Discussion on the Models of ADR
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Abstract

Alternative Dispute Resolution includes a wide set of methods with the goal of potentially settling legal disputes out of the traditional trial court system. Proponents defend ADR as an efficient and cost-reducing system while critics attack ADR as ineffective and burdensome. Two different frameworks for these discussions exist: one school of thought models ADR empirically by case and the other analyzes ADR theoretically. This paper will try and find a comprehensive model for ADR based on these two different approaches. The first section begins with a brief historical overview and summary of the practices of ADR. The next two sections will discuss the strengths and constraints of exemplar models from the empirical and theoretical branches. The last section presents my synthesis that draws both fields together into a more holistic model.
I. Introduction

Traditional legal disputes occur in a fairly straightforward manner. Two parties start with a dispute where one party harms another. At this point, the harmed party (plaintiff) can either take no action (which ends the dispute) or make a claim about the injury experience. The parties may or may not try informal methods of coming to an agreement. If this step fails, then the plaintiff can choose to file a suit. According to the Federal Rules of Civil Procedure, the plaintiff needs to submit a statement of jurisdiction, a statement of the claim, and a demand for relief. The defendant must admit to or deny every claim made by the plaintiff. If the court does not make a summary judgment (a decision made without a full trial), then the lawsuit will proceed on to a trial. Once a verdict is reached, a party may appeal the decision, and if that is unsatisfactory then the case can move up to a court of last resorts.

Alternative dispute resolution provides a way for disputing parties to settle out of court. ADR offers parties a way of reaching an agreement without going through the all strict regulations of a real trial. It also serves as a way for courts to reduce the number of cases while still settling legal disputes. It is important to note that ADR has “not displaced traditional litigation; hundreds of thousands of lawsuits are filed annually in state and federal courts.”¹ Rather than a substitute, ADR functions for as a complement to litigation. In addition, ADR may serve as a way for unclaimed injury experiences to actually be reported. A plaintiff may see the potential time and monetary costs associated with the legal process and decide not to even make a claim, but if the plaintiff knew of ADR, then the likelihood of making a claim could increase.

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Before going into the specific models, discussing the historical background will provide information that can be used in the synthesis section.

A. History of ADR

How did ADR begin? According to Deborah Hensler, “no one has yet written a comprehensive history of the dispute resolution movement in the United States.” But the “community justice movement”\(^2\) gives some insight into the beginnings of ADR. The movement began in the late 1960s and early 1970s. The community justice movement believed that formal legal institutions like courts and lawyers monopolized dispute resolution and served as a way for the elite to maintain power. This seems like a bold statement, but it does make sense. If within a community, two disputing parties can only resolve legal disputes through one specific institution, then that institution can impose its unique power over the community. To break free of this monopoly, the followers of the movement argued the need for “grassroots justice institutions that apply community based norms to disputes, and rely on community members to resolve disputes” (Hensler 2003).

Based on this ideology, many communities began establishing community or neighborhood justice centers. These centers were funded by a variety of sources\(^3\) and run by volunteers to settle local neighbor and family disputes. But how did these centers “apply community based norms to disputes” and did they really have community members work out disputes themselves? As it turns out, the community justice centers embraced “mediation and other conciliatory approaches, rather than adjudication” (Hensler 2003). The formal legal institution relied on a combative method to solving disputes, but mediation put the power of

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\(^2\) Hensler states that “The modern history of alternative dispute resolution in the law has multiple strands, which have been woven together in a complex fashion over the past several decades.” The community justice movement is one of those strands.

\(^3\) These sources include federal government, local government, national foundations, and local foundations according to Hensler. The idea of funding will be an important factor later.
resolutions into the hands of the disputing parties and their willingness to come to an agreement. This fits the community movement ideology perfectly because it would allow for disputes to be settled in a way that stood in contrast to what the formal legal institution promoted.

But these community justice centers faced one big unseen problem: much fewer disputing parties turned to these centers than anticipated. Hensler attributes this problem to “barriers to dissemination of information about the centers’ existence and what they offered” and to the fact that disputing parties “value public vindication of their rights or positions.” Centers frequently turned to courts for referrals, and this set a precedent for the relationship between courts and these centers. Courts would refer “minor” cases to the community centers, and over time adopted this practice as an alternative to trial. After filing a suit, cases could be referred to court arbitration. Parties and their lawyers would present their respective claims in front of arbitrators who made a decision. If the parties agreed, they would settle with the decision. If the parties did not agree, they would request a trial and the suit would continue through the formal process, but the parties would pay a small fee for the arbitrators. This system began to spread, and “judges and lawyers began referring to these arbitration programs and judicial settlement conferences as ‘alternative dispute resolution’ or ‘ADR’” (Hensler 2003).

