Achieving Access to Justice Through ADR: Fact or Fiction?

Friday
November 1, 2019
8 – 9 a.m. | check-in
9 a.m. – 5 p.m. | program

Costantino Room
(Second Floor)
Fordham Law School
150 West 62nd Street New York, NY 10023

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Law Review Speaker Bios

**Harold I. Abramson, J.D., LL.M.**
Professor of Law, Touro Law School

Professor Hal Abramson, Touro Law Center, has been deeply involved in the development and practice of domestic and international dispute resolution for more than 25 years. He contributes as a teacher, trainer, author, and participant on professional committees and serves actively as a mediator and facilitator. He also has taught or trained on dispute resolution in nineteen countries on six continents. He is an award-winning author with two of his numerous publications receiving international awards from the CPR Institute for Conflict Resolution.

While at Touro, he visited full-time at Cardozo Law School in NYC and UNLV Law School in Las Vegas. He also visited for a year as a Distinguished Visiting Professor at the U.S. Air Force Academy where he assisted in building their negotiation program, including teaching negotiations and training negotiation teachers. Professor Abramson has been selected for the International Who’s Who of Commercial Mediation since its inaugural year and served as the first Scholar-in-Residence for the International Academy of Mediators. His most recent project involved the new Singapore Mediation Convention. He served as an expert advisor to UNCITRAL when Working Group II drafted the Convention, participated in the drafting sessions, and co-chaired the first symposium on the Convention and edited a book on the Convention that will be out soon. For his contributions to the field of dispute resolution, Professor Abramson received the 2013 Peace Builder Award from the NYS Dispute Resolution Association.

**Kristen Blankley, J.D.**
Professor of Law, Nebraska College of Law

Kristen Blankley is a Professor of Law and Director of the Robert J. Kutak Center for the Teaching and Study of Applied Ethics at University of Nebraska College of Law. Professor Blankley teaches and writes in the areas of alternative dispute resolution and ethics. Professor Blankley’s interest in this particular topic stems from her work as a pro bono mediator in Lincoln, NE, working on family law cases, including custody and guardianship issues.

**Hon. Wayne D. Brazil (Ret.), J.D., Ph.D.**
JAMS Mediator and Arbitrator

Wayne Brazil was a United States Magistrate Judge in the Northern District of California for 25 years (1984-2009). He was one of the primary architects of that court’s ADR program – overseeing its design and management until his retirement from the bench. In addition to exercising the full range of responsibilities for litigated civil cases, Judge Brazil hosted more than 1500 settlement conferences. After leaving the bench, Judge Brazil taught ADR courses at the law school at the University of California, Berkeley. Earlier in his career, he taught civil procedure and constitutional law at three other law schools. In 2011 he joined JAMS, where he continues to serve as an arbitrator, mediator, and special master. Judge Brazil has published extensively on ADR and procedural topics. He was educated at Stanford (B.A.), Harvard (M.A. and PhD), and Cal (JD).

**Benjamin G. Davis, J.D.**
Professor of Law, University of Toledo College of Law

Professor Benjamin G. Davis: Harvard College, Harvard Law School and Harvard Business School. Teaches Contracts, ADR, Arbitration, International Law, and International Business Transactions. Former Chair of the American Bar Association (ABA) Section of Dispute Resolution; a former Member, Africa Council, ABA Rule of Law Initiative; Former Member, ABA Standing Committee on Law and National Security. 1983 to 1986: Development and Strategic Business Consultant in Paris and West Africa. 1986, American Legal Counsel at the International Court of Arbitration of the ICC in Paris: supervised directly or indirectly over 5000 international commercial arbitration and mediation cases, prepared filings before courts, assisted drafting of arbitration laws, led conferences in Europe, North America, and Asia. In 1996, promoted to Director, Conference Programmes
and Manager of the ICC Institute of World Business Law where he organized diverse events. Created fast-track international commercial arbitration in 1991. 30 year pioneer in Online Dispute Resolution, Fellow of the National Center for Technology and Dispute Resolution. Led the adoption in 2006 of the ASIL Centennial Resolution on Laws of War and Detainee Treatment. Presented and published worldwide.

Ellen E. Deason, J.D.
Professor of Law, Ohio State University Moritz College of Law

Ellen E. Deason is the Joanne Wharton Murphy/Classes of 1965 and 1973 Professor of Law at the Ohio State University Moritz College of Law. She currently teaches the Mediation Clinic, Dispute Resolution Processes, International Commercial Arbitration, and Civil Procedure. She was honored with the Ohio State University Alumni Award for Distinguished Teaching in 2016 and chosen as the Professor of the Year in the Law School in 2015. On behalf of the Association of American Law Schools Section of Alternative Dispute Resolution, she organized and moderated a discussion on ADR and Access to Justice at the 2017 AALS annual meeting. That section recognized her article on appropriate roles for judges in settlement by selecting it as the Article of the Year for 2017. She is the co-author of Global Issues in Mediation (with Jacqueline Nolan-Haley and Mariana H.C. Gonstead) and casebooks on Civil Procedure and Alternative Dispute Resolution.

Howard M. Erichson, J.D.
Professor of Law, Fordham University School of Law

Professor Erichson teaches Civil Procedure, Complex Litigation, Professional Responsibility, and Torts at Fordham Law School. His research explores the U.S. litigation process, particularly the problem of resolving mass disputes. He is the author of the book Inside Civil Procedure, co-author of Complex Litigation: Cases & Materials on Advanced Civil Procedure, and co-author of a forthcoming casebook on Civil Procedure. In addition, he has written numerous law review articles, which have addressed, among other things, ethical issues in non-class aggregate settlements and problems in class action settlements. Before joining the Fordham faculty in 2008, Professor Erichson clerked for the New Jersey Supreme Court and for the U.S. Court of Appeals for the Second Circuit, practiced as a litigator with Cleary Gottlieb Steen and Hamilton in New York City, and taught at Seton Hall Law School.

Mariana H.C. Gonstead, J.D., LL.M.
IDRR Network Executive Director, Deputy to the Dean for International Legal Studies, Professor of Law, University of St. Thomas School of Law

Professor Mariana H.C. Gonstead, Deputy to the Dean for International Legal Studies and Executive Director of the IDRRN at St. Thomas School of Law in Minnesota, holds J.D. and LL.M. degrees from Harvard Law School and a law degree from UCAB. Her broad international experience includes: leading national consensus building in Brazil, working with the Trust of the Americas (OAS), teaching at the WTI in Switzerland, developing capacity for the EPA between Mongolia and Japan, and participating as an expert at UNCTAD and the World Bank. Additionally, she was appointed by the President of the World Bank to serve on the ICSID Panel of Arbitrators and of Conciliators, as one of ten globally-selected mediators. She has co-chaired the ABA Dispute Resolution Section Law Schools Committee and has publications in English, Spanish, and Portuguese.

Bruce Green, J.D.
Louis Stein Chair of Law, Fordham University School of Law

Bruce Green is the Louis Stein Chair at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He writes and teaches primarily in the areas of legal ethics and criminal justice. Before joining the Fordham faculty, Professor Green was a federal prosecutor in the Southern District of New York, and while teaching at Fordham, he worked part-time on the Iran-Contra prosecution, served on the NYS Commission on Government Integrity, and served on the NYC Conflicts of Interest Board. He currently chairs the ABA Criminal Justice
Standards Committee and the MPRE drafting committee. He is a co-author of *Professional Responsibility: A Contemporary Approach* (West, 3d ed. 2017).

**Michael Z. Green, J.D., LL.M.**
Director, Workplace Law Program, Professor of Law, Texas A&M University School of Law

Professor Green has served as a full professor at Texas A&M University School of Law since its beginning in August 2013 and the Director of its Workplace Law Program since 2015. Professor Green has been invited to discuss his scholarly endeavors at scores of venues throughout the nation and internationally. He was selected in 2006 as a member of the American Law Institute (ALI) and appointed to the ALI consultative group advising the Reporters drafting the Restatement of Employment Law. He was selected in June 2014 to join the College of Labor and Employment Lawyers, “a non-profit association honoring the leading lawyers nationwide in the practice of Labor and Employment Law.” In 2015, he received the Paul Steven Miller Memorial Award, determined by peer law professors and given annually to a law scholar who has demonstrated outstanding academic and public contributions in the field of labor and employment law. In 2018, he became a member of the Labor Law Group, a collection of scholars engaged in producing quality casebooks for instruction in labor and employment law. In September 2019, he was selected as a member of the National Academy of Arbitrators in recognition of his scholarly achievements and service as a labor arbitrator. He is a new co-author on the Fourth Edition of ADR in the Workplace expected for publication by West in 2020. More biographical information is available at: http://law.tamu.edu/faculty-staff/find-people/faculty-profiles/michael-z-green.

**Jill I. Gross, J.D.**
Associate Dean for Academic Affairs, Professor of Law, Elisabeth Haub School of Law at Pace University

Jill I. Gross is Associate Dean for Academic Affairs and Professor of Law at the Elisabeth Haub School of Law at Pace University, teaching courses in ADR, securities law, and professional responsibility. At Pace, she has held the Hopkins Chair, and served as Director of the Investor Rights Clinic and of Legal Skills Programs. She also has taught at Cornell Law School, UNLV’s Boyd School of Law and Cardozo School of Law. She is co-author of the fifth edition of the well-known treatise, *Broker-Dealer Law and Regulation* (Wolters Kluwer 2018), has published dozens of book chapters and articles on the negotiation, mediation, and arbitration of securities disputes, and is a Senior Contributing Editor to the *Securities Online Litigation Alert*. She has chaired the AALS Section of Dispute Resolution, and other ADR-related committees. She is an arbitrator for the AAA and FINRA, and member of the Securities Experts Roundtable. She is a former public member of FINRA’s NAMC, and current member of the President’s Council of Cornell Women. She has been retained as an expert in securities matters. She received an A.B. *magna cum laude*, Phi Beta Kappa, from Cornell University and a J.D. *cum laude* from Harvard Law School.

**Lela P. Love, J.D.**
Director, Kukin Program for Conflict Resolution, Professor of Law, Benjamin N. Cardozo School of Law

Lela Porter Love is a professor of law and director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law (NYC). Her program has been ranked by U.S. NEWS AND WORLD REPORT among the top ten law school programs in the US in dispute resolution since 2000. Lela is Past Chair of the American Bar Association Section of Dispute Resolution. In her chair year she initiated the first International Mediation Leadership Summit in the Hague. She has written widely on the topic of dispute resolution, including co-authoring three law school textbooks. Among her books are: *The Middle Voice*, co-authored with Joseph Stulberg, and two collections of stories about mediations—*Stories Mediators Tell* and *Stories Mediators Tell—World Edition*. She has received Lifetime Achievement Awards from the International Academy of Mediators
Julie Macfarlane, LL.M, Ph.D.
Professor of Law, University of Windsor Faculty of Law

Professor Macfarlane is a Full Professor in the Faculty of Law, and was awarded a University of Windsor Professorship (the highest honour of the University) in the Fall of 2014. She has published widely in the area of conflict resolution, mediation, and legal practice. She is the author of the bestselling "The New Lawyer: How Settlement is Transforming the Practice of Law" (University of British Colombia Press 2008). Her student textbook "Dispute Resolution: Readings and Case Studies" is just going into its 4th edition (Emond Montgomery 2015). Both these texts are used widely in law schools throughout North America. In 2012, Julie completed a four year empirical study of Islamic divorce and published "Islamic Divorce in North America: A Shari'a Path in a Secular Society" (Oxford University Press), attracting much public and media interest. Her new project is the National Self-Represented Litigants Project established at Windsor Law in the wake of the momentum created by her national study of self-representation, published in 2013. Professor Macfarlane is also an active mediator and dispute resolution consultant to a wide range of organizations and government agencies.

Jacqueline Nolan-Haley
Jacqueline Nolan-Haley is a Professor at Fordham University Law School where she directs the ADR & Conflict Resolution Program and the Mediation Clinic. She teaches courses in ADR, International and Interethnic Conflict Resolution, Catholic Perspectives on Conflict Resolution, and Mediation at Fordham Law School and at its Queens University Belfast and University College Dublin Summer Program. She has conducted conflict resolution training programs in Ghana, Northern Ireland and the United States. Professor Nolan-Haley is a member of the Ethics Committee of the ABA Section of Dispute Resolution and is chair of the Education Committee of the New York Bar Association’s Dispute Resolution Section. She is the former Chair of the ADR Section of the Association of American Law Schools. Professor Nolan-Haley has taught dispute resolution courses at the University of Lorraine, France, McGill University, Faculty of Law, Boston University Law School, and University of Navarra School of Law, and has been a Visiting Scholar at the Harvard Program on Negotiation. She is an award winning author with one of her publications receiving an award from the CPR International Institute for Conflict Resolution and Prevention. Her recent publications include: Mediation and Access to Justice in Africa: Perspectives from Ghana (2015); Designing Systems for Achieving Justice after a Peace Agreement: The Case of Northern Ireland (2017); Does ADR’s Access to Justice Come at the Expense of Meaningful Consent? 33 Ohio St. J. Dispute Res. 373 (2018); Mediation, Self-Represented Parties and Access to Justice: Getting There from Here, 87 Fordham L. Rev. Online 1 (2019); Global Perspectives in Mediation (co-author) (West/Thompson 2019); Access to Justice and ADR: Comparative Perspectives, Missouri J Disp. Res. (Forthcoming 2020)

Lydia Nussbaum, J.D.
Director, Saltman Center for Conflict Resolution, Professor of Law, William S. Boyd School of Law at UNLV
Lydia Nussbaum is a Professor of Law at the UNLV Boyd School of Law where she also serves as the Director of the Saltman Center for Conflict Resolution. Before joining the faculty at Boyd, she taught at the University of Baltimore School of Law and also was a fellow in the Leadership, Ethics, and Democracy Building Initiative at the University of Maryland Francis King Carey School of Law. She teaches courses on dispute resolution and family law and also directs the law school’s Mediation Clinic. Professor Nussbaum’s research explores questions of how and why states use ADR procedural interventions as instruments for shaping public policy and instituting societal reform. Her articles have been published in the *Hastings Law Journal*, the *Maryland Law Review*, the *Utah Law Review*, and the *Cardozo Law Review*.

Professor Nussbaum earned her J.D. from the University of Maryland and she received her double major B.A. in History and Italian with distinction in all subjects from Cornell University.

**Paul Radvany, J.D.**
Clinical Professor of Law, Fordham University School of Law

Professor Paul Radvany is a Clinical Professor at Fordham Law School where he directs the Securities Arbitration Clinic and also teaches Leadership for Lawyers and Trial and Arbitration Advocacy. He is a past Chair of the American Association of Law Schools’ Litigation Section. He is an active mediator and arbitrator for the International Institute for Conflict Prevention (“CPR”) and was appointed in 2016 to be one of a handful of mediators for a pilot mediation program for the Second Circuit. He is also a member of the mediation panels for the Southern and Eastern Districts of New York. Professor Radvany was appointed to the inaugural Mediation Advisory Committee for the Southern District of New York. He has taught and trained lawyers, law students, and LLM students on various aspects of arbitration and mediation and has been appointed as a member of the Securities Industry Conference on Arbitration.

Before joining Fordham’s faculty, Professor Radvany was a Deputy Chief of the Criminal Division for the United States Attorney’s Office in the Southern District of New York, where he oversaw the Securities and Commodities Fraud, Major Crimes, and General Crimes Units and directed the trial training program for new prosecutors. He also is an adjunct professor at Columbia Law School, where he teaches Trial Practice and the Federal Court Clerk Externship class. Before joining the U.S. Attorney’s Office, Professor Radvany was a litigation associate at Debevoise & Plimpton. He clerked for the Hon. Michael H. Dolinger in the Southern District of New York, and he received his J.D. from Columbia Law School, where he was a Harlan Fiske Stone Scholar, and his B.A. from Columbia College.

Jennifer Reynolds, J.D.
Faculty Director, ADR Center, Associate Professor of Law, University of Oregon School of Law

Professor Jen Reynolds teaches civil procedure, negotiation, conflict of laws, and dispute systems design. Her research interests include problemsolving in multiparty scenarios, cultural influences and implications of alternative processes, and plea bargaining. Reynolds received her law degree *cum laude* from Harvard Law School, a master’s degree in English from the University of Texas at Austin, and a bachelor’s degree from the University of Chicago. While at Harvard, Reynolds served as an editor of the *Harvard Law Review*; as a research assistant for Professor Arthur Miller on his treatise, *Federal Practice and Procedure*; and as a teaching assistant, researcher, and Harvard Negotiation Research Project Fellow for the Program on Negotiation. Reynolds joined the faculty at the University of Missouri School of Law as a Visiting Associate Professor in 2008 before joining the Oregon faculty the following year. She served as a visiting professor at Harvard Law School in 2017-18.

Amy J. Schmitz, J.D.
Elwood L. Thomas Missouri Endowed Professor of Law, University of Missouri School of Law

Professor Amy J. Schmitz joined the University of Missouri School of Law as the Elwood L. Thomas Missouri Endowed Professor of Law in 2016. Previously she was a Professor at the University of Colorado School of Law for over 16 years. Prior to
teaching, Professor Schmitz practiced law with large law firms in Seattle and Minneapolis, and served as a law clerk for the U.S. Court of Appeals for the Eighth Circuit. Professor Schmitz teaches courses in Contracts, Lawyering, Online Dispute Resolution, Major Research Projects, Secured Transactions, Arbitration, International Arbitration, and Consumer Law. Recent speaking engagements include events at the American Bar Association, ODR Forums in New Zealand, Paris and the U.S., Universities in Munich and Augsburg, Germany, Cyber justice Lab in Montreal, Consumer Financial Protection Bureau in Washington, D.C.; University of Leicester in England; University of Ghent in Belgium; Stanford Law School; International Chamber of Commerce; and many other universities and conferences throughout the world. She serves on the Association of American Law Schools Executive Committee on Commercial and Consumer Law, is a Fellow of the National Center for Technology and Dispute Resolution, is Co-Chair of the ABA Technology and Dispute Resolution Committee, and was an External Scientific Fellow of the Max Planck Institute Luxembourg. She also has taught in France, South Africa, and Oxford, England, and has been an expert and liaison for the United Nations working group seeking to create a global online dispute resolution mechanism (UNCITRAL WG III). Professor Schmitz has published over 50 articles in law journals and books, and a book, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, with Colin Rule.

Sukhsimranjit Singh, LL.M.
Managing Director Straus Institute, Director LLM Program, Assistant Professor of Law and Practice, Pepperdine School of Law

Sukhsimranjit Singh is Managing Director of the Straus Institute for Dispute Resolution at Pepperdine University School of Law, where he also serves as Assistant Professor of Law and Practice and directs the LLM programs. Dr. Singh oversees the Institute's global outreach efforts, world-class professional training programs, and rigorous academic curriculum. His practice, teaching, and scholarship focus on cross-cultural dispute resolution, faith-based mediation, and utilizing modern theories, science, and technology to devise creative solutions for global disputes. Dr. Singh is a successful international mediator and has resolved disputes in countries throughout the world—including in states across the United States, Canada, India, Japan and New Zealand, to name a few. He currently serves as the mediator for Willamette University's Atkinson Graduate School of Management, where he identifies and resolves organizational conflicts, and for the City of Beverly Hills, where he was recently nominated for the city's annual Peace Award. He teaches various subjects in dispute resolution at Pepperdine, and he has previously taught at USC School of Law, Willamette University, Hamline University, as well as in India at the National Law University, where he was appointed Honorary Professor of Law, and at Rajiv Gandhi National University of Law. In 2017, the Government of India recognized Dr. Singh as a GIAN scholar for his teaching in the field of dispute resolution. Dr. Singh's work can be found in several journals and books on dispute resolution, and most recently he published, "Best Practices for Mediating Religious Conflicts" for American Bar Association. Dr. Singh has given keynotes, lectures, and trainings on dispute resolution in more than 30 states across the United States, as well in Australia, Brazil, Canada, China, Denmark, Egypt, France, India, Japan, Kenya, Korea, New Zealand, Peru, Saudi Arabia, Singapore, Spain, U.A.E., and United Kingdom. He has delivered online TEDx Talks on dispute resolution in relationships, titled "Negotiating for Love," in 2015 and on professional identity titled "Made in India," in 2018.

Upon earning his Bachelor of Law from India's premier Law University, National Academy of Legal Studies and Research, Dr. Singh clerked for the Chief Justice of India, Justice R.C. Lahoti. He received an LL.M. in Dispute Resolution from the University of Missouri-Columbia and completed a post-graduate fellowship at Hamline University's Dispute Resolution Institute. Dr. Singh received his doctorate from National Law University, Delhi with his work on Indo-American perspectives on Dispute Resolution. Professor Singh is an Honorary Fellow at the International Academy of Mediators (IAM), Co-chair for a Committee for the American Bar Association's (ABA) Section of Dispute Resolution, an Executive Committee.
Member for the American Association of Law School's (AALS) Dispute Resolution Section, and an Executive Committee Member for the Pepperdine/Straus American Inns of Court for Dispute Resolution and serves on advisory committees for Rajiv Gandhi National Law University and Punjab University. He also serves on the board of the Weinstein International Foundation, an affiliate of JAMS International.

David Udell, J.D.
Founder and Executive Director of the National Center for Access to Justice, Fordham University School of Law

David Udell is the Founder and Executive Director of the National Center for Access to Justice at Fordham Law School, a research and advocacy organization that works with data to expand justice in the United States. David leads NCAJ’s justice system reform initiatives, including the Justice Index, promoting best polices for access to justice; the Fines and Fees Project, promoting best policies for controlling the use of court-imposed debt to fund government; the A2J Initiative and A2J Summit Collection, convening justice system reformers and publishing their work; the Outcomes Guide, recommending best practices for tracking outcomes in civil legal aid organizations; and the National Science Foundation Scholars’ Project, engaging social scientists from diverse disciplines to grow the field of civil justice research.

David is a co-director of the school-wide A2J Initiative at Fordham Law School, where he also co-teaches the Access to Justice Seminar. He is a member of advisory boards of the National Coalition for a Civil Right to Counsel, Voices for Civil Justice, and the Justice Center of the New York County Lawyers’ Association. He is a former member of the New York City Bar Association’s Committee on Professional Responsibility and its Committee on Pro Bono and Legal Services, and of the New York Chief Judge’s Taskforce on New Roles for Non-lawyers. He was the Founder and Executive Director of the Justice Program of the Brennan Center for Justice at NYU Law School, a Senior Attorney at Legal Services for the Elderly (NYC); and a Managing Attorney at Mobilization for Justice (NYC). He is a graduate of NYU Law School.

Ellen Waldman, J.D., LL.M.
Professor of Law, Thomas Jefferson School of Law

Ellen Waldman has been active in the fields of mediation and medical ethics for over two decades. In the area of dispute resolution, she writes, trains, consults and mediates in a broad range of cases, including end-of-life in the healthcare context. Former chair of the International Mediation Institute’s ethics committee, and task-force member for the California judicial council’s working-group on training requirements for court-connected mediators, Waldman has been deeply involved in policy questions relating to the qualification and ethics training of mediators.

A mediator for both community centers and superior courts in California and consultant for profit and non-profit healthcare institutions, Waldman founded and directs the Thomas Jefferson School of Law Mediation Program, where she is also a full-time faculty member. She has published more than 25 articles on numerous dispute resolution topics and crafted the first book-length treatment of ethical dilemmas in mediation, entitled Mediation Ethics: Cases and Commentaries. She is currently a visiting professor and directing the mediation clinic at the Cardozo School of Law.

Nancy A. Welsh, J.D.
Director of Aggie Dispute Resolution Program, Professor of Law, Texas A&M University School of Law

Nancy A. Welsh is a Professor of Law and Director of the Dispute Resolution Program at Texas A&M University School of Law. Before joining Texas A&M Law in September 2017, she was Professor of Law and William Trickett Faculty Scholar at Penn State University, Dickinson School of Law. In 2016-2017, she was Chair of the American Bar Association Section of Dispute Resolution.

Professor Welsh is a leading scholar and teacher of dispute resolution and procedural law. She examines negotiation, mediation, arbitration, judicial settlement, and dispute resolution in U.S. and international contexts, focusing on self-
determination, procedural justice, due process, and institutionalization dynamics. Professor Welsh presents nationally and internationally and has written more than 60 articles and chapters that have appeared in law reviews, professional publications, and books. Her article, *The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, has been recognized as one of the three most-cited articles from the first ten years of the existence of the *Harvard Negotiation Law Review*. In 2018, the Texas Bar Foundation selected her article, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, for its Outstanding Law Journal Article Award. Professor Welsh is also co-author of the fourth, fifth, and sixth editions of *Dispute Resolution and Lawyers*. In 2006, she conducted research in the Netherlands as a Fulbright Scholar and taught at Tilburg University. Before joining the legal academy, Professor Welsh was the executive director of Mediation Center in Minnesota and practiced law with Leonard, Street and Deinard. She has advised state legislatures, federal and state agencies, and courts regarding the institutionalization of dispute resolution, conducted empirical research, convened roundtables and symposia on various dispute resolution topics, and served as a mediator, facilitator, and arbitrator.
ESSAY

WHEN “GETTING IT RIGHT” IS WHAT MATTERS MOST, ARBITRATIONS ARE BETTER THAN TRIALS

Wayne D. Brazil

I. INTRODUCTION

Serving as an arbitrator since retiring from the bench has inspired me to think about the quality of the adjudicative process in new ways—and to assess, from an insider’s perspective, the pros and cons of trials (especially court trials) and arbitrations. The purpose of this essay is to share my thoughts on this subject—some of which have surprised me.

My perspective is micro. My “data” source is my personal experience in specific cases—on the bench and as an arbitrator. My goal is to pull ideas and specific lessons from my direct experience working on the ground level within these two different processes.

This is not a case study or a report from an ambitious collection of empirical data. Rather, it is an exploration of process—pure and simple. It compares trials and arbitrations as processes, abstracted from specific circumstances and from socio-political, economic, or strategic factors that can be very important when parties are trying, in a real case, to select between process options.

To compare processes as processes, it is necessary to make assumptions that equalize or neutralize variables that, in the real world, can be quite significant; for example, the competence and integrity of a particular pool of judges, or a particular assigned judge, compared to the competence and integrity of the arbitrators who might be available for a given matter. In this essay, I assume that the decision-makers in court trials and in arbitrations are comparably intelligent and ethical. I also assume, unrealistically, that

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1 The author retired from his position as a Magistrate Judge in the United States District Court, Northern District of California, in October of 2009, after serving on the bench for twenty-five years. He is now affiliated with JAMS.

2 By “integrity” I mean not only freedom from corruption and bias, but also commitment to crafting decisions that are as “true” to the admitted evidence and the relevant law as possible.
the cost and speed of the processes I compare would be roughly equivalent for the same kinds of disputes.\(^3\)

Thus, the case that I make for arbitration in this essay is not grounded in considerations that are commonly cited in support of arbitration (sometimes without much empirical support), considerations such as reducing cost and delay, speeding access to finality, or promising privacy. Nor do I wrestle with the important and controversial issues that surround the use of arbitration clauses to end-run the Seventh Amendment, or to build protections against class actions. My focus is narrower and on considerations that seem to have attracted much less attention. In this article I will identify features or characteristics that distinguish trials and arbitrations, and explore how the differences between the two processes can affect the relative quality of outcomes.

For reasons set forth below, I have concluded that, in many circumstances and for certain kinds of cases, arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than trials conducted by conscientious judges. By “higher quality,” I mean, generally, decisions in which the findings of fact are better supported by the evidence and in which the conclusions of law are informed by reasoning about the dynamic between evidence and law that is deeper, more disciplined, and more subtle.

It is important to emphasize, at the outset, that no process can promise absolute accuracy in identifying historical facts,\(^4\) especially historical facts about a person’s mental or emotional state, or about her motives at the time she acted (these kinds of “facts” can elude even the actor herself). Similarly, no process can guarantee that the decision-maker will apply the controlling legal principles “correctly.” The elusiveness of analytical correctness has many roots—some (especially in higher courts) in the role of quasi-political considerations, and some in the considerable elasticity and indefiniteness of many legal “rules,” to say nothing of broader legal principles or concepts; for example, negligence, good faith, or the doctrine of reverse equivalents in patent law.

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\(^3\) Lengthy arbitration hearings can be quite expensive, especially with three arbitrator panels. But pre-hearing expenses can be lower in arbitrations than in litigation, and parties can exercise some control over the ultimate cost of disposition by agreeing to limit the number of hearing days and the number of writing hours for which the arbitrator will be compensated.

\(^4\) Before beginning my career in the law, I was trained as a historian (at the Ph.D. level). It was in the course of that training, and working on my dissertation, that I first began to understand how elusive historical facts can be, even when the “searcher” scours the evidence, cares about nothing but accuracy, and the facts the historian is pursuing are only about thirty years in the past. At best, the honest historical scholar can only say “I think this is what happened.”
Moreover, which process is most likely to yield the most accurate factual determinations can vary with the kinds of facts in issue. Juries might be better able than judges or arbitrators to determine whether a live witness is trying to tell the truth, or juries might be better at making judgments rooted in common sense or in wide and general life experience. Judges and arbitrators, by contrast, might be more likely to draw accurate inferences that turn on evidence from esoteric or technical fields, or on systematic analysis of relationships between large numbers of documents.

It also is important to acknowledge that sometimes the quality of the decision-making that informs the disposition of a case is not what is most important to lawyers and clients trying to decide which process-option best suits their circumstances or seems most likely to advance their objectives—which sometimes have precious little to do with the merits of a dispute. Occasionally, for example, the parties’ choice of process is dominated by the pursuit of publicity, or by the hope that the outcome will be fueled by a fact-finder’s anger, or political or social agendas or biases.

But, when it is important to maximize the odds that the decision-maker will get it right (on the facts and the law), a strong argument can be made that the best process is arbitration. In short, a good arbitration offers greater promise than a good trial (court or jury) that the disposition will turn on the merits.5

II. GETTING MORE EVIDENCE ON THE TABLE AND ILLUMINATING ITS PROBATIVE CUT MORE CLEARLY

A. Tone: Invitation Rather Than Intimidation

A trial takes place in a courtroom. By design, a courtroom commands formality. Commanded into formalism, lawyers, witnesses, and judges in courtrooms attend carefully to matters of form. Attention to form can compromise attention to content. Ac-

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5 The decision best supported by clarity of understanding and unassailability of reasoning is not necessarily the “correct” or “right” decision. What is “correct” or “right” in litigation outcomes, or even in determinations of what the law is, might be most accurately characterized as a social factum, not something ascertainable by anything approaching a scientific method. The targets of legal inquiry can be elusive and chameleon-like, and the archers are human beings who are encumbered by limitless limitations and who are called upon to make “judgments” that are likely to be influenced by a host of factors, some of which are invisible even to their hosts. There are lots of close games in this business (5-4, 4-3, 2-1, 1-0) for a reason. And reason will never eliminate this reality.
accuracy and subtlety can be the victims when lawyers and witnesses must press the pure, or complicated, or nuanced content that exists in their minds through the strainer of courtroom formalisms. People often experience life as a complex fluidity that eludes capture when “reported” through prescribed courtroom conventions and rigid rules.

Arbitrations do not take place in courtrooms. They take place in conference rooms, i.e., rooms dedicated to informal conferencing. Informality invites liberation of mind, liberation from preoccupation with how to frame communications (questions or answers). Liberated from preoccupation with how to speak, lawyers and witnesses can focus on what they want to say. Witnesses can feel freer to reach directly into their internal view of reality and to use that view to inform their testimony. Lawyers can feel freer to scour the big piles of information in their heads in search of data or ideas that can inform more telling questions and more sophisticated lines of reasoning.

In my most recent sizeable arbitration, the lawyers and I succeeded in creating an environment that enabled all of us to focus on content, largely free from distractions or interruptions by formalities and from “gaming” through theatrics, silly evidentiary objections, or other forms of verbal posturing. Respect was the dominant theme and force—respectful treatment of all people and a deep respect for the seriousness and difficulty of my overriding responsibility: to get it right. By example, and by swift but tempered (respectful) interjections, I made it clear at the outset that posturing and verbal sparring (with witnesses or between lawyers) simply would not be part of our process. Counsel followed suit.

My objectives were to subject the lawyers and witnesses to as little artificial or procedural pressure as possible, to create an environment that was as hospitable to thinking as possible, and to encourage everyone to concentrate on what counts (evidence and reasoning).

Setting this tone and fixing this focus freed the lawyers and witnesses to concentrate on the substance of their evidence and lines of reasoning. It created the psychological and procedural space everyone needed to get to what mattered—and eliminated the distraction and waste of time that are the chief products of canned adversarial conduct and friction.

It is much more difficult to create this kind of environment in trials, especially in jury trials, where pressures and emotions run higher, where pursuit of stratagems is more intense, and where the
temptation to stray into theatrics is greater. The formalities, rituals, and rules by which trials (to juries or judges) tend to be dominated make it much more difficult for lawyers and witnesses to “relax into content,” i.e., to feel a psychological freedom that can clear pathways to more reliable memory and to the sustained clear thinking that will explicate best the evidence and law.

Freedom from time constraints that would have been imposed by the needs of the court system helped us sustain this environment. As an arbitrator from the private sector, I felt neither the backlog pressure nor the acute impatience that can distort the pace of proceedings and infect the tone in a sitting judge’s courtroom. I did not have to worry about attending to higher priority criminal matters or ruling on motions in other cases. I did not have a host of judicial administrative and committee responsibilities. I was freed to listen, to learn, to ask questions, and to clarify—so I could do my job, which was to do my best to get it right.

This is not to suggest that we meandered—or that the parties and I were not committed to completing the hearing efficiently. Expense serves as an important source of discipline in arbitrations—and one of the critical obligations of the arbitrator and counsel, working together, is to fix time constraints that appropriately balance, independently for each particular case, efficiency and fairness. Arbitration’s advantage is that it empowers the parties to fix this balance, based on their interests and resources, rather than locating this power entirely in the court, which must give full consideration to its institutional interests and resources.

B. Process: More Open to Relevant Evidence & More Thorough In Examining Its Implications

Another important source of our ability to sustain the “teaching/learning” tone of our arbitration was being liberated from a strict or mechanical application of the rules of evidence. Counsel (and I) did not have to worry about arcane rules and the multitudes of exceptions that a court of appeal might insist were misapplied, or about waiving objections by not making them. In a court trial, lawyers and judges worry about such things. In so doing, they sometimes lose track of the main evidentiary chain.

Among externally imposed strictures in U.S. courts, the hearsay rule is the biggest single source of constraint and complexity. In continental Europe, legal communities are mystified by the
power (or even the existence) of this prohibition (elastic as its exceptions might sometimes leave it). In Europe, the evidence simply comes in and the decision-maker decides how much, if any, probative weight it deserves. To help her make that determination, the European decision-maker is expected to actively ask questions—to probe on her own initiative—and is not left to hope that the cross-fire between the lawyers discloses everything she wants to know before assessing the credibility of the hearsay.

Arbitrators, unlike sitting judges, can take pages out of the European playbook. Without searching for a neatly applicable exception, arbitrators can admit hearsay. And they are free to ask the questions, if not posed by counsel, that will equip them to make better decisions about how much significance, if any, to ascribe to any given testimony or document (whether “hearsay” or not).

Arbitrators also can liberate witnesses and counsel, in measured ways, from some of the other conventions and rules that can artificially constrain the presentation of evidence at trial and that can increase the risk that the trier of fact will be misled or confused. In arbitrations, versions of events can be presented in the first instance in narrative form\(^6\)—enabling a witness (percipient or expert) to describe, holistically, the circumstances in which she acquired the information or made the perceptions she is reporting, or the process by which she reasoned to the conclusion she reached (e.g., about what happened or why). Cross-examination can be more coherent and telling after an initial narrative presentation by a witness because the cross-examiner can go back through the story systematically, exposing, one at a time, every juncture or step in the process that is infected by some infirmity. The arbitrator also can probe the links in the story line—with less fear than a trial judge might have of encroaching on territory considered off-limits (to a passive fact-finder) under traditional views of the adversarial game.

Arbitration can offer additional procedural flexibilities that are much less likely to be available in a trial. After an evidentiary hearing has been completed, counsel are more likely to persuade an arbitrator than a judge to consider a prompt request to re-open

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\(^6\) A common variation on this theme consists of presenting direct testimony through a percipient witnesses’ affidavit or an expert’s report—which the arbitrator (or judge in a court trial) can read in advance. Live testimony can then be dedicated, more tellingly, to cross-examination and re-direct. An arbitrator is likely to spend more time than a busy trial judge studying affidavits and reports, and is more likely, both before and during the hearings, to formulate analytically significant questions.
the evidentiary process for a specific and limited, but well-justified, purpose. Similarly, arbitrators are more likely than judges to permit additional post-hearing briefing—at least when it seems likely to improve assessments of evidence or to identify additional relevant legal authorities. Moreover, while rarely used, an arbitrator may be given authority, on her own initiative, to submit follow-up questions to counsel (after a hearing has been presumptively closed and the briefs are in), or even to re-open a hearing to address a specific evidentiary issue or to pose questions to an especially important witness (and then to permit follow-up questions by counsel). Trial judges are extremely unlikely to take any such steps, which are essentially foreclosed by constraints on judicial resources and by assumptions about the limited role judges are to play in the adversary system.

Through the greater freedom they enjoy to shape and sequence proceedings, and to participate in the fact-finding process (selectively, and with restraint), arbitrators in the United States are positioned to selectively combine the fact-finding advantages of the adversary system with the fact-finding advantages of continental procedures. The arbitration process that results is far from inquisitorial, but the arbitrator can be analytically active when she does not understand something, or when she senses that there is more to the story than a witness or a lawyer has made clear—and learning what that subterranean “more” is could improve the accuracy of her fact finding and the soundness of her judgment.

In short, the dialectics about evidence and law in an analytically robust arbitration can be richer than they are in the vast majority of trials—even in trials to the court, which can be appreciably less constrained than jury trials by formalisms and by judicial fear of crossing a Seventh Amendment line. Instead of being limited to refereeing exchanges across party lines (a simple bi-directional dialectic), an arbitrator, through measured engagements, can convert the process into a more illuminating and penetrating “trialectic.” The odds of the arbitrator “getting it right” go up, sometimes considerably, when her mind is added to the active engagement mix, i.e., when the parties permit her to ask questions, or for additional evidence or information, or to request that complicated materials be re-packaged or that their implications be re-framed graphically. Through such activity the arbitrator is more likely to understand the evidence, can build a stronger foundation for assessing its pro-
bative cut, and can position herself to weigh more reliably the persuasive power of counsels’ arguments.\footnote{Some litigators may believe that the process just described sacrifices their ability to expose testimonial lying by non-linear, unpredictable cross-examination. The substance, question-sequencing, pace, and predictability of cross-examination are not restricted in the process envisioned in this essay.}

III. QUALITY OF DECISION MAKING

The quality of the analysis that leads to findings of fact and conclusions of law can be higher in arbitrations even than in trials to a judge.\footnote{For a sophisticated and multi-faceted exploration of this proposition in the context of international arbitrations, see William W. Park, \textit{Arbitrators and Accuracy}, 1 J. Int’l Dispute Settlement 25 (2010).} Why?

A. Two Commonly Acknowledged Advantages of Arbitration

Two advantages of arbitration are widely recognized—so need be mentioned only briefly here.

The first is control by the parties over who will conduct the analysis and draw the conclusions in their case. Parties cannot choose their judge, and their ability to affect who sits as jurors in their case is quite limited. In sharp contrast, parties in arbitration are empowered to choose the person or persons in whom they will place ultimate decision-making power. They can select for intelligence, conscientiousness, thoroughness, impartiality, integrity, experience as a decision-maker in litigated matters, and, of course, for subject-matter expertise. In some kinds of cases, having decision-makers with subject-matter expertise can improve the efficiency and fairness of the proceedings—both at the case-development stage and during the hearing. In addition, neutrals with subject-matter expertise are less likely to err en route to findings as a result of misunderstanding or confusing field-specific precepts, concepts, or terminology.

The deployment of three arbitrators, instead of one judge, is the second commonly acknowledged advantage of arbitrations over court trials. Other things being equal, three actively engaged minds probably are more likely to get it right than one. Three minds bring three different life experiences to the task of under-
standing words, actions, influences, and motives. Drawing on three
different life experiences reduces the risk of making inaccurate in-
ferences caused by mistaken assumptions or subconscious biases.
Moreover, three actively engaged minds are more likely than one
to raise analytically significant questions, to perceive and under-
stand all the material components of the evidentiary and legal
landscape, to draw inferences based on an appropriate weighing of
evidence, and to follow tight logical paths to findings and
conclusions.

B. The Less Commonly Acknowledged Sources of Quality
Decision-Making in Arbitration

1. Protection Against Delegations of Decision-Making

Arbitrations can yield higher quality decisions than court trials
even when there is only one arbitrator. In arbitration, unlike in a
court trial, the parties can protect themselves against the risk that
much (or all) of the fact finding and legal analysis that dictates the
outcome will be done by a law clerk or by an advocate, not by the
judge. Especially in busy urban courts, judges must spend signifi-
cant percentages of their time on the bench (literally). When they
are on the bench, they are not analyzing evidence and legal author-
ities in cases that are under submission. They may be compelled,
more often than they would like, to relegate front line responsibil-
ity for much of this kind of analysis to law clerks. Even more prob-
lematic, busy state court trial judges who do not have law clerks
sometimes must draw more than they would like on findings and
conclusions that local rules require the parties to submit.

Trial judges who so use law clerks, or findings submitted by
parties, usually will have developed during trial (or shortly thereaf-
eter) their own thoughts and instincts about the direction that analy-
sis of a case should take or about the outcome that is most
consistent with the evidence and law. If they have a law clerk, they
will communicate these thoughts to their clerk and expect him or
her to be guided by them when they work through the evidentiary
record and formulate proposed findings and conclusions. A judge
who does not have a law clerk for such tasks will use the thoughts
and instincts with which she emerged from the trial (and from any
post-trial briefing) to help choose between (and sometimes edit or
adjust) the findings that are proposed by the parties.
Moreover, busy state court trial judges who know that each trial on their calendar is likely to be separated only by a few days (or less) will feel pressure to begin forming outcome-determinative opinions during the active course of each trial. A decision-making process whose course is directed (or heavily influenced) by impressions and instincts developed during a trial, or whose outcome is essentially dictated by such impressions and instincts, can be less reliable than the decision-making process a good arbitrator has time to adopt. Unlike in a trial, arbitration allows the parties to exercise considerable control not only over when the outcome will be announced, but also over how much time the decision-maker devotes to making the decision and how much post-hearing briefing will inform her work. At the most obvious level, the parties can agree to compensate the arbitrator for the number of hours they think an appropriately careful decision-making process should consume. Less obviously, in an especially significant or time-sensitive matter, in their retention contract the parties could bar the arbitrator from conducting arbitration hearings in other cases until she has issued her findings in their case, or could require her to devote a specified number of hours, within a specified time frame, to assessing the evidence and argument in their matter and writing her opinion.

As important, and as noted above, the parties in an arbitration, unlike the parties in public litigation, can dictate who in fact studies the evidence, who in fact makes the findings, and who in fact draws the legal conclusions that fix the outcome of their case. The parties can require the arbitrator herself to do all this important work, forbidding her to delegate any of it to a law clerk or assistant. Or the parties can limit the tasks that their arbitrator can assign to a law clerk, and limit the number of hours by a clerk or assistant for which they will pay. Of course, in smaller or less complicated matters, formally imposing limitations on delegating decision-work usually would be unnecessary, as all the participants in the process will share an understanding that it is the arbitrator herself who will be making the decisions from the evidentiary ground up.

2. How Requiring the Decision-Maker to Conduct the Analysis Can Enhance the Quality of the Decision

Why is it important (to the goal of getting it right) to have the arbitrator do essentially all of the decision-work? I believe that the dispute resolution process is appreciably more likely to yield high
quality outcomes when the decision-maker herself (the arbitrator) works her way carefully through the exhibits and the recorded testimony and builds, from the ground up, her own analytical pathway—after all the evidence is in and after all the briefs have been submitted. My experience has taught me that the decision-making devil really is in the details. Specifics, carefully considered, really make a difference. A decision-maker who does not know the evidentiary and legal details does not know the case.

By “details” I mean two things: the evidentiary specifics and each element of or step in the legal tests or standards that the law requires the decision-maker to apply to the evidence.

My own sobering experience is the basis for my belief that immersion in the detail of evidence and reasoning is critical to reliable decision-making. At the close of the evidence-taking and oral argument stage of arbitrations, I usually have a general sense of how things are going to play out in the opinion I will write. More than occasionally, this general sense is wrong. It always rests on wobbly legs.

I have found that legs that support a good decision acquire muscle in three ways. First, by assessing the post-hearing briefing and doing my own legal research, I develop a much crisper, more precise understanding of the structure of the analysis the controlling legal norms mandate. I make an outline of this structure.

Second, using this structure as a guide, I work my way carefully back through the evidence for the purpose of isolating the documents and testimony of probative significance and mapping their relationship to other evidence and to the controlling legal norms. To tighten my grasp of the evidence, sometimes I ask the parties to provide me with two sets of the documentary exhibits. In one set, the exhibits are presented in the order they were identified and used during the pre-hearing and hearing stages. In the second set, the documents are presented in chronological order. Chronology improves coherence. It can expose relationships and connections, some of which a party is not always pleased for me to see. By itself, it often does not teach causation. But, in combination with explications based on counsel’s selection of evidence to support arguments, or to disclose interplays that otherwise would elude the trier of fact, chronologies can add illumination, reduce confusion or misunderstanding (sometimes promoted intentionally by counsel), and serve as a check on or tool for testing the parties’ contentions.
The third and most telling tool for adding muscle to the legs that support a solid decision is the process of writing the opinion. The process of writing conserve as the greatest single source of intellectual discipline in the decision-making process. Trial judges in busy state courts often do not write the opinions they sign. When they do write, they work under time pressure that can force them to sprint. They simply do not have time for the sustained critical examinations that are necessary to support analytical incisiveness or subtlety. Trial judges in busy federal courts often delegate much of the initial drafting of opinions to law clerks. But, in my experience, it is in that drafting, that hard initial thinking and re-thinking about the evidence and law, that critical insights occur and connections are made—insights and connections that might well elude the less experienced, less worldly mind of a law clerk.

An arbitrator can be given the time to do the writing job herself and to do it right. The great source of insight and intellectual discipline in arbitration decision-making is the vigorous play between the process of writing, and the requirements that the decision-maker (1) lay out the analytical path that the controlling legal norms require her to follow, (2) identify the evidence that she has decided is material, (3) expose her assessment of that evidence, and (4) explain her outcome to the people most knowledgeable about the subject and most acutely concerned about the character and result of her work.

i. How the Process and Act of Writing Can Increase Accuracy

How can the process and act of writing enhance the quality of decision-making?

To write, one must think. In expository writing, the thinking that precedes the creation or construction of each sentence or point requires the writer to decide what she wants to say or communicate in that sentence or point. Often this “pre-writing” thinking is tentative, exploratory, indistinct, or broad-brushed. In this setting, with only partially formed ideational objectives, the writer often begins by identifying several candidate words. To select from among these, she must make micro-decisions, choices that can refine her understanding or that could re-direct her mind toward different thought-routes.

In making each significant word choice she must test, or at least make sure, that she understands the relationship between each candidate word and the other words that she already has chosen, or that she can foresee considering down the analytical path.
It is through this most foundational dimension of the process of writing, through the mental experiments that involve identifying and assessing candidate words—and then trying out different configurations of relationships between them—that the writer has access to new insights and deepens her understanding of what she is doing.

The disciplined, engaged writer goes through this process one sentence at a time. At the end of each sentence, she must decide what comes next, where to go from here. She must ask herself, which candidate thoughts seem to follow from the one I have just crafted? Very significantly, she must ask herself why the next sentence or thought she selects would follow from the last. As she presses herself to answer these questions, she might well see that particular candidate thoughts do not in fact follow, or would follow only if modified, or only if she modified the thought to which she earlier had committed, or only if she added a new, bridging thought.

There is a very significant additional dimension to these facts about good expository writing that emerges when we focus on the process of reaching and explaining a neutral’s decision in an adjudicated matter. When writing an opinion that sets forth the bases for the outcome of a litigated case, the critical parts of the process of selecting between candidate words or inferences does not turn on logic in vacuo, but on evidence. Critically, choosing between candidate inferences of fact requires the decision-maker to re-identify, re-assess, and then carefully compare the strength of the evidence that could support each competing inference. Reliability resides in this most granular component of the process of constructing a dispositive opinion. Decision-making depth can be achieved only through the re-examination of evidence that the conscientious neutral must undertake in order to make choices between competing candidate inferences. Lawyers sometimes worry that their trier of fact will get lost in the proverbial evidentiary weeds. But good decision-makers understand that it is only by crawling through those weeds slowly that they can accurately judge the promise that each alternative pathway forward seems to offer.

To mix metaphors, it is in these intellectual trenches that depth of understanding and quality of analysis is achieved. It is by digging in these trenches that decision-makers have new ideas, acquire new perspectives, and detect errors that informed their initial instincts or infected earlier findings or conclusions. Arbitrators can be instructed to labor in these trenches; judges cannot.
The second, and fully complementary, source of quality in an arbitrator’s decision-making is the knowledge that she will be required to explain, fully and clearly, to the parties who chose and paid her, how she reached her decision. She knows, as she is writing, that step by step she must lay bare the analytical path that she has followed to reach the result that she knows will be scrutinized knowledgeably and vigorously by the parties. She knows, while she is constructing her decision, that the parties expect her to describe and defend how her mind moved from the evidence to each finding of fact, from each element of the applicable test to the next, or why she ascribed the weight she ascribed to each factor or element in a balancing analysis.

In order to explain to others, she must first explain to herself. If, at any important juncture, she cannot explain to herself, she stalls. Stalling forces her to re-examine what she has already done or the working assumptions that got her to the place where she is stuck. Stalling leads to re-examination, to more searching, more probing. Aggressive re-examinations can lead to tighter analyses and more reliable understandings. These, in turn, can yield changes in findings or conclusions, sometimes even moving the arbitrator toward a different outcome.

In theory, trial judges work along similar lines with similar objectives. In addition, they must worry about public reaction to and possible appellate court scrutiny of their work. But, there often is considerable distance between theory and practice in trial courts—especially in major urban centers, where most trials occur. Only a small percentage of dispositions (which include rulings on motions) of civil cases by state trial courts are appealed—a fact well understood by the trial bench. And only a tiny percentage of dispositions of civil cases by state trial courts receive any public attention. These circumstances, and the high volume of work they are expected to complete with what often feel like woefully insufficient resources, conspire to force many judges in busy state courts to be satisfied with appreciably less searching and painstaking work on their judgments and opinions than arbitrators can be empowered to devote to these important tasks.

ii. One Unnerving but Instructive Example

I will describe one case in point. After a full two weeks of taking evidence in an arbitration hearing, I had to make very difficult “judgments” about the credibility (truthfulness and accuracy) of testimony and the legal implications (under imprecise general
norms) of a great deal of documentary evidence. There is no reason to believe that a law clerk and I would have made the same such judgments. But, what is most telling is what happened as I worked through the evidence en route to writing my opinion.

The evidence included some thirteen bankers’ boxes of documents, multiple deposition transcripts, and ten days of hearing-testimony. The post-trial briefs were good. Using them and some additional research, I prepared a detailed outline of the relevant law. Then I turned to the evidence, committing several days of painstaking time to careful assessments of the evidentiary terrain. Based on these efforts, I drew conditional conclusions about findings and outcome.

Then I started writing. When I was about three-fourths of the way through this process, after several days of hard analytical labor, I got stuck when I was trying to explain how I had provisionally resolved a particular issue in one direction. I got stuck because when I tried to set forth, in detail, the reasoning that I had intended to present to explain this finding, that reasoning felt soft, a little wobbly. I realized that the jump I had planned to make from “evidence” to “finding” was neither short nor sure. So, I dove back into the evidence on this point. The harder I thought, the less sure I got. After struggling for a time, I changed my mind—by 180 degrees. This change had a considerable effect on outcome. In the end, I felt that my changed finding was supported by a more accurate reading of the pertinent evidence and by more demanding reasoning from it. I could never be positive I had gotten it right—but I was sure that I had given the effort everything my mind could deliver.

This experience has taught me, more powerfully than any I had on the bench, how fragile the decision-making process can be, how important the details (of evidence and law) are, and how the level of resources available to the decision-maker can significantly affect the quality of the thinking that supports outcome.

Juries are unlikely to have the resources, the inclination, or the time to undertake this kind of careful analysis. They neither explain nor write—so this potentially difference-making source of discipline in reasoning is not likely to be at work in their deliberations. And trial judges in busy urban courts rarely will have the time to engage in labored, trench-level scrutiny of evidence or retesting their own reasoning. In short, they will rarely have the time to impose on themselves the kind of demands and detail orienta-
tion that are essential to empowering the writing process to serve as such a critical source of intellectual integrity.

Instead, trial judges often are forced to rely on instincts, on gestalt impressions, on relatively quick cuts through the evidence, or on proposed findings submitted by a party. Even in federal courts, where the judiciary generally is supported by more resources, trial judges more than occasionally rely to a considerable extent on assessments of evidence and legal analyses performed by clerks who, while often quite bright, lack the judge’s intellectual maturity or worldly experience.

Arbitrators, by contrast, can be instructed to work through the evidence and explicate their reasoning at a level the parties feel is appropriate for the intellectual difficulty and the significance of their case. Thus, a good arbitrator working with appropriately measured resources can bring a level of care and depth to the decision-making process that trial judges very often would not be in a position to match.

IV. Conclusion

Nothing is perfect. Trials are not perfect tools for delivering outcomes that are fully faithful to the merits of cases. Nor are arbitrations. But, not all imperfections are equal—and I contend that, when compared as processes, arbitrations conducted by conscientious arbitrators are likely to yield higher quality decisions than trials conducted by conscientious judges (or trials to conscientious juries).

Compared to a trial, arbitration offers parties opportunities to get more evidence on the table and provides parties with more flexible tools for illuminating its probative cut. Unencumbered by process formalities and conventions, arbitration can create less distracting pressure on lawyers and witnesses, and can free up all their intelligence and knowledge for use during hearings. Freedom from strict application of the rules of evidence, especially the hearsay rule, can enable lawyers to draw on a wider range of material to make their case and can provide the decision-maker with access to more information as she tries to assess, thoroughly, the probative power of evidence and the persuasiveness of argument.

Moreover, by granting the arbitrator greater freedom to affect how the record is developed, to contribute to framing issues and formulating questions, arbitration can convert what would be a
stylized and sometimes sterile dialectical process in a trial into an informationally and analytically richer and more illuminating “trialectic.”

As significant, the quality of the thinking that informs the disposition of disputed issues in arbitration can be appreciably higher than it is likely to be in a trial, at least in busy urban courts. In arbitration, the parties can prescribe which mind, in the first instance and in the last, works through the evidence, analyzes its significance, and decides which inferences it supports. In arbitration, the parties can require that the mind that does this important, front-line work be the mind of the arbitrator they have selected for her experience, intelligence, and analytical acumen—not the mind of a clerk or an advocate.9 In arbitration, the parties can be sure that the mind that decides what the relevant legal tests consist of, and the mind that works its way carefully through the steps those tests prescribe, is the mind of the arbitrator, not the mind of a clerk or of an advocate.

Quite significantly, in arbitration, the parties can require the arbitrator to do all the writing from the first tentative drafts through the final award that will explain and justify the outcome. The act and process of writing can enhance considerably the quality of the thinking that supports the neutral’s decision—but that benefit can be lost, or at least much diluted, if the decision maker is forced by pressures on her time to delegate much of the writing to others, or to sprint through the process, or to rely heavily on submissions by the parties. In short, the parties to arbitration can create the space and provide the incentives for their neutral to do the job right. Parties in a trial can do neither.

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9 The mind of an advocate can take over this process, or exercise considerable influence in it, when a trial judge feels constrained to rely on findings of fact or conclusions of law that counsel have submitted, or when a trial judge adopts whole sections of briefs to explain and justify the disposition of an issue, claim, or case.
MEDIATION, SELF-REPRESENTED PARTIES, AND ACCESS TO JUSTICE: GETTING THERE FROM HERE

Jacqueline Nolan-Haley*

INTRODUCTION

Mediation is enthusiastically promoted as a vehicle for providing access to justice. This is as true in developing countries as it is in the United States. For individuals, mediation promises autonomy, self-determination and empowerment; for courts, there is the lure of procedural and administrative reforms—reduced dockets and greater efficiencies. Unburdened with formal discovery, evidentiary and procedural rules, pleadings, and motions, mediation is thought to generate access to justice at a faster pace than litigation. Commentators sing its praises while bemoaning its underutilization.

I argue that claims about mediation’s ability to provide access to justice should be more modest because mediation falls short on its original promise

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3. Court administrators have also suggested the benefits of “closure, insight, clarity, acceptance . . . and control for the parties themselves.” See Rebecca Price, From the Southern District of New York, a Success Story: Limited-Scope Pro Se Program Provides Access and Justice, 1 ABA DISP. RESOL. MAG., 13, 15 (2016).

of being a voluntary process based on party self-determination. In what I label a “withering away of consent,” courts and legislatures have pushed hard to sell mediation as an access to justice opportunity, often without regard for the consensual nature of the process. Too often, this hard sell has negative consequences for individuals with disadvantaged economic status who navigate the legal system on their own. These are the self-represented parties who seek access to justice in the formal judicial system but then find themselves in mediation, a different, informal system than what has been institutionalized in the courts. The extent to which they receive justice from either system is unclear.

There are multiple understandings of the meaning of “access to justice” that frequently begin with the need for access to legal representation and to legal processes that can resolve disputes. Beyond these basics, scholars consider a range of issues including whether the scope of the access to justice movement should be expanded to pursue specific goals and reform of specific policies or whether it should pursue incremental change as distinct from deeper change in the infrastructure of the justice system. From a historical perspective, access to justice is a reform movement described by Mauro Cappelletti and Bryant Garth in their international and interdisciplinary study of access to justice, wherein they identified three waves of law reform: legal aid, procedural devices for class actions, and promoting systemic reform of the legal system through alternative dispute resolution (ADR).

In this Essay, I engage with the third wave of the historical access to justice reform movement—promoting systemic reform of the legal system through ADR. My focus is on the institutionalization of mediation in court-connected programs. In addition to the withering away of consent, there are other negative features associated with these programs which impair access to justice and diminish fairness. These impediments include lack of

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7. See generally Robert Rubinson, Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of “Bad” Mediation for Low-Income Litigants, 100 MARQ. L. REV. 1353 (2017). “The risk of poor mediation intensifies in settings where there are large numbers of low-income litigants.” Id. at 1355.


9. See Fordham University School of Law, Agenda for the A2J Summit (Oct. 2, 2018) (on file with the author). The five agenda items were related to whether (1) the A2J movement should pursue specific goals, and the reform of specific policies and practices; (2) pursue incremental change as distinct from deeper changes in the infrastructure of justice; (3) related to other movements; (4) inform and relate to communities that pursue A2J in single practice areas; and (5) to what extent should the movement address the civil/criminal connection.


11. Id. at 198. The term “ADR” is frequently understood today to mean “appropriate dispute resolution.” Id.
information for parties to guide them through an informed decision-making process, rushed mediation sessions, and questionable mediator behaviors. Critics have observed that current ethical standards focus more on guiding mediators than on protecting the rights of self-represented parties in mediation. All of this raises concerns about the quality of justice experienced by self-represented parties in mediation. Do they achieve the kind of fairness that is considered a core value of the access to justice movement? Beyond fairness concerns, blending the informal justice of mediation with the formalities of the court system raises a basic access to justice question—are the benefits of court mediation more desirable for unrepresented parties than the benefits provided by the civil litigation system?

I argue that to the extent courts, legislatures, and policymakers have institutionalized mediation in the court system, there needs to be greater accountability for its functioning in that system, particularly where vulnerable (self-represented) parties are involved. We need to be concerned not just with the withering away of consent but with the collateral damage that follows in its wake. Towards that end, I will offer a proposal that the mediation community of scholars, practitioners, and users develop a set of best practices specifically directed towards self-represented parties. These stakeholders would then work towards establishing an Index that would rate the performance of court mediation programs serving unrepresented parties.

I. SELF-REPRESENTED PARTIES AND THE COURT MEDIATION EXPERIENCE

Studies show that many people do not go to court when they have a legal problem, and when they do take a legal problem to court, they come without an attorney. A large proportion of the cases that are brought to court involve contract, debt collection, and landlord/tenant issues. Most litigants

12. Applegate & Beck, supra note 1, at 95–96 (describing such practices in the family law context). For an example of guidance to courts that is not focused on self-represented parties, see generally CTR. FOR DISPUTE SETTLEMENT, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992), https://s3.amazonaws.com/aboutours/594428b132c16660b4360f46/NationalStandardsADR.pdf [https://perma.cc/7F4T-CA5V]; ABA SECTION OF DISPUTE RESOLUTION, supra note 1.

13. See Nancy A. Welsh, Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation, 70 SMUL. REV. 721, 730 n.36 (2017) (discussing the potential for inequality, bias, and prejudice to undermine mediation’s potential to deliver justice and self-determination).


in courts that deal with these issues are self-represented because they cannot afford a lawyer.¹⁶

When self-represented parties arrive in court they interact with a number of actors, including clerks, magistrates, judges, mediators, and arbitrators.¹⁷ They may also discover that their opponent is represented by an attorney,¹⁸ thus adding one more player to the mix. Many self-represented parties expect to see a judge, not a mediator. The information that is available to them about mediation varies, depending upon the state in which they live. Some states have extensive information offerings with detailed websites, brochures, and videos while others offer very little information.

