and employment counselling. Counselling programs involve consultation and guidance on a variety of pressures and problems that can lead to court such as marital, parental, monetary, and neighborhood difficulties. Behavior-monitoring programs simply require the disputant to do or to refrain from doing certain specific acts, such as repairing a sub-code apartment, refraining from threats, and the classic "staying out of trouble."

The greatest amount of data is available about employment programs and the results are favorable.³¹ Although such programs

29. *Pretrial Diversion*, *supra* note 3, at 180.

30. Legal concepts of knowing and intelligent waiver, including waiver of the right against self-incrimination and the right to speedy trial, logically apply here. *See generally* *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

31. Data from the Manhattan Court Employment Project of the Vera Institute, cited in Danzig, *supra* note 2, at 53 n.170, indicate that 61% of the people in their diversion program completed it and had their cases dismissed, and of these 15.8% were rearrested; yet for those who failed in the diversion project and were returned to court for trial, the rearrest rate was 30.8%.

are expensive and difficult to replicate without additional funds and extremely dedicated court staff and volunteers, the distinct relationship between unemployment and crime and the existing positive data urge their inclusion in the community court.

There is much less reliable information about treatment programs. The author's experience with drug programs indicates failure regardless of methodology. There is some evidence, mostly impressionistic, that alcohol programs are more successful, particularly if the accused has some reason to participate and obtain help. Two unknown variants in the treatment approach, which lead to further confusion about the nature of success and make data hard to gather and evaluate, are the differences from court to court in the seriousness of the charge and the availability of mental health resources.

There exists relatively little data about counselling and behavior-monitoring programs. It does appear, again impressionistically, that the greater the degree of challenge or threat in the issues or persons involved in counselling, the less likely the person is to continue. Conversely, if the topic is general, the relationship pleasant, and the perceived reward important to the participant, the completion rate can be high. Affirmative behavior is more likely to be induced where there is a distinct benefit to be gained, such as the return of a driver's license for attending driver education classes, or where strong social or neighborhood norms demand the result, such as restoring hot water to an elderly tenant. And finally, behavior which requires only avoiding major consequences (*e.g.*, "don't get arrested again," "don't be seen in that place again") is quite likely to come to pass among first offenders.

The challenge of diversion for the community court is that of finding and offering meaningful rewards (such as no criminal record, the return of one's license, or the chance to keep a job) for altered patterns of behavior directly affecting neighborhood health and welfare. Drugs, alcohol, unemployment and unemployability, vandalism, and family disruption and dissolution are familiar urban problems, most of which ultimately surface in court. The needs of the individual accused are often too clear and too overwhelming for anything other than an immediate carrot-and-stick coerced treatment approach to catch hold. The gap between the accused's often confused reasoning for choosing diversion and the higher goals of the intervenors may never be resolved. But if he or she is offered an

informed choice, makes it in a legally proper manner, and has access to the trial's formal processes of dispute resolution if and when he or she wishes, then the pressure and stricture imposed outweighs the relatively minimal loss of free choice imposed.

E. Mediation

Widely heralded as the most promising of the ADRMs, mediation is just now being seriously attempted within several courts.³² Whether one starts with the scholarly explanations of its virtues or with the reports of its evaluators, common claims emerge about its values. First, a noncoercive "third party facilitator," drawn from the community, specially trained and speaking in common, everyday language, is said to be a far more acceptable, patient, and understanding intervenor than a judicial officer.³³ Second, the process, described by Professor Fuller as "helping [the parties] to achieve a new and shared perception of their relationship," is so different in its openness, mutuality, and flexibility that it should encourage much fuller participation than occurs in court.³⁴ Third, the orientation, through the special skills of the mediator, toward the parties' developing underlying root causes of the dispute far exceeds the capacity of the adversary system to develop that perspective, particularly from the mouths of the disputants.³⁵ Fourth, the educational nature of the process both among participants and for the larger society is vastly different from the court's emphasis on the threat or reality of punishment to maintain social control.³⁶ Fifth, when the mediation is completed, verbal or written agreement among the parties is not only the result of a participatory process, but it has the normative weight, and implications if broken, of a community pledge.³⁷ Few participants in court, it is argued, feel

32. MCGILLIS & MULLEN, *supra* note 1, at ch. 3, reviews six case studies of dispute processing projects all of which offer mediation.

33. Sander, *supra* note 1, at 115.

34. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

35. Sander, *supra* note 1, at 115; Smith, Book Review, 87 HARV. L. REV. 1874, 1876-77 (1974) (YAFFE, SO SUE ME! THE STORY OF A COMMUNITY COURT (1972)).

36. Smith, *supra* note 35, at 1876. Smith takes a particular note of ways in which the Jewish Conciliation Board differs: reconciliation, understandable commonsense solutions, education regarding the basic sources of the differences, follow-up by court and staff, and attempts to probe the roots of the conflict so that it does not reoccur.

37. F. Snyder, *Crime and Mediation: The Boston Experience; A Case Study of the Mediation Component of the Urban Court Program in the Municipal Court of the District of*

anything but the stigma of being "the accused" regardless of the result.³⁸ Sixth, the available follow-up of the mediator and the immediate access to a return to the mediation process is preferable to the cold formalities of a fine, probation, or the collection process.³⁹

Because of the many differences in process and personnel, the question of coercion to undertake mediation is much easier to resolve than with diversion. The substantive merits of mediation, in terms of what the disputants might actually get out of participation, including education, new insights, or altered personal relationships, are of a different magnitude from "beating the charges" or "getting help" so frequently associated with diversion. Lawyers play a much more limited role in the decision to enter mediation than they do in the choice of diversion. Lawyers seem to direct clients into diversion for a variety of good and bad reasons, such as saving time or money, fear of trial, or incompetence. It is also anticipated that because disputes appropriate for mediation will arise more often in the civil than in the criminal area, the fact of failure, meaning automatic return to the judicial process, is reduced, and thus freer participation is encouraged. For numerous reasons, including case-

Dorchester 49, 72, app. C (1977) (unpublished LL.M. thesis in Harvard Law School Library) (to be published in the University of Wisconsin Law Review under the title, *Crime and Community Mediation: A Boston Experience; A Preliminary Report on the Dorchester Urban Court Program*).

In the Dorchester mediation program, the agreement reached by the disputants is written down by the panel of mediators at the end of the hearing. It is then read aloud to the disputants; they are free to ask questions or make clarifications. After the final form is reached, the disputants sign the agreement and the panel members witness it. The following day typed copies are sent to the disputants and, depending on the source of the referral, the court clerk or the district attorney and the judge.

38. Griffiths, *supra* note 11, at 366. Griffiths describes Packer's battle model of the present criminal justice system as focused on "a particular and limited conception of the substantive function of criminal law—prevention and retribution." Both of these aspects are directed at stigmatizing the accused, though this is not the ostensible purpose of the prevention aspect. He deals specifically with "the special air of desperateness" which characterizes the stigmatizing process in contemporary criminal trials. *Id.* at 385-86.

39. In the Dorchester program, mediation component staff contact the disputants after two weeks and again after two or three months. Often specific parts of an agreement must be checked, such as an exchange of property. Social service referrals made at the time of the hearing or subsequently are also monitored. Second mediation sessions are available, and the parties are reminded that the dispute may be returned to the regular criminal process, although they are encouraged to reach a resolution themselves. During the first 14 months of the program, 40 agreements (18.9%) broke down and were returned to the regular criminal process. Snyder, *supra* note 37, at 84-85.

load management, proving their own success with easy clients, and keeping up good relationships with the court, diversion programs have rather fixed standards of success. This contrasts sharply with the more fluid processes of mediation by which only a partial solution, or even a solution incorporating some degree of avoidance, may be what the parties choose. Realizing this they should feel freer to choose mediation.

Judicially-ordered and attorney-pressured mediation remains troublesome. The availability of full information about mediation, continual reliance on the concept of free choice by potential participants, and the flexible pattern of the process itself to respond to user dissatisfaction, all offer some hope of dissipating the mood of coercion that surrounds other alternatives. Whether it is of any comfort on this issue, it will always be necessary that various incentives exist for disputants to use all the ADRMs. Once methods are devised so that the most irrational pressures to use mediation are eliminated, the fact that some people make unwitting choices should be tolerated.

There are at least three types of disputes for which mediation seems appropriate. These are certain types of neighborhood, family, and isolated "I want to be heard" disputes in which the disputants know each other and certain specific needs of theirs can be better met by the unique characteristics of mediation. Mediation may well also work for what Nader and Singer call the "general complaints" of consumers.⁴⁰ The alleged insensitivity of larger corporations to consumer desires for product or policy changes may be more thoroughly explored and thus better understood through mediation than through trial. Another area offering tremendous potential for mediation are disputes among those who participate in closed or even captive institutional settings such as public housing projects, schools, and prisons. While mediation programs are now being established within these settings, many such grievances still reach court untouched by a conciliatory approach. Not only may mediation, as an alternative to trial, produce insights and solutions to individual grievances, but it offers the potential for grasping the larger problem so often found in institutional settings where individ-

40. Nader & Singer, *supra* note 23, at 313.

ual grievances tend to pile up and then burst into more serious problems or even major litigation. A simple example is the school suspension situation which results in repeated suspensions until someone—maybe a judge in family court hearing a delinquency petition, maybe a federal judge after a civil rights suit is filed, or maybe a mediator—gets to the bottom of the matter and learns of bias, unwise policies, or unskilled personnel.

One reason mediation has received so much attention as an ADRM is because it is quite different in procedure and personnel from the court system. Approaches like screening, specialized courts, and fact-finding are more familiar to the judiciary because they already use variations of them and the staffing involved is usually from within the court. Mediation poses difficult new questions not just of function but also of staff selection, training, and relationship. Mediators should ideally be chosen from the community, be trained by organizations specializing in dispute resolution, and have a clearly defined and understood relationship to the operation of the court.⁴¹ While it is anticipated that the mediators, even though chosen from the community in which they work, will become a skilled paraprofessional group, a distinct problem of sustaining them in their work may emerge. Similarly the cost of a full-time mediation program, particularly if the mediators work in panels, can be significant.⁴² One solution worthy of further exploration is the use of volunteers, selected from established community sources such as churches, labor organizations, social agencies, and retirement homes. These individuals would receive special training, work individually for expenses only, and would be on call from a

41. Dorchester mediators are trained in a three-week evening and weekend program by staff members of the Institute for Mediation and Conflict Resolution, based in New York City. The sessions use lectures, written materials, and role-playing. Heavy emphasis is placed on the nature and purpose of mediation—understanding of the nature of the conflict, encouraging a will to settle, and negotiating a satisfactory agreement, all focused on the active role of the disputants themselves. The mediators are trained to be empathetic rather than judgmental. Snyder, *supra* note 37, at 74-78.

42. Though cost is a major element of concern in setting up ADRMs, this article does not deal with it. A review of studies of some of the currently operating programs (*e.g.*, Dorchester, Columbus night prosecutor's program) indicates that savings in court expenses may be expected to result from using an alternative method as compared to litigation, not to mention saving the litigants from having to pay attorneys' fees. However, more concrete data from operating programs will be required before a reliable study of actual and anticipated costs can be carried out.

rotating list, much as labor arbitrators are presently chosen. Once criteria for selection and referral were established, court personnel could easily undertake the task of selecting the mediators and arranging for everyone to start work together.

F. *Information and Referral*

At the far end of the spectrum, associated with the court only because it would be located inside the community court, is the information and referral desk. Long a favorite tool of social agencies and social workers, this approach seeks to provide disputants with the greatest possible information about their options. As is often noted, many Americans, despite our growing range of dispute processing institutions, do not know about them or how to use them.⁴³ Once they locate a source of information, they are further frustrated by the process of continuous referrals, and real help seems quite elusive.⁴⁴ Accepting the reality that Americans are turning to their courthouses in ever increasing numbers not only to press articulated grievances, but also in search of answers to unarticulated frustrations, the use of the courthouse as an information source is inescapable. Knowledgeable personnel, possibly on duty around the clock, would answer questions about the availability and functions of the court, the ADRMs, and other outside agencies. They would also provide the specific information necessary to get access to a trial. Questions about locations, preliminary requirements, entry fees, procedures, attorneys, and so on, could be routinely answered, possibly with the aid of simple pamphlets.⁴⁵

43. Theoretically, Americans have access to a great number of old and recent institutions where disputes may be processed: newspaper, radio and television action lines; Better Business Bureaus; city consumer departments; consumer fraud offices of state attorneys general; toll-free hot lines set up by companies; ombudsmen; advertising review boards; consumer voluntary complaint centers; neighborhood legal services; congressional constituent complaint handling; union complaint systems, etc. In actual fact, knowledge and use of these organizations and others, from small claims courts to consumer offices, varies, as does the satisfaction of users with their results.

... Even if a potential user learns about a possible remedy agent, he or she probably will not know how or what procedures to follow. In many cases the intricacies of filing a complaint are prohibitive.

Nader & Singer, *supra* note 23, at 312.

44. *Id.*

45. For example, the East Palo Alto, California, neighborhood court program uses a

Information and referral is essentially a noncoercive recognition of where people go for help. In reality, however, the person giving information or making a referral is just another intervenor, although at a very preliminary level. Studies of street-level complaint centers, like the walk-in bureaus of prosecutor's offices or consumer fraud agencies, indicate that the potential for *ad hoc* screening, categorizing clientele, and making functions routine, is very real indeed.⁴⁶ The fine lines between giving information and making a recommendation and between making a referral and imposing a requirement—particularly when the task is in the hands of court personnel—suggest more caution here. What would help would be community participation, as in the concept of the community court with a number of ADRMs available in various well-marked rooms of the courthouse, and a requirement of that strict lawyer-like admonition to all inquiries, "all I can review with you are your choices; it's your decision." Ultimately, however, the role of the information and referral desk is in the hands of those operating the community court. If they want certain types of disputes sent to certain mechanisms, and certain others sent home or elsewhere, they can give such instructions. On the other hand, as argued in this paper, if they want to enhance the free use of such untested notions as outlined here, they will allow for informed self-determination. Only when a variety of alternatives has been established, and citizens offered the freest chance to choose among them, will we begin to understand the reasons behind their grievances and how they think they can best resolve them.