But this community justice movement is only one strand of the rise of ADR, and there are other origins to consider. In Alternative Dispute Resolution: An Empirical Analysis, Rosenberg and Folberg mentions that ADR processes “began as an experiment in the methods used to resolve family disputes.” Hensler supports this family law strand because “movies like Kramer v. Kramer that dramatized the negative effects on children of adversarial processes helped build support for family mediation.” Whereas in the community justice movement the adversarial

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4 The information cost and the value of the public aspect will be important to later discussion.
5 This specific process is an example of mandatory non-binding arbitration or court annexed arbitration.
process monopolized power away from disputants, in terms of family law the adversarial process damaged the wellbeing of the involved parties.\textsuperscript{6} State courts adopted methods for families to meet with counselors, psychologists, and lawyer who did not use combative methods to resolve disputes and would provide advisory opinions.\textsuperscript{7}

In addition to grassroots movements and experimental forays, ADR has also had federal government support through federal statutes. The Civil Justice Reform Act of 1990 focused on “expanding and enhancing the use of alternative dispute resolution.”\textsuperscript{8} The Negotiated Rulemaking Act in 1990 provides “structure for using consensus-based negotiations” while the Administrative Dispute Resolution Act sought to “designate an in-house dispute resolution specialist; provide ADR training for agency personnel; review all programs for ADR opportunities; adopt dispute resolution policies; and examine grant and contract language to identify means of promoting ADR over litigation.”\textsuperscript{9}

Despite Hensler’s statement about no comprehensive history, Jerome Barrett in the recent A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement makes a successful attempt at a comprehensive history. Barrett disagrees with other authors who believe that ADR was “a movement born of the social unrest – and progress – of the 1960s.” He traces the roots of ADR as far back as 1800 B.C. when the Mari Kingdom uses mediation and arbitration to settle disputes with other kingdoms. He includes an extensive timeline starting from this point. Many elements of the timeline are outside the scope of this paper, but there are relevant events that I should mention:

\textsuperscript{6} This idea of damage to disputing parties through litigation will also be important later.  
\textsuperscript{8} Bernstein, Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs (1993). The Act made the federal courts complete a “cost and delay reduction plan” and “specifically consider the possibility of instituting court-connected ADR programs.”  
\textsuperscript{9} Manring, ADR and Administrative Responsiveness: Challenges for Public Administrators (1994)
1888: Arbitration Act Passed. Probably the first ADR statute in the US providing voluntary arbitration and ad hoc commissions to investigate the cause of specific railway labor disputes.
1913: Department of Labor created and mediates first labor dispute; mediates thirty-three disputes in its first year.
1914–1918: World War I uses ADR process to resolve labor disputes and establish labor agreements to aid war effort.
1920: New York state passes first modern arbitration law; within five years, fifteen other states would follow.
1942: War Labor Board created; uses ADR.
1962: President Kennedy’s Executive Order 10988 required federal agencies to engage in collective bargaining with unionized employees.
1962: Steel Trilogy: U.S. Supreme Court recognizes labor arbitrators’ expertise as final authority.
1968: Ford Foundation creates National Center for Dispute Settlement and Center for Mediation and Conflict Resolution to apply labor-management ADR to civil rights, campus, and community disputes.
1972: Society of Professionals in Dispute Resolution (SPIDR) created as membership organization for all ADR practitioners. It would merge to become the Association of Conflict Resolution in the late 1990s.
1983: National Institute for Dispute Resolution established to encourage ADR with foundation funds.
1985: National Institute of Dispute Resolution funds pilot programs to encourage state governments to use ADR.\(^{10}\)

This timeline tells a different origin story of ADR. I noticed a trend that ADR was used in many labor related disputes. In addition to being a community justice movement and a family law experiment, ADR can also be seen as a solution to labor disputes. The point I want to make is that ADR works in labor management for the same reasons it works for family law and community justice. The combative nature of litigation limits its effectiveness in cases where both parties have a relationship that could be harmed. If employers won every lawsuit, then employees would be unsatisfied, but if employees succeeded in every lawsuit then employers would suffer. A lawsuit could bring an “end” to conflicts between two parties, but the parties

\(^{10}\) All printed from Barrett, A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement (2004).
may still feel as if the issue still remained, and this would sour the relationship. In the context of employer/employee relations, it is imperative that both parties reach a solution they agree to, otherwise recurring problems will create friction within their relationship.11

B. ADR Policies and Principles

Before going into specific models, it is necessary for me to cover the actual practices that constitute ADR. The traditional litigation system follows an adjudication process with several distinguishing characteristics: the judge is a neutral party that holds the power and responsibility over the process, the procedure is highly structured with formal rules, the decisions are binding on the parties, and the process itself is public. ADR consists of “mediation, arbitration, and a variety of ‘hybrid’ processes by which a neutral facilitates the resolution of legal disputes without formal adjudication” (Mnookin 1998).

Arbitration involves an arbitrator as the neutral party who plays a similar role as the judge and has the responsibility to run the process and make decisions. But unlike the judge, the arbitrator is a private figure12, not a public official, and instead of being appointed by the courts, an arbitrator can be chosen. The parties present arguments and claims at a hearing, but in a much less formal manner, and the arbitrator makes a binding decision. Before disputes begin, parties may contract to arbitrate future all future disputes, and this is classified as ex ante agreements. Conversely, ex post refers to the situations where during a dispute the parties agree to arbitrate.