Depending upon the nature of their dispute and the jurisdiction in which they find themselves, when self-represented parties arrive at court there are a few possible mediation scenarios that might take place.¹⁹ First, they may be automatically referred to mediation through a mandatory program. Alternatively, a judge, clerk, or ADR program director may suggest that they try to resolve their dispute through the court’s mediation program. A third possible scenario, oddly enough, is that some parties may never even learn that the court has a mediation program available.²⁰

A. Forms of Mediation

There are countless variations of court-connected mediation programs. In this Essay, I brush with broad strokes and sketch only basic descriptions, focusing upon the main divide between mandatory and voluntary mediation programs.

¹⁶. Russell Engler, Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed, 37 FORDHAM URB. L.J. 37, 41–43 (2010) (describing data on self-representation in family, small claims, and housing courts). In the family law context, some parties are self-represented because they believe they are capable of representing themselves or because they fear that attorneys will hamper the process with adversarial conduct. Applegate & Beck, supra note 1, at 87.


¹⁸. A Civil Justice Initiative study showed that in 76 percent of cases at least one party was self-represented (usually the defendant). PAULA HANNAFORD-AGOR ET AL., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS vi (2015), www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx [https://perma.cc/7T63-NZND].

¹⁹. There are many different referral schemes. The referral procedures in small claims courts, for example, may differ from family courts and even within the category of small claims courts there are several models of referrals. See generally Heather Kulp, Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice, 14 CARDOZO J. CONFLICT RESOL. 361 (2013) (describing six models by which cases are referred to mediation).

Mandatory mediation: The state’s power to compel mediation has been upheld in the United States, and mandatory mediation is now a common feature in many state and federal courts. In essence, this means that mediation is a type of condition precedent to trial or even to meeting with a judge. Other sanctions may also be imposed on parties who refuse to mediate. A variation of mandatory mediation is the opt-out model. While there are several variations of this model, in essence, it requires that litigants participate in an initial session with the mediator as a pre-condition of bringing an action in court.

Critics claim that mandatory mediation imposes additional procedural hurdles on parties—thereby increasing the cost of litigation—and that coercive behaviors by some mediators lead to a dilution in informed consent. Advocates for the poor and others in the mediation community oppose adoption of mandatory mediation for unrepresented parties because of their inability to receive legal advice from the mediator given the restrictions imposed by unauthorized practice of law rules.

Voluntary mediation: In contrast to compulsory programs, many courts offer parties the option of participating in the mediation process. Mediation may be among a menu of ADR offerings including arbitration, early neutral evaluation, or settlement conference. In these courts, parties must weigh all the options available to them and make a procedural choice. In reality, the choices are not always so clear cut because the label mediation is attached to many processes, including settlement conferences. If parties have the benefit of being represented by counsel, there is a high likelihood that they would seek their lawyer’s advice about whether or not to choose mediation. Without counsel, they may become confused.

21. See generally In re Atlantic Pipe Corp., 304 F.3d 135 (1st Cir. 2002).
22. See generally SARAH RUDOLPH COLE, NANCY HARDIN ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE 143 (2008). Family courts, for example, have long required parties to engage in the mediation process. But see Peter Salem, The Emergence of Triage in Family Court Services: The Beginning of the End For Mandatory Mediation?, 47 FAM. CT. REV. 371, 378 (2009).
23. This approach is used in Italy. See generally Leonardo D’Urso, Italy’s “Required Initial Mediation Session”: Bridging the Gap Between Mandatory and Voluntary Mediation, 36 INT’L INST. FOR CONFLICT PREVENTION & RESOL. 49 (2018).
27. See Donna Shestowsky, Inside the Mind of the Client: An Analysis of Litigants’ Decision Criteria for Choosing Procedures, 36 CONFLICT RESOL. Q. 69, 70 (2018); see also Engler, supra note 16, at 54 n.74 (noting how the presence of counsel influences the choice of the dispute resolution process).
Studies report mixed motivations for self-represented parties’ choices in accepting or rejecting mediation. Julie Macfarlane’s study of self-represented litigants in Canada found that some self-represented parties were hesitant about participating in mediation because of concerns over fairness when the opposing side was represented by a lawyer. Studies from small claims court mediation programs show that, as a practical matter, litigants may opt for mediation if they are persuaded by an authority figure that mediation makes the most sense for them.

B. Behind Closed Doors: What Can Go Wrong for Unrepresented Parties in Mediation

Procedural and substantive information about mediation is necessary for informed consent. Lack of information about the mediation process and understanding how it differs from the judicial process, as well as a lack of information about the law relevant to their case, can dramatically affect the outcome of mediation for unrepresented parties. They could end up like the tenant in New York who, following a court-referred mediation, lost the only home she had known for over twenty years or the homeowner in a New Jersey foreclosure mediation who reached an agreement in mediation and two years later lost her home to foreclosure.

Beyond a lack of procedural and substantive information, the mediator’s style may also make a difference in outcome. Unsuspecting self-represented parties may find mediators who engage in evaluative behaviors even though a program is labeled as “facilitative mediation.” To the extent that the mediator’s evaluation becomes aggressive, parties may be coerced into settlement agreements. Short of coercion, there are many anecdotal reports of mediators becoming directive, making recommendations, predicting court outcomes, and pressuring parties into agreement. For example, studies of

28. MACFARLANE, supra note 20.
29. See Kulp, supra note 19, at 386 (noting that, in the context of small claims court mediation, “litigants are more likely to choose mediation if an authority figure gives them a number of legitimate, easy-to-understand incentives for doing so”).
31. Applegate & Beck, supra note 1, at 94. The authors observe that, in the context of family law issues and court-mandated mediation, self-represented parties may be confused if they have no prior mediation experience. Id. at 95.
35. Empirical studies in the context of EEOC mediation programs show that, when an evaluative mediation is conducted without representation, the charging party was worse off than if the mediation was facilitative and without representation. See E. Patrick McDermott & Ruth Obar, Mediation of Employment Disputes at the EEOC, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, supra note 6, at 476.
36. See, e.g., Salem, supra note 22, at 378.
family court mediation programs show that conditions are less than ideal, with mediation practice described as being “rushed and mechanical.”

Many mediators acknowledge that they cannot conduct a facilitative mediation process if they are to meet the demands of the workplace with its complex cases, growing caseloads, and diminished resources.

II. STRATEGIES FOR IMPROVEMENT

A. Information

Information is a critical component of fairness. Self-represented parties need information about the mediation process, how it differs from adjudication, and what it means to consent to mediation. There are a wide variety of ways in which states provide this information, whether through websites, brochures, fact sheets or videos. In some cases, process information about mediation is available on the court’s general website. In other cases, information is limited to specific areas such as small claims court. Some states have excellent programs that provide information on multiple platforms. Maryland, for example, has a designated office for ADR and a website that provides clear information and is easily navigated. It has a web-based program which collects feedback to try to make ADR resources more efficient. The video links on Maryland websites are accompanied by helpful fact sheets. California provides several videos that describe mediation in small claims court and how to navigate the process.

Self-represented parties also need substantive information about their legal rights and entitlements. Would they be entitled to treble damages if their case were heard in court? Has the statute of limitations expired? Was the landlord’s lockout illegal? All of these inquiries relate to informed decision-making. Given the strictures imposed by unauthorized practice of law statutes, self-represented parties are limited to receiving legal “information” rather than legal “advice” from non-lawyers. But even if court clerks or mediators give parties legal information, it is not clear how the litigants would work through its complexity. A recent study in the family law context identified several challenges faced by self-represented parties when they attempt to process legal information.

38. Salem, supra note 22, at 377–78 (questioning whether court connected mediation continues to deliver on the promise of family self-determination).
41. Id. at 794.
42. See Jonathan Crowe et al., Understanding the Legal Information Experience of Non-Lawyers: Lessons from the Family Law Context, 27 J. Jud. Admin. 137, 139–41 (2018) (describing the challenges faced by self-represented parties). First, parties must deal with the complexity of the information they receive; second, parties are challenged by the difficulty in assessing credibility of the sources of information; third, parties indicate a clear preference for informal sources such as websites; fourth, parties are challenged in being able to apply the
B. Beyond Information

Many proposals that have been advanced for assisting unrepresented parties in mediation include the greater use of online technology.\(^{43}\) Three other correctives that are worth considering on a larger scope than already exist are pre-mediation counseling, limited scope representation, and non-lawyer advocates with subject matter expertise.

**Pre-mediation counseling:** In some mediation contexts, parties may benefit from assistance in dealing with difficult legal issues before participating in mediation.\(^{44}\) An empirical study of foreclosure mediation programs found that homeowners who worked with housing counselors before their mediation reported that it was beneficial in helping them understand their options.\(^{45}\)

**Limited scope representation in mediation:** In general, parties who are represented by attorneys are much more likely to achieve better results than self-represented parties.\(^{46}\) In the context of mediation, studies show “some evidence” that those who are represented by attorneys might obtain better outcomes than those who are not represented.\(^{47}\) In the EEOC mediation context, studies show that parties who are represented by counsel achieve higher monetary amounts in mediation than those who are not represented.\(^{48}\)

Limited scope representation provides unrepresented parties with an attorney for a particular event. Ethical rules of the legal profession permit lawyers to engage in limited scope representation if it is reasonable and the client gives informed consent.\(^{49}\) While full representation may be the ideal in a perfect access to justice world, the assistance of an attorney who can help

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\(^{43}\) Nancy Welsh, for example, suggests that online technology may contribute to ensuring “real, informed self-determination in mediation.” She notes that online dispute resolution is already being used experimentally by Legal Services attorneys to provide information to self-represented parties. Welsh, supra note 13, at 758–59; see generally J. J. Prescott, Improving Access to Justice in State Courts with Platform Technology, 70 VAND. L. REV. 1993 (2017).

\(^{44}\) See Jennifer Shack & Hanna Kaufman, Promoting Access to Justice: Applying Lessons Learned from Foreclosure Mediation, 1 ABA DISP. RESOL. MAG. 16, 18–19 (2016).

\(^{45}\) Id. Resolutions Systems Institute researched all the foreclosure mediation programs in the country to identify best practices. It identified four program design elements that align with access to justice goals. Id.


\(^{47}\) Roselle L. Wissler, Representation in Mediation: What We Know from Empirical Research, 37 FORDHAM URB. L.J. 419, 468 (2010).

\(^{48}\) See McDermott et al., supra note 34, at 76, 107.

\(^{49}\) MODEL RULES OF PROF’L CONDUCT r. 1.2(c) (AM. BAR ASS’N 2018).
parties engage in informed decision-making is beneficial.\textsuperscript{50} For example, a housing court study showed that limited scope representation both in mediation and in the courtroom achieved better results for pro se tenants than receiving information alone in the hallways.\textsuperscript{51}

Scholars have proposed the concept of limited representation in the context of mediation, and this approach has already been adopted by some foreclosure mediation programs.\textsuperscript{52} A successful limited scope representation program has also been instituted by the Southern District of New York. It provides limited scope representation to pro se parties in employment discrimination cases.\textsuperscript{53} Despite the ethical challenges related to the nature of the lawyer-client relationship, including the scope of representation, confidentiality, and conflicts of interest, the concept of limited scope representation is worth pursuing for court-connected mediation.\textsuperscript{54}

Non-lawyer advocates: In general (outside of the mediation context), scholars have called for an expanded role for non-attorneys to participate in access to justice efforts.\textsuperscript{55} Lay advocates are already a common feature in the mediation of special education disputes\textsuperscript{56} and in EEOC mediations.\textsuperscript{57} The use of non-lawyer advocates with subject matter expertise could be

\textsuperscript{50} It should be noted, however, that even if unrepresented parties were appointed legal counsel, it would not necessarily affect their satisfaction with the mediation process. Empirical studies of EEOC mediation and related data found that “mediation can provide party satisfaction on both procedural and distributive dimensions without representation.” See McDemott & Obar, supra note 35, at 469.

\textsuperscript{51} See Engler, supra note 17, at 2064.


\textsuperscript{53} See Price, supra note 3, at 14.

\textsuperscript{54} Russell Engler, Limited Representation and Ethical Challenges, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA, supra note 6, at 431, 440.


\textsuperscript{56} See, e.g., Nancy A. Welsh, Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value, 19 OHIO ST. J. ON DISP. RESOL. 573, 407–12 (discussing a special education mediation program that permits non-lawyer advocates to assist parties). It should be noted that this practice is not without its critics who believe in the importance of attorney assistance in special education mediation cases. See, e.g., Sonja Kerr & Jenai St. Hill, Mediation of Special Education Disputes in Pennsylvania, 15 U. PA. J.L. & SOC. CHANGE 179, 193 (2012).

\textsuperscript{57} Lisa B. Bingham et al., Exploring the Role of Representation in Employment Mediation at the USPS, 17 OHIO ST. J. DISP. RESOL. 341, 347, 364 (2002) (noting the use of union representatives or fellow employees to represent parties in EEOC mediations).
expanded to the court mediation programs that are typically frequented by self-represented parties: family court, housing court, and small claims court.

III. MEDIATION INDEX

Mediation has become an important asset to the judicial system. The diversion of cases to mediation has relieved federal and state courts of some of their burdens by reducing dockets, thereby enabling greater efficiencies. At the same time, mediation has affected the legal rights of parties who seek access to justice in the judicial system. For this reason, accountability for court-connected mediation programs is crucial to their legitimacy. In this regard, what Judith Resnik has said with respect to arbitration, can also be said of mediation: “[t]he alternatives must be publicly available and accountable so as to permit analyses of whether their processes and results constitute law, justice, or both.” The specific inquiry for mediation is whether court mediation programs provide justice. Under the current mediation landscape, where you live determines how much information you will have about the mediation process and how your legal rights may be affected by mediation.

One form of accountability is the use of an index or similar assessment tool that would capture a snapshot of what is happening in court mediation programs throughout the United States. In general, several commendable efforts are underway in courts to assist self-represented litigants in accessing ADR options, including the mediation process. However, too often, the good news about these programs is not appreciated.

The Index would operate to measure the extent to which states adhere to best practices with self-represented parties in court mediation. It would build on the work of states that have already begun to identify best practices in court mediation. However, its specific focus would be on self-represented parties and it would be designed to rate the performance of courts that serve these parties with regard to problems that affect all of them. Working with courts and other stakeholders, Index designers would examine the data and consider a variety of potential best practices for self-represented parties in mediation. These practices might include specific guidelines to assist

mediators in dealing with self-represented parties, mediator training to address explicit bias, the availability of limited scope representation, and the availability of lay advocates with subject matter expertise to assist parties. Index designers would also be concerned with how information about the mediation process is conveyed to parties, confidentiality protections, mediator impartiality, and how the cost of mediation is covered.

The Index is not a novel proposition. Heather K. Gerken’s book describes the benefit of having an index to create incentives for political reform. The National Center for Access to Justice, housed at Fordham Law School, operates a Justice Index which measures access to justice across four categories. An index has been used in other contexts including the Rule of Law.

No doubt, developing a Mediation Index would involve a number of challenges. Given the multiple state and federal court mediation programs with different subject matters, measuring fairness in a way that is both systematic and comparable across subject matters and states is a daunting task. For this reason, it makes sense to begin on a small scale: collecting data with one court, such as family court or small claims court, distilling best practices, and then developing categories for an Index.

CONCLUSION

From an access to justice perspective, it is not simply the availability of mediation that contributes to reform of the legal system, but the quality of justice that results from a given mediation program. If court-connected mediation is to reflect Cappelletti and Garth’s vision of contributing to the systemic reform of the legal system, there needs to be transparency and some measure of accountability for its functioning. A Mediation Index is one place to start. Yes, a daunting task but worth the effort if we continue to promote mediation as an opportunity for achieving access to justice.

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62. See Applegate & Beck, supra note 1, at 87 (discussing the rules of Virginia, Indiana, and California).
63. Welsh, supra note 13, at 750–52.
64. See generally HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009).
66. See generally Juan Carlos Botero, The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide, NYSBA J., Jan. 2018, at 30. There are four universal principles: accountability, just laws, open government, and accessible and impartial dispute resolution. Eight categories are ranked within these principles: constraints on government power, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. Id. at 31.
2018

ADR and Access to Justice: Current Perspectives

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ADR and Access to Justice: Current Perspectives*

ELLEN E. DEASON, **MICHAEL Z. GREEN, ***DONNA SHESTOWSKY, **** RORY VAN LOO, *****ELLEN WALDMAN******

ELLEN DEASON: Welcome to the 2018 AALS Annual Meeting Alternative Dispute Resolution Section program. We thank the Litigation Section for their co-sponsorship of this presentation.

I will introduce the panelists by name and school and then they will each provide a more substantive introduction in a minute. At the far end is Michael Green from Texas A&M University School of Law. Next to him is Rory Van Loo from Boston University School of Law. Next in line is Ellen Waldman from Thomas Jefferson School of Law and sitting next to me is Donna Shestowsky from UC Davis School of Law.

Unfortunately, Deborah Masucci is unable to be with us today. She is the co-chair of IMI, the International Mediation Institute. IMI initiated the Global Pound Conference to examine issues surrounding access to justice for commercial disputes. This involved twenty-nine events held during 2016-2017 in twenty-four different countries around the world. The events were attended by over 3,000 stakeholders representing parties, lawyers/advisors, mediators, arbitrators, judges, legislators, court personnel, and academics who discussed the same series of questions at each of the meetings. So, it provides a very rich source of data about the attitudes of dispute resolution participants that reveals how they experience commercial dispute resolution, what they think is desirable for the future, and the factors they see as promoting and inhibiting change. I'll be interjecting comments about some of the results.

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1 The best place to find this data is on the Global Pound Conference website. GLOBAL POUND, http://globalpound.org/ (last visited, Apr. 8, 2019). Some preliminary results are discussed in Deborah Masucci, Access to Justice—The Road Ahead: What is the Role of
I want to give you a roadmap for our program. We will not be delivering individual papers but, rather, hope to have a discussion. We are planning to spend thirty minutes on introductions for the purpose of allowing you to identify the source of each panelist’s perspectives. We will then use an hour, more or less, for a discussion among the panel. That will leave fifteen minutes for audience questions and participation. Because we will be publishing an edited transcript, we ask that you hold your questions until the end.

Access to justice is a broad topic, and we cannot cover everything. You will notice a few major omissions. Most notably, we are not going to emphasize consumer pre-dispute arbitration agreements. This is not because they are not important, but because much has been written and said on this topic, and it could easily swallow the whole discussion. Also, we are probably not going to say very much about restorative justice, and I am sure you will notice some other holes. We invite you to raise missing issues in your comments.

Let me start with a few opening remarks. We are building upon earlier panels on access to justice at this meeting. At the ones I attended, I have heard two different themes. One is about the availability of lawyers and the value of legal representation, emphasizing that having a lawyer is a key aspect of access to justice. Another theme asks whether the legal system is providing justice aside from the question of adequate representation in individual cases. This critique emphasizes the extent to which the litigation system is stacked, and ways in which laws fail to recognize the individual realities of the disadvantaged. Both these themes are highly relevant to the role of dispute resolution in access to justice.

Those of you who were at the plenary program this morning on Access to Justice heard a question from the audience specifically about ADR, with reference to the role of mediation. In response, Martha Minow opined that mediation is part of the solution, but also troubling. She labeled mediation as

a “frenemy” of access to justice. So, we will try to build on some of these themes.

Our field has a long history of debate on the relationship between dispute resolution and access to justice. There is a rich literature that critiques mediation as impeding the access of disadvantaged groups to justice and often this literature emphasizes the importance of enforcing legal rights. There is also a counterpoint in the literature that values voice and autonomy in the disputing process. It places an emphasis on procedural justice and remedies beyond those that are available in court. Our discussion is set in the context of this debate.

I have asked the panel members to give us a brief introduction to their work with the goal of defining the perspectives that they bring to access to justice issues. We will start with Rory Van Loo.

RORY VAN LOO: My research focuses on consumer law and the intersection between regulation and technology. So when I first started looking into dispute resolution, I thought I would be writing about the area that Ellen alluded to earlier, which was pre-dispute arbitration agreements, because that is where a lot of the literature is. And then, once I started digging, I realized that most incidents are not settled or handled in courts and or arbitration, but inside the corporation itself. Just to give an example, the American Arbitration Association handles about 1,500 consumer disputes each year, last I looked, which was a few years back. And eBay handles sixty million disputes internally between buyers and sellers. Comcast has a million touch points in its customer service department with consumers each day. Comcast is the most hated company in America (laughter). So, that number may not necessarily be representative of all companies.

So the point of what I was just saying is that if you look at the numbers for consumer disputes, the vast majority unfold—begin and end—with some kind of communication with businesses. Not in arbitration. Not in the courts. And just to map out this ecosystem a bit, the customer service department is the main player, if you will, in the business sector, but it’s not the only one. In today’s increasingly financially- and technologically-intermediated world, there is often another business involved in any given transaction. We use credit cards and thus we can go to our credit card company to dispute an issue that we have with the merchant that sold us the goods, for example The Home Depot. We may rent a home from somebody (through Airbnb) or pay for a ride (through Uber) and maybe have a dispute with the homeowner or the driver and there will be an intermediary third-party corporation that decides what is

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2 A colloquial term combining “friend” and “enemy.”

3 See, e.g., Rory Van Loo, The Corporation as Courthouse, 33 Yale J. on Reg. 547 (2016).
going to happen with that dispute. So there is the customer service department and there are financial and technological third-party intermediaries that increasingly will become involved in consumer disputes.

And then there are reputation mechanisms. A few years back a musician, David Carroll, was flying on an airplane and, as he was sitting on the tarmac waiting for the plane to take off, he heard someone say, “Oh look, they’re throwing guitars around out there.” He looked down and, sure enough, saw the United baggage agent tossing guitars onto the conveyor belt to get them on to the plane. And, when he got to his destination, he realized that his new guitar was badly damaged to the tune of about $1,200.00, which is a lot to a struggling musician. And, so he went through United’s various processes for trying to get compensated for that. He went to the claims agent on the ground who told him, “You need to call this number.” So, he called the number. And when he called the number, they told him, “You had only 24 hours.” So he went through all of these hoops and finally at the end of nine months, after banging his head repeatedly on the United wall, he got what he figured was the final “NO.” So what he did as a musician was record a song about the experience and put it up on YouTube. And it has as the catchy chorus line—“United breaks guitars”—over and over again. It got 100,000 hits on the first day on its way to 15 million overall. And, as you might have guessed, United called him up and said, “We will give you a new guitar and pay you what you want.” They also revamped their dispute resolution processes as a result of that. So now, websites (like YouTube) that have nothing to do with the initial transaction with consumers have entered into the dispute resolution realm.

To answer the specific question about what perspective I bring, I look at dispute resolution through the lens of consumers and also economic analysis, in large part because the consumer business transaction is so driven by how corporations believe that a given dispute resolution process will pan out in terms of dollars. I am interested in questions such as: How do these processes work? How well do they work? And, what role should the law play, if any?

MICHAEL GREEN: Hello, can you hear me in the back? Ok. I write about workplace law issues and the intersection of ADR, sometimes with that and race. And, so in particular I believe the reason why Ellen even thought about asking me to be on this panel is she had heard from one of her colleagues that I was involved in putting together a symposium that was held at SMU and

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4 Sonsofmaxwell, United Breaks Guitars, YouTube, (Jul. 6, 2009), https://www.youtube.com/watch?v=5YGc4zOqozo.
I am very proud of the result of that symposium. So, I feel like my only purpose here is to highlight to you the significance of that symposium (laughter) and the wonderful people who were involved, not only my own work. But, I see many of them out there and I will mention them in a second.

ELLEN DEASON: You're too modest, Michael (laughter).

MICHAEL GREEN: But, the significance of that is that we actually wanted to look at prejudice and bias in ADR. And, starting with Richard Delgado's landmark co-authored article which is now thirty-something years old, we ended up bringing together several scholars to talk about prejudice and bias. I think it has been theoretically published, but it hasn't come out yet officially. I think it is in the mail and it will be on the website within the next week or two. So you should see a really important contribution to the issue of bias and prejudice in ADR. It starts off with Richard Delgado doing a foreword, looking backward, actually, at his own piece and then he makes a new contribution with an updated version of his article. And then, there are several other people who contribute. It's actually two books as a symposium, all with people talking about prejudice and bias. I deal with it from a workplace perspective. Andrea Schneider has a paper, "Negotiating While Female" which looks at female issues in negotiation. Charles Craver talks about bias in negotiation. Nancy Welsh talks about the magic of mediation. Carol Izumi talks about implicit bias in mediation. Pat Chew talks about the context of arbitration. And, there are several more, including Eric Yamamoto and others who I think will add such rich resources

9 Andrea Kupfer Schneider, Negotiating While Female, 70 SMU L. REV. 695 (2017).
12 Carol Izumi, Implicit Bias and Prejudice in Mediation, 70 SMU L. REV. 681 (2017).
to this subject. So, I highlight them to you and I think that is the only reason that I am here, is to highlight that to you.

What I will say though, about my own paper and how it fits with this panel, is that it is basically a spin-off of Richard Delgado’s paper, called Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters. I look at the Black Work Matters movement, which is related to the Black Lives Matter movement. And, I look at that in context of how ADR might work for black workers. A section on Negotiating While Black looks at issues for black workers and difficulties they may have when attempting to negotiate concerns such as salary or work schedules while recognizing issues of stereotype threat and covering may affect their negotiation positions. Another section on Mediating While Black addresses the same concept but in the context of having a neutral mediator attempt to facilitate negotiation of workplace disputes involving black workers. And a section on Arbitrating While Black explores resolution of black worker disputes via arbitration agreements. The intent is to highlight the barriers for black workers trying to resolve disputes and looking at whether or not ADR is a barrier. And I make a final suggestion on a type of workplace system that might help deal with the concerns about prejudice in ADR. All of this gives you access to justice, to me, in terms of the ability of black workers to be able to vindicate their rights in the workplace.

DONNA SHESTOWSKY: Thanks for coming to our panel. My perspective stems from my background in psychology. I have a PhD in Psychology; my training is in social and personality psychology.


16 Id. at 647-54.

17 Id. at 654-57.

18 Id. at 657-61.

19 Id. at 661-66, 71-74 (referring to the employer and union and the collective bargaining agreement at issue in the Supreme Court’s 2009 decision in 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009), and suggesting that their subsequent agreement aimed at preventing further litigation of their disputes, the Post-Pyett Protocol, provides an excellent framework for black workers seeking justice in the workplace if a few modifications are made to that Protocol); see also Deborah Masucci, How Labor and Management are Using Mediation, ABA JUST RESOLUTIONS E-NEWS, (Oct. 2016), available at, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/oct2016/masucci_using_mediation.authcheckdam.pdf (describing the Pyett Protocol and its mediation process as a viable dispute resolution mechanism), available at https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/oct2016-e-news.html.
scholarship falls at the intersection of psychology and law.\textsuperscript{20} Much of my recent work has focused on what I call the \textquotedblleft psychology of litigants,\textquotedblright\ meaning that I examine how they evaluate different legal procedures such as negotiation, arbitration, jury trials, judge trials, negotiation, and the like. And, I do much of that in the context of the procedural justice paradigm.

I am the Principal Investigator for a longitudinal study sponsored by the National Science Foundation which examines how litigants compare procedures both before and after using them. I hope to shed light on the big question of whether people's attitudes towards procedures depends on when you ask them to evaluate them—either \textit{ex ante}, which gets at their initial preferences as well as their expectations for procedures—or \textit{ex post}, which concerns how they evaluate them after they actually use them. That said, my perspective on the question of access to justice is that the perspective of the litigants really is the one that should matter to us the most. And it is often the one that is quite ignored.\textsuperscript{21} We as lawyers and policy makers can build an amazing system from our own perspectives. But if litigants can't access the system, don't \textit{believe} they can access it, or don't feel that it is just, then clearly we have failed. So, that is the perspective that I bring.

ELLEN WALDMAN: I write in the field of mediation ethics.\textsuperscript{22} And, I have started to believe that perhaps our ethics are getting in the way of good practice. We have had concerns expressed about racial minorities. And, we have had concerns about the attitudes of disputants. I guess I am also worried about disputants, and largely through the lens of socio-economic inequality.

A couple of years ago in the Ohio State Journal, Professor Lela Love, whom many of you know, and I co-authored an article looking backwards and forwards at mediation's trajectory.\textsuperscript{23} We began by noting that we both run mediation clinics where law students are placed in small claims court and mediating with the litigants there. And, Professor Love told a heart-warming story about a family from Ghana that had suffered some internal friction and how her law students helped the family come together and resolve their differences. And, I told a story about how concerned I was about uninformed decisionmaking. So, the Cardozo clinic came out looking really good. And,


\textsuperscript{21} See e.g., Donna Shestowsky, \textit{Disputants' Preferences for Dispute Resolution: Why We Should Care and Why We Know So Little}, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008).

\textsuperscript{22} See e.g., ELLEN WALDMAN, MEDIATION ETHICS: CASES AND COMMENTARY (2011).

\textsuperscript{23} Lela Love & Ellen Waldman, \textit{The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation}, 31 OHIO ST. J. ON DISP. RESOL. 123 (2016).
my students were inadvertently thrown under the bus by their professor. But, my orientation is to have concerns about the disputants who come to our lesser courts, as they are often called—Landlord/Tenant, Small Claims, Family Court—and are referred to mediation and then expected to make decisions which to them have really serious consequences, without the informational platform that they need and deserve. And, that is the context in which I am operating and writing in.

ELLEN DEASON: We thought that before we get to the heart of the discussion about access to justice, it would be important to say a little bit about concepts of justice. And, so my first question to the panel is—based upon the context in which you work—what do you identify as the essential elements of justice?

ELLEN WALDMAN: I just want to follow up just a little bit. For me, I think justice is, of course, difficult to define. But, justice cannot occur in the absence of informed decisionmaking. We talk a lot in alternative dispute resolution about self-determination and the importance of autonomy in decisionmaking. And, much of that is in distinction to a process where a judge or arbitrator is telling parties what they will do. We are very proud of the opportunity that we provide disputants to make their own decisions and determine their own destiny. But, I think we give short shrift to our obligation to ensure that disputants' decisions are being made with enough information. You can't make a decision that reflects your values unless you know the context and the consequences of those choices.

DONNA SHESTOWSKY: Piggy-backing on that point, I could not agree more about informed consent and how important that is. And, just to add to that, following the procedural justice paradigm, I want to underscore the fact that justice is largely a subjective construct. So, if I am a litigant, even if one hundred of the best legal minds in the country, including those in this room, tell me that I got a really great outcome, I may still feel deeply dissatisfied with my experience if I think that it did not have certain elements relating to procedural justice. First of all, to feel like I was fairly treated, I would need to feel that I had an opportunity for voice, that is, that I could tell my version of the story. And that the procedure I used offered neutrality—meaning, if a decisionmaker was involved, that he or she applied not their personal opinions, but some set of rules that they would apply systematically to other people in similar situations. And that I was treated with respect, that is, that I was taken seriously, and that my concerns were taken seriously. And finally, if a third party was involved in determining the outcome of my dispute, that they were
trustworthy, meaning that they were sincere, transparent, and were genuinely trying to do what is right.\textsuperscript{24} There is a sense in the literature that bad actors can manipulate some of these elements to make people believe that their dispute was handled fairly. But in the absence of those situations, I think that these subjective elements really are critical components of justice.

\textbf{MICHAEL GREEN:} For me, when I think about “What is justice?” I think about righting wrongs in our society. And so, as some have mentioned, there is a subjective nature to that and you first have to agree that something is a particular wrong. But, if there is a consensus about certain wrongs in our society, for instance some people might think that there is a consistent wrong in our society about the imprisonment of black men. If there is a wrong, and there is a way in which to deal with that wrong, that is where we can deliver justice. However, I think that there is this thing (I don't know where it came from), it’s not the “No Justice, No Peace,” that is, it’s not the “N-O justice, N-O peace,” but the “K-N-O-W”—“If you know justice, that is when you know peace.”\textsuperscript{25} So, if you have justice, you have peace.

\textbf{RORY VAN LOO:} I also think about justice in a largely subjective manner, and that raises the question of what is the reference point? One common reference point in the literature is that people are bargaining the shadow of the law. But at least for consumer disputes, the vast majority of them don’t think about them in terms of reference to the law. I believe that consumers and businesses are more often bargaining with each other in the shadow of norms, and not of the law. Those norms have both internal components of fairness—what the consumer’s sense of fairness is, especially—and also external—what would other consumers potentially get through similar dispute resolution processes.

I think this touches on inequalities to some extent. I am thinking of the Bank of America patent on software that enables the customer service representative to have access not only to all the records of the individual customer they are on the phone with, but also to that customer’s families' records at that bank—to get a sense of the aggregate value, the net value of this person if the bank were to make them mad. For instance, would we be alienating their family? Also, would they be pulling a lot of money? And so, whether or not an individual gets a fee waived, for example, may or may not

\textsuperscript{24} For a succinct summary of these principles, see Tom R. Tyler, \textit{Procedural Justice and the Courts}, 44 \textit{COURT REV.} 26 (2008).

\textsuperscript{25} I have now remembered the source of the “Know Justice, Know Peace” moniker that I referred to in the presentation. See Isabelle R. Gunning, \textit{Know Justice, Know Peace: Further Reflections on Justice, Equality, and Impartiality in Settlement Oriented and Transformative Mediations}, 5 \textit{CARDOZO J. CONFLICT RESOL.} 87, 88–89 (2004).
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seem just, in isolation. The answer may change depending not only on an
individual's sense of fairness in terms of what they immediately experience,
but also depending on any differences in how others with a similar dispute are
being treated.

ELLEN DEASON: One way we deal with fairness in how others are to
be treated in similar circumstances is by applying the law. So, I would like to
jump in and add what I believe Deborah Masucci would say if she were here,
which is that often when people say, “access to justice,” they mean “access to
the courts.” That is especially true when we are talking about pre-dispute
arbitration clauses where enforcement denies access to court. And I think that
this emphasis is also what is reflected in the very justified concern for legal
representation.

But does denial of access to courts really mean denial of access to
justice? What Deborah said in our prior discussion is that, in the international
context, we should be aware that the courts are not the gold standard for
justice. In many countries, there are not only problems with huge delays, but
also with corruption and distrust of the judicial system. And that has led, in
the international context, to people and companies in many countries looking
to arbitration systems in order to get better justice than one could get through
the application of law in the national court system.

Let's now turn to the heart of the issue for today, which is access. My
question is: From your perspective, what are the major issues regarding access
to justice using the ADR processes? And embedded in that question is: What
do you see as the most important barriers? And what you think needs to be
done to reduce them?

We have several general themes on this topic. I would like to start with
the lack of information about the processes are that are available. I will ask
Donna to kick off the discussion.

DONNA SHESTOWSKY: To me, the big issue on this front is that parties
don't seem to know what their options are. Some of my own research supports
this view and I am going to share some of the takeaways with you.26 My team
and I surveyed over 330 litigants from three different state courts in the
country.27 These litigants had a wide variety of different case-types including

26 See Donna Shestowsky, When Ignorance is Not Bliss: An Empirical Study of
Litigants’ Awareness of Court-Sponsored Alternative Dispute Resolution Programs, 22
27 The study courts were the Third Judicial District Court, Salt Lake City, Utah; the
Superior Court of California, Solano County; and the Fourth Judicial District, Multnomah
County, Oregon.
medical malpractice, personal injury, and property. We conducted phone surveys with them within three weeks of their cases being closed in court. The only people who were eligible for this study were litigants who had cases in their court that made them eligible for both court-sponsored mediation as well as court-sponsored arbitration. And, we asked them two questions: 1) Did the court where your case was filed offer a mediation program? And, 2) did the court where your case was filed offer an arbitration program? I can't emphasize enough that the correct answer to both questions for everyone in the study was “Yes.”

Let's talk about the mediation program first. Less than 24% correctly identified their court’s mediation program. Roughly half of them admitted that they did not know whether their court offered mediation or not. And, about 22% were flat out wrong by saying, “No, my court did not offer mediation.” We observed a similar pattern for arbitration. About 27% of litigants correctly identified their court’s arbitration program. About half said “I don't know,” and, about 22% were flat out wrong by saying, “No.” When we collapsed the responses across the data for both mediation and arbitration, we found that less than 16% knew that their court offered both of those programs. Less than 16%!

We also examined a question related to representation. We looked at whether people had a lawyer or not. We wanted to see if that made a difference in terms of whether litigants were able to identify their court’s ADR programs. We found that it did not matter. People were not more knowledgeable about their options they had if they a lawyer for their case. This raises interesting questions about how much education they are getting about these options from their attorneys. Apparently, not very much.

So, to me the big issue in all of this in terms of access is: since justice is so subjectively construed . . . measured by the litigants themselves . . . the litigants themselves need to know what their options are and be able to make informed decisions about whether to use them. How can they do that if they don't know what options are available to them? Both lawyers and courts must do a lot more in terms of educating litigants. We can't just assume that the lawyers are doing this.

What I suggest in terms of improving access to justice is that courts should require lawyers to educate their clients. Some courts already do this. But, not every court does. And, I think a really good example, a model example of this kind of requirement, is set by the U.S. District Court of Northern California which requires not only the lawyers to sign off on the fact that they educated their clients about options in ADR, but actually asks the parties themselves to sign off on the fact that they were educated about their options. So, they have to sign off that they read the court's handbook describing the court's ADR procedures. They have to sign off on the fact that
they discussed court-connected options as well as private ADR options. And, that they considered whether ADR was a good option for their case. Courts can go a step further by advertising clear penalties for attorneys who don't comply with such rules.

I also found, in the course of my own literature review, that some courts do other exciting and innovative things for small claims cases, and also for family law cases. These innovations offer great ideas for advancing access to justice, keeping in mind that many litigants are self-represented. Some courts have ADR information meetings for parties, which they offer on a periodic basis. Some of them make these sessions mandatory and some offer them on a voluntary basis. And, some courts have self-help desks, staffed by lawyers, where litigants can go to get information about these options. So, these are other ideas we could consider as well, in terms of improving access to justice.

And then, finally, I think better education on the part of lawyers is absolutely critical. Some really interesting and important research by Roselle Wissler found that when you ask lawyers how much they advise clients about ADR, how often they advise them about their options, it is often related to their personal level of experience with ADR procedures.28 She found that lawyers are more likely to advise clients to try ADR if they have prior exposure to ADR—meaning that they served as a lawyer in one of these alternatives, as a neutral in one of these alternatives, or even just attended a CLE program about ADR. So, I think one solution on the issue of these access to justice barriers is that we need to find better ways to mandate lawyer exposure to ADR.

ELLEN DEASON: There's been a lot of talk about the promise of technology. What role did the court websites play in your study?

DONNA SHESTOWSKY: That is a great question. Yes, all of these courts had information about their ADR programs on their websites. And that clearly was not enough in terms of educating litigants about what alternatives they had. It is important to keep in mind that members of certain communities are relatively less likely to gain access to information that is available online. The Pew Research Center has conducted important survey research looking at what kinds of communities have less access to the internet. Although over 80% of Americans report using the internet, there are notable income, age, and race

disparities in internet use, and those with disabilities are also less likely to use the internet.

ELLEN DEASON: Others on this topic?

ELLEN WALDMAN: I think this is an easy one. Who is going to argue against having attorneys inform their clients about the existence of ADR? Encouraging attorneys to play this educational role seems uncontroversial, sort of like supporting 4th of July fireworks and apple pie.

DONNA SHESTOWSKY: It is sad that the data revealed so much ignorance and that attorney representation didn’t help.

ELLEN WALDMAN: If we can solve access to justice by tweaking attorney education in this regard I think we’d be in very good shape.

ELLEN DEASON: The data that came out of the Global Pound Conference supports the suggestions you’ve made. It indicates that participants see a need for both education initiatives and requirements that parties certify they have considered non-adjudicative options. One of the questions the participants discussed was “What is the most effective way to improve parties’ understanding of their options regarding resolving commercial disputes?” The number one answer by a substantial amount was a desire for “education in business and/or law schools and the broader community about adjudicative and non-adjudicative dispute resolution options.” In the last twenty years we have seen a proliferation of ADR courses offered by law schools and mediation clinics. In addition, many trial advocacy courses include a discussion of using mediation in the course of a matter. This has gone a long way toward educating lawyers, but these are not required courses so not all lawyers attend them. The second priority when answering the question about improving parties’ understanding of their options favored “procedural requirements for all legal personnel and parties to declare they have considered non-adjudicative dispute resolution options before initiating arbitration or litigation.”

MICHAEL GREEN: I would say that lack of information is a problem from a minority disputant’s perspective. I do talk a little bit about this in the

section of my article on "Negotiating While Black" and this is probably a problem for any smaller player who is up against a repeat player in any kind of negotiation. Lack of information will put the smaller player at a disadvantage. However, whenever we can create a mechanism to provide more information to the little guys in the dispute, it is always a good thing. And one of the things I highlight in my article includes a discussion of some studies that talk about how race may have been used either overtly or unconsciously in the negotiation process. What hindered the black disputants in those processes was a lack of information. If you could level the playing field so that everyone had the same amount of information, that would help assist in the access to justice problem. That would limit the specific concern that some players have a lot more information in the process than others.

ELLEN DEASON: How about in the consumer context, Rory?

RORY VAN LOO: So definitely in the consumer context there are some analogous issues in that some people don't necessarily know that they can complain. There are a lot of people who just assume that if they were late, they have to pay the $50 fee, or whatever, because that's the rule of the company. Some of these consumers would save money if we were to let them know on a broader scale that they could actually complain, that they don't have to take whatever treatment they get, and that there are outlets through which they could see better dispute resolution in the consumer realm.

Also, just to throw in a different concept into this mix: competition. If you're Comcast and three-fourths of all households have really only one choice for cable or internet, you don't need to worry about how you resolve disputes with consumers. But if you are a retail store, or a hotel, and so on, you pay very close attention to any dispute that arises. In other words, one of the barriers to consumer dispute resolution in some markets is insufficient competition. A whole separate literature is addressing what is going on right now in antitrust and many are arguing that we don't necessarily enforce antitrust enough. Too often we have different licenses that provide barriers to even competing in the first place, and so on. I don't think the antitrust crowd

30 Green, supra note 15, at 652–54 (referring to how minorities’ lack of information places them at a disadvantage in negotiations).

31 Id. at 648–50.

32 Id. at 654 ("Through mentoring networks, identity caucuses, or unions, black persons can meet similar role models who provide a positive reflection and offer social or business information to level the negotiating playing field. These groups help combat the application of negative stereotypes and also encourage self-affirming opportunities to show that negative stereotypes do not match the individual black person involved").
really thinks about dispute resolution in what it does. But, I think their work has really important implications for what the people in this room think about it.

ELLEN DEASON: In addition to problems with lack of information about what options are available, a second access issue that we identified is lack of information once disputants are using a process. Assuming we have passed the hurdles that we just discussed, and disputants actually get into a dispute resolution process, several kinds of lack of information become problematic. One of them is about using the process itself. And another is about the possible outcomes. Here is where legal entitlements and the lack of knowledge about them can become really important. I am going to ask Ellen to take up this topic.

ELLEN WALDMAN: In San Diego County, we used to have a legal advisor's office and we had a very vibrant mediation practice here for 20 years. And, we had small claims mediation taking place in South County, East County, and downtown. These legal advisor's offices were jam packed. And, whenever we had a disputant—and when I say “we” I mean my law students—when we had a disputant who really seemed quite at sea in terms of what their entitlements were, they would say, “We are here all day. Please go upstairs to our legal advisor’s office. Come down stairs again when you feel that you have a better sense of the legal landscape and we will be happy then to help you.” Then, as a result of draconian cuts in the state court budget, that office was shuttered. It really transforms the practice, and makes for very, very difficult decisionmaking, not just for the disputants, but also for the mediators. So, I think Small Claims is part of what Owen Fiss was worried about when he talked about the dangers of alternative dispute resolution for under-resourced parties.

I want to provide a quote that describes Landlord/Tenant courts, but it could apply to any number of courts where the majority of disputants are unrepresented or, as they are often called, self-represented.

Rent court, more than most other courts, is a theatre of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are

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poor and poorly situated with respect to the attributes that garner respectful hearing in courtrooms.35 These are one-shotters who are very uncertain about what negotiation even means. “If they make me an offer, do I have the option to say ‘yes’ or ‘no?’ What else can I do?” Many of these disputants are not native English speakers and they really have very little idea what their rights are. Imagine being a tenant who is being subjected to an unlawful detainer action who doesn’t know about the implied warranty of habitability.

So, I agree with everyone else on the panel that procedural justice is very, very important. But, the norms that are reflected in some of our laws embody really important ideals of justice.36 It is not substantively just to be forced to live in an apartment and pay rent and have rodents or have no heat from November to February. That is substantive. That has nothing to do with how you are treated in the dispute resolution process. So, I don't think limiting our concern to procedural justice is sufficient. So, to restate this, we have unsophisticated disputants. They don't know the legal landscape. They are referred to mediation. And, they are basically asked to make decisions without knowing their entitlement or the legal consequences.

Our ethical code basically emphasizes three principles: 1) self-determination; 2) impartiality; and 3) informed consent. There are other important principles: confidentiality and no conflicts of interest. But, these are the big three that you will see over and over again in most codes. In the context of mediation with unrepresented parties, I think that concern about impartiality has really eclipsed all other concerns. We are so worried that if we talk about legal norms, and the norm advantages one party and disadvantages another, that will pollute the mediator’s impartial stance and render the mediation a nullity, unsuccessful, unethical, a process we should not engage in. So then, when we start thinking about self-determination, we think, “Well, as long as a party is making their own decision and not being told what to do then we are passing muster when it comes to self-determination.” It’s a thin vision of autonomy, but it's a vision that we live with.

And, when we move to informed consent, we focus a lot on whether parties understand the mediation process. Do they understand that the mediator doesn’t represent them even if the mediator is a lawyer or a law student? Do they understand that they can leave at any time? Do they understand that they can take a break? Do they understand that it is their

process? Again, we gloss over what it is that they need to understand about the substantive decisions they are making. And, it is convenient for us; it is convenient for the mediator. Is this a good process for our unrepresented parties? I don't think so. It's an access to justice problem.

ELLEN DEASON: Do you think that if they could get effective representation it would solve the problem?

ELLEN WALDMAN: I think, ... yes. And, actually it is a great irony. I wrote a very short article that's about mediation for the one percent and mediation for the ninety-nine percent. It's ironic that when the parties lawyer-up and they walk into the mediation room with lots of representation, we are relatively untroubled by mediators who talk a lot about legal norms, because we're not worried that the parties in those cases—usually very sophisticated and well-resourced—are going to mistake the mediator's discussion for representation. Because, after all, they are amply represented. So, mediation for the one percent, actually involves a lot of evaluation and a lot of normative discussion. It is only in the context of poor, unrepresented parties that we are terrified about discussing legal norms. So yes, representation could do a lot. I think we can do better. I was thinking that maybe in my mediation class, instead of all of those simulations, we will work on a booklet. We have been in the courts for twenty years; we know the problems people have. Maybe we ought to be producing a booklet for disputants who are going into mediation. In other words, give them that information up front and have them read it. I don't know ... I think that there are solutions.

DONNA SHESTOWSKY: I think these points are really excellent. I would just add one little thought, which is that there is some interesting research suggesting that lawyers often misunderstand their clients' objectives. So, to the extent that lawyers may be great at articulating legal arguments and applying legal norms, sometimes those are inconsequential to the client's actual goals.

37 Ellen Waldman, Inequality in America and Spillover Effects on Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent, 35 LAW IN CONTEXT 24 (2017).

MICHAEL GREEN: So, this issue of the unrepresented party is a really interesting dilemma in terms of how you deal with access to justice. Most of the things I have addressed recently regarding access to justice focus on the lack of legal representation and how you address that issue. In my article, I talk about representation from unions—and really about workplace voice—as a mechanism to address some of these information disparities and some of the bargaining disparities that occur in the workplace when employees—especially employees of color—are trying to navigate problems.

There certainly needs to be more legal representation for employees pursuing workplace discrimination claims. But if you look at empirical results for employment disputes, even in the court system when there are attorneys involved, employees still lose a lot. And, so that is not a just system to me. Going back to my initial statement about justice, a just system is a system where you know that wrongs can be righted. And most people feel when they look at the federal court system data on employment discrimination claims, that it’s not a system that is just. So, if you look at other ways to address that employment discrimination claim, the employee needs representation in ADR as much as in the court system.

But, that representation may take certain forms. Earlier today at the plenary, they were talking about how access to information may need to take different forms. It may not just be lawyers. We may need to get beyond unauthorized practice of law concerns and figure out other ways to help individuals seek justice as they navigate the impediments presented by the legal process. Unions deal with those issues all the time when they are

39 See Michael Z. Green & Kyle T. Carney, Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits When a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access? 20 NYU J. OF LEG. & PUB. POL’Y 403, 405 (2017) (“Concerns about ‘access to justice’ typically refer to the adequacy of a society's legal system to provide all people with legal representation in a meaningful legal forum”) (citing Deborah L. Rhode, Access to Justice, 69 FORDHAM L. REV. 1785, 1786–87 (2001)).
40 See e.g., Green, supra note 15, at 668–69 & n.175 (citing Jean R. Sternlight, Lawyerless Dispute Resolution: Rethinking a Paradigm, 37 FORDHAM URB. L.J. 381,383–84 (2010)).
41 Id. at 658 & n.97 (citing Pat K. Chew, Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied? 46 WAKE FOREST L. REV. 185, 207–08 (2011)).
42 Id. at 668–69.
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representing clients. I've met many a union representative who represents their clients much better than the attorneys on the other side.

Ellen Deason: At the panel yesterday for the AALS Section on Minority Groups, there was some discussion relevant to this. Someone made a comment that the "law is not justice." They were referring to structural problems with the law, systematic problems that require more than our usual solution of "let's provide a legal representative." And, in addition, we know that even the solution of representation is—in so many situations—simply not an option. Rory mentioned consumers dealing with Comcast; there is no representative involved in that picture.

Rory Van Loo: Yes, this is where it gets tough to think about how we might improve the consumer dispute resolution realm. Class actions definitely can help. But we live in a world without class actions. Nor are class actions perfect. On average roughly thirty-three percent of the payout goes to lawyers, and a lot of people don't sign up. When I think about having a representative for a $50 or $30 dispute, it doesn't make sense.

But there is an interesting new company called "David," as in David and Goliath. What David does is fight small consumer disputes for about thirty percent of the cut. So, if you are trying to get rid of a fee, or whatever it may be, you just give them the information. Because these consumer disputes often happen in patterns, they know what to do, and they know who to call, and they know what to say. They can have several people in their call center doing multiple things while they are on hold—because that is one of the techniques companies use to try to deter everyone. So, there are some private sector sources.

For those who have faith in regulation, you can imagine our regulators trying to pay more attention to the disputes that are submitted to companies. Financial regulators are doing this already. The Consumer Financial Protection Bureau is requiring banks—especially in the wake of Wells Fargo and their creation of millions of fake accounts and a variety of other transgressions—to look more closely at what is actually being said in those disputes. Even if it doesn't provide the individual with representation, the complaint auditing could create some form of redress. The idea would be that, if they find a pattern in the complaints, then whatever redress is deemed appropriate would be given to all consumers. So, it is kind of after-the-fact relief that rights the situation as if it had been settled.

Ellen Deason: The last major category of issues we want to discuss groups several issues together under what we are loosely calling the quality of the process. These are not problems in availability of processes, but rather
concerns about the justice that can be obtained in ADR processes if they are not of high quality.

One part of this is something that Deborah Masucci raised in an earlier conversation. She mentioned that there is a lot of criticism by litigants of court rosters of mediators. There is a perception of lack of adequate training and lack of adequate follow-through. There are shortcomings in the mentoring process; less experienced mediators are not paired up with more experienced mediators. And, more generally, there is a sense that courts are not doing a good job of monitoring quality. She found a desire among litigants for more standardized training and more qualification requirements for ADR professionals. That raises a lot of other issues. As some have pointed out, this could cause more difficulties with access to the profession by minorities. Does anyone on the panel have a reaction regarding mediator training and qualifications?

MICHAEL GREEN: So, the issue of the neutral . . . The National Academy of Arbitrators is the most esteemed body of labor arbitrators, the trade group of arbitrators that has been in existence for the longest period of time. These are the most experienced professional labor arbitrators. They have to have over sixty opinions in six years to even become a member. They did a study several years ago, and what that study indicated was that the typical arbitrator was sixty-two years old, and was a white male, with twenty-six years of experience. Only twelve percent of the arbitrators were women and less than six percent were non-white.

Now, when you are talking about access to justice and you're talking about disputants—and even more so when you are talking about disputants who are bringing claims based upon either race or gender—this raises a concern that you don't have access to justice. You don't have someone who might understand your plight in society or might have experienced something similar to you so they might at least have a chance of understanding the nature of the claim at issue.

I raised this issue several years ago and someone tried to suggest that I was advocating for some kind of litmus test or color requirement. I said, "no," because I wouldn't necessarily want Justice Clarence Thomas to be my

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46 Id.
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arbitrator either (laughter). But, what I would look at is—do you have a system that at least provides opportunity for more women and people of color to be a part of it? So that an individual involved in the system doesn't look at it and feel there is no chance for justice and give up on it. I am not suggesting that you should have a specific person of color or woman.

In terms of the concept of matching race or gender with the neutral, in some instances, I think what I'd do would be to have co-mediators or co-dispute resolution professionals of mixed race or gender. That's not directly race-matching, but it's an opportunity to increase diversity. Carol Izumi has addressed this issue and Isabelle Gunning have mentioned this as well. You are looking at expanding the dispute resolution process in a way to provide more fairness. If you have a system designed in a way that gives the appearance that there is no chance to have a neutral of color, I think that's going to be problematic for access to justice.

RORY VAN LOO: This isn't exactly on point in terms of the mediator, but today an increasing number of disputes are being decided and intermediated by algorithms. You think you are talking to a human being on the phone, but they have a computer keyboard, and an algorithm is running in the background. In some regard, that algorithm is a neutral intermediary deciding the dispute. But we also know that if it is using factors such as the number of Twitter followers and the wealth of family members, those factors can start to become proxies for various kinds of discrimination. So even with the dispute resolution realm moving towards algorithmic intermediations, that's not going to solve this problem.

MICHAEL GREEN: I do want to add something because your question was also about mentoring, right? So, I've identified a problem, but how do we address that issue? How do we get more women and people of color in these positions and in these fields? There have been attempts to try and do that, but those attempts have not been very successful. And that takes you back to Richard Delgado's whole argument. In his most recent article, I think he's still

48 See Isabelle R. Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. Disp. Resol. 55, 89 (1995) (finding that “[m]atching parties and mediators based upon gender or race or sexual orientation does not assure that those individuals who happen to be members of the same identity group will have the same perspectives.”)
49 Green, supra note 15, at 656–57.
as critical of ADR as he's ever been, and maybe even more so. He believes the more informal things are, the less transparent they are. And the less transparency, the more problems in our society.\textsuperscript{51}

When you think about who makes the decisions in selecting the neutrals, acceptability is the issue for the people who are making the decisions. How do we get those folks in the decisionmaking process to recognize that this is an important issue and get it to resonate with them? And, yes, there could be better mentoring programs. The National Academy of Arbitrators tries to do some things with mentoring, but still people of color have to be selected. And the question is whether the decisionmakers who are choosing ADR professionals have considered the need for diversity in the neutrals being selected as an issue? Do they have this as a goal?

I worked once with a group of primarily African-American attorneys who represent employers. And there was some discussion about how they face a double-edged sword, because if they pick an ADR professional of color, it's assumed that person's going to be helping them in some way. If they don't, then are they going too far the other way? So, you have this dynamic for the people making the decisions who need some incentive to do this.

DONNA SHESTOWSKY: One issue that comes to mind for me, in terms of the quality of the process, is how are we assessing that quality? In some of the courts that I've worked with over the years to help evaluate their mediation programs, I've been astonished at the differential response rates. We see a high response rate for attorneys completing mediation evaluation forms and a very, very poor response rate for litigants who are also asked to fill out similar forms. In one case, there were so few litigants returning the forms, that I couldn't even run statistics (laughter) using the number that I got.

These courts are trying to rely on data, and the data they get ends up coming from attorneys. But that is not necessarily the data we need in order to assess quality. I think the courts really need to take stronger measures to get litigants to complete evaluation forms. For example, in one case, they literally were asking the litigants to compete the evaluation forms while they were still in the courthouse. For a little extra money, the litigants could have had the option to send them to me, an independent researcher. The litigants might have been less reluctant to report what they thought about the program if they had options other than to hand their forms over to court personnel. But there's great resistance.

\textsuperscript{51} Delgado, supra note 8, at 638 (criticizing how, whether in court or elsewhere, we have begun to "normalize the predicament of poor people seeking relief from corporate villainy").
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ELLEN WALDMAN: So, this may be limited to California, but commercial mediation has become, almost entirely, the province of retired judges. And to the degree that our judiciary is not a particularly diverse group, we now have a mediation profession that is astonishingly white and male if you look at the rosters. Again, I can only speak for California; it may be different in other parts of the country.

ELLEN DEASON: Any other comments related to the quality of court programs?

ELLEN WALDMAN: I think my suggestion complicates training. It suggests not only that we should have neutrals who are well skilled in facilitation, but that somewhere in the system we need to have a source of substantive information. Ideally, we would open up all those legal advisors’ offices. But until there’s an infusion of funds for that purpose, I think we in the mediation field—who are channeling our students into this venue—have to be thinking about how to get that information to the disputants who need it.

ELLEN DEASON: We’ve been focused on quality in court mediation programs. What about controls or incentives for quality in the business context or the company context? Rory, you mentioned competition?

RORY VAN LOO: Yes, competition is a big one and another one is the parties’ reputation mechanism. It essentially boils down, to some extent, to an analysis by the company of the likelihood of the customer either leaving and taking their business elsewhere, or voicing discontent online, or to friends, and how much that’s going to cost the company. I think that you can provide extra motivation for good dispute resolution by changing any of those levers of analysis.

But I see a role here for people like those in this room who have developed an expertise in dispute resolution processes because most companies are starting to understand that having good customer dispute resolution processes is good for business. And at the same time, they don’t necessarily know what good customer dispute resolution looks like. That is one of the reasons why they often get it wrong—why two-thirds of people surveyed say they had some kind of customer rage in the past year. So, if given some guidance as to what procedural justice looks like, I think businesses would be inclined to implement those types of suggestions and that could impact millions of people’s lives.
ELLEN DEASON: What about regulation? I believe you mentioned that. What happens when the competition isn't there?

RORY VAN LOO: Yes—it's crazy that this is actually something that needed to be done through law—but there are now laws throughout the country requiring Comcast to have a live human being available on the phone during business hours (laughter). We see more and more of these provisions. With airlines, when a customer has made a mistake and purchased the wrong date or ticket, airlines have to give them a certain amount of time to get a refund. That's not because the airlines want to do that or thought it would be a good idea for customer dispute resolution. It's because they're required by law. You see more and more of these kinds of legal rules creating contours of more acceptable dispute resolution in industries that lack as much competition. Another thing you see is that some companies are starting to do auditing of customer complaints. The FAA requires this for airlines, which must keep a log of the complaints they get and make them available. Then every few months, or years, the FAA will send someone in to go through them. And if they see patterns, then they often will write a rule to address the issue. You can imagine that we will see more of that.

ELLEN DEASON: The last general question for the panel is: What do you see for the future? Are there improvements in access that you anticipate? Are there more problems ahead? And what can academics contribute here?

ELLEN WALDMAN: I'm not sure that most of my colleagues in the mediation field agree that we should complicate our ethical canon by imposing additional duties on the mediator. So, I'm not expecting a sea-change in the way dispute resolution professionals think about their ethical obligations. I do think that there's a lot of awareness of barriers that unrepresented parties face and that the legal services world is actually working pretty hard to assist unrepresented parties.52 And, I think courts are working pretty hard. If dispute resolution professionals could get on board, that would be a good thing. And again, it's going to require some creative thinking. There are some mediation groups involved. The Center for Understanding in Conflict53 has a very enlightened notion of how educating parties about the law actually frees

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52 Another example of a group that provides resources for unrepresented parties and improves the responsiveness of the justice system is the National Self-Represented Litigants Project in Canada. See https://representingyourselfcanada.com/about-the-nsr/lp/.

parties from being wedded to legal outcomes. So, maybe we will move more in that direction. But, I don't see us moving with alacrity.

DONNA SHESTOWSKY: Earlier, I talked about barriers to access to justice and some possible remedies. Some of them are really not so hard or complicated to implement, in terms of requiring lawyers to educate their clients about ADR, having courts do that too, and such. I foresee some improvements in access to justice as a result of such measures but, as a preliminary matter, it is critical that we better educate lawyers on ADR. We need more CLE programs, and perhaps mandatory courses in law school, making sure that everyone has a basic understanding of what each dispute resolution procedure entails. That way, when lawyers do discuss options with litigants, they can do a good job of educating them.

RORY VAN LOO: So, I’ve already largely answered this question by mentioning that it would be nice to have legal scholars thinking about how businesses resolve disputes with customers. One of the things that’s needed so that legal scholars can contribute is just seeing these disputes inside the corporation as a civil procedure matter. The corporation is a courthouse, to some extent. For the mass majority of consumer disputes, it is really the only courthouse the consumer ever sees.

And there will also be, I suspect, a migration towards more and more of David-type companies, where you have a third party that’s offering services for consumer dispute resolution. And even with small disputes, that’s going to become more and more financially viable with automated systems. There was an interesting article about a lawyer who represents people for parking and speeding tickets. They’re at the courthouse all day, and they go through 50 to 100 tickets on a given day. And even though each one is only $50 or so, when you do them all and consolidate, it starts to make economic sense. So I think maybe we’ll see more of that.

MICHAEL GREEN: Of course, I have the solution (laughter). One of the things I suggest is union representation. But, the reality is that union density is such a small part of the workplace right now. I looked at the parties from the 14 Penn Plaza v. Pyett case. Those parties don't want the courts to decide their issues. The case basically said that a union could agree to a clear and unmistakable waiver to prevent employees from pursuing claims in court. That suit got into the courts and eventually to the Supreme Court, but it wasn't the union that filed it. It was the attorney representing individual employees. And afterwards, the parties to the collective bargaining agreement entered into what

they call a “post-Pyett protocol agreement.” The employer and the union involved in Pyett are trying to work out their issues through mediation and arbitration (although it's not clear what happens when the union decides not to pursue the case). But, this is a way in which they give some voice, some protection, some representation to employees dealing with disputes. Now certainly, that's one way, but it's a very small impact given union density.