II. CLAIMS FOR ADRMs VS. REALISTIC POSSIBILITIES

There are at least five noteworthy themes which recur in the increasingly frequent discussions of the virtues of local or street level resolution of disputes through alternative mechanisms:

simple, brief leaflet to publicize and explain its functions. Massachusetts Small Claims Courts send, along with the summons, a pamphlet explaining the operations of the court and defining legal terms contained in the summons and likely to be used during the court proceeding.

46. Lipsky, *Toward a Theory of Street-Level Bureaucracy*, URB. AFF. Q. (June 1971). Similar observations are found in Lipsky, *Street Level Bureaucracy and the Analysis of Urban Reform*, in NEIGHBORHOOD CONTROL IN THE 70'S: POLITICS, ADMINISTRATION AND CITIZEN PARTICIPATION 103 (G. Frederickson ed. 1973).

(A) The likelihood that ADRMs will reduce the burdens on our formal court system;

(B) The possibility of reducing the need for attorneys and discovering new forms for delivering legal services;

(C) Finding more accurate or "better" truth-finding techniques than the current processes provide;

(D) The opportunity for enhanced community participation in local affairs; and

(E) The potential for a more stable, "healthier" social structure if citizens' grievances are more quickly and successfully resolved through ADRMs than they would have been through traditional means.

As the ensuing discussion will reveal, each of these goals is not only difficult to attain in and of itself but is, in fact, countered by serious considerations of opposing values. Most of these opposing considerations are of such magnitude and bear so directly on as yet unresolved issues of design that further consideration of the operational details of a community court cannot proceed without careful attention to them. In the following pages, I will describe the outlines of each debate and then indicate my own preferences and conclusions. Having set forth these choices, I will proceed in the third and fourth parts of this paper to illuminate my own, I hope consistent, notions of how a community court would operate within the framework of the judicial system.

A. *Volume of Caseload vs. New Duties*

The most popular theme being heard in the media and among the organized bar in support of alternative dispute resolution methods is that they will reduce the flow of cases into our courts and thereby help in reducing backlogs.⁴⁷ Little, if any, tangible evidence is available to support this thesis.⁴⁸ The speculation, however, runs

47. "When the program succeeds, no one pays a fine or goes to jail, no one suffers the expense of a court trial, and no one is forced to wait months for a hearing." Stanley, *President's Page*, 63 A.B.A.J. 753 (1977).

48. The data from Dorchester are inconclusive on this point. Data are not maintained on the nature of disputes and relationship of disputants in matters disposed of through court, so no comparison is possible with the cases handled by the mediation component. Moreover,

along two lines. First, we are a litigious society in which many minor complaints, both criminal and civil, wind up in court. If some number of these can be quickly resolved by alternate means, caseloads of lower courts would thereby be reduced. Second, certain types of citizen grievances (*e.g.*, neighborhood disputes) are known to fester and grow if not resolved at the start, whether in or out of court. The eventual outcomes can be as serious as murder and contribute to the volume of time-consuming cases on a court's docket, as in jury trials on evictions and small claims cases. Most of this thinking is, therefore, axiomatic—if we can reduce lower court intake, those courts will not have as many cases to hear; thus they can either spend more time on the ones they do hear or catch up on their backlog. Without even attempting to resolve the last possibility, there is a range of practical considerations that make even the generally anticipated gains unrealistic.

First, many lower courts are simply not overwhelmed with work, and to the degree they are, they have already developed various types of diversionary and caseload reduction techniques. One striking example of this is that virtually every jurisdiction in this country has, by statute or custom, a procedure by which proven charges against a first offender may be continued for a period of time and then dismissed without any conviction resulting. This is compounded by the fact that most urban courts of initial jurisdiction do only two tasks in the criminal field—either try lesser charges (misdemeanors) to conclusion or send up (“bind over”) more serious charges (felonies) for further proceedings in a higher trial court. For that large volume of misdemeanor cases which the lower courts complete, they play, and play quite well in most jurisdictions, the role of adjuster. The widespread use of consensual dismissals, out of court restitution, informal pretrial probation, and drug and alcohol diversion programs confirms this observation. How they accomplish this—who participates, where the balance is drawn between due process and rough justice, what forms of review are available

the number of complaints issued in Dorchester rose after the mediation components began operating—possibly because people who would not discuss their disputes in open court would bring them to the courthouse if a private session for resolution became available. Snyder, *supra* note 37, at 54, 124.

for the disgruntled—is another issue.⁴⁹ The important debate is not over reduction in volume but over the methods used in our lower courts to keep the system moving.

A related observation about the work of lower courts is that they simply do not handle, by trial or otherwise, the types of cases that make up the backlogs of the major trial courts. By whatever range of diversionary techniques, plea bargaining, and trial list management, the lower courts do retain and dispose of a high volume of neighborhood, family, juvenile, and consumer grievances.⁵⁰ Only the occasional husband-wife squabble or neighborhood “beef,” which goes unresolved in municipal court only to boil over into a serious assault and battery or murder, can be said to build the superior court’s trial list unreasonably. Poor prosecutorial decisions and/or unreasonable judges can also do so by not reducing charges or by inflexibility. Consequently, it is the author’s view that localized resolution of disputes must be viewed not as an improvement in efficiency or the salvation to backlogs, but on its own merits as to whether it resolves disputes effectively.

49. [L]ower courts are visible institutions that, for purposes of supervision and evaluation, function invisibly. . . .

In such a setting judicial style tends to emphasize outcome over process, leaving the judge free to draw on extra legal criteria in his determinations. Thus, we find the actual decision-making process of the lower court to be a mere shadow of the formally prescribed adversary procedure of reasoned adjudication. Most cases are handled by well-developed routines. Guilty pleas predominate. Trials occur swiftly, often with the presumption of innocence and the burden of proof inverted. Right to counsel may be slighted, or presented as a liability . . . Defendants may also be persuaded or coerced into waiving rights to trial, appeal, discovery, or confrontation of witnesses. Fact-finding and sentencing turn on rough rules of thumb, rather than on an orderly exploration of the individual case. Contributing to the atmosphere of rough justice is a pervasive sense that the defendant, once he has entered this legal machine, has lost his claim to be treated as a unique being with an intrinsic moral worth.

ROUGH JUSTICE, *supra* note 7, at xix.

50. Not only are most criminal cases initiated in the district courts, but 96 percent of all criminal matters are finally disposed of at the district court level. In fiscal year 1968, 537,957 criminal charges were brought in the district courts. By comparison, in the Superior Court, only 11,982 criminal cases were brought as original matters—*i.e.*, cases not tried first in the district court. In this same period only 11,371 trials *de novo* were noted, 2 percent of all cases brought in the district courts.

Bing & Rosenfeld, *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston*, reprinted in part in ROUGH JUSTICE, *supra* note 7, at 259.

A second reason why the development of ADRMs will have little effect on reducing court caseloads lies in the nature of the new techniques. Whether they are operated within or outside the courts, and whatever may be their operating methodology, the existing experience shows that they will be utilized.⁵¹ Whether by reason of publicity, court referrals, the need to prove themselves successful, or mere virtue, alternative fora have been well filled with users. Perhaps it is the need for a sympathetic ear—the availability of a place just to talk things out. If the system is actually detached from the court system, this use may free some judge and court time. But since these mechanisms have to date required either indirect court involvement in their creation, supervision, and monitoring, or direct court involvement in screening, referral, and re-referral into the judicial process, little real time-saving is anticipated. If, as this author advocates, the existing municipal court is to become the community court offering a variety of approaches to dispute resolution, no judge or court administrator should realistically plan to cut backlogs or have fewer jury trials. In fact, it may well turn out that in such a community court, some additional time is required of the judge, at least initially and perhaps continuously, to plan and to initiate the new approaches, to advise litigants and attorneys on their options, to make referrals, and to handle matters sent back into the judicial system after the recommended alternative failed.

A final perspective on the question of caseloads takes us into the debate on “avoidance”—the American citizen’s alleged preference to avoid dispute-settling institutions, preferring to walk away from minor grievances and contentious situations rather than make a complaint or file a lawsuit.⁵² If this description of citizen behavior in “technologically complex, rich societies” is in any way accurate,

51. See MCGILLIS & MULLEN, *supra* note 1, at 110, 125, 136, 152.

52. Felstiner describes his concept of avoidance by reciting a few common techniques of reducing or eliminating contact with a person or persons likely to result in friction (e.g., family members), dissatisfaction (e.g., merchants), or minor dispute. He goes on to state:

The cost of avoidance is always a reduction in the content of the relationship which has been truncated or terminated. If the relationship was geared to a single interest, only that interest is affected. If the relationship was multiplex, all the interests are affected, even though the cause of avoidance grew out of only one.

Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & Soc’y Rev. 63, 76 (1974).

two relevant ideas seem to follow: First, many minor disputes simply do not come to court at all for a variety of reasons;⁵³ and second, for those that do, the use of alternate mechanisms is not an appealing choice to obtain resolution and therefore court caseloads can expect to remain at present levels.⁵⁴ This notion has been rebutted by proponents of extended use of mediation in the United States.⁵⁵

The behavioral preferences of the American population, however, remain essentially unknown. Each party to the debate cites certain limited data tending to support its claims.⁵⁶ To date, unfortunately, most of the carefully collected data come from mediation alternatives which exist within or in close relation to existing court systems, thereby eliminating the element of pure or totally free choice by citizens. And, as previously noted, these existing alternatives, for a variety of possible reasons, are being actively used by participants.

In sum, the argument of reducing court loads by increasing ADRMs has, in and of itself, little real substance. The realities of lower court work, the anticipated involvement of the judiciary in the work of community courts, and the possibilities of avoidance all

53. *Id.* at 65-67.

54. Felstiner's discussion focuses in part on the feasibility of mediation, given the cultural characteristics of a technologically complex, rich society, and thus asks that close consideration be given to mediation on its merits for each society proposing to make extensive use of it. *Id.*

55. See Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 L. & Soc'y Rev. 675 (1975), which brought the following reply, Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 L. & Soc'y Rev. 695 (1975).

56. Professor Danzig in his major piece, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, *supra* note 2, cites a limited amount of data. In certain areas of California, referral programs for juveniles operate to shift offenders away from traditional judicial intervention either by referring the child and family to specially trained probation officers for counselling or by avoiding probation officers altogether and referring juveniles to individuals or groups in the community where the child lives. In the latter program, over 60% of the cases are handled in this way. Royal Oak, Michigan, has operated a similar misdemeanor probation project since the early 1960's, but this has produced only the raw data that 94% of the probationers do not violate probation. Professor Felstiner does not cite statistical data although he criticizes reported data on mediation for being oversimplistic and fragmented. Rather, he focuses on the unlikelihood of successful mediation because of the fragmented and highly mobile nature of American society—a society in which shared experience and a sense of a permanent place in a local community are absent. Without these roots in both past and future, he argues, mediation will tend to be unsuccessful. Felstiner, *supra* note 52.

work against any real gain in available court time. The gain, if it is to be made at all, is in the area of prevention—keeping minor disputes from becoming major ones that really do add to trial court calendars. And this, the author believes, is really the question of the quality—the workability—of the alternatives presently under consideration. If community-based mediation schemes, court clinics, or pretrial diversion programs have within them better components of effectiveness than the present approach, modest reduction in volume may be logically anticipated as a by-product. The focus, therefore, should be on effectiveness and not on efficiency.

B. *Reduced vs. Continuing Need for Attorneys*

A second theme, heard almost as frequently as the first on behalf of ADRMs, is that their implementation will reduce the need for lawyers in the overall dispute resolution business.⁵⁷ This theme is based on two well-established facts. First, other than disputants and dispute-resolvers, such as judges, administrative judges, and hearing officers, lawyers are the other professionals necessary to the present adjudicatory form of dispute resolution. Second, there are simply not enough lawyers around to represent the disputants in all these fora, particularly those citizens who cannot afford to pay a lawyer.⁵⁸ Since alternative mechanisms will neither be adjudicatory nor stress the adversarial model, attorneys will not be necessary for the parties. Furthermore, to the degree that the initial alternative used is successful, the overall need for lawyers will be reduced.⁵⁹

57. Rubenstein, *supra* note 3, at 77 n.114, 77-97.

58. A good summary of this situation nationwide is found in Address by Robert B. McKay, *Minor Disputes and Other Major Problems*, ABA Conference on Resolution of Minor Disputes, in New York City (May 25, 1977). See also Johnson, *State Courts: A Blueprint for the Future*, in *COURTS AND THE COMMUNITY* (1978) (prepared for the National Center for State Courts). An excellent analysis of the same situation in an urban center is found in *BOSTON BAR ASSOCIATION, ACTION PLAN FOR LEGAL SERVICES TO THE POOR: REPORT ON THE LEGAL PROBLEMS OF THE POOR IN BOSTON* (1977).

59. Two other more cynical, more anti-lawyer, points of view may be at work here too. First is the judiciary's dislike of contentious, time-consuming, and sometimes greedy lawyers, who prolong in the judges' minds, minor, easily soluble disputes. The other is the public's dislike for lawyers as a professional class and desire to see their work reduced; replaced by the free interplay of citizens, whenever possible. Nader and Singer point out examples of fora in which legal representation may be replaced by lay representation or excluded altogether, either explicitly or by a very low ceiling on permitted fees. Other possibilities suggested include regulating the legal profession by statute or by boards dominated by nonlawyers. This

Prior to the intensification of interest in ADRMs, several other approaches to this predicament have been popular. The concept of the paraprofessional, a specially trained non-lawyer who handles varying amounts and types of legal work under an attorney's supervision, has received the most attention.⁶⁰ Equally popular, especially in the context of delivering legal services to the poor, is the idea that either clients or lawyers, or the two together, can make decisions about which types of larger issues or test cases should be addressed so that the limited legal resources can obtain the greatest benefits.⁶¹

A third approach, one which is really an outgrowth of the former, is that rather than restrict themselves to litigating test cases in search of larger results, attorneys should be sensitive to the variety of tasks they have traditionally undertaken for clients and do them for the greater good of the greater number.⁶² Obvious examples include legislative advocacy, negotiation, political advising, and the incorporation of new economic entities, mostly for group clients.