Mnookin discusses potential benefits to arbitration relative to adjudication. Since arbitrators can be chosen, an expert in whatever field the dispute arises in is preferable to a judge who is “typically a generalist who is knowledgeable about legal procedures but may have no relevant experience and background relevant to the dispute.” The more informed arbitrator can

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11 This idea of preserving a “relationship” will be returned to in later sections.
12 This private v. public aspect echoes the concept of public validation brought up in Hensler
have “lower transaction costs and higher quality results.” The informality of the process may cause arbitration to continue more quickly than a trial.

Mediation also involves a third party, but the mediator has no authority to make binding decisions. Mediators seek to help parties negotiate and reach a mutually acceptable settlement on their own. Mediation is usually voluntary and always a private experience, but otherwise there are no standard, fixed rules. The community justice centers described by Hensler are prime examples of mediation.

Hybrid processes “use neutrals in ways that represent variations on the basic alternatives” (Mnookin 1998). This category combines elements of adjudication, arbitration, and mediation in different ways. For example, court-annexed mediation describes the mandatory process where a mediator tries to negotiate a resolution. An important subset of court-annexed mediation to remember for later is early neutral evaluation which consists of neutrals helping “parties to arrange for efficient discovery and also provides an early, impartial report evaluating the strengths and weaknesses of each disputant’s claims and defense” (Mnookin 1998).

In summary, ADR can be binding or nonbinding, voluntary or mandatory, and _ex ante_ or _ex post_. Like adjudication, ADR can have a neutral third party, but is typically much less formal and more private.

II. The Empirical Case Approach to ADR

After detailing the history and practices of ADR, I now move on to the first framework of interpreting ADR. The empirical framework relies on specific formal models to make specific judgments calls about ADR. Formal modeling is defined “an external and explicit representation of part of reality as seen by the people who wish to use that model to understand, to change, to manage, and to control that part of reality in some way or other” (Pidd 1999). The most
important qualities of a model (in descending order) consists of “1) problem context (e.g.,

discoversing the real problem), 2) model assessment (e.g., validation and verification), 3) model

structure (e.g., selection of key variables, elaboration of submodels), and 4) model realization

(e.g., prototyping, data collection)” (Willemain 1994). Authors who work in this framework also

utilize empirical evidence to make their models and draw conclusions. I will discuss a few key

exemplary models by reviewing the main points and assessing their strength and weaknesses.

A. Shavell

Shavell follows a behavioral economic analysis of ADR. Shavell questions why ADR is

used, what the private and social benefits to ADR are, whether ADR should be subsidized,

provided, or mandated by the state. Shavell makes a number of assumptions. He assumes that

“parties take rational account of the effects of ADR on the likely disposition of their disputes”

which means that disputing parties choose ADR or not depending on the potential outcomes.

Shavell also follows the standard model of litigation which assumes that “parties are risk neutral,

bear their own legal costs, know the judgment amount that would be awarded, but may hold

different beliefs about the likelihood of a plaintiff victory.” This standard model is linear:

Expected Return = (Probability of winning)\*(Amount won) – Costs. From the previous

assumption about taking into account the rational effects of ADR, Shavell adds to the standard
model the value (Expected Returns from Trial) – (Expected Returns from ADR). Depending on this value, parties involved will choose different actions. Shavell also holds that parties have probabilistic beliefs about the outcomes of ADR and probabilistic beliefs about how ADR influences the outcome of the trial. He considers three scenarios: ADR perfectly predicts trial outcomes, ADR does not predict trial outcomes, and ADR imperfectly predicts outcomes. I’ve summarized all the outcomes that Shavell discusses in the following:

<table>
<thead>
<tr>
<th>ADR Type</th>
<th>Predictive Value:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Perfect</td>
</tr>
<tr>
<td>Voluntary</td>
<td>Never Trial</td>
</tr>
<tr>
<td></td>
<td>Settlement</td>
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<tr>
<td></td>
<td>Binding</td>
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<tr>
<td></td>
<td>Nonbinding</td>
</tr>
<tr>
<td>Mandatory Nonbinding</td>
<td>Never Trial</td>
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<tr>
<td></td>
<td>Settlement</td>
</tr>
<tr>
<td></td>
<td>Binding</td>
</tr>
<tr>
<td></td>
<td>Nonbinding</td>
</tr>
</tbody>
</table>

The rows distinguish between the types of ADR, the columns follow Shavell’s three different scenarios, and each cell summarizes the preferred choice of actions based on Shavell’s limitations. For example if the two parties have no predictive value and engage in mandatory nonbinding ADR, then they will much prefer to settle or take up binding ADR because both parties know that mandatory nonbinding ADR will have no bearing on the actual trial outcome and only serve to increase costs and time to a litigation.