But, I think this is kind of reflective of what you were saying about consumer disputes. It's activism. It's social activism. It's using social media. It's rounding up groups. It's the Black Lives Matter movement. It's all these entities getting together, to say that it's not right. And then, pushing corporations to take corporate responsibility to deal with these issues. Randall Stevenson, the CEO of AT&T came out and voiced his support for Black Lives Matter. Ben & Jerry's has done the same thing. You have some corporations that decide, because a movement is in place, that their ADR processes need to work in a way that values diversity and guards against prejudice. Now, what Richard Delgado says, is that none of this is clear with respect to corporations being concerned about rejecting prejudice and desiring fairer dispute resolution processes. But it goes back to how many companies have responded by pursuing pre-dispute arbitration. And how badly, and how aggressively, and how much pre-dispute arbitration is being enforced in our society, is evidence big corporations don't really care about these issues of prejudice or access to justice through ADR.

55 Green, supra note 15, at 678.
56 Id.
57 Delgado, supra note 8, at 633.
58 Id. at 636 (discounting the value of formal adjudication as providing any justice in our hardened society while also lamenting that “ADR may be in the process of turning into a barren landscape for disempowered disputants as well so that both avenues are just as unpromising”). In a key example of how a movement may result in getting powerful businesses to make their ADR processes fair, the #MeToo movement, a development aimed at responding to concerns of sexual harassment and assault of women employees, has recently led some prominent law firms to abandon their mandatory arbitration policies. See Leah Litman, #MeToo: Advocacy on Mandatory Arbitration Clauses, TAKE CARE BLOG (Mar. 29, 2018) https://takecareblog.com/blog/metoo-advocacy-on-mandatory-arbitration-clauses (describing how three key large law firms, Munger Tolles, Orrick, and Skadden Arps, had decided not to require their summer associates to enter into confidential arbitration agreements). Also, the #MeToo movement recently led to collective activism by students at the University of California Berkeley when a group of students requested that law firms with mandatory arbitration policies not be allowed to interview Berkeley law students for legal positions. Id.

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ELLEN DEASON: In closing, I'd like to add some points from the findings of the Global Pound Conference that are relevant here. Many of the people in those discussions put a lot of emphasis on their ability to select a process for themselves. In other words, they value self-determination and autonomy in terms of designing their processes. Along with that, there's a lot of interest in step-clauses (or as some people call them, escalation clauses), with combinations of multiple different processes. These clauses typically start with consensual processes, so this choice suggests that these disputants really do want control over the outcome. So, it appears that perhaps there is an interest in more dispute resolution alternative resolution, rather than less.

When Global Pound Conference participants were asked where governments and administrators should focus their attention to promote better access to justice in the international commercial context, they favored pre-dispute or early-stage case evaluation or assessment systems using third-party advisors who will not be involved in proceedings. The second choice recommendation was to insert a step with a non-adjudicative process (mediation or conciliation) before a party can initiate an adjudicative process, either in the form of a compulsory process or something the parties can “opt-out” of. These approaches may add a layer, but especially the first approach could provide unrepresented parties with better information about how their case would be resolved and thus better settlement options.

When asked what innovations and trends are going to have the most significant influence on the future of commercial dispute resolution, the highest ranked response indicated a desire for greater emphasis on collaborative, instead of adversarial, processes for resolving disputes, which would lead to an expansion of mediation. The second-ranked response supported changes in corporate attitudes toward conflict prevention, which is consistent with our earlier discussion of consumer and employment dispute resolution programs. Participants favored improving pre-dispute processes to prevent disputes. I think that's something we often gesture toward in our field, but we haven't really focused on it yet. This might be an area where dispute resolution academics could contribute in terms of more theory, as well as more empirical work.

So, finally, we'd like to hear from you. Please come up to the microphone, because we are recording. Identify yourself and where you're from. We have about 20 minutes left, so there is plenty of time for comments.

PAUL KIRGIS: Hi. Thanks for a great panel. I'm Paul Kirgis, Dean at the University of Montana School of Law. I'm on the Access to Justice Commission in Montana and we have number of access to justice problems, like most states do. One of the very big ones is in divorce cases, where there is an enormous backlog. And the difficulty for the litigants is not that they can't
get to court. They're in court and they can't get out. They can't get a resolution of their divorce. And of course, there are big power imbalances in those cases that mean if you don't have a process that's moving, the weaker party is going to lose and ultimately often give up.

And so, one of the things that we're looking at is building a mediation program around the state with the explicit purpose of speeding the process up to get people through it more quickly. The difficulty that I've been wrestling with as a member of this Commission—backing up, Ellen, to your point about mediator quality—is how do you know when you've given enough training to a mediator, and what kind of training, so the mediator will do more good than harm in that situation? I think most of us who are in this world have seen mediators do a lot of harm. The odds of successfully getting a full forty-hour training implemented are very small—people won't do that. So, we're looking at less than that. And then, what's the right metric? How do you make that assessment so that you know that you're doing more good than harm? And, I'd love to hear from others in the room after the panel if other people have thoughts on this.

ELLEN WALDMAN: Do you have any way to separate out the cases—cases that are just involving kids, no assets; cases just involving uncomplicated assets; cases involving complex pensions, etc. etc. I mean, the more money the couple has, the less likely they're going to be in your program, right?

PAUL KIRGIS: Yes, we're in Montana; there isn't any money (laughter). The main screen that we're doing is for domestic violence. We're looking at the Michigan tool; there are some things out there. They're trying to get the worst of the domestic violence cases out. But, otherwise, we're not screening for financial matters.

ELLEN WALDMAN: And the parties are unrepresented?

PAUL KIRGIS: Yes.

ELLEN WALDMAN: I think they need both process training and substance training. That would be my advice. I don't think you can have a divorce mediator who's not going to be knowledgeable about custody, support, division of marital property, etc. etc.

DONNA SHESTOWSKY: I'm not aware of any research that provides a magic number regarding how many hours of training are needed, in a way that can answer your question. But, I have some good news: RSI and the ABA put
together a group of researchers and policymakers, myself included, who worked together for about two years to design model forms for evaluating mediation. We have model forms for parties, for mediators, and for attorneys, along with guidelines for how to interpret the answers to the questions on the forms . . . what meaning to make out of them . . . and suggestions for how to tailor your own survey based on our model questions. So, in terms evaluating your program, we have tools available for free, online.59

ELLEN WALDMAN: I do have one suggestion: I know that there are community mediation programs that have developed family mediation programs. So they've taken your journey and there are folks that you could talk to, to say what has worked, what modules you need, what modules you can jettison. So, they give you some advice.

ELLEN DEASON: And this isn't helpful, but I think it might be worth pointing out that this question takes us back to one of the original critiques of mediation. Trina Grillo, in the context of divorce mediation, pointed out the harms that can come about.60 So clearly, with all of the progress we've made over the decades, we're still grappling with some of these very basic issues.

PAUL RADVANY: Hi, I'm Paul Radvany. I teach the Securities Litigation and Arbitration Clinic at Fordham Law School. I also serve as a pro-bono mediator for the Southern District and the Second Circuit. I tend to agree with your comment that it is difficult to be a mediator for someone who is pro se, which is why I actually refuse to take those cases. So, I'm wondering what your thoughts are on solutions for them that don't involve providing representation.

In securities arbitration, as you may know, there are a handful of mediators around the country who resolve 80-90% of these cases and they are extraordinarily evaluative. I was wondering what your thoughts are on whether one potential solution would be to allow mediators, or to train mediators, to be much more evaluative. And, if not, just to say cases are not appropriate for mediation with a pro se plaintiff. They should have their case resolved in court or arbitration, where someone can take all the laws that are available—that the pro se litigant is not knowledgeable about—into account in making a determination.

ELLEN WALDMAN: Based on your experience, do you think that it would be possible to pull together what a litigant would need to know in order to make an informed judgment? Could you imagine a set of materials that would give the disputants what they need?

PAUL RADVANY: I have to say that when we negotiate or mediate our cases, the memos are really long and there are lots of factors. And it's taken me ten years to feel very competent in advising my clients about a number that is helpful, which is why it's very evaluative in my field. I actually think in this area it would be pretty impossible for a pro se litigant to determine what their case is worth. It might be easier in consumer disputes.

ELLEN WALDMAN: Yes. So, you either need representation, or maybe these are just not the cases for mediation.

JENNIFER BROWN: I'm Jennifer Brown, the Dean of Quinnipiac Law School. I'm interested in your thoughts about judges as mediators and their potential to increase access to justice. Ellen, in your work on the role of norms in mediation, you've acknowledged that some mediators appropriately educate parties about the substantive law that would govern their cases. Certainly, we know that judges are pretty good at that. On the other hand, people who train judges to become mediators sometimes find that judges are quick to separate the parties into caucus and may fail to appreciate the value of interaction and mutual problem solving by the parties—something that's easier to achieve when the parties stay in the room together.

I'd like to hear from you or others on the panel about the values that can clash in mediation, especially when judges or retired judges mediate. We are facing huge challenges in providing access to justice, especially in housing and family courts. In light of these challenges, maybe the tradeoff with judges who mediate is OK: they might be very evaluative and might send parties into caucus quickly. Could we rest easy, somehow, knowing that this theoretically flawed mediation is actually increasing access to justice? Or are we giving up too many of the values of mediation?

ELLEN WALDMAN: Sometimes when I am giving this pitch about the importance of legal norms, I have an out-of-body experience where I think "Oh come on! Isn't that an overstatement!?" And I'm not the litigation romanticist that I think it sometimes appears I am. And I am horrified at how much "judicial mediation" has come to define the field in Southern California.

I guess I'm just really looking for a neutral who has a lot of skills. And I think that being able to sit with two angry parties in the same room and help them have a conversation is at the heart of the process. So, if you asked me,
“What should we give up? Should we give up knowledgeable decisionmaking on the part of disputants, or should we give up the capacity to foster what might be an illuminating and restorative conversation?” I don't really want to make the choice, and I'm not sure that we have to. Although, maybe we need to make more trade-offs than we are willing to say out loud.

JUDITH RESNIK: Judith Resnik from Yale Law School. My question is about the role of legal academics in affecting the values and norms of ADR providers. I hope the panelists will comment on whether we, inside the academy, can play a role in supporting a shift towards toward transparency and accountability for ADR providers in either the public or the private sectors. For example, I know that Professor Nancy Welsh has been instrumental in working with the ABA Section of Dispute Resolution, which supported the Consumer Financial Protection Bureau’s (CFPB) published rule to have more accountability in arbitration. The focus of the work of the CFPB was both on preventing enforcement of one-sided mandates banning consumers from participating in class actions and on creating obligations by arbitration providers to provide data. Thus the goals were to create accountability about what had transpired within arbitrations. While that effort was aborted due to the Vice President’s vote to break the tie in the Senate, the ABA Dispute Resolution Section was—and is—an important voice. And its members include many who are themselves providers of dispute resolution.

So my question is about the impact of our teaching, programs and the functioning of the AALS ADR section, and of your writing on changing norms. To the extent there are concerns—that all of you have differently expressed about equality, access, capacity of users, and the like—where are “we” in responding? What metrics of quality and what qualities for alternative dispute resolution should we encourage and help to shape? My underlying concern is about the opacity of both processes and outcomes, and about the capacity of repeat players (to borrow from Marc Galanter) to play for rules that may not be generative for all involved.

Let me be concrete. After looking at American Arbitration Association records reporting arbitration use for consumers, we (students and myself) identified fewer than sixty people per year using arbitration against AT&T, which had 85 to 120 million customers during that time period (2009-2017).61 We focused on AT&T because it had pressed the U.S. Supreme Court to enforce class action waivers. Finding that information took lots of time and, given data challenges, provides a glimpse but not an absolute count. My

question then is how to structure information forcing into ADR, and more generally how to generate norms of openness to third parties. And when members of the academy or others will insist that what is being provided is not "their" form of ADR.

**ELLEN WALDMAN:** One of the problems with alternative dispute resolution is confidentiality. We say it's essential to our process, and yet, it can hide a multitude of sins. In California, we have some pretty abominable case law, culminating in the *Cassel* case. For those of you unfamiliar with it, that case effectively says that attorney malpractice is within the oral discussions that are protected as part of the mediation process. And there are many mediation academics who have said, "Okay, that's a bridge too far. We didn't really mean to protect professional malpractice." So, I think that you can see, within the academy, thoughtful objections to rules and ethics mandates that seem to be hurting the people we hope to serve.

**RORY VAN LOO:** Lawyers have some allies inside the corporation at this time in the transformation towards transparency and accountability. They are the customer service professionals who attend the trade shows and go to conferences like this each year. Most of them believe that resolving consumer disputes in line with justice and fairness is a good thing. What they need, in my mind, is better data and better arguments to make the case to decisionmakers inside corporations that this is the appropriate thing to do. There are a number of studies that have come out recently that start to link high profits to customer dispute resolution, but they're vague. So that's one of the ways.

And, another thing that is going on, is that a lot of lawyers now are being asked to lead compliance departments inside corporations, and compliance groups are now co-equal to the legal departments in most major corporations. So if we are teaching our students these principles and they are in the compliance departments (because the legal implications can become compliance issues), when they are aware of these issues, that's one avenue for rolling it out.

**MICHAEL GREEN:** So, when I heard your comment, I was thinking about the whole mandatory arbitration movement. In terms of scholarly reactions, there is one extremist group I call the "haters" (laughter). Although my articles have not used the terminology "haters," I have captured this notion by referring to any commentator or advocate who hates or "attacks every aspect of

63 Although my articles have not used the terminology "haters," I have captured this notion by referring to any commentator or advocate who hates or "attacks every aspect of
is anything that involves mandatory arbitration, they hate it—it will not work under any circumstances. And another extremist group counters this approach in a way that I have started to call them “apologists.” If there is any kind of mandatory arbitration agreement, it works for them—regardless of the circumstances or concerns about bargaining fairness, the agreement should be enforced no matter what others think. A third group is probably made up of more pragmatic people and I claim to be a part of that group. But overall, most of the scholarly commentary out there about mandatory arbitration is critical.

So, with all this critical commentary regarding mandatory arbitration, why do we have the situation we just had in October 2017, when Vice President Mike Pence provided the winning vote to stop the Consumer Financial Protection Bureau (CFPB) from establishing a rule to limit mandatory arbitration in class claims that had been created in response to five years of research on the subject conducted by CFPB? Congress took this action despite criticisms of mandatory arbitration in the finance industry due to scandals involving broad consumer complaints related to misdeeds by Wells Fargo and Equifax. Yet, Congress, by the narrowest of margins with Pence’s vote, and most of corporate America, seemed to be in support of the vote to stop any bans on mandatory arbitration for class claims. You mentioned the ABA Section of Dispute Resolution. And we have some other entities and processes that could help; we have the consumer due process protocol; we have the employee due process protocol. We have a lot of data indicating concerns and scholars are writing about them.

But again, it comes back to what I mentioned about acceptability when choosing a neutral. The decisionmakers have to really feel that there’s something there to drive them business-wise to do it if we ever reach a repeal of mandatory arbitration. And that makes me think about the role of affirmative action. In Grutter, you saw companies signing amicus briefs saying how important it was to support affirmative action efforts. That was the issue for them in terms of their motivation and likely originated from activities that sprung from the civil rights movement. Also, there are groups of corporate general counsels who have issued a call to action, saying to law firms they

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65 Likewise, I did not use the term “apologists.” I have captured this notion by referring to any commentator or advocate who apologizes for any negative impacts of arbitration by refusing to accept that “real concern exists when an agreement to arbitrate” is mandated because the result is better than the court system. Id.

employ that "You have to have more minority attorneys and women representing you."

What drives that? What is motivating these corporations to do that? I don't know if it is scholarly commentary, but there is something that's resonating with them. Possibly, they are responding to actions arising from some strong movement.

ELLEN DEASON: I'm sorry to have to cut this off, but we are over time. Let me remind you to gather in the front for a very brief business meeting. And thank you to all of you for attending and participating (applause).
Beyond “Managerial Judges”: Appropriate Roles in Settlement

ELLEN E. DEASON*

Settlement is prevalent, and crucial to the functioning of the U.S. judicial system. But the pretrial regulatory framework in the courts is largely discretionary, and its emphasis on management does not fully take into account all the consequences of combining settlement with adjudication. The label “managerial judge” does not differentiate between the functions involved in managing a settlement process and the very different role of serving as a settlement neutral. By introducing this distinction, this Article provides a framework for analyzing settlement that focuses on the conflicts between a judge’s role as a neutral in settlement and as a neutral in adjudication.

This Article argues for reform that would prevent judges assigned to a case for pretrial management and trial from serving as the neutral at a settlement conference or judicial mediation. The proposal to separate these roles structurally would address the problems of coercion and partiality that can result from a dual-neutral role, while retaining the contributions of settlement judges. The proposal is informed by the history of judges’ involvement in settlement, and by their increasing reliance on mediation techniques. It draws on principles that are already recognized in some local and state ADR rules and rests on modern understandings of cognitive functioning and decisionmaking that should be incorporated into our thinking about frameworks for settlement.

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I. INTRODUCTION

In U.S. courts, judicial efforts to aid settlement are usually thought of as an element of pretrial management. This conception dates back to the identification of a “managerial” role for judges,¹ although its roots reach even

earlier, to the inclusion of settlement in pretrial conferences. In her influential 1982 article, *Managerial Judges*, Professor Judith Resnik contrasted the judge’s traditional role in adjudication—making decisions based on information presented by the parties in motions and at trials, with justifications in the form of reasoned explanations— with that of the “judge-overseer.” Pretrial, a managerial judge is engaged in supervising discovery, managing case development, and encouraging settlement. Professor Resnik famously questioned the wisdom of the increase in judicial authority associated with these “judge initiated, invisible, and unreviewable” roles due to the absence of procedural safeguards to protect parties from abuse of that authority. Her critique of the emergence of managerial judging, and of the shift in judicial focus from trial to pretrial proceedings, ushered in an era of debate about the role of judges among both academic observers and judges themselves.

This Article builds on insights from that debate, but proposes a different analytical structure for examining judicial settlement activities and the rules that govern them. This framework is based on the insight that judges perform two very different functions in settlement. Their first role is truly managerial: helping the parties plan for alternative dispute resolution (ADR) and select an appropriate process. Their second role is that of a neutral: helping to resolve the dispute by direct involvement as a third party who leads a settlement process. Rule 16 of the Federal Rules of Civil Procedure currently contemplates both roles and blends them in its authorization, and many local and state rules follow the same pattern. The debate spawned by Professor Resnik’s article similarly treats all of settlement as an aspect of management. Yet, although both settlement and management take place pretrial, acting as a settlement neutral is conceptually and functionally distinct from managing the settlement of a case and the other pretrial managerial duties authorized by Rule 16.

Recognizing this distinction enables a fresh consideration of the issue of judges who act as settlement neutrals in cases in which they are the assigned judicial officer. A dual judicial role that encompasses both attempting to settle cases and adjudication has been condemned (and defended) before, in the context of criticisms of pretrial managerial judging. Unlike these earlier role); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982) (criticizing the role).

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3 Id. at 379.
4 Resnik also examined the managerial judge’s posttrial role in monitoring remedies, especially in public law litigation, but concluded that pretrial supervision represents the sharper break from the norms of American adjudication. Id. at 414.
5 Id.
6 Id. at 380.
7 See infra text accompanying notes 67–68.
8 See, e.g., Resnik, *supra* note 1, at 435 (suggesting that the judge who will preside at trial should not try to settle the case).
criticisms, however, I do not object either to judicial pretrial management or to judicial involvement with settlement in general. Pretrial judicial management by the judge assigned for trial is a deeply ingrained (and, in many ways, effective) aspect of procedure. And judges often serve effectively as settlement neutrals—traditionally in judicial settlement conferences and more recently as mediators—and can make significant contributions in this role.

Judges’ truly managerial functions related to settlement—encouraging parties to settle and helping them plan a process—are consistent with the primary thrust of Rule 16 to improve the efficiency and quality of litigation as a case moves toward a disposition. However, a problem arises when a judge who is assigned to preside as adjudication neutral also serves as a neutral to facilitate settlement. These two roles are not only distinct, but incompatible. The problems become clearer when the roles are conceptualized as two neutral roles—settlement and decisionmaking—rather than as merely adding a managerial function to the judge’s traditional role of adjudication.

Some judges refuse this dual role based on their personal convictions. Yet in most jurisdictions this is a matter of discretion, not prohibited by rule, and there is ample evidence that it is not uncommon for judges to assume both roles in the same case. This Article demonstrates how new understandings of decisionmaking processes reinforce longstanding doubts about combining these roles. It argues that the practice raises such troubling implications for party self-determination in settlement, and for the integrity of the adjudicatory process, that the rules should be amended to prohibit the practice.

In Part II, this Article draws on contemporary judicial writing and empirical studies to trace judicial involvement in settlement conferences through four developmental stages. These stages were accompanied by amendments to Rule 16 that endorsed expanded judicial roles and discretion. Although today the federal rules impose few limits on judicial roles related to settlement, this history reveals that the concerns underlying the separation proposed in this Article have deep, historical roots.

Part III explores the benefits of judicial settlement, and the conflicts that result from mixing the role of settlement neutral with the judicial role of adjudication (both pretrial and as the presiding judge at trial) as currently permitted by Rule 16, the majority of local federal rules, and many state rules. The conflicts in neutral roles stem from two primary sources. One is the potential for coercion that undermines the important value of party self-determination in settlement. The other is the dilemma that requires attorneys to make a choice between guarding information that would improve the prospects for settlement or sharing it with the judge and potentially undermining the integrity of the adjudication process. These concerns are strengthened by modern understandings of cognitive processes, which suggest multiple flaws.

in a structure that allows settlement neutrals to be decisionmaking neutrals. In a day when the limitations of human decisionmaking processes are common knowledge, these concepts should be reflected in the way we organize our settlement processes.

Part IV examines possibilities for limiting the effects of these conflicting neutral roles. It draws examples from local federal court rules and state law and identifies ways in which some jurisdictions apply principles that draw a distinction between managing settlement in the context of court-connected ADR programs and serving as a neutral in settlement. This Article argues that procedural rules should use these same principles to structure the permissible roles of judges in all settlement processes, including settlement conferences. Limiting judicial discretion is necessary to avoid the problems that occur when a judicial officer who is assigned the adjudicative role also takes an active role as settlement neutral.

Granted, coercion is to some degree inherent in judicial encouragement of settlement, and concerns about bias run through the litigation process. There are two reasons, however, why it is important to attack these problems in the settlement context. First, these problems are especially acute when an adjudicatory/managerial judge serves as settlement judge. In terms of coercion, the potential is heightened when parties who do not settle will return to the settlement judge for trial. In terms of impartiality, judges gain far more information that can affect their judgments in settlement than they do in the ordinary course of management and adjudication. Significantly, this information is different in kind from that which judges learn in the context of motions and evidentiary rulings.

Second, there is a manageable solution. This Article proposes that Rule 16, local federal rules, and state rules should prohibit assigned judges from serving as settlement judges and limit the information that the settlement neutral may provide to the adjudicatory/managing neutral about the settlement process. If the rules recognize that serving as a settlement neutral is distinct from management and needs to be structurally isolated from adjudication, then settlement, management, and adjudication all will benefit from parties’ increased confidence in the judicial system.

II. THE CO-EVOLUTION OF JUDICIAL SETTLEMENT AND RULE 16

The evolution of judicial pretrial settlement practices in the federal district courts is a story of expansion: both in the roles of individual judges and in the operational roles of courts as institutions. The authorization for this activity in Rule 16 of the Federal Rules of Civil Procedure has generally followed, rather than led, the developments in settlement practices.10 Overall, amendments to

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10 See, e.g., FED. R. CIV. P. 16(c) advisory committee’s note on 1983 amend. (stating that the amendment “recognizes that it has become commonplace to discuss settlement at pretrial conferences”); Daisy Hurst Floyd, Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement, 26 ARIZ. ST. L.J. 45, 52 (1994) (stating the 1993
Rule 16 have recognized the expanding reality of judicial pretrial practices, endorsing and making more explicit the district courts’ pretrial management powers. This has been especially true of the amendments concerning settlement, which have pragmatically codified judicial trends and court innovations. These amendments have reflected the increasing attention paid to judicial settlement since the inception of the Federal Rules in 1938 and the changes in legal culture that have, in many districts, institutionalized court-sponsored settlement processes as a normal element of litigation.

Pretrial proceedings are largely committed to judges’ discretion; Rule 16’s current regulatory structure for settlement is primarily permissive, not limiting. The Rule not only grants judges great discretion in how they approach settlement in a particular case, but also accepts significant diversity in the local structures within which that discretion is exercised. This diversity is consistent with the Alternative Dispute Resolution Act of 1998: while that Act requires district courts to provide some form of ADR process, it also gives them extensive leeway to select and structure the processes they offer to suit local conditions. As a result, court-sponsored settlement varies greatly among the districts and, inevitably, some courts have surpassed others in terms of the scope and quality of their dispute resolution program.

This Part draws on judicial writings and contemporary studies to identify four stages in the evolution of judicial settlement practices. Part II.A describes the period immediately following the 1938 adoption of the Federal Rules, when Rule 16 did not recognize settlement as a pretrial judicial activity. Judges who held pretrial conferences tended to restrain themselves in discussing settlement with attorneys and, under the prevailing case assignment systems, those judges who were active in settlement rarely tried the case. This general restraint gave way during the 1960s and especially the 1970s to a second stage of development, outlined in Part II.B. It was marked by the growth of managerial judging and increasing judicial enthusiasm for promoting settlement. Pretrial settlement conferences became widespread, and they were eventually endorsed in the 1983 amendments to Rule 16. Stage three, which is detailed in Part II.C, was characterized by the establishment of court-sponsored ADR programs. Judges continued to hold settlement conferences, but options for settlement processes broadened and judges assumed additional managerial roles in settlement, which varied greatly due to the local nature of ADR programs. These changes were recognized in 1993 with further amendments to Rule 16. Part II.D presents evidence of a fourth, ongoing stage in which mediation has become an increasingly important part of judicial settlement. Judges have begun to mediate, and mediation techniques have influenced how many judges conduct their settlement conferences.

amendment “again provides explicit authorization in the rules for what many judges are already doing”).

11 See infra notes 84–92 and accompanying text; see also infra note 157.
For the most part, the discretion allowed to each judge to determine his or her preferred role in settlement has expanded through these evolutionary stages. Today, litigants may experience a wide range of court-connected settlement activity, which includes both judges performing managerial functions and judges presiding as neutrals. Rule 16 currently authorizes both these roles with little limitation. It is noteworthy, however, that even as discretion with regard to settlement has expanded over the decades, concerns with one potential consequence—conflicting judicial roles—have echoed repeatedly through each stage of the evolution of judicially-led settlement.

A. Stage 1: General Judicial Restraint in Settlement and Rule 16 Silence

The inaugural version of the Federal Rules of Civil Procedure that merged law and equity in 1938 did not mention settlement. The Rules contributed major innovations in the form of liberal rules of pleading and joinder13 and provisions for information exchange through discovery to develop cases prior to trial14 that, along with a decline in the rate of trials, made the pretrial phase the “main event” in litigation.15 The rulemakers, inspired by the practice of some state court judges, also added Rule 16 to authorize pretrial conferences.16

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The Circuit Court of Wayne County, Michigan (where Detroit is located) is credited as the first to institutionalize the pretrial format in the United States. Alexander Holtzoff, Pretrial Procedure: Report of the Committee to the Judicial Conference for the District of Columbia, 1 F.R.D. 759, 759 (1941). The court was initially motivated to relieve congestion in its docket of lien cases that resulted from a building boom in the 1920s but, based on its success, it expanded the practice to the law side of the docket and made it compulsory in all cases. Ira W. Jayne, Foreword, 17 OHIO ST. L.J. 160, 161–62 (1956). This pretrial “preview” of cases resulted in “the reduction of issues, settlements, limitations of proofs, and early decisions on such issues as required proofs.” Id. at 162 (quoting George E. Brand, “Mighty Oaks”—Pretrial, 26 JUDICATURE 36, 37 (1942)). Similar procedures were instituted in Cleveland, Milwaukee, and Boston, and also served as
Consistent with the overall emphasis on the flexibility of equity traditions in the Federal Rules, Rule 16 gave district judges discretion to decide on a case-by-case basis whether to hold a conference and how to shape it. It thus encouraged, but did not require, judges to participate in discussion and exchange with the parties as a more informal way of narrowing issues for trial than reliance on formal pleadings.

There was concern among the drafters, however, with the potential for coercion of the parties. This was reflected in their reluctance to include settlement as an appropriate topic for discussion at pretrial conferences. Years later, Charles Clark, the influential reporter for the Supreme Court’s Advisory Committee on Rules of Civil Procedure, explained that the omission was purposeful and stemmed directly from concerns about coercion: “[I]t is dangerous to the whole purpose of pre-trial to force settlement upon unwilling

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18 In creating Rule 16, there had been drafting disagreements over whether conferences would be limited to jury trials and whether judges would be obliged to hold a conference at the request of the parties. These limitations on judicial discretion were rejected. Resnik, *supra* note 16, at 935–36; Shapiro, *supra* note 16, at 1979.


**Rule 16. Pre-Trial Procedure; Formulating Issues.**

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
4. The limitation of the number of expert witnesses;
5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
6. Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.


parties and to make the conference the recognized instrument of compelled
negotiations.”

Despite the absence of settlement authorization from the language of the
Rule, judges certainly did settle cases in pretrial conferences in the decades
immediately following the adoption of the Federal Rules. But tradition
imposed informal constraints on pretrial activity in general, and two factors
appear to have restrained judicial behavior specifically in terms of settlement
during the 1940s, 1950s, and 1960s. First, the dominant view in the federal
courts (at least as reflected in the rhetoric of the day) was that settlement was a
“by-product” of pretrial conferences, not their primary purpose. Second,
under the prevalent system for assigning cases, the judge conducting the
conference was typically not the judge assigned for trial.

The by-product theory was articulated in recommendations submitted by
the Pre-Trial Committee of the Judicial Conference of the United States and
approved by the Conference in 1944. They stated that the “committee
consider[ed] that settlement is a by-product of good pre-trial procedure rather
than a primary objective to be actively pursued by the judge.” Settlement at
pretrial conferences was accepted, however, as “often the logical result of pre-

21 Charles E. Clark, Objectives of Pre-Trial Procedure, 17 OHIO ST. L.J. 163, 167
(1956); see also William J. Brennan, Jr., The Continuing Education of the Judiciary in
Improved Procedures (“[W]e must stand steadfastly against the perversion of the pretrial
procedure into a device for forcing settlements.”), in Proceedings of the Seminar on
(1960) [hereinafter Seminar on Practice and Procedure]; Charles E. Clark, To an
Understanding Use of Pre-Trial (“Compelled settlement negotiations are dangerous as
bringing in question the impartiality of the tribunal . . . .”), in Proceedings of the Seminar
[hereinafter Seminar on Effective Judicial Administration].

22 See Marcus, supra note 15, at 1563 (noting that before the 1970s, “district judges’
discretion was constrained by the traditional reticence of the judge during the pretrial
period”).

23 The term “by-product” frequently appears in judicial writing from the time about
Rule 16. See, e.g., Harry M. Fisher, Pre-Trial Conference and Its By-Products, 1950 U.
ILL. L.F. 206, 214; Alexander Holtzoff, Federal Pretrial Procedure, 11 AM. U. L. REV. 21,
29 (1962); Irving R. Kaufman, The Philosophy of Effective Judicial Supervision over
Ligation, in Seminar on Effective Judicial Administration, supra note 21, at 207, 215;
Shafroth, supra note 16, at 252; J. Skelly Wright, Pre-Trial on Trial, 14 LA. L. REV. 391,
399 (1954); see also Handbook for Effective Pretrial Procedure, 37 F.R.D. 255, 271
(1964) (statement on pretrial procedure adopted by the Judicial Conference of the United
States); Harry D. Nims, Some By-Products of Pre-Trial, 17 OHIO ST. L.J. 185, 185 (1956).

24 See infra notes 39–43 and accompanying text.

25 Alfred P. Murrah, Pre-Trial Procedure: A Statement of Its Essentials, 14 F.R.D.
417, 424 (1954). Justice Brennan, addressing the Judicial Conference of the Tenth Circuit
in 1960, endorsed this view, asserting that “settlement can never be the reason for the
[pretrial] conference, but merely an incidental, although, of course, valuable, result of it.”
Brennan, supra note 21, at 50.
trial.” Judge Alfred P. Murrah, then-chair of the Pre-Trial Committee, expressed the relationship between pretrial and settlement as follows: “By narrowing the area of disagreement and pointing out the pitfalls of going to trial, the pre-trial judge can thus attempt to clear the way for a settlement advantageous to the interests of both parties.”

In terms of judicial behavior, contemporary judicial commentary suggests widespread consensus that it was appropriate to ask the attorneys whether they had considered settlement, thereby initiating discussions that attorneys might hesitate to start for fear of signaling weakness. Some judges thought suggesting that attorneys discuss settlement should be the limit of their involvement, while other judges thought they could go somewhat further without overstepping. But the by-product theory was inconsistent with judges aggressively promoting settlement at the pretrial conference and empirical evidence from the time suggests that this attitude seems to have encouraged restraint.

The by-product view was not universally accepted, however, and there were disagreements during this period about the appropriate degree of

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26 Murrah, supra note 25, at 420. The settlement rate could be substantial. In the first nine months of conducting pretrial conferences in the District Court for the District of Columbia, almost 60% of the cases settled at or after the conferences, which were conducted shortly before trial. Holtzoff, supra note 16, at 761.

27 Murrah, supra note 25, at 420; see also Holtzoff, supra note 23, at 29 (stating that at pretrial, counsel “begins to discern the weaknesses of his own side, and to perceive the strong points of his adversary’s case,” likely becoming “more amenable and more desirous of settlement”).

28 See Shafroth, supra note 16, at 250; Wright, supra note 23, at 398. State appellate courts also accepted the practice. E.g., Madrigale v. Corrone, 258 A.2d 102, 106 (Conn. App. Ct. 1968) (urging both counsel to settle was not inappropriate in case in which judge did not participate in negotiations); Washington v. Sterling, 91 A.2d 844, 845 (D.C. 1952) (stating trial court may suggest the advisability of settlement).


30 See Grover M. Moscowitz, Glimpses of Federal Trials and Procedure, 4 F.R.D. 216, 218 (1946) (“If the judge merely suggests to the attorneys that they discuss the possibilities of settlement, that should be sufficient impetus from the Court.”).

31 See, e.g., Murrah, supra note 25, at 420 (advocating that a judge could “make discreet suggestions as to the possible outcome of a trial”).

32 See, e.g., William F. Smith, Pretrial Conference—A Study of Methods (noting that “judicially supervised ‘haggling’ and efforts to exert pressure are to be cautiously avoided” in settlement discussions, which “should not be regarded as a primary objective of the pretrial conference”), in Seminar on Effective Judicial Administration, supra note 21, at 348, 352–53; Wright, supra note 23, at 393 (“It is suggested that pre-trial is a means by which a judge coerces lawyers into settlement and thereby avoids the necessity for trial. I say to you such is not pre-trial, but a prostitution of the process.”).

33 John W. Delehant, The Pre-Trial Conference in Practical Employment: Its Scope and Technique, 28 NEB. L. REV. 1, 23–24 (1948) (reporting that 80% of federal trial judges responding to an ABA survey limited their settlement involvement to inquiring if the attorneys had initiated settlement and if they thought it would be appropriate).
emphasis on settlement\textsuperscript{34} with some judges taking an activist stance, particularly in state courts.\textsuperscript{35} This group of judges saw settlement as the "primary objective" of pretrial conferences,\textsuperscript{36} and expressed great enthusiasm for the effect of settlement in pretrial conferences in reducing dockets and waiting times to trial.\textsuperscript{37} Among such judges, settlement techniques included assessing the value of the case, pointing out strong and weak aspects of the claim or defense, and attempting to persuade the parties to settle.\textsuperscript{38}

\textsuperscript{34} See Fisher, supra note 23, at 212 (noting two schools of thought, one of which "attaches much higher importance to [the pretrial conference] as a means of bringing about settlements"); Stanley M. Ryan & John C. Wickhem, Pre-Trial Practice in Wisconsin Courts, 1954 Wis. L. REV. 5, 15–23 (finding several schools of thought on settlement in a survey of Wisconsin judges on pretrial conferences); Sunderland, supra note 29, at 203 (advocating a secondary role for settlement at pretrial conferences but acknowledging a "considerable difference of opinion" in its importance); Melvin Belli, Book Review, 76 YALE L.J. 857, 858 (1967) (reviewing MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964)) (noting the divergent views of New Jersey judges).

\textsuperscript{35} Galanter, supra note 16, at 259–60.

\textsuperscript{36} Ryan & Wickhem, supra note 34, at 15 (emphasis omitted); see also Ross W. Shumaker, Appraisal of Pre-Trial in Ohio, 17 OHIO ST. L.J. 192, 205 (1956) (stating that settlement at pretrial is a controversial subject, but "in Ohio the majority of judges and lawyers feel that settlement is not merely a by-product, but one of the most desirable objectives, of pre-trial").

\textsuperscript{37} E.g., Harry M. Fisher, Judicial Mediation: How It Works Through Pre-Trial Conference, 10 U. CHI. L. REV. 453, 454 (1943) ("The number of cases disposed of under the guidance of the pre-trial judge without trial has exceeded the fondest hopes of the advocates of the system."); John W. McIlvaine, The Value of an Effective Pretrial ("[W]ith the congested condition of the docket . . . I feel it is incumbent on every judge to use the pretrial as an aid in effectuating settlement."), in Seminar on Practice and Procedure, supra note 21, at 158, 162; Ryan & Wickhem, supra note 34, at 15 (reporting that many judges "emphasize that unless a large percentage of cases is disposed of by settlement at pre-trials, their calendars would become hopelessly backlogged"); Shafroth, supra note 16, at 244 (noting that in Detroit and Boston pretrial conferences “succeeded in clearing up very bad congestion of the trial calendars”). In contrast, a book from this era on the problem of congestion in the courts, AM. ASSEMBLY, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (Harry W. Jones ed., 1965), did not even mention the potential efficacy of a pretrial conference convened for the purpose of settlement. See James B. Little, Book Review, 18 HASTINGS L.J. 237, 238 (1966).

\textsuperscript{38} See, e.g., HARRY D. NIMS, PRE-TRIAL 28 (1950) ("After a frank discussion by counsel as to the value of the case, I give expression as to what, in my judgement, the case should be settled for." (quoting Judge Cornelius J. Harrington)); id. at 34 ("[T]he Court frequently points out the strong points and the weak points of either the plaintiff’s claim, or the defense, as the case may be, in endeavoring to bring the parties to an agreement." (quoting Judge Alexander Holtzoff)); Ruggero J. Aldisert, A Metropolitan Court Conquers Its Backlog, 51 JUDICATURE 247, 248 (1968) (noting that he makes “a realistic appraisal of both sides” of a case); Ryan & Wickhem, supra note 34, at 16 ("I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement, and then also attempt to persuade the parties and their attorneys to accept a settlement within that range.” (quoting Judge Herman W. Sachtjen)); J. Skelly Wright, The Pretrial Conference ("I tell them, ‘This case is worth
The system for assigning cases, however, served as a second source of restraint on behavior, especially in state courts where judges tended to be more active in settlement. Many courts used a master calendar system that placed cases in central pools and assigned judges particular functions such as motions, pretrial conferences, or trial, often in rotation. This meant that a single case would be handled by multiple judges and, if a case did not settle at a pretrial conference, a different judge would be assigned to preside at trial.

At least some judicial advocates of using pretrial conferences to encourage settlement considered this separate trial assignment to be a crucial design feature. In the words of Harry M. Fisher, a pretrial conference judge of the Circuit Court of Cook County, Illinois, “We regard it as of the utmost importance that the conference be held by a judge other than the one who will be assigned to hear the case in the event a formal trial becomes necessary.”

The reasons were partly functional: lawyers would be willing to make disclosures, and judges would feel free to participate in a discussion of the merits of the case as part of the settlement process. They also reflected concerns for neutrality and the integrity of trials: “[I]lawyers would feel, rightfully so, that no judge could successfully detach himself from the information absorbed during the conference or escape forming views on the merits of the case which might unconsciously color his rulings at the trial.”

See generally MAUREEN SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 10–13 (1973) (suggesting standards and guidelines for planning, developing, and operating an effective case management system).

This separation was especially prevalent under state court master calendar systems. See NIMS, supra note 38, at 22 (describing pretrial conferences as used in New York County, New York (Manhattan) and noting “[t]he chance that the pre-trial judge will try the case, if it is not ended in the conference, is very, very small”); id. at 28 (“[I]f counsel cannot agree [on a settlement] then the case is reassigned to the head of the assignment division for an immediate jury trial.”) (quoting Judge Cornelius J. Harrington); see also Ryan & Wickham, supra note 34, at 23–24 (describing a program in Milwaukee with separate, voluntary assignment to a judge for conciliation).

The early practice regarding settlement judges in federal courts was more variable. Some federal courts assigned separate judges for pretrial and trial functions. See George L. Hart, Jr., The Operation of the Master Calendar System in the United States District Court for the District of Columbia (describing separate processes for assigning cases to judges in the Pre-Trial and Ready for Trial Calendars), in Seminar on Effective Judicial Administration, supra note 21, at 265, 266–67; Holtzoff, supra note 23, at 23 (describing a system in which a pretrial examiner was devoted to conducting pretrial hearings, freeing judges for trial work). In other federal courts, pretrial conferences were held shortly before trial and were often conducted by the trial judge regardless of the type of calendaring system. See Shafroth, supra note 16, at 250 (“[F]ederal districts where the pre-trial judge does not try the case are very few . . . .”)

See also Maurice Rosenberg, Mastering the Calendar (“[T]he central calendar avoids the unseemly situation of having the same judge—who at
B. Stage 2: Active Judicial Participation in Settlement Leading to Rule 16 Authorization

In the 1970s, a “forthright and ardent embrace of active participation” displaced the by-product framework as the dominant approach to settlement in federal pretrial conferences.44 At the same time, a movement toward individual calendar systems in the federal courts meant that more judges had responsibility for cases from their inception.45 These changes were part of the well-documented shift in judicial self-conception from neutral adjudicator to active case manager.46 Effectiveness in settlement was regarded as a crucial aspect of the pretrial management role. As expressed by Chief Judge Noel P. Fox of the Western District of Michigan, “judge-mediator participation in pretrial settlement negotiations is an essential part of imaginative, active administration of the court calendar.”47

The high level of enthusiasm for settlement is indicated by the statement, described in a mid-1980s judicial opinion as a “familiar axiom,” that “a bad settlement is almost always better than a good trial.”48 As in the earlier era, settlement as a mode of docket control continued to be an important motivating factor for judicial involvement,49 and now the compilation of pretrial hearings the lawyers frankly admit specific weaknesses in their case—later preside at trial of the case.”), in Seminar on Effective Judicial Administration, supra note 21, at 271, 279; E.J. Dimock, Book Review, 36 A.B.A. J. 837, 837 (1950) (reviewing NiMS, supra note 38) (noting the general custom of keeping the settlement conference judge away from the trial and opining that “[a] party who has stuck to his settlement figure in the face of pressure from a judge has a right to have his case tried before another whom he has not antagonized”).

44 Galanter, supra note 16, at 261; see also Frederick B. Lacey, The Judge’s Role in the Settlement of Civil Suits 3 (1977) (“The nonactivists had their day. The activists are now in the ascendancy, as times change and case loads become increasingly burdensome both in number and complexity of suits.”); Peckham, supra note 1, at 774 (“[M]ost judges routinely consider prospects for settlement at the pretrial conference and consider settlement promotion to be one of the chief purposes of pretrial . . .”).

45 Robert F. Peckham, A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253, 257 (1985) (describing the switch in the late 1960s to a single-assignment model in metropolitan federal districts). With the individual calendar system, a case is typically assigned to an individual judge when it is filed and that judge has responsibility for the case throughout its life. Steven Flanders, Case Management and Court Management in United States District Courts 13–15 (1977).

46 See generally E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306 (1986); Peckham, supra note 1; Resnik, supra note 1.

47 Noel P. Fox, Settlement: Helping the Lawyers to Fulfill Their Responsibility, 53 F.R.D. 129, 132 (1972); see also Lacey, supra note 44, at 5 (“The more efficient the judge and the more talented he is as an administrator the more cases he will settle . . .”).

48 In re Warner Commc’ns Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), aff’d, 798 F.2d 35 (2d Cir. 1986).

49 See, e.g., Elwood M. Rich, An Experiment with Judicial Mediation, 66 A.B.A. J. 530, 530 (1980) (expressing enthusiasm about institutionalizing settlement conferences,
docket statistics gave a ready measure of accountability that increased the pressure for quicker settlements and dispositions. However, unlike the judicial writing on Rule 16 in the earlier decades (which emphasized almost exclusively the docket benefits of settlement), for some the enthusiasm for settlement during this era had an additional grounding: a conviction that settlement produced superior outcomes. Thus, Judge Hubert L. Will of the Northern District of Illinois proclaimed “in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.”

This enthusiasm translated into widespread judicial involvement with settlement at pretrial conferences, although more conservative attitudes also persisted. Contemporary observations suggest that the extent and intensity of judicial intervention varied greatly, an impression supported by the research which eliminated a chronic backlog in a California Superior Court in ten months). See generally Peckham, supra note 45, at 253 (identifying pretrial judicial case management as the “prevailing response” to high costs of litigation).

See, e.g., Resnik, supra note 1, at 404. In addition, settlement activity received encouragement from favorable publicity among the judiciary. Leroy J. Tornquist, The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry, 25 WILLAMETTE L. REV. 743, 750 (1989) (noting attention given to judges active in settlement: “They are invited to give seminars to new judges. Their views are published in Federal Rules Decisions and disseminated in booklets by the Federal Judicial Center.”).

See supra note 37 and accompanying text.

Galanter, supra note 16, at 261; see also Dep’t of Pub. Advocate v. N.J. Bd. of Pub. Utils., 503 A.2d 331, 333 (N.J. Super. Ct. App. Div. 1985) (stating that the policy encouraging settlement is not to relieve dockets, but because “parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone”).

Hubert L. Will et al., The Role of the Judge in the Settlement Process, in Proceedings of Seminar for Newly Appointed United States District Court Judges, 75 F.R.D. 89, 203, 203 (1976). Judge Will was not alone. Chief Judge Fox of the Western District Court of Michigan described settlement as at least coequal to adjudicated decisions: “We accept settlement as a preferred means of disposition. We believe that encouragement of settlement is an important use of pretrial and is consistent with the overriding goal “to further the disposition of cases according to right and justice on the merits.”” Fox, supra note 47, at 134–35 (footnote omitted) (quoting William J. Brennan, Jr., Pretrial Proceedings in New Jersey — A Demonstration, 28 N.Y. ST. B. BULL. 442, 449 (1956)); see also id. at 142 (stating that settlement can be expected to “reflect the parties’ evaluation of the actual merits of the case” thus producing “results which are probably as close to the ideal of justice as we are capable of producing”).

See, e.g., ROBERT MCC. FIGG ET AL., CIVIL TRIAL MANUAL 315 (1974) (stating that the role of the pretrial conference “may vary from one in which the conference is used to force settlement to one in which the mere mention of the word settlement is taboo”); Menkel-Meadow, supra note 16, at 506–07 (observing a variety of conceptions of judicial settlement roles and associated techniques); Perspectives from the Federal Trial and Appellate Bench: Judge Cornelia G. Kennedy, THIRD BRANCH, Apr. 1984, at 1, 9 [hereinafter Kennedy] (“[S]ome judges participate a great deal, . . . and others don’t participate at all.”).
work from the era. According to a nationwide survey of state trial judges published in 1980, many judges were involved in settlement; over three-quarters described themselves as intervening at least occasionally to promote settlement discussions. Of these, approximately 10% reported taking an aggressive role “through the use of direct pressure.” A second survey published in 1980 also conveys a sense of activism in settlement, finding that it was common for judges to initiate settlement discussions, especially in jury cases, and that substantial numbers of judges reported suggesting settlement terms. In contrast, a separate survey of lawyers in the early 1980s portrayed judges as far less likely to participate in settlement, but reported that this

55 See Franklin N. Flaschner Judicial Institute, Inc., The Judicial Role in Case Settlement 2 (1980) (reporting differences of opinion among Massachusetts state and federal judges on the appropriateness of an active role in settlement proceedings); David Neubauer, Judicial Role and Case Management, 4 Just. Sys. J. 223, 227–28 (1978) (reporting both activist and abstentionist federal judges based on interviews in three federal districts).

56 John Paul Ryan et al., American Trial Judges: Their Work Styles and Performances 177 tbl.8-2 (1980). Only 21.8% of the judges surveyed stated that they typically did not participate in settlement discussions. Id. Thus these authors concluded that the primary issue was “not whether but how a judge will intervene in pre-trial conference.” Id. at 177.

57 Id. at 177 tbl.8-2. The study found that the type of calendar system was significantly related to the style of intervention. Id. at 182. Where the court used a master calendar, 20% of the judges reported intervening aggressively in pretrial negotiations, whereas this was reported by only 9% of judges in courts with individual calendaring systems. Id.

58 See Marc Galanter, “...A Settlement Judge, Not a Trial Judge:” Judicial Mediation in the United States, 12 J.L. & Soc’y 1, 7, 17 n.42 (1985) (describing a survey conducted by the Civil Litigation Research Project). The survey polled state and federal judges in five judicial districts about their typical settlement practices. Id. Seventy-five percent of federal judges and 56% of state court judges reported initiating settlement discussions in jury cases. Id. Forty-one percent of the federal judges and 56% of the state judges reported suggesting terms for settlement. Id. For bench trials, fewer judges reported these activities. Id.

When the self-reports from judges in this survey were combined with the views of lawyers who appeared before them, there was further support for a conclusion that judges assigned to a case for trial were frequently involved in settlement discussions. Herbert M. Kritzer, The Judge’s Role in Pretrial Case Processing: Assessing the Need for Change, 66 Judicature 28, 30–34, 34 n.12 (1982). Judicial settlement activities ranged from initiating settlement discussions to more intensive, less frequent, activities such as meeting separately with each side and suggesting settlement figures. Id. at 31; see also Eugene F. Lynch, Settlement of Civil Cases: A View from the Bench, Litigation, Fall 1978, at 8, 57–58 (describing his typical evaluation of the case with the plaintiff).

59 James A. Wall, Jr. & Lawrence F. Schiller, Judicial Involvement in Pre-Trial Settlement: A Judge Is Not a Bump on a Log, 6 Am. J. Trial Advoc. 27, 35 (1982) (concluding that judges participated “significantly” in only 34% of settlement proceedings). But see Wayne D. Brazil, Settling Civil Suits: Litigators’ Views About Appropriate Roles and Effective Techniques for Federal Judges 12 (1985) (criticizing the question that led to this conclusion as “ambiguous”).
participation included practices, such as perceived coercion to settle, that were considered unethical by many of the lawyers.60

How did litigants react to the more prevalent involvement of judges in settlement? While I can find no studies of clients at the time, attorneys in four different federal districts were very enthusiastic. In response to a survey of lawyers by Wayne Brazil in the early 1980s, an amazing 85% of the respondents agreed that “involvement by federal judges in settlement discussions [is] likely to improve significantly the prospects for achieving settlement.”61 The survey indicated that a majority of lawyers preferred a judge to participate “actively” in settlement by offering suggestions and observations.62 There was, however, one major exception to the enthusiasm: lawyers were far less comfortable with judicial involvement in settlement when the settlement judge was also the judge assigned for trial.63

In 1983, Rule 16 (which, it should be recalled, originally did not even mention settlement)64 was amended to be consistent with the existing practice of widespread judicial involvement in settlement. The amendment’s expansion of authority for settlement activity during pretrial proceedings was consistent with the other 1983 changes to Rule 16, which overall “shift[ed] the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase.”65 But the Advisory Committee acknowledged that the changes regarding settlement merely conformed the rule to existing practice, stating that the new rule “explicitly recognize[d] that it ha[d] become commonplace to discuss settlement at pretrial conferences.”66

The language of the new Rule established a judicial role for settlement with a broad scope. The Rule’s new list of purposes for pretrial conferences officially recognized judicial authority for “facilitating the settlement of the case.”67 The scope of “facilitating” is undefined but, given prevailing practices at the time, it can be understood as authorizing judges to intervene directly as

60 The lawyers’ reports of judicial behaviors included “[c]oerces lawyers to settle” (reported by 54% of lawyers surveyed; considered unethical by 51%); “[p]oints out to the client the strengths and weaknesses of his case” (reported by 52%; considered unethical by 29%); “[d]elays rulings to the disadvantage of the stronger side” (reported by 48%; considered unethical by 65%); and “[d]owngrades the merit of the stronger case and/or the demerits of the weaker” (reported by 45%; considered unethical by 20%). Wall & Schiller, supra note 59, at 35–36, app. at 43 tbl.2, 44 tbl.3.
61 BRAZIL, supra note 59, at 1, 39 (alteration in original). Professor Kritzer’s survey also indicates that lawyers believed judicial participation had an important influence on the settlement process. See Kritzer, supra note 58, at 35–36.
62 BRAZIL, supra note 59, at 46; see also Menkel-Meadow, supra note 16, at 497 (“[L]awyers overwhelmingly seem to favor judicial intervention.”).
63 BRAZIL, supra note 59, at 84; see infra notes 260–66 and accompanying text.
64 See supra note 19.
65 FED. R. CIV. P. 16(a) advisory committee’s note on 1983 amend.
66 Id. R. 16(c) advisory committee’s note on 1983 amend.
settlement neutrals in order to lead negotiations between the parties. The new
Rule 16 also contemplated a planning function distinct from direct
participation in negotiations. It granted judges authority to “consider and take
action with respect to . . . the possibility of settlement or the use of
extrajudicial procedures to resolve the dispute.”

Thus the concept of judicial settlement activity embedded in Rule 16
included both serving as a settlement neutral and planning for a resolution
procedure that would be conducted extrajudicially by someone else. Moreover,
the provisions in the 1983 rule endorsed these settlement roles for judges
within a framework of abundant pretrial judicial discretion carried over from
the original Rule 16. The Advisory Committee notes did express a caution
that echoed the reasoning behind the drafters’ original decision to omit
settlement from the 1938 rule. While noting that “providing a neutral forum”
to discuss settlement “might foster it,” the Advisory Committee emphasized
that it was not the purpose of the rule “to impose settlement negotiations on
unwilling litigants.” Further, the drafters seem to have contemplated that,
ideally, someone other than the assigned judge should lead the settlement
process. Yet, by failing to distinguish a judge’s planning and neutral
functions, the rule conflated them in a way that misleadingly identified them
both with “management,” eliding an important distinction and obscuring
thinking about the boundaries of the appropriate role of judges in settlement.

C. Stage 3: Expansion of Court-Sponsored “Alternative” Dispute
Resolution, with New Managerial Roles for Judges

The third phase of development in settlement practices—court-sponsored
settlement programs—broadened the focus from conferences convened at the
discretion of individual judges to processes offered on an institutional basis.
The programs were often motivated by the same concerns about cost and delay
in civil litigation that had been associated with the rise of managerial judging,
but those concerns now grew to a conviction that a litigation explosion was
causing a full-blown crisis of congestion in the courts that was severe enough
to impair access to justice. While it is important to note that both the

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68 Id. R. 16(c)(7).
69 If there were any doubt about judicial discretion, the rule included an open-ended
authorization for conferences to include “such other matters as may aid in the disposition
of the action.” Id. R. 16(c)(11).
70 See supra notes 20–21 and accompanying text.
71 FED. R. CIV. P. 16(c) advisory committee’s note on 1983 amend.
72 Id. (suggesting that “a judge to whom a case has been assigned may arrange . . . to
have settlement conferences handled by another member of the court or by a magistrate”).
73 This viewpoint was influentially expressed by Chief Justice Burger. Warren E.
Burger, Isn’t There a Better Way?, 68 A.B.A. J. 274, 275 (1982); see also Robert H. Bork,
Dealing with the Overload in Article III Courts (describing “an overload so serious that the
integrity of the federal system is threatened”), in Addresses Delivered at the National
Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70
explosion and ensuing crisis were contested, the perception of a crisis generated proposals to deal with it: chiefly reforms to discovery procedures and increased attention to settlement as a means to remove cases from court dockets.

Chronologically, the development of court programs overlapped with the growing enthusiasm for judicial settlement conferences that took place in Stage 2. Professor Frank Sander’s speech describing a vision of a multi-door courthouse at the 1976 Roscoe Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice is often cited as a key event in the association between ADR programs and U.S. courts. Innovative federal districts began offering mediation programs and court-annexed nonbinding arbitration in the late 1970s. This was also a time when experimentation with new forms of ADR flourished, and districts began to offer processes that judges invented especially for use in the courts, including early neutral evaluation and the summary jury trial. While only a few courts developed full-fledged multi-door programs in which litigants could choose the process best suited to their case from a large menu, many courts—both federal and state—eventually established programs that provided (or required) dispute resolution processes other than judicial settlement conferences.

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Burger, supra note 73, at 276; see also Griffin B. Bell, Crisis in the Courts: Proposals for Change, 31 VAND. L. REV. 3, 12–13 (1978).

Frank E.A. Sander, Varieties of Dispute Processing, in Pound Conference, supra note 73, at 111, 130–32.

DONNA STIENSTRA, ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 1 (Nov., 2011).


This development was not limited to the United States. See, e.g., Louise Otis & Eric H. Reiter, Mediation by Judges: A New Phenomenon in the Transformation of Justice, 6 PEPP. DISP. RESOL. L.J. 351, 353 (2006) (describing Quebec’s “unified and integrated
A significant spur to the growth of federal court ADR came with the enactment of the Civil Justice Reform Act of 1990 (CJRA). It required district courts to consider six case management principles, one of which was referral to ADR programs, and to adopt expense and delay reduction plans. The local nature of the plans, which were developed with input from advisory committees in each district, led to great variation, but many districts included some form of ADR as an element of their plan. By 1996, mediation had become the most common ADR process offered by the federal courts; it was available in over half the districts. During the same time period, many state courts also instituted mediation programs.

The authority of the CJRA expired in 1997, but the Judicial Conference urged local districts to continue to develop ADR programs. And the following year, Congress turned the CJRA’s encouragement of court ADR into a mandate. The Alternative Dispute Resolution Act of 1998 (ADR Act)...
required each federal district court to offer at least one ADR process—
including, but not limited to, mediation, early neutral evaluation, minitrial, and
(when specially authorized) arbitration—and to adopt local rules requiring
civil litigants to consider its use.89 These ADR programs have become a
common feature of the settlement landscape in many federal district courts. A
2011 Federal Judicial Center review of district court ADR reveals that
mediation remains the most common court-connected process; two-thirds of
the ninety-four district courts have authorized it as a distinct ADR process.90
Almost one-quarter of the districts authorize early neutral evaluation, with
smaller numbers including rules for summary jury or bench trials, mini-trials,
or settlement weeks.91 Slightly more than one-third authorize multiple forms
of ADR.92

Along with these new programs, judges have continued to conduct
settlement conferences.93 A few districts placed settlement conferences in their
ADR programs.94 However, most courts did not integrate their provisions
governing Rule 16 settlement conferences with the new rules they adopted for
their ADR programs pursuant to the CJRA and the ADR Act. This is perhaps
understandable as a historical accident: courts incorporated settlement
conferences and ADR programs into their procedures at different times and
under distinct authorizations. Moreover, conceptually, ADR meant alternatives
to traditional processes, while settlement conferences were, by this time,
solidly traditional.95

89 28 U.S.C. § 652(a) (2012). In the case of mediation and early neutral evaluation,
the Act also authorized the courts to require parties to use these ADR processes. Id.
90 STIENSTRA, supra note 77, at 6, 7 tbl.2. According to the local rules and other
written sources, in more than one-quarter of these district courts, mediation is the only
specifically-authorized process. Id. at 5 & tbl.1. The indication that mediation is authorized
in two-thirds of the districts, id. at 7 tbl.2, is likely a conservative estimate. It reflects only
specifically authorized mediation programs in districts that provide guidance for their use,
while additional districts have a general authorization for ADR or establish an “open” or
“general” management track allowing cases to use ADR. Id. at 5 tbl.1, 6. Although these
more general authorizations may mention mediation or another form of ADR, Stienstra
does not count them because the lack of detail casts doubt on the existence of an active
court-administered ADR program. Id.
91 Id. at 6, 7 tbl.2. Court-annexed arbitration, while still authorized by a significant
number of courts, plays a smaller role today than it did during earlier decades. Id. No
district relies solely on court-annexed arbitration as its ADR process. Id. at 6.
92 Id. at 4–5, 5 tbl.1. Fourteen districts authorize three or more processes. Id. at 5.
93 See, e.g., DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT
EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 253 tbl.11 (1995) (compiling
provisions on settlement conferences from local CJRA plans and rules).
94 As of 2011, ten districts satisfied the ADR Act’s mandate by designating settlement
conferences as the sole type of ADR process they authorize by local rule. STIENSTRA,
supra note 77, at 5 tbl.1, 6.
95 See Donna Stienstra, ADR in the Federal Trial Courts, FJC DIRECTIONS, Dec. 1994,
at 4, 7 n.1 (“Because ADR is defined in contrast to ‘traditional’ litigation, the judge-hosted
Even today, local federal rules typically do not cover settlement in a single coherent set of rules. The rules governing district court ADR programs often define “ADR” in a way that does not include either settlement conferences or judicial mediation, and only one-third of the local ADR rules even mention the settlement conferences authorized by Rule 16.96 Procedures for settlement conferences tend to be covered, if at all, in a section of the local rules that is separate from the ADR provisions.97 This continuing lack of integration seems strange given the common focus on settlement. And it has had practical consequences in that a judge’s role as a settlement neutral is often treated differently in the two contexts.