What is important to note about each of these approaches, all of which are very much alive today, is that none suggests we will really need or use fewer lawyers. Rather they suggest that attorneys will have different functions from those traditionally associated with the due process-adversary-adjudicatory model featuring the trial of individual cases.

A similar state of affairs exists with regard to the advent of ADRMs. There is no question that the inherent nature of the alternatives is different in method, personnel, and role in the legal order than present-day adjudicatory approaches. Lawyers will not and should not participate in these new processes. Nevertheless, a num-

should, they propose, be accompanied by the creation of streamlined standard transactions and dispute-settlement mechanisms with speedy operations, easily understandable rules, decisionmaking by the parties or a neutral third party of their choice, and freedom from reprisal for exercising their rights. Nader & Singer, *supra* note 23, at 316-18.

60. See, e.g., Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 COLUM. L. REV. 1153 (1971).

61. Bellow, *Reflections on Caseload Limitation*, LEGAL AID BRIEFCASE, June 1969, at 195. Compare Getzels, *Legal Aid Cases Should Not Be Limited*, LEGAL AID BRIEFCASE, June 1969, at 203.

62. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

ber of observations lead to the conclusion that lawyers will be no less in demand, and for largely fair and legitimate reasons.

Many of the disputes, whether civil or criminal, that will come to ADRMs will initially have been brought to court where attorneys will be involved. This is not simply because of the author's preference that the ADRMs operate within the framework of the court system, but it would be true even in a looser, referral-type arrangement because of the present-day demands for help placed by disputants upon our lower courts and because of current constitutional standards. Virtually all minor disputants who come into court as misdemeanor defendants must have counsel under *Argersinger v. Hamlin*.⁶³

Regardless of going to court, disputants will seek legal advice about their rights, about access to court, and about the procedures therein, simply because lawyers continue to have the monopoly on such services. While the growth of citizen counselling services about legal rights is significant, and some of their activities have been sustained in judicial opinions,⁶⁴ the tendency to turn to the professional traditionally associated with the perceived problem is all too well ingrained in the American people. Closely related to this tendency is the manner in which the bar seizes upon it and refuses to relinquish the simplest of functions which the public has traditionally brought to it.

In addition, the need to consult with or obtain counsel does not end with voluntary participation in an ADRM. Whether they have consulted a lawyer previously or not, citizens may well have questions about the processes they are undertaking and about their rights as participants. They may also discover that after the alternative process is completed, they are back in court, either voluntarily or involuntarily, and sorely in need of counsel. An instructive example is the experience of federally-funded neighborhood legal services programs with small claims courts. Most such programs will advise but not represent litigants in small claims court simply as a policy for the efficient use of the limited resources of the professional staff.

63. 407 U.S. 25 (1972).

64. *United Transportation Union v. State Bar of Mich.*, 401 U.S. 576, 580-82 (1971); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964).

Putting aside the questions of professional responsibility involved,⁶⁵ the difficulties of the successful but uncounselled litigant when a frivolous appeal is taken by the loser should be obvious.

A fourth and quite complex factor is one which does not by itself ensure the participation of attorneys. Rather it calls forth a type of legal caution that everyone associates with the role of counsel, *i.e.*, protection of the participants in ADRMs from violations of their basic constitutional rights. There is no dearth of concern in the literature about this possibility, including the writings of those who argue vigorously that there is so much inherent coercion involved that no truly free choice to participate is possible.⁶⁶ This extreme concern may well require the availability or even the appointment of counsel, particularly if the decision about participation is being made in the context of pending court proceedings. It cannot, however, eliminate years of constitutional law establishing well-defined concepts of informed waiver and voluntary choice.⁶⁷ The appropriate concerns in this area then ought to be whether counsel is available to the participants if they wish consultation both prior to and during the alternative process, and whether the full due process-adversary system of adjudication is available, with counsel, should either or both participants be dissatisfied with the results of the alternative.

A fifth and final factor is the need for various interest groups likely to have dealings with ADRMs to have the advice and assistance of counsel. Given the complexities and tensions found in the issue of citizen participation in traditional institutions like courts, it is quite likely that neighborhood groups will seek counsel to advise them on the wisdom, types, and workings of ADRMs. Similarly, experience indicates that the mechanisms themselves, once defined, will need counsel to assist them in their establishment, continuing operations, and relations with participants.⁶⁸ The constitutional

65. ABA CANONS OF PROFESSIONAL ETHICS No. 2 provides: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." See particularly EC 2-26 and EC 2-27.

66. See, *e.g.*, *Pretrial Diversion*, *supra* note 3.

67. See generally cases cited note 30 *supra*.

68. The Dorchester Urban Court Program utilized a lawyer's services during its formation but did not hire one for its staff, although a part-time position was created. The Program's staff has a social work background, but its board of directors is composed mostly of attorneys. Snyder, *supra* note 37, at 38, 43, app. A.

questions previously mentioned are alone enough to require any alternative mechanism, particularly one involved in delicate interactions with a court system, to have some version of house counsel.

It should be apparent at this point that rather than diminish the need for or role of counsel in the business of processing disputes, the new dimensions of the community court proposed in this article will at least perpetuate the present situation of unmet need. To the degree that new disputants are drawn into the alternatives from the streets, more demands on counsel may be made. The direction for the future then is not to see ADRMs as a solution to unmet need for lawyers, particularly for the poor and middle classes, but as an additional ingredient in the ongoing challenge to allocate those precious resources rationally. Paraprofessionals, lay advocates, lay counsellors, and citizen information and advice centers are all necessary experiments in association with ADRMs not to replace lawyers as advisers, advocates, and strategists, but to deal with the limitations on their number and on their abilities for citizens seeking resolution of a variety of disputes.

C. *Truth-Finding vs. Learning More About the Parties*

A third, though infrequently heard, theme for developing new ADRMs is that they, or certain of them, will actually help better determine the "truth" than the present adversary system.⁶⁹ While there are many good and sufficient reasons for moving away from the adversary system and its variations as we know them today toward the alternatives developed herein, getting a more accurate or "truer" picture of what actually occurred during a dispute is not among them. In fact, the functions of the community court as set forth in this paper are so varied that no single goal of this type, even if attainable, is sufficient.

Initial inquiry on the question of truth seeking must begin with our time-honored tool, the adversary system, and ask whether it or any of its present alternatives obtains "truth" and, if not, what

69. Judge Frankel's provocative speech-turned-article expresses his desire for new approaches to "making truth the paramount objective." Address by Judge Frankel, *The Search for Truth: An Umpireal View*, 31st Annual Benjamin N. Cardozo Lecture (Dec. 16, 1974), reprinted in 123 U. PA. L. REV. 1031, 1052 (1975).

alternatives might do so. At one level of abstraction the answers have already been provided in a familiar trilogy of models of the criminal justice system—the due process, the crime control, and the family models.⁷⁰ While presented by their authors in generalized terms, each model correlates rather closely with styles of adjudication frequently encountered in our lower courts.

The due process model is represented by the careful dispassionate legalistic judge, governed by precedent, operating in an adversarial framework, and fully sensitive to the rights and duties of all involved.⁷¹ One distinguished federal trial judge has recently urged a tightening up of the present due process-adversary approach with the goals in mind of “mak[ing] truth a paramount objective, and impos[ing] upon the contestants a duty to pursue that objective.”⁷² But as Judge Frankel himself acknowledges, the inescapable dilemma of the due process-adversary system as truth finder is its “sporting theory” of the trial:

The advocate in the trial courtroom is not engaged much more than half the time—and then only coincidentally—in the search for truth. The advocate’s prime loyalty is to his client, not to truth as such.⁷³

The crime control model, on the other hand, relies upon far cruder devices to determine “truth,” and does so as a compromise to gain efficiency, finality, and stability.⁷⁴ It is reflected in the daily practices of lower court judges who routinely believe all police testimony without question, regularly accept only those plea bargains proposed by the prosecutor, and indulge in frequent *ex parte* communication with police and prosecutors just to keep up on who is really doing what around town. The accuracy of this approach de-

70. See Packer, *Two Models of the Criminal Process*, in H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149 (1968), reprinted in part in *ROUGH JUSTICE*, *supra* note 7, at 136. Although the concern of this paper is broader than the criminal justice system with which these three models deal, many civil disputes are forced into the criminal framework in our lower courts. Furthermore, some of the ideas presented find easy analogies in the resolution of civil disputes.

71. Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUD. 193 (1972), reprinted in part in *ROUGH JUSTICE*, *supra* note 7, at 192; Packer, *supra* note 70.

72. Frankel, *supra* note 69, at 1052.

73. *Id.* at 1035.

74. Packer, *supra* note 70. The two contrasted models are that of crime control and that of due process.

pend exclusively on one group—law enforcement personnel. The high degree of unrestrained discretion exercised by them, their persistent and divisive internal conflicts, and their dominant social role, surely combine to bring this approach to truth-finding into question.

Perhaps more promising as a means to get at the "truth" of a dispute is the family model. In Professor Griffiths' ideas are many of the themes of the community court with which this paper is concerned, including such notions as: (1) courts as a "therapeutic process aimed at conciliation of disputants or reintegration of deviants into society";⁷⁵ (2) judges as active agents of conciliation and rehabilitation affirmatively searching for the decision "which best incorporates and reconciles the interests of all concerned";⁷⁶ and (3) the state, including the judiciary and its agents, with the capacity to work, in good faith, in the best interests of the disputants.⁷⁷ This approach gets at the truth, not because it endows the disputants with greater perception, memory, or recall, or makes them tremble about the consequences of lying, but because it creates an atmosphere in which a larger picture—some parts actually "true," some misconceived, and some subconsciously altered—is more likely to emerge. Much of this "truth" comes, in fact, from the accused, the fifth amendment notwithstanding. In our lower courts, something akin to this occurs daily in drug screening boards, court clinics, and pretrial diversion programs, which rely upon obtaining a high degree of honesty and mutual cooperation from defendants despite the courthouse backdrop.

What we see then, from a variety of perspectives, is the futility of altering our dispute-resolving mechanisms simply to obtain a more accurate picture of how a particular grievance occurred. What can happen, however, is that by variations in the personnel and processes, the disputants will tell a more complete story of all that is involved from specific events to emotions to future fears. Professor Felstiner insists that effective mediation can only occur when the third party "will possess as a matter of existing experience sufficient information about the particular perspectives and histories of the

75. Griffiths, *supra* note 11, at 383.

76. *Id.* at 383.

77. *Id.* at 380.

particular disputants to be able efficiently to suggest acceptable outcomes."⁷⁸ His stress on the full availability of current information and past history is well placed. As Danzig and Lowy point out, however, that valuable data can emerge for a stranger only if the process involved is voluntary, cooperative, respectful, and essentially free of sanctions.⁷⁹

Finally, although the relevant value here is not telling the truth, but the willingness to talk about the dispute, no one method of resolving dispute can be said to ensure this happy result. The use of various alternatives is growing, but no one has measured what processes get which disputants to talk about which grievances most openly. All that can be said at this point is that experimentation with a variety of alternatives is necessary not only to watch the behavior of the user-disputants but also to allow, at this primitive stage, the various reasons behind disputes to have a variety of outlets.

D. *Community Participation vs. Professionalism*

A fourth and popular theme favoring ADRMs, and one being voiced by spokespersons not usually associated with the organized bar, is that it will enhance community participation in local institutions. Community control of or participation in society's formal institutions has been a major ideological strain since the early 1960's.⁸⁰ Together with its twin notion, decentralization, these two powerful ideas have received scattered but serious attention in recent socio-legal literature.⁸¹ For this reason, it is important at the outset to distinguish between the two concepts. Decentralization of lower courts, as already indicated, is essential to the notion of a community court which can be responsive to a variety of local dis-

78. Felstiner, *supra* note 52, at 79.

79. Danzig & Lowy, *supra* note 55, at 687-91. Danzig and Lowy stress that the role of a mediator is to encourage the disputants to discuss underlying aspects of their conflict and to provide a supportive, noncoercive atmosphere for them to develop their own outcome—i.e., resolution of the difficulty through positive steps they agree to undertake.

80. NEIGHBORHOOD CONTROL IN THE 1970'S: POLITICS, ADMINISTRATION, AND CITIZEN PARTICIPATION (G. Frederickson ed. 1973); W. FARR, L. LIEBMAN & J. WOOD, DECENTRALIZING CITY GOVERNMENT: A PRACTICAL STUDY OF A RADICAL PROPOSAL FOR NEW YORK CITY (1972).

81. Cahn & Cahn, *supra* note 3; Danzig, *supra* note 2; Statsky, *supra* note 3; *Community Courts*, *supra* note 3; see also Cahn & Cahn, *The War on Poverty: Civilian Perspective*, 73 YALE L.J. 1317 (1964).

putes. Community control, it is suggested, is a much more elusive concept not necessary to the functioning of the community court. Numerous considerations about the lower courts and effective dispute resolution contribute to this somewhat heretical conclusion.

First, many of the ADRMs frequently discussed require a type of training, skills, and duties usually associated with the term "paraprofessional." Mediators and diversion program counsellors come to mind as good examples. While such persons may well and often should be drawn from the community involved, social, economic, and possibly even political distinctions soon emerge as they undertake their work. Their ties to and roots in the community will be of great assistance in performing their dispute-resolution tasks, but their role, with all that word connotes, will be far more defining than their origin or residence.⁸²

Second, the dilemma of choice—who really represents the community?—argues equally persuasively for a set of distinctions oriented toward tasks or skills rather than toward community input per se. The courts, of all of our local institutions, seem least well-equipped to measure and choose true voices of community sentiment, if such even exist. A somewhat more useful distinction occurs when the community advice, even in the form of a panel or board, is rendered as a recommendation on a specific issue made by participants trained for the task at hand.⁸³ In this type of arrangement, the standards for selecting the disputes to be addressed and the specialized training and duties given the community members create a role or status for them which diffuses the issue of whether they truly represent the community at large.