Shavell also distinguishes between *ex ante* and *ex post* ADR. He states that *ex ante* ADR “may lower the cost of resolving disputes or risk.” Since the parties agree beforehand to engage in ADR when a dispute arises, there is a set plan in motion that makes resolving disputes much
easier. In addition, *ex ante* ADR “may engender superior incentives through greater accuracy of result or other characteristics.” Since expert arbitrators can be chosen instead of generic judges, the belief that an expert can more correctly assess the dispute incentives both parties to behave properly. Third, *ex ante* ADR “may result in improved incentives to engage in disputes or to refrain.” This refers to how parties use the (Expected Returns from Trial) – (Expected Returns from ADR) value to determine whether it would be better to avoid disputes or engage in them. Shavell believes that *ex ante* agreements jointly raise the well-being of parties which essentially increases social welfare, and so promotes that “*ex ante* ADR agreements should ordinarily be enforced by the legal system.” But Shavell sees none of these incentives in *ex post* ADR and argues that since there are little benefits to welfare, *ex post* ADR has no viable function.

This model looks at ADR solely in terms of a rational, risk neutral individual making decisions based off expected returns. The strengths of this model include its flexibility since it can account for various scenarios and it can be used to calculate both individual and social benefit. But problems arise because it can only factor in expected value of things that can be calculated in monetary terms. What if the parties valued privacy instead of public trials? In this case, how would one include the value of privacy in (Expected Returns to ADR)? What about the costs of spreading the word about ADR brought up by Hensler? If these information costs were to be included, then the (Expected Returns to ADR) would be lower in all categories because ADR would cost relatively more, and this may change Shavell’s conclusions on *ex ante*. The calculations also do not factor intangible benefits or externalities like the negative impact on a child in a family mediation or the potential relationship between an employer and employee in a labor lawsuit. In terms of modeling, Shavell makes an excellent model for ADR, but it lacks in the ability to include certain variables.
B. Rosenberg & Folberg

This study makes a true empirical model of ADR. Rosenberg and Folberg studied the ADR program in the Northern District of California for a 4 year period. The district used mandatory early neutral evaluation (ENE) since before the Civil Justice Reform Act of 1990. Rosenberg and Folberg summarize their finding as follows:

(1) Approximately two-thirds of those who participated in the mandatory ADR program felt satisfied with the process and believed it worthy of the resources devoted to it (dissatisfaction with the program resulted primarily from dissatisfaction with the particular neutral assigned to the case); (2) while the percentage of parties who reported saving money approximately equaled the percentage who reported that the process resulted in a net financial cost, the net savings were, on average, more than ten times larger than the cost of an ENE session; (3) approximately half the participants in the program reported that participation decreased the pendency time of their cases; (4) the majority of parties and attorneys reported learning information in the ENE session that led to a fairer resolution of their case; and (5) the ENE process varied significantly from case to case and from neutral to neutral, and the most important factor in determining the success of the process in any one case was the individual neutral involved. (1488)

These findings generally support ADR. To get these results, Rosenberg and Folberg reviewed all cases filed from April 1988 to March 1992 that were put through ENE; they treated the even numbered cases as the experimental group and the odd numbered cases as the control group. They also gathered information through telephone interviews, observation of ENE sessions, records, and responses to questionnaires sent out to all who participated in ENE.

Since I am not trying to prove whether ADR is either beneficial or not, the specific conclusions and recommendations of Rosenberg and Folberg are a little outside of the scope of this paper. But what is important is how they model the ENE process. This study examines the overall effectiveness of ENE in terms of certain variable that can be examined from the filed cases. Although it may not be completely accurate, I interpret their model as a linear function:

\[ \text{ENE} = \beta_1(\text{Overall litigation costs}) + \beta_2(\text{ENE fees}) + \beta_3(\text{ENE savings}) + \beta_4(\text{Satisfaction from}) \]

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13 This falls under the hybrid category of ADR mentioned earlier in section I
ENE) + β_3(Pendency Time) + β_6(Neutral Assigned). Each of the values represents either positive or negative factors that influence the overall effectiveness ENE. The coefficients refer to the relative weights of the factors. So when they mention that “our study revealed an ADR program strongly influenced by the individual assigned as the neutral for a given case,” then it would mean that β_6 would have a higher value than others and make the term β_6(Neutral Assigned) have a stronger effect.

This model has a distinct advantage over Shavell’s model because it accounts for factors other than expected values. The information costs associated with ADR can fall under ENE fees. If they wanted, Rosenberg and Folberg could have asked in their questionnaires whether the parties preferred the benefit of private or public dispute resolution and whether a relationship between the parties was harmed or not. Based on the responses, the model could include two issues as variables that influence the overall effectiveness of ENE that Shavell’s model had no way of attributing for. But on the other hand, this model only applies to specifically to ENE, so it may not apply to other ADR processes. Also, since the study only takes place in the Northern California District, it does not necessarily hold true for other districts.

