

Out of Eden

Owen M. Fiss†

Religion can inspire. It can also distort, and this is precisely what it does for Professors McThenia and Shaffer.¹ It leads them to mistake the periphery for the center.

In my earlier article² I tried to come to terms with a movement that seeks alternatives to litigation. Known as ADR (“Alternative Dispute Resolution”), this movement is headed by Chief Justice Burger and is now sweeping the bar. It recently received the endorsement of the President of Harvard, Derek Bok, and the Advisory Committee on the Federal Rules of Civil Procedure. In 1983, the Advisory Committee managed to revise Rule 16 to strengthen the hand of the trial judge in brokering settlements, and for the last two years the Committee has been engaged in a determined campaign to amend Rule 68 to create additional pressure for settlement. The party who rejects an offer of settlement would, if the Advisory Committee has its way, stand in jeopardy of paying the attorney’s fees of the other side.³

Professors McThenia and Shaffer now lend their voices to this movement, but in an unusual way. They add a religious dimension. They emphasize reconciliation rather than settlement, and appear to be moved by a conception of social organization that takes the insular religious community as its model: “Justice is what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.”⁴ McThenia and Shaffer speak out on behalf of social mechanisms that might restore or preserve loving relationships and, not surprisingly, they find the judicial judgment a rather inept instrument for that purpose.

I have no special interest in countering their plea: I am as much for love as the next person. What McThenia and Shaffer say is not wrong,

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1. See McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

2. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

3. See Committee on Rules of Prac. & Proc. of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States Courts*, 102 F.R.D. 407, 423–24, 432–37 (1984); Committee on Rules of Prac. & Proc. of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 361–63 (1983).

4. McThenia & Shaffer, *supra* note 1, at 1665.

just beside the point: Their reasons for seeking alternatives to litigation are not those of the movement. Chief Justice Burger is not moved by love, or by a desire to find new ways to restore or preserve loving relationships, but rather by concerns of efficiency and politics. He seeks alternatives to litigation in order to reduce the caseload of the judiciary or, even more plausibly, to insulate the status quo from reform by the judiciary. Of course, McThenia and Shaffer are entitled to their own reasons for supporting a social and political movement, but they should not delude themselves that they have given a general account of ADR or explained its saliency and sway within the bar today.

McThenia and Shaffer should also understand that their plea for reconciliation does not respond to the primary social situation to which ADR is addressed. In their search for alternatives to litigation, the advocates of ADR focus on social situations in which interpersonal relationships have been so thoroughly disrupted that there is no chance of reconciliation: People turn to courts when they are at the end of the road. That is why I focused my attention on settlement rather than reconciliation. As I said in the original article, ADR proposals like those embodied in Rule 16 and in the amendments to Rule 68 picture settlement not as a reconciliation, but as a truce.⁵ To be against settlement is not to be against reconciliation but to address another social situation altogether.

Of course, it would be nice if the blacks of Chicago, to take one example, did not have to go to court in order to obtain all that the Constitution promises, and instead were able to work things out with the school board by walking, and talking, and loving. But once they have turned to the courts, it strikes me as absurd for the legal system to create incentives or pressures that force them to settle. It is costly to litigate, as they well know, but it also is costly to settle. To ignore these costs and to disfavor litigation because you hope that social relations between the parties can be restored is like ignoring the dangers of plea bargaining and favoring it over trial because you wish the crime that gave rise to the prosecution had not occurred.

In defending their variant of ADR, Professors McThenia and Shaffer might contest my factual premise about the divided character of our communities. They might argue that the blacks of Chicago who turn to the courts are mistaken in their belief that they cannot get justice on their own. Or McThenia and Shaffer might insist that no matter how improbable, reconciliation is always a possibility, at least as a logical or formal matter, and that one should not be allowed into court unless one first has attempted reconciliation—a miracle is always possible. On this account,

5. Fiss, *supra* note 2, at 1075.

ADR emerges as an exhaustion requirement, and at one point McThenia and Shaffer draw on the experience of the ancient Hebrews and Christians to proffer such an idea: "The [preferred] procedure involves, first, conversation; if that fails, it involves mediation; if mediation fails, it involves airing the dispute before representatives of the community."⁶ Only if the claimant refuses to heed the advice of the community elders will he or she be allowed to turn to the courts, and then only at the greatest risk: Whatever you lose on earth should be considered lost in heaven.