Third, the problem of authority—who do the disputants really respect?—also questions the validity of community groups and other forms of direct citizen decisionmaking for local disputes. Professor Felstiner, as part of his work, has focused on the relationship

82. A good summary of the implications of role theory, especially as applied to judges and judicial institutions, is found in C. SHELDON, *THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES* 73-98 (1974).

83. The Disposition Component of the Dorchester Urban Court Program was created to develop presentence investigation reports and to get community participation in proposing recommendations for "meaningful" sentences. Justice Resource Institute, Inc., *The Urban Court Program* (1974) (unpublished) (cited in Snyder, *supra* note 37).

between what he calls the "third party" and the disputants. He argues that the third party "is unlikely to be functional unless he shares significant intimate experience with the disputants."⁸⁴ He goes on to suggest that such individuals are simply not a part of the complex urban fabric in what he calls "technologically complex, rich societies."⁸⁵ Accepting for the moment his analysis about the absence of group cohesion in this country, it does not, however, seem inconsistent to tender mediation and other skill- or role-oriented techniques as useful alternatives.

Professors Danzig and Lowy, in their reply to Professor Felstiner, make just this point: "[W]e think Professor Felstiner overlooks the ease with which position confers authority on those who may otherwise lack it in everyday life."⁸⁶ In addition, Professors Danzig and Lowy offer their own notion of the disputants' perspective which argues that the feasibility of alternate mechanisms like mediation should be measured not in terms of who the third party is, but in terms of what the process is which he or she conducts and what the behavior and expectations are of the disputants within it. Their conclusion, correlating with my own emphasis on role and skill as defining characteristics, is a concern not for the authority or communality of mediators, but for their educational abilities to teach participants about the process they represent.⁸⁷

Moreover, this education in citizens' rights and responsibilities will, it is hoped, percolate through the community in which the community court is functioning. The knowledge of process, sense of shared values, and self-confidence of asserting one's rights should be spread to one's neighbors and should lead to increased awareness of what an aggrieved individual can do and where he or she can go to get a fair airing of any problem. It may also lead to increased autonomy in seeking solutions to disputes. The very fact that members of one's own community have been trained and act with a degree of professionalism in interpreting citizens' rights may well inspire a sense of one's own ability to understand how such issues

84. Felstiner, *supra* note 52, at 74, 87.

85. *Id.* at 65-67.

86. Danzig & Lowy, *supra* note 55, at 688.

87. Danzig and Lowy also emphasize the importance of the disputants educating each other to see what the issues and possible areas of compromise are. *Id.* at 690.

affect oneself. In addition, the community response to the level of participation in locally available ADRMs may be closely related to the degree of community pride in the work of these specially trained local people.

The import of these observations about the emerging professionalization or task-defined distinction of the new dispute-resolvers (or "processors," as in Felstiner's preferred term) is that neighborhood decisionmakers or citizen judges as such will not be found at the outset in the community court. Rather, through an interactive process between the community and the existing judicial structure, concepts of dispute-resolving roles (*e.g.*, mediator, ombudsman, counsellor referral specialist) will be defined. Citizens will then be selected for these positions on the bases of merit, local residence, prior experience, availability of time, and commitment. This type of community participation will not satisfy certain ideologues and may, in fact, lead to familiar tensions about class and professionalism. Nevertheless, if the pitfalls of authority, selection, and representativeness that have proven so difficult for numerous other efforts at decentralization are to be avoided, an approach emphasizing role and process is recommended.

E. *Improved Dispute Resolution vs. Lack of Knowledge About Why and to Whom People Complain*

A fifth and quite frequently voiced theme on behalf of expanding ADRMs is that their use will actually result in "better" results than currently obtained, that is, in a more stable, healthier neighborhood environment. Some of the reasoning underlying this argument has already been reviewed. For example, some define "better" in terms of more "truth," some in terms of more community participation, and some in terms of lawyer or caseload reduction. Some of the reasoning is quite general in nature, stressing the larger social, economic and political good that occurs when the society in general has access to and confidence in local dispute resolution fora.⁸⁸ Laura

88. Every major revolution of this century (Russia, China, and Cuba, among others) has been accompanied by a clamor for the creation of people's courts—courts that are cheap, effective, and responsive to everyday problems. . . . What would happen if the medical system would not handle a \$10 cut or a \$20 burn? . . . Lawyers are probably the only profession that repudiates the

Nader and Linda Singer cover all three dimensions in their attempt to establish that "[t]he costs of not having systems of dispute resolution that work for everyday problems are massive."⁸⁹

The more meaningful measure of quality, however, would seem to be the enduring nature of the solutions reached through the various alternative methods. If it could be established, for example, that mediation led to results that were more readily adhered to for longer periods of time (that were, in effect, more self-enforcing) than the results achieved by the present lower court system, that would have profound implications.

Upon closer analysis, this concern with better or more effective results really has two essential components.⁹⁰ The first is desirability, or Professor Sander's "credibility." Put another way, what characteristics of these alternatives will appeal to citizens and thus draw them to use them? The second is captured in Professor Sander's term "workability." Do the processes involved, once chosen, achieve acceptable or operational results capable of endurance? Any further look at this particular premise for expanding ADRMs must then proceed with this two-step analysis. For without meeting the preferences of citizens, there can surely be no satisfaction for them and resulting neighborhood stability.

Unfortunately, the data to answer either of these questions are simply not available. Beyond some very preliminary studies offering quite limited and tentative observations,⁹¹ the best we can do at the

majority of its potential customers and refuses to entrust them to anyone else.
The consequences are serious.

Nader & Singer, *supra* note 23, at 281-82.

89. *Id.* at 315.

90. Professor Sander sees a total of five components: cost, speed, accuracy, credibility, and workability. Sander, *supra* note 1, at 113 n.7. But as I have dealt with accuracy elsewhere, I will deal with the other four here. Two, credibility and workability, are primary to my concern; and two, cost and speed, are secondary. In fact, since cost and speed are essentially design characteristics capable of easy adjustment once ideology and process are established, they will not be dealt with further in this paper. It may be noted, however, that speed is a characteristic that should be maximized due to the citizen interests involved, and cost will vary depending on how high a value the designers put on experimentation, development of alternatives, new employees, and gathering statistical data.

91. Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974) [hereinafter cited as Thibaut]. The authors note four prior studies of theirs similarly exploring the comparative characteristics of various systems of decisionmaking. *Id.* at 1272 n.13.

moment is to take careful note of the general characteristics of the major alternatives currently under discussion and infer what impact these qualities might have on obtaining sustained or viable results in individual disputes.

Having already delineated the range of existing dispute resolution mechanisms, I will generally review the salient characteristics setting them apart from courtroom adjudication. A discussion of the specialized abilities of various alternatives and the types of disputes for which they are appropriate will follow in the section defining the community court and its functions.

1. Less structured, more open processes are used for the gathering and sharing of relevant, understandable information. Whether it be a mediation session, an ombudsman's interview, or a screening session for pretrial diversion, the rules of court and strictures of counsel are eliminated as the party involved deals directly and openly with program personnel.

2. The focus of any third party or intervenor is on the disputants and on enhancing their production of information for their mutual benefit. Professor Fuller's description of mediation captures this well:

[T]he central quality of mediation . . . [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.⁹²

3. The third party, while having a distinct role or task, has no active or coercive power over the participants.

4. Neighborhood residents, most likely unknown to the disputants, but sharing some common characteristics like race, sex, economic situations, or education, will usually be the third parties or intervenors.

5. The neighborhood residents who act as intervenors undertake an educative role with the parties about the larger meaning,

92. Sander, *supra* note 1, at 115 (quoting Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)).

deeper roots, and consequences of the expressed, and sometimes the unexpressed, sources of the conflict. While this elaboration of the basics of the dispute may go unheard, some disputants will be seeking just such explanations from a detached or professional viewpoint.

6. The alternate processes involve no distinct determination of winners and losers. Substantial as the roles of guilt and innocence are in our society, most techniques of dispute resolution do not use them, and some, like mediation, try to minimize even their unconscious impact.

7. Most alternatives under consideration follow up their efforts, either actively or by offering on-going services if necessary.

8. The alternatives operate in a basically private manner, not publicly as do formal court sessions.

9. The sessions or meetings of the alternatives are held in comfortable, informal settings, including homes, churches, schools and staff offices. As Professor Gibbs points out in his article on the Kpelle Moot:

[The moot] takes place in the familiar surroundings of a home. The robes, writs, messengers, and other symbols of power which subtly intimidate and inhibit the parties in the courtroom, by reminding them of the physical force which underlies the procedures, are absent.⁹³

10. Though programs do vary depending on demand, location, complexity, and funding sources, ADRMs should be accessible, speedy, and inexpensive.⁹⁴ Whether they are more so than the lower

93. Gibbs, *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes*, 33 AFRICA 1-10 (1963), reprinted in ROUGH JUSTICE, *supra* note 7, at 396-97.

94. Only 21 days are required, as the maximum, to handle a case through the Dorchester mediation program. The shortest period in 1974-1975 during which a Massachusetts Superior Court processed a case was 63 days. Snyder, *supra* note 37, at 112. The author believes these are basically design considerations which are easily met. If the alternative mechanisms do not meet in the courthouse itself, and often they should not, they can hold working sessions in churches, schools, and community centers in the neighborhood. These working sessions should be convened promptly after the disputants agree to participate. While the alternative chosen may take more time than a quick court appearance, that result is thought to be justified by the existence of free choice and the vitality of the ultimate result. The financial cost of the alternatives, particularly for those diverted from the criminal side of the court, should be free. Costs to the taxpayer remain subject to yet undone cost-benefit analysis, and

court system varies from location to location, but they should be easily the equal and often the better.

What then may one fairly infer from these characteristics about the durability or effectiveness of alternate approaches? To whom might these various values appeal and why? One suggestion is those urban dwellers who reluctantly, but with conviction, bring a neighborhood grievance to court because they want to find a solution that will restore a degree of peace to a human setting and among human beings whom they care about. For them, the alternate mechanisms have the multiple appeals of openness to a full story, flexibility for compromise solutions, availability of follow-up, and intervenors somewhat akin, through a combination of shared background and the acquisition of specialized skills, to "family elders and village headmen."⁹⁵ For these reasons, it is likely not only that this approach will be preferred but that the solution obtained will be satisfactory and longer lasting than one achieved through the formal and coercive powers of a court.

A second, equally likely possibility would be those families in difficulty, whether within the family unit or among relations with separate homes. They will prefer alternate mechanisms for reasons of privacy, self-education, follow-up, and the modest, neighborhood-oriented, but nevertheless quite real authority of the third party. Once this choice is made, these same considerations will arguably lead to more durable results. Similarly, isolated individuals with far fewer commitments (such as to finding a solution or to their neighborhood or family) may well prefer the alternative mechanisms for reasons of access, cost, and speed. Satisfaction on one or more of these measures can easily ensure durability of the results. For example, the citizen who simply wants a minor consumer grievance resolved may be happy to collect half or less of his claim and say no more if he can do it promptly when the matter is presently in his mind, at little or no cost, and with one session.

the current infusion of substantial federal funds prevents any such analysis from being undertaken with respect to widespread duplication at local levels.

95. Felstiner, *supra* note 52, at 699. Although a catchy and nostalgic phrase, there is serious doubt if such parties with analogous authority exist in the United States. "Danzig and Lowy . . . and I . . . agree that American equivalents of family elders and village headmen are rare and specialized (family counselors, psychotherapists) and that in the United States government courts are rarely used to process interpersonal disputes." *Id.* at 699-70.

While all of the foregoing is for the moment only the logical speculation which the detachment of scholarship allows, some of these conclusions appear in other literature on the subject.⁹⁶ Greater certainty, however, as to citizens' preferences for such alternatives and their capacity to produce more viable or lasting solutions will have to await further field studies. One distinctly complicating factor is the complex psychology of grievance—what initiates disputes in the first place and why citizens choose the fora they presently do for resolution. Without some accommodation to these difficult questions, little that is proposed, or even reordered, in the way of improved opportunities for informal dispute resolution will be of help. If, however, our understanding is increased, the functioning of alternative fora may be enhanced:

If we can learn how and why people come to dispute-settling agencies, we may discover why people come to "court" at all (in terms of real motivations rather than in terms ultimately formulated by a lawyer). We may gain important insights into the functions that our dispute-settling institutions should play. The reasons for bringing a conflict to a court may involve a desire for economic or social redress, harassment, an urge to punish, a need to save injured pride, hope for reconciliation, a desire for attention, a desire for involvement in drama, a need for catharsis. Whatever the primary motivation, however, it seems that once a "dispute" reaches a formal civil court, it may be converted into a form which no longer reflects the basic "purpose" of the suit. If an alternative forum is available, offering a different legal process, the ultimate solution of the case may be more appropriate.⁹⁷

As indicated, the range of possibilities and motivations underlying disputes is at once both fascinating and defiant of solution. We must be cognizant also of the argument that too rigorous or mandatory a series of alternatives may have a chilling effect on the use of lawsuits, courts, and the complexities of litigation for political ends.⁹⁸ For the present, rather than aim, as some would have us, to

96. Smith, *supra* note 35, at 1876.

97. *Id.* at 1879-80. Smith sketches some of the aspects of the complex psychology of grievance in discussing both the work of the Jewish Conciliation Board and the motivations, both stated and unstated, that the Board probes in its efforts to reach a reconciliation.

98. Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134 (1976).

target individual disputes into preselected alternatives, it seems wiser to develop the fullest set of choices so that our knowledge about hidden motivations, preferences, solubility, and durability may grow together with our knowledge about the processes themselves.