C. Bernstein

Bernstein focuses on mandatory non-binding court annexed arbitration (CAA).\textsuperscript{14} Bernstein generally disfavored CAA and suggests “that there is no conclusive evidence that CAA programs reduce either the private or social cost of disputing.” Through her analysis of her model, Bernstein believes that “CAA programs will not increase access to justice and may in fact decrease access to justice for poorer and more risk-averse litigants by either adding an additional layer of costly procedure or, in programs with post-arbitration fee and cost-shifting provisions,

\textsuperscript{14} This type of ADR falls under the hybrid category.
by forcing them to take more risk.” Bernstein has an approach similar to Shavell, and limits the possible actions of disputants to the following:

Like Shavell, Bernstein assumes the parties to be risk neutral assumes both pre-arbitration and post-arbitration costs to be fixed and known in advance by both parties. Additionally, Bernstein imposes a new set of conditions:

1. if a plaintiff requests a trial and fails to improve upon the arbitration award by 15% at trial, he must pay the defendant's post-arbitration costs; (2) if a defendant requests a trial and fails to achieve more than a 15% reduction in the arbitration award at trial, he must pay the plaintiff’s post-arbitration costs; and (3) if both parties request a trial, they each bear their own costs regardless of the trial outcome. (2217)

Both the plaintiff and defendant will compare their respective post-arbitration position to their respective expected post-trial position and then decide whether to accept the arbitration award or request a trial. If the expected post-trial position is better than the post-arbitration position, then both parties will rationally choose to go to trial, but if the expected position is not, then the parties will choose to accept the arbitration award. The plaintiff will have some “critical point” that for any amount above the plaintiff will favor the arbitration settlement, but prefers trial to any amount below. The defendant also has a “critical point” where paying an amount below favors settlement, but any higher will favor requesting trial. The region between these critical points which Bernstein refers to as the “dead zone” covers any award amount that makes neither party request trial, and this is the settlement range. Because of the restrictions stated above, there is more risk for the party requesting trial since if the 15% improvement is not met, then more
costs are acquired. Risk-averse individuals suffer relatively more than other individuals. Conversely, Bernstein mentions that “a request for ADR, however, may also signal a superior ability to bear risk since the outcome of many ADR processes is more uncertain than a trial outcome.” The parties that choose to request a trial do so because they feel confident in taking the risk, which further discourages the risk-averse from going through with a lawsuit. Additionally, poorer disputing parties face higher costs if they request trial and fail the 15% improvement. Bernstein reinforces this point when pointing out that “it will sometimes be in a party's best interest to accept an arbitration award, even if it would have been rational for him to reject a settlement offer in the same amount at the outset of the litigation process” since risking a trial potentially results in even higher costs. For these reasons Bernstein disapproves of CAA programs.

Bernstein’s model parallel’s Shavell’s model of comparing expected values of post-trial to expected arbitration awards. But unlike Shavell, Bernstein includes certain “real life” variables. According to Bernstein, “one of the primary reasons that parties might not enter into an ADR agreement even when it can produce private benefits is that the delay associated with trial is frequently advantageous to one side.” This claim makes sense because if one party can afford the increased costs of delaying while the other party cannot, then the disadvantaged party may not go through with the lawsuit. Bernstein mentions how in tort cases, the defendant has superior bargaining power because the plaintiff knows that delaying increases costs and reduces the value of the reward amount. For CAA programs to eliminate defendant advantage, Bernstein suggests the program “would have to be both mandatory and binding. Otherwise, the defendant will still be able to make strategic use of his ability to inflict delay.” This provides more support for why CAA programs should not be used.
Another overlooked factor is the distinction between private and public ADR. Public ADR encompass programs like federally funded mandatory non-binding CAA. Private ADR corresponds to any of the institutions which parties can seek out voluntarily that are not directed connected to courts. Private ADR contains features that parties consider important; Bernstein specifies these features as “secrecy, informality, speed, finality, the right to select a trier of fact with specialized knowledge or expertise, and, in some trade industry arbitration, the ability to specify the rule of decision that will be used to resolve the dispute as well as the avoidance of litigation costs.” Despite the federal backing, Bernstein asserts that “public ADR programs cannot capture most of the benefits available from private ADR that lead parties to either include ADR provisions in their contracts or enter into agreements to use ADR after a dispute has arisen.” The distinction between public and private ADR reflects earlier discussion about the value of privacy. Shavell does not include the private/public distinction, but Bernstein brings up the value of a private settlement. Bernstein even goes as far as to suggest the “use private ADR in place of or in conjunction with certain pre-trial procedures, and to ensure the legal enforceability of ADR provisions and other types of agreements designed to reduce the cost of trial.” Under this idea, private ADR could replace sections of the traditional legal system. Bernstein believes that doing so “would create private benefits by reducing the cost of traditional adjudication, and might also create social benefits by enabling judges to spend more time deciding questions of law.”

D. Heise

Heise makes an empirical study to test the two core goals of ADR: that ADR increases the likelihood of settlement and that ADR reduces disposition time. Heise relies on data from

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15 I want to point out how outstanding this idea is. The other models downplay the role of public/private spheres in ADR, but Bernstein not only sees the value of privacy but also attaches social benefits that come from privacy.
“46 large counties consisting of 8,038 trials that generated 965 filed appeals, with 166 appeals participating in ADR programs,” but Heise’s approach is special in that he examines ADR date from the appellate level which is an understudied area. Heise’s model of ADR revolves around the twin central promises, so the model is a function of increased settlement and reduced disposition time.

In terms of settlement rate, Heise finds that “ADR programs succeeded in terms of promoting settlement.” He presents his results by comparing appeals settled and concluded depending on whether the parties participated in ADR or not.