I am sure that there is much to be learned from the ancient Hebrews and Christians. I am sure that there is much force to the plea for reconciliation when it is addressed to the insular religious communities that still dot the American landscape. But I think Professors McThenia and Shaffer, like my colleague Robert Cover,⁷ are fundamentally misguided in their effort to model law and the legal system of modern America on these religious communities. Such exercises result in a marvelous display of learning, and one cannot help being moved by the underlying religious commitments. But I must also admit that I am left with the firm impression that such efforts misunderstand the character of our social life and the role that the state and its courts must play in our search for justice today.

From the perspective of an insular religious community, distinguished by its cohesiveness and the devotion of its members to a set of shared values, there may be reason to doubt the claim of those who turn to the courts that reconciliation is not possible. There may even be reason to force the claimant to try those mechanisms that might restore the relationship, for what is at stake is not just a claim of right, but the totality of relationships known as the community. But once we stop thinking about the Anabaptists and start thinking about Chicago, once we stop thinking about the ancient Hebrews and Christians and turn to modern America, we can see that there is no reason in the world to engage such assumptions. There is no reason to assume either that the despair of blacks over getting justice on their own is unwarranted, or that they sue because they want some high class counseling. The more reasonable assumption is that they turn to the courts because they have to.

Moreover, once we change our perspective and consider the modern American community, whether it be a Chicago, or an Evanston, or a Gary, we can understand why an exhaustion requirement of the type Professors McThenia and Shaffer propose is likely only to compound the costs of justice. Society will come to have two (or more) processes where it

6. McThenia & Shaffer, *supra* note 1, at 1666.

7. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

now has one, because the claimant is not likely to be satisfied with conversation, mediation, or a lecture by the representatives of the community, and thus will eventually turn to the courts. The McThenia-Shaffer proposal is likely to obstruct access to the courts without increasing the chance that the fabric of the community will be restored.

Milner Ball, referred to in footnote 33 of the McThenia and Shaffer essay, is a scholar whose work is infused with a religious perspective,⁸ and yet he gets the point. He understands that my critique was not aimed at this religion-based strand of ADR, which plays a slight and trivial role in the professional debates of the day. He also understands the more general ADR version of the 1980's for what it is: not a vindication of community, religious or otherwise, but just another assault upon the activist state, "another form of the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms."⁹ The force of Ball's observation is not lost on McThenia and Shaffer. They seem genuinely reluctant to defend this more general form of ADR, and in the closing paragraph of their essay specifically disassociate themselves from what they call the "[i]nformalism of the Chief Justice's formulation."¹⁰ They do, however, have something in common with the Chief Justice, namely his distrust of the state and its courts. McThenia and Shaffer are anti-statists: "Justice is not usually something people get from the government."¹¹ Apparently people get it from talking and listening to one another.

I believe that people should talk and listen to one another. But sometimes that is not possible, because their relationships have disintegrated, or because the community is fractionated, or because those who have power are not interested in either talking or listening to the weak and disadvantaged. Moreover, even when people are prepared to talk and listen to one another, they might not understand the norms of the community, or, as Professor Ball suggests, they might not be prepared to abide by them. Adjudication is but a response to this predicament. It is a social process that uses the power of the state to require the reluctant to talk and to listen, not just to each other, but also to judges (and sometimes juries) who must in turn listen and talk to the parties. These public officials are the trustees of the community. They are given the power to decide who is

8. See, e.g., M. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* (1981).

9. McThenia & Shaffer, *supra* note 1, at 1665 n.33 (quoting M. Ball). For the development of a similar point, see Abel, *The Contradictions of Informal Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 267, 295-301 (R. Abel ed. 1982).

10. McThenia & Shaffer, *supra* note 1, at 1667.

11. *Id.* at 1664-65. Cover expresses his anti-statism in slightly more vivid terms: "Judges are people of violence." Cover, *supra* note 7, at 53.

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right and who is wrong and, if need be, to bring the conduct of the parties into conformity with the norms of the community. The underlying hope is that if all goes well, justice will be done.

I realize that all might not go well and that adjudication might fail. Justice is not reducible to the law or to the particular decisions of any court: It is an aspiration. The truth of the matter, however, is that all institutions—not just those of the state—stand in jeopardy of failing in this aspiration. And there is no reason whatsoever for believing that adjudication suffers this risk more than any other institution. In fact, given the inequalities and divisions that so pervade our society, and given the need for a power as great as that of the state to close the gap between our ideals and the actual conditions of our social life, adjudication is more likely to succeed in this aspiration. Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini-trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason. What we need at the moment is not another assault on this form of public power, whether from the periphery or the center, or whether inspired by religion or politics, but a renewed appreciation of all that it promises.

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