III. ADRMs WITHIN THE JUDICIAL FRAMEWORK

Having indicated a personal preference for ADRMs within the judicial framework, I must examine the reasoning involved. For while each of the five arguments favoring ADRMs has been examined on its own merits and will later be argued to support close ties with the courts, it may be suggested that the conclusions reached about them were influenced by preconceptions about relationships with and within the courts. That the contrary is true should be evident from considering the implications of various themes for the courts—no finding standing alone supports ideas particularly favorable to the courts or court control, such as reduced court caseloads, better accuracy in fact-finding, elimination of quarrelsome advocates, or establishment of a singular diversionary scheme for erroneously motivated litigants.

A review of the writings of those advocating or describing community courts reveals a curiously unjustified proposal.⁹⁹ Several suggest explicitly that the new entities be independent from and not part of the existing court system.¹⁰⁰ However, no one really states

99. A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 175-80 (1976)[hereinafter cited as ROSETT & CRESSEY]; Cahn & Cahn, *supra* note 3; Danzig, *supra* note 2; Sander, *supra* note 1; Statsky, *supra* note 3; *Community Courts*, *supra* note 3; Smith, *supra* note 35.

100. The method of operation of such a moot could vary experimentally with each community. Typically, however, it might draw its "business" from referrals by social agencies, the community police, the neighborhood attorney, the municipal police, the existing court system, and from voluntary submissions by individuals who wished the services of the body. A salaried counselor accepting such requests for a moot might then arrange sessions at a time and place suitable to the participants: the complainant, the person about whom he had complained, and those invited by these parties or the counselor. If a necessary party refused to attend, a counselor would simply refer the other parties to the municipal justice system.

Danzig, *supra* note 2, at 46.

Stressing a similar theme the Cahns propose process of delegation:

There is a clear need for the creation, on a neighborhood level, of mechanisms for settling disputes, dispensing remedies and enunciating norms of conduct.

good reasons why. The basic resistance is rooted in functional differences. The argument is generally, "if we want ADRMs which will operate without rules so that citizens may conciliate among equals, then they cannot be part of the courts which have rules by which judges adjudicate among unequals." This argument about operational differences tells us nothing, however, about citizens' unwillingness to participate in the alternative processes related to the courts.

The only reasonable basis for such resistance would be the harmful effects upon the operation of the alternative from the continuing threat of formal court action if the chosen alternative fails.¹⁰¹ This possibility is thought to be exacerbated when the referring judge tells the disputants that unless the matter is resolved via the informal mechanism, they will be back in his or her courtroom for trial. On the other hand, even in the most independent of schemes, the possibility exists that one of the parties will drop out and take the matter directly into court. Unless it can be established that a relationship to the court system, whether by referral or more directly, actually is a factor in citizens' rejecting the alternatives, then the numerous advantages of a judicial relationship should prevail. It is interesting that, despite the lack of enthusiasm among the

These needs cannot be dealt with by any single means. . . .

We propose a neighborhood tribunal with at least four auxiliary arms: a neighborhood arbitration commission, a panel of hearing referees with independent investigative resources, a youth division run and administered by youth, a referral bureau. . . . Each of these institutions would be manned primarily by neighborhood inhabitants—trained and appropriately selected to fulfill their respective duties as officers of the "court."

Such a neighborhood court system might well come into being as decentralized arbitration, fact finding and conciliation branches of the small claims court, magistrates court, domestic relations court, juvenile court and landlord-tenant court. We are not proposing the replication in miniature of every specialized municipal court—but rather we are suggesting the delegation of certain arbitration, conciliation, fact finding, and hearing functions to locally based and locally responsive tribunals.

Cahn & Cahn, *supra* note 3, at 950.

101. The comprehensive study by MCGILLIS & MULLEN, *supra* note 1, acknowledges this theme in a section characterizing Danzig's community moots as a "minimal coercion of disputants" concept. *Id.* § 1-6.1, at 25. They also note the role of this theme in the development of the noncourt related San Francisco Community Board dispute processing project. *Id.* Case Study F, at 163-72.

writers for a direct court relationship, none really writes in direct opposition to it.

The advantages of the ADRMs coming within the operations of the municipal or local court fall into several categories. First, there is the fact that more grievances than ever before are being brought into lower courts in search of something.¹⁰² The withdrawal or acknowledged breakdown of other institutions which once handled disputes at the local level—such as local political organizations, the church, the family, and labor groups—is a major factor. In fact, the experience within the decentralized district courts of Massachusetts has been that by default they became the locus of virtually all grievances.¹⁰³ The behavioral patterns represented by the “so sue me” and “I’ll take you to court for that” philosophies have firmly established the courthouse as *the* place to go for help. This being the case, the appropriate response is not, as some would suggest, to close the courthouse doors, but to utilize this take-it-to-the-courthouse mentality to facilitate the use of alternatives. The role of the judiciary or its agents in sorting and referring disputes to immediately available alternative mechanisms is just beginning to be explored.¹⁰⁴

Closely related are the dual realities of continuous referral and referral dropouts.¹⁰⁵ Both notions mean that the easier it is for the

102. There seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society. Much as the police have been looked to to “solve” racial, school and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family. Not only has there been a waning of traditional dispute resolution mechanisms, but with the complexity of modern society, many new potential sources of controversy have emerged as a result of the immense growth of government at all levels, and the rising expectations that have been created.

Sander, *supra* note 1, at 114.

103. The basic factor leading to this result in Massachusetts is the range of legalized problem solving services now found in one neighborhood courthouse, *e.g.*, clerk’s hearings on whether criminal complaints should issue, small claims sessions, mental health hearings, children’s protective proceedings, and landlord-tenant matters, to highlight the most utilized. A sound statement of this reality and how lower courts should respond to it is found in Flaschner, *The District Courts of Massachusetts: The Office of Chief Justice and Five Precepts of Judicial Administration*, 58 *Mass. L.Q.* 115, 123-26 (1973).

104. The leading studies to date are: Sander, *supra* note 1; MCGILLIS & MULLEN, *supra* note 1.

105. See Nader & Singer, *supra* note 23, at 22 n.43.

citizen to find and begin the appropriate approach to his or her problem, the more likely he or she is to participate until a conclusion is reached. Consequently, the ADRMs contemplated herein should be as closely attached to the courthouse as possible, so that those who choose to use them can meet their representatives and learn about them, if not start the process itself, the very same day they come or are brought to court. In sum, given the striking failure of American citizens to use available dispute-processing institutions at all, it seems imperative to utilize the one institution known to draw participants.

On the other side of the coin, considering the motivations of those who come to court purposely, there is logic in offering them immediately available alternatives which are consistent with the values that brought them to court in the first place. Whether they came to court seeking to halt certain offensive behavior by others, to right a perceived wrong, or to solve a neighborhood problem, their attitude or mind-set should be promptly used for the exploration of alternative approaches. This favorable frame of mind is best capitalized upon when the alternatives are immediately made available through the court to which the citizen has come.

Thirdly, there is the utility, questionable to some but quite apparent to most who work in the courts, of having available the authority and sanctions of formal court processes. Debates about the wisdom of courts undertaking "social control" and "coerced treatment" are inherent to any institution which exercises the power over daily lives found in the judicial process.¹⁰⁶ Nevertheless, for those including this author who believe that temporarily altered social behavior can be achieved as much by the threat as by the imposition of undesired consequences, there is merit in an approach by which unresolved disputes would promptly return to the court system for adjudication when the attempted alternative fails. The basic notion here is that when an authority figure (*e.g.*, a judge) is known to have a variety of options running along a continuum of severity ending with loss of liberty, the withholding of certain of these possible sanctions (*e.g.*, no criminal record, no jail) in return

106. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52 (1967), reprinted in part in *ROUGH JUSTICE*, *supra* note 7, at 89.

for modest adjustments in life style (*e.g.*, attending counseling, paying restitution) is acceptable to both parties. This only works, however, if the two parties understand, not intellectually, but as a vision of the possible (of reality), that failure to make the agreed upon adjustments will lead directly to the promised consequences. This continuum of authority, running from the voluntary with informal social pressure to the involuntary with formal sanctions, can help ensure social stability, if it ensures the availability of a more detached figure with a broader perspective and greater social standing—namely, a judge. Achieving this, of course, means that the ADRMs must be closely tied to the courts in order for the availability (and thereby the threat) of formal sanctions to be meaningful.

Fourth, the expertise of the judge should be available in supervising the entire community court operation. Putting the important questions of judicial selection, tenure, and training aside, no intervenor has more experience in basic resolution of disputes than a lower court judge. After a few years on the bench, he or she will have heard the full range of neighborhood, family, commercial, and other disputes. The skills of getting to the heart of a dispute will be familiar. Standards for determining not just issues of credibility but the ultimate seriousness of a dispute will be refined. So, too, will some sense of how and to what degree sanctions should be applied. To eliminate this valuable assistance from an overall plan of ADRMs would seem wasteful.

The role of the judge beyond that traditionally undertaken in court can be multiple and will vary depending on how comprehensive a community court scheme is chosen. Initially, however, his or her expertise and status are valuable in the process of selecting the alternatives to be offered, hiring the new personnel, setting the standards by which the use of various approaches will be triggered, reviewing how the mechanisms are working, hearing matters which return to the court system from them, and possibly even participating directly in some screening and referral of cases.

A fifth perspective on the judicial relationship, and one which to some degree responds to the initial question of how a community court would be established in the first place, is that if anyone has the imagination, prestige, and power to establish ADRMs, it is the local judge. The frustrations and inadequacies of the current crimi-

nal court system are well documented.¹⁰⁷ Judicial literature is full of proposals for reform, much of it written by creative and innovative judges.¹⁰⁸ In fact, several of the experimental programs now operating in our lower courts have been initiated or generously supported by the judiciary.¹⁰⁹ Given this reality, it is unlikely that the local judiciary will silently divorce itself from the creation or operation of any community court. It is more likely, and in the long run more profitable for all concerned, for the judiciary to be intimately involved in community court functions cooperatively with the neighborhood area served.

Defining this sphere of cooperation, particularly against the background of the competing ideologies of community control and judicial professionalism, is difficult. Relevant to the inquiry, however, are the conclusions originally reached in reviewing the five themes supporting the concept of ADRMs. For example, the assertion that the only probable way ADRMs will reduce court backlog will be by offering more lasting initial solutions so minor disputes do not explode into major ones surely suggests a collaborative relationship with the courts. This is because the courts, seeking to avoid such explosive litigation, will want some say in what types of alternatives were available and what types of cases are going where. Furthermore, should such explosions result, the courts will want to know what alternatives were attempted, why they failed, and whether others should be tried prior to trial.

Similarly, the concept of community participation, not by lay

107. See generally *ROUGH JUSTICE*, *supra* note 7, for a variety of essays on the problems of the lower criminal courts. See also L. BERKSON, S. HAYS & S. CARBON, *MANAGING THE STATE COURTS* (1977).

108. Examples of the work of one dedicated jurist, the late Franklin N. Flaschner, are: Flaschner, *Response of Chief Justice Franklin N. Flaschner to the Petition* [of the Massachusetts Law Reform Institute for the Adoption and Enforcement of Rules Governing Practice in Criminal Cases in the District Courts], *reprinted in* *ROUGH JUSTICE*, *supra* note 7, at 492; Flaschner, *Memorandum to the Justices, Special Justices, Clerks and Probation Officers from Chief Justice Franklin N. Flaschner, Re: Initial Rules of Criminal Procedure and Other Matters*, (July 9, 1971), *reprinted in* *ROUGH JUSTICE*, *supra* note 7, at 495; and Flaschner, *The Importance of Standards Approach to the Administration of Justice*, 14 *THE JUDGES J.* 80 (1975).

109. The active support of the Presiding Judge of the Dorchester District Court was instrumental in establishing the Urban Court Program. Moreover, the majority of referrals to the mediation component come from the bench after the district court judges have had the opportunity to screen the cases. Snyder, *supra* note 3, at 48, 57, 113.

judges, but by local residents learning new skills and undertaking new roles as intervenors, suggests close ties with the judiciary. To some degree this will be the result of the emerging paraprofessionalism of these new third parties. They, like each new member of the judiciary, will feel isolation from their peers, the stresses and strains inherent in the skills performed, and the frustrations of failure resulting from the unpredictable, but inevitable, twists in the human situation. They will seek the association and counsel of the judiciary, and will in turn be sought by the judiciary because of their varied skills and mutual enterprise—the harmonious resolution of life's minor but exasperating squabbles.

It is also likely that the recommended emphases on process over precision in fact-finding, and on variety over singularity of approach, will necessarily bring the ADRMs into close cooperation with the courts. This is because of the importance of screening, selection, referral, and re-entry. Choice, whether by disputants, program personnel, court staff, or all of these in concert, must be made as to whether a dispute is strictly a question of fact-finding best handled by the due process-adversary approach, or one susceptible to the strengths of the alternatives. Decisions must also be made about which alternative is appropriate; the larger the number offered, the more complex the task. Given that the court represents only one end of this spectrum of options and is freely accessible, it surely has an interest in how these choices are made, from among what options, and by whom. It may even want the flexibility or right to return a matter to one of the alternatives after formal litigation is started based solely on the judgment of the trial judge. It may also want the right to step into the operations of an alternative and promptly return the parties to court because of adverse developments.

In the final analysis, and even if the case so far for a cooperative relationship with the judiciary has been persuasive, the wisdom of such close ties rests on an increased "basic faith in public officials." As Professor Griffiths puts it with respect to his Family Model:

[E]veryone would assume, as a general matter, that if a public official has a particular role or duty, he can be expected to carry it out in good faith and using his best judgment. The Family Model could not exist without such confidence. Absent the notion of absolute irreconcilability of interest between the

state and the individual, no *a priori* obstacle would preclude it.¹¹⁰

Wide-ranging discretion, perhaps greater than that wielded in the lower courts today, would rest with judges who sit in community courts. Such decisions as eligibility, referral, success or failure, and re-entry into the courts' processes, would be made rapidly, with varying amounts of information, on widely differing grievances. One need not, however, accept Professor Griffiths' statement that, "[b]asic faith in public officials would revolutionize American, criminal procedure,"¹¹¹ in order to live comfortably with the advent of ADRMs. The resolution, as will be developed in more detail, lies in the unfettered availability of the formal trial, the neutral judiciary, and adequate appellate processes. What it does require, however, is a new appreciation that a higher degree of reconcilability of individual and state interests is desirable, even possible, through confidence in judicial action to stimulate and initiate ADRMs.