Regardless of the structure of the local rules, the expansion of court-sponsored dispute resolution processes has led to changes in the roles judges play in managing settlement (as distinct from the roles associated with presiding as settlement neutral). When the only court-connected settlement option was a judicial settlement conference, a judge’s management functions consisted primarily of initiating the conference process by encouraging (or

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96 STIENSTRA, supra note 77, at 6 (commenting, however, that “[w]e can be certain that a greater number of districts use settlement conferences, but many very likely do not mention this procedure in their ADR provisions”).

requiring) parties to participate and considering what timing would be productive for settlement discussions. With multiple ADR options available, management functions expanded. In many courts, judges became involved in pretrial settlement planning by assessing cases for the ADR program and, in courts with multiple processes, matching them with a specific ADR process.

An analysis of the current local federal rules reveals that judges are assigned multiple management functions for the settlement processes that courts offer through their ADR programs. In some districts, they play a role in selecting a neutral, in the timing of the process, or in setting the fees for a neutral. The most common judicial management function, however, is selecting an appropriate dispute resolution process. Many districts emphasize consultation with the judge at a case management conference as a means to encourage settlement efforts or to help the parties decide on the most appropriate dispute resolution process for their case. While a few districts

98 Professor Carrie Menkel-Meadow identified three new management functions associated with the new ADR programs: “selecting cases for ADR, providing ADR neutrals, and managing cases that have been referred to ADR.” Carrie J. Menkel-Meadow, Judicial Referral to ADR: Issues and Problems Faced by Judges, FJC DIRECTIONS, Dec. 1994, at 8, 8. Each district had to decide whether to address these issues with a court-wide policy, assign them to staff, or include them as part of individual judges’ pretrial functions. Id.; see also SECTION OF DISPUTE RESOLUTION, AM. BAR ASS’N & INT’L CTR. FOR DISPUTE RESOLUTION, PRESENTING DISPUTE RESOLUTION TO JUDGES: A GUIDE FOR DEVELOPING JUDICIAL TRAINING ON ALTERNATIVE DISPUTE RESOLUTION 31 (1996) (listing the roles of judges in ADR as “[p]rogram planning & implementation, [n]eutral selection, [c]ase assessment, ADR referral, [c]oordination between ADR and litigation ([c]ase monitoring, [j]udicial action, [and] [e]nsuring compliance), [and] [f]eedback on neutral and program effectiveness”).

99 See J. Daniel Breen, Mediation and the Magistrate Judge, 26 U. MEM. L. REV. 1007, 1012–13 (1996) (reporting that in the Western District of Tennessee, the local rule required discussions about settlement processes at the initial Rule 16(b) conference, with a determination of what ADR process would be most effective); Menkel-Meadow, supra note 98, at 8–9 (discussing factors relevant to the selection of cases for ADR processes by judges); id. at 11 (discussing the educational function of judges in assisting attorneys and parties to choose an appropriate process); see also NAT’L ADR INST. FOR FED. JUDGES, JUDGE’S DESKBOOK ON COURT ADR pt. C, at 53–60 (Elizabeth Plapinger et al. eds., 1993) (materials prepared for an educational institute on ADR for federal judges).

100 See, e.g., D. ALASKA CIV. R. 16.2(e); N.D. GA. CIV. R. 16.7(F)(1); S.D. GA. CIV. R. 16.7.4; D. HAW. R. 88.1(d); D. IDAHO CIV. R. 16.4(b)(3)(D); D. KAN. R. 16.3(c)(1); W.D. LA. CIV. R. 16.3.1; E.D. TEX. COURT-ANNEXED MEDIATION PLAN pt. VI (General Order 14-6); E.D. WASH. R. 16.2(g); S.D. W. VA. CIV. R. 16.6.2; E.D. WIS. CIV. R. 16(d)(4)(D).

101 See, e.g., N.D. CAL. ADR R. 5-5, 6-5; E.D. TEX. COURT-ANNEXED MEDIATION PLAN pt. VI (General Order 14-6).

102 See, e.g., S.D. TEX. CIV. R. 16.4.G.

103 See, e.g., D. DEL. R. 16.1; D. HAW. R. 16.2(a)(11); C.D. ILL. R. 16.4(D); D. KAN. R. 16.3(c); D. ME. R. 16.3(b)–(c), 83.11; D. MASS. R. 16.4(b); D.N.H. CIV. R. 53.1(a); N.D.N.Y. R. 16.1(d)(10), (14), (15); S.D.N.Y. R. 83.9; W.D.N.Y. CIV. R. 16.2(b)–(c); N.D. OHIO CIV. R. 16.3(b); S.D. OHIO CIV. R. 16.3(a); W.D. TENN. CIV. R. 16.3; D. UTAH CIV. R. 16-2(c); E.D. WIS. CIV. R. 16(d) (ADR evaluation conference).
make their ADR programs strictly voluntary by rule.\textsuperscript{104} Many more districts grant judges authority to select a process and refer the parties, with or without their consent.\textsuperscript{105} Hence, judges are often expected to participate in the decision to use dispute resolution, and they are frequently assigned responsibility for referring the parties to a particular process.\textsuperscript{106}

Again, rather than leading change, Rule 16 was revised in a way that merely responded to these developments. The 1993 amendments to the Federal Rules of Civil Procedure reacted boldly to concerns about expense and delay with controversial new discovery provisions: initial disclosures of information\textsuperscript{107} and presumptive limits on the number of depositions and interrogatories.\textsuperscript{108} The settlement amendments to Rule 16, however, did no more than refine the authorization for judges’ involvement in planning in a way that recognized the widespread adoption of court dispute resolution programs in the wake of the CJRA. A change in language emphasized the availability of court settlement procedures beyond the traditional judicial

\textsuperscript{104}See, e.g., E.D. CAL. R. 271 (voluntary program); S.D. GA. CIV. R. 16.7.5 (court-annexed mediation by election of the parties); C.D. ILL. R. 16.4(E) (referral to mediation only by parties’ agreement); E.D. LA. CIV. R. 16.3.1 (referral to private mediation, minitrial, or summary jury trial with parties’ consent); W.D. LA. CIV. R. 16.3.1 (same). Some courts require party consent for only selected forms of dispute resolution. See, e.g., E.D. TENN. R. 16.3(a), 16.5(a). These are typically court-annexed arbitration, summary jury trial, or summary bench trial. Occasionally districts offer parties the opportunity to make a dispute resolution process binding, which requires party consent. See, e.g., N.D. GA. CIV. R. 16.7(B)(1) (binding arbitration, summary jury trial, or bench trial).

\textsuperscript{105}See, e.g., N.D. FLA. R. 16.3; E.D.N.Y. R. 83.8; M.D. TENN. R. 16.04(b); W.D. VA. R. 83(b); S.D. VA. CIV. R. 16.6(a). It is common for rules to couple a provision that the judge will discuss ADR options with the parties with an authorization for the judge to select a process if the parties are unable to agree on one. See C.D. CAL. R. 16-15.3; N.D. CAL. ADR R. 3-2; W.D. PA. CIV. R. 16.2(d). Typical language allows a judge to order a dispute resolution process on the request of a party, by the agreement of the parties, or in the judge’s discretion (or on the court’s own motion). See, e.g., D. ALASKA CIV. R. 16.2(c); D. COLO. CIV. R. 16.6(a); D. HAW. R. 88.1(d); D. IDAHO CIV. R. 16.4(b)(2); N.D. & S.D. MISS. R. 83.7(c), (e)(1); N.D. OHIO CIV. R. 16.5(b), 16.6(b); D. OR. R. 16-4(e); S.D. TEX. CIV. R. 16.4.C. Other districts simply grant the judge authority to order parties to use a dispute resolution process without elaborating on the role of party consent. See, e.g., N.D. ALA. CIV. R. 16.1; M.D. FLA. R. 9.03; N.D. GA. CIV. R. 16.7(B)(1); S.D. ILL. R. 16.3; D. MASS. R. 16.4; D. MINN. R. 16.5(b); D. MONT. R. 16.5; D. WYO. CIV. R. 16.3(b).

\textsuperscript{106}Alternatively, when judges are not involved in an initial process choice, they may play a role in exempting parties from dispute resolution as a check on an administrative determination. In districts that refer all cases with certain characteristics to a particular dispute resolution procedure, or in which an administrator selects and diverts cases, judges are often given the role of considering objections to the assigned process and deciding whether a specific case should be exempted from the referral. See, e.g., N.D. CAL. ADR R. 3-3(c); E.D.N.C. CIV. R. 101.1(a); W.D.N.C. CIV. R. 16.2(B); N.D. OHIO CIV. R. 16.7; E.D. PA. CIV. R. 53.2(3)(C)(3); W.D. TEX. CIV. R. 88(g).


\textsuperscript{108}Id. R. 30, 33(a).
settlement conferences, \(^{109}\) and the advisory committee notes stressed the new judicial planning roles that accompanied these expanded settlement opportunities.\(^ {110}\)

Further, this amendment to Rule 16 reflected the institutionalization of ADR programs at the district court level through the local expense and delay plans. The Rule contained a new reference to procedures “authorized by statute or local rule,” which signified a shift from experimentation by individual judges to more predictable procedures adopted by each district.\(^ {111}\) In this way the amendment could be seen as a mild limitation on judicial discretion.\(^ {112}\) The overall message, however, emphasized the great degree of discretion associated with settlement. The Seventh Circuit had recently upheld the exercise of judicial discretion to order a party to attend a Rule 16 settlement conference as grounded in the court’s inherent power.\(^ {113}\) Although procedural rules can limit courts’ authority to use their inherent power,\(^ {114}\) the drafters of the 1993 amendments did not seek to restrict this exercise of discretion. Instead, the advisory committee notes contain multiple references recognizing the inherent powers of courts in the context of settlement and disavowing any intent to limit reasonable judicial exercise of those powers.\(^ {115}\)

Thus the amendments were consistent with the views of judges who rejected the proposition that Rule 16 was “designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences.”\(^ {116}\) And significantly, the Rule’s endorsement of a broad scope of judicial discretion

\(^{109}\) The new rule replaced the reference to “extrajudicial” settlement procedures, Fed. R. Civ. P. 16(c)(7) (1983), with language authorizing judges to consider and “take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.” Fed. R. Civ. P. 16(c)(9) (1993).

\(^{110}\) Fed. R. Civ. P. 16(c) advisory committee’s note on 1993 amend. (“[T]he judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration . . .”).


\(^{112}\) See In re Atl. Pipe Corp., 304 F.3d 135, 142 (1st Cir. 2002) (“[T]he words ‘when authorized by statute or local rule’ are a frank limitation on the district courts’ authority to order mediation [under Rule 16] . . .” (quoting Fed. R. Civ. P. 16(c)(9) (1993)))).

\(^{113}\) G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 650 (7th Cir. 1989) (en banc).

\(^{114}\) See, e.g., Bank of N.S. v. United States, 487 U.S. 250, 254 (1988) (holding that a court cannot rely on its supervisory power in contradiction of a procedural rule); United States v. ONE 1987 BMW 325, 985 F.2d 655, 661 (1st Cir. 1993); G. Heileman Brewing Co., 871 F.2d at 652; Landau & Cleary, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996, 1002 (7th Cir. 1989); cf. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (allowing use of inherent powers when the Civil Rules did not limit the nature of the sanction); Atl. Pipe, 304 F.3d at 143.

\(^{115}\) Fed. R. Civ. P. 16(c) advisory committee’s note on 1993 amend. (acknowledging inherent judicial authority to require disputants to engage in settlement procedures without their agreement and to require party participation).

\(^{116}\) G. Heileman Brewing Co., 871 F.2d at 652.
continued to blend the (now expanded) pretrial roles of promoting, organizing, and planning for settlement with authorization for judges to act as the settlement neutrals.

D. **Stage 4: Influence of Mediation on Judicial Settlement Practices**

In a fourth phase of development that overlaps chronologically with the growth of ADR programs in courts, the nature of judicial involvement in settlement has continued to evolve. Although there is a dearth of information on how judges actually behave in settlement, there is some evidence that in recent decades mediation has exerted an increasing influence on judicial settlement activity. Mediation practices and norms appear to have had a discernable effect on how many judges conceive their role—and on what they actually do—when they act as settlement neutrals. These developments in the way judges exercise this role make separating it from their adjudicatory and management functions all the more important.

By the mid-1990s, commentators were reporting that “most federal judges favor and actively promote settlement,” creating what James Alfini described at the turn of the century as a “settlement culture” in the courts. In this culture, judges not only encourage settlement by referring parties to ADR processes, but they also frequently intervene directly in a role that Alfini tellingly labeled as “a mediator or case evaluator.” Alfini’s phrase reflects many judges’ expanded conception of their settlement roles to include facilitative mediation, but at the same time signals the ongoing vitality of more traditional settlement styles focused on evaluation.

In recent decades, judges have seen the growth in popularity of private mediation and the establishment of court-annexed mediation programs. They have had opportunities to learn to mediate: there are mediation training programs for judges and articles for judges explaining how to mediate.

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120 Alfini, *supra* note 119, at 11.

121 See *infra* notes 137–53 and accompanying text.

122 Organizations focused on judicial administration and the education of state and federal judges, such as the National Center for State Courts, Institute for Court Management, Federal Judicial Center, and the National Judicial College, have included
Judicial writing is replete with enthusiastic stories about the benefits of mediation, and what Professor Jennifer Reynolds has called “conversion narratives” that focus on the “substantive justice benefits” of mediation’s alternative perspective. Some courts have established mediation programs in which judges officially serve as mediators. More generally, many individual judges now incorporate aspects of mediation when they serve as a settlement neutral. In this context there are judges who conduct what they


The influence of these programs is indicated by the number of judicial authors writing about settlement who describe receiving mediation training tailored for judges. See, e.g., Harold Baer, Jr., History, Process, and a Role for Judges in Mediating Their Own Cases, 58 N.Y.U. Ann. Surv. Am. L. 131, 147 (2001); Stephen G. Crane, Judge Settlements Versus Mediated Settlements, Disp. Resol. Mag., Spring 2011, at 20, 21; Dan Aaron Polster, The Trial Judge as Mediator: A Rejoinder to Judge Cratsley, Mayhew-Hite Rep. on Disp. Resol. & Cts. n.3 (2006), http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/lead.html [https://perma.cc/5A6B-2JK2]. The educational trend is not limited to the United States. See Otis & Reiter, supra note 81, at 367 n.68 (stating that in Canada, the National Judicial Institute offers training programs in judicial mediation). But see John C. Cratsley, Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet, 21 Ohio St. J. on Disp. Resol. 569, 576 (2006) (claiming that many judges have no formal mediation training and tend to rely on “procedures borrowed from ADR” combined with “personal settlement techniques”).


127 See, e.g., Cratsley, supra note 122, at 573–74 (listing mediation techniques borrowed by settlement judges).
explicitly label as “mediation,” and other judges who advocate techniques for what they call “settlement conferences” that closely resemble methods associated with facilitative mediation. When set alongside more traditional judicial roles in settlement, the result is a melange of many different approaches.

The labels “mediation” and “settlement conference” are not very helpful for informing parties what to expect in a settlement process. As a starting point, although local court rules frequently authorize the two processes separately, creating an implication that they are distinct processes with separate identities, there is no precise understanding of the differences between them. The labels encompass widely varying and overlapping practices, making their use problematic. As might be expected from a process that is considered part of managing cases, a judge hosting a conference might issue orders and limit issues, or alternatively conduct a process that appears identical to a mediation session.

To confuse matters even more, although the type of process can have important legal consequences for confidentiality protections, participants and observers often make no distinction at all

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128 Karen K. Klein, A Judicial Mediator’s Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice, 81 N.D. L. REV. 771, 785 (2005); Kristena A. LaMar, I Think I Blew It, DISP. RESOL. MAG., Spring 2011, at 12, 13; Steven J. Miller, Judicial Mediation: Two Judges’ Philosophies, LITIGATION, Spring 2012, at 31, 38 (interview of Judge Polster).

129 Morton Denlow, Settlement Conference Techniques: Caucus Dos and Don’ts, JUDGES’ J., Spring 2010, at 21, 23 (advocating principles identified with mediation such as “client control of the outcome,” “confidentiality,” “creative resolution possibility,” and “preserving a continuing relationship”); Michael R. Hogan, Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation, 27 WILLAMETTE L. REV. 429, 441 (1991) (describing the judge’s role as a “communication link[] between the parties”); id. at 443–44 (characterizing the settlement process as “reorient[ing] the parties away from competitive posturing toward problem solving); id. at 445 (placing emphasis on exploring “underlying interests”); id. at 445–46 (emphasizing the need to listen and attend to feelings); see also Welsh, supra note 126, at 1019–21 (discussing the blurring of lines between settlement conferences and mediation).

130 See supra notes 94–97 and accompanying text. But see D.N.D. R. 16.2 (authorizing “mediation in the form of court-sponsored settlement conferences held by judicial officers”).

131 Stienstra, supra note 95, at 7 n.1 (arguing that categorizing settlement conferences as distinct from ADR is problematic due to a lack of firm definitions of the processes).


133 UNIF. MEDIATION ACT § 3(b)(3) cmt. (UNIF. LAW COMM’N 2003).

134 For example, in California the protection for confidentiality of communications in mediation does not apply to judicial settlement conferences. CAL. EVID. CODE § 1117(b)(2) (West 2009); see also Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc., 25 P.3d 1117, 1124 n.8 (Cal. 2001) (finding that confidentiality was required when a judge’s role was
between settlement conferences and mediation, treating them as equivalent. Others simply label them based on the position of the neutral, calling any settlement procedure conducted by a judge a “conference.” This lack of clarity in terminology illustrates the difficulty of distinguishing the processes based on their characteristics.

Along with confusion about designations, the distinction, in actual practice, between judicial behaviors in settlement conferences and mediations is not particularly clear. Even when comparing settlement conferences conducted by judges with mediations conducted by private neutrals, the contrasts are based, at best, on loose generalizations about the processes. In characterizing mediation and settlement conferences, Roselle Wissler notes a greater tendency in mediation to emphasize party involvement and to give prominence to the importance of parties’ views and interests. As a corollary to this, mediators are likely to spend more time “eliciting information from the

defined by party agreement as “act[ing] as [a] mediator for settlement conferences”). In contrast, the coverage of the Uniform Mediation Act, which establishes a privilege for mediation communications, does not rest on a distinction between mediation and settlement conferences. Instead, mediations “conducted by a judge who might make a ruling on the case” are excluded from coverage by the Act. UNIF. MEDIATION ACT § 3(b)(3).

135 See, e.g., Cratsley, supra note 122, at 571 (combining judicial mediation and settlement conferences under the label “settlement activity”); Hogan, supra note 129, at 445, 453 (referring to a judge conducting a settlement conference as a “judge mediator”); Robert A. Holtzman & Jeff Kichaven, Recent Developments in Alternative Dispute Resolution, 39 TORT TRIAL & INS. PRAC. L.J. 195, 213 (2004) (describing a court settlement process that was variously referred to as “mediation” and “settlement conference” despite the difference in applicable confidentiality rules and statutes); David A. Katz, Mediation—A Judge’s Views on Judicially Monitored Settlement Conferences, LITIGATION, Summer 2009, at 3, 3 (using terms interchangeably); Menkel-Meadow, supra note 16, at 510 (noting that some judges conducting settlement conferences call themselves mediators and are referred to as mediators); Rich, supra note 49, at 530 (identifying a settlement conference procedure as “mediation”); see also STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS (2000) (referring to active judges conducting settlement conferences in court and retired judges conducting private mediations using the single term “judicial mediator”).

136 Martin A. Frey, Does ADR Offer Second Class Justice?, 36 TULSA L.J. 727, 733 (2001) (“If the mediator is a judge, . . . the process is called a settlement conference.”).

parties than providing information to them.” Their orientation toward facilitating party self-determination makes mediators less likely to use “strong-arm tactics” than judges in settlement conferences. And mediators are thought to be more likely to adopt a problem-solving approach than the predictive or evaluative methods typically associated with judges.

Wissler stresses, however, that these differences between judicial settlement conferences and private mediations are “more a matter of degree than kind.” Difficulties in separating the processes stem in part from the wide range of approaches that mediators employ, which can encompass both facilitation and evaluation. Moreover, the plethora of retired judges who

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138 Wissler, supra note 137, at 291; see also Wayne D. Brazil, Hosting Mediations as a Representative of the System of Civil Justice, 22 OHIO ST. J. ON DISP. RESOL. 227, 233 n.9 (2007) (observing that, as a magistrate judge conducting settlement conferences, he talked more than court-trained mediators).

139 Brown, supra note 137, at 8 (describing judges as “widely perceived” to be “less interested than many mediators in . . . enhancing your client’s sense of personal empowerment over the resolution of the case”); Wissler, supra note 137, at 291–92.

140 Id. at 292; see also Craig A. McEwen, Pursuing Problem-Solving or Predictive Settlement, 19 FLA. ST. U. L. REV. 77, 78–79 (1991); Carrie Menkel-Meadow, Judges and Settlement: What Part Should Judges Play?, TRIAL, Oct. 1985, at 24, 27–28 (arguing that judges often act as arbitrators or adjudicators during settlement conferences); Pyle, supra note 137, at 21 (“[J]udges are ‘evaluators’ while . . . mediators are ‘facilitators.’” (quoting Charles B. Wiggins, professor and mediator)). Settlement conferences are also characterized as taking less time than mediation and as cheaper because there is no need to compensate a private neutral. Baer, supra note 122, at 146; Brown, supra note 137, at 8–9; Pyle, supra note 137, at 22.

141 Id. at 291 n.82; see also Hensler, supra note 117, at 17 (suggesting that settlement conferences are much like mediation, which is often evaluative and distributive); Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 H ARV. NEGOT. L . REV. 1, 25–26 (2001) (noting “uncanny resemblance” between settlement conferences and court-connected mediations, which often emphasize legal issues).


The lack of agreement on what constitutes “mediation” is reflected in a debate on what should be appropriately included in a mediator’s role. Compare, e.g., Kimberlee K. Kovach
have developed second careers as private mediators has further muddied the
distinction, as some of them have transferred stereotypical settlement
conference techniques to mediation.\textsuperscript{144}

If it is difficult to separate judges’ behaviors in court settlement
conferences from those of private mediators, it is even more difficult to
distinguish between behaviors in “settlement conferences” and “mediation”
when both are court processes conducted by judicial officers.\textsuperscript{145} Professor
Peter Robinson, who surveyed judges for a study of settlement practices in
California, found that the judges did draw a distinction between the two
processes, at least in terms of labels.\textsuperscript{146} Questions designed to elucidate the
differences, however, revealed that judges who engaged in both settlement
conferences and mediation described a substantial overlap in the techniques
they used in the two settings.\textsuperscript{147}

The picture that emerges from recent accounts of judges’ approaches to
settlement in these two contexts is one of some convergence between the

\textsuperscript{144} See James J. Alfini, \textit{Trashing, Bashing, and Hashing It Out: Is This the End of

In an observational study comparing settlement proceedings conducted by sitting and
retired judges, Stacy Lee Burns concluded that their practices were “much more similar
than different,” \textit{Burns, supra} note 135, at 210, and she labeled both processes as “judicial
mediation.” Burns found that these processes, whether conducted by sitting or retired
judges, are characterized by “active and directive intervention” with judges drawing on
their “substantive legal expertise and persuasiveness.” \textit{Id.}

The differences Burns did observe between settlement conferences conducted by
sitting judges and mediation conducted privately by retired judges stemmed primarily from
differences between the public court and private institutional settings. For example, private
judicial mediators were able to devote more time to the process and were overall more
cordial and patient, while judicial time and resources were limited in the public system and
judges could not spend time with cases that were not likely to settle. \textit{Id.} at 211.

\textsuperscript{145} Edward J. Brunet, \textit{Judicial Mediation and Signaling}, 3 NEV. L.J. 232, 238
(2002/2003) (observing that there is little difference between judicial mediation and a
settlement conference); \textit{see also} Baer, \textit{supra} note 122, at 146 (stating that both mediation
and settlement conferences “involve the judge’s recommendation as to an appropriate
resolution”).

\textsuperscript{146} They overwhelmingly reported that they call their settlement activity a “settlement

\textsuperscript{147} \textit{Id.} at 373–78. These findings were limited by the sample size, \textit{see id.}, and when
judges did report differences in their approaches to the two processes, they were consistent
with Wissler’s characterizations of mediation verses settlement conferences. \textit{See supra}
notes 137–41 and accompanying text.
processes, but with significant variation that seems to depend largely on individual style and training. Notwithstanding the judges who identify themselves as facilitators, many judges believe that lawyers and parties want an evaluation. And certainly judges’ adjudicatory experience can predispose them to an evaluative role. A judge’s approach may also reflect the stage of the settlement talks. Several judges, for example, describe beginning a conference with a facilitative approach and moving toward a more evaluative mode.

It appears that facilitative mediation has become a more important part of the mix of approaches that parties encounter in judicial settlement processes, but it coexists with a more traditional conception of an evaluative, and even directive, settlement judge. This coexistence has two consequences for the regulation of these processes. First, it does not make sense to regulate judicial

148 Professor Robinson concluded that California general civil trial court judges were less directive and had a broader focus during settlement conferences than generally expected. Peter Robinson, Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques, 33 AM. J. TRIAL ADVOC. 113, 124–39 (2009).

149 Judge Cratsley’s interviews with superior court judges in Massachusetts revealed dramatically different approaches to settlement. Cratsley, supra note 117, at 5–6; see also Agnes, supra note 82, at 265, 282 (describing variations in number of settlements, timing of settlements, and quality of settlement processes); Jonathan M. Hyman & Milton Heumann, Minitrials and Matchmakers: Styles of Conducting Settlement Conferences, 80 JUDICATURE 123 (1996) (contrasting approaches to settlement used by New Jersey judges).

150 Moreover, judicial styles are not necessarily static; some judges report that they have changed their approach over time. See, e.g., LaMar, supra note 128, at 14 (describing the evolution of her settlement process to involve clients, joint sessions, and expression of emotions).

151 Compare, for example, Judge Polster’s description of himself as “a facilitator” in mediation, Miller, supra note 128, at 38 (quoting Judge Polster), with Professor Brunet’s observation that most judges who mediate use primarily an evaluative style, Brunet, supra note 145, at 235.

152 Klein, supra note 128, at 784–85; see also Aldisert, supra note 38, at 248 (observing that many cases involve a disagreement on value, not facts, and “I am usually asked my suggestion of value and I have no hesitation in offering my ideas”); Baer, supra note 122, at 136 (describing how caucuses can provide a judge with a view of the appropriate resolution of the case, the “hallmark” of evaluative mediation); Brown, supra note 137, at 9 (asserting that many judges and lawyers believe evaluative techniques contribute to settling as many cases as possible); Crane, supra note 122, at 21 (retired judge observing that parties who hired him as a mediator expected an opinion on the merits). But see Dein, supra note 126 (expressing hesitancy to predict outcomes based on the limited information available to her in mediation); Otis & Reiter, supra note 81, at 369 (urging that in Canada a judge-mediator should refrain from expressing any opinion on the legal merits).

involvement in mediation and settlement conferences separately, as is now typically done in local federal rules. Second, any form of regulation must take into account the great variation in styles and approaches that judges deploy as neutrals in these processes. While evaluative techniques emphasize predictions and suggestions that flow from the neutral to the attorneys and parties, use of facilitative techniques mean that information flows in the opposite direction. This information is different in kind from the knowledge about a case that a judge ordinarily gains as part of pretrial management, in deciding pretrial motions, and at trial. And it can come from an additional source—the parties—as well as the attorneys. As a consequence, the increased popularity of mediation makes settlement by adjudicative judges more problematic.

The current version of Rule 16 accommodates this variety of judicial approaches and settlement styles by its silence on this matter, which translates into granting judges nearly complete discretion for conducting settlement proceedings. The Rule 16 framework continues to blend authorizations for disparate judicial functions related to settlement. This extends the discretion associated with pretrial management to the role of settlement neutral, allowing judicial officers to host a settlement conference or mediate even when assigned to the case.

154 See supra note 97 and accompanying text.
155 See supra text accompanying note 138; infra text accompanying notes 230–32.
156 See supra text accompanying note 137.
157 After stylistic revisions in 2007, the pertinent part of Rule 16 now reads:

Rule 16. Pretrial Conferences; Scheduling; Management

(a) PURPOSES OF A PRETRIAL CONFERENCE. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(5) facilitating settlement.

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(i) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule.
III. NEUTRAL ROLES: WHEN A DECIDER BECOMES A SETTLER

The following section starts in Part III.A by examining the benefits of judicially-led settlement, but then distinguishes settlements led by an assigned judge from those led by other judicial officers. In Part III.B, it explains why the blending of adjudicatory and settlement functions is problematic for two reasons: the potential for coercion in settlement and the dangers of undermining the impartiality at the heart of our adjudicatory values. These risks are exacerbated by the trend toward the use of facilitative mediation techniques by judges. The concerns are expressed by attorneys with experience in judicial settlement and by some judges, as well as by academics. Crucially, they are supported by modern scientific understandings of cognition and decisionmaking processes, which are outlined in Part III.C.

A. The Advantages of Judicially-Led Settlement

There can be distinct advantages to settlement conducted by a judicial officer. An individual judge may have a reputation for wisdom and fairness, and these traits also tend to be imputed in general terms from the “gravitas” of the judge’s position and respect for the moral authority and integrity associated with the impartiality and independence of their office. Other advantages stem from the legal acumen and experience that a judge brings to a settlement process. These factors do not compensate for lack of skill, but


160 See, e.g., BURNS, supra note 135, at 208–10 (describing legal content in mediations conducted by judges: legal reasoning; argumentation; precedent; knowledge of local juries, judges, court procedures, and outcomes in similar cases); Dein, supra note 126 (describing advantages of experience in the courtroom for her role as a mediator); Marcus, supra note 15, at 1592 (noting that settlement conferences provide the parties with the “insights of an experienced outsider about the strengths and weaknesses of a case”).

161 Claudia L. Bernard, Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal, DISP. RESOL. MAG., Spring 2011, at 16, 17 (arguing that a judge’s status and authority do not trump skill and experience as a mediator); Stephen B. Goldberg et al., What Difference Does a Robe Make? Comparing Mediators With and Without Prior Judicial Experience, NEGOT. J., July 2009, at 277, 277 (finding that the capacity of a mediator to gain the confidence of the disputants was the most important factor in attorneys’ judgments about why a mediator is successful).
judges who combine skill with the attributes of their position can be particularly effective settlement neutrals.162

Judges carry special credibility for functions that draw on legal analysis and expertise: evaluating the value of a case, analyzing parties’ positions, and predicting outcomes.163 Significantly, many lawyers see these activities as an important contribution toward settlement. Based on his survey of lawyers, Wayne Brazil characterized the strength of judges’ contribution as “skill in judging.”164 He concluded that “[l]awyers value penetrating, analytical exposition and thoughtful, objective, knowledgeable assessment. They want the judges’ opinions. They want the judges’ suggestions. They want the perspective of the experienced neutral.”165 Lawyers cite the benefits of a judge who provides a “reality check” for a client who has an inflated view of the strength of her case.166 Judges may also provide insights about the litigation process that a client may not have fully accepted even if he previously heard the same information from counsel.167 While any mediator may (and some routinely do) provide such information, explanations about the hurdles involved in proving a case or sobering assessments of its strength can be particularly effective coming from a sitting judge.168 A judge’s current, direct

162 Alexander, supra note 118, at 652 (noting that the “primary reason why settlement conferences are so effective is the authority and expertise of the judge who conducts them”); Cratsley, supra note 122, at 574 (“[N]o one can dispute that a judge has the greatest standing and resources to promote settlement.”).

163 In Professor Wissler’s study of attorneys’ views of settlement neutrals, judges were seen as having more “credibility regarding settlement considerations” than court staff mediators, private mediators, or volunteer mediators. Wissler, supra note 137, at 292, 293 tbl.1; see also Brunet, supra note 145, at 239 (noting the “evaluative legitimacy” of judges); Pyle, supra note 137, at 21 (stressing the advantage of a “credible evaluator” in a settlement conference). But see Dein, supra note 126 (judge noting that when she serves as a mediator she has limited information and no sense of the witnesses, and is therefore loath to make predictions).

164 BRAZIL, supra note 59, at 45.

165 Id. Judges also consider these activities as important for encouraging settlement. See Hogan, supra note 129, at 450; Zampano, supra note 137, at 69. There is some empirical evidence to support these views. See Bobbi McAdoo et al., Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?, DISP. RESOL. MAG., Winter 2003, at 8, 9 (reporting that cases are more likely to settle and litigants are more likely to assess mediation as fair when mediators disclose their view on the merits or value of a case).

166 See, e.g., Martin, supra note 159, at 192; see also Hogan, supra note 129, at 449 (opining that judges can ensure a realistic view of liability and damage issues).

167 Dale, supra note 159, at 59 (citing example of providing information about burden of proof); Polster, supra note 122 (judge noting that clients will accept information from him when they were unwilling to listen to their attorney).

168 Crane, supra note 122, at 20–21; Dale, supra note 159, at 47; Martin, supra note 159, at 192; see also Goldberg et al., supra note 161, at 288 (finding that lawyers rate evaluation skills as more important to the success of former-judge mediators than nonjudge mediators).
experience with local juries and motions outcomes heightens confidence in her predictions.\(^{169}\)

In addition to the advantages of their informed legal analysis, the participation of a judge also offers the possibility of some psychological benefits. Many judges believe that, for some clients, an ADR session with a sitting judge can provide a satisfactory substitute for having a day in court.\(^{170}\) Observers also credit the participation of a sitting judge with beneficial effects on litigants’ behavior.\(^{171}\) Attorneys may act more constructively when there is a chance that they will appear before the judge in the future.\(^{172}\)

Finally, a judge’s participation as a settlement neutral can promote the interests of justice. Support for court settlement programs is consistent with a vision of courts as public institutions that provide services to help parties resolve their disputes in a holistic manner.\(^{173}\) ADR programs that rely on referrals to outside mediators or other neutrals impose costs that litigants do not incur when a court provides the settlement process. Furthermore, when settlement neutrals are judicial officers, at least some observers credit them with using their skills and powers to achieve substantive outcomes in settlement that promote the interest of justice,\(^{174}\) that the parties think are fairer than an imposed decision,\(^{175}\) and that may serve the parties’ needs and interests better than adjudication.\(^{176}\)

Many of these real advantages of judicial settlement or mediation can be achieved with a separate settlement judge—one who is not assigned for pretrial development or to preside at trial. Some do argue that a judge’s contribution is stronger if the settlement effort is led by the assigned judge.\(^{177}\) For example, there are judges who believe that parties are more likely to feel they have had a true “day in court” when they can tell their story to “their”

\(^{169}\) For example, with a jury trial, a sitting judge has credibility in predicting how a local jury will react to a case, or in highlighting the unpredictability of jury deliberations. Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, *Litigation*, Spring 2009, at 17, 19. Some commentators believe that current local knowledge gives sitting judges credibility that even retired judges lack. See, e.g., Brown, *supra* note 137, at 8; Dale, *supra* note 159, at 47. But see Burns, *supra* note 135, at 209 (citing use of “experience-based local knowledge” by both sitting and retired judge-mediators).


\(^{172}\) Id. at 193.

\(^{173}\) See Brazil, *supra* note 138, at 240–41.


\(^{175}\) Hogan, *supra* note 129, at 436.

\(^{176}\) Menkel-Meadow, *supra* note 16, at 504.

\(^{177}\) See, e.g., Craver, *supra* note 123, at 42 (noting the argument that settlement participants are more conciliatory and less likely to exaggerate the strength of their case with the judge assigned for trial because they don’t want to appear obstinate before the future decisionmaker).
However, the parties’ perception that they have been heard is likely enhanced only incrementally when the assigned judge serves as the settlement judge, especially if the alternative is a judicial officer from the same court.\footnote{Brazil Interview, supra note 153, at 27 (quoting Judge Klein); Polster, supra note 122.}

The more significant advantage of settlement by an assigned judge, and the strongest argument against referral to another judicial officer, is probably informational.\footnote{Moreover, while “being heard” is an important element of a sense of procedural justice, it is probably related more to the behavior of a neutral than to her judicial status. See, e.g., Goldberg et al., supra note 161, at 298 (“The authority of the robe was sometimes a substitute for keen listening and creativeness and former judges therefore may not have developed these skills as well because they haven’t had to when they had the authority of the robe . . . .” (omission in original) (quoting survey respondent)).} A judge who has ruled on pretrial motions and discovery issues has personal knowledge of the facts, the parties, and counsel that a colleague on the court cannot possess at the start of a settlement process.\footnote{See Brunet, supra note 145, at 257.} This familiarity increases the efficiency of settlement\footnote{See, e.g., Menkel-Meadow, supra note 16, at 512 (attributing some of a judge’s settlement authority to the judge’s “power, control, or knowledge of the specific case”).} and may make the assigned judge more accurate in evaluating the strengths and weaknesses of the case.\footnote{Polster, supra note 122 (emphasizing the judge’s understanding of a case obtained from the case management conference and the limited time available to prepare for settlement of a case on another judge’s docket); see also Miller, supra note 128, at 35 (“There’s a lot of work that goes into a successful mediation . . . .” (quoting Judge McCarthy)); Polster, supra note 122 (emphasizing the importance of preparation for credibility); Zampano, supra note 137, at 4 (stressing need for the judge to be familiar with the case).} The informational argument loses force, however, if settlement occurs early in the case before extensive pretrial activity.\footnote{Evaluation and prediction by an assigned judge has been endorsed as providing a signaling function that can inform parties’ assessment of their prospects at trial. Brunet, supra note 145, at 234.} Moreover, the possible gains in efficiency when an assigned judge serves as settlement judge must be weighed against the very substantial risks.

B. Risks of Judicially-Led Settlement

There are risks to judicially-led settlement. And those risks are exacerbated when the settlement judge is also the managerial/adjudicatory judge. This Part presents arguments that these roles are in conflict and should be separated. First, the potential for coercion due to the behavior of the settlement neutral is greatly heightened when the parties will return to that neutral for pretrial and trial decisions. Second, there are dangers for both the settlement and decisionmaking processes. Either a party must forgo

\footnote{See generally JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION (2d ed. 2015).}
participating fully in settlement by revealing information that could be instrumental, or it must accept the risk of impaired neutrality in adjudication if the case does not settle.

1. The Potential for Coercion

The potential for coercion was the original source of hesitation about a judicial role in settlement, and it continues to be a frequent objection today. A sense of being coerced into settling is in the eye of the parties and their attorneys, and there are two potential sources: judicial behaviors during settlement and pretrial decisions and management designed to encourage settlement.

When considering judicial behavior, it is helpful to remember that the role of a judge in the adjudication process is by its nature directive. This personal experience, combined with the predilections of some judges, can lead them to be forceful arm twisters. Such behavior on the part of any settlement neutral can threaten the parties’ self-determination, but there is a heightened danger when the behavior comes from a judge: the authority of the office accompanies a judge even in an informal process such as a settlement conference or mediation. The gravitas that can be a positive source of credibility for a judge leading a settlement process can, when misused, turn the judge into a coercive authority figure in the parties’ eyes.

The potential for coercion is elevated many fold when the arm twisting, or even less forceful encouragement, comes from a judge who will have decisional power over the case if it does not settle. This stems from parties’

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185 See supra notes 20–21 and accompanying text.
186 See Brunet, supra note 145, at 248 (stating that the most common criticism of judicial settlement is that judges can be “overly coercive”).
187 See, e.g., Goldberg et al., supra note 161, at 298 (“Because they’ve been judges, they’re used to being able to tell you what to do and what not to do.” (quoting a survey respondent, describing a retired-judge mediator)).
188 Alfini, supra note 144, at 68–71 (describing “bashing” mediators, who are often retired judges); Brown, supra note 137, at 9 (acknowledging that judges’ approach can be “rough” and observing that this can have a negative effect on clients’ views of the civil justice system); Brunet, supra note 145, at 248; Marcus, supra note 15, at 1592 (noting instances when judges use “rather firm techniques of persuasion to obtain agreements”).
189 See Otis & Reiter, supra note 81, at 367 (observing that maintaining party self-determination is a special challenge for judges, “since they will always remain judges in the eyes of the parties,” even in the “informal setting” of mediation).
190 See Floyd, supra note 10, at 90 (“[T]he judge’s position, as opposed to the particular action of the judge, may have coercive effect.”).
191 Crane, supra note 122, at 22 (noting that the “environment is inherently coercive” when a settlement conference is conducted by the judge who will have power over the case at trial); see also UNIF. MEDIATION ACT § 3(b)(3) cmt. (UNIF. LAW COMM’N 2003) (recognizing “concern that party autonomy in mediation may be constrained either by the direct coercion of a judicial officer who may make a subsequent ruling on the matter, or by
natural fears that the judge’s subsequent rulings might be influenced by their failure to cooperate with the judge. Judges are under great docket pressure, and parties worry that repercussions could follow when the judge knows a party rejected a settlement backed by the judge. Defenders of a dual role for judges as a neutral, both in settlement and at trial, reject this specter of retribution as an unrealistic fear that underestimates judges’ understanding of their role. But even if judges are able to see the parties’ failure to settle in completely benign terms, a party’s perception may be very different. When a judge has urged settlement forcefully, a party may understandably interpret settlement as being important to that judge.

More generally, judges’ perceptions of their behaviors are not always aligned with the reactions of attorneys and parties. Actions that a judge may regard as merely supportive of settlement may nonetheless be perceived as pressure on a party due to the judge’s position of power over the case. For example, a judge’s pride in his “assertive” style, which he believes promotes settlement in difficult cases, can blind him to the risk that he is imposing settlement coercively.

It is impossible to assess accurately the degree to which parties perceive judges as unduly forceful in settlement, but there are too many troubling accounts of behavior that, even if only isolated instances, could be coercive.

the indirect coercive effect that inherently inures from the parties’ knowledge of the ultimate presence of that judge”).

192 Crane, supra note 122, at 22; Welsh, supra note 142, at 67.
193 Brunet, supra note 145, at 247; Frey, supra note 136, at 760; Longan, supra note 126, at 736–37.
194 Hogan, supra note 129, at 439 (“[J]udges who understand and use successful intervention tactics in the negotiation process would [not] blame one particular party for a case not settling.”) (emphasis omitted); see also Baer, supra note 122, at 148 (commenting that it is “demeaning . . . to suggest . . . that the judge cannot be fair regardless of the result of the mediation”).
195 See Molot, supra note 174, at 93 (arguing that a party urged by a judge to settle has an incentive to avoid proceeding before a potentially hostile judge); Schuck, supra note 158, at 359–61 (warning of judicial overreaching and the danger that lawyers will interpret judicial involvement in settlement as coercion).
196 D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 92 (1986) (“Settlement-oriented judges . . . tend to resist the idea that judicial involvement in the settlement process might be coercive.”).
198 See Dodds v. Comm’n on Judicial Performance, 906 P.2d 1260, 1270 (Cal. 1995) (concluding that judge’s interruptions and unprovoked displays of anger “exceed[ed] his proper role and cast[] disrepute on the judicial office”); see also Peskin v. Peskin, 638 A.2d 849, 858 (N.J. Super. Ct. App. Div. 1994) (finding comments that were likely intended to force a decision on whether or not to settle instead “unquestionably had the effect of coercing defendant into agreeing to settle”).
199 See, e.g., Newton v. A.C. & S., Inc., 918 F.2d 1121, 1126 (3d Cir. 1990) (finding fine levied for reaching settlement after court’s deadline was coercive); Crane, supra note
Consider the judge who reportedly instructed plaintiff’s counsel to “tell his client he’d better settle or there would be ‘reverse interest’ if the damage award was lower.” Or the judge who threatened contempt and warned that he would take defendant’s refusal to settle into account in considering any fee application. Then there was the judge who allegedly threatened to report a party to the ethics committee if the mediation did not succeed. Even less explicit threats, such as an admonition to settle “because I can guarantee you much pain,” or a judge’s antagonistic reaction to counsel’s statement that mediation would not “work out right now,” can be interpreted as coercive. The potential coercion in all these instances, and the interference with the parties’ autonomy and self-determination in settlement, arises because the judge will become the decisionmaker if the case does not settle.

There can also be an important link between actions a judge takes in her pretrial management role—whether for the purpose of encouraging settlement or not—and a perception of coercion to settle. Tight scheduling timetables or the timing of decisions on pretrial motions are often interpreted as ways to increase pressure to settle. Preliminary rulings can increase or decrease...
uncertainty in ways designed to encourage settlement. Prospective decisions that rest with the court’s discretion and are of great importance to the lawyers—ranging from class certification to discovery decisions to admissibility of expert testimony—give the judge subtle and implicit leverage over the lawyers, who want the judge to view them as reasonable and cooperative. Using judicial decisions to create motivation to settle can be abused, or perceived to be abused, by a judge who is enthusiastically promoting settlement.

Unfortunately, mechanisms to remedy coercive judicial settlement behavior are not effective in practical terms. One problem is definitional. Courts consistently agree that a judge may not coerce or force a settlement, and some condemn even the appearance of coercion. Yet judges have abundant discretion in settlement, and the boundaries of appropriate judicial involvement are hazy. While the stricture against coercion in settlement may be clear at the extreme, the line at which a judicial practice crosses from (acceptably) encouraging a settlement to (unacceptably) coercing one is certainly not bright.

A second set of problems is procedural. Critical or even hostile remarks made during judicial proceedings ordinarily do not require recusal unless they stem from an extrajudicial source or are especially extreme. Standards for recusal are difficult to meet; unless a judge learns information outside of court proceedings, he must display such a “deep-seated favoritism or antagonism” that fair judgment would be impossible. Even when a judge’s comments are

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208 Schuck, supra note 158, at 351–53 (discussing how preliminary rulings in the complex Agent Orange case assisted settlement: a decision precluding punitive damages reduced uncertainty about the stakes of the case, while key choice-of-law decisions increased uncertainty about its outcome).
209 Id. at 358–59 (attributing lawyers’ cooperation in settlement to “professional norms and strategic concerns”).
210 Id. at 360–61 (describing attorneys’ allegations of improper pressure by Judge Weinstein to achieve settlement in the Agent Orange case).
212 See, e.g., In re Ashcroft, 888 F.2d 546, 547 (8th Cir. 1989) (per curiam).
213 See, e.g., Goss Graphics Sys., Inc. v. DEV Indus., Inc., 267 F.3d 624, 627–28 (7th Cir. 2001) (reversing dismissal of suit imposed as a sanction due to parties’ failure to settle); Kothe, 771 F.2d at 669–70 (condemning coercion and reversing a sanction imposed when a case settled at trial after the insurance carrier agreed to pay the same amount the judge had recommended weeks earlier).
214 Floyd, supra note 10, at 83; Shoot & McGrath, supra note 197, at 34; Tornquist, supra note 50, at 752.
215 See generally Elliott, supra note 46, at 329–33 (criticizing active case management for lack of procedural safeguards); Resnik, supra note 1, at 424–35 (same).
217 Id. at 555.
motivated by “settlement fever,” they do not justify disqualification.\textsuperscript{218} Moreover, the decision to press a disqualification motion is a daunting prospect for a party who will later be appearing before that same judge if the motion fails.\textsuperscript{219} Finally, there is little opportunity for review of a judge’s settlement activity.\textsuperscript{220} It is an informal process that usually takes place off the record, often in the privacy of the judge’s chambers. As with much pretrial judicial activity, there are few procedural paths to an appellate court.\textsuperscript{221}

\textit{2. The Dilemma of Risk to Impartiality or Risk of Reticence}

Many of the participants in the debate on judicial settlement have also expressed concern about a second danger that arises when the judicial officer leading the settlement will resume or assume a decisionmaking role if settlement is unsuccessful: the effect of the judge’s experience as settlement neutral on the capacity of the judge as adjudicator. The argument has been traditionally framed as one of bias or partiality: that involvement in settlement makes it difficult for a judge to maintain her neutrality about the case.\textsuperscript{222} As stated by James Alfini, “The judge \textit{qua} settlement agent may very well have formed opinions or impressions about the case that are inappropriate for the judge \textit{qua} adjudicator.”\textsuperscript{223}

For a traditional settlement conference that involves an evaluative approach, one of the primary criticisms of a judge presiding in a case she has tried to settle is that, by conveying her assessment of the case or suggestions for settlement options to the parties, she formed a preliminary judgment about the outcome that may trigger a tendency toward making subsequent judgments consistent with her initial views.\textsuperscript{224} This criticism has support from modern understandings of the effect of tentative opinions on cognitive functioning.\textsuperscript{225} Conversely, a decision that is inconsistent with the prior views a judge expressed as a devil’s advocate in caucus may equally cause a party to

\textsuperscript{218} \textit{Johnson v. Trueblood}, 629 F.2d 287, 291 (3d Cir. 1980).
\textsuperscript{219} \textit{Floyd}, \textit{supra} note 10, at 83.
\textsuperscript{220} \textit{id.} at 82–83.
\textsuperscript{221} Either the situation must qualify for mandamus, or there must be an appealable order in the trial court (such as a sanctions order or dismissal) to provide a vehicle to challenge inappropriate settlement behavior. \textit{id.} at 82. Ironically, when coercion to settle is effective, the case is closed, leaving no avenue to raise an objection. \textit{id.} at 82–83.
\textsuperscript{222} \textit{Resnik}, \textit{supra} note 1, at 426–31; \textit{Tornquist}, \textit{supra} note 50, at 771–72; \textit{see also}\ \textit{Elliott}, \textit{supra} note 46, at 327.
\textsuperscript{223} \textit{Alfini}, \textit{supra} note 119, at 13.
\textsuperscript{224} \textit{See, e.g., Cratsley}, \textit{supra} note 122, at 581; \textit{cf.} Lon L. Fuller, \textit{The Adversary System} (“An adversary presentation seems the only effective means for combating th[e] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.”), \textit{in TALKS ON AMERICAN LAW} 34, 44 (Harold J. Berman ed., rev. ed. 1971).
\textsuperscript{225} \textit{See infra} text accompanying notes 305–07.
question that judge’s impartiality. Yet, courts disagree as to whether taking a position on the merits of a case during an unsuccessful settlement conference creates an appearance of bias, leaving recusal uncertain.

When the criticism is framed, in this way, as a concern with the judge’s formulation of a premature evaluation of the case, one possible solution is that assigned judges should avoid making predictions or suggestions in settlement. Under this view, using facilitative mediation, rather than the evaluative approach associated with traditional settlement conferences, can alleviate the problem of bias because the judge avoids making predictions and providing suggestions for outcomes. From this perspective, the trend toward judges’ increased use of facilitative mediation is good news that reduces the danger to their subsequent neutrality as decisionmakers.

I believe that the opposite is true, and that the growth of judicial mediation poses new dangers for impartiality in subsequent decisionmaking. Although judges who adopt the role of a facilitative mediator are not as likely to evaluate the case for the parties, a facilitative approach to mediation tends to rely heavily on parties sharing information with each other and with the mediator. Moreover, many mediators have conversations with the parties separately in caucuses and take on the role of an intermediary between them. This intermediary role depends entirely on information gained in those private conversations. The danger to impartiality is the extensive

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227 Compare United States v. Pfizer Inc., 560 F.2d 319, 322–23 (8th Cir. 1977) (per curiam) (proposing that a settlement figure creates appearance of bias requiring judge’s recusal for a bench trial), and First Wis. Nat’l Bank of Rice Lake v. Klapmeier, 526 F.2d 77, 80 n.6 (8th Cir. 1975) (same), with Franks v. Nimmo, 796 F.2d 1230, 1233–34 (10th Cir. 1986) (finding no appearance of bias when judge urged plaintiff in ex parte meeting to settle because judge could not rule in his favor), and Smith v. Sentry Ins., 752 F. Supp. 1058, 1061–62 (N.D. Ga. 1990) (denying recusal request based on judge’s comments on the merits of plaintiff’s case during a settlement conference). Moreover, again, there are also procedural barriers to success with a motion to recuse or disqualify. See Floyd, supra note 10, at 83–84.

228 See, e.g., Kearny, 2007 WL 3171395, at *2 (opining that the ethical obligations of a presiding judge “limit[] the judge’s ability to speak candidly”).

229 Robinson, supra note 122, at 372–73; see also Brazil Interview, supra note 153, at 26 (Judge Klein expressing the view that parties are less likely to fear that settlement will color subsequent rulings if a judge uses a facilitative approach, whereas a highly evaluative style raises questions about a judge’s ability to remain neutral).


232 Often a mediator does not convey the information explicitly to the other side, but instead engages in a process of “noisy translations.” Id. at 328.
amount of information—unfiltered by the rules of evidence—that judges obtain during informal mediation proceedings.\textsuperscript{233} While an evaluative approach poses problems when a judge communicates conclusions to the parties, the information that flows in the opposite direction in a facilitative process—from the parties to the judge—poses its own risks to adjudicative decisions.\textsuperscript{234}

The argument against connecting impaired impartiality with making suggestions and predictions or hearing sensitive information in settlement is that judges can compartmentalize their knowledge and ignore what they should not consider. In the words of one judge, judges are expected to separate their thoughts for separate rulings all the time.\textsuperscript{235} They hear both admissible and inadmissible information when they decide pretrial motions, make evidentiary rulings, and dispose of posttrial motions.\textsuperscript{236} The general presumption is that judges can be trusted to maintain impartiality by separating what they may appropriately consider from what they may not,\textsuperscript{237} and this presumption extends to what judges learn in settlement conferences.\textsuperscript{238} Evidence that judges, like other humans, have difficulty disregarding irrelevant information suggests that this confidence may be misplaced.\textsuperscript{239} But even if we must accept, as a general matter, the risk that inadmissible information may affect decisions, the type of information conveyed in settlement discussions raises much more acute concerns. Stated simply, it is different in kind.\textsuperscript{240}

For judges functioning as mediators, information gathering from the parties is central to the process of reaching an agreement.\textsuperscript{241} Mediators do not just hear inadmissible information; they hear personal information, and they

\begin{itemize}
\item \textsuperscript{233} Professor Resnik argued that this was a more general problem associated with all pretrial proceedings. Resnik, supra note 1, at 426–27.
\item \textsuperscript{234} See infra notes 241–46 and accompanying text.
\item \textsuperscript{235} Hogan, supra note 129, at 439–40.
\item \textsuperscript{236} Id.; see also Cratsley, supra note 122, at 588 n.69.
\item \textsuperscript{237} See, e.g., Enter. Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001); Pizzuto v. State, 10 P.3d 742, 748 (Idaho 2000); Hite v. Haase, 729 N.E.2d 170, 176 (Ind. Ct. App. 2000); see also JUDICIAL CONFERENCE OF THE U.S., Advisory Opinion No. 95 (2009) ([hereinafter Advisory Opinion No. 95] (“Judges . . . periodically receive information that is not admissible and exclude it from their deliberations before rendering judgment. It is not unreasonable to credit their ability to be impartial in these circumstances.”), in 2B GUIDE TO JUDICIARY POLICY ch. 2, § 220, at 161, 162, http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf [https://perma.cc/2BTP-LKKL] (last revised Apr. 25, 2016).
\item \textsuperscript{238} Cratsley, supra note 122, at 583 n.49 (citing cases). For judicial expressions of confidence in this ability, see infra note 318.
\item \textsuperscript{239} See infra notes 293–99 and accompanying text.
\item \textsuperscript{240} Brazil Interview, supra note 153, at 25 (quoting Judge Bremer stating that a judge is likely to learn about the parties’ interests, strategies, and the value their counsel places on the case).
\item \textsuperscript{241} FRENKEL & STARK, supra note 230, at 169 (“If a resolution is to be achieved in mediation, both the parties and the mediator need far more and different information than a judge would need to decide a case.”).
\end{itemize}
hear it from parties as well as from their attorneys.\textsuperscript{242} To help the parties settle their dispute, it is important for a mediator to learn “about the parties’ feelings, motivations, relationships, values, standards and priorities—topics generally irrelevant to a judge.”\textsuperscript{243} It is commonplace, for example, for parties in mediation to describe their personal interests. For example, a mediator may learn why a party needs to settle quickly, or why a party needs a particular sum of money. And this is not dry information; parties often express their personal situation in emotional terms, which makes it especially salient and more accessible in the judge’s memory.\textsuperscript{244} A mediator is also likely to become privy to parties’ strategies, priorities, and trade-offs as she discusses their bargaining concessions.\textsuperscript{245} Moreover, in the course of these discussions she is bound to gain an impression of each party’s degree of cooperation and willingness to settle. Perhaps most significantly, the discussion is likely to cover extensively the attorneys’ assessments of their cases: their view of the most likely outcome, the litigation cost, and the bottom line for reaching an agreement. Indeed, it “would be difficult . . . to conduct a settlement conference without at some point dealing with the issue of value.”\textsuperscript{246} The key point is that exposure during settlement to the parties, to their strategies, and to the settlement value of a case go far beyond what judges usually learn in their adjudicatory and managerial roles.

The potential effect of this knowledge on a judge’s subsequent decisionmaking needs to be taken seriously. As recognized in an American Bar Association (ABA) ethics opinion on settlement, such disclosure to the judge of a client’s settlement position significantly increases the potential for an unsatisfactory disposition of the case.\textsuperscript{247} The Judicial Conference’s Committee on Codes of Conduct concurs, concluding that information from settlement that is not likely to be presented at trial “may undermine the judge’s objectivity as a fact finder and give rise to questions about impartiality.”\textsuperscript{248} Standards for recusal and disqualification are not, however, tailored for

\begin{itemize}
  \item \textsuperscript{242} See \textit{supra} note 137 and accompanying text.
  \item \textsuperscript{243} \textit{Frenkel} & \textit{Stark}, \textit{supra} note 230, at 169 (emphasis omitted).
  \item \textsuperscript{244} \textit{Jennifer K. Robbenolt} & \textit{Jean R. Sternlight}, \textit{Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making} 73 (2012).
  \item \textsuperscript{246} \textit{Brazil Interview}, \textit{supra} note 153, at 25 (quoting Judge Bremer expressing special concern about settlement disclosures of case valuation).
  \item \textsuperscript{247} ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370 (1993), http://www.americanbar.org/content/dam/aba/publications/YourABA/93_370.authcheckdam.pdf [https://perma.cc/B2TM-75U8] (discussing judicial participation in pretrial settlement negotiations and concluding that a judge may ask a lawyer to disclose settlement limits authorized by the client and inquire about the lawyer’s advice on settlement terms, but that a lawyer may not reveal that information without informed client consent).
  \item \textsuperscript{248} Advisory Opinion No. 95, \textit{supra} note 237, at 162.
\end{itemize}
settlement and do not provide an effective vehicle for considering the effect of information from settlement on subsequent decisionmaking. While there are court decisions that condemn mediator reports to assigned judges or testimony that reveals information learned in mediation, such knowledge does not usually lead to disqualification of the judge. Even when a judge gains knowledge about what transpired in mediation directly from his role as the settlement neutral, the effect of that knowledge tends to be treated as benign. Courts have interpreted the federal statute on disqualification and recusal for bias or prejudice in light of the “extrajudicial source” doctrine. The judge’s favorable or unfavorable opinion must be wrongful either because it is “excessive in degree” or based on extrajudicial knowledge. This means the bias cannot be “derived from the evidence or conduct of the parties that the judge observes in the course of the

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249 E.g., Duininck Bros., Inc. v. Howe Precast, Inc., No. 4:06-cv-441, 2008 WL 4411608, at *2 (E.D. Tex. Sept. 23, 2008) (order granting defendant’s motion to strike) (striking mediator as expert witness and noting that sensitive, highly relevant information was disclosed to the mediator on the understanding that it would facilitate settlement); VJL v. RED, 39 P.3d 1110, 1113 n.3 (Wyo. 2002) (reprimanding mediator for reporting on party’s behavior during mediation). But see Harkrader v. Farrar Oil Co., No. 2004-CA-000114-MR, 2005 WL 1252379, at *2 (Ky. Ct. App. May 27, 2005) (refusing to reverse a court order enforcing a settlement when trial court had considered an affidavit from a mediator).

250 E.g., Enter. Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001) (holding that a judge who learned of mediation settlement offers in violation of confidentiality statute was not disqualified); Metz v. Metz, 61 P.3d 383, 389 (Wyo. 2003) (holding that a judge who heard evidence about divorce mediation was not required to recuse).

251 See Blackmon v. Eaton Corp., 587 F. App’x 925, 933–34 (6th Cir. 2014) (holding that a magistrate judge was not disqualified from issuing a report and recommendation in a case he had previously mediated); Zhu v. Countrywide Realty Co., 66 F. App’x 840, 842 (10th Cir. 2003) (rejecting a claim that it was improper for a magistrate judge who served as mediator to recommend that the contested settlement agreement be enforced); Rehkoph v. REMS, Inc., 40 F. App’x 126, 130 (6th Cir. 2002) (finding no error when the trial judge acted as mediator and then decided motion for summary judgment); Garrett v. Delta Queen Steamboat Co., No. 05-1492-CJB-SS, 2007 WL 837177, at *2 (E.D. La. Mar. 14, 2007) (denying motion to recuse the magistrate judge based on argument that her involvement as mediator would cause her to be prejudiced and vested in enforcement of the contested settlement); DeMers v. Lee, 99 Wash. App. 1056 (Ct. App. 2000) (per curiam) (finding no violation of the appearance of fairness doctrine when the judge who presided at the settlement conference enforced the contested agreement). But see In re Disqualification of Unruh, 937 N.E.2d 1030, 1031 (Ohio 2010) (ordering disqualification of trial judge who participated in mediation from evidentiary hearing on disputed settlement agreement because of the likelihood she would be called to testify about the agreement).