**Table 2. Appeals Settled and Concluded by ADR Participation**

<table>
<thead>
<tr>
<th>ADR Participation</th>
<th>Appeals Settled</th>
<th>Appeals Concluded</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADR</td>
<td>89</td>
<td>77</td>
</tr>
<tr>
<td>No ADR</td>
<td>327</td>
<td>472</td>
</tr>
<tr>
<td>N</td>
<td>416</td>
<td>549</td>
</tr>
</tbody>
</table>

Heise looks at the distribution of settled cases controlling for ADR participation. If ADR participation had no effect, then the distribution of settled cases to concluded cases should follow an even and random distribution (meaning close to 50%/50%). But since the ADR appeals settled significantly exceeds the predicted amount, Heise believes that ADR does succeed in promoting settlement.

For the change in disposition time, Heise uses a similar method. He uses the number of days between filing an appeal and its disposition as the dependent variable, but converts the time to the square root of the number of days. He presents the results in a comparable way to Table 2.

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Heise concludes that “differences in mean disposition times between appeals that submitted to ADR programs and those that did not, after controlling for whether the appeals settled, do not suggest any systematic differences between these two subgroups of appeals.”

This model takes a very narrow look at ADR compared to the others. Heise only looks at settlement and disposition times as the only relevant variable of ADR. Despite the restricted conditions, Heise illustrates two concepts not addressed directly in other models. Since the financial costs of ADR participation are borne by litigants and not the courts, by imposing mandatory ADR, the courts internalize the benefits (such as increased settlement) while externalizing most of the associated costs. This faintly resembles Bernstein’s argument that public ADR like CAA possesses fewer benefits than private ADR practices because the public forms will raise the costs for litigants.

In terms of appeal cases, Heise notes that “there is simply less work for ADR to perform. With less work available, it is less surprising to learn that ADR participation did not contribute to a reduction in appeals disposition time.” This suggests that ADR provides more benefits earlier on in the trial process; in other words, ADR has diminishing marginal returns the later in the adjudication process it is used.

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III. The Theoretical Branch of ADR

This framework deemphasizes empirical statistics and case studies and is more concerned with the theory behind ADR. In this section I examine a few models and theories that exemplify this branch.

A. Priest and Klein

Priest and Klein in *The Selection of Disputes for Litigation* attempt to clarify “the relationship between the set of disputes settled and the set litigated.” Priest and Klein believe that only economic factors determine settlement and litigation. Similar to Shavell, the economic factors include the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement.

The selection model consists of many assumptions. A dispute occurs when a plaintiff makes a claim against a defendant. The dispute can only be resolved in two ways: through a rendered trial verdict (classified as “litigated”) or by settlement (anything short of a verdict). If the verdict favors the plaintiff, then the defendant pays some amount, but if the defendant wins, then the plaintiff receives nothing and suffers without compensation. The last assumption these two make is “that the distribution of initial disputes is determined exogenously and that the parties behave nonstrategically with respect to litigation and settlement.” The main point Priest and Klein make is that “the individual maximizing decisions of the parties will create a strong bias toward a rate of success for plaintiffs at trial or appellants at appeal of 50 percent regardless of the substantive standard of law.”

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18 Priest and Klein refer to this as the “judgment.”
19 In game theory terms, this means that the model is a one shot game or one period model.
In any dispute, there is a legal standard Y used by judges and juries as the appropriate decision standard. Priest and Klein hold that “Each potential litigant forms an estimate of Y' based upon his individual knowledge of the facts of the dispute and his prediction of how these facts will be interpreted by the court or jury. For several reasons, a party's estimate of Y’ may differ both from the estimate of the opposing party and from the true Y' value of the dispute.” The litigating parties use their estimates of Y’ in weighing the options of litigation or settlement. When the disputes are closer to the true Y' value, then the parties become more uncertain about which will win, resulting in more disagreement and lower chances of settlement. The authors believe “the shape of the dispute distribution and the position of the decision standard will have some effect on the rate of plaintiff victories in litigated disputes. There will always persist a tendency toward 50 percent plaintiff victories regardless of the shape of the distribution or the position of the standard.” A deviation from the 50% selection can happen in only two ways. One is for a very high proportion of disputes to go through litigation because of lower costs of litigation or higher expected judgments. The other way is from a systematic difference in the stakes of the parties. Stakes arise from differences in risk; a risk-averse individual will expect lower returns relative to the risk neutral individual, so the risk neutral party stakes relatively more.

The selection model simplifies settlement and litigation in terms of expected benefits, costs, and risks to the litigating parties much akin to Shavell’s model. This model differs because it moves beyond the scope of ex ante and ex post ADR and discusses behavior of plaintiffs and defendants more generally. These two models also disagree on when trials occur. As Heise points out, Priest and Klein assert “trials are more likely to occur in ‘close’ cases” while Shavell insists trials are more likely when “litigants’ perspectives of their respective legal
positions change.” Shavell believes that when mutual benefits are highest, parties will be most likely to settle. This point corresponds to where the parties’ expected outcomes converge, which stands at odds with Priest and Klein who hold that when expected outcomes are close then higher uncertainty will prevent settlement.