The issue is one of establishing alternative mechanisms within a framework of fundamental fairness to the disputants. Only if ADRMs are linked to the supervisory capacity of a judge and court responsive to the basic need to be fair to the participants will those alternatives, I believe, fully serve their dual functions. On one hand, they must offer speedy, nontraditional ways of resolving disputes that respect individuality and reconcile and educate citizens to each other, and on the other hand they must do so within a context of known authority and escalating sanctions to ensure social stability.

IV. THE MODEL OF A COMMUNITY COURT

Keeping in mind the range of ADRMs described and the reasoning offered for operating them within the framework of the judicial system, it is now appropriate to ask how this so-called community court would actually operate on a day-to-day basis. Prior to the particulars, however, several basic concerns require attention.

The first is the serious question of just what traditional safeguards would be surrendered to initiate and use ADRMs. Must we

110. Griffiths, *supra* note 11, at 380.

111. *Id.*

entrust even larger amounts of discretion to our lower court judiciary so they can sort grievances and direct disputants among the appropriate ADRMs? Does the community court really require, as Professor Griffiths puts it, a new degree of "basic faith in public officials"? What is left for the adversarial approach, the battle model?

To this delicate question, the responses are twofold: First, and with due respect to Professor Griffiths, there has always existed at the lower court level a high degree of mutuality of interest between the individual and the state—a conciliatory or healing perspective. Many judges of our city and municipal courts will quickly acknowledge that the bulk of their daily work is or should be reconstructive. They quickly perceive from the cases before them that the destructive results of drug addiction, alcoholism, unemployment and poor education are far more likely to be relieved by processes which include individuals in the social fabric, such as treatment, training, and counseling, than by ones which exclude them, like fines and imprisonment. Lower court judges vary tremendously in their capacities to respond to such observations and in their overt recognition of them in the terms just described. However, few will deny the reality of these complex debilitating situations, especially when they take shape as trying to keep an assaultive, alcoholic, but working father in the home, or an angry but underachieving kid in an alternative street school. This judicial partiality toward community conciliation on a day-to-day basis has long gone unchallenged in the lower courts, largely in accord with the adage, "who's gonna complain"?¹¹² At the lower levels both the courts and the public have been in a semi-détente over individualized or what might be called good rough justice for many years.¹¹³ Merely expanding and chang-

112. This may also result because, in fact, no one really cares about what goes on in the lower courts, or because among those who do care, they see this approach working. From time to time, however, this tranquility is disturbed by legislative proposals reaching into this discretionary domain with bills for mandatory minimum sentences for car thieves, drug users, etc. Current proponents of fixed or presumptive sentencing frequently draw no meaningful distinctions for misdemeanors and status crimes. See THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976), which draws no separation for lower court crimes.

113. Good versus bad rough justice, like obscenity, is best identified only when you see it. Generally speaking, however, good rough justice is characterized by practical, individualized problem solving rather than legalistic adjudication. It includes community sensitivity,

ing the methods of accomplishing this by adding ADRMs should therefore be of less concern than anticipated.

The second response is that the formal legal process is or should be regularly available no matter what the initial or temporary diversion. Irrational and unreasonable barriers to the judicial process not only violate due process in and of themselves,¹¹⁴ but defeat the concept of unhindered re-entry which ADRMs must provide if they are to succeed. In addition, since one reason ADRMs have arisen is to provide outlets for presently latent disputes lest there be future social or political disasters, denial of access to court seems to increase that risk. Unwitting and subjective reasons will always operate to keep some disputants from ever having their day in court. Despite this, no justification can be suggested for establishing explicit rules and policies to bar litigants who have chosen, or been forced through, the alternatives from ever getting to a trial court.

The next basic consideration is that of coercion. The focus of concern is not exclusively the coercion that participants in ADRMs may feel directly from the judiciary, but a version of institutional coercion—*i.e.*, the necessity of the alternative mechanisms themselves to attract and retain participants simply to prove that they can succeed. Overt as well as hidden pressures may well emerge to insure that ADRMs are used early and often. How else will either the data on use and success be gathered or the burdens on the court system be relieved?

As noted earlier, there can be little real hope that the advent of ADRMs will actually reduce court caseloads. The true test of success, of the wisdom of the approach, is choice by citizens and

a willingness to listen to everyone involved, and an ability to cut through legal technicalities to obtain, or impose, workable solutions. Professor Levin calls it "the administrative model of decision-making." Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUD. 193 (1972), reprinted in part in *ROUGH JUSTICE*, *supra* note 7, at 192. Bad rough justice is an attempt to do much the same thing without listening to participants, balancing community interests, or considering the larger, community-wide implications of the results. It relies instead on a more routinized view of disputes leading to more arbitrary and generalized imposition of personal judgments.

114. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Supreme Court struck down state filing fee requirement for indigent filing for divorce); *Douglas v. California*, 372 U.S. 353 (1963) (state cannot deny indigent defendant counsel for appeal); and *Griffin v. Illinois*, 351 U.S. 12 (1956) (state must provide transcript to indigent defendant appealing conviction).

satisfaction of users. No measure of either dimension can ever be attained if artificial pressures to use the mechanisms and/or avoid court exist. Consequently, while subtle and subjective pressures may well work to impel disputants toward the alternatives, all formal efforts must be resisted.

The final concern is whether the creative and responsive potential of ADRMs is lost to the more traditional phases of the judicial process by the nature of the affiliation. Will judges be foreclosed from utilizing the apparent strengths of the alternatives simply because one or more was attempted and rejected prior to trial? Once again a realistic appraisal of the work of the lower courts indicates that practical options and alternatives are regularly examined, often in the most informal settings, both prior to and after trial.¹¹⁵ Whether they do so from a need to reduce jury trials or to move along the calendar of cases, or as a result of an honest appraisal of how the matter could be more sensibly resolved, lower court judges are prone to initiate, propose, intervene, and respond—all in an effort to reach workable solutions without trial which are satisfactory to a variety of interest groups.¹¹⁶ When this tendency is considered together with a similar interest in such options at time of sentencing, there can be little basis for concern that the new affiliation proposed herein would cause judicial interest to be diverted from ADRMs. The limited number of current experiments with what is coming to be called alternative sentencing strongly indicates, particularly at the lower court level, an interest in, if not a preference for, novel approaches to getting the offender's attention and involving the individual in his or her own community.¹¹⁷ If, as this growing body of experience indicates, the judiciary prefers to have options somewhat similar to the ADRMs available both pre- and post-trial, no valid argument remains for isolating ADRMs to an initial or preliminary phase.

115. See ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE, §§ 4.1 & 4.2 (1972). See also note 18 *supra*.

116. ROSETT & CRESSEY, *supra* note 98, at 67-84.

117. See Chesney, Galaway & Hudson, *When criminals repay their victims: a survey of restitution programs*, 60 JUDICATURE 313 (1977); McCarty, *How one judge uses alternative sentencing*, 60 JUDICATURE 317 (1977); and Read, *How restitution works in Georgia*, 60 JUDICATURE 322 (1977). See also U.S. DEP'T OF JUSTICE, OFFICE OF DEVELOPMENT, TESTING, AND DISSEMINATION, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, SENTENCING TO COMMUNITY SERVICE (1977).

Preliminary concerns aside, the working model for operating a variety of ADRMs within the judicial framework, or the community court, has three basic components. The first is selection and screening of disputants; the second is free access to a fair trial; and the third is discretionary dispositions emphasizing the alternatives. Each phase, at least descriptively and theoretically, can stand alone, not dependent for success upon some distortion of or demand upon another. Free access, free choice, and individualized results are the hallmarks of the model. A concern with customer satisfaction along several dimensions, including responsiveness, simplicity, and durability of results, is the theoretical basis for success.¹¹⁸

A. Disputant Selection and Screening

The general thrust here comes from ideas similar to those found in Professor Packer's description of the crime control model of the criminal process.¹¹⁹ He holds that "repression of criminal conduct" is the central function of this model and that it is accomplished by an essentially administrative process of screening so that only the most serious or intractable cases reach trial.¹²⁰ The screening is accomplished by "the application of administrative expertness, primarily that of the police and prosecutors" and results, due to numbers, in "routine, stereotyped procedures."¹²¹ The predicates for this model are, quite naturally, that crime can be repressed most effectively and efficiently if summary processes are used by the preliminary, on-the-scene actors—the police and prosecutors who have the necessary expertise. A corollary tenet is that this administrative

118. These values, of course, disregard the consumer dissatisfaction inherent in the police arrest and other coercive means by which citizens are brought into court. Many police arrests, however, do involve citizen complainants who may be receptive to alternative mechanisms, and some may involve police who feel likewise. The McGillis study cites different levels of police cooperation in different cities. See MCGILLIS & MULLEN, *supra* note 1, at 89-172. Protecting the police department and individual officers from litigation when ADRMs achieve an out-of-court solution remains a problem. For a case rebuking the judiciary for its role in offering a lenient result in return for a citizen's waiver of civil rights against the arresting officer, see *Enbinder v. Commonwealth*, 368 Mass. 214, 330 N.E.2d 846, 849-50 (1975).

119. Packer, *Two Models of the Criminal Process*, in H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 158-59 (1968), reprinted in part in *ROUGH JUSTICE*, *supra* note 7, at 138-39.

120. *Id.* at 158, reprinted in *ROUGH JUSTICE* at 138.

121. *Id.* at 160, reprinted in *ROUGH JUSTICE* at 140.

fact-finding is more reliable than that which follows should the case go through the adversary system to trial.

While the value orientation for the community court model is resolution of disputes rather than repression of crime, the concept of screening through a series of options or stages utilizing the skills of administrative personnel is the essential ingredient. Much as police and prosecutors for many years have decided who shall receive various degrees of sanction from the so-called criminal justice system, it is proposed that others, including the disputants themselves, join law enforcement in utilizing the range of new alternatives to resolve disputes—and possibly repress crime too. Participants in ADRMs who find a sense of protection in the operations of the community court should be comfortable having this institution handle more serious problems, such as those faced by victims of violent crimes.

How would such screening work? The state controls the screeners in the crime control model, and their functions touch on only those disputes in which criminal charges are sought. This is, of course, a large portion of the work of the lower courts, and it is well recognized that many of the important developments to date in the alternative resolution of disputes, including diversion and mediation, have been done within prosecutors' offices.¹²² What is necessary, however, is to enlarge the nature of screening to include the disputants, the court, and even the personnel who staff the ADRMs. This must be done against the backdrop not of crime control, but of community conciliation for the lasting resolution of minor disputes.

As the following discussion indicates, there are a variety of ways in which disputants can arrive at different ADRMs. Some useful generalizations about the different methods of citizen entry can be made, especially in relationship to the question of which citizens in what circumstances would choose an ADRM and then abide by its results.

Most desirable for many reasons, including research purposes, is free choice. Here a citizen with a complaint decides on his or her

122. MCGILLIS & MULLEN *supra* note 1, Case Study B, at 108-21, describes the Columbus (Ohio) Night Prosecutor Program.

own to take the matter to one of the alternatives. The choice of approach may well be aided by a visit with the staff of the information and referral center located in the courthouse or elsewhere. There is, of course, the chance for some staff coercion at this stage, but proper training can eliminate this possibility. The citizen's choice may even result from some degree of shopping around—a preliminary talk with the ombudsman, an abortive attempt at mediation (the other party never came to the sessions), and finally a case filed in small claims court. One type of limitation upon free selection worthy of note is that some ADRMs, once chosen, are exclusive and their use bars return to the trial process.¹²³

Somewhat less spontaneous but still an exercise in free choice is the situation where the issue is joined, court process has issued, and both disputants choose to use one of the alternatives. Occasionally this may occur when both sides come to the courthouse seeking help, but usually it happens when the parties voluntarily decide to withdraw from a more formal approach. Examples include the disputants who appear before a police officer, assistant prosecutor, or court clerk seeking criminal complaints, and after hearing about the cost and complexities of cross-complaints choose to participate in a mediation program. Their choice is essentially free, although the possibility of returning to the criminal process may influence their participation in mediation. If both parties see the criminal process as undesirable, they may try all the harder to make mediation work; but if one has an upper hand, financially or otherwise, he or she may be quite willing to leave mediation and force the other into court if the results of mediation are not favorable.

In contrast to what might be called free or voluntary referral, "coerced" referral finds the disputants participating in an ADRM not exactly against their will, but certainly with their backs to the wall. This approach, most frequently used by judges but also available to other authority figures, such as prosecutors, clerks, and agency personnel, relies upon a clear statement of undesirable con-

123. Arbitration, by its very nature, can be binding and bar other options. Provisions and programs of this type are reviewed in NAT'L CENTER FOR STATE COURTS, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES*, ch. 5 (1977). The Massachusetts small claims statute provides that the plaintiff, having elected to file in small claims court, waives any right of appeal. See MASS. GEN. LAWS ch. 318, § 23 (West 1977).

sequence should the alternative to which the parties are being referred fail. This includes the prosecutor or judge who in an informal, pretrial session threatens a heavy penalty upon the loser unless the parties agree to use an alternative. An example of such conduct would be the judge who tells the parties to an essentially civil matter that is in criminal court (*e.g.*, collection of a bad check brought as a larceny charge) that if the defendant is found guilty he will get a heavy fine; and if he is found innocent, the merchant can bring no more such "junk" in criminal court. He then "recommends" they take the matter to small claims court. Obviously, the freedom the parties feel to return to the judicial process and the enthusiasm with which they participate in the alternative vary with the severity of the threat. Because citizens are so unfamiliar with court procedures and basically afraid of dealings with authority figures like police, prosecutors, public utilities, etc., veiled threats received as rumors, courthouse gossip, etc., also play a large role here in leading to informal paths of resolution. It is also true that a disputant's self-appraisal of the costs of potential losses from completing the trial process may make him feel coerced into using an alternative, if the convenor of the more formal process (judge, clerk, prosecutor) is silent.