253 Liteky v. United States, 510 U.S. 540, 553–55 (1994). The same requirement for an extrajudicial source of bias has been applied in cases refusing to reverse decisions for alleged judicial bias in a decision. Floyd, supra note 10, at 72–74.

proceedings.” A judge’s knowledge acquired from participating in a settlement proceeding is not “extrajudicial,” and thus does not necessitate recusal.

A party may choose to avoid the risk of sharing information that might affect future decisions of the neutral, but the cost of reticence can be high. The reason this information is shared is that it is helpful to the settlement process. Withholding it handicaps a mediator and very likely reduces the chances of settlement, or at least the responsiveness of the settlement to the party’s needs. Thus a party whose mediator is also the decisionmaker in a case faces a difficult choice: accept the risks to impartiality of sharing sensitive information with a looming trial, or risk a less effective settlement process.

3. From the Trenches: Attitudes of Attorneys

The risks are also expressed by lawyers with reservations about a dual role for judges. Despite expressing a high degree of approval for a settlement judge’s participation in settlement negotiations, almost 60% of the lawyers who responded to Wayne Brazil’s study in the early 1980s felt it was improper for the judge assigned to conduct a bench trial to preside over a settlement process. The assignment for trial also had a strong effect on lawyers’

256 See, e.g., Sec. & Exch. Comm’n v. Sunwest Mgmt., Inc., No. 09-6056-HO, 2009 WL 1065053, at *2 (D. Or. Apr. 20, 2009) (refusing to require recusal of presiding judge who had mediated a similar case with many of the same parties and citing cases), aff’d, 360 F. App’x 826 (9th Cir. 2009); see also Floyd, supra note 10, at 68–72 (discussing cases in which courts rejected arguments that a judge should be disqualified for biased statements made during settlement conferences).
257 Some policies have drawn on the assumption that lawyers and parties are likely to choose reticence. For example, the Uniform Mediation Act excluded from its coverage judicial conferences conducted by a judge who might make a ruling in the case in part because the drafters believed that parties were not likely to be candid with a judge during such a mediation, and thus the confidentiality protections of the Act were unnecessary. See SARAH R. COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE § 10.16, at 628 (2016–2017 ed.).
258 See supra note 241 and accompanying text.
259 Cf. Ellen E. Deason, Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review, 5 Y.B. ON ARB. & MEDIATION 219, 224–25 (2013). Lawyers may also be tempted to engage in other unproductive strategic behaviors, such as demanding excessive amounts to anchor a judge’s perception, see infra text accompanying notes 284–90, which can reduce the likelihood of reaching a settlement. See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT § 16.14(2)(a) (8th ed. 2016) (opining that advocates would be “wise” to engage in anchoring when a settlement conference is conducted by a presiding judge, but noting that this will decrease the likelihood that the conference will lead to a settlement).
260 BRAZIL, supra note 59, at 84. Smaller, but substantial, percentages also disapproved in cases scheduled for a jury trial. Id. at 85–86 (reporting that more than 40% of lawyers
acceptance of judicial settlement techniques. For example, while the vast majority (86%) believed that, in general, it was proper for a settlement judge to suggest a dollar range for a reasonable settlement, the approval rate for this technique plummeted (to 30%) if the judge was assigned to the case for trial.261

Brazil’s findings on lawyer preferences are consistent with a more recent study conducted by Roselle Wissler in the Southern District of Ohio that allowed a comparison of attorneys’ attitudes about settlement conferences conducted by judges assigned to try the case, and those who are not.262 While the lawyers’ first choice of process was mediation with court staff mediators, they voiced a statistically significant preference for settlement conferences with judges not assigned to the case as compared to conferences with assigned judges.263 The data suggest three reasons for this strong preference. First, the lawyers rated judges who were not assigned to the case equivalently or more highly than assigned judges on multiple dimensions, which suggests that they did not see any particular advantage to settlement with an assigned judge.264 Second, and even more importantly, the lawyers thought judges assigned to the case for trial were much more biased than non-assigned judges.265 Third, they confirmed the problem of reticence; they thought that when settlement conferences were led by judges assigned to the case, parties were less able to discuss the case candidly and fully explore settlement options without possible negative consequences or prejudice to the ongoing litigation.266 Thus, lawyers

had reservations about settlement involvement by an assigned judge in cases to be tried by jury: 33% deemed this practice to be improper, while 9% were not sure about its propriety). 261 Id. at 85. Brazil found that the greatest antipathy for an assigned judge acting as a settlement neutral was in the district where lawyers had the most pronounced preference for active and assertive judicial involvement in settlement. Id. at 90–94. This led him to suggest that these attitudes were linked. Id. at 94. He speculated that because these lawyers wanted their settlement neutral to dig deeply into the case and express opinions, perhaps they therefore did not think this judge could then try the case with complete impartiality. Id.

262 Wissler, supra note 137, at 274–75. The study also compared lawyers’ views on these two forms of settlement conferences with their opinions on three types of mediation: court-connected mediation by court staff mediators, court-connected mediation by volunteer mediators, and mediation with private, paid mediators. Id.

263 Id. at 298–99, 298 tbl.12, 299 n.110.

264 Judges not assigned were seen as more likely to incorporate clients into the settlement process, to devote a sufficient amount of time to settlement, and to leave clients feeling well served regardless of the outcome. Id. at 310. The two types of judges were rated similarly on providing useful input, helping to manage difficult parties, responding in a timely manner, and making good use of parties’ resources. Id. The only advantage lawyers attributed to judges assigned to the case was more credibility regarding settlement considerations. Id.

265 Id. at 287 & tbl.3 & n.68.

266 Id. at 284–86, 284 n.57, 285 tbl.1 & n.60, 286 tbl.2. Similarly, in Brazil’s study, nearly two-thirds of the lawyers thought they would be less open in discussing settlement with the trial judge in a non-jury trial than with another judge. BRAZIL, supra note 59, at
experienced in settlement conferences expressed significant concerns about the participation of judges assigned to adjudicate the case.

Similarly, in Brazil’s earlier study in other districts, overall the lawyers preferred facilitation by a separate settlement judge. This preference was based on concerns for propriety, but it was also coupled with a “positive overall assessment” of how much a separate settlement judge could contribute to the process. Brazil concluded that lawyers are “confident that courts can delegate responsibility to conduct settlement negotiations to settlement judges (not the assigned judges) without sacrificing the effectiveness of judicial intervention in this important process.” Both studies show that, in the lawyers’ eyes, the disadvantages and risks of judges’ participation in settling cases assigned to them for trial outweighed any extra effectiveness conferred by prior exposure to the case.

C. Insights from Modern Science: The Decisionmaking Literature

When Professor Resnik wrote her article, she speculated that pretrial management could lead to bias, but could only note that we still had much to learn about how prior knowledge affects the formation of opinions. In contrast, in today’s world a book on cognitive function has popular appeal, and there is widespread familiarity with the distinction between thought processes framed as “thinking fast” (automatic thinking) and “thinking slow” (careful deliberation). The concepts are so mainstream that an executive order encourages federal agencies to use behavioral science insights to improve policies and programs. These current understandings of the way humans think and make decisions are also relevant to the dynamics that occur when a single judicial officer serves as a neutral for both settlement and adjudicative decisions. They can provide new perspectives on the mental processes at work and shed important light on concerns about maintaining impartiality.

Psychologists theorize that thinking and decisionmaking operate on two levels, which are often labeled System 1 and System 2. System 1 processes

92. This was especially true in northern California, where 80% of the respondents held this view. Id.
267 BRAZIL, supra note 59, at 85.
268 Id. at 84.
269 Resnik, supra note 1, at 427 & n.197.
270 DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).
272 Keith E. Stanovich & Richard F. West, Individual Differences in Reasoning: Implications for the Rationality Debate?, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436–38 (Thomas Gilovich et al. eds., 2002) [hereinafter HEURISTICS AND BIASES]. Others have proposed two-process models that use different terminology and vary somewhat, but there is agreement on the general characteristics of the two systems. Id.
are “spontaneous, intuitive, effortless, and fast.” System 2 processes, in contrast, are “deliberate, rule-governed, effortful, and slow.” They are associated with the exercise of “agency, choice, and concentration.” The two systems act in concert. System 1 (the automatic system) is the main source of impressions and feelings. These impressions and feelings fuel the “beliefs and deliberate choices of System 2” (the effortful system). System 2 can produce careful, systematic thought, but it also endorses many intuitive reactions derived from System 1 impressions, meaning that System 1 influences even careful decisions.

A model of judicial decisionmaking drawn from these insights by Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich “posits that judges make initial intuitive judgments (System 1), which they might (or might not) override with deliberation (System 2).” This cognitive conception of legal decisionmaking contemplates a fluid interaction between reasoning and more intuitive thinking: a judge may maintain her initial, quickly proposed solution, or may modify it after careful, systematic consideration.

When Guthrie and his co-authors tested their model on judges, they found that, like the rest of us, many of them make incorrect intuitive judgments about problems when the right conclusion requires deliberative reevaluation. They also asked judges to make decisions based on hypotheticals designed to match situations that judges commonly face. These experiments showed that, in many settings, judges rely on heuristics—mental shortcuts associated with System 1 thinking—that can produce systematic errors in judgment.
Some of these heuristics, or “cognitive illusions,” are especially problematic when a judge has conducted a settlement conference. The most obvious source of potential bias is anchoring, a commonplace cognitive phenomenon that affects people when they make quantitative judgments. Individuals are influenced by the first number available to them, which creates an “anchor” that pulls their estimate up or down. Even if this anchor is something completely ridiculous, it can alter one’s judgment.

Experiments indicate that judges are susceptible to anchors based on settlement demands when making damage awards. Judges were asked to determine damages for pain and suffering in a personal injury suit following an unsuccessful settlement conference with the judge. Those in one experiment were told that the plaintiff had demanded $175,000 in the settlement talks (low anchor), while judges in a second experiment were told the plaintiff asked for $10 million (high anchor). In both experiments, a control group of judges was not given any demand figure. The applicable evidentiary rules required the judges to ignore the amount of the settlement demands, and they were reminded of this in the scenario. Yet the awards by judges who had numerical information about the settlement demand were significantly higher, or lower, than those in the control group, depending on the anchor. The pull of the anchors was so strong that the judges were


See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124, 1128–30 (1974) (describing anchoring and showing how providing different starting points influences estimates); see also Kahneman, supra note 270, at 119–28 (discussing mechanisms of anchoring and its effects); ROBBENOLT & STERNLIGHT, supra note 244, at 71–72 (discussing anchoring in the legal context).

For example, when people were asked to estimate the average daytime temperature in San Francisco, they gave higher values if they had first been asked if the average temperature was greater than 558 degrees Fahrenheit. SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 146 (1993).

Wistrich et al., supra note 282, at 1288–89.

Id.

Id.

Id. at 1289.

The judges in the low anchor group awarded an average of $612,000 in damages, less than half the average of the control group. Id. at 1289. In the high anchor group, the average damage award was $2.2 million, approaching three times that of the control group. Id. at 1290.

In another experiment demonstrating anchoring, a personal injury scenario with substantial damages, judges awarded significantly less if they were told that the defendants had filed a motion to dismiss the case from federal court on the ground that it did not meet the $75,000 jurisdictional minimum for a diversity case. Guthrie et al., Blinking, supra note 279, at 21; Guthrie et al., Inside, supra note 282, at 790–91. While the motion clearly lacked merit under the facts of the scenario, judges exposed to this anchoring figure awarded nearly 30% less on average than judges who were not told about the motion. Guthrie et al., Blinking, supra note 279, at 21; Guthrie et al., Inside, supra note 282, at
influenced despite the fact that they knew the settlement demands were irrelevant.\textsuperscript{291}

An actual settlement situation will often provide judges with even more anchoring information than the experiments: judges are likely to learn not only demands, but also the parties’ bottom lines. Settlement judges are also routinely exposed to other information that can influence their views.\textsuperscript{292} And, while judges tend to be confident about their ability to compartmentalize and ignore inadmissible information,\textsuperscript{293} intentionally disregarding or forgetting is a difficult mental task. Judges are likely to find it hard to ignore knowledge such as a party’s statements of personal interests, goals, and priorities, or the judge’s impression of a party’s degree of cooperation in the settlement process. These factors would not normally be relevant to the judge’s legal determinations, but such information is likely to have a persistent effect on her judgment. Experiments with judges given a variety of inadmissible

\textsuperscript{791–92; see also Birte Englich et al., Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 196–97 (2006) (reporting effects on length of sentences from sentencing demands that judges knew to be randomly generated); Guthrie et al., Hidden, supra note 279, at 1501–06 (reporting anchoring by administrative law judges based on an irrelevant damage award from a court TV show).

\textsuperscript{291} Similar studies have demonstrated analogous anchoring bias with mock jurors; their damage awards are influenced by the amount they are told the plaintiff has requested in the lawsuit. See, e.g., Gretchen B. Chapman & Brian H. Bornstein, The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts, 10 APPLIED COGNITIVE PSYCHOL. 519, 525–27 (1996). In the case of juries, the legal system has reacted to this effect of anchoring. Some states have enacted provisions to eliminate this source of bias, either by prohibiting tort plaintiffs from specifying the amount of damages they seek in the complaint, see, e.g., HAW. REV. STAT. ANN. § 663-1.3 (West 2008) (prohibiting “ad damnum” clause); ME. REV. STAT. ANN. tit. 14, § 52 (2003) (prohibiting dollar amount in demand in any civil case), or by prohibiting disclosure to the jury, see, e.g., IDAHO CODE § 10-111 (2010) (grounds for mistrial to reveal amount of general damages sued for); TENN. CODE ANN. § 29-26-117 (2012) (demands for a specific sum may not be disclosed to the jury in a health care liability action). But see CONN. GEN. STAT. ANN. § 52-216b (West 2013) (authorizing counsel in personal injury or wrongful death cases to articulate the amount of damages claimed to the jury). Moreover, the practice of using closing argument to suggest a specific award that would compensate for noneconomic damages, such as pain and suffering, has fallen into disfavor in some courts on the ground that it risks “anchor[ing] the jurors’ expectations of a fair award at a place set by counsel, rather than by the evidence.” Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1016 (2d Cir. 1995), vacated on other grounds, 518 U.S. 1031 (1996). See generally Don Rushing et al., Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings, 70 DEF. COUNSEL J. 378 (2003) (citing cases).

\textsuperscript{292} See supra text accompanying notes 241–46.

\textsuperscript{293} See supra text accompanying notes 235–38. This confidence may result from a tendency toward positive illusions and egocentric bias. See infra text accompanying notes 314–16.
information indicate that, in many cases, they were unable to ignore it in making legal decisions.\(^{294}\)

One explanation for why the task of disregarding information is so challenging is that information produces what psychologists call “mental contamination,” which persists even if a person recognizes that the information is misleading or inaccurate.\(^{295}\) The brain stores information in a holistic manner using cognitive organizing principles called schemas that then influence how additional stimuli are processed.\(^{296}\) Thus, the influence of the initial information (for example, something a judge learns during settlement that he knows should be ignored) persists through the schema and affects the ways that later information is interpreted. Disregarding information is also difficult because of the phenomenon of “belief perseverance.” New information is incorporated into a person’s existing knowledge quickly and ideas formed unconsciously can persist, making it hard to eradicate beliefs based on that information.\(^{297}\) Due to these characteristics of memory, “[m]erely ignoring the information itself is not enough.”\(^{298}\) Even if a judge can ignore a specific fact she learned during a settlement conference and prevent it from directly affecting her judgment, the attitudes and inferences that she associates with that information can still influence her decision indirectly.\(^{299}\)

In addition to the mental challenges that a judge faces in trying to truly ignore irrelevant information, a prior role as a settlement neutral may also influence later decisionmaking because of a process known as “confirmation bias.”\(^{300}\) When seeking new information, people tend to look for information that confirms existing views and disregard information that challenges those views.\(^{301}\) Moreover, that new information tends to be assessed in ways that are

\(^{294}\) Wistrich et al., supra note 282, at 1286–322 (reporting that judges’ rulings showed they were unable to disregard what they knew about settlement demands, information protected by the attorney-client privilege, sexual history in a sexual assault case, a criminal record in a civil case, and information excluded by a sentencing agreement, but were able to ignore the outcome of a search without probable cause and a criminal confession obtained after a request for counsel); see also Stephan Landsman & Richard F. Rakos, A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 BEHAV. SCI. & L. 113, 125 (1994) (finding that judges were unable to disregard evidence that a tort defendant had taken subsequent remedial measures).

\(^{295}\) Timothy D. Wilson et al., Mental Contamination and the Debiasing Problem, in HEURISTICS AND BIASES, supra note 272, at 185, 185–87.

\(^{296}\) See Wistrich et al., supra note 282, at 1265–67 (providing examples); see also ROBBENNOLT & STERNLIGHT, supra note 244, at 12–13.

\(^{297}\) Wistrich et al., supra note 282, at 1267–69.

\(^{298}\) Id. at 1269.

\(^{299}\) Id. at 1270.

\(^{300}\) ROBBENNOLT & STERNLIGHT, supra note 244, at 15.

\(^{301}\) Id. at 14–16; Eva Jonas et al., Giving Advice or Making Decisions in Someone Else’s Place: The Influence of Impression, Defense, and Accuracy Motivation on the Search for New Information, 31 PERSONALITY & SOC. PSYCHOL. BULL. 977, 978 (2005) (noting bias “in favor of previously held beliefs, expectations, or desired conclusions”).
consistent with preexisting attitudes or expectations, which is known as “biased assimilation.” These effects are particularly strong in decisionmaking settings. In order to reduce cognitive dissonance, a person who previously made a choice tends to prefer information that supports that choice and to deprecate information that opposes it.

One of the most effective methods for avoiding bias in a decisionmaking process is to deliberately consider opposing viewpoints and arguments. This is consistent with the theory of the adversary process in which the decisionmaker hears arguments presented by both sides of a case. There are, however, two ways in which the adversary process might not work ideally as a debiasing mechanism following a settlement conference.

First, it is not uncommon for a settlement neutral to assess a case or suggest that parties settle for a particular amount, particularly in a traditionally evaluative settlement conference. Even though a judge may not actually commit to any particular decision based on a preliminary assessment, cognitively this can be enough to trigger bias in subsequent interpretations of evidence. Research suggests that the tendency to seek confirming information operates not only to reinforce firm decisions, but is also triggered by preliminary decisions and even by what cognitive scientists call “predecision” thinking. Thus, an opinion a judge voices in settlement can influence the judge’s interpretation of additional, more complete information added later at trial through an unconscious tendency to support the preliminary assessment.

Second, judges are privy to private information in settlement when they meet with parties in caucus. This ex parte information is not subject to rebuttal by the other side because it is unknown. Thus, while evidence presented at trial may be sufficient to counter earlier impressions gained through traditional pretrial management, it cannot fully address impressions that stem from information conveyed to the judge in confidence during settlement.

There are factors associated with judging that may reduce the effects of System 1 thinking on judges’ decisions. There have been suggestions that decisionmakers who are highly motivated to make accurate decisions may use

302 ROBBENNOLT & STERNLIGHT, supra note 244, at 15.
304 ROBBENNOLT & STERNLIGHT, supra note 244, at 16, 77–83 (discussing “debiasing”).
305 See supra notes 151, 163–69 and accompanying text.
307 Aaron L. Brownstein, Biased Predecision Processing, 129 PSYCHOL. BULL. 545, 545 (2003). In developing a preference, decisionmakers seem to distort new information so as to favor their leading alternative, Russo et al., supra note 303, at 107, and thus inhibit careful and objective consideration of all alternatives.
308 It may also be irrelevant as an evidentiary matter.
more accurate reasoning. As professional decisionmakers, judges would ideally display this motivation. The transparency of the judicial process may also help. Experimental evidence suggests that anchoring has less influence if people are told that they must explain their estimates so when a decision involves writing a judicial opinion, that may constrain anchoring bias.

More generally, accountability can be seen as an incentive that increases willingness to put more effort into the decisionmaking process by using System 2 thinking. Since judges are accustomed to public scrutiny of their decisions, at the very least by parties and their attorneys, this may reduce the bias introduced by participating in settlement. There is, however, growing evidence that all forms of accountability are not equal. People who know they will have to justify the process behind their judgment display more accurate and unbiased decisionmaking than those who are merely held accountable for the outcome of the process. Judges’ opinions typically justify the outcome of their decisions, not the decisionmaking process. And unfortunately, other key factors that encourage deliberative thinking, such as prompt and accurate feedback, are missing from the judicial decisionmaking environment.

In evaluating the cognitive effects of participating in settlement, it is particularly important to be skeptical of judges’ own assessments of their abilities. This is because positive cognitive illusions make it difficult for judges to evaluate their own decisionmaking objectively. “Overconfidence” means we don’t allow sufficiently for uncertainty in the judgments we make. This tendency is increased with access to evidence for only one side of a story. “Egocentric bias” means we overestimate our abilities and make judgments consistent with our own point of view. Judges are no different. Yet despite the cognitive evidence to the contrary, some judges are very confident that they can ignore what happened during settlement in subsequent proceedings. This is likely to be overconfidence, which can exacerbate the

309 Brownstein, supra note 307, at 565.
310 Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 PSYCHOL. BULL. 255, 262–63 (1999).
311 See Jonas et al., supra note 301, at 988.
312 Id.
313 See Guthrie et al., Blinking, supra note 279, at 32 (discussing the lack of feedback in litigation and explaining why appellate review is an inadequate mechanism).
314 ROBBENNOLT & STERNLIGHT, supra note 244, at 68.
315 KAHNEMAN, supra note 270, at 86–88 (reporting that confidence in judgments is increased by coherence of the story).
316 ROBBENNOLT & STERNLIGHT, supra note 244, at 70.
317 Guthrie et al., Inside, supra note 282, at 813–16; see also Theodore Eisenberg, Differing Perceptions of Attorney Fees in Bankruptcy Cases, 72 WASH. U. L.Q. 979, 983–87 (1994) (reporting a study of bankruptcy judges who overestimated the degree to which lawyers who appeared before them felt they were fair, efficient, and diligent).
318 LACEY, supra note 44, at 23 (“As you become known as one who can conduct [settlement] discussions without coloring your judgment at trial, lawyers will not hesitate to engage in full, frank discussion with you.”); Martin, supra note 159, at 194–95
problem by preventing a judge from recognizing the effects of settlement conferences on her decisionmaking. This lack of recognition is, in turn, likely to reduce the vigilance that might help judges deploy System 2 deliberative thinking to avoid the distortions settlement conferences can introduce. Even under the best of conditions, fighting these tendencies is difficult, for judges just as for the rest of us, because they operate at an unconscious level.

These cognitive insights are in tension with current standards for judicial conduct and settlement practices, which are examined in the following Part. The after-the-fact remedies for bias also provide an illustration of how legal standards fail to reflect modern conceptualizations of bias and its sources. The recusal and disqualification statute, \(^{319}\) for instance, applies when a judge has an opinion, either favorable or unfavorable, “that is somehow wrongful or inappropriate, either because it rests upon knowledge that the subject ought not possess, or because it is excessive in degree.” \(^{320}\) Knowledge that a subject “ought not possess” is limited to extrajudicial sources of information; this limitation reflects a traditional conception of judicial activity that does not contemplate judges’ modern roles in conducting settlement. The alternative prerequisite, that a judge’s opinion must be “excessive” in order to be inappropriate, means that the judge must express a strong identifiable animus or favoritism. This focus on only expressed, pronounced bias reflects an outdated, confident view of rational decisionmaking that does not recognize psychological insights into actual behavior. Information shared in settlement may skew or distort a judge’s subsequent attitudes, and perhaps decisions about a case, even without producing any visible animus or strong favoritism. This modern understanding of the subtle operation of bias supports the view that knowledge gained in settlement raises questions about impartiality. Because judges can avoid this knowledge, it should be regarded as “inappropriate” even if it is not “extrajudicial.”

**IV. LIMITING (APPROPRIATELY) THE JUDICIAL ROLE IN SETTLEMENT**

The final Part of this Article evaluates possible mechanisms for avoiding the problems of dual neutral functions in the settlement context. Part IV.A reviews efforts to restrict judges assigned for trial from serving as a settlement

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\(^{319}\) 28 U.S.C. § 455(a), (b)(1) (2012); see also supra text accompanying notes 216–18, 252–56.

\(^{320}\) Blackmon v. Eaton Corp., 587 F. App’x 925, 933 (6th Cir. 2014) (emphasis omitted) (quoting Williams v. Anderson, 460 F.3d 789, 814 (6th Cir. 2006)).
neutral as an ethical matter. I conclude, given the failure to incorporate any restrictions on settlement activity into recent revisions of ethical standards, that this is not a promising avenue. Part IV.B considers proposals to better define acceptable judicial behaviors in settlement. I argue that this approach is an incomplete solution that could have deleterious side effects and is likely unworkable. Part IV.C explores the most promising path for reform: separating the roles of settlement and adjudicative neutrals by limiting the authorization for settlement activity in Rule 16 and other procedural rules. This structural solution would be a preventative measure, and hence more effective than after-the-fact evaluations for disqualification based on the circumstances of particular settlements (which are problematic for the reasons described above). There is precedent for this approach in some local district court ADR rules and state confidentiality provisions that apply principles of separation to reduce the risks of both coercion and partiality. This Article closes by urging rulemakers to draw on these local and state rules and to extend their principles to the regulation of settlement conferences.

A. Limiting the Judicial Role in Settlement as an Ethical Principle

In the most recent attempts at reform, the focus on limiting the settlement role of judicial neutrals in assigned cases centered on ethical obligations. For federal judges, judicial ethics are governed by the Code of Conduct for United States Judges.\(^\text{321}\) State court judges are subject to the code adopted in their state,\(^\text{322}\) some of which make no mention of settlement.\(^\text{323}\) Historically, both federal and state codes have been influenced by the ABA Model Code of Judicial Conduct and its predecessors.\(^\text{324}\)

An opportunity to strengthen the provisions on settlement in the ABA Model Code arose when the ABA undertook a revision beginning in 2003.\(^\text{325}\) In 2005, the ABA Section of Dispute Resolution presented a proposal to revise


\(^{322}\) See, e.g., Cal. Code of Judicial Ethics Canon 3(B)(7) (Supreme Court of Cal. 2015); Ohio Code of Judicial Conduct r. 2.6 (Supreme Court of Ohio 2017); Tex. Code of Judicial Conduct Canon 3(B)(8)(b) (Supreme Court of Tex. 2002).


the provisions on judicial ethics on settlement.\textsuperscript{326} It provided that a judge should not act as a mediator if he or she would also be judging the merits of the case.\textsuperscript{327} In addition, the merits judge would receive very limited information about the mediation: only whether a mediation was held, who attended, and whether a settlement was reached.\textsuperscript{328} This proposal was rejected.

The revision process culminated in the adoption of the 2007 ABA Model Code of Judicial Conduct, which does not even address whether a judge who participates in settlement efforts should be permitted to hear the case if those efforts are unsuccessful.\textsuperscript{329} Instead, Rule 2.6, Ensuring the Right to be Heard, merely states:

\begin{quote}
A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.\textsuperscript{330}
\end{quote}

Elsewhere, the Model Code prohibits, as a general matter, ex parte communications concerning pending matters.\textsuperscript{331} But there is an explicit exception for judges, “with the consent of the parties,” to “confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.”\textsuperscript{332}

The current official Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States, has an almost identical provision. Canon 3 prohibits ex parte communications on the merits in pending matters but has a similar exception, which provides that a judge may “with the consent of the parties, confer separately with the parties and their counsel in an effort...
to mediate or settle pending matters.” The commentary states that “[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.”

It is interesting that both of these provisions stress preventing coercion in settlement, rather than the usual worry stemming from ex parte communication: unrebuttable information that can skew decisionmaking. To the extent these settlement exceptions ignore the informational consequences of ex parte communication in settlement, they stand in tension with the general principles of due process in adjudication.

In 2009, the Judicial Conference’s Committee on Codes of Conduct interpreted the official Code of Conduct’s settlement provision in an advisory opinion: Judges Acting in a Settlement Capacity. The Committee determined that a trial judge’s participation in settlement efforts in a case assigned to her for trial is not “inherently improper under the Code.” It relied heavily on the Rules of Civil Procedure and local rules in reaching this conclusion. The opinion stressed the fact that “Rule 16 does not prevent a judge who engaged in settlement discussions from presiding over a trial,” and concluded that, while a judge’s actions could raise concerns in a particular case, there is no per se impropriety in an assigned judge leading settlement discussions or conducting a trial afterwards. Local procedural rules that explicitly permit the practice “lend[] support to the propriety of a judge’s actions in this respect.”

One way to read the canon and its interpretation is that it extends the discretion granted in Rule 16 from procedural rules to ethical rules. The Committee concluded that, in the absence of a local rule prohibiting a dual neutral role, ethical concerns should be evaluated by considering settlement practices on a case-by-case basis. The Committee felt that such concerns are less serious when a judge who has led settlement negotiations presides over a jury trial, or when the parties have consented to the dual role. They also identified the type of information learned in settlement as an important variable, observing that, “The extent to which a judge’s impartiality may be compromised, . . . will depend in part on the nature and degree of the judge’s participation in settlement . . . .”

333 CODE OF CONDUCT, supra note 321, Canon 3(A)(4)(d).
334 Id. Canon 3(A)(4) cmt.
335 See generally Advisory Opinion No. 95, supra note 237.
336 Id. at 162.
337 Id. at 161.
338 Id. at 162.
339 Id.
340 Id. at 163.
341 Advisory Opinion No. 95, supra note 237, at 162.
342 Id. at 163.
There are those who express discomfort with the discretion that implicitly accompanies this flexibility. They believe the canon is so elastic that it does not provide adequate guidance, instead allowing judges to conclude that a vast number of very different approaches to settlement are ethical.\textsuperscript{343} Certainly the check on discretion prescribed in the judicial ethics opinion—a case-by-case, after-the-fact evaluation of the circumstances to determine their effect on a judge’s impartiality—is not as prophylactic as a bright-line rule. Moreover, such evaluations require uncovering communications in mediation in ways that could either be blocked by confidentiality principles, or violate them. But perhaps the strongest argument against relying on ethical rules to limit dual judicial roles is a practical one: the proposal based on defining the problem as a matter of ethics was not approved. This was, at least in part, due to opposition from judges. They believe settlement is an important function of their job and oppose limiting their discretion to achieve it.\textsuperscript{344}

B. Limiting the Judicial Role in Settlement by Defining Acceptable Judicial Involvement

For some, the concern with judicial activity in settlement is seen as a need to constrain problematic judicial behavior in settlement. This is primarily a concern about coercion. Under the discretionary framework that governs settlement conferences, statutes and court rules provide little guidance on acceptable judicial behavior in settlement.\textsuperscript{345} One suggestion, raised by a number of commentators, is to adopt new ethical or procedural rules to clarify the appropriate limits of judicial settlement behavior.\textsuperscript{346} Judge Cratsley, for example, notes the significant variability in judicial approaches to settlement and maintains that clearer rules will “promote litigants’ confidence in the trustworthiness and fairness” of the judiciary.\textsuperscript{347} These rules would presumably apply to all settlement judges, whether assigned an adjudicatory role or not. While some guidance is appropriate through education, and more work could be done to establish appropriate norms, in my view it would be unduly restrictive (and likely unworkable) to incorporate behavioral limits on judicial settlement into procedural or ethical rules.

First, there is a wide range of acceptable behaviors and roles for neutrals in settlement and little agreement on particular limits. With regard to mediation,
for example, there has been vigorous debate over the appropriateness of using evaluative techniques.\textsuperscript{348} There are regional variations in practices such as using joint sessions, and variations based on the type of case, such as whether it is a commercial or family dispute. Thus it would be very difficult to agree on generally applicable, comprehensive guidelines with any meaningful specificity.

Second, there is a real danger that an effort to codify particular behaviors as acceptable for settlement neutrals would impair one of the great strengths of mediation: its flexibility. Good mediators (and good settlement judges) need to be able to tailor their approach to a particular case and to respond to the unique circumstances of the parties.\textsuperscript{349} This means that discretion regarding approach and technique is useful, and excessive regulatory intrusion that introduces rigidity should be avoided.

Third, the proposals aimed at defining acceptable judicial behaviors in settlement address only half of the problem. They primarily react to worries about coercion in the settlement process by forceful judges. The solution (a more detailed settlement code of conduct) would not be particularly effective in reducing the risk of partiality stemming from dual roles in settlement and adjudication. To limit the potential for bias by regulating judicial conduct, a behavioral measure would need to restrict the information available to an assigned judge during settlement. But this would also impair his effectiveness as a settlement neutral.\textsuperscript{350} One federal district court does have a local settlement rule of this nature. It addresses concerns about partiality by precluding judges presiding over settlement from obtaining the type of information that poses the most obvious risk: the parties’ settlement offers and demands.\textsuperscript{351} However, this restriction is remarkable for its rarity, probably because most districts recognize that it would reduce judges’ effectiveness in the settlement context. In contrast, in districts that have adopted a structural solution—substituting a settlement judge for the assigned judge—the rules can

\textsuperscript{348} See \textit{infra} note 143.

\textsuperscript{349} See, e.g., Golann, \textit{supra} note 143, at 42; Stempel, \textit{supra} note 143, at 970–83.

\textsuperscript{350} Despite the potential to diminish their effectiveness, there are nonetheless judges who self-censor their participation in settlement when assigned to trial due to worry about introducing bias. See, e.g., Miller, \textit{supra} note 128, at 34 (quoting Judge Polster commenting that he limited communications when settling a case scheduled for a bench trial by discussing only business solutions, not the merits); Will et al., \textit{supra} note 53, at 215 (describing a judge who avoids discussion of settlement numbers even with a jury trial due to concern for bias in deciding potential post-verdict motions); \textit{see also} CRAVER, \textit{supra} note 259, § 16.14(2)(a) (suggesting a prohibition on parties stating specific demands as a way to prevent the anchoring effect in settlement conferences conducted by a judge assigned to trial); Deason, \textit{supra} note 259, at 246–47 (describing a proposal for a no-caucus approach to mediation in order to limit information flow when mediation is combined with international arbitration before the same neutral).

\textsuperscript{351} See, e.g., N.D. TEX. CIV. R. 16.3(b) (judge may not discuss settlement figures in nonjury cases “unless requested to do so by all concerned parties”).
endorse full access to information and encourage active participation by the settlement neutral.\footnote{352}

Finally, it is unlikely that regulating specific judicial behaviors would be effective without reforms to enforcement standards and procedures. As Professor Floyd demonstrated, limitations in the standards for recusal based on actions during settlement and procedural barriers to appeals make enforcement of behavioral guidelines illusory.\footnote{353} Happily, there is a more effective alternative to trying to manage and monitor individual judicial behavior: procedural rules that prevent conflicting neutral roles through structural and informational separation between adjudication and case management on the one hand, and settlement on the other.

C. Principles from State and Local Federal Rules: Separating Managing from Settling

Perhaps the most appropriate (and promising) way to address the problem is to avoid characterizing it as an issue of a particular judge’s ethics or behavior. The incompatible dual neutral roles assigned to judges are at their core a structural issue; it is a side effect of lumping all judicial functions related to settlement into the category of pretrial management. How should the role of adjudicating (with its associated managing) be separated from settling? We can look to the local district court rules and some state provisions for examples to follow.

This Part examines three types of rules for principles that could be applied more generally in Rule 16. Alternatively, if uniformity in the federal courts proves impossible, individual federal courts and states could adopt these principles to harmonize their rules for settlement conferences and ADR programs. First, this Part considers rules that govern court ADR programs.\footnote{354} The provisions in local rules that govern who can serve as neutrals in ADR

\footnote{352 See, e.g., D. IDAHO CIV. R. 16.4(b)(1)(A) (judge’s function in settlement conference is to “facilitate communication between the parties and assist them in their negotiations, e.g., by clarifying underlying interests”); E. OKLA. CIV. R. 16.2(a) (discussion to include “every aspect of the case bearing on its settlement value”); id. R. 16.2(g) (participants are “required to be completely candid with the settlement judge so that the judge may properly guide settlement discussions”); N.D. OKLA. CIV. R. 16.2(a), (g) (containing the same language as the Eastern District of Oklahoma); M.D. TENN. R. 16.04(d)(1)(a) (parties provide settlement judge with ex parte settlement conference statement including settlement positions); D. UTAH CIV. R. 16-3(c) (settlement judge may discuss any aspect of the case and make suggestions or recommendations for settlement); see also Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *2–3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (describing benefits to settlement of a judge’s “unencumbered” participation, in contrast to the ethical obligations that constrain a presiding judge).

\footnote{353 Floyd, supra note 10, at 82–84; see also supra text accompanying notes 216–21.

\footnote{354 As described above, see supra text accompanying notes 94–97, most courts currently segregate “ADR” from settlement conferences and provide separate authorizations in their rules.}
programs often establish a clear separation between management and neutral functions. Second, this Part explores ADR confidentiality rules. They often go to the heart of the problem of access to information that is inherent in dual roles. Many impose restrictions on the flow of information from the settlement process to the assigned judge, which emphasizes a separation between the role of settlement neutral and the role of decisionmaking neutral. Third, this Part analyzes the problematic rules governing judicial settlement conferences. Here, some federal districts do separate management and neutral roles to avoid role conflicts, but this approach is by no means ubiquitous. This is where courts could improve their procedures by harmonizing their rules for settlement conferences with their ADR and confidentiality rules to limit judges’ discretion in settlement conferences.

1. Rules on Neutral Roles in “ADR” Processes: Programmatic Separation

In federal courts, the local rules that govern court-sponsored ADR programs tend to be both more detailed and more sensitive to conflicting neutral roles than the corresponding rules that govern settlement conferences convened by judges. ADR rules tend to allot settlement management tasks to the assigned judge, but structure programs in ways that limit judges’ discretion to serve as both the assigned judge and the ADR neutral. There are two typical patterns in local ADR rules. Under one common approach, judicial officers do not participate as mediators for the program. Instead, the parties usually agree on a private mediator. This person is often chosen from a court-approved list, although some districts provide a staff mediator. Under a second approach, judicial officers do serve as mediators in the court-sponsored mediation program, which preserves the benefits of having a judicial officer as a mediator. Often magistrate judges shoulder a major responsibility for mediating cases in these programs. Neutral roles are typically kept separate

355 See supra text accompanying notes 100–06.

356 Under this approach, judges similarly do not serve as neutrals for neutral evaluation or court-annexed arbitration if the court sponsors those processes. Summary jury trials or summary bench trials are an exception, often presided over by the same judge who will hear the case if there is no settlement. They are not considered in this Article because they are relatively rare and because the neutral’s role in those processes has so much overlap with the judge’s role at trial.

357 Unfortunately, staff mediators in some districts, such as the Southern District of Ohio, have been eliminated due to budget cuts. E-mail from Terence P. Kemp, Mag., U.S. Dist. Court for the S. Dist. of Ohio, to author (Mar. 11, 2017, 10:44 EST) (on file with author).

by a rule specifying that the judicial officer who is assigned to try the case may not serve as the mediator.359 Both of these design structures for ADR programs effectively divide an assigned judge’s extensive pretrial management functions from any role as a settlement neutral, and thus prevent conflicts between adjudicatory and settlement roles.

2. Rules on ADR Confidentiality: Isolating the Assigned Judge from Settlement Information

In addition to imposing a structural separation between the neutral responsible for adjudication and management and the settlement neutral in court ADR programs, many federal courts have confidentiality rules for these programs. These provisions are aimed at the potential for settlement to serve as a source of bias even with separate neutrals. They prevent settlement information from flowing to the adjudicator by explicitly prohibiting mediators from disclosing details about a mediation to the assigned judge.360 They demonstrate a sensitivity to the distortions that can be introduced into decisions if a judge learns what happened or what was said in a settlement process, and reflect an understanding that such reports from mediators will undermine confidence in the integrity of the settlement process. Courts also limit information flow to assigned judges by preventing them from seeing the pre-mediation or evaluation statements that parties prepare for the settlement neutral,361 or by strictly limiting the information that may be reported to them at the close of the process.362

Some states impose similar restrictions on communications to the court about the settlement process either by court rule or by state statute. For example, in Minnesota, communications to the court are strictly limited during conferences a week); see also Welsh, supra note 126, at 999–1004; supra note 126 (citing articles by magistrate judge mediators).

359 See, e.g., D. ALASKA CIV. R. 16.2(e)(2)(A) (court may order parties to mediate before a district, bankruptcy, or magistrate judge who is not assigned to the case); S.D. W. VA. CIV. R. 16.6.2 (“The parties may request that a judicial officer (who is not the presiding judicial officer) conduct the mediation.”).

360 See, e.g., N.D. CAL. ADR R. 5-12(a)(2), 6-12(a)(2); N.D. GA. CIV. R. 16.7(F)(3); S.D. GA. CIV. R. 16.7.8; C.D. ILL. R. 16.4(E)(7); D. KAN. R. 16.3(i)(2); E.D.N.Y. R. 83.8(d)(3); N.D. OHIO CIV. R. 16.5(h), 16.6(e)(3); D. OR. R. 16-4(g)(1); M.D. TENN. R. 16.08(a); S.D. TEX. CIV. R. 16.4.1; E.D. WASH. R. 16.2(g). In some districts, there is an exception that allows communication to the assigned judge with the consent of all the parties. See, e.g., C.D. ILL. R. 16.4(E)(7); M.D. TENN. R. 16.05(e).

361 See, e.g., N.D. CAL. ADR R. 5-8(b).

362 Reporting restrictions often limit the content of a mediator’s report. See, e.g., D. ALASKA CIV. R. 16.2(e)(3)(A); W.D. MICH. CIV. R. 16.3(f); N.D. OHIO CIV. R. 16.6(h); E.D. TENN. R. 16.4(m); M.D. TENN. R. 16.05(e). A parallel principle is often used with nonbinding arbitration so that the assigned judge may not learn the award until after a final judgment is entered or the case is terminated. See, e.g., N.D. OHIO CIV. R. 16.7.
and following an ADR process. If the parties do not come to an agreement, the neutral may report only that fact, without comment or recommendation. The Uniform Mediation Act, now enacted in twelve jurisdictions, prohibits mediators from making reports to judges who may rule on the dispute in order to maintain “confidence in the neutrality of the mediator and in the mediation process.”

3. Rules on Judicial Settlement Conferences: Mostly Silence and Ambiguity

In contrast to the detailed rules and extensive protections in the context of ADR programs and confidentiality rules, federal local rules tend to be relatively silent concerning judicially-sponsored settlement conferences. Many rules refer only to pretrial conferences in general; they do not differentiate settlement conferences from other types of pretrial conferences. When the local rules do mention settlement conferences explicitly, their approach to assigning neutral roles spans the full spectrum. Some protect against threats to impartiality by limiting the judicial discretion of the assigned judge to serve as the neutral and by providing confidentiality protections. Many, however, are silent or ambiguous about the identity of neutrals. Yet others explicitly endorse a dual-neutral role for judges in settlement and adjudication.

A substantial number of districts have adopted the principle of structural separation urged in this Article through rules that explicitly exclude the assigned judge from serving as the presiding neutral at a settlement conference. A number of these districts also extend robust confidentiality principles to their settlement conferences. Others less comprehensively specify particular mechanisms to insulate assigned judges from learning about

363 MINN. GEN. R. PRAC. 114.10(c), (d).
364 Id. R. 114.10(d). The neutral’s report may also, with the parties consent, identify pending motions, outstanding legal issues, or discovery processes that, if resolved or completed would further the possibility of a settlement. Id.; see also IND. ADR R. 2.7(E)(1).
365 UNIF. MEDIATION ACT § 7(a) & cmt. (UNIF. LAW COMM’N 2003). There are limited exceptions allowing mediators to disclose whether mediation occurred, whether settlement was reached, and attendance. Id. § 7(b)(1).
366 See, e.g., N.D. CAL. ADR R. 7-2; D. IDAHO CIV. R. 16.4(b)(2)(B); C.D. ILL. R. 16.4(B); N.D. ILL. CIV. R. 16.1(5); N.D. & S.D. IOWA CIV. R. 16.2(e); D. MASS. R. 16.4(b) (allowing case referral from a pretrial conference “to another judicial officer for settlement purposes”); E.D.N.C. CIV. R. 101.2(c); W.D.N.C. CIV. R. 16.3(D); D.N.D. R. 16.2(C)(1); E.D. OKLA. CIV. R. 16.2(j); N.D. OKLA. CIV. R. 16.2(c); W.D. OKLA. CIV. R. 16.2(a); D. OR. R. 16-4; M.D. TENN. R. 16.04(a); D. UTAH CIV. R. 16-3(b); see also Dale, supra note 159, at 47 (describing the settlement role of magistrate judges in the District of Idaho). Some limit this exclusion to assigned judges who are scheduled to conduct a bench trial. See, e.g., D. CONN. CIV. R. 16(c)(2); C.D. ILL. R. 16.1(B).
367 See, e.g., N.D. CAL. ADR R. 7-4(a); D.N.D. R. 16.2(C); M.D. TENN. R. 16.04(d)(3).
the content of settlement conferences. There are also rules that channel disputes or reports about problems in dispute resolution processes away from the assigned judge, which helps prevent judicial bias by limiting information that might create a bad impression about participants.

Other rules that mention settlement conferences are silent or ambiguous as to who will conduct the conference and whether the assigned judge is eligible. It may be that the practice in these districts is to assign the facilitation role to separate settlement judges, but the local rules do not impose any firm limitation on judicial discretion. Finally, there are districts that explicitly reject a principle of separation. They specify that the assigned judge will personally conduct settlement conferences or reserve this power for the assigned judge. The districts with rules that are silent on settlement conferences, along with those that are ambiguous or explicitly authorize blending neutral roles, all demonstrate the need for a uniform national rule that does not leave decisions about settlement neutrals to the discretion of local judges.

D. A Proposal for Revised Procedural Rules

Many judges have expressed the personal view that settlement negotiations should not take place before the judge who will later adjudicate the case, or they have proposed separating these functions. Numerous

368 These measures include prohibiting communications about information discussed at a settlement conference, see, e.g., D. IDAHO CIV. R. 16.4(b)(2)(F), preventing parties from filing their settlement conference memos with the court, see, e.g., D. WYO. CIV. R. 16.3(c)(2)(A), or limiting reports following the conference to whether or not the parties reached a settlement, see, e.g., D. IDAHO CIV. R. 16.4(b)(2)(E); E.D. OKLA. CIV. R. 16.2(j); N.D. OKLA. CIV. R. 16.2(j); D. UTAH CIV. R. 16-3(d).

369 Some districts appoint a single judge as a compliance judge who handles all allegations that the ADR rules were violated or a process abused. See, e.g., E.D. CAL. R. 271(m)(2)(C)(ii), (p); D.D.C. CIV. R. 84.9(a)(2), 84.10; D. UTAH CIV. R. 16-2(j)(1).

370 For an example of this ambiguity, see S.D. W. VA. CIV. R. 16.3, under which the judicial officer to whom the case is assigned convenes pretrial conferences, and id. R. 16.7(c), which states that the final settlement conference is to be conducted by “the judicial officer.”

371 See, e.g., D. ME. R. 83.11(c); D. MD. CIV. R. 607(1); W.D. MICH. CIV. R. 16.8; D. MINN. R. 16.5(a)(4); N.D. & S.D. MISS. R. 16(g); W.D. VA. R. 83; W.D. WASH. CIV. R. 39.1(a), (c); N.D. W. VA. CIV. R. 16.04(e); E.D. WIS. CIV. R. 16(d).

372 See, e.g., C.D. CAL. R. 16-15.4; S.D. CAL. CIV. R. 16.1(c), 16.3; D. CONN. CIV. R. 16(c); D. HAW. R. 16.5; D. N. MAR. I. CIV. R. 16.2CJ(e)(5)(c); W.D. TENN. CIV. R. 16.1(b); see also C.D. ILL. R. 16.3(I)(4)(a) (special provision for prisoner cases); D.N.H. CIV. R. 16.2(a)(8) (requiring parties to include information in their final pretrial statement describing their ADR participation and their final demand or offer, except in bench trials).

373 See, e.g., Jaclyn Barnao, In Pursuit of Settlement: Deciphering Judicial Activism, 18 GEO. J. LEGAL ETHICS 583, 594–95 (2005) (quoting Judge Levy); Brazil Interview, supra note 153, at 24 (quoting Judge Bremer); Crane, supra note 122, at 21; Cratsley, supra note 122, at 571; R. Allan Edgar, A Judge’s View—ADR and the Federal Courts—
commentators agree. As discussed above, lawyers strongly prefer settlement with a judge who is not assigned to try their case. Encouragingly, some state and local federal court rules do impose this separation. And, even when they do not, some judges recuse themselves voluntarily after presiding over a settlement conference or mediation out of a concern for public perception and the importance of trust in the court system.

Yet many judges do not see a problem. A vocal group is on the record defending the practice of settling their assigned cases. Empirical evidence about judges’ attitudes is slight, but in a recent study of California state court judges a strong majority felt that they should be allowed to conduct settlement conferences (82%) or mediate (71%) with the consent of the parties in cases assigned to them for trial. Because the discretion granted to judges for

The Eastern District of Tennessee, 26 U. MEM. L. REV. 995, 1000 (1996); Kennedy, supra note 54, at 10; McKay, supra note 122, at 827; Peckham, supra note 1, at 789; Zampano, supra note 137, at 4. For some, this concern is limited to nonjury cases. See Baer, supra note 122, at 150–51; Brazil Interview, supra note 153, at 25 (quoting Judge Klein); Will et al., supra note 53, at 211–12.


See supra notes 260–68 and accompanying text.

See supra text accompanying notes 356–59.

Novak v. Farneman, No. 2:10-CV-768, 2011 WL 4688630, at *4 (S.D. Ohio Sept. 30, 2011) (deciding that continuing to preside over disputes the judge had mediated did not pose a threat to impartiality and that recusal was not required, but nonetheless recusing himself to avoid any taint of suggested bias); Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (magistrate judge recusing himself on his own initiative when assigned to try a case he had mediated); see also Day v. NLO, 864 F. Supp. 40, 41, 43–44 (S.D. Ohio 1994) (order transferring case) (disagreeing with the argument that a judge who participated in settlement is incapable of reviewing that settlement, but recusing himself “out of an abundance of caution”).

Brazil Interview, supra note 153, at 24 (noting “considerable disagreement” among federal judges).

See, e.g., LACEY, supra note 44, at 23; Baer, supra note 122, at 148; Brazil Interview, supra note 153, at 27 (quoting Judge Klein); Hogan, supra note 129, at 439; Miller, supra note 128, at 33 (quoting Judge McCarthy); Polster, supra note 122; see also Martin, supra note 159, at 194–95 (describing a judge who conducts his own settlement conferences when he is the trier of fact).

Robinson, supra note 122, at 344 & tbl.2, 356 & tbl.6. Actual use of the practice was somewhat less prevalent. Practices were almost evenly split at the extremes on the general civil trial bench. About 38% of the judges reported that they were the trial judge in 90% or more of their settlement conference cases, while almost 40% reported that they
prettrial management includes everything related to settlement (unless restricted by local rule), many judges are free to take on dual-neutral roles. And, as shown above, judges’ confidence in their ability to do this is understandable, even if misplaced.\textsuperscript{381}

In the federal court system, the ideal way to reduce the potential for coercion and partiality that can damage perceptions of civil justice—in the context of both settlement and adjudication—would be through amendments to Rule 16 that prevent judges from serving as settlement neutrals in cases assigned to them for management and adjudication. Separating these functions structurally would establish a uniform national approach and establish a norm that state court systems could adopt as well. This is, however, an ambitious proposal. It failed as an ethical reform, and any attempt to amend Rule 16 of the Federal Rules of Civil Procedure will surely face similar challenges.

One headwind the proposal will face is that it would impose limitations on judicial discretion, which was embraced by the Rules’ original drafters and is now particularly strong in the pretrial setting.\textsuperscript{382} While a general lack of constraint on judicial power has been one of the central criticisms of the discretion associated with judicial management,\textsuperscript{383} it should be clear by now that I am not urging reform from that perspective or seeking to curtail discretion as a general matter through procedural rules.\textsuperscript{384} The argument here is limited to settlement conferences. Professor Cooper, the long-serving Reporter for the Advisory Rules Committee, offered a pragmatic justification for discretion as “a useful rulemaking technique when it is difficult — as it were rarely assigned as the trial judge in their settlement conference cases (10% or less). Id. at 346 & tbl.5. Judges assigned to the family law bench, however, were more likely to conduct settlement conferences in cases to which they were assigned for trial. Id. at 347; see also Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv., Nos. 00-1401 (PLF/JMF), 00-2089 (PLF/JMF), 2010 WL 4116858, at *4 (D.D.C. Oct. 19, 2010) (remarking that federal magistrate judges “are often called upon to try a case after they have presided over settlement discussions” in the District of Columbia).

\textsuperscript{381} See supra notes 314–18 and accompanying text.

\textsuperscript{382} See Gensler, supra note 9, at 720. See generally Marcus, supra note 15; Subrin, supra note 17.


almost always is — to foresee even the most important problems and to determine their wise resolution.”

The problems with judges settling cases they manage and adjudicate are not, however, difficult to foresee. A decision to serve as a settlement neutral is unlike the many pretrial managerial decisions that require case-by-case tailoring or that benefit from judicial discretion to make adjustments from default provisions. Instead, policies governing the extent to which judges should mix conflicting neutral roles can be determined with reference to overarching principles coupled with practical considerations.

Perhaps the best hope is that federal rulemakers would regard an amendment as an opportunity to achieve national uniformity on an important issue by imposing a structural separation of neutral functions. As with prior changes to Rule 16’s provisions concerning settlement conferences, an amendment of this nature would not be breaking new ground. Although it would do much more than merely confirm the status quo, it would follow the lead of the districts with similar rules. Failing a uniform national approach, however, district courts could improve their local rules by coordinating their provisions for settlement conferences with those that govern their ADR programs. The framework suggested in this Article defines the issue as one of eliminating conflicting neutral roles rather than one of restricting judicial management. This conceptualization could provide a basis for revisions of local rules to bring provisions for judicial settlement conferences within accepted principles for ADR processes.

1. Essentials for Separating Neutral Functions

Two key elements need to be incorporated in an amendment. First, the rule should establish a structural separation by prohibiting judges assigned to adjudicate and manage a case from presiding at settlement. “Settlement” needs to encompass both judicial settlement conferences and mediations. This does not mean relieving judges from presiding over settlement conferences or serving as mediators, where they have much to offer. Separate settlement

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386 As an example, the Federal Rules of Civil Procedure permit judges to vary the appropriate number and length of depositions depending on the circumstances of the case. See *Fed. R. Civ. P.* 26(b)(2), 30(a)(2), 30(d)(1).

387 There are also other reasons to avoid undue optimism about the prospects of addressing the problem of dual-neutral roles via an amendment to Rule 16. In the words of Professor Marcus, Associate Reporter of the Advisory Committee on Civil Rules, “Amendments do not and should not happen often. Amending the rules is not easy and should not be.” Richard Marcus, *Shoes That Did Not Drop*, 46 U. Mich. J.L. Reform 637, 637 (2013). Moreover, sometimes a crisis mentality is necessary before procedural reform is undertaken. Richard L. Marcus, *Modes of Procedural Reform*, 31 Hastings Int’l & Comp. L. Rev. 157, 186 (2008).

388 *See supra* notes 158–76 and accompanying text.
judges are not impractical if courts assign this function to magistrate judges or use a “buddy system” in which judges trade cases for settlement. Courts could also use senior or retired judges as settlement judges.389

Objectors sometimes envision a sharing system in which the assigned judge conducts the settlement proceeding and then, if it is not successful, transfers the case to another judge for trial. This could create administrative problems and would make it difficult to set a firm trial date as a method to encourage settlement.390 Reassigning the settlement process rather than the trial would mitigate these administrative barriers. And, given the decisionmaking that is involved in pretrial management, reassigning settlement better serves the goal of separating adjudicatory and settlement roles. Another objection to referring mediations to another judge is that the colleague will not welcome the case, which will consume time but not bolster his disposition statistics or lighten his docket.391 This administrative barrier could be remedied by adjusting the way statistics are gathered to account for settlements, and exchanging cases for settlement should even out the effect on the docket in the long run.

Second, the rule should include a confidentiality provision to ensure that settlement judges and mediators may not report settlement communications to assigned judges.392 Because sometimes judges would like to know what happened during a settlement attempt in their case, it is important to limit disclosures from settlement conferences just as many districts limit such communication from their ADR programs. A provision could be modeled on the Uniform Mediation Act, the local federal court rules, or state rules discussed above.393

2. Potential Exceptions

If the rulemaking bodies do take up the issue of dual-neutral roles, there are two potential exceptions that will likely be urged to modify a bright-line rule. One is to limit the prohibition on dual-neutral roles to bench trials. The second is to allow exceptions when parties consent to the assigned judge serving as the settlement neutral. The first exception should be rejected. The second should be limited to very narrow circumstances.

The Judicial Conference’s Committee on Codes of Conduct thought that ethical concerns about a dual judicial role are lessened when a judge presides

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389 One judge has even suggested reciprocal arrangements between federal- and state-court judges. Cratsley, supra note 122, at 589.
390 Polster, supra note 122.
391 Baer, supra note 122, at 149.
392 See Welsh, supra note 126, at 990, 1028–32 (proposing strict confidentiality provisions to separate mediation from adjudication).
393 UNIF. MEDIATION ACT § 7(a) (UNIF. LAW COMM’N 2003); see also supra Part IV.C.2.
over a jury trial. Consistent with this view, there are judges who consider their settlement efforts in cases assigned to them for adjudication as far less problematic in jury trials than in cases they will try from the bench. The reasoning behind this distinction is that, in a bench trial, the judge is the trier of fact and key witnesses may have participated in the mediation. In contrast, in a jury trial the judge’s role is only to manage the process while the jury decides the merits of the case. Thus the potential effect of settlement on decisionmaking is lessened with a jury trial.

The arguments against making an exception for jury trials are twofold. First, while judges in a jury trial do not make the ultimate decision on the merits, they do make other crucial rulings during and after trial, and it is important to avoid any perception that these decisions have been influenced by settlement conversations. Decisions on motions to set aside a verdict or reduce the amount of damages awarded by a jury, for example, could be affected by a party’s concessions or the judge’s access to inadmissible evidence during settlement. Moreover, assigned judges make managerial decisions on discovery issues that might affect the value of a case in both jury and non-jury trials.

Second, a judge conducting a jury trial can influence a jury through her demeanor and nonverbal communication. Nonverbal signals are important in human communication and persuasion, and experimental work suggests that judges indicate their attitudes and respect for trial participants to the jury through facial expressions and body language. Jurors naturally look to judges for guidance during a trial, and studies of mock juries support a conclusion that not only are judges signaling their underlying views to jurors, but jurors are aware of these nonverbal cues from judges, particularly their negative behaviors. At the extreme, nonverbal judicial conduct has been

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394 Advisory Opinion No. 95, supra note 237, at 162.
395 See, e.g., Baer, supra note 122, at 150; Barnao, supra note 373, at 594–95; Brazil Interview, supra note 153, at 25 (quoting Judge Klein); Katz, supra note 135, at 3; Will et al., supra note 53, at 211–12; see also D. CONN. CIV. R. 16(c) (distinguishing assignment of neutral for bench and jury trials); D. HAW. R. 16.5 (same).
396 Polster, supra note 122, at n.2.
397 Cratsley, supra note 122, at 589 (discussing decisions about the jury empanelment process, evidentiary rulings, motions for directed verdict, and jury instructions); Killefer, supra note 169, at 19 (noting important effect of judges’ rulings on “the shape” of jury trial).
398 Barnao, supra note 373, at 595 n.87 (quoting Judge Levy).
399 Brazil Interview, supra note 153, at 24 (quoting Judge Bremer discussing procedures in the District of Iowa to separate settlement from management functions).
found to be reversible error.\textsuperscript{402} Even with more subtle effects, nonverbal signals are a reason to take seriously concerns about a judge who has led a settlement process presiding at a jury trial.

The second potential exception is one that would allow an assigned judge to function as a settlement neutral with the consent of the parties. As with jury trials, party consent is a factor that the Judicial Conference’s Committee on Codes of Conduct thought should mitigate ethical concerns when an assigned judge leads settlement discussions.\textsuperscript{403} The ABA Section on Dispute Resolution ethical proposal would have permitted a trial judge to serve as a mediator with consent of the parties,\textsuperscript{404} and some judges have also voiced support for this approach.\textsuperscript{405} In addition, among the federal districts that generally do not permit an assigned judge to preside at a settlement conference, some permit an exception if the parties all stipulate their consent.\textsuperscript{406}

An exception for consent would be consistent with the emphasis in mediation on party self-determination\textsuperscript{407} and with the judicial codes’ permission for ex parte communications in settlement with the consent of the parties.\textsuperscript{408} Parties and their attorneys may prefer settlement with the judge assigned for management and trial based on that judge’s settlement skill and style, especially if there are few alternatives in a particular jurisdiction. Consent may also, however, implicate the tendency toward overconfidence. An attorney may be so confident that the judge will see her side of the case as stronger that she may undervalue the risks of settlement participation. In any event, consent should not be a matter of agreeing to a judge’s suggestion that she serve as the settlement judge; it should come entirely at the initiative of the parties. This is necessary in order to avoid the dilemma inherent in resisting a judicial request. In addition, if the case does not settle, the parties should have

\textsuperscript{402} See e.g., Andrew Horwitz, Mixed Signals and Subtle Cues: Jury Independence and Judicial Appointment of the Jury Foreperson, 54 CATH. U. L. REV. 829, 850–54 (2005) (discussing cases).
\textsuperscript{403} Advisory Opinion No. 95, supra note 237, at 161.
\textsuperscript{404} See SECTION OF DISPUTE RESOLUTION, supra note 326. It would also have permitted the practice if there is no reasonable alternative, such as when a jurisdiction has only a single judge. \textit{Brazil Interview, supra} note 153, at 26.
\textsuperscript{405} \textit{Brazil Interview, supra} note 153, at 25 (quoting Judge Klein emphasizing the importance of the parties’ wishes); Katz, \textit{supra} note 135, at 3 (describing a judge willing to participate in mediation in cases scheduled for bench trial when parties so request and waive the conflict). The survey of California judges that asked about dual-neutral roles premised the question on party consent. Robinson, \textit{supra} note 122, at 343; see also \textit{supra} text accompanying note 380.
\textsuperscript{406} See, e.g., E.D. CAL. R. 240(a)(16), 270(b); N.D. CAL. ADR R. 7-2; D. GUAM R. 16-2(b)(1)(B); D. HAW. R. 16.5(a); D.N.D. R. 16.2(C)(1) (“appropriate jury case[s]” only); see also D. OR. R. 16-4(e)(2) (parties must “jointly initiate a request”); M.D. TENN. R. 16.04(a) (exception when “requested and agreed by the parties” or if the assigned judge deems it appropriate “because of the exigencies of the case”).
\textsuperscript{408} See \textit{supra} text accompanying notes 331–34.
the option to reevaluate their consent after the settlement attempt, when they will know what information they shared with the judge. At that point, they will be better able to evaluate the risk of partiality on the part of the judge. 409

V. CONCLUSION

Concerns about bias and coercion have accompanied judicial settlement from its inception. Both these concerns are greatly heightened when a judge serves as a neutral in a case she is also managing and will adjudicate if settlement is unsuccessful. Forceful encouragement to settle becomes coercion when it comes from a person with decisionmaking power over the case. Impartiality at trial is threatened by the information shared with the judge in settlement or, alternatively, the settlement process is made less effective by withholding that information. The rise of facilitative mediation as a judicial settlement method may help reduce worries about coercion, but it heightens concerns about impartiality because of the types of information that pass from parties to the decisionmaker. And due to advances in cognitive and social psychology, a greater understanding of mental processes and decisionmaking supports and sharpens these concerns.