B. Friedman & Wickelgren

Friedman & Wickelgren examine both the benefits and costs to the increasing rate of settlements. They believe that “settlement is not a ‘free lunch’ but potentially comes at the significant cost of undermining the incentives that we rely on the legal system to create.” The legal system not only has the power to resolve disputes through trials, but it can also influence behavior. Legal systems deter harmful behavior by forcing parties that cause more harm that benefit to compensate for the difference; consequently, parties can be chilled from beneficial acts if they have to compensate a victim for harm caused by something else. Despite acknowledging that settlements reduce legal costs and delay, Friedman & Wickelgren “argue that settlement can fundamentally reduce the ability of the legal system to deter harmful behavior without chilling desirable behavior.”

Friedman and Wickelgren use the model of settlement bargaining under asymmetric information. For this paper, the defendant is the informed party, acts rationally, and engages in an activity if and only if the benefit exceeds the expected damages and legal costs. They state that “when damages equal the harm from the activity, settlement will weaken deterrence because settlement acts like a cap on damages” and that “increasing the damages the defendant must pay at trial does not change that

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20 Heise (2010) Section II. Part A.
21 Heise would disagree with the idea that settlement reduces delay.
22 Wickelgren, Law and Economics of Settlement Chapter 3 describes this model. One party has information about the outcome and the other party does not. The trial eventually brings out the information, but the uninformed party cannot access this information before the trial. Bargaining under asymmetrical information happens either as screening (the uninformed party makes a final offer to the informed party) or as signaling (the informed party makes a final offer to the uninformed party).
23 Friedman and Wickelgren (2008) refer to the sum of expected damages and legal costs as “expected liability.”
the defendant will not consider the actual harm her action causes whenever that harm is large enough to make accepting the settlement preferable to going to trial.” Since the defendant has information about harm while the plaintiff does not, then the defendant will always be able to choose between the lower of trial or settlement damages. Even if the compensation amount is increased, the defendant still has the advantage through information in choosing the better option. The legal system has much less deterrence when the defendant possesses these advantages. Friedman and Wickelgren mention that “to the extent that defendants are able to capture some of the \textit{ex-post} benefit of settlement, these are more likely to be captured by culpable defendants who have more to gain by settlement” to show how much defendants potentially gain through asymmetric information settlements.

Another side effect of asymmetric information is that plaintiffs will prepare less for trial. When plaintiffs prepare less, the difference between the amount a harmful producer expects to pay and the amount a harmless producer expects to pay decreases.\textsuperscript{24} When the distinction between harmful and harmless producers blur, harmless producers are faced with the possibility of paying damages for harms they do not cause, resulting in chilling of behavior. In summary, settlement can have benefits of reducing litigation costs and delay, but it can also reduce deterrence and the accuracy of the legal system. Judges should discourage settlement when they believe it can be harmful, and Bernstein would agree with this statement. Bernstein also explored the negative aspects of public ADR programs. She believed CAA caused more harm than good and ran counter to the goals of ADR; Bernstein advocates careful use of private ADR instead of widespread public ADR in much the same way as Friedman & Wickelgren urge caution in the use of settlement for every trial.

The asymmetric information model is only one of the few settlement models Wickelgren utilizes. In the symmetric information model, both parties possess information about the harm value. Bargaining is much easier and will fall between the settlement range of the plaintiff’s expected recovery and the defendant’s expected loss. Under exogenous timing, one party will make a final offer before the fixed

\textsuperscript{24} This is analogous to “a smaller difference between the expected liability of committing harmful acts and the expected liability of committing harmless acts” (Friedman & Wickelgren 2008).
trial date. Under endogenous timing, parties do not have a fixed trial date, so they continue negotiations or end settlement and go to trial at any point.

IV. Synthesis

The two previous sections demonstrate how the two frameworks for thinking about ADR can be at odds. Shavell believes that similar expectations of outcomes lead to higher mutual gains which make ADR more likely. Priest and Klein contradict this with the selection model which believes that similar expectations lead to uncertainty and lower the possibility of successful settlement. Heise finds empirically that ADR increases the likelihood of settlements but has no effect on disposition time. Friedman and Wickelgren on the other hand trust that settlements “reduce legal costs and delay.”

Discord arises even within models of the same field. Heise claims ADR programs do not deliver on the promised reduced disposition. Yet, Rosenberg and Folberg exert that “ENE cases consistently had a higher resolution rate than their non-ENE counterparts.” Granted that the higher rate could apply only to ENE, Rosenberg and Folberg’s findings still conflict with Heise’s claims. While Bernstein argues that CAA works unfairly against the risk averse and poor, Shavell would say that within the groups of risk averse and poor, their expectations of outcomes would be similar since the groups both want to minimize costs, so CAA should work efficiently. Shavell would only contend CAA on the grounds that as an ex post ADR program it did not increase welfare so the government should not support it. Friedman and Wickelgren suggest that judges be more selective about settling cases. This would lower the settlement rate while artificially raising the trial rate. This would throw off the 50% selection balance advocated by Priest and Klein.