Some participants in ADRMs will be there as a result of mandatory referral. Various programs of pretrial screening and conciliation are now required by court rule or statute. The option to return to the court is usually tightly proscribed.¹²⁴ Some ADRMs may be the exclusive form for the type of dispute involved, particularly where there is no constitutional bar to completely eliminating the controversy from the trial process.¹²⁵

A more flexible possibility is that of referral between or among the ADRMs. Whether the parties freely chose the alternative or got

124. The Massachusetts medical malpractice screening statute requires the plaintiff to post a \$2,000 cash bond if the tribunal finds the case presented to them to be "merely an unfortunate medical result." MASS. GEN. LAWS ch. 231, § 60B (West Cum. Supp. 1977) was held constitutional in *Paro v. Longwood Hospital*, ___ Mass. ___, 369 N.E.2d 985 (1977).

125. One example would be the change in some states to the use of administrative tribunals to hear traffic cases. If a state's constitution permits some types of arrests to be decriminalized depending on legislative category (*e.g.*, ordinance violations, petty offenses, etc.) or maximum penalty, such an approach offers promise. The application of the federal constitutional right to trial by jury to this question is discussed in Annot., 26 L.Ed.2d 916 (1971).

to it under some degree of duress, those who operate a given process may determine from their own expertise that it is inappropriate. With the exception of the mandatory alternatives, most others are of such a nature that the convenors could redirect the disputants. For example, a small claims judge could see that mediation would likely exceed his or her efforts at dispute resolution and point out its advantages to both parties, leaving open the option to return to small claims court. Similarly, a counseling program, like a court clinic, could suggest after several sessions were completed that the parties try mediation or that they obtain the final and definitive results of litigation. This, of course, raises the troublesome spectre that some will recommend or refer for their own ends, *e.g.*, reduce caseload, force therapy, get rid of troublesome people, show good "success" data, etc. Few solutions to this problem are available, other than good faith and a sense of shared purposes, unless a czar of ADRMs is contemplated—a step that seems unwise to recommend this early in our experience and research.

As can readily be seen, the desirable values of free selection, neutral information, and reasoned referrals can suffer much in practice. The motives of the judiciary to whom the ADRMs are to be closely related, the growing expertise of the administrators of the alternatives, and the preferences and prejudices of authority figures like prosecutors and court clerks who are already an integral part of the screening picture, all conspire against a marketplace vision of the community court. Nevertheless, if the screening notion can be implemented with the overarching goal of obtaining effective, durable dispute resolution, much as law enforcement screening has been implemented for the goal of crime control, the ultimate impact on society of the satisfied consumers outweighs the difficulties some of them may experience to obtain satisfactory results.

Two more specific thoughts may help illuminate these generalities. First, the preliminary experience with voluntary, coerced, and mandatory referrals will provide the raw material for emerging categories of disputes most susceptible to various alternatives. If some of the speculation about citizen preferences for a structured procedural system mentioned earlier proves accurate,¹²⁶ then greater tol-

126. Thibaut, *supra* note 91.

erance for limited types of coercion in these disputes can be more logically argued. Second, a dual approach may well be appropriate. This contemplates that voluntary referrals participate in ADRMs operated entirely outside of and independently from the courts. Such distance is necessary, it is suggested, to guarantee the integrity of the alternative process chosen and eliminate any degree of judicial coercion or taint.¹²⁷ On the other hand, those disputes which have entered the formal judicial process (*e.g.*, criminal complaint issued and pending, small claims action filed and pending) would remain within court related ADRMs with all the attendant possibilities for coerced and mandatory referrals. This division recognizes more explicitly the virtues of free choice and maximizes customer satisfaction on that basis, while at the same time acknowledging the more coercive possibilities in the judicial setting.

B. *Free Access and Fair Trial*

At this point in the discussion, concern with the traditional concepts of due process and fair trial becomes paramount. Unlike Professor Packer, who suggests a dichotomy between his crime control and due process models, this writer suggests that a fair trial, meeting the traditional requirements of due process, can logically follow the screening phase just described. Naturally, it is anticipated that some disputes will be successfully resolved by the screening functions of the ADRMs. This useful result, however, is not a necessary one. Neither the issue of citizen preference or that of fundamental fairness—*i.e.*, the general due process question of freedom from coercion to give up constitutional rights—can adequately be answered unless there is free access for disputants to the trial function of the court. Except for those disputants who are eliminated by their own choice or by mandatory referral, all others who choose among the ADRMs should have open access to the court system.

How would this work in practice? First, for the voluntary participants who have either walked in on their own or agreed among themselves to use an alternative approach, the option to utilize the

127. The San Francisco Community Board Program and its philosophy to specifically avoid a court relationship is discussed in MCGILLIS & MULLEN, *supra* note 1, Case Study F, at 163-72.

judicial process should be explained by those operating the chosen alternative. Similarly, the information and referral service which many voluntary participants will consult should review the option to go into court as part of their presentation about the ADRMs. Finally, upon completing an alternative, the disputants should be reminded that a dissatisfied party may still take the matter to court.

Those participants who come to the ADRMs as a result of a coerced referral will be very much aware of their further options in court as a result of the referral instructions given them. These options, however, may be more restrictive than for groups described above, because of the conditions placed upon them by the referring prosecutors, judges, or other figures. In fact, the possibility of their being given specific disincentives to return to court is so likely that some supervisory controls may well be necessary to retain unimpeded access to the court system.¹²⁸ On the other hand, prosecutors, clerks, and judges should use ADRMs intelligently, focusing on the ultimate outcome rather than shortsightedly dumping people in them. Those who follow this approach tell the referred parties about the open availability of court should the alternative selected fail to resolve their dispute. A more devious version of this would occur when a referring agent such as a judge would encourage adjustment and compromise by calculating on the disputants' reluctance toward, or fear of, a freely available trial and its consequences.

Mandatory referral need not always prohibit or discourage return to the judicial process, although this is often its intention, especially when used by a trial judge. Some screening plans are legislatively or judicially prescribed with a clear right of return to the judicial process should no solution be achieved.¹²⁹ Other ap-

128. For example, administrative regulations may be necessary to prohibit judges from threatening, or actually imposing, harsher penalties after conviction upon those who are referred to an ADRM but fail to resolve their dispute and return for trial. Practices of this sort would clearly violate the United States Supreme Court's decisions barring judicial vindictiveness against a defendant who seeks to exercise a legal right. See *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969). Compare *Bordenkircher v. Hayes*, 98 S. Ct. 663 (1978).

129. One example is the Massachusetts pretrial diversion statute, MASS. GEN. LAWS ch. 276A, § 6 (West 1977), which dictates that the program director shall report violations of program conditions or subsequent arrests to the court for appropriate judicial action to bring the deferred defendant back before the court.

proaches of this type, such as arbitration and special courts, allow limited forms of return to the judicial process, such as appellate review under a strict standard,¹³⁰ or return at the option of one party and not the other.¹³¹

Another group of participants in ADRMs who may experience difficulty in obtaining access to the courts are those who are referred back and forth among the alternatives. These disputants may have initially known of the availability of court, but the process of referral back and forth has eroded their awareness of that possibility. Furthermore, those convenors who manage the alternatives, particularly the final one to which the oft-referred parties are finally sent, may say nothing about future options.

Given the inevitable tendencies noted here—(1) to have the ADRMs handle a larger and larger portion of the lower court's workload; (2) to pressure or coerce disputants into using them; (3) to fail fully to apprise disputants who choose alternative methods of their rights to return to court if unsatisfied; and (4) to bar access to court, either by statute or local custom, when an ADRM has been selected—what precautions are in order to leave as much flexibility and free choice to the disputants as possible? Methods like the information and referral service and the reading of rights and alternatives are helpful but insufficient. Much as screening emerges as the functional description of the first phrase of the model, *free access to a fair trial* must be an ideological tenet of the second phase of the community court. As such, it is enforced in the philosophy, rules, and daily operation of the model. Every reasonable step is therefore taken to reduce the degree of coercion and the number of mandatory referrals. This includes proscribing certain conduct, such as judicial threats and admonitions that increased penalties will or even may result if an alternative fails. The critical notion therefore is informed choice, rather than imposed decisions.

130. The entire field of administrative law with its "substantial evidence" test for judicial review of the adjudicatory decisions of administrative tribunals illustrates this concept, as does the concept of prevailing-party presumptions found on appeal in certain de novo civil systems. See, e.g., MASS. GEN. LAWS, ch. 231, §§ 102, 104 (West 1977).

131. A number of small claims statutes in this country allow only the losing defendant to have access by appeal to the regular civil docket. An important fifteen-city study of small claims courts indicates that while all fifteen give the defendant some form of access to the regular civil docket, at least four bar both plaintiff and defendant from an appeal after trial. Rhunka & Weller, *supra* note 13, Table 49, at 60-62.

No amount of philosophizing and rule-making will accomplish this lofty goal, as the evidence with reforming the current lower court system demonstrates.¹³² An attitude can be fostered, however, which establishes that it is more appropriate for the disputants than for the decisionmakers to choose how the grievances that flood our lower courts are to be resolved, especially if we are to have more effective, lasting results than those presently obtained. This theme, when coupled with the larger due process requirement that the trial process be available to adjudicate conduct which has monetary and punitive consequences, leads inescapably to the conclusion that the community court must leave the door to the courtroom unfettered. If we add the perspective that only with a marketplace approach to both the ADRMs and the court will we ever know who chooses which approach and why, the issue is even more firmly resolved in favor of free access.

One specific approach to insuring free access is the requirement of full disclosure at each stage—information and referral, a particular alternative, arraignment, trial, etc.—so that the disputants know in detail where they stand in relationship to the court system, what the available options are, what the risks or costs of each option are, and what benefits might be obtained. Much as the Code of Professional Responsibility and contemporary notions of the lawyering role stress informed client autonomy, this approach stresses informed disputant choice.¹³³ It is a very fine line between the parties who choose mediation and stick with its results because they honestly evaluate the costs of court (time lost from work, expense of hiring an attorney, possible criminal sanctions) as too great, and those who do so because a judge tells them it is the only way they can avoid having to pay an attorney and a bondsman. Nevertheless, the more detailed the information is and the more patiently it is explained by seemingly neutral court staff, the freer the citizen choice will be, at least consciously.

132. Flaschner, *supra* note 103.

133. A.B.A. CANONS OF PROFESSIONAL ETHICS, No. 7 provides: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law," EC 7-5, EC 7-7, EC 7-9. See particularly EC 7-8 which provides: "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . A lawyer should advise his client of the possible effect of each legal alternative."

If free access is reasonably assured, what then is a fair trial? Should the flexible, sensible, and informal approaches of the ADRMs, useful prior to trial, be suddenly halted for an altogether different process? Is the due process model of Professor Packer really viable at the lower court level with its "insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him"?¹³⁴ Can the lower courts afford the loss in efficiency which the due process system requires in order both to insure reliability and to protect against official coercion?

The answer to these questions for the community court model is decidedly yes. This is not only because it is the legally required mode of resolving disputes involving the potential loss of liberty or property, but more importantly because it is the approach which gives the greatest vitality to the ADRMs themselves. Only by a process of weighing contrasts, options, and opposites, will the merits and accomplishments of the varying approaches emerge. As stressed earlier, some diminution in fully litigated cases, but not in lower court work, should result from the anticipated successes of the ADRMs with certain types of conflicts. Some disputes which might previously have never entered the court system, except after a human explosion resulting in felony indictments, may well be explored in one of the alternatives as the word spreads. It is this increasingly free form of participation, and not the coercive referral, on which the efficiency argument sinks. For if the community court can in fact offer a variety of fully operational ADRMs, and if the formal power brokers such as prosecutors, clerks, and judges will moderate but not eliminate their coercive use of them, then the lower courts will have the capacity, jury trials and all, for the full implementation of the due process, fair trial model. The essential thesis here is that the ADRMs will be so appealing and their results so satisfying that it will be unnecessary to indulge in any speculation about the need to restrict due process at the trial stage. Professor Packer's concern with "how much reliability is compatible with efficiency"¹³⁵ can be answered by the community court model—the

134. Packer, *Two Models of a Criminal Process* in H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 163-64 (1968), reprinted in part in *ROUGH JUSTICE*, *supra* note 7, at 143.

135. *Id.* at 164, reprinted in *ROUGH JUSTICE* at 144.

efficiency coming in the screening phase conducted by the ADRMs and the reliability in the assurance of a free choice to have a fair trial.

A more specific issue in attempting to draw the balance between efficiency and reliability is the gnawing question of just how many jury trials this second phase can sustain. There is substantial dispute over what level of jury trial capacity a well-planned and operated court system should provide.¹³⁶ Obviously the closer one can come to providing constitutional, legitimate fair trials without the burdens of substantial numbers of time-consuming jury trials, the greater is the reality of unencumbered access to this second phase. One practical, and currently constitutional, approach is the trial de novo system found in the courts of Massachusetts and other states.¹³⁷ The Massachusetts experience indicates that by providing a speedy and essentially fair bench trial in the first instance, over 90% of the lesser criminal and juvenile cases are resolved without appeal to jury trial.¹³⁸ Such a dual level approach to providing fair trials could appropriately be part of the community court.

C. *The Disposition—A Return to the Flexibility of the ADRMs*

A further reason why the community court will operate with a relative degree of efficiency and yet afford full due process at the trial stage is found in the third, dispositional, phase of cases. Once the fact-finding or trial phase is completed, and guilt, delinquency or liability has been fairly determined by strict adherence to the due process, fair trial model, the determination of the disposition of the case—the sentencing in more formal criminal terms—is essentially discretionary with the judge. Despite much current interest in such ideas as appellate review of sentences, sentencing review courts, sentencing panels, presumptive sentences, and even statutorily

136. The Special Committee on Trial De Novo of the District Court of Massachusetts had reason to consider the varied opinions on this question as they reported on proposed changes. See FINAL REPORT OF THE SPECIAL COMMITTEE ON TRIAL DE NOVO TO THE CHIEF JUSTICE OF THE DISTRICT COURTS, ALTERNATIVES TO THE PRESENT SYSTEM OF TRIAL DE NOVO IN CRIMINAL CASES 18-22 (1976).

