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# Court-Annexed ADR - A Dissent

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# COURT-ANNEXED "ADR"—A DISSENT

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*In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.*[1]

In these few simple words lies one of the most precious rights provided in the United States Constitution. There are more stirring passages in that great work, but none more inspiring to those who hold dear individual rights and collective participation in the democratic processes. The preservation of the right to a civil jury trial affords all citizens access to the federal courts— from the indigent to the rich and the powerful. It guarantees participation by persons from every walk of life, through selection as jurors, in the awesome process of truth finding, vindicating rights and protecting principles. It personalizes the ideals and responsibilities of freedom and democracy for everyone—laymen, lawyer and judges alike. It brings to the people the very essence of justice.

A democratic society must have an accepted and respected method of resolving disputes which may arise between its citizens. The civil court and jury system is that traditionally accepted method of dispute resolution in our society. For centuries, individuals have brought appropriate civil wrongs to the federal courts for redress and the system has served them, and our democracy, well. My purpose in this brief article is to advance the premise that it is ill-advised and, perhaps, unconstitutional to suggest court-annexed Alternative Dispute Resolution (ADR) as an alternative to the traditional civil jury trial dispute resolution process.

Thomas Jefferson viewed the civil jury trial as a stabilizing force and a bulwark against the corruption of our democratic form of government. "[Trial by jury is] the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[2] Because of the power and importance of the civil jury trial, it has been carefully

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1. U.S. CONST., AMEND. VII.

2. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 16 n.6 (1990) (quoting 3 Writings of Thomas Jefferson 71 (Washington ed.)).

guarded by the United States Supreme Court, the keepers of the Constitution.

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.[3]

But the civil jury trial has come under attack recently as a cumbersome, time and resource consuming imposition on litigants, taxpayers and the judicial system. There are those who have come to view traditional dispute resolution, that is, the civil jury trial, not as a marvelous cog in the machinery of democracy, but as an antiquated, inadequate process. They have proposed to change, through court-annexed ADR, what the Constitution has provided, the founding fathers have defended and the United States Supreme Court has protected. They offer instead a myriad of alternatives to the civil jury trial, with an apparent goal of disposing *quickly,* though not necessarily *justly,* of all cases capable of being filed in federal court. Judge Robert M. Parker, a highly respected federal judge and important supporter of court-annexed ADR, proposes a system in which cases are tracked in the early stages for arbitration, mediation or summary jury trial treatment and the civil jury trial "ascends to its appropriate place as the institutionally exceptional."[4] Under this ambitious reform proposal, decisions reached through the alternative track proceeding are presumptively both correct and final.[5] If a litigant would be so bold as to still wish to exercise the right to a jury trial, he or she would have to overcome these presumptions at a hearing where the court (which tracked the case initially) would decide whether "the case warrants the *additional* litigant and court resources implicated by the post-decision, traditional litigation."[6] Under this ADR reformation model, a litigant is placed in the unenviable position of expending personal and court resources in an alternative proceeding that he or she did not choose, and is subject to expending still more resources in a fight to win back a right the Constitution already undeniably affords!

There are less radical proposals for court-annexed ADR than Judge Parker's to be sure. Some have been authorized or directed by Congress as experimental or pilot programs. The Judicial Improvements and

3. Jacob v. New York City, 315 U.S. 752, 752-53 (1942).
4. Judge Robert M. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905-06 (1993).
5. *Id.* at 1914.
6. *Id.* at 1915.

Access to Justice Act of 1988[7] was the first congressional impetus for mandatory court-annexed arbitration. The Act authorized ten experimental district arbitration programs for a five-year period. These experimental arbitration programs were tempered by the explicit statutory requirement that "trial *de novo*" was available to any party upon demand within thirty days of the filing of an arbitration award.[8] The Civil Justice Reform Act of 1990 continues the legislative push for ADR by directing that each of several early implementation district courts "consider and [possibly] . . . include . . . alternative dispute resolution programs."[9] These early implementation courts have submitted plans which employ various court-annexed ADR methods including mediation, arbitration and summary jury trials. The districts have developed various thresholds and systems to determine which cases will be referred first to ADR and which will be allowed access to a civil jury trial from the outset. All the systems seem less radical than Judge Parker's proposal. However, they all include "disincentives" to litigants seeking a civil jury trial.[10] To court-annexed ADR proponents, the civil jury trial appears to be the boondoggle of the federal judiciary, to be avoided at all costs.