The perception of these problems by parties and attorneys is as important as the reality. Settlement has become an important judicial function, identified with the courts, and the way it is conducted will influence how the public views the integrity of the judicial system. It is time to move beyond the conception of a managerial judge as someone who handles all the pretrial matters in a case, including settlement. Presiding at settlement is, at its core, a neutral role, not a managerial function. Judges make significant contributions as settlement neutrals, and the risks inherent in dual neutral roles can be avoided by imposing a structural separation between settlement and adjudication. Rules that leave true settlement management in the hands of the assigned judge, while reassigning the settlement neutral function to a judge who is not responsible for adjudication, would enhance the effectiveness of settlement and protect the integrity of courts’ decisionmaking processes.

409 Cf. Welsh, supra note 126, at 990, 1032–33 (proposing that when a single magistrate judge presides over both settlement and adjudication, caucuses should be barred in the settlement session and the parties should be able to elect, after the settlement session, whether or not the magistrate judge will conduct the trial).
DO YOU BELIEVE IN MAGIC?:
SELF-DETERMINATION AND PROCEDURAL JUSTICE MEET INEQUALITY IN COURT-CONNECTED MEDIATION

Nancy A. Welsh*

ABSTRACT

Proponents of the “contemporary mediation movement” promised that parties would be able to exercise self-determination as they participated in mediation. When courts began to mandate the use of mediation, commentators raised doubts about the vitality of self-determination. Though these commentators also suggested a wide variety of reforms, few of their proposals have gained widespread adoption in the courts.

Ensuring the procedural justice of mediation represents another means to ensure self-determination. If mediation provides parties with the opportunity to exercise voice, helps them demonstrate that they have considered what each other had to say, and treats them in an even-handed and dignified manner, it is more likely that the parties will share information that will lead to a result that actually represents the exercise of their self-determination.

Recent research, however, counsels that status affects procedural justice perceptions, voice is not always productive, and parties who are marginalized or lower status may neither expect nor desire to exercise voice. Further, research indicates that even those parties in mediation who value voice may not value participating in the back-and-forth or bargaining process that is required to arrive an agreement.

After reviewing this and other research, the Article proposes the following reforms to enhance the likelihood that mediation will provide all parties with voice, trustworthy consideration and real, substantive self-determination: increasing the inclusivity of the pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with pre-mediation information they need to engage in informed deci-

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sion-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which mediators would be required to take affirmative steps to avoid unconscionable unfairness or coercion.

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I. INTRODUCTION

Dreams and noble intentions, at least in part, inspired the “contemporary mediation movement.” \(^1\) Many mediation advocates\(^2\) urged—and continue to urge\(^3\)—that mediation should be embraced and institutionalized because it is an inclusive process and can enable people to find paths that allow them to exercise meaningful self-determination in resolving their disputes. This promise of self-determination has dimmed, however, as courts and agencies have focused on efficiency as a primary reason to institutionalize mediation,\(^4\) as lawyers and repeat players have come to dominate the issue framing and negotiations occurring within mediation,\(^5\) and as research has revealed that a significant percentage of parties do not possess the temperament or desire to fashion their own unique resolutions.\(^6\)

As self-determination has lost luster, some mediation advocates have emphasized mediation’s potential to provide an “experience of justice.”\(^7\) Drawing on the vast social–psychological literature regarding procedural justice, these mediation advocates have urged that the process offers important opportunities for “voice,” “trustworthy consideration,” and “even-handed and respectful treatment,” in marked contrast to the processes used to resolve the vast majority of litigated civil matters—i.e., default, lawyers’ bilateral negotiation, and dispositive motions.\(^8\) This Article, in part, represents a reminder regarding mediation’s potential to

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2. This includes the author of this Article.
6. See Donna Shestowsky, How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study, 49 U.C. DAVIS L. REV. 793, 828 (2016) (reporting research regarding ex ante litigation preferences, specifically that “maintaining veto power over a third-party suggestion was as much decision control that litigants desired and they were indifferent between having this type of power and delegating decision-making authority to a third party or group of third parties.”).
8. See Welsh, Making Deals, supra note 5, at 788; Welsh, The Transitional State, supra note 7.
provide self-determination and procedural justice and then considers the fate of proposals that have arisen to reclaim this potential.

But this Article also examines more recent research raising questions regarding the appropriateness of expecting mediation to deliver self-determination or procedural justice. In particular, the Article examines research indicating that people’s societal identity and status can and does affect the likelihood that they will perceive procedural justice in mediation, their ability and willingness to exercise voice in mediation, and even their ability and willingness to demonstrate trustworthy consideration. Members of society who feel marginalized or isolated—or who know that they exercise no power due to their disadvantageous place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to express themselves in mediation. To do so represents an unacceptable risk. Meanwhile, members of society who are powerful—or who know that they exercise privilege due to their superior place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to hear and acknowledge what other parties have said in mediation. If mediation lacks participants’ voice and trustworthy consideration, it is difficult to understand how the process can provide either procedural justice or a meaningful version of self-determination. In other words, as self-determination and procedural justice meet inequality in mediation, these noble intentions are found wanting.

It is at this point that it becomes tempting to question the value of mediation—to label mediation as an innovation that looked promising but has ended in failure. It is also at this point that the question (and song title) Do You Believe in Magic? comes to mind. Of course, the answer to such a question must be “No!” Only a fool believes in magic. But as is so often true, the lyrics of the song are much more nuanced than the title would lead us to believe. The lyrics urge us to “believe in [the] magic in a young girl’s heart” and that music can “free your soul.” The lyrics also acknowledge that talking about this form of magic is “like trying to tell a stranger ’bout-a rock and roll.”

In other words, it is the hope and creativity in music that are “magic,” and they must be experienced in order to be felt. There is no doubt that both of these assertions can be true. Music can overcome all sorts of barriers, inhabiting both the space outside and inside us, reaching beyond the rigorously rational and into the hopefully emotional. It can unlock individuals’ previously-unacknowledged abilities for expression and freedom, and when we make music together—or dance together—we can feel the power of coming together to create something good. Music defi-

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9. **The Lovin’ Spoonful, Do You Believe in Magic?, on Do You Believe in Magic** (Kama Sutra 1965).
nitely has a power, a language, a connecting force—a magic—that can help us overcome barriers and inhibitions that would otherwise divide us. So, the answer to the question “Do you believe in magic?” really has to be both “yes” and “no.”12 It depends.

And so it is with mediation. “It depends” must be the appropriate response to the question of whether we should continue to believe in the potential power of mediation to foster dialogue, procedural justice, and self-determination. Therefore, this Article will not end with the conclusion that mediation represents a failed experiment, unable to overcome the negative effects of inequality, bias, and prejudice. Instead, this Article will call for more realistic expectations of the process, the establishment of conditions that make achievement of its potential more likely, and reforms to increase the inclusivity and safety of the process—thus fostering all people’s ability to find and express their own voices, find and exercise their abilities to consider the voice of the other, and arrive at their own voluntary (self-determined) agreements. There is work to be done.

II. MEDIATION AND SELF-DETERMINATION

The field of “alternative” dispute resolution is grounded in the concept of self-determination.13 Oxford defines this concept as “[t]he process by
which a person controls their own life.” Merriam-Webster defines it as “free choice of one’s own acts or states without external compulsion.” The Free Dictionary defines it as “[d]etermination of one’s own fate or course of action without compulsion; free will.” All of these definitions evince a faith in people’s desire and ability to control their own lives.

For those of us who believe in the dignity and capacity of every human being, there is some degree of magic in this concept of self-determination.

Importantly, self-determination is not familiar to most lawyers and judges. Instead, it is a concept that finds its home in the worlds of diplomacy and nation building. Nonetheless, mediators in the United States have long embraced self-determination. For example, the Model Standards of Conduct for Mediators adopted by the American Bar Association (ABA) Section of Dispute Resolution, the American Arbitration Association, and the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution) in 1994 placed self-determination first among the standards. The 1994 Model Standards described self-determination as “the fundamental principle of mediation.” Standard 1 of the 2005 Model Standards, meanwhile, provides: “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” The vision of self-determination contained in this standard is not quite as inspirational as those referenced earlier, but the basic message remains the same: resolution of disputes in mediation shall occur only if the people involved in the dispute choose resolution on their own and without anyone forcing their hands.

(2016), they/we share this commitment to providing people with the real opportunity to resolve disputes in the manner that they choose. See Nancy A. Welsh, Introduction, 5 Y.B. On Arb. & Mediation v (2013).


17. See Welsh, The Transitional State, supra note 7, at 878.

18. See Welsh, The Thinning Vision, supra note 4, at 60.

19. See Daniel Thürer & Thomas Burri, Self-Determination, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 [https://perma.cc/NX7F-4MZ9] (last updated Dec. 2008) (asserting that the origin of the modern concept of self-determination derives from the U.S. Declaration of Independence, particularly the provision that governments “derive[] their just powers from the consent of the governed and that ‘whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it’”).


Largely due to concerns about declining access to justice—specifically, concerns that litigants were experiencing unacceptable delay and increased costs due to burgeoning civil and criminal court filings and litigation inefficiencies—federal and state courts institutionalized mediation for the resolution of all sorts of civil matters. Respect for parties' self-determination was not a guiding principle. When insufficient numbers of litigants voluntarily elected to try mediation to resolve their cases, courts began making mediation mandatory. As lawyers became more involved in the process, their voices and framing of issues dominated the discussions occurring in mediation, thus marginalizing their clients' participation. The lawyers also chose mediators who were experienced litigators or judges with relevant subject-matter expertise. They sought mediators who would provide reality testing. In some types of cases, lawyers counseled their clients not to attend the mediation. Increasingly today, lawyers urge mediators to avoid joint sessions that would allow the parties to talk directly with each other. Instead, many lawyers prefer private conversations with the mediator (caucuses) and shuttle diplomacy.

All of these adaptations have occurred while many courts continue to describe mediation in a manner that hearkens back to the early days of the contemporary mediation movement and as judges express a preference for mediation because they believe that it involves the parties more

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22. See Bobbi McAdoo & Nancy A. Welsh, Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, 5 Nev. L.J. 399, 400, 420 (2005) [hereinafter McAdoo & Welsh, Look Before You Leap]; Riskin & Welsh, Is That All There Is?, supra note 5, at 420; Welsh, Making Deals, supra note 5, at 846; Welsh, The Thinning Vision, supra note 4, at 8–9. I have even raised concerns that lawyers are using mediation—specifically, the mediation privilege—to protect themselves from potential malpractice suits arising out of the settlement of cases. See Nancy A. Welsh, Musings on Mediation, Kleenex, and (Smudged) White Hats, 33 U. La Verne L. Rev. 5, 13 (2011) [hereinafter Welsh, Musings on Mediation].


24. See Lynne S. Bassis, Face-to-Face Sessions Fade Away: Why is Mediation’s Joint Session Disappearing?, Disp. Resol. Mag., Fall 2014, at 33; Jay Fölberg, The Shrinking Joint Session: Survey Results, Disp. Resol. Mag., Winter 2016, at 19; Eric Galton & Tracy Allen, Don’t Torch the Joint Session, Disp. Resol. Mag., Fall 2014, at 25–27; Thomas J. Stipanowich, Insights on Mediator Practices and Perceptions, Disp. Resol. Mag., Winter 2016, at 7. I pointed out the reduced use of joint session nearly twenty years ago. See Welsh, Making Deals, supra note 5, at 789–91; Welsh, The Thinning Vision, supra note 4, at 20–21. Meanwhile, it is important to note that caucusing has been part of mediation for a very long time. Researchers found that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants’ statements occurred in caucus as compared to joint session; and

[In cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties’ behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.

Gary L. Welton et al., The Role of Caucusing in Community Mediation, 32 J. Conflict Resol. 181, 199 (1988).]
directly in the resolution of their disputes. The United States District Court for the Eastern District of New York, for example, defines mediation as:

a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party’s legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

When parties seek to set aside agreements they have reached in mediation, however, courts generally do not try to determine whether there was “communication across party lines,” articulation and understanding of the parties’ interests, “exploration of a wide range of potential solutions,” options that “address interests . . . outside the scope of the stated controversy or which could not be addressed by judicial action,” and—ultimately—the exercise of self-determination. Rather, courts look for the other extreme, trying to determine whether any participant in the process engaged in behaviors or threats so overwhelming that they could be classified as “coercion.” Courts rarely find coercion in mediation.

25. See Bobbi McAdoo, All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation, 22 OHIO ST. J. ON DISP. RESOL. 377, 398–99 (2007) (reporting that one of the top reasons that judges order parties into mediation is because they believe it will get clients more directly involved in discussing their case and its resolution); McAdoo & Welsh, Look Before You Leap, supra note 22, at 410; see also Jennifer W. Reynolds, Judicial Reviews: What Judges Write When They Write About Mediation, 5 Y.B. ON ARB. & MEDIATION 111, 142–143 (2013) (observing that when judges write about mediation, their perspective and goals for the process depend upon whether they are focusing on their obligation to process cases or serve as mediators themselves and care about the “fit” between the social role of the courts and mediation).

26. S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.8. (emphasis added). Interestingly, the definition of mediation on the court’s website varies slightly from the definition in its local rules. There, mediation is defined as a confidential process in which parties and counsel meet with a neutral third party who is trained in settling disputes. The mediator assists in improving communication across party lines, identifies areas of agreement, and helps parties to generate a mutually agreeable resolution to the dispute. Mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action.


28. See Welsh, The Thinning Vision, supra note 4, at 47.

29. See Nancy A. Welsh, Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 420 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004);
This standard of self-determination as “not coercion” represents a very thin vision of self-determination indeed. But it is important to recall that (1) the courts exist in order to produce resolution of disputes; (2) they do not exist to foster citizens’ self-determination; (3) they have an interest in the disposition of cases; and (4) they are constantly facing legislative calls for increased efficiency, budget cuts, and competition from administrative courts, private dispute resolution, and even international tribunals. Nonetheless, over the years, there has been no shortage of proposals to reinvigorate self-determination in court-connected mediation.

Working under the assumption that courts will continue to mandate parties’ participation in mediation, Leonard Riskin and I have urged that courts should provide for a pre-mediation consultation with the parties to determine the issues that the parties hope to address and their preferred mediation model. Similarly assuming the continuation of mandatory mediation, Jaqueline Nolan-Haley has called long and consistently for parties to have access to information regarding their legal rights and remedies so that their consent to any agreements in mediation is sufficiently informed. Jennifer Reynolds has advocated for law schools to commit themselves to educating members of the public regarding their legal rights and the skills needed to participate in mediation. Stephen Landsman has proposed that state-appointed lawyers should accompany parties

Welsh, The Thinning Vision, supra note 4, at 47; see also 1 SARAH R. COLE ET AL., § 7:9, Contract Defenses—Duress, in MEDIATION: LAW, POLICY AND PRACTICE (Dec. 2016 Update) (“Traditional duress principles would provide a pressured party no relief if the ‘threats’ come from the party’s lawyer and the mediator, and not from the adverse party. Furthermore, if both the mediator and the lawyer believe the settlement is fair, the settlement likely is within the range of settlements the courts would find acceptable.” (footnotes omitted)).


31. See Riskin & Welsh, Is That All There Is?, supra note 5, at 920–21. As noted in the article, staff mediators at the U.S. District Court for the Northern District of California and the Ninth Circuit provide such consultations.

32. See Jacqueline Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 NOTRE DAME L. REV. 775, 799–823 (1998); see also McAdoo & Welsh, Look Before You Leap, supra note 22, at 413–15 (regarding concerns about ordering self-represented litigants into mediation); Welsh, The Thinning Vision, supra note 4, at 5 (describing one vision of self-determination that focuses on ensuring parties have relevant information about rights, remedies, and usual settlements).

33. See Jennifer W. Reynolds, Luck v. Justice: Consent Intervenes, but for Whom?, 14 PEPP. DISP. RESOL. L. J. 245, 306–07 (2014) [hereinafter Reynolds, Luck] (examining the meaning of consent and calling for law schools to engage in public education regarding the law relevant to landlord-tenant, income tax, family, immigration, Social Security, and workers compensation and to improve people’s skills in negotiation, mediation, and contract-reading; also providing examples of law schools that offer “people’s law schools” and clinics that conduct outreach as well provide direct client service).
in mediation,\(^\text{34}\) while Kristen Blankley has urged that lawyers should use limited scope agreements to provide legal representation to clients in mediation.\(^\text{35}\) Omer Shapira has focused on mediators’ ethics, calling for revision of the Model Standards of Conduct for Mediators to require mediators to foster parties’ real, substantive self-determination rather than permitting formal, illusory self-determination to suffice.\(^\text{36}\) Alone and

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34. See Stephan Landsman, Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings, 37 Fordham Urb. L.J. 273, 277 (2010); see also Jean R. Sternlight, Lawyerless Dispute Resolution: Rethinking a Paradigm, 37 Fordham Urb. L.J. 381, 416–17 (2010) (reporting on one legal services office that largely limits its lawyers’ time to representation of clients on the day of mediation, with strikingly good results).

35. See Kristen M. Blankley, Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services, 28 Ohio St. J. on Disp. Resol. 659, 661–62 (2013). Interestingly, Dr. Roselle Wissler has observed that people participate less and express less satisfaction with their participation when represented by lawyers in mediation. She also provides several possible reasons for this. Roselle L. Wissler, Representation in Mediation: What We Know from Empirical Research, 37 Fordham Urb. L.J. 419, 446–47 (2010).

36. See Omer Shapira, A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform, 100 Marq. L. Rev. 81, 125–27 (2016). Omer Shapira has recently examined the concept of self-determination in some detail:

[T]he exercise of self-determination requires the convergence of three accumulative elements: competency to make decisions, voluntariness and lack of coercion at the time of decision-making, and the availability and understanding of the information relevant to the decision-making. It will be helpful in the following discussion to distinguish between the factual observation that an autonomous decision has been made, and its value or quality. An autonomous decision must satisfy the first two conditions of self-determination: it must be made with competence, and be voluntary and uncoerced. An autonomous decision need not satisfy the third condition of self-determination, and could be based on inadequate information. However, such a decision would be of low quality. To put it differently, an uninformed decision is an exercise of formal self-determination, while a decision made with awareness of information relevant to the decision is an exercise of substantive self-determination.

...The more the elements of self-determination are present and realized, the more likely it is that the decision is the product of substantive rather than formal self-determination. The exact point that separates substantive self-determination from formal self-determination might sometimes be blurred. However, it seems to me that the legitimate expectation of mediation parties is for “true,” i.e., substantive, self-determination, not formal self-determination. This expectation of a real, substantive exercise of rights is sometimes described as an expectation of fairness or justice.

...for a decision to be the product of “real,” substantive self-determination, as opposed to illusory, formal self-determination, each of the elements of self-determination must be of high quality: a high degree of competence in the sense of a high capacity to perceive and process information, as opposed to a low degree of competence following, for example, mental stress, confusion, or exhaustion; a high degree of voluntariness in the sense of a decision-making process free of coercive attempts, as opposed to a low degree of voluntariness following coercive acts and pressures that leave the decision-maker with feelings of helplessness and lack of choice; and decisions that are based on information relevant to the decision and understood by the decision-maker, as opposed to decisions that are based on inadequate information or on a misunderstanding of the information and its implications. When one or more of the elements of self-determination are of low quality, we will
with others, I have urged courts to establish mechanisms to monitor mediation or provide parties with post-mediation opportunities to submit feedback regarding their experience with the mediation process and the mediators.\textsuperscript{37} I have also advocated for a “cooling off” period to be applied to mediated settlement agreements, which would allow parties to rescind their agreements at will as long as such rescission occurred relatively promptly after the agreement was reached.\textsuperscript{38} I have urged that courts should be sure that court-connected mediation is supplemented with other alternatives so that parties are ordered to participate in the process that is most appropriate for their dispute—rather than expecting mediation to be all things to all people.\textsuperscript{39}

Of course, other means to protect and foster parties’ self-determination would be to end courts’ mandatory imposition of mediation, make use of mediation only presumptive, or mandate something less than mediation. Jacqueline Nolan-Haley has urged very recently that courts should never consider the decision-making process as reflecting the exercise of formal self-determination, and tend to treat it as unfair or unjust.


\textsuperscript{38} See Welsh, The Thinning Vision, supra note 4, at 87–89. This approach has been adopted by Minnesota for debtor-creditor matters, Florida in family matters, and California in insurance matters. See Minn. Stat. 572.35(2) (providing for 72 hours to rescind mediated settlement agreement between debtor and creditor); Fla. Family L. R. P. 12.74(I)(1) (providing for ten-day cooling-off period for agreements reached in family mediation, if attorneys do not accompany parties); Cal. Ins. Code 10089.82(c) (providing a three-day cooling-off period for insured to rescind mediated agreement reached regarding earthquake insurance dispute, provided that insured was not accompanied by counsel at the mediation and the settlement agreement is not signed by her counsel). See also Reynolds, Luck, supra note 33, at 309 (expressing great skepticism regarding the likelihood that parties will exercise such opt-out rights).

be permitted to make mediation mandatory in the first place. 40 Bobbi McAdoo and I have urged, separately and together, that if courts make mediation mandatory it should be for only a short time—perhaps two years so that lawyers have enough time to experience it—and then its use should be made voluntary. 41 Bobbi McAdoo and I have also advocated for allowing parties to opt out of mandatory mediation at will, without any required showing whatsoever. 42 Some courts specifically provide for such opt-outs. 43 Often, however, such permission is conditioned upon a sufficient showing by at least one of the parties or a screening by the mediator. 44 Andrea Schneider and I have endorsed proposals to mandate only the parties' participation in pre-mediation meetings to educate the parties regarding the mediation process. 45 Jacqueline Nolan-Haley has suggested that courts could create incentives to encourage parties' participation in mediation—in cases involving fee-shifting provisions, courts could determine whether a party's refusal to voluntarily participate in mediation should be punished by refusing to shift all or a portion of the fees that they would otherwise be entitled to receive. 46

Most of these proposals have fallen on barren soil in American courts and thus have borne no or little fruit. The only real exception is the option of allowing parties to opt out, usually conditioned upon a sufficient showing. This exception exists primarily in court-connected family medi-
tion and represents an acknowledgement of the unfortunately widespread reality and likely effects of intimate partner abuse. 47

At this point, then, it is difficult to muster up faith in the reality of the magic of self-determination as applied to court-connected mediation, especially mandatory court-connected mediation. The courts, certainly, are not going to act as the optimizers or guarantors of self-determination.

As a result, this Article will now turn from the concept of self-determination to the social–psychological concept of procedural justice. This is because assuring procedural justice in mediation may serve as a reasonable link between achieving the courts’ mission of case disposition and providing a meaningful measure of self-determination in mediation.

III. MEDIATION AND PROCEDURAL JUSTICE: THE USUAL STORY

Many people use the social–psychological term “procedural justice,” but a smaller number actually ground their understanding in the vast social–psychological empirical literature regarding the subject. 48 This literature reveals that people tend to perceive a process as fair or just if it includes the following elements: (1) “voice” or the opportunity for people to express what is important to them; 49 (2) “trustworthy consideration” or a demonstration that encourages people to believe that their voice was heard by the decision-maker or authority figure; 50 (3) a neutral forum

47. See, e.g., Ballard, supra note 44, at 241–243, 253; Pokman, supra note 44, at 529–31; Olson, supra note 44. It is relatively easy to comprehend why an abused intimate partner would not feel the presence of self-determination in a mediation if he or she has been harmed by an abusing partner and fears being harmed again. Others have suggested—legitimately—that an individual who has suffered harassment, discrimination, retaliation, or has been the victim of abuse or a hate crime could feel quite similarly in mediation. However, the courts generally have not established opt outs for these types of cases.

48. Meanwhile, there is also a vast empirical literature regarding related concepts—organizational justice, interactional justice, informational justice, etc. See Lisa Blomgren Bingham, Designing Justice: Legal Institutions and Other Systems for Managing Conflict, 24 OHIO ST. J. ON DISP. RESOL. 1, 26–46 (2008) (cataloguing the many different categories of justice that have been identified); Lisa Blomgren Amsler et al., Dispute Systems Design: Preventing, Managing and Resolving Conflict (unpublished manuscript) (on file with author).

49. See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 211–12 (1988) [hereinafter LIND & TYLER, SOCIAL PSYCHOLOGY]; E. Allan Lind, Procedural Justice, Disputing, and Reactions to Legal Authorities, in EVERYDAY PRACTICES AND TROUBLE CASES 177, 187 (Austin Sarat et al. eds., 1998) [hereinafter Lind, Procedural Justice, Disputing, and Reactions]; Tom R. Tyler, Social Justice: Outcome and Procedure, 35 INT’L J. PSYCHOL. 117, 121 (2000) [hereinafter Tyler, Social Justice] (describing voice as the opportunity for people to present their “suggestions” or “arguments about what should be done to resolve a problem or conflict” or “sharing the discussion over the issues involved in their problem or conflict” and also noting that voice effects have been found even when people know they will have little or no influence on decision makers); Nourit Zimerman & Tom R. Tyler, Between Access to Counsel and Access to Justice: A Psychological Perspective, 37 FORDHAM URB. L.J. 473, 488–89 (2010) (reporting that voice “shapes evaluations about neutrality, trust, and respect” and has the “strongest influence, followed respectively by neutrality, trust, and respect”).

50. Theories regarding “social exchange,” heuristics, and “group value” explain the importance of this perception. In part, at least, people care about voice—and trustworthy consideration—because they wish to know that the decision-maker is fully informed re-
that applies the same objective standards to all and treats the parties in an even-handed manner; and (4) treatment that is dignified. If people believe that they were treated fairly in a decision-making or dispute resolution procedure (i.e., the process was “procedurally just” or “procedurally fair”), they are more likely to (1) perceive that the substantive outcome is fair—even when it is adverse to them; (2) comply with the outcome; and (3) perceive that the sponsoring institution is legitimate.

Regarding their perspective, in hopes that this will influence the outcome. See Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 179. But people care about procedural fairness even when they have been told their voice will not influence the outcome. Procedural justice researchers now theorize that procedural fairness serves as a fairness “heuristic.” See E. Allan Lind et al., Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic, 38 ADMIN. SCI. Q. 224, 225–26 (1993); Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. & SOC. SCI. 171, 185–86 (2005); Kees van den Bos et al., How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect, 72 J. PERSONALITY & SOC. PSYCHOL. 1034, 1034–36 (1997). According to the “group value” or “relational” theory, meanwhile, people also care about the opportunity for voice and sincere consideration because these procedural elements signal the individual’s value and social standing within the relevant social group. See Donald E. Conlon et al., Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments, 19 J. APPLIED SOC. PSYCHOL. 1085, 1095 (1989); Tom R. Tyler, Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 858 (1994) [hereinafter Tyler, Psychological Models].

51. See Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DEPAUL L. REV. 661, 664 (2007) [hereinafter Tyler, American Public] (“Transparency and openness foster the belief that decisionmaking procedures are neutral.”); see also Steven L. Blader & Tom R. Tyler, A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 749 (2003) (distinguishing between “formal” or “structural” aspects of groups that influence perceptions of process fairness, such as group rules, and the “informal” influences that result from individual authority’s actual implementation of the rules).


54. See Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 192; Tyler, American Public, supra note 51, at 673–74 (describing procedural justice findings generally and research that has identified procedural justice and trust as the key antecedents of the willingness to defer to legal authorities); Tyler, Psychological Models, supra note 50, at 857; Tyler, Social Justice, supra note 49, at 119.

55. See Lind & Tyler, Social Psychology, supra note 49 at 209; Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 188. This perception is obviously important to courts. See David B. Rottman, Admin. Office of the Courts, Trust and Confidence in the California Courts: A Survey of the Public and Attorneys 24 (2005); Tom R. Tyler, Why People Obey the Law 94–108 (1990); Tyler, American Public, supra note 51, at 665; Tom R. Tyler, Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform, 45 AM. J. COMP. L. 871, 885–86 (1997) (suggesting that the influence of procedural justice judgments supports the idea “that the
This is the usual story, the generally true story. It is not the whole story, but the Article will return to that a bit later.

For now, it is important to notice the potential relationship between a procedurally just process and one that provides some measure of self-determination. If a person truly has and takes advantage of the opportunity for voice—i.e., if she truly says what she wants and needs to say—she has engaged in an act of procedural self-determination. Her expression of voice also makes it more likely that she will have significant input into the outcome (even though she cannot entirely control that out-

public has a very moral orientation toward the courts” and “[t]hey expect the courts to conform to their moral values,” especially regarding “the fairness of the procedures by which the courts make decisions”).

56. I need to distinguish here between voice and participation. They are related but not the same. Dr. Roselle Wissler has conducted research indicating that people’s perceptions of procedural justice in mediation are strongly influenced by their perception that they had voice—i.e., the opportunity to tell their views of the dispute. See Wissler, Representation in Mediation, supra note 35, at 448 n.136, 450. Interestingly, the relationship between perceptions of procedural justice and voice is much stronger than the relationship between perceptions of procedural justice and the amount of time people spent talking during (i.e., participating directly in) the mediation. See id. at 452 (“Parties’ sense that they had a chance to tell their views was more strongly related to favorable assessments of mediation than was how much they participated. Thus, ensuring that parties feel they have a chance to fully express their views appears to be more important to their experience in mediation than how much they participate directly.”). Indeed, although there is a relationship between people’s perception of voice and the amount of time they talked in the mediation, many people felt they had voice even when they spoke very little or not at all. See id. at 448–49, 451 (“Thus, although talking a lot virtually guaranteed that parties felt they had voice, not talking at all, or having a lawyer who talked a great deal, did not prevent a substantial number of parties from feeling they had a chance to tell their views. These findings suggest that parties can feel they have voice through their lawyers. It is not clear, however, why some parties who did not talk in mediation felt they had voice while others did not; perhaps it made a difference whether parties preferred not to talk and wanted their lawyer to speak for them, or whether they were ‘shut down’ by their lawyers, the mediator, or the other side.” Rather, people can feel they had voice even if they spent little time talking in mediation or if their lawyer dominated the conversation.). Consistent with some of the original procedural justice research conducted by Walker, Thibaut, and others, it appears that many people perceived they had voice as a result of their lawyers’ participation. See Welsh, Making Deals, supra note 5, at 841–43 (describing early studies by Walker, Thibaut, LaTour, and Lind). It also appears that those who felt they had voice but did not talk a lot were less likely to feel pressured to settle. In contrast, those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle. See Wissler, Representation in Mediation, supra note 35, at 449–50; see also Roselle L. Wissler, An Evaluation of the Common Pleas Court Civil Pilot Mediation Project viii (Feb. 2000) (unpublished manuscript) (on file with author). Meanwhile, “parties who said their lawyer talked more felt less pressured to settle than did parties who said their lawyer talked less.” Wissler, Representation in Mediation, supra note 35, at 451.

Wissler’s research suggests, to me at least, that the opportunity for voice is not the same thing as the opportunity to engage in the give-and-take of negotiation. See Welsh, Stepping Back Through the Looking Glass, supra note 7, at 654–58 (observing that while parents in special education mediation sessions valued the opportunity for voice, they did not particularly value the opportunity to negotiate or problem-solve with school officials). Further, Wissler’s findings appear consistent with other research suggesting that people value having their lawyers serve as “buffers” who reduce the need to engage directly in unpleasant interpersonal conflict. See Stephen LaTour et al., Procedure: Transnational Perspectives and Preferences, 86 YALE L.J. 258, 274 (1976).
and the opportunity to share this information may open up a new path toward both relational and instrumental resolution. It is important to notice as well the ways in which trustworthy consideration, a neutral forum, and even-handed and dignified treatment may create a greater likelihood that both parties will be able to hear and share information that may surprise or enlighten them, that such information may create new opportunities for resolution, that the parties may experience enhanced trust, and that this trust and the expanded exchange of information thus may produce both an integrative solution and a changed relationship.58

All of this potential is entirely consistent with the tantalizing promise of substantive self-determination. Long ago, Isabelle Gunning highlighted such potential and its particular promise for otherwise-disadvantaged people who need the opportunity to express “their authentic voices and experiences.”59 Mediation seemed to offer such people a forum in which “ideas about equality are [or at least could be] defined and redefined.”60 Thus, a procedurally just mediation process had the potential to bring different people together in a safe space,61 break through preexisting stereotypes and behaviors that continue to mar negotiations,62 and model


58. See Nancy A. Welsh, The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students, 28 NEGOT. J. 117, 133–34, 136 (2012) (observing the correlations that have been found among behaviors associated with procedural justice perceptions, enhanced perceptions of trustworthiness, enhanced information sharing, and enhanced likelihood of capturing available integrative potential) (citing Morton Deutsch, Conflict Resolution: Theory and Practice, 4 POL. PSYCHOL. 431, 438 (1983); Rebecca Holland-Blumoff, Just Negotiation, 88 WASH. U. L. REV. 381 (2010)).


60. Id. at 67, 86.

61. This is consistent with one of the interventions recommended to combat implicit bias. See Andrew J. Wistrich & Jeffrey J. Rachlinski, Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It, in ENHANCING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., 2017) (describing exposure to stereotype-incongruent models as one means to combat implicit bias directly).

62. There are many examples of empirical research that demonstrate racial discrimination in the selection of potential negotiation partners and the negotiation process itself. See, e.g., Ian Ayres & Peter Siegelman, Race and Gender Discrimination in Bargaining for a New Car, 85 AM. ECON. REV. 304 (1995) (experiment involving more than 400 visits to 200 car dealerships in Chicago); Ian Ayres et al., Race Effects on eBay, 46 RAND J. ECON. 891 (2015) (experiment involving sale of baseball cards in eBay auction held by light-skinned versus dark-skinned hand with payment of 20% less if card was held by a dark-skinned hand—even though that card was actually more valuable); Benjamin Edelman, Michael Luca & Dan Svirsky, Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, 9 AM. ECON. J. 1 (2017) (rental of home to “guests”—8% more likely to accept queries from Caucasian-seeming names than African-American-seeming names; the exception was that African-American females did not discriminate against African-American females, but both Caucasians and African-Americans discriminated against African-Americans generally); Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 AM. ECON. REV. 991 (2004) (resumes for those with white-sounding names 50% more likely to get callbacks than those with African-American-
the respect, responsibility, and dialogue that “fair and equal” people could and should extend to each other. However, as this Article has already indicated, there is a “rest” of the procedural justice story. The Article turns to this now.

IV. PROCEDURAL JUSTICE MEETS INEQUALITY

A. THE POTENTIAL FOR “SHAM” PROCEDURAL JUSTICE

First, and unfortunately, something called “sham” procedural justice exists. A process may include all of the elements listed above—with the implicit message that people’s voice has the potential to affect the outcome. However, the mediator or the parties may have absolutely no intention of allowing themselves to be affected by what they have heard or seen. This situation is most likely to occur when the mediator or the other party has a vested interest in the outcome. Under these circumstances, the mediator or the other party may be using the lessons of procedural justice research simply to seduce compliance. Not surprisingly, people’s trust can plummet if they learn that they were misled and unwittingly
participated in a sham procedure. They may perceive the outcome of this sham procedure to be less fair than the identical outcome of an obviously unfair process.

Importantly, however, this “frustration effect” has been found to occur quite rarely—e.g., when the apparent procedural justice of a process is relatively weak, the evidence of bias is strong, or a colleague points out the inequity of the outcome. E. Allan Lind and Tom Tyler have concluded that frustration effects “will occur only when there is overwhelming social or factual support for the supposition that the procedure is corrupt.”

The marginalized and vulnerable are most likely to bear the brunt of a sham procedure—and recent decades have seen worrisome growth in the gap between “haves” and “have-nots” around the world. Unfortunately, the marginalized and vulnerable also may be least likely to detect that they were the victims of a sham procedure.

**B. Status and Its Effects on the Perceptions and Influence of Procedural Justice**

There is also research indicating that even if a process is authentic and conducted in a procedurally just manner, individuals’ roles or social statuses affect the extent to which their judgments regarding procedural justice will influence their perceptions of substantive justice. Some of this research involves mediation directly. The Metrocourt Project, for example, reported that Hispanic-American litigants were more likely than Whites to be satisfied with the mediation process and its outcomes, even though Hispanic-Americans’ mediation outcomes were neither as favorable as Whites’ mediation outcomes nor as favorable as the outcomes...

66. People are aware of their vulnerability to manipulation and if they perceive evidence of unfair treatment or perceive “false representations of fair treatment,” they respond with “extremely negative reactions.” Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 187; see Tom R. Tyler et al., Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 73–74 (1985) (explaining that, under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “frustration” effect”). Note that what seems to matter here is the falsity of the explicit or implicit representation that people’s voice will have the potential to influence the outcome. In somewhat surprising contrast, there is substantial research demonstrating that if people are told in advance that their voice will not or cannot influence the outcome, they are nonetheless more likely to judge a process as procedurally just if the process includes an opportunity for voice. See Welsh, Making Deals, supra note 5, at 821–22 (describing these studies).


68. Id. at 183–84. Recent research has found an interesting and very strong relationship between people’s perceptions of the existence of the rule of law and the absence of corruption. See Mila Versteeg & Tom Ginsburg, Measuring the Rule of Law: A Comparison of Indicators, 42 LAW & SOC. INQUIRY 100, 117-118 (2017) (discussing the overwhelming correlation between Transparency International’s Corruption Perceptions Index and the Rule of Law indicators of the Heritage Foundation, World Bank, World Justice Project and Freedom House).

69. See Ellen Waldman & Lola Akin Ojelabi, Mediators and Substantive Justice: A View from Rawls’ Original Position, 30 OHIO ST. J. ON DISP. RESOL. 391, 398–400 (2016); Reynolds, Luck, supra note 33.

70. See Reynolds, Luck, supra note 33.
comes Hispanic-Americans received in adjudication. Interestingly, women of color expressed the highest level of satisfaction with mediation, while white women were the least satisfied and least likely to perceive the mediation process as fair even though they experienced the most favorable outcomes.

Recent research in the Netherlands regarding the mediation of labor disputes similarly indicates that people’s place in a hierarchy affects the influence of their procedural justice perceptions upon their perceptions of substantive outcomes. In this study, researchers found that supervisors were more likely than subordinates to judge mediation as effective even when the supervisors perceived low levels of procedural justice. Meanwhile, subordinates’ perceptions of mediation’s procedural justice determined their perceptions of the process’s effectiveness. Especially if subordinates perceived low levels of procedural justice, they perceived mediation to be ineffective. Supervisors also were more likely than subordinates to perceive mediation as procedurally just. Thus, in this research, those with higher status in the hierarchy of the workplace were more likely than those lower in the hierarchy to judge mediation as procedurally just and effective and less likely to find that low levels of procedural justice undermined the effectiveness of the mediation process.

Other research, not involving mediation, also suggests the relevance of status to procedural justice perceptions and their power. Substantial research has been conducted regarding the effect of procedural justice per-


72. See Hermann, New Mexico Research, supra note 71, at 92.


ceptions on people's perceptions of substantive justice when they interact with police. In general, that research has shown that when police behave in a manner consistent with procedural justice, people are more likely to perceive substantive outcomes as fair even when they are adverse. In other words, the provision of procedural justice can reduce the impact of outcome favorability on perceptions of substantive fairness. Other research has shown, meanwhile, that in making judgments about procedural fairness, people of color “place[d] significantly greater weight on evidence about their social standing than did White group members.” The researchers measured social standing by asking respondents “whether the authorities had been polite to them” and “had shown respect for their [respondents’] rights.”

More recent research suggests that in interactions between lower status and higher status people in negotiations or the workplace, the lower status persons are more likely to desire future interactions with higher status persons if they perceive that the higher status persons behaved in a procedurally just manner—even when those interactions produced disappointing outcomes for the lower status persons. In contrast, the higher status persons (which would tend to include more powerful parties and dominant repeat players) were less likely to be influenced by procedural fairness. Indeed, when lower status persons treated them in a procedurally just manner, those with higher status were more likely to perceive outcomes as fair only if those outcomes were consistent with what they expected or knew themselves to be entitled to receive.

These findings regarding the interaction between status and the composition and influence of procedural justice perceptions may be explained by the notion that procedural justice is more important and more influential for those who are lower status. Many studies have shown that people’s perceptions of outcome fairness are affected primarily by their expectations or comparison to others’ outcomes. Lower status persons,

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75. See Ya-Ru Chen et al., When is It “a Pleasure to Do Business with You?”: The Effects of Relative Status, Outcome Favorability, and Procedural Fairness, 92 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 4 (2003).
77. Id. at 833. These two measures were averaged to form a Standing scale. Id.
78. See Chen et al., supra note 75, at 1; Jane W. Adler et al., Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program 76, 83 (1983) (“Unlike the unsophisticated individual litigants, . . . institutional litigants” who made extensive use of the arbitration program “appear[ed] to care little about qualitative aspects of the hearing process” and “judge arbitration primarily on the basis of the outcomes it delivers.”).
79. See Chen et al., supra note 75; Roselle L. Wissler, Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics, 29 LAW & SOC'Y REV. 323, 346–47 (1995) (reporting that disputants’ satisfaction with outcomes was influenced primarily by outcome measures and, to a lesser but significant degree, by process evaluations; noting that these results are “consistent with theories that maintain that outcome satisfaction is influenced more by one’s assessment of the outcome compared with expectations or with others’ outcomes than by the absolute outcome received”).
however, are less likely to be confident regarding what they are entitled to receive, more concerned about the potential for exploitation, and thus more likely to need to determine how much they can trust a higher status person.\(^8\) For lower status people, attending to procedural cues represents a coping mechanism to help them deal with uncertainty regarding outcome fairness. As a result, for these people, strong procedural justice reduces the influence of outcome favorability upon their perceptions of substantive justice.

There is even biological support for the value of using the assessment of procedural justice as a coping mechanism. Being treated in a manner that is dignified, feels safe, and reduces stress has been shown to have a positive physiological effect that enhances people’s cognitive ability and decision-making.\(^1\) Thus, it makes sense that procedural justice will be particularly important for those dealing with vulnerability or uncertainty.\(^2\) It also makes sense that the provision of procedural justice will exercise less influence upon the judgments of those who do not expect to experience vulnerability or uncertainty.\(^3\) In fact, there is research suggesting that when higher status persons perceive that they have received


\(^1\) See Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 51–53 (2017) (discussing the “sweet spot” in cortisol production for problem solving and decision-making and how mediators can and should address disparities between mediating parties in the extent to which stressors may affect them); see also Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 83, 92 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting that perceptions of fair process lead to more trust and loyalty).


\(^3\) See Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. PERSONALITY & SOC. PSYCHOL. 1449, 1452 (1998) (reporting research showing that procedural justice information was not as necessary when the authority had a trustworthy reputation while there was heavy reliance on procedural justice information when no reputational information was provided). Procedurally just treatment has also been found to be more important to, and more influential for, those who define and evaluate themselves based on their relationships with others or believe that social interactions should affirm basic moral values. See Joel Brockner et al, *The Influence of Interdependent Self-Construal on Procedural Fairness Effects*, 96 ORG. BEHAV. & HUM. DECISION PROCESSES 155, 155 (2005). There is also research that is beginning to demonstrate that people’s roles correlate to the heightened importance of certain elements of procedural justice. For example, one field study (in Germany) has found that observers of court procedures are much more likely to focus on dignified treatment than on voice, consideration, or even-handed treatment. See Susanne Beier et al., *Influence of Judges’ Behaviors on Perceived Procedural Justice*, 44 J. OF APPLIED SOC. PSYCHOLOGY 46 (2014).
high procedural justice from a lower status person, they are likely to focus even more strongly on outcome favorability in deciding whether to judge the outcome as fair. For them, procedural justice does not soften the blow of an adverse outcome. Rather, procedural justice may sharpen the blow because the occurrence of an adverse outcome as a result of a procedurally fair process calls into question the higher status person’s self-conception.

Finally, there is somewhat counter-intuitive research suggesting that people with low self-esteem and those who are highly committed to avoiding unfavorable outcomes but are certain they are going to lose actually do not prefer procedurally just processes. Indeed, they prefer procedurally unjust processes because they can then blame the processes for adverse outcomes. If the process were procedurally just, these individuals would have to blame themselves for not doing all they could to win—while they were sure they were going to lose.

C. STATUS AND ITS EFFECTS ON THE DESIRE AND ABILITY TO EXERCISE VOICE

There is also an increasing amount of research focusing on the element of voice, and some of this research is particularly problematic in considering how inequality, bias, and prejudice may undermine the potential of mediation to offer procedural justice and a forum in which people’s authentic voices and experiences can be expressed.

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84. See Chen et al., supra note 75, at 1 (finding in experiments—one involving negotiation between higher status and lower status parties and a second involving the allocation of rewards between customer service representatives and supervisors—“high procedural fairness heightened the positive relationship between outcome favorability and desire for future interaction”). These researchers explain that higher status people “are more self-focused” than lower status people and use procedural fairness information (in conjunction with outcome favorability) more than lower status people do to determine how much they will be able to maintain existing conceptions of their status. On the one hand, social encounters that combine favorable outcomes and fair procedures on the other’s part enable higher status individuals to maintain their existing self-perceptions. Consequently, higher status people will strongly desire future interaction with other parties under such conditions. On the other hand, social encounters that combine unfavorable outcomes and fair procedures on the other’s part will be unwelcomed by higher status people insofar as these conditions threaten their existing self-perceptions. Id. at 6 (citing Dacher Keltner et al., Power, Approach, and Inhibition, 110 PSYCHOL. REV. 265 (2003)).

85. See id. at 6. On the other hand, prospect theory indicates that those who believe themselves entitled to a procedurally just process are quite likely to notice if they fail to receive such treatment. See Heather Pincock & Timothy Hedeen, Where the Rubber Meets the Clouds: Anticipated Developments in Conflict and Conflict Resolution Theory, 30 OHIO ST. J. ON DISP. RESOL. 431, 436 (2016) (discussing prospect theory). This research suggests that there is no particular advantage to providing a procedurally just process when dealing with higher status parties, but negative consequences may follow from the failure to provide a procedurally just process.

86. See Brockner, Wiesenfeld & Diekmann, supra note 80, at 188–90, 194–98 (describing research showing that people with lower self-esteem “felt significantly more self-verified [and their need for consistency was met] when told the event was handled with lower process fairness” while their level of commitment to an institution and its authorities was not affected by low process fairness).
1. Voice That Affects Perceptions of Procedural Justice

As noted earlier, the expression of voice is central to both procedural justice and self-determination. It is important, however, to identify the particular aspects of voice that are valuable in mediation. Roselle Wissler has conducted important research on this topic. First, she has found that people perceive that they have experienced the opportunity for voice and a procedurally just process in mediation if their lawyers speak on their behalf. Second, she has found that people’s perceptions of voice are even stronger if they have the opportunity to “tell their stories” themselves. Third, Wissler has found a distinction between voice and “participation.” In her research, while people’s perceptions of procedural justice are strongly related to their perception that they had a sufficient opportunity for voice, their perceptions of procedural justice are much less strongly related to the extent of their direct participation in the mediation. Indeed, Wissler found that those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle. This research suggests a disconnect between the voice that is important to procedural justice and the sort of participation that is often associated with self-determination—i.e., the opportunity to participate directly in the back-and-forth or bargaining of negotiation and mediation. I conducted qualitative research similarly suggesting that, in hierarchical systems, those with less power are quite likely to value the opportunity to express what is important to them while not valuing the opportunity to participate in the bargaining or negotiation process.

87. Voice also is central to procedural due process and, some would argue, rule of law. See Rebecca Hollander-Blumoff & Tom R. Tyler, Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution, 2011 J. DISP. RESOL. 1, 10 (2011) (“Because the legal system in the United States is adversarial and relies on parties to present their own evidence, this in turn links voice and an opportunity to be heard with principles of rule of law.”); Welsh, Hollow Promise, supra note 57, at 187 (observing that while voice and procedural due process certainly apply to adjudicative procedures, it is much more difficult to apply them to consensual procedures).

88. See Wissler, Representation in Mediation, supra note 35, at 447–52 (distinguishing between clients’ direct participation and indirect participation as their lawyers negotiated on their behalf); Roselle L. Wissler, Party Participation and Voice in Mediation, Disp. RESOL. MAG., Fall 2011, at 20; see also Lind et al., In the Eye of the Beholder, supra note 52, at 969, 972 (finding that in a variety of dispute resolution processes other than mediation, tort litigants’ sense of control over the way their case was handled was strongly related to procedural fairness judgments, while how much they felt they “participated in the process of disposing” of their case was not).

89. See Wissler, Representation in Mediation, supra note 35, at 449–50; see also Wissler, Common Pleas, supra, note 56, at viii.

90. Importantly, the exercise of self-determination does not require participation in the back-and-forth of negotiation. People can also exercise meaningful (although perhaps thinner) self-determination in choosing among predetermined options or in choosing to veto a single proposed solution. See Welsh, The Thinning Vision, supra note 4, at 44–46 (describing this definition of self-determination).

91. Parents participating in special education mediation sessions generally expressed a desire for, and appreciation of, the opportunity to express themselves but were much less likely to anticipate or value the opportunity to listen and try to understand school officials or negotiate with them. See Welsh, Stepping Back Through the Looking Glass, supra note 7, at 581.
Meanwhile, voice is not always pretty or easy to hear. Voice can be angry, aggressive, and cause discomfort, both for the person expressing it and the person listening to such expression.92 Such voice, with a strong emotional content, is often called “venting” in mediation.93 Although mediation commentators acknowledge venting as valuable when new information is being shared (including revealing emotional impacts and needs),94 they increasingly criticize the notion that venting is valuable for its own sake. There is physiological evidence, for example, that allowing a party to vent too much is not effective in helping with the release of difficult feelings and instead has the opposite effect. Continued venting, particularly in the presence of the other party, can result in heightened cortisol levels, which can then lead to greater entrenchment in negative feelings such as anger, as well as distorted perceptions that can inhibit problem-solving and decision-making.95 Thus, unrestrained venting can

92. Being evaluated negatively and not having a sense of control are reported to be among the most serious psychological stressors that exist, leading to heightened levels of cortisol that then affect perceptions and attributions. See Tanz & McClintock, supra note 81, at 37 (citing Sally S. Dickerson & Margaret E. Kemeny, Acute Stressors and Cortisol Responses: A Theoretical Integration and Synthesis of Laboratory Research, 130 PSYCHOL. BULL. 355 (2004)). This research appears to be consistent with findings from other research regarding the fundamental attribution error. This research has established that situational influences strongly affect our judgments. See Lee Ross, The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 184–87 (Leonard Berkowitz ed., 1977); Michael W. Morris, Richard P. Larrick & Steven K. Su, Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits, 77 J. PERSONALITY & SOC. PSYCHOLO. 52, 53 (1999); Keith G. Allred, Anger and Retaliation in Conflict: The Role of Attribution, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 236, 240–41 (Morton Deutsch et al. eds., 2d ed. 2006) (noting that “research indicates that in observing a person at an airport yelling at an airline agent, one tends to over-attribute the behavior to bad temper and underattribute it to circumstances, such as having recently been the victim of recurring unfair treatment by the airline”). We are more likely to take into account situational factors to explain our own behavior. Edward E. Jones & Richard E. Nisbett, The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in Attribution: Perceiving the Causes of Behavior 79, 80 (Edward E. Jones et al. eds., 1972). Research further indicates that we are even more likely to attribute negative behaviors to a person’s character or disposition if that person is not a member of our own social group. Meanwhile, venting strong emotions in front of an adversary in a mediation session also can represent a stressor that raises cortisol levels. See Tanz & McClintock, supra note 81, at 37, 45.

93. See Tanz & McClintock, supra note 81, at 59–60.

94. Id. at 59.

95. Id. at 60, 66 (citing Brad J. Bushman et al., Chewing on It Can Chew You Up: Effects of Ruminating on Triggered Displaced Aggression, 88 J. PERSONALITY & SOC. PSYCHOLOG. 969, 974 (2005); Kenneth F. Dunham, I Hate You, but We Can Work It Out: Dealing with Anger Issues in Mediation, 12 APPALACHIAN J.L. 191 (2013); Tammy Lenski, Venting Anger: A Good Habit to Break, MEDIATE.COM (May 2011), http://www.mediate.com/articles/LenskiTbl20110516.cfm [https://perma.cc/Y3NT-6AMK]; Dominik Mischkowski et al., Flies on the Wall Are Less Aggressive: Self-Distancing “in the Heat of the Moment” Reduces Aggressive Thoughts, Angry Feelings and Aggressive Behavior, 48 J. EXPERIMENTAL SOC. PSYCHOLOG. 1187, 1187–91 (2012)), Tanz and McClintock note that there may be a difference between men and women in their response to negative emotions, with women being more likely than men to inhibit such emotions and begin problem-solving. Id. at 49–51. Tanz and McClintock also report that women are more likely to respond to stress with a tend-and-befriend intervention, thus increasing social ties and resources. Id. at 68–69 (citing Shelley E. Taylor et al., Biobehavioral Responses to Stress in Females: Tend-
chill communications that are likely to be productive in terms of producing settlement in mediation.\textsuperscript{96}

At the very least, this research regarding the physiological effects of venting suggests that there can be a “right” and a “wrong” sort of voice in mediation.\textsuperscript{97} At this point, it is not clear who is more likely to exercise the wrong sort of voice in mediation, but this research raises legitimate concerns that mediators who seek to place restrictions on venting ultimately could chill the expression of righteous anger and fear by those feeling the effects of inequality, bias, and prejudice.\textsuperscript{98}

2. \textit{Status and the Willingness to Exercise Voice}

Research also reveals that we cannot assume that those who perceive that they have been ignored, excluded, or disrespected will be willing or able to exercise their voice at all. Robert Rubinson has written quite passionately about the difficulties facing low-income participants who are required to participate in court-connected mediation. They may not be able to get child care. Their reliance on public transportation could make it difficult for them to travel to the courthouse. They may have to forego hourly wages and may fear the loss of their jobs if they fail to turn up for work in order to participate in mediation.\textsuperscript{99} These difficulties make it unlikely that people will be able to afford the luxury of voice.
Recent research also has demonstrated that people’s willingness or ability to exercise their voice will depend, in large part, upon their identification with the relevant social group. In this research, the more people felt themselves to be part of a social group, the more they desired and expected voice in matters relevant to group membership. The less they identified with the social group, however, the less they desired and expected voice. Thus, despite the centrality of voice in the procedural justice literature, we cannot assume that everyone will always and uniformly have a high desire for voice. Those who do not feel part of the relevant social group—i.e., those who are marginalized or perceive that others are prejudiced against them—are likely to be less willing to exercise voice. Indeed, they are likely to be aware that their exercise of voice could subject them to heightened attention and negative consequences. People with higher status and greater identification in a social group, meanwhile, are more likely to exercise voice—and more likely to expect to exercise more voice. Interestingly, researchers noted that this may mean that people with higher status may actually be willing to trade their voice for something they want even more—i.e., a favorable outcome:

[Lower-status individuals or groups might demand voice precisely for its instrumental properties. At the same time, higher-status individuals and groups—particularly legitimately higher-status individuals and groups—may feel sufficiently confident in their positions that they would be willing to forgo voice (i.e. express a relatively low desire for voice) in favour of alternative rules such as unbiased decision-making, precisely because the unbiased decision maker ought to recognize their legitimately higher status and afford them the material benefits normatively associated with it.]

100. See Michael J. Platow et al., Social Identification Predicts Desires and Expectations for Voice, 28 SOC. JUST. RES. 526, 527 (2015). These researchers also observed, however, that people’s desire for voice generally is greater than their expectations regarding whether they will have voice. Id. at 545.

101. See, e.g., Doron Dorfman, Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process, 42 LAW & SOC. INQUIRY 195, 214–15 (2017) (describing how persons with disabilities who identify with the medical-individual model of disability do not necessarily want or need voice while those who identify with the social model of disability appreciate voice but also fear negative consequences of exercising voice in the disability determination process); Welsh, Stepping Back Through the Looking Glass, supra note 7, at 653–54 n.337 (suggesting this dynamic for parents of children with special needs); James A. Wall, Jr. & Suzanne Chan-Serafin, Do Mediators Walk Their Talk in Civil Cases?, 28 CONFLICT RESOL. QUARTERLY 3, 16 (2010) (finding that mediators tended to use evaluative or pressing strategies even when they said they would employ a neutral style, and such strategies were used most often with plaintiffs engaging in behavior the mediators perceived as too demanding or competitive); see also Welsh, I Could Have Been a Contender, supra note 63, at 1168–71 (citing research demonstrating that women who make demands and negotiate assertively are more likely than men to be judged harshly, parties who have suffered discrimination are particularly unlikely to bring claims, employer-respondents tend to refuse the EEOC’s invitation to mediate discrimination matters, and status quo bias tends to favor dominant parties and disfavor marginalized parties).

102. See Platow et al., supra note 100, at 526–49.

103. Id. at 545–46.
Related research indicates that people’s desire for, and expectation of, voice also is affected by the power distance culture of their national or organizational setting. In those nations with low power distance cultures\(^{104}\) (i.e., more egalitarian cultures), voice is expected and its legitimacy is high. When people in these nations experience lower levels of voice, they react negatively. In nations with high power distance cultures\(^{105}\) (i.e., more hierarchical cultures), people’s reactions to “low voice” are less negative. The researchers noted that “[a] central premise of the procedural justice literature—based on studies conducted mainly in the United States—is that people react unfavorably when they have little voice in a decision-making process.”\(^{106}\) These studies show that people’s desire for voice and their expectation that they will have voice are very likely to vary depending upon their culture, its power distance, and their placement in a relevant hierarchy.

Upon examination, it becomes clear that voice is neither a simple concept nor one that we can take for granted in the context of mediation. It is not magic. Rather, voice may be quite limited. Voice of the wrong sort can produce physiological effects that make it less effective in producing solutions. And people in a hierarchical setting who know they are marginalized may not expect voice or may choose not to exercise voice because they perceive, quite rationally, that it may cause them harm.\(^{107}\)

### D. Status and Its Effects on the Desire and Ability to Provide Trustworthy Consideration

As noted earlier, procedural justice research generally reveals that while people care about the opportunity for voice, they also care about whether their voice has been heard—i.e., whether their views were considered in a trustworthy manner. Most of the research focuses on whether an authority figure or decision-maker—e.g., a judge, police officer, or supervisor—has demonstrated trustworthy consideration. Notice that the people in these roles tend to be third parties, not engaged directly in the dispute. Indeed, researchers have long raised doubts about the ability of

\(^{104}\) The United States and Germany were the low power distance countries examined in this study.

\(^{105}\) China, Mexico, and Hong Kong were the high power distance countries examined in this study.


\(^{107}\) This research is reminiscent of the story told in White, *supra* note 97, in which the client chose to tell one story—the real story—to her lawyer and then told another story—the one that would fit a stereotype and yield the result she needed—when dealing with her welfare officer.
the disputing parties involved in a mediation to truly listen to each other.108 Relatively recently, however, researchers have discovered that the procedural justice perceptions of parties trying to resolve disputes in mediation depend very much on whether the other party—who shares decision-making authority in this consensual process—demonstrated trustworthy consideration.109

Trustworthy consideration is a concept that bears similarities to several others: active or reflective listening,110 “looping,”111 perspective taking,112 open-minded listening,113 testing for understanding,114 and empathizing.115 There are three key questions here: “Did the authority (or other) listen to what I said?” “Did the authority (or other) understand what I said?” “Did the authority (or other) care to understand what I said?” Research indicates that people tend to judge accurate procedures—i.e., those in which the decision maker or authority takes all relevant information into account in coming to a decision—as fairer than inaccurate procedures.116

As with voice, there is research indicating that inequality, bias, and prejudice can get in the way of listening to someone else’s perspective, accurately understanding what she has said, and caring to understand her perspective. Research regarding the fundamental attribution bias, for example, shows that when someone has hurt us and is not in our social

108. See, e.g., Welton et al., The Role of Caucusing, supra note 24, at 185 (“Joint sessions encourage disputants to simply repeat their official positions over and over rather than to explore these positions or listen to one another.”).

109. See Tina Nabatchi et al., Organizational Justice and Workplace Mediation: A Six-Factor Model, 18 INT’L J. CONFLICT MGMT. 148 (2007) (reporting, in the context of a transformative mediation program, the statistical significance of whether the other party heard and understood).