137. *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (upheld the constitutionality of the Massachusetts two-tier de novo system).

138. Bing & Rosenfeld, *supra* note 49, reported that in fiscal year 1968 only two percent of all criminal cases brought in the district courts received a trial de novo.

fixed sentences, the lower court judiciary remains free to impose any sentence or solution deemed appropriate, within broad statutory limits.¹³⁹

This high degree of dispositional discretion has been compounded in the lower courts by an equally high degree of procedural creativity. Many lower courts, heedless of legislative dictates on sentencing, have established their own essentially lenient approaches to such individuals as first offenders, drug addicts, alcoholics, and youthful shoplifters. The result has been the growth in many municipal courts of an informal, almost customary law of sentencing employing such terms as "deferred sentence," "continued without a finding," and "probation with the option for dismissal." Underlying this development are several humane and compassionate motives, the wisdom of which is often not universally recognized, but which becomes quite evident over time to municipal or juvenile judges. Examples include allowing a "guilty" defendant to complete a period of probation supervision without receiving a formal criminal record, with all the adverse consequences which that implies for future work, schooling, licensing, and other activities; creating the motivation for a drug or alcohol abuser to undertake counseling by withholding formal conviction and a criminal record if such treatment is actively pursued; and developing a consistent and uniform pattern of punishment for all persons, rich and poor, convicted of a troublesome and frequent but minor crime like shoplifting, yet offering to void it later upon proof of good behavior.

Once these unwritten types of dispositions become established and well-known in a local court, they also become predictable. Once predictable, they become an essential ingredient on the efficiency side of the delicate balance between speed and due process necessary to operate our lower courts. If an attorney can predict the outcome of a criminal or juvenile case to his or her client with reasonable certainty, and if that outcome includes certain of the individualized considerations previously noted, no formal trial will be requested, but an admission of guilt or guilty plea will result. In other words, the creation and implementation of informal sentenc-

139. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS FOR SENTENCING ALTERNATIVES AND PROCEDURES, §§ 2.1, 2.2 (1974).

ing options, particularly those that touch upon the special concerns of the misdemeanor defendant (e.g., no criminal record, relief from addiction, or vacating the judicial proceedings) become self-fulfilling. Once available, they are chosen in ever-increasing numbers, with a corresponding reduction in the trial list.

What this means, using a slightly different mode of analysis, is that at the dispositional or sentencing phase, the judge becomes an actor in the administrative, discretionary processing of cases associated with Professor Packer's crime control model. This is remarkably similar to the administrative decisionmaking model noted by another scholar in his study of the sentencing behavior of judges in two different cities.¹⁴⁰ In that study, Professor Levin cites as an attribute of the administrative model the ability to fit the disposition to the "needs of those individuals."¹⁴¹ In an important footnote, he comments that his findings indicate a far more active and involved judiciary than Professor Packer posits for either of his models.¹⁴²

If one adds the ADRMs described in this paper to the informal sentencing practices just discussed, the implications for the community court are clear. Since there are no real due process restrictions on the dispositional phase in lower courts, judges are free to utilize the strengths of the alternatives if they wish. Lower court judges have already indulged in a high degree of procedural creativity to individualize sentencing; thus it is only logical that they like-

140. Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUD. 193 (1972), reprinted in part in *ROUGH JUSTICE*, supra note 7, at 192.

141. *Id.* at 205, reprinted in *ROUGH JUSTICE* at 198.

142. [T]he differences in the goals and means of [Packer's] models and this study's are much more significant. For example, in the crime control model the goal is the repression of crime by all possible means, and the means are routinized and uniform procedures. By contrast, in the administrative model that the Pittsburgh judges' behavior approximates, the maintenance of order is but one of several goals, which also include arriving at "just" settlements based on the particular merits of individual cases and expediting their caseload in a pragmatic fashion. These judges feel that the policies of agencies such as the courts are not likely to be effective deterrents or modifiers of illegal behavior. Also, Packer's models relate to legislators, police, prosecutors, defense attorneys, and judges and emphasize the central role of counsel and the passive role of the judge. This study's models relate only to the judges; its findings indicate that in these two cities the judges dominate the counsel.

Id. at 205-06 n.23, reprinted in *ROUGH JUSTICE* at 198 n.23.

wise indulge in substantive creativity by using dispositional concepts from among the alternatives. Moreover, returning to the theme of user satisfaction, it may be anticipated that as a result of their appeal to the disputants in certain types of cases, the alternatives when applied as a disposition will be more successful—longer lasting—than traditional criminal sentences. Finally, the use of the range of alternatives at this phase, like the present procedural innovations, should be self-fulfilling, thereby leading to more admissions of guilt in order to obtain the benefits involved.

Which of the ADRMs offer promise at the dispositional stage? Before answering that question, two important differences between their pre- and post-trial availability must be noted. First, the post-trial situation, by definition, involves a determination of wrongdoing, or legal guilt, against one of the disputants. From that point on, his or her participation in any alternative mechanism is by court order and as a wrongdoer. While some of the sting of this status can be removed by judicially created procedural fictions like "sufficient facts for a finding of guilt," with no conviction imposed pending participation in the alternative, the change in status of the disputants at this phase is clear to all concerned.

Second, in the post-trial setting the judge, not the convenor of the alternative nor the parties, is in command. The parties are really not free to order their own solution, but must find one satisfactory to the judge. This essentially limits the alternative to a recommending function. The judge's power is at a maximum, since the defendant's failure in the alternative can mean the immediate imposition of traditional, potentially severe, criminal sanctions.¹⁴³

Considering these limitations, those ADRMs with the greatest potential at the dispositional phase are fact-finding, diversion, and mediation. Fact-finding would be employed where the sentencing judge felt he or she needed greater factual detail about such issues as the nature of the crime involved, the defendant's background, or the community resources available to meet the defendant's social and medical problems. Traditionally, this type of fact-finding with

143. Even if formal probation is not involved at this point, the defendant is probably entitled to the constitutional protections of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), regarding probation surrender hearings, when a more severe criminal sanction can be imposed.

appropriate recommendations for the judge has been done by the court's probation staff.¹⁴⁴ Courts are now, however, using a variety of supplemental fact-finders in the disposition phase, such as clinic personnel, psychologists, and special need evaluators. Often these investigators work hand-in-hand with the probation staff to prepare a joint report for the court. The latter idea, the evaluation of special needs, is a catch-all phrase for determining the role of drug, alcohol, mental, vocational, and educational disabilities in the behavior of the defendant. This concern recently received attention; it has been shown to give a sentencing judge information about certain types of disabilities which were previously disregarded in the sentencing process, such as mental retardation.¹⁴⁵ It is true, of course, that the fact-finder's data and recommendations are not binding upon the sentencing judge, and while special treatment, such as unsupervised probation, a long continuance of the formal sentencing pending therapy, or even diversion, may result from the report, such recommendations may also be rejected and a traditional sentence imposed. However, the data can be helpful in forming the terms and conditions of such a sentence or of contract probation; it can even be useful in suggesting an appropriate jail program to penal personnel.

Diversion programs operate at the post-trial stage much as described previously. The major difference is that for them to be effective at this point, for the defendant to be motivated to participate in them, the fiction of "guilt without conviction" is employed. This requires either statutory or judicial creation of a concept that the defendant is guilty in fact but will have no formal finding of guilt put on his or her record, for it is the opportunity to have no criminal record at the end of the diversion period which is believed to motivate most participants to successful completion. The question of the sincerity of participation in these various coerced treatment approaches remains troublesome, usually answered by the propositions that something is better than nothing and that at least the defendant stayed out of trouble while in the program.

144. See ABA, *STANDARDS FOR CRIMINAL JUSTICE*, Pt. II, §§ 2.1-2.5 (1974).

145. One such project is the Massachusetts' Bar Association's Specialized Training and Advocacy Program (S.T.A.P.), and the project's comprehensive Final Report describes their services to the mentally retarded offender in detail. Copies are on file at the offices of both the Massachusetts Bar Association and the author.

A second important element of the diversion approach at this phase is the need for careful evaluative screening. The decision about which convicted defendants can usefully benefit from diversion is much more complex for the thoughtful sentencing judge than determining the broad eligibility categories for pretrial diversion programs. Consequently sentencing judges rely upon a variety of evaluation mechanisms to assist them in not only determining the likelihood that a defendant will respond to treatment, but also which specific program will provide that treatment. In this regard, drug and alcohol screening boards, special needs advocates, and youth service boards are extremely helpful to the court in providing the link between the diagnosed problem of the defendant and the precise treatment plan he or she will undertake during diversion. Finally, it must be added that diversion programs need not be utilized exclusively in that somewhat metaphysical stage of post-trial and pre-conviction. Such programs may well, following conviction on the record, form the terms and conditions of formal probation, probation under a suspended sentence, or even a split sentence.

Mediation at the dispositional stage would hardly be recognized by its advocates. Because of the authoritarian role of the judge, and the essentially unequal positions of the parties, even under the "guilt without conviction" notion, much of the genius of mediation for resolving neighborhood disputes is eliminated. Some of its qualities of free and open discussion, full airing of the total situation, informality and privacy, and seeking a consensual conclusion are maintained. What occurs is that the judge at disposition suggests that the disputants meet with a community group to discuss a proposed solution, or, if you will, the appropriate "punishment" for the defendant. That meeting, or series of meetings, leads via processes similar to those employed in mediation to certain sentencing recommendations for the judge.¹⁴⁶ Despite the drawbacks that result from having gone so far through the traditional criminal process, this approach has its virtues. There can be face-to-face confrontation between the victim and the defendant regarding the appropriate disposition. This rarely occurs in court-

146. For a discussion of the Disposition Component of Urban Court Program, in which citizens meet with the victim and the accused and make sentencing recommendations to the judge, see Snyder, *supra* note 36.

room sentencing and can provide for a useful clarification of frustrations, expectations, and heart-felt concerns. It may even lead directly to a recommendation to the judge proposed by both parties, such as restitution or community service work by the defendant. In addition, the use of community residents promotes a much fuller review of available community resources and dispositional alternatives than the busy judge and probation staff can undertake. Not only are existing and new programs more likely to be considered, but strong figures in the community and their creative capacities are more likely to be identified. The fledgling photographer just home from art school, who is willing to teach the boy who broke into the school's darkroom, is just one example of what the judiciary is apt to miss. Similarly, the community mediators may well be more imaginative in discerning an activity of real meaning to the wrongdoer. They have had a far keener sense than the judiciary when the weekend work projects at City Hall have lost their impact and help at the local mental hospital or school for retarded children is more appropriate. This type of mediation can develop in the wrongdoer a far greater appreciation of his or her improper actions and continuing responsibilities than any judicial lecture and sentence. Discussion with members of the community and with his or her victim may lead to a variety of responses among the parties—such as anger, shame, guilt, reconciliation, reaffirmation, or forgiveness—which, when openly discussed, increase the offender's own understanding of his or her role in that community. Similar to Professor Griffiths' concerns in his family model, this approach would view the defendant's offense as a "failure of expected self-control,"¹⁴⁷ and try to develop within the individual an understanding of what is expected in his or her community, and what steps he or she can take to show (and, one hopes, accept) responsibility toward this community.

A review of the role of ADRMs in the dispositional phase is not complete without reaffirming the fullness of the sentencing judge's discretion in the lower courts. His or her creative instincts are hardly limited by the traditional statutory sentences on one hand and the ADRMs on the other. Some of the most novel approaches to sentencing in recent years have not resulted from the use of existing pretrial programs or even the range of alternatives sug-

147. Griffiths, *supra* note 11, at 375.

gested in this paper.¹⁴⁸ Rather they stem from a sensitive combination of the highly discretionary sentencing power, a philosophic commitment to individualize sentencing to capture both the motivational mechanisms of the wrongdoer and the inherent capacity for forgiveness and reconciliation of the victim and the local community, and a detailed knowledge of community resources and attitudes so that this philosophy can be feasibly implemented with appropriate sanctions on one hand and compassion on the other. The integration of ADRMs into the community court model establishes a range of options and an ideological background against which this dispositional or sentencing function can be conducted. As a result, the notion of a community court should promote a far broader vision of the possibilities for exercising that function.

CONCLUSION

With disaster for our courts consistently predicted on one hand,¹⁴⁹ and the vision of neighborhood justice centers newly appearing on the other,¹⁵⁰ renewed collaboration of court and community towards establishing alternative methods of dispute resolution offers appropriate solutions. While this article has suggested a number of realistic, perhaps limiting, observations about that effort, their realism should by no means detract from the apparent evidence that significant numbers of disputants will choose, if offered, a variety of new, court-related methods to resolve their grievances. The working model of the community court set forth in this article provides both an ideology and a procedural vehicle for implementing this citizen interest in our local courthouses.

148. The Committee on Alternative Sentencing of the Massachusetts District Courts will soon publish a manual of alternative sentencing practices. Among the innovative sentences disclosed in their survey were: (1) requiring a parent of a delinquent child to be home for dinner for a specified period of months; (2) requiring vandals to do repair work in an elderly housing project; and (3) requiring volunteer work in mental hospitals.

149. In his classic speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 40 AM. L. REV. 729 (1906), 35 F.R.D. 273 (1960), Roscoe Pound said this theme was "old as the law." It was recently restated in Massachusetts as follows: "The administration of justice in Massachusetts stands on the brink of disaster." GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS, REPORT ON THE STATE OF THE MASSACHUSETTS COURTS 1 (1976) (Archibald Cox, Chairman).

150. MCGILLIS & MULLEN, *supra* note 1.