To that end, the proponents of court-annexed ADR offer procedures that are less refined, quicker, and so, presumably more cost-efficient than civil jury trials. They cite burgeoning civil case dockets, criminal dockets that interfere with the too high civil caseload, increasing case disposition time periods, and increasing time from issue to trial as proof that an alternative to the civil jury trial is needed. In short, they say the federal judiciary is in serious danger of collapsing and that ADR is the panacea for that crisis.

But I believe the perceived crisis in our federal courts is just that—a perception. This is not to say a crisis is not possible. I am concerned that the present public and congressional inclination to federalize all wrongs will overburden the federal courts.[11] However, that crisis does not now exist. In 1987, the total case filings in all United States district courts

7. Pub. L. No. 100-702, 102 Stat. 4659 (1988) (codified as 28 U.S.C.A. §§ 651-658 (1993)).

8. *Id.* at § 655(a). As expected, ADR reformists asked Congress to continue and expand the court-annexed arbitration programs to include mandatory or voluntary programs upon sunset repeal of the law as of November, 1993. Congress agreed to continue the program as it is now in place, but declined the invitation to expand it.

9. *Id.* at § 473(a)(b).

10. A common, and effective, disincentive is the relative cost and delay for litigants who seek more process after a decision is reached in an ADR context. Parker, *supra* note 4, at 1917.

11. Carjacking is now a federal crime. *See* 18 U.S.C. § 2119 (Supp. 1993). The Child Support Recovery Act of 1992 federalized some aspects of parental nonsupport. *See, e.g.*, 18 U.S.C. § 228 (Supp. 1993) and 42 U.S.C. §§ 3793, 3796(cc) (1992). The First Lady, Hillary Clinton, is advocating the federalization of crimes of violence against women. In 1991, the Senate passed Senate Bill 1241, to amend The Violent Crimes Act of 1991. That bill, had it been passed, would have provided for federal prosecution of state homicides where firearms are used.

came to 265,234; in 1992, that figure was 265,612.[12] In 1987, the number of civil filings per judge was 411; in 1990, it was 381.[13] With 74 more judgeships, each judge had 355 civil filings in 1992.[14] The Administrative Office statistics offer the surprise that there has actually been a *decrease* in the number of civil filings per judgeship in federal district courts during this six year period. In North Dakota, there were 211 civil filings per judgeship in 1987 and only 237 in 1992.[15] I do not believe these statistics show a "burgeoning" civil case docket, nor do they, in my opinion, demonstrate a need for an alternative method of handling disputes in the federal courts.

While court-annexed ADR programs may indeed offer a less expensive, faster procedure by which the federal courts may dispose of civil cases, they do not offer a *better* alternative than the traditional jury trial and the attendant rules of procedure and evidence. I submit that litigants and lawyers would agree that these rules "even out" the playing field for parties. The meek and the mighty, the rich and the poor, and, yes, even the United States government, must all play by the same rules. They are all constrained in their effort to put on their case and so, stand more or less equally before the jury. There are strong indications that ADR processes are not the best dispute resolution choice in cases where there are power imbalances, such as often exist when one party is a woman or a member of a racial or ethnic minority.[16] In such cases, the less powerful litigant may very well be harmed by the domination of the other party, unchecked by formality and rules. Federal courts have a long history of protecting the less powerful members of our society.[17] This is the great

12. Administrative Office of the U.S. Courts, Federal Court Management Statistics at 167 (1992).

13. *Id.*

14. *Id.* There is still room for expansion and improved efficiency of the traditional justice delivery system within the federal courts. That growth and efficiency can be (and, in some aspects, has been) accomplished in the following ways: (1) completing computerization of the system for accuracy and efficiency (accomplished over the past five years); (2) increasing the number of Article III judges (accomplished to a limited degree—there is general agreement that the number of federal judges can reach 1,000 without jeopardizing the benefits of a small federal Article III judiciary); (3) expanding the magistrate judge support system which has proven itself an efficient part of the traditional court system (it is accepted that the desirable ratio of Article III judges to magistrate judges should be 1:1, a ratio that has not been reached); and, (4) a recognition by Congress of the folly of continuing to federalize all wrongs, thereby, expanding federal question jurisdiction.

15. Administrative Office Report, *supra* note 12, at 119. Though civil filings in North Dakota are lower than the national average, the criminal caseload is higher. *Id.* Annually, there was an average of 74 federal felony criminal cases per judgeship filed in the last five years in North Dakota. *Id.* Nationally, there were 53 federal felony criminal cases filed per judgeship during the same period. *Id.* at 167.

16. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 10-11 (1991). These are the groups traditionally disadvantaged by a powerful, dominant class. However, in North Dakota, in addition to these groups, other groups, such as family farmers and small business people, could easily be dominated by aggressive and powerful opponents.