116. See Jan-Willem Van Prooijen et al., Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1357 (2002) (describing manipulation of procedural accuracy in experiment and noting that it represented “an alternative way to study procedural fairness”); see also Chen et al., supra note 75, at 15 (describing a “high procedural fairness condition” as one in which the decision-maker wrote “I carefully scored the forms, and I saw that you did X percent of the work, so I thought it’d be fair to give you Y of the 10 tickets,” while in a “low procedural fairness condition,” the decision-maker wrote “I didn’t bother to score the forms, but X is my lucky number, so I’m giving you Y percent of the tickets”).
group, we are more likely to over-attribute her bad behavior to her essential character and under-attribute it to the situation in which she found herself. We are more forgiving of those in our in-group and even more forgiving of ourselves.117 This psychological phenomenon is likely to impede our ability or desire to listen and really understand the voice of someone who is not in our social group.

There is also research showing that status can impede trustworthy consideration. Those who have higher status and greater power have been shown to be less likely to be trustworthy118 and thus less likely to provide consideration that is trustworthy. Worryingly, there is even research suggesting that people naturally associate the failure to provide procedural justice with power and assume that someone who has behaved in a procedurally just manner is less powerful.119 The failure of those with higher status and greater power to extend trustworthy consideration has been attributed to their reduced need for others’ help. This phenomenon also may be self-protective. Bob Mnookin has suggested that one of the great challenges of a similar skill, empathizing, is that it seems to require sympathy, agreement, or even the assumption of responsibility and blame for another’s pain—i.e., “the fear that I’m being asked to characterize my own decision as immoral.”120

This research demonstrates that placing two people in the same room in the presence of a mediator does not guarantee that either will provide the other with trustworthy consideration. Trustworthy consideration, like self-determination and voice, is not magic.

But can something be done to achieve many of the benefits of procedural justice while also recognizing that certain people—e.g., those who are lower status in a hierarchical system, those who have been marginalized within a social group, and ultimately those who are likely to be among the marginalized—may need assistance in exercising their voice, while other people—e.g., those who are higher status—may need assistance with demonstrating trustworthy consideration?

117. Allred, supra note 92; Morris, Larrick & Su, supra note 92. See Ross, supra note 92.

118. See David DeSteno, The Truth About Trust: How It Determines Success in Life, Love, Learning, and More 129–144 (2014) (summarizing research that has shown that trustworthiness is affected by context—e.g., an experience of increased status (even if temporary) leads to a reduced sense of needing others’ help and an increased sense of self-reliance that then results in reduced trust, reduced trustworthiness, and increased lying; as social class goes up, trustworthiness also declines).

119. See Brockner, Wiesenfeld & Diekmann, supra note 80, at 157 n.2.

V. POTENTIAL RESPONSES

The following potential responses represent just a beginning in trying to address the potential for inequality, bias, and prejudice to undermine mediation’s potential to deliver procedural justice, substantive justice, and self-determination. The first response focuses on mediators, their commitment to procedural justice and self-determination, and the role that their social identities play in conveying a message of equal treatment, inclusivity, and the safety of a neutral forum. The second response focuses on the use of caucuses, primarily before the formal mediation session begins, in order to foster all parties’ voice, their sense of belonging, trustworthy consideration by the mediator, and trust in the mediation forum. The third response examines the potential to enhance the parties’ ability to provide each other with trustworthy consideration. The fourth response considers whether online technologies may be used to increase voice, trustworthy consideration, even-handed treatment, and respect—and also increase real, substantive self-determination and access to justice through access to important information. The fifth response asks whether mediators should have some responsibility to avoid patently unconscionable results.

A. INCREASING THE INCLUSIVITY OF THE POOL OF MEDIATORS AND TRAINING ALL MEDIATORS TO ACKNOWLEDGE AND ADDRESS IMPLICIT BIAS

There is no doubt that courts and public and private dispute resolution providers must increase the inclusivity of their pools of mediators,121 include underrepresented demographics (e.g., professional women and people of color) in the lists of potential mediators sent to parties,122 and mentor and promote professional women and people of color as mediators.123 The presence of such mediators will signal greater inclusivity.
ity and safety for all.124 From the perspective of the procedural justice literature, increasing the diversity of the pool of mediators should enhance marginalized parties’ willingness to perceive that they will be, and were, heard and understood, therefore increasing marginalized parties’ willingness to exercise voice and increasing the likelihood of actual understanding and trustworthy consideration—which may then reduce the likelihood of unjustifiably disparate outcomes.125 There are hopeful signs that public and private dispute resolution providers126 and other organizations127 are moving in this direction.

Carol Izumi has written comprehensively about the presence and influence of implicit bias in mediation128 and is writing more for this symp-

124. See Lorig Charkoudian & Ellen Kabcencell Wayne, Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants’ Perception of Mediation, 28 CONFL. RESOL. Q. 23, 47 (2010) (based on empirical study urging the matching of mediators with disputants by gender (which may require use of co-mediators); regarding race and ethnicity, urging co-mediation or avoiding a mediator-participant match altogether in order to avoid isolating any disputant “who will feel outnumbered and disadvantaged in a process where the opponent and the neutral seem to have so much in common”).

125. See Gary LaFree & Christine Rack, The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 LAW & SOC’Y REV. 767, 789–90 (1996) (reporting no disparity in outcomes based on gender alone but that “both minority male and female claimants received significantly lower MORs [monetary outcome ratios]—even when we included the nine case-specific and repeat-player variables. Of greatest concern is the fact that this disparity was only present in cases mediated by at least one Anglo mediator. Cases mediated by two minorities [in a co-mediator team] resulted in lower MORs, regardless of claimant ethnicity . . . . Of particular importance is our finding of no significant ethnic disparities in cases mediated by two minority mediators.”); see also Daniel Klerman & Lisa Klerman, Inside the Caucus: An Empirical Analysis of Mediation from Within, 12 J. EMPIRICAL LEGAL STUD. 686, 689, 715 (2015) (reporting that “settlement rates [were] the same for male and female plaintiffs and lawyers” and that “[w]omen and men fared equally well in the mediations studied here, whether as plaintiffs or lawyers”).

126. See supra note 123.

127. See Letter from Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau 4-5 (July 29, 2016) (observing that ICANN’s publication of UDRP decisions “has permitted patterns of decision making and institutions’ repeat appointments of arbitrators to be highlighted”).

128. See Carol Izumi, Implicit Bias and the Illusion of Mediator Neutrality, 34 WASH. U. J.L. & POL’y 71 (2010). Others have written about the influence of implicit bias upon
sium. In this Article, I will suggest only that requiring mediators to practice “considering the opposite” has been shown to be effective in reducing bias.129

B. PRE-MEDIATION CAUCUSING WITH PARTIES TO INCREASE THE LIKELIHOOD AND PRODUCTIVITY OF VOICE

Earlier, this Article expressed concerns regarding lawyers’ increasing tendency to avoid joint sessions in mediation and to request mediators whose mediation sessions occur entirely in caucus. Indeed, recent research has indicated that in certain contexts extensive caucusing does not necessarily increase the likelihood of settlement,130 while it can reduce parties’ belief in their ability to work together.131

From a procedural justice perspective, however, targeted and careful use of caucus may have the effect of enhancing the voice of those who are hesitant to exercise it (i.e., those who are of lower status or who do not identify with the “social group” being served by the mediation). Targeted and careful use of caucus also may increase the likelihood that people feel and believe that their views received trustworthy consideration and respect. Thus, used appropriately, caucusing has the potential to help parties gain the benefits of procedural justice.

Several years ago, I conducted a small qualitative empirical research project involving special education mediation.132 To my surprise, caucus emerged as very significant to the parents and school officials who participated in the mediation sessions. It was a potent tool. In some cases, the mediators chose to allow initial presentations in a joint session and then engaged in shuttle diplomacy. One participant expressed appreciation of this approach because he “—like many others—. . . valued the way in which caucus simultaneously permitted bargaining and buffered both the parents and him from the negative emotions often triggered by distribu-

judges in the facilitation of settlement, motion practice and adjudication. See, e.g., Wistrich & Rachlinski, supra note 61; Jeffrey J. Rachlinski, Processing Pleadings and the Psychology of Prejudgment, 60 DePaul L. Rev. 413, 428 (2011) (reporting that judges, like most human beings, make egocentric or self-serving judgments about their own abilities; for example, 97.2% of judges surveyed “indicated [that] they were better than the median judge” in avoiding bias in judging and 87% described themselves as “better than the median judge at facilitating settlements” (citing Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice, 58 Duke L.J. 1477, 1519 (2009))).

129. See Frenkel & Stark, supra note 112, at 22–24; see also Phyllis E. Bernard, What Some Theories Say; What Some Mediators Know, Disp. Resol. Mag., Spring 2009, at 6 (reporting on the effects of requiring mediators to reflect on the role of gender, race, and socioeconomic class and the inclusion of such opportunities for reflection in the Early Settlement Central Mediation Program in Oklahoma City).

130. See Mediation Research Task Force Report, supra note 37.


132. See Welsh, Stepping Back Through the Looking Glass, supra note 7, at 580.
Other school officials and parents similarly found that the use of caucus kept mediation from “get[ting] out of control,” “eliminated the arguments,” and allowed the parties to “take a deep breath, step back, take a look, and then come back to the table.”

Some participants in this study also described how the use of caucus significantly enhanced their perceptions of procedural justice. For example,

both parents and school officials reacted positively to caucuses when mediators used the technique to provide disputants with a full opportunity to tell their stories or spent time in caucus ensuring that they understood what disputants were saying. . . . Mediators’ use of caucus also garnered positive reviews when the technique assisted the disputants in engaging in a thorough and dignified deliberative process. For example, when the mediator in one case did not challenge the disputants’ selection of a normative frame in caucus, but instead assisted the disputants in a more careful examination and application of the legal norms they had invoked, both the parent and the school official accepted and valued the mediator’s evaluative interventions.

In other instances, however, the mediator’s use of caucus significantly harmed the parties' perceptions of procedural justice. “When [the participants] were uncertain that the mediator truly understood what they had said and could not hear the mediator’s translation for themselves, they raised concerns about the accuracy of what the mediator communicated on their behalf” and “feared the potential effect of caucus on the quality of the substantive outcomes achieved in mediation.”

“The privacy of caucus also may have encouraged some mediators to engage quickly in more aggressive evaluative actions and statements, which disputants then described as ‘adversarial,’ ‘impatient,’ and ‘going over the edge.’” For instance, “when mediators used the privacy of caucus to try to persuade disputants to accept the validity of the other side’s normative frame, both parents and school officials questioned the mediators’ impartiality.” Finally, when mediators did not permit parents to make an initial presentation in joint session, did not disclose prior contact with school officials, or “spen[t] so much time” with school officials, some parents became very suspicious about the relationship between the school officials and

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133. *Id.* at 647.
134. *Id.* at 650–51.
135. *Id.* at 650.
136. *Id.* at 647–48.
137. *Id.* at 648 (footnotes omitted); see also Welsh, *Magistrate Judges, supra* note 37, at 989 (providing examples of aggressive evaluation by judges in ex parte meetings during settlement conferences).
138. Welsh, *Stepping Back Through the Looking Glass, supra* note 7, at 648. A Party’s reaction is likely to be quite different if the mediator expresses understanding and appreciation of the position being taken by that party. See, e.g., Welton et al., *The Role of Caucus ing, supra* note 24, at 200 (noting that “[c]aucusing allows mediators to take sides with one party in order to move the process along. Thus it appears that caucusing somewhat relieves the third party of the requirement of being strictly neutral between the two parties.”).
mediators. Rather than experiencing a procedurally just mediation process that fostered free, equal, and respectful dialogue, some of these parents felt that they and their children had once again become marginalized “odd men out” with officials talking behind their backs.

Based on these reactions from parents and school officials, I suggested that special education mediation could “borrow a page” from victim-offender mediation, which regularly provides for pre-mediation caucusing—generally conducted before the day of mediation, with the mediator visiting the victim and the offender separately to prepare both of them to participate in the mediation process. The goal is to help both participants identify their goals for the mediation session and prepare to achieve those goals. In a very similar vein, Gary Friedman and Jack Himmelstein recommend meeting with parties individually to help them come to their own decisions about whether, why, and how they might use mediation. Friedman and Himmelstein describe their mediation model as “understanding-based” and also specify that it is a “non-caucus approach”—but their pre-mediation meetings with the parties also represent a sort of caucusing, one in which the focus is on welcoming the parties’ voice and providing respectful and trustworthy consideration.

In the last few years, other commentators have similarly urged the use of pre-mediation caucuses to enhance the quality of mediation sessions. Jill Tanz and Martha McClintock, who have raised concerns regarding the negative physiological effects of unrestrained venting in mediation, have encouraged the responsive use of early caucuses to build trust in the mediation process and the mediator, learn what each party hopes to achieve, gauge emotional levels, and plan. Such caucusing is designed to reduce stress and anger and instead enhance trust, focus, problem-solving, and decision-making. Other researchers have also recommended the use of pre-mediation caucuses in order to build trust and specifically not to develop settlement proposals. Still other commentators have recommended the use of pre-mediation caucuses to assist individuals claiming discrimination to prepare for the mediation process and place their expe-

139. Id. at 649.
140. Id.
141. Id. at 658.
143. See Tanz & McClintock, supra note 81, at 55, 60, 62. Tanz and McClintock observe that mediators trying to determine whether parties are experiencing stress may watch for microaggressions (often targeted at women and people of color), which can signal that the aggressor is experiencing stress and then engaging in displaced aggression. Id. at 65. Such microaggressions then often cause stress in those who have been targeted. Id. Other researchers are focusing on other physiological factors that influence decision-making. See, e.g., Roy F. Baumeister et al., The Glucose Model of Mediation: Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior, 15 Pepp. Disp. Resol. J. 377 (2015); Jeffrey Z. Rubin et al., Social Conflict: Escalation, Stalemate, and Settlement 78–79 (2d ed. 1994) (excitation transfer effect).
144. See Roderick Swaab & Jeanne Brett, Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution, IACM Meetings Paper at 2, 9 (2007).
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rience within a larger context. Finally, the researchers who examined the use of labor mediation in the Netherlands, described earlier, also have recommended pre-mediation caucusing, particularly with the subordinates who cared so much about procedural justice and outside the presence of the supervisor, in order to avoid triggering hierarchical relationships and dynamics.

In all of these cases, the commentators and researchers have focused on the use of pre-mediation and early caucusing to enhance parties’ trust in the mediator and the process, affirm that each party is a valued member of the group engaged in mediation, and help parties prepare for their participation. It is noteworthy that these efforts also would have the effect of encouraging the productive expression of voice and providing evidence of trustworthy and respectful consideration by the mediator.

Of course, these recommendations also tend to assume that only good things will happen in caucuses. As noted earlier, mediators and parties generally use caucuses to move toward settlement. When mediators focus too heavily or too quickly on settlement, however, they can undermine perceptions of procedural justice and self-determination. Some researchers observing the parties’ behavior, meanwhile, have raised other concerns. For example, when the parties are in caucus they are more likely to speak quite strongly about their own cases and more disparagingly about the other party. They also may use caucus to try to manipulate the mediator.


146. See Bollen, Ittner & Euwema, supra note 73, at 632.

147. See Welton et al., The Role of Caucusing in Mediation, supra note 24, at 182 (discussing the importance of caucus for the early development of rapport between mediator and party).

148. See id. at 196 (noting the many positive consequences of using caucus: less direct hostility between the parties, increased disclosure of information, more ideas for solutions (perhaps because emotion and defensiveness are reduced and offering an idea is less likely to be seen as a sign of weakness), increased requests from the mediator for information (in contrast to joint session where such requests declined rapidly), more useful challenges by the mediator, providing a route into problem-solving: also noting that caucuses are used for different purposes at different stages of the mediation—e.g., greater likelihood of requests for other disputant’s or mediator’s reactions to ideas in middle and late stage caucus than in joint sessions; greater likelihood of mediator-generated alternatives in middle stage caucus and then in final stage joint session).

149. See id. at 199 (reporting that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants’ statements occurred in caucus as compared to joint session; and “[j]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties’ behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.”).

150. See Dwight Golann, Sharing A Mediator’s Power: Effective Advocacy in Settlement 6–8, 50–52, 68–69, 83–87 (2013) (examples of lawyers’ use of mediation and mediators to implement a distributive or competitive negotiation strategy); James R. Coben, A Candid Look at Advocacy Strategies in Caucused Mediations, 7 Disp. Resol. Mag. 27 (Fall 2000); Welton et al., The Role of Caucusing in Mediation, supra note 24, at 193–94 (reporting research regarding community mediation, finding that in caucus dispu-
The lesson? Pre-mediation caucusing also is not magic. If it is used, its purpose should be clear and constrained. Mediators should be trained in how to use it to develop trust, and courts encouraging or ordering parties’ use of mediation should institutionalize sufficient time for pre-mediation caucuses as well as systems that provide for feedback and quality assurance.151

C. REFLECTIVE LISTENING IN MEDIATION TO INCREASE THE LIKELIHOOD AND PRODUCTIVITY OF TRUSTWORTHY CONSIDERATION

As noted earlier, participants’ inability or unwillingness to extend trustworthy consideration to each other also can hinder mediation’s potential to foster procedural justice and self-determination. But people can learn the value of listening as a result of participating in mediation.152 People also can learn at least the rudimentary components of active or reflective listening—e.g., allowing the other party to speak and then trying to summarize, accurately, what they believe the other party has said.153 Interests were more likely to engage in indirect hostile behavior (e.g., behavioral and character putdowns of the other disputant), self-enhancement, and other persuasive arguments to enhance their own position. “Though we cannot be sure from the data, it seems likely that many of these statements were less than truthful . . . . That such statements could nevertheless have an impact on the mediator is suggested by the finding that mediators tend to recommend solutions that favor the side that has been most vigorous in presenting his or her position”). The use of caucus raises additional procedural justice and due process concerns if it occurs in the context of “judicial mediation” or “med-arb”; if the mediator assumes an adjudicative function, her decision-making may be affected by confidential information she learned while in caucus—and there will not be the opportunity for the veracity of such information to be tested. See Welsh, Magistrate Judges, supra note 37; Tania Sourdin, Why Judges Should Not Meet Privately with Parties in Mediation but Should Be Involved in Settlement Conference Work, 4 J. ARB. & MEDIATION 91 (2013–2014); Ellen E. Deason, Beyond “Managerial Judges”: Appropriate Roles in Settlement, 78 OHIO ST. L.J 73. (2017).

151. See Welsh, Magistrate Judges, supra note 37, at 1035–1043, 1046–1060 (urging feedback for federal magistrate judges who facilitate settlements, providing examples of different means to provide feedback and opportunities for self-reflection, and providing a sample feedback form); Welsh & Schneider, Thoughtful Integration of Mediation, supra note 45, at 137–139 (describing courts’ systems for assuring the quality of mediation); Welsh, et al., The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions, supra note 37 (presenting and explaining a questionnaire soliciting feedback from lawyers and parties regarding the procedural fairness and helpfulness of judicial facilitation of settlement); McAdoo & Welsh, Aiming for Institutionalization, supra note 37, at 39–43 (recommendations for assuring effectiveness and quality of court-connected dispute resolution programs and for resolving complaints about dispute resolution processes); McAdoo & Welsh, Look Before You Leap, supra note 22, at 430; Welsh, The Place of Mediation supra note 7, at 139–140 (expressing concerns regarding many courts’ failure to monitor the quality of court-connected mediation programs).

152. For example, in the U.S. Postal Service’s REDRESS program, supervisors who had participated in mediation reported that they had learned that it was important to listen, rather than immediately propose a solution or other response. See Jonathan F. Anderson & Lisa Bingham, Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS, 48 LAB. L. J. 601, 607–08 (1997); Lisa B. Bingham, Employment Dispute Resolution: The Case for Mediation, 22 CONFLICT RESOL. Q. 145, 158 (2004).

153. It appears that these sorts of behaviors are likely to be perceived as collaborative and procedurally fair, are likely to increase trust, and are likely to result in the provision of
ingly, recent research also indicates that when a mediator models reflective listening (or trustworthy consideration), this can enhance parties’ ability to do the same.154 Other research, in the communications context, has found that when meetings are characterized by a substantial amount of checking for understanding of previous contributions, the incidence of attacking or defensive behaviors is low.155 Meanwhile, people participating in meetings characterized by substantial testing for understanding tend to judge these meetings as fair.156

If the mediator has developed a trusting relationship with the parties and demonstrates that she cares very much about accurately understanding what each of the parties has to say, then it appears to be more likely that the parties will care about ensuring that they understand each other.157

**D. Online Technology to Increase the Likelihood and Productivity of Voice, Trustworthy Consideration, and Real, Substantive Self-Determination**

Some have also suggested that those who are hesitant to exercise voice may be emboldened by the opportunity to participate in asynchronous online mediation.158 There certainly is plenty of research and personal experience demonstrating that people’s online voice can be different from their in-person voice. Research has indicated that lower-status individuals, for example, are more willing to participate in “lean media” like email and that social influence bias is reduced.159 People can also take their time in composing messages, discerning the meaning of the messages they receive, and making decisions about how to respond. Indeed, a person’s written facility with language under these circumstances may be quite different from her verbal facility with language in an in-person meeting.

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157. See supra note 131. But see Wissler, *Representation in Mediation, supra* note 35 (reporting that mediation participants were less likely to indicate that they understood each other better when they were represented by lawyers; the reason is unclear).
158. See Bollen, Ittner & Euwema, *supra* note 73, at 631.
Some dispute resolution organizations actually facilitate an online pre-mediation exchange of information between the parties by requesting that parties respond online to a series of questions and then allowing the parties to see each other’s answers. Thus, these online providers facilitate a form of voice and trustworthy consideration.

Less dramatically, asynchronous online communication may play a helpful role as a component part of in-person mediation. For example, researchers have examined the effects of including an online intake procedure before face-to-face mediation (i.e., e-supported mediation) in the context of the workplace, with presumed hierarchical differences between supervisors and subordinates. The particular intake procedure that was examined “encouraged both parties to reflect on the issue at hand, the accompanying feelings, the underlying interests as well as potential solutions.”160 According to the researchers, these online tools “provided parties with an opportunity to tell their side of the story via asynchronous typewritten messages (e-mails); [and] it helped parties to get some insight into the situation at hand, and their needs and interests as well as the needs and interests of the other.”161 The researchers found that in the face-to-face mediations preceded by the online intake procedure, subordinates did not differ from superiors in their satisfaction with the mediation outcome or the mediation process. This was in marked contrast to face-to-face mediation that was not preceded by a preparatory online intake procedure, in which subordinates felt less satisfied with the mediation outcome and the mediation process.162 This research suggests that an online intake procedure, with carefully-crafted questions, may be used to achieve some of the same goals as pre-mediation caucusing, described earlier.

In addition, online tools may help to ensure real, informed self-determination in mediation. There is research indicating that the widespread use of smartphones (in contrast to computers) is bridging the digital divide that has existed between men and women, between racial groups, and between rich and poor.163 If this is so, then widespread online access to information—such as that regarding legal rights and defenses, available procedures, available dispute resolution providers, and outcomes in

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161. Id.
162. Id. at 312.
163. See SCHMITZ & RULE, THE NEW HANDSHAKE, supra note 96, at 19 (citing to data from the Pew Research Center showing “smartphone usage has created new means for accessing the internet, especially for minority groups and those with lower economic means. For example, 10% of Americans do not have home broadband internet access, but they do own a smartphone. Smartphones also virtually eliminate the digital divide among races and ethnicities, with 80% of “White, Non-Hispanic,” 79% of “Black, Non-Hispanic,” and 75% “Hispanic” having some internet access through home broadband or a smartphone. Still, smartphones widen the digital divide between 18–29 year olds and those who are over age 65 (increasing from a gap of 37 percentage points in home broadband access to 49 percentage points when taking smartphones into account).”).
Do You Believe in Magic?

2017

comparable cases—may create the potential for both increased access to justice and more informed self-determination. Legal service providers in the United States already are experimenting with the provision of such information to their clients and self-represented litigants using artificial intelligence, online videos, online legal libraries, and many other tools.164

Online tools also may have an important post-mediation application. For example, online publication of information regarding numbers of mediated cases, settlement rates, procedural fairness perceptions and even aggregated substantive outcomes with status-based breakdowns, would provide some degree of transparency and contribute to trust in the procedural and substantive fairness of mediation and the avoidance of systemic but under-the-radar discrimination.165

More generally, many are now advocating for online dispute resolution (ODR) in order to increase access to justice by reducing costs and time to disposition.166 Thus, ODR may be in the process of becoming the “new” mediation,167 just as mediation has become the new arbitration168 and arbitration has become the new litigation.169 Like the processes that came before it, however, ODR is very likely to need to embrace procedural safeguards and transparency in order to assure people of both procedural and substantive justice.170

164. The Legal Service Corporation's annual Technology Initiative Grants Conference provides an opportunity to explore all of these futuristic options. See also ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 157–158 (2017).

165. See Nancy A. Welsh, Class Action Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?, 13 U. ST. THOMAS L. J. 381, 430-431 (2017) (imagining an online dispute resolution process for business-to-consumer disputes that provided consumers with access to information about their rights and defenses, substantive and procedural safeguards, aggregated information regarding consumers' perceptions of fairness and substantive results, and impressive compliance with results).

166. See Rebecca Love Kourlis, Natalie Anne Knowlton & Logan Cornett, A Court Compass for Litigants (INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, July 2016) (proposing use of technology and ODR for family disputes); ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016) (calling for the piloting and expansion of court-annexed online dispute resolution systems); SCHMITZ & RULE, THE NEW HANDSHAKE, supra note 96; Katsh & Rabinovich-Einy, Digital Justice, supra note 165, at 158-165; see also Zena Zumeta, Profiles in ADR: Douglas Van Epps, DISP. RESOL. MAG., Spring 2017, (foreseeing the use of ODR for small monetary disputes, but continued use of in-person procedures like mediation for disputes involving relational or emotional issues).


169. See Tom Stipanowich, supra note 23.

170. See Nancy A. Welsh, ODR: A Time for Celebration and the Embrace of Procedural Safeguards, Conference Presentation at the 2016 International Forum for Online Dispute Resolution, The Hague (May 2016) [hereinafter Welsh, Time for Celebration] [transcript available at www.adrhub.com/profiles/blogs/procedural-justice-in-odr] [https://perma.cc/8NNA-VETM] (calling for algorithmic audits and alternative forums for those who do not have access to, or facility with, online options); see generally Noam Ebner & John Zeleznikow, Fairness, Trust and Security in Online Dispute Resolution, 36 HAMLINE J. PUB.
E. EMPOWERING MEDIATORS TO AVOID UNCONSCIONABLE UNFAIRNESS OR COERCION

Ellen Waldman, Lola Akin Ojelabi, Jennifer Reynolds, and other scholars increasingly express concern that even if mediation sessions provide for voice, trustworthy consideration, even-handed treatment, and respect, they also have the potential to produce unconscionable outcomes. Waldman and Ojelabi do not urge that mediators should therefore impose their own solutions and definitions of fairness upon the disputants. However, they do advocate for mediators’ ethical responsibility to assist the “have-nots” and at least question outcomes that are so lopsided that they appear unconscionable or patently unfair.171 This is likely the most controversial suggestion contained in this Article, but there is precedent for imposing some ethical obligation upon mediators to avoid extreme substantive unfairness in specified contexts.172 It is also relatively easy to


171. See Ellen Waldman & Lola Akin Ojelabi, Mediators and Substantive Justice: A View from Rawls’ Original Position, 30 OHIO ST. J. ON DISP. RESOL. 391, 420–30 (2016) (using Rawls’ “veil of ignorance” as well as ethical codes that permit mediators to withdraw due to concerns regarding unconscionability).

172. In some settings, for example, mediators are obligated to avoid unconscionable settlements. See Wissler, Representation in Mediation, supra note 35, at 435 (citing MODEL STANDARDS OF CONDUCT FOR MEDIATORS, §§ LA, II.VLA. (AM. ARB. ASS’N ET AL. 2005); ABA MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION §§ I, IV (2001) [hereinafter ABA MODEL DIVORCE MEDIATION STANDARDS]; MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL r. 4.5.3, 4.5.6 & cmts. (CPR-GEORGETOWN COMM’N ON ETHICS AND STANDARDS IN ADR); NAT’L STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS §§ 8.1.f, 11.1 & cmts. (CTR. FOR DISPUTE SETTLEMENT, INST. FOR JUDICIAL ADMIN); Jacqueline M. Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 NOTRE DAME L. REV. 775, 787 (1999); Leonard Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 ARIZ. L. REV. 329, 349, 354 (1984); Welsh, The Thinning Vision, supra note 4, at 15, 78–84); see also ABA MODEL DIVORCE MEDIATION STANDARDS, §§ XI, 25.4 (“A family mediator shall suspend or terminate the mediation process when . . . the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable.”); Robert A. Baruch Bush, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications 13–19 (1992); John Lande, How Will Lawyering and Mediation Transform Each Other?, 24 FLA. ST. U. L. REV. 839, 878 (1997); Craig A. McEwen et al., Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 MINN. L. REV. 1317, 1332–33, 1397–98, 1405–06 (1995); Nolan-Haley, supra, at 811, 836; Pincock & Hedeen, supra, note 85, at 444–47 (discussing
understand how such an obligation would make it more likely that marginalized parties would perceive the mediation process as offering at least minimal assurance that they and their claims will be treated in an even-handed and dignified manner.

VI. CONCLUSION

This Article began by recounting the dreams and noble intentions that inspired many of those who advocated for the institutionalization of mediation. Of course, powerful dissenting voices arose at the time. Richard Delgado was chief among them, and he continues to raise legitimate concerns that must be addressed. Indeed, this Article has examined the ways in which mediation has fallen short of achieving aspirational self-determination and how and why inequality can undermine the ability of mediation to assure a procedurally just process. Much of the research reviewed here is consistent with the social science research that Professor Delgado and his co-authors invoked as the basis for their concerns regarding mediation. Thus, mediation has fallen prey to the same social and economic problems that have afflicted (and continue to afflict) civil and criminal litigation, administrative adjudication, and arbitration.

This Article, though, is for those who have valued and continue to value mediation for its potential to offer self-determination and procedural justice—its potential for a certain sort of magic—even while admitting its shortcomings and acknowledging the need for reform. The research described here, particularly regarding procedural justice, reveals that we can and should take steps to increase the likelihood and productivity of all participants’ voice, trustworthy consideration and real, substantive self-determination by: increasing the inclusivity of our pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with the information they need to engage in informed decision-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which marginalized parties’ safety requires mediators to take affirmative steps to avoid unconscionable unfairness or coercion.


174. See Michael Mofitt, Three Things To Be Against (“Settlement” Not Included), 78 FORDHAM L. REV. 1203, 1245 (2009) (“We should celebrate the beauty in each process’s internal narrative of justice, of truth, of efficiency, of predictability, and even of morality. . . . Both settlement and litigation fail on each of these measures with some reliability . . . .”).
It turns out that achieving the illusion of magic demands commitment from us, and quite a lot of work. But it is work that can and should be done.
Dispute Resolution Neutrals’ Ethical Obligation to Support Measured Transparency

Nancy Welsh
DISPUTE RESOLUTION NEUTRALS’ ETHICAL OBLIGATION TO SUPPORT MEASURED TRANSPARENCY

NANCY A. WELSH*

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Introduction

In 2016, the Consumer Financial Protection Bureau (CFPB) issued proposed rules regarding the use of mandatory pre-dispute arbitration clauses in consumer contracts for financial goods and services. One of these rules—barring class action waivers in mandatory pre-dispute arbitration clauses—attracted substantial attention. Much less noticed was the CFPB’s second proposed rule (“Arbitration Reporting Proposal”) requiring regulated providers of financial products and services to report to the CFPB regarding their use and the outcomes of arbitrations conducted pursuant to mandatory pre-dispute arbitration clauses. The Arbitration Reporting Proposal also proposed to make such information public, with appropriate redactions.¹

The American Bar Association Section of Dispute Resolution (“the Section”) submitted comments strongly supporting the CFPB’s Arbitration Reporting Proposal. In the course of preparing the Section’s comments, it also became clear to the author of this Article that dispute resolution neutrals and organizations should have an affirmative ethical obligation to

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¹ There have also been legislative efforts to increase the transparency of mandatory pre-dispute arbitration. See, e.g., H.R. 832, 115th Cong. (1st Sess. 2017) (also known as the “Arbitration Transparency Act”) (proposing to amend section 2 of the Federal Arbitration Act to require arbitrations between financial institutions and consumers to be open to the public); S. 647, 115th Cong. (1st Sess. 2017) (known as the “Mandatory Arbitration Transparency Act”) (proposing to amend Title 9 to ban pre-dispute agreements that provide for arbitration of employment, consumer, or civil rights if the agreements bar parties from contacting state or federal agencies regarding unlawful conduct or other issues of public policy or public concern, deeming such agreements to be “unfair or deceptive act[s] or practices” under the Federal Trade Commission Act, instructing the FTC to issue new rules and punish violators, and creating a private right of action for aggrieved consumers).
support responsible—“measured”—transparency regarding the use and outcomes of the processes they provide and promote in order to protect the public and these processes’ integrity. Most particularly, dispute resolution neutrals (including mediators, arbitrators, ombuds, and providers of online dispute resolutions services) should have an ethical obligation to support transparency when their processes are imposed upon people pursuant to judicial or legislative mandates or by contracts of adhesion, and when the outcomes that dispute resolution neutrals help to produce will be granted the privileges of narrow and deferential judicial review and expedited judicial enforcement.2

2. Professor Judith Resnik has also recently called for increased transparency regarding ADR, observing:

[H]ere, as part of a larger project addressing the impact of new procedural forms, I argue for shaping First Amendment doctrine in light of commitments that courts function as open, egalitarian venues. Even if the parties, judges, and other neutrals believe in the benefits of closure, and even when parties consent, court promotion of ADR, as a matter of constitutional interpretation, ought to be accompanied by public accountings of what transpires. . . . [T]he presence of the state infuses all these forms of ADR, which are mandated, advocated, and structured through hundreds of court rules, government manuals, and websites, and are commended to litigants by judges. The result of these many new rules is not “bargaining in the shadow of the law,” but bargaining as a requirement of the law. . . . As procedure is increasingly becoming contract, state-promoted contracting—produced at the behest of the state and shaped through judicial intervention—needs regulation through public oversight and participation. . . . The issue is which activities ought to have what Justice Brennan termed the “public character of judicial proceedings.” . . . Chief Justice Burger, writing for the plurality in [Richmond Newspapers], spoke about the “nexus between openness, fairness, and the perception of fairness.” He commented further that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” . . . When [judges] convene meetings in courts, when they take on the role of “neutrals” or authorize others to do so with “quasi-judicial” status, their decisions and their procedures are the state, in action. As more of the activity of “the judicial” moves to become “quasi-judicial,” the public needs to be built in, so as to be able to be present [for] at least some aspects of the proceedings and to know the results.

Now is a particularly good time to consider the ethical obligations of one set of dispute resolution neutrals: mediators. This is because the Section, the American Arbitration Association (“AAA”), and the Association for Conflict Resolution (“ACR”) are currently considering whether to review and revise the Model Standards of Conduct for Mediators. Courts and legislatures regularly mandate parties’ participation in mediation. Mandatory pre-dispute mediation clauses are now turning up in the same contracts that contain mandatory pre-dispute consumer arbitration clauses. Courts reliably enforce mediated settlement agreements, generally with little review. Mediation is also the subject of substantial recent international activity. On December 20, 2018, the United Nations General Assembly adopted an international convention for the expedited enforcement of mediated settlement agreements. The convention will be open for signatures in Singapore in August 2019.

commitment to transparency may have had the unintended effect of diverting more cases to arbitration and mediation); David Horton, Arbitration as Delegation, 86 N.Y.U. L. REV. 437, 485, 494 (2011) (pointing to delegation of legislative power to a private party, also pointing out lack of transparency, opacity); Judith Resnik, A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations, 96 N.C. L. REV. 605, 629-30 (2018) [hereinafter Resnik, A2J] (“My focus is on the impact of these shifts to [mediation, arbitration, early neutral evaluation, ODR, and settlement] on access to knowledge about justice-seeking [processes].”).

3. See Alliance for Justice, Lost in the Fine Print (HD), YOUTUBE (Oct. 6, 2014), https://www.youtube.com/watch?v=tgC3N802Sjk (picturing a contract that includes a mediation clause just before the arbitration clause).


5. The United Nations Convention on International Settlement Agreements Resulting from Mediation will be known as the "Singapore Convention on Mediation." See General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation at http://www.unis.unvienna.org/unis/en/pressrels/2018/unisI271.html. The Singapore Convention is modeled upon the New York Convention, which requires signatory nations’ courts to recognize and enforce international commercial arbitration awards with only narrow grounds for the denial of such enforcement. Article 1 of the Singapore Convention specifically excludes employment, family, and consumer matters. See REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE
This Article will begin by describing the event that triggered the Section’s consideration of transparency—the CFPB’s announcement of its Arbitration Reporting Proposal. The Article will also detail the Proposal’s subsequent history, including its promulgation and repeal. The Article will then turn to the transparency that exists or has been proposed for various dispute resolution processes. For example, the Article will consider the transparency that (1) federal and state courts provide regarding their court filings and outcomes; (2) some states, some federal agencies, and some domestic and international dispute resolution organizations now require or provide regarding the use and outcomes of arbitration (and to a lesser degree, mediation); (3) some users of dispute resolution achieve through “self-help” initiatives; and (4) some commentators have proposed for online dispute resolution. Finally, the Article will consider whether the ethical principles that currently apply to mediators establish an affirmative ethical obligation to support transparency, at least under certain circumstances. Concluding that the Model Standards of Conduct for Mediators do not establish such an ethical obligation, the Article will end with a proposal to establish mediators’ ethical obligation to support transparency to a responsible degree when mediations are mandated by courts, legislatures, or contracts of adhesion and the resulting mediated settlement agreements are subject to only narrow and deferential judicial review or are granted expedited judicial enforcement. In particular, the Article will argue for the creation of a set of customized Model Standards for “imposed mediation.”

1. The Precipitating Event: The CFPB’s Arbitration Reporting Proposal

The use of mandatory pre-dispute arbitration agreements in consumer transactions and employment contracts has elicited substantial controversy in the general public, the courts, and the dispute resolution field. It has also been the subject of countless articles in law reviews and professional journals.


6. Regarding the general topic of mandatory pre-dispute arbitration in a disparate party context, see, for example, Hiro N. Aragaki, The Federal Arbitration Act as Procedural Reform, 89 N.Y.U. L. Rev. 1939 (2014); Lisa Blomgren Amsler, Combating Structural Bias...

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Congress specifically authorized the CFPB to issue regulations that would “prohibit or impose conditions or limitations” on mandatory pre-dispute consumer arbitration clauses in contracts for
financial products or services as long as the CFPB found that doing so was “in the public interest and for the protection of consumers.” Congress also required the CFPB to conduct a study of mandatory arbitration. Any regulatory findings made by the CFPB had to be consistent with the study. The CFPB conducted its empirical study and issued its final, voluminous report in March 2015 (“March 2015 Report”). In May 2016, the CFPB announced its proposed rules.

One portion of the CFPB’s proposed rules—in which the CFPB barred class action waivers in mandatory pre-dispute consumer arbitration clauses—garnered substantial attention. The other portion of the CFPB’s proposed rules—section 1040.4(b), or the Arbitration Reporting Proposal—remained largely under the radar. This portion dealt with the issue of transparency. The CFPB proposed to require regulated providers of financial products and services to report information regarding their use and the outcomes of arbitrations conducted pursuant to mandatory pre-dispute arbitration clauses. Specifically, the Arbitration Reporting Proposal required submission, with redaction of individuals’ names and other information, of the following five types of documents:

(1) the initial claim (whether filed by a consumer or by the provider) and any counterclaim; (2) the pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator; (3) the award, if any, issued by the arbitrator or arbitration administrator; (4) any communications from the arbitrator or arbitration administrator with whom the claim was filed relating to a refusal to administer or dismissal of a claim due to the


11. This step was preceded by the CFPB’s submission of its tentative proposed rules to a Small Business Review Panel in November 2015.
provider’s failure to pay required fees; and (5) any communications related to a determination that an arbitration agreement does not comply with the administrator’s fairness principles.\textsuperscript{12}

The CFPB also proposed to publish these materials on its website in some form, with appropriate redaction or aggregation.\textsuperscript{13}

For most of the CFPB’s proposed requirements, the agency’s reasoning was, and remains, fairly apparent. However, the required reporting of communications regarding failure to comply with dispute resolution administrators’ fairness principles deserves further explanation. In April 1998, the AAA’s National Consumer Disputes Advisory Committee produced \textit{A Due Process Protocol for Mediation and Arbitration of Consumer Disputes} to guide the use of ADR processes to resolve consumer disputes.\textsuperscript{14} The Protocol’s Statement of Principles asserted parties’

\begin{footnotesize}
\begin{enumerate}
\item[(13)] See \textit{id.}; see also CFPB, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS, \textit{supra} note 9, at 20 (“The Bureau is considering a proposal to require covered entities that use arbitration agreements in their contracts with consumers to submit initial claim filings and written awards in consumer finance arbitration proceedings to the Bureau through a process the Bureau would expect to establish as part of this rulemaking. The Bureau is also considering whether to publish the claims or awards to its website, making them available to the public. Before collecting or publishing any arbitral claims or awards, the Bureau would ensure that these activities comply with privacy considerations.”) The CFPB anticipates that regulated entities would be required to submit to the Bureau “an electronic file with documents that the entity already possesses” that may also be redacted. \textit{Id.} at 25.
\end{enumerate}
\end{footnotesize}
entitlement to a “fundamentally-fair ADR process,” with the Principles serving as “embodiments of fundamental fairness.” The Protocol provided, among other things, for “independent and impartial” neutrals and administration; consumers’ continued access to small claims court; reasonable costs for consumers (including consideration of their ability to pay); “arbitrator-supervised exchange of information”; consumers’ access to all remedies available in courts of law and equity; and consumers’ access (upon request) to written explanations of arbitral awards. The Protocol also strongly encouraged the use of mediation. It did not address class action waivers. The AAA subsequently conditioned its provision of service upon compliance with the Protocol and, over the years, has been removed.

15. CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, supra note 14, at 1, 9.
16. Id. at 1–3.
17. Id. at 2. The complete list of principles contained in the Protocol are:
   1. Fundamentally fair process
   2. Access to information regarding ADR program
   3. Independent and impartial neutral; independent administration
   4. Quality and competence of neutrals
   5. Small claims
   6. Reasonable cost
   7. Reasonably convenient location
   8. Reasonable time limits
   9. Right to representation
   10. Mediation
   11. Agreements to arbitrate
   12. Arbitration hearings
   13. Access to information
   14. Arbitral remedies
   15. Arbitration awards

Id. at 1–3. The Protocol does not address class action waivers.
   - For consumer cases with claims under $75,000, the AAA reviews the
from some consumer agreements due to businesses’ unwillingness to abide by the principles contained in the Protocol.\textsuperscript{19} Presumably, such removals involved communications regarding the AAA’s determination that the businesses’ consumer arbitration clauses did not meet the requirements of the Due Process Protocol. The CFPB proposed to require the submission of these communications.\textsuperscript{20}

The ABA Section of Dispute Resolution had examined mandatory pre-dispute consumer arbitration at various points over the years.\textsuperscript{21} With some limited exceptions for particular applications,\textsuperscript{22} the Section’s Council had

\begin{itemize}
  \item Pursuant to the AAA’s National Rules for the Resolution of Employment Disputes, employers submit pre-dispute, corporate employment programs naming the AAA to the AAA for review to determine that the programs do not substantially and materially deviate from the Employment Due Process Protocol. The AAA reserves the right to decline its administrative services if the employer does not submit its plan for review or if the program does not comply with the Due Process Protocol.
\end{itemize}

\textit{Id.; see also} Drahozal \& Zyontz, \textit{Private Regulation, supra} note 6, at 91 (reporting the results of first empirical study of the AAA’s enforcement of its Consumer Due Process Protocol and finding that the AAA’s review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations); Horton \& Chandrasekher, \textit{supra} note 6, at 91 (observing that the “prophylactic steps” resulting from the AAA’s adoption and enforcement of its Consumer Due Process Protocols may make the AAA “more amenable to consumer plaintiffs than other venues”); STIPANOWICH ET AL., \textit{supra} note 6, at 48 (“Importantly, AAA reviews arbitration clauses for their compliance with the Due Process Protocol. When AAA has found deviation from the Protocol, it has rejected cases or has required the company to agree to correct deficiencies.”).


\textbf{20.} \textit{Id.} at 10.


\textbf{22.} For example, the Section’s Council voted to support a proposed ABA House of Delegates resolution (Resolution 111B) opposing the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and residents or their agents and supporting legislation and regulations invalidating such arbitration agreements. The House of Delegates
been unable to achieve a general consensus on whether to support or oppose mandatory pre-dispute consumer arbitration.\textsuperscript{23} Due to the importance of the CFPB’s proposed rules to the dispute resolution field, however, the Section decided to try again. The Section’s Council established a CFPB Review Task Force, composed of experienced and well-respected dispute resolution practitioners and academics knowledgeable regarding mandatory pre-dispute arbitration (particularly consumer arbitration),\textsuperscript{24} to review the CFPB’s proposals\textsuperscript{25} and provide advice to the Section. The subsequent deliberations of the Section’s Executive Committee and Council were informed by the Task Force’s report.\textsuperscript{26}

After such deliberations, the Section’s Council voted to express its strong support for the CFPB’s Arbitration Reporting Proposal. In comments submitted to the CFPB in July 2016,\textsuperscript{27} the Section noted the current lack of complete and consistent information regarding consumer arbitration and the need for such information. The Section referenced the CFPB’s March 2015 report, in which the agency concluded that although it had a “reasonably complete picture of the claims that consumers are willing to file in arbitration where arbitration is an available option,”\textsuperscript{28} its analysis was adopted this resolution in February 2009. More recently, the Section’s Council also voted to support a proposed ABA House of Delegates resolution (Resolution 300) urging legal employers not to require mandatory arbitration of claims of sexual harassment. The House of Delegates adopted this resolution in August 2019.

\textsuperscript{23} See Welsh, \textit{Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses}, supra note 6, at 381-86 (describing history of Section’s attempts to develop a policy and protocols on mandatory pre-dispute consumer arbitration); Welsh & Lipsky, “Moving the Ball Forward,” supra note 7, at 14 (describing position taken by Section Council on Arbitration Fairness Act and its aftermath).

\textsuperscript{24} The CFPB Review Task Force consisted of Nancy Welsh (Chair), Lisa Amsler, Louis Burke, Ben Davis, Homer Larue, Bruce Meyerson, Lawrence Mills, Peter Phillips, Colin Rule, Jean Sternlight, Thomas Stipanowich, and Beth Trent.

\textsuperscript{25} At this point, the CFPB had released tentative proposals as part of a review by the Small Business Review Panel. See CFPB, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS, supra note 9 (regarding Small Business Review Panel).

\textsuperscript{26} \textbf{WELSH ET AL., CONSUMER FIN. PROT. BUREAU, REPORT TO THE COUNCIL OF THE DISPUTE RESOLUTION SECTION FROM THE CFPB REVIEW TASK FORCE} (on file with author).

\textsuperscript{27} Pursuant to Council direction, the Section sought and won permission from the ABA (through its “blanket authority” procedure) to submit comments to the CFPB. See Nancy A. Welsh, ABA Section of Dispute Resolution, Comment Letter on Proposed Rule of Arbitration Agreements (July 29, 2016), https://www.regulations.gov/document?D=CFPB-2016-0020-5905 [hereinafter Welsh, Comment Letter].

\textsuperscript{28} CFPB REPORT, supra note 10, § 5.1, at 4.
subject to limitations. To a large extent, these limitations derived from the paucity of complete and consistent information regarding the numbers, types of claims, outcomes, arbitrators, parties, and party representatives involved in arbitrations conducted pursuant to mandatory pre-dispute consumer arbitration clauses. The Section concluded that “despite the prevalence of mandatory pre-dispute consumer arbitration clauses, the public generally has little information regarding use of the process or its outcomes.”

Specifically, the Section noted that the CFPB had been forced to rely on data from a single source—the AAA—that “voluntarily provided its case filings to the CFPB pursuant to a non-disclosure agreement.” While there was “substantial evidence that the AAA dominate[d] the administration of consumer financial arbitration cases[,]” the CFPB had pointed out in its March 2015 report that other dispute resolution organizations also administered consumer financial arbitration. The Section found it significant that “only 18.3% of storefront payday-loan contracts, 16.7% of private student loan contracts, and 37.3% of prepaid cards studied by the CFPB provided for the AAA as the sole administrator, while most contracts identified the AAA as either the sole administrator or one of the available choices.” The CFPB had noted that “the types of claims handled by other providers might differ from the claims evidenced in the AAA filings, but due to the lack of required reporting, the CFPB had no means to determine whether such differences existed.” As a result, “the AAA might not be the

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30. Id. at 2-3.
31. Id. at 3, 10 n.10 (“[T]he AAA is specified as at least one potential choice of contractually-specified arbitration administrators in 98.5% of the credit card market we studied; 98.9% of the checking account market we studied; 100% of the GPR prepaid card market we studied; 85.5% of the storefront payday loan market we studied; and 66.7% of the private student loan agreements we reviewed. The AAA is specified as the sole choice in 17.9% of the GPR prepaid card market that we studied; 44.6% of the checking account market we studied; and one of the private student loan agreements we reviewed. With that said . . . when we reviewed the court records of class cases in which parties moved to compel arbitration, we found five records indicating a subsequent filing with the AAA and four indicating a filing in JAMS.” (quoting CFPB REPORT, supra note 10, § 5.1, at 4 n.5)).
32. Id. at 3, 10 n.11 (“The CFPB specifically named JAMS, Inc., but it is very likely that there are also other dispute resolution providers handling these cases.”).
33. Id. at 3 (citing CFPB REPORT, supra note 10, § 2.5.3, at 35-39).
34. Id.
dominant administrator of arbitration in consumer financial contexts that were not studied by the CFPB.\(^{35}\)

The CFPB acknowledged other difficulties with the data upon which it relied for its report, including the following shortcomings: ambiguity in defining what should count as a “win” for a consumer or company; a lack of information regarding the cases in which arbitrators did not make awards or in which the parties settled;\(^{36}\) and a lack of information regarding the outcomes of cases that did not proceed to arbitration or did not result in awards.

Ultimately, the Section was troubled by the lack of complete and consistent information regarding consumer arbitration and believed there was a need for such information.

The Section also found that the experience of quasi-public dispute resolution organizations, private organizations, and states demonstrated the value of collecting and publishing arbitration-related information, suggested specific information that would benefit from disclosure, and evidenced a developing trend toward transparency. The Section acknowledged that some dispute resolution professionals and organizations had raised legitimate concerns regarding the costs of complying with the CFPB’s Arbitration Reporting Requirement\(^{37}\) and the potential loss of confidentiality for processes that many describe as “private” dispute resolution. Nonetheless, the Section urged that transparency was essential to protect the integrity of arbitration and that:

[the] reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the

35. Id.
36. CFPB Report, supra note 10, § 5.1, at 5-6 (observing that most state and federal courts also do not require reporting regarding settlements).
37. See, e.g., Letter from Nessa Feddis, Vice President & Senior Counsel, Ctr. for Regulatory Compliance, Am. Bankers Ass’n; Steven I. Zeisel, Exec. Vice President & Gen. Counsel, Consumer Bankers Ass’n; and K. Richard Foster, Senior Vice President & Senior Counsel for Regulatory & Legal Affairs, Fin. Servs. Roundtable, to Richard Cordray, Dir., CFPB (Aug. 22, 2016).
strong federal policy in favor of arbitration that has been expressed by the Supreme Court.\textsuperscript{38}

The Section then specifically identified the use of arbitration at issue here and explained the factors that demanded modification of the usual understanding of arbitration as a “creature of contract” that could and should be entirely private.

[T]ransparency is particularly important when, as here, one of the parties to a dispute is imposing a dispute resolution process upon the other party and the courts may be asked to enforce—and thus lend their coercive power and legitimacy to—the award produced by the process.\textsuperscript{39}

In sum, the Section strongly supported the CFPB’s proposal to require regulated entities to submit arbitration claim filings, awards, and other documents to the CFPB, and to publish such information. The Section also urged the CFPB to consider how quasi-public and private organizations had structured their databases to ensure easy access, searchability, and an overall sense of the dispute resolution system and its outcomes. The Section was particularly struck by those organizations that provided for both an online searchable database of individual awards and useful aggregated data (including data regarding mediation and different types of arbitral panels).

The Section also proposed a few modifications, based on the importance of assuring parties and the public that “individual arbitrators and dispute resolution providers offer an effective and impartial forum.”\textsuperscript{40} Regarding impartiality, the Section advocated for a searchable database of claim filings and awards that would reveal the number of times that a regulated entity had been a party in an arbitration filed with or administered by a particular dispute resolution provider, the number of times that a regulated entity’s arbitration had been conducted by a particular arbitrator, and the number of times that particular lawyers had represented clients in such arbitrations and before particular arbitrators. Thus, a searchable database would reveal repeat players of various types and potential conflicts of

\textsuperscript{38} Welsh, Comment Letter, supra note 27, at 2. Notably, defenders of arbitration have also remarked upon “the need for more thorough empirical research into the dynamics of arbitration specifically and the resolution of disputes more generally.” Peter B. Rutledge, \textit{Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act}, 9 CARDOZO J. CONFLICT RESOL. 267, 281 (2008).

\textsuperscript{39} Welsh, Comment Letter, supra note 27, at 8.

\textsuperscript{40} \textit{Id.}
interest. The database proposed by the CFPB did not, however, include information regarding “prior mediation experience with a particular dispute resolution organization or neutral, or the financial interests that might exist among dispute resolution organizations, parties, and legal representatives.” The Section urged the CFPB to require disclosure regarding such prior experience and relationships to further assist with protecting the impartiality, effectiveness, and integrity of arbitration, and recommended considering the experience of the states in requiring disclosures regarding prior mediations and financial interests that might represent conflicts of interest. Finally, the Section urged the CFPB to consider specifying the mechanisms it would use to enforce its reporting requirements.

The election of Donald Trump as President in November 2016 apparently scuttled any chance that the CFPB’s proposed rules would be made effective. Nonetheless, on July 10, 2017, the CFPB announced its new rule barring mandatory pre-dispute consumer arbitration clauses that included class action waivers and requiring the reporting of arbitration claim filings, pre-dispute arbitration agreements, awards, and communications regarding compliance with fairness principles and payment requirements. The rule also provided for making such information public after appropriate aggregation or redaction.

There were only a few differences between the Arbitration Reporting Proposal and the final rule announced in July 2017. Most notably, the CFPB had added two more reporting requirements. Providers of financial services and goods would be required to submit the answer to any initial claim or counterclaim and, “[i]n connection with any case in court by or

41. Id. (emphasis added).

42. See Carrie Menkel-Meadow, Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR, 15 OHIO ST. J. Disp. Resol. 19, 34 n.71 (1999) (“Beyond the use of one ADR firm as a repeat provider, this law firm represented to me that a single mediator had been used over 300 times in one year! The repeat play law firm (by specialty) was able to maximize its use of a single repeat play mediator. So far, neither ethics regulations nor other rules require the law firm or the mediator to disclose to one-shot litigants that he had performed for this firm before.”).

43. See Welsh, Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses, supra note 6, at 431 (expressing doubts regarding the likelihood that the CFPB would announce final rules).


45. Id.
against the provider . . . [a]ny submission to a court that relies on a pre-dispute arbitration agreement in support of [an] attempt to seek dismissal, deferral, or stay . . . and [t]he pre-dispute arbitration agreement [itself].”

The final rule also provided for the CFPB’s posting of the redacted records (with possible additional redactions by the CFPB) on a publicly available website that the CFPB would establish and maintain, with easy access and retrieval functions.

Opponents quickly mounted legal\(^{47}\) and legislative\(^{48}\) challenges. Before the end of July 2017, the House of Representatives voted to nullify the CFPB’s new rule.\(^{49}\) On October 24, with a tie-breaking vote cast by Vice President Pence, the U.S. Senate joined the House.\(^{50}\) On November 1, President Trump signed the repeal of the CFPB’s rule.\(^{51}\)

A surprisingly broad swath of the media covered the Senate’s and the President’s action nullifying the CFPB’s final rule.\(^{52}\) As before, though, almost no attention was paid to the reporting provisions in the rule. Few

\(^{46}\) Id. at 33,430.


\(^{49}\) Id.

\(^{50}\) See Gillian B. White, Congress’s Late-Night Vote to Protect Banks from Lawsuits, ATLANTIC (Oct. 25, 2017), https://www.theatlantic.com/business/archive/2017/10/cfpb-mandatory-arbitration/543918/ (noting opposition to the CFPB rule from the Treasury Department “headed by the former Goldman Sachs banker Steve Mnuchin” and the “Office of the Comptroller of the Currency, currently led by the one-time Wells Fargo defense attorney Keith Noreika”).


noticed when the CFPB first proposed to require reporting. Few noticed when the CFPB announced its reporting requirements. Few noticed when the reporting requirements were repealed. Regardless, by the end of this saga, the opportunity to bring some measure of transparency to mandatory pre-dispute consumer arbitration was dead.

Why, at this point, should anyone care?

II. The Experience of Federal and State Courts with the Collection and Publication of Information Regarding Civil Litigation

Professor Judith Resnik has observed recently that judges regularly “posit that openness supports informed discussions of government, fosters perceptions of fairness, checks corruption, enhances performance, facilitates accountability, discourages fraud, and permits communities to vent emotions.” Perhaps the courts’ appreciation of the benefits of openness, particularly in a democracy, helps to explain federal and state courts’ general history of ensuring access to information regarding their operations.

Of course, court filings have long been presumed to be accessible to the public. As a result, information regarding the claims in individual cases, relief sought, counterclaims, defenses, parties, lawyers, and court judgments have been available to those willing to undertake the effort and time required to travel to individual courthouses and page through court files. Access to federal filings became much easier in 1990 with the creation of PACER (Public Access to Court Electronic Records), an online system maintained by the Administrative Office of the U.S. Courts. Access is not free, however, which has placed limits on the availability of

56. See Stevenson & Wagoner, supra note 54, at 1357-59.
57. The cost is ten cents per page, with a thirty-page cap on such costs for documents and case-specific reports. This cap does not apply to other searches. See Frequently Asked Questions, PACER, https://www.pacer.gov/psc/faq.html (last visited Nov. 27, 2018); see also Stevenson & Wagoner, supra note 54, at 1359-62 (regarding complaints about pay wall,
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In addition, as Peter Rutledge has observed, “the litigation system is not always bathed in sunshine—protective orders, closed proceedings, filings under seal, and settlements all reduce the degree of public scrutiny of the system.”

Both federal and state courts make aggregate information available regarding their operations. Interestingly, the Attorney General of the United States was responsible for the first publication of statistical tables regarding the federal courts in 1871. Today, the Administrative Office of the U.S. Courts produces and publishes annual reports that discuss the federal courts generally, with separate sections devoted to component parts of the federal judiciary. The reports provide aggregate numbers regarding complaints against judges and their disposition. They also highlight and explain unusual increases or declines in civil filings or dispositions. These


58. See Lynn M. LoPucki, Court-System Transparency, 94 IOWA L. REV. 481, 537 (2009) (urging that federal courts should require the use of data-enabled PDF forms) (“Policymakers, litigants, and the public could see the amounts of damages granted in personal-injury cases, the lengths of criminal sentences, the likelihood of success on various kinds of motions, the differences in outcomes among courts, the relative effectiveness of lawyers and expert witnesses, and the answers to a myriad of other questions.”); see also Stevenson & Wagoner, supra note 54, at 1359-60.

59. Rutledge, supra note 38, at 276-77 (urging that “the virtues of confidentiality at least counterbalance some of the loss of transparency”); see also Michael Kagan, Rebecca Gill & Fatma Marouf, Invisible Adjudication in the U.S. Courts of Appeals, 106 GEO. L.J. 683, 685-86 (2018) (reporting results of empirical research showing that many federal circuit court decisions on immigration appeals are unavailable and essentially invisible to the public).

60. See Resnik, 42 J., supra note 2, at 627 (citing Peter G. Fish, The Politics of Federal Judicial Administration 91-95 (1973); David S. Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. CAL. L. REV. 65, 97 (1981)).


explanations alert interested parties to trends throughout the federal courts or in particular jurisdictions. Twice each year, the Administrative Office of the U.S. Courts also publishes the most frequently requested tables of statistics regarding the workload of the federal courts. These tables contain aggregate data regarding a variety of information: numbers of cases filed, terminated, and pending by jurisdiction; numbers of cases filed by jurisdiction, nature of suit, and district; numbers of cases terminated, by nature of suit and action taken; and median time from filing to disposition of civil cases, by action taken.63 Both the annual reports and the semi-annual tables of statistics are available online at no cost.

These reports and statistical tables are not perfect. Concerns have been raised regarding the accuracy and consistency of the data input by court clerks.64 In addition, there are some notable exclusions in the data captured for aggregation and publication. For example, while the reports and tables reveal the occurrence of dispositions, they do not provide information regarding the terms of such dispositions. Further, while the reports and tables show the number of civil cases terminated during a twelve-month period and provide some breakdowns regarding the actions taken that resulted in termination,65 such breakdowns are extremely limited. For example, there is no information regarding the number of terminations resulting from judicial settlement conferences, mediation, other facilitated settlement procedures, or traditional bilateral negotiations between the lawyers.66 Notably, a few district courts have taken the initiative to provide

Syngenta AG, Deepwater Horizon’s oil spill, and use of pelvic repair products, the cholesterol drug Lipitor, and Skechers Toning Shoe Products).


65. The tables indicate how many civil cases are terminated with no court action and with court action occurring before trial, during or after pretrial, during or after a non-jury trial, and during or after a jury trial. See, e.g., Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary, U.S. CTS. (Dec. 31, 2017), http://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2017/12/31.