Despite the conflicting opinions, the different models have common elements and can learn from each other. The idea of comparing (Expected Benefit) and (Expected Cost) is a
common staple in many of the models. Shavell says the (Expected cost of Trial) – (Expected Value of ADR) determines the actions parties choose. Bernstein uses (Expected post-arbitration outcome) – (Expected post-trial outcome). Priest, Klein, Friedman, and Wickelgren all think about (Expected benefit) – (Expected cost). The symmetric and asymmetric information models parallel Shavell’s predictive/no predictive value scenarios. Bernstein disapproves of public ADR overuse, while Friedman and Wickelgren mirror that sentiment by cautioning against settlement.

A truly comprehensive model should be able to account for potential problems addressed in the different models. In addition, there are several other costs that I think are necessary to include. Law schools have continued to add ADR courses to their curricula.\textsuperscript{25} With the increasing prevalence of ADR, educating and training effective lawyers will become more difficult. ADR courses should be integrated into the curriculum rather than offering more instruction.\textsuperscript{26} ADR may reduce litigation costs, but it will raise the costs of producing more lawyers, and this should be accounted for.

Another issue is that courts have an incentive to impose ADR participation because they can internalize the benefits while externalizing the costs.\textsuperscript{27} This can either be a benefit or detriment. By externalizing costs, courts have more left over resources to use which could return to the community in the form of better quality judgments or more effective service. On the other hand, if the courts required ADR participation regardless of outcome, then this would just impose a direct litigation cost on everyone.

On the topic of courts, I believe the vanishing jury trial phenomenon to be an important consideration. Jury trials have been dropping dramatically and “Alternative dispute resolution, in all of its permutations, also contributes to the declining trial rates” (Refo 2003). Earlier, the

\textsuperscript{25} Bernstein (1993)  
\textsuperscript{26} Sternlight (2010)  
\textsuperscript{27} Heise (2010)
private aspect of ADR was seen as a beneficial element, but in this case privatization of dispute resolution can have negative effects. Public trial systems have intangible social benefits and when settlement becomes prioritized over trials, now the opposite problem of Hensler’s community justice movement arises, where the public element is now threatened by mass privatization. If Bernstein read this article she would be surprised by the looming threat of private ADR mechanisms.

ADR also presents the problem of nuisance and negative expected value (NEV) suits. According to Bernstein, “The asymmetric cost theory defines a nuisance suit as a ‘suit in which the plaintiff is able to obtain a positive settlement from the defendant even though the defendant knows the plaintiff's case is sufficiently weak that he would be unwilling or unlikely to actually pursue his case to trial.’” As another criticism of CAA, Bernstein mentions that “a plaintiff will file an asymmetric cost nuisance suit in a CAA jurisdiction if the cost of doing so is less than the settlement he can extract.” Cheap ADR procedures can promote nuisance suits which would increase overall litigation.

An NEV suit is a dispute in which the plaintiff recognizes that the expected value of going to court is negative. It is possible for a plaintiff to obtain a positive settlement under exogenous timing. But under endogenous timing, defendants can use the threat of negative expected value defenses to reduce settlement amounts. ADR makes both these types of suits more common, and this cost should be taken into account.

The two branches could draw from each other to make a model that encompasses many of the problems not previously accounted for. I prefer the symmetric/asymmetric models

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28 Friedman and Wickelgren hint at something like this when they mention the unique ability of courts to influence behavior.
29 Bebchuck (1996)
30 Schwarz and Wickelgren (2009)
presented by Wickelgren. The general idea of (Expected benefits) – (Expected costs) can have terms expanded out to include whatever extra costs public and private ADR forms impose on the litigants. Heise’s conclusion about the increased likelihood of settle would fall under expected benefits while the lack of reduction in disposition time would factor into expected costs as a monetary value. Increases in lawyer training would figure into the expected cost. Wickelgren already demonstrates the effect of nuisance and NEV suits and how they fit into the model.\textsuperscript{31} Hensler’s problem of transaction costs of information would fall under plaintiff expected costs if the plaintiff needed to learn about ADR. Friedman and Wickelgren confirm that this model is flexible enough to apply to intangible social costs like reduced deterrence and chilling, so it should be able to cover the intangible consequences of the vanishing jury trials and account for an immeasurable element like preservation of a relationship.\textsuperscript{32}

The symmetric/asymmetric information model serves as the best baseline because it can include both factors that can be put in monetary figures and intangible terms. Additionally, it is flexible enough to appease most of the other models. Bernstein, Shavell, Priest, and Klein all use the same expected value calculations to determine parties’ actions. Shavell would want the model to make a distinction between \textit{ex post} and \textit{ex ante}, but he should agree with the assumptions and predictions of the model. Bernstein’s critical point analysis is similar to the range of plaintiff and defendant expected values that the model discusses. She would suggest incorporating the public and private ADR discussion. By sharing in this symmetric/asymmetric model the two branches can develop a more universal model.

\textsuperscript{31} Schwartz and Wickelgren (2009)
\textsuperscript{32} From the earlier discussion of family law and labor management
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