17. North Dakota's own history demonstrates the federal court's powerful ability to protect the disadvantaged. One need only look at the cases involving family farm foreclosures in the 1980s or the

advantage of the traditional civil dispute resolution process - one that should not be surrendered in favor of speed and efficiency.

The court-annexed ADR proponents look at the perceived problems and costs of the civil jury trial, and ask, "At what price justice?" When confronted with the proposition of mandatory court-annexed ADR and the loss of a constitutional right, I am forced to ask, "At what price *to* justice?" Of course, civil jury trials do have flaws, as do all resolution processes. The present system is subject to abuse, as would be any court-annexed ADR system. Civil jury trials are often, by necessity, long and complicated. They tie up the time of the litigants, lawyers, judges, jurors, witnesses, and court personnel. Pretrial discovery is also a complex and lengthy process, replete with delay tactics, litigation strategies and the antagonism that is inherent in the adversarial system. But, courts can take active steps, short of court-annexed ADR, to deal with these problems. In this district, the court, in its Civil Justice Reform Act Report and Plan (CJRA) addresses these concerns through, among other things: pretrial case management, differentiated on the basis of the complexity of the case; firm trial dates set early; mandatory attendance at settlement conferences; case management conferences; cooperative discovery devices; and continued extensive utilization of the magistrate judge.[18] These are all good devices to deal with the problems presented by the traditional dispute resolution process. They are solutions that do not place roadblocks in the way of individuals wishing to exercise their constitutional right to a jury trial.

There is, of course, no guarantee that the same sort of problems will not exist in a court-annexed ADR program. To be sure, nonbinding mediation and arbitration programs are being used by lawyers as nothing more than delay strategies or expansive discovery devices. It is certainly arguable that nonbinding court-annexed programs do more to add to the workload of the federal court system than to lighten it. The suggested alternative to make the decisions reached in these programs presumptively final and, so, to put a civil jury trial out of reach for most litigants, is simply unacceptable from a constitutional perspective.

Lest proponents of ADR be convinced that I am against any other than the traditional means of dispute resolution, let me correct that perception. Indeed, the CJRA plan for this district encourages voluntary use

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*Association for Retarded Citizens of North Dakota* case to see this dynamic in process. *See, e.g.*, Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983); Ass'n for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 470 (D.N.D. 1981).

18. *Report of the Civil Justice Reform Act Advisory Group for the District of North Dakota*, 69 N.D. L. REV. 739 (1993); *The Civil Justice Expense and Delay Reduction Plan of the U.S. District Court for the District of North Dakota*, 69 N.D. L. REV. 859 (1993).

of ADR options.[19] I do believe alternatives to the civil jury trial have a place in dispute resolution. For many parties, arbitration, mediation or summary jury trials are cost-efficient satisfactory processes by which to resolve their disputes. I certainly hope that these alternatives will be available to those parties who make a completely voluntary choice in that direction. But they should be supplied by the private sector, not by the federal courts.

I see the civil jury resolution process as being incompatible with ADR as suggested by the reformists. The jury trial contemplates a definitive answer to a dispute—a clear winner. On the other hand, arbitration and mediation always look to compromise or middle ground and operate from what I believe to be a false premise—that the parties to a dispute are never either clearly right or absolutely wrong. Certainly, the civil jury resolution process encourages (but does not mandate) compromise by way of settlement when issues are not clear. In fact, most cases are settled. There is, however, the recognition by litigants that the case will have a clearly defined end when a jury decides the issue. Mandatory court-annexed ADR will, I believe encourage litigants to inflate initial demands when they recognize that "middle ground" is always the goal of ADR.

It appears at first blush that the function of both ADR and a civil jury trial is the resolution of a controversy. In a limited sense, that is true. In reality, however, ADR and civil jury trials (and so, traditionally, the courts) serve two very different and distinct functions. Alternative dispute resolution programs function solely to aid parties to resolve disputes. The courts, through the process of the civil jury trial, however, also protect the public interest, enforce public policy, educate and engage citizens in the democratic process, find the truth and protect principle. All of this is so much more than a resolution to an individual controversy. The traditional civil jury trial system assures the citizens of this country that each of them is entitled to have their rights vindicated—to have "their day in court." For that, there can be no "alternative."

19. *The Civil Justice Expense and Delay Reduction Plan of the U.S. District Court for the District of North Dakota*, 69 N.D. L. REV. 859, 867 (1993). "[T]he Court encourages counsel and clients to voluntarily explore the feasibility of ADR options in order to assist expeditious resolution of disputes." *Id.*