66. Nancy A. Welsh, Magistrate Judges, Settlement and Procedural Justice, 16 Nw. L.J. 983, 1044-45 (2016) (“While much is reported about magistrate judges’ functions, much more is unknown—e.g., how many dispositions actually result from magistrate judges’
aggregated information regarding their use of mediation and other ADR procedures. Other district courts have developed their own jurisdiction-specific settlement databases. Federal magistrate judges facilitating settlement conferences then use these databases with parties to allow comparisons with settlements reached in similar matters. These databases are not made available to the public generally.

State courts also publish aggregate information regarding their operations. For civil caseloads, state courts tend to report the number of filings and dispositions, often indicating whether the dispositions were the result of defaults, jury trials, or bench trials. However, only a few state

settlement sessions, how many cases go to mediation, how often magistrate judges serve as mediators, how many dispositions result from mediation and other settlement procedures, and the terms of these dispositions.

67. See, e.g., Rebecca Price, U.S. Dist. Court S. Dist. of N.Y., Mediation Program: Annual Report January 1, 2016 – December 31, 2016 (Dec. 5, 2017); U.S. Dist. Court of the N. Dist. of Cal., ADR Program Report, Fiscal Year 2017 (October 1, 2016 through September 30, 2017); U.S. Dist. Court of the Cent. Dist. of Cal., ADR Program Report – Calendar Year 2016; see also Wayne Brazil, Informalism and Formalism in the History of ADR in the United States and An Exploration of the Sources, Character, and Implications of Formalism in a Court-sponsored ADR Programme, in Formalisation and Flexibilisation in Dispute Resolution 250, 303-04, 317, 330-332 (Joachim Zekoll et al. eds., 2014) (using data gathered by District Court staff to discuss party perceptions of mediator interventions and fairness, as well as parties’ or their attorneys’ preference for mediation).


69. See, e.g., Md. Cts., Maryland Judiciary Statistical Abstract 2017 (2018), https://www.courts.state.md.us/sites/default/files/import/publications/annualreport/reports/2017/fy2017statisticalabstract.pdf (providing number of civil cases filed and terminated; no detail regarding the manner of disposition); Summary Reporting System, Fla. Cts., http://trialstats.flcourts.org/TrialCourtStats/ReportTrialCourtStats (last visited Oct. 25, 2018) (showing that Circuit Civil cases’ disposition types include: dismissed before hearing; dismissed after hearing; disposed by default; disposed by judge; disposed by non-jury trial; disposed by jury trial; and other); Office of Court Admin., Tex. Judicial Branch, Annual Statistical Report for the Texas Judiciary: Fiscal Year 2017, at 22, 23, 46 (2018), http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf (providing information regarding filings and dispositions for civil cases as a result of: dismissal by plaintiff, default judgment, agreed judgment, bench trial, dismissal for want of prosecution, all other dispositions, summary judgment, jury/directed verdict); Judicial Council of Cal., Cal.
courts provide more detailed aggregate numbers regarding the dispositions resulting from the use of dispute resolution processes, such as court-connected mediation, arbitration, early neutral evaluation, or judicial settlement conferences.\footnote{See, e.g., Uniform Data Reporting, Alternative Dispute Resolution Programs: Cases Ordered July through September 2017, FLA. CTS. (Oct. 27, 2017), http://www.flcourts.org/core/fileparse.php/541/url/Alternative-Dispute-Resolution-Program-Jul-Sep17.pdf (“This data is reported by court administration through the Uniform Data Reporting system web application and is not audited. In addition, data may be amended at a later date.”). But see Resnik, The Contingency of Openness, supra note 2, at 1667-68 (reporting that in Illinois, court-connected arbitration includes a public dimension and that outcomes are in a court database).}

Significantly, federal and state courts are not alone in providing access to filings and aggregate information. Increasingly, quasi-public and “private” dispute resolution procedures are also subject to some degree of transparency.

III. The Experience of Quasi-Public and Private Organizations, States, and Users with the Collection and Publication of Information Regarding Dispute Resolution

The experience of quasi-public arbitration programs, private dispute resolution organizations, states and users with the collection and publication of data regarding arbitration proceedings (and to a much lesser degree, mediation sessions) is also instructive. The transparency and accountability offered by such reporting and publication have helped to promote the integrity of the dispute resolution processes.

A few examples follow regarding quasi-public and private arbitration programs’ provision for the transparency and accountability of their processes and outcomes by making their awards available and searchable online, much as proposed by the CFPB and supported by the Section. These are followed by examples of states’ disclosure requirements, users’ “self-help” initiatives, and calls for ODR to provide for transparency.

A. FINRA: Required Publication of Awards and Other Aggregate Data

The rules of the Financial Industry Regulatory Authority (“FINRA”), a not-for-profit organization authorized by Congress, require its awards to be made publicly available. The awards are online and searchable through the FINRA Arbitration Awards Online database, as well as commercial databases, such as Westlaw. The FINRA database is available without charge, and users can access FINRA arbitration awards from January 1989 through the present. In addition, users can access the awards of all arbitration programs absorbed over the years by FINRA (which include the American Stock Exchange, Chicago Board Options Exchange, International Stock Exchange, Philadelphia Stock Exchange, and Municipal Securities Rulemaking Board) and the New York Stock Exchange (“NYSE”) (which includes Pacific Exchange/NYSE ARCA).

The database provides users with instantaneous access to awards and the ability to search for awards by using multiple criteria, such as by case number, keywords within awards, arbitrator names, party names, date ranges set by the user, and any combination of these features. FINRA also now includes information about the panel selection method and panel composition.

In addition, FINRA publishes various statistics online:

- The number of cases filed and closed thus far during the current year
- Historical statistics for cases filed and closed
- The top fifteen controversy types in customer arbitrations
- The top fifteen security types in customer arbitrations
- The top fifteen controversy types in intra-industry arbitrations


How arbitration cases close (e.g., after arbitration hearing, after arbitrators’ review of documents, direct settlement by parties, settled via mediation, withdrawn, all others)

Results of customer claimant arbitration award cases (e.g., percentage of all customer claimant cases closed that were decided by arbitrators, percentage (and number) of cases where customer awarded damages)

Results of all-public panels and majority-public panels in customer cases

Arbitrators by type and location

Mediation statistics thus far during the current year.

The resulting disclosures have helped to protect the integrity of the arbitration process by providing parties with information they need to prepare for arbitrations and, more broadly, enabling important empirical research and systemic analysis that otherwise would not be possible. These disclosures also have permitted regulators and observers to become aware of potentially worrisome trends in the financial services industry.

FINRA has continued to examine its procedures to enhance their transparency and legitimacy. Since 2009, for example, FINRA has required its arbitrators to issue an explained award—defined as “a fact-based award stating the general reason(s) for the arbitrators’ decision”—if all parties to the dispute jointly request one. Few parties have jointly requested an explained award since the rule’s enactment. In response, the FINRA Dispute Resolution Task Force recommended that FINRA change its rule to require an explained decision unless any party notifies the panel before the initial pre-hearing conference that it is opting out of such requirement.


The Task Force noted that it believed “increased confidence in the fairness of the system would likely flow from th[e] increased transparency.”

B. ICANN: Required Publication of Awards

The Internet Corporation for Assigned Names and Numbers (“ICANN”), a not-for-profit public benefit corporation, similarly requires its approved dispute resolution service providers to make Uniform Domain-Name Dispute-Resolution Policy (“UDRP”) decisions publicly available online, thus providing the public, parties, and arbitrators with easy access to arbitrators’ decisions and their reasoning. Publication of neutrals’ decisions is understood as necessary to enhance the legitimacy and predictability of the system. One of the dominant providers, the World Intellectual Property Organization (WIPO), has also established a system for querying its database regarding particular issues or categories of cases. As a result of the required publication of decisions, the ICANN system has permitted patterns of decision-making and institutions’ repeat appointments of arbitrators to be highlighted. Such transparency has assisted the integrity of the dispute resolution system.

79. Id. at 21.

80. See Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), ICANN r. 16(b)), https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en (last visited on Dec. 11, 2018) (“Except if the Panel determines otherwise [per Paragraph 4(j) of the Policy, ‘when an Administrative Panel determines in an exceptional case to redact portions of its decision’], the Provider shall publish the full decision and the date of its implementation on a publicly accessible web site. In any event, the portion of any decision determining a complaint to have been brought in bad faith (see Paragraph 15(e) of these Rules) shall be published.”).

81. See List of Approved Dispute Resolution Service Providers, ICANN, https://www.icann.org/resources/pages/providers-6d-2012-02-25-en (last visited Nov. 28, 2018) (listing approved dispute resolution service providers, including links to their databases of proceedings and decisions).


83. See Ethan Katsh & Colin Rule, What We Know and Need to Know About Online Dispute Resolution, 67 S.C. L. Rev. 329, 336-37 (2016) (noting that the other major provider, National Arbitration Forum, enables only a full-text search of its decisions, and it is necessary to access a third party in order to conduct a full-text search of the decisions of both WIPO and NAM).

C. International Arbitration: Required and Increased Voluntary Publication of Awards

International dispute resolution providers regularly make information public regarding their proceedings and awards. The World Trade Organization (“WTO”), for example, provides a searchable, online database of trade disputes brought to the WTO for resolution pursuant to the Dispute Settlement Understanding.\(^{85}\) The awards are public, while pleadings are public only at the election of nations.\(^{86}\) In the investor-state arbitration

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\(^{86}\) For example, the United States makes its pleadings available. Id.
context, the International Center for Settlement of Investment Disputes ("ICSID") currently offers an online, searchable list of cases and arbitral awards. ICSID only publishes awards with the consent of the parties. However, even without the parties’ consent, ICSID publishes excerpts of arbitral panels’ legal reasoning. This information has been useful for the parties directly involved in investor-state disputes and for those conducting systemic, empirical analysis.

Indeed, in the investor-state context, substantial attention has been paid to the need for transparency. For example, the United Nations Rules on Transparency in Treaty-Based Investor-State Arbitration, which became effective on April 1, 2014, provide for the publication of documents, open hearings, and the opportunity for interested third parties to file and make submissions. For disputes arising out of treaties concluded before April 1, 2014, these rules regarding transparency apply only at the election of the parties to the arbitration or the parties to the relevant treaty.


Even though international commercial arbitration awards are not required to be published, there are indications that such awards and aggregated information are being published voluntarily with greater frequency. In the past, only a selective group of lawyers and law firms was likely to know about and use international commercial arbitrators’ decisions. Now, however, international commercial arbitral institutions are advocating increased publication, “with some institutions even shifting to a presumption in favor of redacted awards in the absence of party objection.” Legal journals, such as the Collection of ICC Arbitral Awards, publish arbitral awards with the redaction of names and other identifying information. As a result of shifting presumptions regarding the publication of awards, some commentators perceive an increasingly transparent body of non-binding but persuasive precedent being produced by international commercial arbitration. Other commentators acknowledge a trend toward transparency (especially in the investor-state arbitration context as described above), but they also note that “most if not all” international commercial arbitral institutions continue to publish only selected awards and then only in redacted form, and that such awards “are not always easy to search or find.” Indeed, access to such awards is generally available only by subscription.

Meanwhile, online subscription services now exist that use aggregated data regarding international commercial mediation and arbitration contributed by dispute resolution organizations from around the world (and involving data from 185 nations) to generate up-to-date geographic and case-type reports on “average claim amounts by case type, average claim amount versus amount awarded, arbitration and/or settlement outcomes by Trade Law (UNCITRAL) Rules on Transparency, Mauritius Convention on Transparency, and the UNCITRAL Transparency Registry).


94. See Rogers, supra note 92, at 1319-20.

95. Ank Santens & Romain Zamour, Dreaded Dearth of Precedent in the Wake of International Arbitration: Could the Cause Also Bring the Cure?, 7 Y.B. ON ARB. & MEDIATION 73, 78 (2015) (citing S.I. Strong, Research in International Commercial Arbitration: Special Skills, Special Sources, 20 AM. REV. OF ARB. 119 (2009)).
case type, whether parties frequently file counterclaims and their success rates, and the average length of case." Subscribers also can learn about “the frequency of the use of discovery tools, including e-discovery, and the success rate of counterclaims by case type.” Access to these aggregated data regarding international commercial arbitration and mediation requires payment of a fee.

D. Labor Arbitration: Required and Voluntary Publication of Awards

Labor arbitration provides another model for the publication of information regarding arbitrations and their results. Many state providers of labor arbitration make their awards available online. Some states also make public the results of grievance arbitrations with public sector unions.

96. Q&A with Bill Slate, Chairman, CEO and Co-founder of Dispute Resolution Data, NORTON ROSE FULBRIGHT (Oct. 2017), http://www.nortonrosefulbright.com/knowledge/publications/157150/data-insights; see also International Commercial Arbitration and Mediation: What Does the Data Show?, DISP. RESOL. DATA, http://www.disputeresolutiondata.com/international_commercial_arbitration (last visited Dec. 11, 2018) [hereinafter What Does the Data Show?] (“[D]ispute Resolution Data (DRD) is receiving data from 17 international entities and then aggregating the data by case type (28 different) and seven geographic regions. In this process, each closed international commercial arbitration provides information for up to 100 data fields and each closed international mediation up to 45 data fields. Presently, over 1,000 cases have provided information, in excess of, 40,000 data fields.”).

97. What Does the Data Show?, supra note 96.

98. In contrast, this sort of information is not generally available for employment arbitration. See David B. Lipsky, J. Ryan Lamare & Michael D. Maffie, Mandatory Employment Arbitration: Dispelling the Myths, 32 ALTERNATIVES TO HIGH COST LITIG. 133, 142 (2014) (critiquing claims regarding expansive use of mandatory pre-dispute employment arbitration clauses but also acknowledging “that no institution or individual has ever been able to collect a comprehensive set of data on the total number of employment arbitration claims”). But see text at infra notes 103-04 (regarding AAA disclosures, including disclosures regarding employment arbitration conducted pursuant to mandatory pre-dispute arbitration clauses).


In other settings, labor arbitration awards are not required to be published. However, those that are published are generally accompanied by reasoned opinions that provide parties with valuable information. Parties can access searchable online databases of these labor arbitration awards through various private providers (e.g., Bloomberg BNA, CCH, and Thomson West’s LAIS). Bloomberg BNA’s Arbitration Award Navigator, for example, allows users to access a collection of at least 20,000 arbitration awards to assess trends, evaluate arbitrators, and pinpoint awards. Users can search awards by case name, arbitrator, topic, union, employer, industry, classification outline number, and several other criteria. These sources are non-public and require payment.

E. Consumer Arbitration in California, District of Columbia, Maine, and Maryland: Required Disclosures

There is also substantial state (and District of Columbia) experience with the required submission and publication of data, specifically regarding consumer arbitration. Again, such disclosures have enabled vital empirical research and systemic analysis.

101. The benefits of arbitrator opinion writing are many and varied. See Sarah R. Cole, The Federalization of Consumer Arbitration: Possible Solutions, 2013 U. CHI. LEGAL F. 271, 280. First, opinion writing improves the quality of arbitral decision-making. The process of writing an opinion encourages the arbitrator to carefully consider her decision. In addition, opinion writing assists parties in selecting an arbitrator because it provides them with better information about a particular arbitrator’s decision-making process and potential biases. The opinion-writing requirement also improves the hearing process (because the arbitrator will need to make sure he or she understands all of the issues presented) and provides a greater sense of resolution to the parties, who will now have a deeper understanding of the reasons they won or lost. Moreover, this relatively inexpensive process change would have a significant impact on parties’ and the public’s perception of arbitration as a fair and legitimate forum for the resolution of disputes. See generally Chad M. Oldfather, Writing, Cognition, and the Nature of the Judicial Functions, 96 GEO. L.J. 1283 (2008).

Unlike the quasi-public and private organizations described *supra*, the states have not provided for the disclosure and publication of awards. Instead, they have required dispute resolution providers to collect and disclose specific pieces of information. In some respects, the resulting data provides less information than would be available from a review of arbitration filings and awards; in other respects, the resulting data exceeds what would be available from such a review.

California is the leader in requiring disclosures regarding consumer arbitration. Effective January 1, 2003, California Civil Procedure Code section 1281.96 began requiring dispute resolution providers to collect, publish at least quarterly, 103 and make available to the public on the provider’s website (and on paper upon request) a report containing information about the provider’s consumer arbitrations within the preceding five years. 104 The statute also requires the report’s format to be searchable and sortable by members of the public using “readily available software” and “to be directly accessible from a conspicuously displayed link” that is identified as “consumer case information.” 105

The statute, which was amended in 2014, currently requires publication of the following pieces of information:

(1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

(2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

103. *Cal. Civ. Proc. Code* § 1281.96(a) (West 2016). Certain providers that handle fewer than 50 consumer arbitrations are required to report only semiannually. *Id.* § 1281.96(c)(2).


(3) The nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment106, or other.

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, “prevailing party” includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

(7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any.

(8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

106. California is unique in including the arbitration of employment matters within a statute structured to focus on consumer arbitration. The Section was careful to take no position on this inclusion.
The name of the arbitrator, his or her total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.  

It is particularly notable that California’s statute requires disclosure of a non-consumer’s prior mediation experience with a dispute resolution provider, as well as prior arbitration experience. Meanwhile, the statute does not require disclosure of the name of the consumer, the specific legal claims involved, the basis for an arbitral award, or the terms of any settlement. The statute also does not provide for any mechanism to enforce its requirements. 

Some commentators and scholars report that despite the value of the information disclosed pursuant to California’s requirements, many dispute resolution providers are not in compliance. The AAA has been particularly conscientious in complying with the state’s requirements. The AAA displays the relevant data quite prominently on its website, discloses information about the statutes that require provision of the data, provides guidance on how to search the database, and, as noted supra, cooperated with the CFPB in furnishing data for the study required by the Dodd-Frank Act. Recently, however, Professor Judith Resnik reported deficiencies in even the AAA’s disclosures and concluded that the available information

107. CAL. CIV. PROC. CODE § 1281.96(a) (West 2016).
108. Id.
109. Id.
110. See Resnik, A2J, supra note 2, at 648 (observing that a 2017 study reported that of the 32 entities offering consumer arbitration, only about one third (eleven) posted the data and one tenth (three) met all the California requirements); Resnik, Diffusing Disputes, supra note 6, at 2898 (citing DAVID J. JUNG, JAMIE HOROWITZ, JOSE HERRERA & LEE ROSENBERG, PUB. LAW RESEARCH INST., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96, at 9, 51 (2013)).
112. Resnik, Diffusing Disputes, supra note 6, at 2900. A research team analyzed the AAA’s disclosures regarding claims that had been filed and closed between July 2009 and June 2014 (and thus were governed by the 2003 version of California’s disclosure requirements). They found disclosures regarding 7,303 consumer claims, excluding real estate and construction, and the disclosures generally revealed the names of the business entity and of the arbitrators and lawyers (if appearing), as well as whether the claim closed by settlement or award, the amounts sought, the fees, and fee allocations between the disputants. Of the
was “spotty.” It does not appear that any dispute resolution provider has suffered any negative consequence as a result of the failure to make the disclosures required by California. Three other jurisdictions have also enacted arbitration disclosure requirements: Maine, Maryland, and the District of Columbia. All are patterned after California’s 2003 statute, although they include variations.

The District of Columbia’s reporting requirements, which became effective in 2008, look much like those in California. However, the

5,224 claims “terminated by an award,” about half included a dollar figure. Id. at 2899-900. Resnik also observes, “The information on prevailing parties comes with the caveat that arbitrators are the source; the AAA has not ‘reviewed, investigated, or evaluated the accuracy or completeness’ of such information.” Id. at 2900; see also Resnik, supra note 2, at 649 (observing that arbitration files are not accessible and often are held by individual arbitrators, not the reporting dispute resolution providers, and that the providers do not independently verify the individual arbitrators’ reports; also noting that “coding errors can occur at both individual and aggregate levels” and providing an example of sixty-two cases in which the consumers were coded erroneously as seeking exactly the same amount and receiving exactly the same award).

113. Resnik, Diffusing Disputes, supra note 6, at 2898; see also Amsler, supra note 6, at 42 (noting that California data was incomplete, thus precluding systematic analysis of outcomes (citing Lisa Blomgren Bingham, Jean R. Sternlight & John C. Healey, Arbitration Data Disclosure in California: What We Have and What We Need (Apr. 15, 2005) (unpublished paper presented at the American Bar Association Section of Dispute Resolution Conference in Los Angeles))).

114. CAL. CIV. PROC. CODE § 1281.96(f) provides: “It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.” However, there is no express provision for enforcement of such obligation. See, e.g., Appellants’ Opening Brief at 10, Cross Country Bank v. California, No. A108572 (Cal. Ct. App. Jan. 2005), 2005 WL 677738 (observing that in dicta, the trial court in the case had noted that an arbitration agreement naming NAF as the provider “might be unenforceable” due to NAF’s failure to comply with the California disclosure requirements, but also noting the lack of any express provision for such disqualification). But see Honeycutt v. JPMorgan Chase Bank, N.A., 236 Cal. Rptr. 3d 255, 270-71 (Cal. Ct. App. 2018) (entering a judgment of vacatur of arbitral award in employment matter due to arbitrator’s failure to make disclosures as required by California statute and ethics provisions).

118. Interestingly, the District of Columbia’s reporting requirements also provide for the waiver of arbitration fees and costs “for any person having a gross monthly income that is less than 300% of the federal poverty guidelines issued annually by the United States Department of Health and Human Services.” Id. § 16-4430(d)(1).
District of Columbia specifically provides for enforcement by permitting any person or entity affected by a violation of the provisions to seek an injunction against, and appropriate restitution from, the allegedly violating arbitration organization. If the person or entity bringing the action prevails, or if the arbitration organization voluntarily complies after the commencement of the action, then the arbitration organization can be held liable for the person or entity’s attorney’s fees and costs.\footnote{119}

In addition, the District of Columbia requires each dispute resolution provider to disclose any financial interests that the provider has in a party or the legal representation of a party, as well as any financial interests that a party has in the provider.\footnote{120} This additional requirement is consistent with the recommendations of scholars and the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR\footnote{121} and addresses important

\footnote{119}. D.C. CODE ANN. § 16-4430(i).

\footnote{120}. Id. § 16-4430(h). Maine also requires disclosures regarding financial interest. See ME. REV. STAT. ANN. tit. 10, § 1394(1)(K) (2010).

\footnote{121}. In 2002, the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR published the CPR-Georgetown Principles for ADR Provider Organizations. These principles include the following regarding disclosures:

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

a. The nature of the ADR Provider Organization’s services, operations, and fees;

b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;

c. The ADR Provider Organization’s policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;

d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and

Electronic copy available at: https://ssrn.com/abstract=3331299
concerns regarding the potential for conflicts of interest. Such concerns were heightened after the Minnesota Attorney General brought a highly publicized suit against the National Arbitration Forum (“NAF”), a dispute resolution provider that conducted consumer arbitrations pursuant to mandatory pre-dispute arbitration clauses. The Attorney General alleged that NAF and its operations had become financially entangled with lawyers.

e. The method by which neutrals are selected for service.

... The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

CPR-GEORGETOWN COMM’N ON ETHICS & STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS 9-10 (May 1, 2002), https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/principles-for-adr-provider-organizations/_res/id=Attachments/index=0/Principles-for-ADR-Provider-Organizations.pdf [hereinafter PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS]; see also Welsh, Mandatory Predispute Consumer Arbitration, supra note 6, at 225-26 (suggesting disclosures of the following in order to understand the operation of any negotiated or facilitated processes that precede arbitration—e.g., “written policies (or performance evaluation factors) to guide employees’ decisions regarding the amount of their first [and subsequent] settlement offers to consumers”; the number of times that a consumer must refuse “settlement offers in order to be offered the full amount of [their] claim”; the length of time that employees wait before the consumer’s selection of an arbitrator to offer the full amount requested by a consumer; also suggesting disclosure of the following regarding arbitration—e.g., how the “available pool of arbitrators [was] selected for these types of cases”; how arbitrators are selected for particular cases; the “contractual and financial relationship” between companies and their arbitral provider(s); the company’s “share of each arbitral provider’s gross and net revenues”; the “potential for the arbitral provider, or individual arbitrators, to receive bonuses for their work” for a company and the basis for such bonuses; the information that the company receives about “the claims made by consumers, the results of these claims and the arbitrators responsible for deciding the claims”; how the company has used this information; and whether the company has ever used this information to “improve its products or services” and, if yes, in what way).

122. See generally Welsh, What Is “(Im)partial Enough,” supra note 6, at 427-30.
and other actors involved in debt collection matters subject to arbitration.\textsuperscript{123} NAF subsequently entered into a settlement with the Attorney General and discontinued its provision of consumer arbitrations pursuant to mandatory pre-dispute arbitration clauses.

Maine also requires a disclosure regarding financial interests that could represent a conflict of interest. In addition, the consumer protection division of Maine’s Office of the Attorney General is directly involved in publicizing dispute resolution providers’ disclosures to consumers. Specifically, each dispute resolution provider must notify the Attorney General of the website where its disclosures are posted (and must provide notification of the discontinuation of the use of such website), and the Attorney General is required to include links on its own publicly accessible website.\textsuperscript{124}

Maryland varies from both California and Maine in additionally requiring disclosure of the address where a consumer arbitration was conducted.\textsuperscript{125}

\textbf{F. Disclosures by Users of Dispute Resolution Services}

Some proponents of international commercial and investor-state arbitration have pioneered online initiatives that empower users of dispute resolution services to publicize information regarding their experience with international arbitrators and arbitration.\textsuperscript{126} For example, the non-profit organization Arbitrator Intelligence solicits arbitral awards from users and posts them online. In addition, Arbitrator Intelligence uses a two-phase Arbitrator Intelligence Questionnaire (“AIQ”) to collect both objective

\begin{footnotesize}

\textsuperscript{124} ME. REV. STAT. ANN. tit. 10, § 1394(2) (West 2010).

\textsuperscript{125} MD. CODE ANN., COM. LAW § 14-3903(a)(11) (West 2011). Maryland also varies from both California and Maine in not requiring disclosures regarding the arbitration of employment-related disputes or the number of times that a non-consumer has been a party in a mediation conducted by the disclosing dispute resolution organization. \textit{Id.} § 14-3903(a)(2), (5).

\end{footnotesize}
information and subjective assessments from users and counsel regarding individual arbitrators’ case management (e.g., ordering of interim measures and document production), decision-making (e.g., interpretive methodologies), and timeliness in the issuance of awards.127 When enough anonymized data has been collected as a result of users’ completion of questionnaires, Arbitrator Intelligence intends to publish “AI Reports” regarding individual arbitrators.128 These reports will be available, for a fee, to users, counsel, institutions, and arbitrators, provided that the profiled arbitrator consents to such publication.129 The underlying data that Arbitrator Intelligence gathered also will be made available to cooperating arbitral institutions.130

Consumer advocates and academics have urged similar initiatives for domestic consumer arbitration. Professor Lisa Amsler, for example, has proposed that one-shot players might increase transparency and improve their experience in consumer arbitration if they are trained to identify key procedural elements and then upload their assessments and other information to an online platform that would be widely accessible—and potentially quite influential in the aggregate (e.g., TripAdvisor).131 Based in part on suggestions made during a National Roundtable on Consumer

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128. See id. (answering the question “How will information from the AIQs be made available?”).

129. See id. (answering the question “How does the AIQ ensure that feedback is fair to arbitrators?”).


131. See Amsler, supra note 6; see also Alyson Carrel & Alan Boudreau, Crowdsourcing and Mediation: A New Approach to Social Justice Critiques, Presentation at ABA Dispute Resolution Section Annual Conference (Apr. 17, 2015) and Association of Conflict Resolution (Mar. 25, 2015), http://tinyurl.com/crowdsourcing-mediation; Alyson Carrel & Alan Boudreau, Crowdsourcing: Can Today’s Technology Answer Yesterday’s Social Justice Critique of Mediation? (n.d.) (unpublished manuscript, on file with author) (proposing use of crowdsourcing to bring transparency to mediated settlements, referencing glassdoor.com and others for potential templates, and noting that questions regarding confidentiality and logistics must be resolved); see also Carrie Menkel-Meadow & Robert Dingwall, Negotiating with Scripts and Playbooks: What to Do When Big Bad Companies Won’t Negotiate, in THE NEGOTIATOR’S DESK REFERENCE 717-18 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017).
Arbitration, Professor Tom Stipanowich developed a “Fairness Index” that users similarly could access in order to provide feedback on arbitration services.

There are some particularly notable examples of institutional repeat players’ willingness to cooperate with the publication of information regarding their internal dispute resolution programs. Professor Alan Morrison, for example, has used the annual reports published by the Office of the Independent Administrator—which administers arbitrations between Kaiser Foundation Health Plan, Inc. and its health plan members in California—to assess the fairness of Kaiser Permanente’s mandatory medical malpractice arbitration program. Professor Morrison has called for others to engage in greater in-depth analysis of this program, with access to data beyond what was contained in the annual reports.

132. See STIPANOWICH ET AL., supra note 6; see also Nancy A. Welsh & Lipsky, “Moving the Ball Forward,” supra note 7.


134. See Alan B. Morrison, Can Mandatory Arbitration of Medical Malpractice Claims Be Fair? The Kaiser Permanente System, 70 DISP. RESOL. J. 35, 35-36 (2015) (using available data to determine whether this type of mandatory arbitration can be “operated in a manner in which those who must use it to resolve their claims receive a fair hearing and a reasonable opportunity to recover their damages”). These reports include information on the process used to close cases, time to closure, claimants’ win rates, and parties’ and counsel’s assessments of the arbitrators and process. Morrison supplemented his review of the annual reports with interviews with the independent Administrator and Kaiser-Permanente officials. Id. Also, it should be noted that Kaiser Permanente developed its current arbitration program following the California Supreme Court’s severe criticism of the prior program in Engalla v. Permanente Medical Group, 938 P.2d 903 (Cal. 1997). Morrison, supra, at 36; see also Stephanie Smith & Janet Martinez, An Analytic Framework for Dispute System Design, 14 HARV. NEGOT. L. REV. 123, 134-44 (2009) (describing the design process that led to Kaiser Permanente’s current arbitration program).

135. See Morrison, supra note 134, at 59 n.71. Notably, Professor Morrison concluded that Kaiser Permanente’s arbitration system was less expensive for claimants and thus made it more possible to bring small- and medium-size claims, was faster than litigation, permitted claimants to present their cases fully, and produced “reasonably just” outcomes. Id. at 59. He added that “[t]he loss of a public trial before a jury is a negative, but whether it outweighs the positives is a question that will not be answered in the same way by everyone.” Id.
G. Proposed Transparency Requirements for ODR

A last recent development involves online dispute resolution (“ODR”). Increasingly, courts, agencies, and repeat litigants (e.g., insurers, manufacturers, employers) are expressing interest in using ODR to resolve relatively routine, low-dollar disputes. ODR creates the opportunity for collecting and analyzing substantial amounts of data, which can then be used to detect problematic patterns. At the same time, the public is increasingly aware of the dangers presented by involvement with the online world, including the potential for security breaches, victimization as a result of inaccurate information, and unfairness as a result of biased


The CRT team constantly seeks feedback from both satisfied and unsatisfied users to improve the process, identify problems, and replicate successful elements. They collect data in a myriad of ways available only because of the CRT’s online nature: active user input given through rating and ranking, open text boxes, ex-post feedback, and analysis of dispute resolution data. Indeed, CRT developers have devoted significant efforts and resources to the development and refinement of categorizations of claims and defenses in order to allow for meaningful use of the data. Such data helps to improve the CRT and the diagnosis phase, and, perhaps more importantly, helps prevent future claims.

As the CRT team has recognized, learning from data and prevention of problems need not be limited to the improvement of the system itself, but could be viewed as a broader goal of the legal system. As use of online systems expands and data is stored and studied more extensively by courts, they will be able to detect, through such indicators as spikes in particular claims, that there is a regulatory gap or a need for better enforcement of existing laws in certain areas. In this way, dispute resolution data collected in courts can be used to prevent future disputes from occurring.


Consequently, many ODR advocates are calling for ODR procedures to be made transparent and accountable, with required reporting regarding the number of people using them, their substantive results, users’ perceptions of the ODR process’s fairness, demographic patterns, and the results of algorithmic audits."
The example of federal and state courts, as well as the developments involving quasi-public and private organizations and self-help initiatives as described supra, strongly suggest a trend toward some degree of transparency—what this Article will term “measured transparency”—in order to assure the integrity and trustworthiness of “private” dispute resolution processes. It is at this point, then, that this Article turns to dispute resolution neutrals’ ethical obligations and their relationship with transparency.

IV. Dispute Resolution Ethics and Transparency: Focus on the Model Standards of Conduct for Mediators

In light of the Article’s primary focus to this point on the value of transparency in connection with the use and outcomes of mandatory pre-dispute consumer and employment arbitration, it would be reasonable to turn now to the Code of Ethics for Arbitrators in Commercial Disputes. After examining the ethical obligations of arbitrators, the Article might then begin to consider other dispute resolution neutrals’ ethics—e.g., mediators,141 dispute resolution organizations,142 ODR providers,143 ombudspersons,144 and even state145 and federal judges.146


141. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS PMBL. (AM. ARBITRATION ASS’N, AM. BAR ASS’N, AND ASS’N FOR CONFLICT RESOLUTION 2005) [hereinafter MODEL STANDARDS OF CONDUCT].

142. See generally PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, supra note 121.


Because there are now discussions regarding potential revisions to the Model Standards of Conduct for Mediators, however, the Article will turn at this point to the ethical obligations of mediators. As noted previously, the use of mediation is mimicking arbitration in key respects. Mandatory mediation is most frequently associated with courts, but private contracts of adhesion increasingly contain mandatory pre-dispute mediation clauses. Thus, like consumer and employment arbitration, mediation is imposed upon parties, and many commentators have raised concerns over the years about the fairness of the process for those who are less powerful. 147 Most

recently, legislative mandates to participate in foreclosure mediation have triggered particular attention to these concerns.\textsuperscript{148}

Even though there is currently no federal statute\textsuperscript{149} providing for narrow and deferential judicial review or expedited judicial enforcement of mediated settlement agreements, traditional legal research\textsuperscript{150} and available metrics\textsuperscript{151} suggest that federal and state courts tend to treat mediated settlement agreements as “super-contracts”\textsuperscript{152} with nearly automatic entitlement to judicial support and enforcement. An international

Schneider, Nancy Welsh, Eric Yamamoto, Deborah Hensler, Pat Chew, Sarah Cole, Charles Craver and Lisa Blomgren Amsler, among others. Gilat Bachar and Professor Deborah Hensler undertook to identify all of the empirical efforts to test Professor Delgado’s hypothesis that mediation (and arbitration) create systematic differences in dispute resolution outcomes by gender, race, ethnicity, or socio-economic status. Ultimately, they found the results to be contrary and inconclusive, and they called for such research to be undertaken. Gilat J. Bachar & Deborah R. Hensler, \textit{Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don’t Know}, 70 SMU L. REV. 817, 829-30 (2017).

148. \textit{See} Lydia Nussbaum, \textit{ADR’s Place in Foreclosure: Remediing the Flaws of a Securitized Housing Market}, 34 CARDOZO L. REV. 1889, 1946 n.242 (2013) [hereinafter Nussbaum, \textit{ADR’s Place}] (citing Admin. Office of the Courts, Supreme Court of Nev., Foreclosure Mediation Program Beneficiary Compliance Outcomes (2012), http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/8318 [hereinafter Foreclosure Mediation Program] (detailing the extent to which the six primary loan servicers in Nevada (Bank of America, Wells Fargo, JP Morgan Chase, Ally/GMAC, US Bank, CitiGroup) and others complied with statutory requirements of the state foreclosure mediation program, such as attendance at mediation, production of required documents, authority to negotiate, and good faith participation)); Lydia Nussbaum, \textit{Mediation as Regulation: Expanding State Governance over Private Disputes}, 2016 UTAH L. REV. 361, 412 [hereinafter Nussbaum, \textit{Mediation as Regulation}] (pointing out that the foreclosure crisis ultimately required the creation of the Consumer Financial Protection Bureau and legal action by the U.S. Department of Justice and the state attorneys general from forty-nine states and the District of Columbia, and observing that “policymakers need to be aware that, while it may appear more politically expedient to require parties to mediate and then shape their behavior within the context of mediation, direct government intervention may be required to achieve the intended policy outcome”).

149. In contrast, the Federal Arbitration Act provides very limited grounds for vacating an arbitral award, and the courts have developed a deferential standard of review. \textit{See} Welsh, \textit{Mandatory Predispute Consumer Arbitration}, \textit{supra} note 6, at 206.

150. \textit{See} Welsh, \textit{Thinning Vision}, \textit{supra} note 4, at 59-78.

151. \textit{See} Cohen & Thompson, \textit{supra} note 4, at 74.

152. \textit{See} LEONARD L. RISKIN ET AL., \textit{DISPUTE RESOLUTION AND LAWYERS} 483 (5th ed. 2014); \textit{see also} Lydia Nussbaum, \textit{Trial and Error: Legislating ADR for Medical Malpractice Reform}, 76 MD. L. REV. 247, 269 (2017) (describing, in the medical malpractice context, how some states have “deputiz[ed] screening panels to formalize settlement agreements and render them binding so parties can skip going to court for a final judgment and order”).
OBLIGATION TO SUPPORT MEASURED TRANSPARENCY


\footnote{In some respects, mediation presents a more difficult case than arbitration because the process promises confidentiality in order to encourage the candor and free flow of information needed to arrive at settlements. Indeed, Professor Lydia Nussbaum has pointed out the conflict that can exist between mediation’s promise of confidentiality and state legislatures’ policy goals in mandating mediation, particularly in the foreclosure context:

\[\text{Making decisions about policy reform requires access to information, but the mediation process can obscure information with its confidentiality protections and individualized approach to dispute resolution. Therefore, legislatures should spend time considering whether “nudging” more disputes to resolve out of the public eye, erodes transparency and undermines the state’s interest in protecting consumers. Will families be able to assess the safety practices of an adult care home if previous complaints were resolved in confidential mediation?}\]
Therefore, this Article now turns to the Model Standards of Conduct for Mediators (“Model Standards”) originally adopted by the American Bar Association’s Section of Dispute Resolution, American Arbitration Association, and Society of Professionals in Dispute Resolution (“SPIDR”) in 1994, and then revised and adopted as revised by the American Bar Association, AAA, and ACR (the successor to SPIDR) in 2005. The Model Standards have been very influential. Most courts, bar associations, and other organizations in the United States have looked to the Model Standards as templates for ethical requirements for their mediators.\footnote{See Riskin \textit{et al.}, supra note 152, at 401. There are exceptions, of course. In Florida, for example, the ethics provisions regulating court-certified mediators (as well as mediators handling court-connected cases) preceded the 1994 Model Standards.}

The Model Standards certainly invoke the importance of gaining and retaining the public’s trust and protecting the integrity of the mediation process. The Preamble, for example, quickly establishes that one of the Standards’ primary goals is “to promote public confidence in mediation as a process for resolving disputes.”\footnote{See Nussbaum, \textit{Mediation as Regulation}, supra note 148, at 412-13. Others have pointed to the confidentiality offered by mediation as a means to avoid the increasing transparency of arbitration. See, e.g., Shahla F. Ali & Odysseas G. Repousis, \textit{Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?}, 45 \textit{Deny. J. Int'l L.} \\& Pol'y 225, 228-29 (2017) (“If this treaty [for the enforcement of mediated settlement agreements] were to be concluded, would it mean that investor-state mediation would not only be a convenient method to avoid the high levels of transparency now paradigmatic to investor-state arbitration, but would also enjoy high levels of international enforceability?”).} Neither here nor elsewhere, however, do the Model Standards provide for any duty actually owed by mediators to sessions? How can consumer advocates identify patterns of misconduct by loan servicers or telecommunications carriers if individual claims are resolved quietly, one at a time? Whether the state should relinquish its power over dispute resolution outcomes, and whether parties, often unequally matched, can actually regulate each other in settlement negotiations, are questions hotly debated by scholars. Policymakers should be thoughtful about what kinds of disputes may have significance to the public. Some existing proposals for preserving public information while encouraging settlement include requiring parties to report the outcome of settlements negotiated in mediation in a national database or for the parties themselves to make mediated settlement terms publically available.

\textit{Nussbaum, Mediation as Regulation, supra} note 148, at 412-13. Others have pointed to the confidentiality offered by mediation as a means to avoid the increasing transparency of arbitration. See, e.g., Shahla F. Ali & Odysseas G. Repousis, \textit{Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?}, 45 \textit{Deny. J. Int'l L.} \\& Pol'y 225, 228-29 (2017) (“If this treaty [for the enforcement of mediated settlement agreements] were to be concluded, would it mean that investor-state mediation would not only be a convenient method to avoid the high levels of transparency now paradigmatic to investor-state arbitration, but would also enjoy high levels of international enforceability?”).
demonstrate to the public on a systemic basis that the mediation process is deserving of trust and confidence.157

Meanwhile, the Model Standards frequently reference mediators’ duty to protect the integrity of the mediation process in individual cases. For example, Standard III, “Conflicts of Interest,” provides that while a mediator is required to disclose conflicts of interest, she is also required to withdraw from or decline to proceed with a mediation when the conflict “might reasonably be viewed as undermining the integrity of mediation.”158 Also pursuant to Standard III, a mediator is required to avoid establishing a relationship with a mediation participant if “that would raise questions about the integrity of the mediation.”159 Standard VII, “Advertising and Solicitation,” provides that a mediator’s solicitations for business must be constrained in order to avoid “giv[ing] the appearance of partiality for or against a party or otherwise undermin[ing] the integrity of the process.”160

In addition to focusing on individual cases rather than systemic needs, these standards consistently establish what a mediator must not do. A mediator must not proceed to serve as a mediator if a conflict of interest exists. A mediator must not establish a relationship with a mediation participant. A mediator must not engage in troublesome business solicitations. All of these prohibitions exist to protect the integrity of the mediation process. No standard referencing integrity establishes an affirmative requirement, however, such as taking action to support reasonable—or “measured”161—transparency regarding the use or outcomes of the mediation process.162

157. See Omer Shapira, A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform, 100 MARQ. L. REV. 81, 95-104 (2016) (urging that the Model Standards should be revised to make it clear that mediators owe a duty to the public, not just the parties); see also Alyson Carrel & Lin Adrian, Regulating Mediator Practice, DISP. RESOL. MAG., Fall 2017, at 21, 23 (distinguishing the Model Standards from the mediation statutes and rules developed in Florida; noting that the Florida rules “don’t just discuss promoting public confidence as an aspirational goal but explicitly state that these rules are meant to ‘ensure protection of the participants in mediation and the public.’”).

158. MODEL STANDARDS OF CONDUCT, supra note 141, at Standard III.E. Christopher Honeyman has chronicled situational and structural biases in mediation that actually are endemic to the process—e.g., a situational bias toward the interests of the party that provided or hired the mediator, a structural bias toward moderates as compared to radicals—that may be best resolved by disclosure. See Christopher Honeyman, Patterns of Bias in Mediation, 1985 MO. J. DISP. RESOL. 141, 142-43, 146.

159. MODEL STANDARDS OF CONDUCT, supra note 141, at Standard III.F.

160. Id. at Standard VII.B.

161. The term “measured transparency” comes from Dispute Resolution Data. See What Does the Data Show?, supra note 96 (“The use of data in international commercial
Standards IV, “Competence,” and VI, “Quality of the Process,” provide for some affirmative ethical obligations regarding the assurance of quality, but their scope is limited to the parties participating in a mediation. For example, Standard IV notes that “[a] person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively” and urges that a mediator should both attend relevant educational programs and make available to the parties information that is “relevant to the mediator’s training, education, experience and approach in conducting a mediation.” Standard VI provides that a mediator must conduct a mediation “in a manner that promotes . . . party participation [and] procedural fairness.” If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, then the mediator should explore the circumstances and potential accommodations, modifications, or adjustments that would make possible the party’s capacity to comprehend, participate, and exercise self-determination. These actions certainly are consistent with a mediator’s obligation to protect the integrity of the mediation process, but it is noteworthy that their reach is entirely limited to the mediator’s interaction with the parties participating in mediation.

Standard IX, “Advancement of Mediation Practice,” is the only standard that begins to hint at the value of monitoring mediation and providing information about the process to the larger public. This standard provides that a mediator should “act in a manner that advances the practice of arbitrations and mediations, measured transparency, and the opportunity for new scholarly research has arrived!”).

Interestingly, even though Standard IV, Competence, does not specifically reference the need to consider the public and protect the integrity of the mediation process, the Reporter’s Notes observe:

The Model Standards (September 2005) retains the commitment expressed in the 1994 Version that the Standards not create artificial or arbitrary barriers to serve the public as a mediator. But to promote public confidence in the integrity and usefulness of the process and to protect the members of the public, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possesses the basic competency to assist.


163. Model Standards of Conduct, supra note 141, at Standard IV.A.
164. Id. at Standard VI.A.
mediation” and may promote the standard by “[p]articipating in research when given the opportunity, including obtaining participant feedback when appropriate.” Standard V, “Confidentiality,” however, cautions that “[i]f a mediator participates in . . . research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.”

Interestingly, in 2001, the American Bar Association’s House of Delegates adopted standards for the mediation of family and divorce matters that included an appendix with special policy considerations for the state regulation of family mediators and court-affiliated programs. Two of these special considerations make clear that confidentiality could and should co-exist with sufficient transparency to ensure consumer protection. Specifically, the Appendix provides:

. . . Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.

. . . Confidentiality should not be construed to limit or prohibit the effective monitoring, research or evaluation of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.

165. Id. at Standard IX.

166. Id. at Standard V.A.

The failure of the subsequently adopted 2005 Model Standards to include this sort of clear endorsement of measured transparency for court-connected mediation is both noteworthy and confusing. The International Mediation Institute (IMI) Code of Conduct provides another model for encouraging accountability. Standard 1.3.2 makes mediators’ solicitation of parties’ feedback mandatory.168

There have been efforts to encourage reporting and greater transparency regarding mediation. Not long after the adoption of the 2005 Standards, for example, the ABA Section of Dispute Resolution’s Research and Statistics Task Force, chaired by Professor Lisa Bingham (now Amsler), developed a list of key data elements that every court should collect on mediation programs.169 Resolution Systems Institute (RSI), in collaboration with the ABA Section of Dispute Resolution, undertook a multi-year initiative to develop model post-mediation questionnaires170 in order to increase public knowledge regarding the incidence and effects of court-connected mediation. In 2012, the ABA Section of Dispute Resolution’s Task Force on Mediator Credentialing recommended that mediator-credentialing organizations provide accessible, transparent systems to register

168. Standard 1.3.2, Appointment, provides that “Mediators shall advise parties that they will be invited to offer the Mediator feedback on the process at any stage, including offering written feedback at the conclusion of the mediation,” and Standard 4.4, Feedback, provides:

Unless inappropriate in the circumstances, Mediators will, at the conclusion of a mediation, invite the parties and advisers and any co-mediators or assistant mediators, to complete an IMI Feedback Request Form and return it to the Mediator or to the Reviewer indicated by the Mediator in his/her IMI Profile to assist in the preparation of the Mediator’s Feedback Digest.

169. See Memorandum from Section of Dispute Resolution Task Force on Research and Statistics, Am. Bar Ass’n, to Court Adm’rs & ADR Program Adm’rs, Top Ten Pieces of Information Courts Should Collect on ADR (June 9, 2006), https://www.americanbar.org/content/dam/aba/events/dispute_resolution/cle_and_mtg_planning_board/teleconferences/2012-2013/May_2013/topten.authcheckdam.pdf.

complaints, and a majority of the task force also recommended a process to monitor the performance of credentialed mediators.\footnote{171} Over the years, additional efforts have been undertaken by the ABA Section of Dispute Resolution’s Court ADR Committee, the Section’s Mediation Committee, various law schools, and university-related centers to encourage the collection of feedback and standardized data.

Notably, some individual court-connected and non-profit community mediation programs have collected data and undertaken evaluation to improve their services, sometimes on their own initiative, and other times as a result of funders’ requirements.\footnote{172} However, it is primarily the Model Standards’ muted endorsement of transparency and accountability as expressed in the combination of Standards XI and IX that has played out in practice. Most mediators and commercial dispute resolution organizations have expressed relatively little interest in participating in evaluation and research.\footnote{173} In general, therefore, the efforts to encourage data collection, evaluation, and transparency have had little effect.

This paucity of data has mattered. In 2012, the California Legislature tasked the California Law Revision Commission with determining whether a potential revision to the Evidence Code, creating an exception to

\footnote{171}{See ABA Section of Disp. Resol. Task Force on Mediator Credentialing, Final Report (Aug. 2012); see also Principles for ADR Provider Organizations, supra note 121, at 7 (Principle 1, Quality and Competence of Services) (“The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary. . . . The ADR Provider Organization’s responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.”). Principle VI also provides for complaint and grievance systems.}


\footnote{173}{See Christopher Honeyman, Barbara McAdoo & Nancy A. Welsh, Here There Be Monsters: At the Edge of the Map of Conflict Resolution, in The Conflict Resolution Practitioner: Monsters in the Waters: Fear and Suspicion Divide the Field of Conflict Resolution 1 (Office of Dispute Resolution, Ga. Supreme Court, 2001) (monograph) (describing challenges in collaborations between researchers and dispute resolution providers to conduct evaluations and empirical research).}
mediation confidentiality, might negatively affect court-connected mediation. The Commission conducted a multi-jurisdictional, comprehensive review of court-connected mediation and reported: “It is clear that mediation is well-established in California. There are many mediators, lots of mediation programs, and numerous mediations. Nonetheless, precise statistical information appears to be scarce.” In considering the lack of data on court-connected mediation in California, the Commission observed:

[Empirical research on mediation issues involves significant challenges. The effectiveness of mediation could be measured in a variety of ways; there is no standardized, broadly accepted, and readily administered measuring technique. Collecting data on mediation programs and analyzing such data is . . . expensive, slow, time-consuming, and hard to finance when state budgets are tight and data collection would divert funds and resources away from direct provision of services to the public. In addition, “sound empirical data is necessarily hard to obtain given the confidential nature of most mediation.” In fact, it is even hard to learn how many mediations occur.]
Rather than transparency, procedural fairness, or self-determination, confidentiality arguably has emerged as the defining feature of mediation. At times, mediators’ commitment to confidentiality—exacerbated by legislatures’ and courts’ interpretation and application of the mediation privilege—has even demonstrated the potential to enable bad behavior by parties and lawyers in mediation.

surveyed on settlement practices in 2000-2004, but results were published in 2012); Jeffrey W. Stempel, The Inevitability of the Eclectic: Liberating ADR from Ideology, 2000 J. Disp. Resol. 247, 250; see also Cohen & Thompson, supra note 4, at 52 n.18 (“Since many mediations are private matters, it is difficult to determine the number of mediations conducted in any jurisdiction.”); Jones, supra, at 283 (“Given the importance of process integrity and confidentiality, how can we measure the performance of alternative dispute resolution programs, particularly those that are connected to our formal systems of justice?”); Id. at 303 (“We do not even have a good idea about how many mediations are conducted each year.”); Art Thompson, The Use of Alternative Dispute Resolution in Civil Litigation in Kansas, 12 KAN. J.L. & PUB. POL’y 351, 354 (2003) (“[M]uch of the ADR that takes place is never reported.”). The Commission also noted that:

In 2003, an ABA task force developed a list of data fields the courts could use to determine what ADR data to capture. “The hope [was] that with more similar data collection across court systems, there [would] be more ability to discern the impact of ADR on the justice system as a whole.”

The Commission also noted: “Long-term follow-up (such as checking whether a settlement proves durable) is particularly prohibitive.” Id. at 92 n.511 (citing Lynn Kerbeshian, ADR: To Be Or . . . ?, 70 N.D. L. REV. 381, 400 (1994) (“[L]ong-term follow-up is nonexistent.”)).

176. See Resnik, The Contingency of Openness, supra note 2, at 1683-85 (reporting that research regarding courts’ rules revealed that, “to the extent rules address the public or third parties, the purpose is generally to ensure confidentiality. As currently practiced, ADR makes most of its processes and outcomes inaccessible. Even as ADR takes place inside courthouses, it is generally outside the public purview and it displaces public adjudication.”).

However, there are examples of courts and legislatures requiring confidentiality to co-exist with measured transparency in order to promote accountability and public trust in the integrity and quality of mediation. Perhaps the most notable example involves foreclosure mediation, marked by significant power disparities between repeat-player mortgage holders (i.e., banks, loan servicers) on one hand and unsophisticated homeowners on the other hand.\(^{178}\) In this context, many states have chosen to require mediator reports regarding the achievement of settlement, the terms of such agreements, and parties’ compliance with the program’s requirements (e.g., authority to settle, document provision, timeliness, etc.).\(^{179}\) Some states have then made certain information public, while protecting confidentiality in individual cases.\(^{180}\) The Nevada Supreme Court, for example, decided to “issue[] a report detailing lender compliance with the program’s statutory requirements,” including attendance at mediation, production of required documents, authority to negotiate, and good-faith participation.\(^{181}\) Other states have published aggregate information regarding foreclosure mediation settlement rates and the types of outcomes achieved.\(^{182}\) There have been calls for foreclosure mediation programs around the country to collect consistent metrics in order to permit cross-jurisdictional evaluation.

\(^{178}\) See Nussbaum, ADR’s Place, supra note 148, at 1889, 1893 (pointing out how the entrance of new players in the mortgage market, with different incentives, undermined the effectiveness of the procedural safeguards that had existed in the foreclosure process); Jill S. Tanz & Martha K. McClintock, The Physiologic Stress Response During Mediation, 32 OHIO ST. J. ON DISP. RESOL. 29, 52 (2017) (discussing the stress likely experienced by borrowers in foreclosure mediation).

\(^{179}\) See Alan M. White, Foreclosure Diversion and Mediation in the States, 33 GA. ST. U. L. REV. 411, 443-50 (2017) (discussing various states’ reporting requirements for foreclosure mediation, as well as the reporting provided for in “foreclosure resolutions” pursuant to the provisions of the Uniform Home Foreclosure Procedures Act, and their interaction with the confidentiality protections of the Uniform Mediation Act).

\(^{180}\) See Nussbaum, ADR’s Place, supra note 148, at 1936-37, 1950-51.

\(^{181}\) Id. at 1946 (citing Foreclosure Mediation Program, supra note 148 detailing the extent to which the six primary loan servicers in Nevada (Bank of America, Wells Fargo, JP Morgan Chase, Ally/GMAC, US Bank, CitiGroup) and others complied with statutory requirements of the state foreclosure mediation program)).

\(^{182}\) See id. at 1951; see, e.g., Mónica Tabales Maldonado & Alberto Tabales Maldonado, Compulsory Mediation in Cases of Mortgage Execution: Origin, Effect and Interrelation with the Loss Mitigation Process, 9 UNIV. P.R. BUS. L.J. 36, 46 (2018), 9 No. 1 UPRBLJ 36 (Westlaw) (English translation of Spanish-language title).
and the development of best practices. There have not been calls for an end to the current level of transparency.

It is therefore time for the Model Standards to acknowledge that in certain contexts—i.e., when mediation is imposed by a court, legislature, or contract of adhesion, and mediation’s outcomes are granted expedited enforcement, with scant judicial review—there is an ethical obligation to support measured transparency.

V. Options for the Recognition of an Ethical Obligation to Support Measured Transparency

At this point, it appears that there are at least three different options for acknowledging a duty to the public and the value of transparency.

A. Revision of the Current Model Standards

The first, most obvious option is to revise the current Model Standards. Many years have passed since the last revision, and mediation practice has inevitably evolved. As noted supra, revision of the Model Standards has already been proposed and is being considered. This revision could be made as part of a larger package.

Standard IX, “Advancement of Mediation Practice,” already acknowledges and provides some support for mediators’ role in developing knowledge regarding the practice of mediation in order to advance its quality. This standard could be revised—to recognize a duty to the public and to affirm the value of measured transparency—as follows:

A mediator shall act in a manner that advances the practice of mediation and public confidence in it. A mediator promotes this Standard by engaging in some or all of the following:

183. See Nussbaum, ADR’s Place, supra note 148, at 1950-51 (citing Melanca Clark & Daniel Olmos, U.S. DEP’T OF JUSTICE, FORECLOSURE MEDIATION: EMERGING RESEARCH AND EVALUATION PRACTICES (2011), http://www.justice.gov/atj/foreclosure-mediation.pdf) (noting recommendations of a working group convened by the U.S. Department of Justice to permit evaluation); see also Jennifer Shack & Hanna Kaufman, Promoting Access to Justice: Applying Lessons Learned from Foreclosure Mediation, DISP. RESOL. MAG., Spring 2016, at 16 (observing the importance of collecting information in order to monitor the effectiveness of the foreclosure mediation program); Adam Zimmerman, The Bellwether Settlement, 85 FORDHAM L. REV. 2275, 2281-88 (2017) (describing how anonymous information from bellwether mediations were used to achieve a global settlement).
1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Supporting and complying with reporting requirements that assist the public in developing an improved understanding of, and appreciation for, mediation and its outcomes while also protecting the anonymity of the parties and abiding by their reasonable expectations regarding confidentiality.

6. Assisting newer mediators through training, mentoring and networking.

Revision of the Model Standards will require cooperation from the three organizations that adopted the 2005 version—the ABA, AAA, and ACR. That alone suggests one of the most significant challenges posed by this option. Many within these organizations see no need for revisions to the Model Standards. In addition, in the thirteen years since the adoption of the 2005 Model Standards, the number of mediators and mediation organizations has mushroomed. At least some of these individuals and organizations will want to be consulted as part of any initiative to revise the Model Standards. These additional voices and viewpoints will make the revision process even more complex.

Further, as noted supra, many courts, agencies, and organizations have relied upon the 1994 and 2005 Model Standards as the templates for their own ethical requirements, and they may resist revisiting them. In addition, many mediators are unlikely to perceive a sufficient need for such wholesale revisions. Indeed, some commentators have already expressed such views. 184

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Revision of the current Model Standards may represent the best option in an ideal world, but it would present very real logistical and political challenges.

B. The Addition of Commentary to the Current Model Standards

Another option is to supplement the current Model Standards with Explanatory Comments, as is done in other contexts. Such Explanatory Comments could consider the application of various standards to mediation, particularly when the process is imposed upon people by the courts or pursuant to mandatory pre-dispute mediation clauses in contracts of adhesion. As this Article has suggested, the imposition of mediation, accompanied by de facto limits on judicial review and expedited judicial enforcement, could trigger a second and more demanding interpretation of the Preamble’s reference to “public confidence in mediation,” various standards’ declaration of the importance of protecting the integrity and quality of the process, and the provisions of Standard IX, “Advancement of Mediation Practice.”

The key question with this option is whether an Explanatory Comment will have any meaningful effect. The ABA Section of Dispute Resolution’s Committee on Mediator Ethical Guidance produces advisory opinions on the application of the Model Standards, with a similar goal of influencing practice while avoiding the logistical and political challenges of revising the black letter. The Committee on Mediator Ethical Guidance issued its first advisory opinion on August 6, 2007, and has continued to issue advisory opinions. Although there are occasional references to these opinions, it is not clear that they have had a significant effect on mediation practice.

185. See Memorandum from Samuel Jackson to ABA Section of Dispute Resolution Council (on file with author).
C. The Creation of Customized Standards for “Imposed Mediation”

Although the Model Standards purport to apply to all forms of mediation, there are also customized ethical standards that have been developed for particular areas of mediation practice. According to the Reporter’s Notes, the joint committee that developed the 2005 Model Standards anticipated such developments.

One example of customized standards is the Model Standards of Practice for Family and Divorce Mediation (“Family Model Standards”), referenced supra. Unlike the Model Standards, the Family Model Standards require family mediators to engage in various affirmative actions: “assist[ing] participants in determining how to promote the best interests of children,” “recogniz[ing]” family situations involving child abuse or neglect and domestic abuse, “and tak[ing] appropriate steps to shape the mediation process accordingly.” The Family Model Standards also require mediators to suspend or terminate mediations when the “mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.” Two possible reasons are when “the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable” or when “a participant is using the mediation process to gain an unfair advantage.”

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188. The Reporter’s Notes, under Guiding Principles, provide:

The members of the Joint Committee adopted the following principles to govern their work: . . . B. The Standards should retain their original function of serving as fundamental, basic ethical guidelines for persons mediating in all practice contexts while simultaneously recognizing that mediation practice in selected contexts may require additional standards in order to insure process integrity.

Reporter’s Notes, supra note 162, at 2.

189. Ass’n of Family & Conciliation Courts, Model Standards of Practice, supra note 167, at Standard VIII.

190. Id. at Standards IX and X.

191. Id. at Standard XI.

192. Id. at Standard XI.A.4.

193. Id. at Standard XI.A.6; see also Code of Professional Conduct, supra note 168, at Standard 4.3.2, Termination of the Process.

Mediators shall withdraw from a mediation if a negotiation among the parties appears to be moving toward an unconscionable or illegal outcome. An unconscionable outcome is one which is the product of undue pressure, exploitation or duress. An unconscionable outcome reflects one party’s exploitation of an existing power imbalance to the degree that the resulting agreement “shocks the conscience” and violates accepted legal and cultural
well beyond those contained in the Model Standards applicable to all mediators. As discussed supra, the Family Model Standards also reference principles for the regulation of mediators and court-connected family mediation programs. Particularly relevant are the standards that continue to protect confidentiality in individual cases but provide for monitoring, aggregate reporting, and measured transparency in order to ensure mediation quality and consumer protection.194

As discussed supra, the specialized area of foreclosure mediation has also developed a rebalancing of transparency and confidentiality. Although there are not customized ethical standards for foreclosure mediators, state statutes and court rules have created a sort of workaround to the confidentiality restrictions that might otherwise apply.

The option of creating customized ethics standards for “imposed mediation” is very appealing. It would acknowledge that mediation occurring pursuant to mandates by courts, legislatures, or contracts of adhesion is different, and that its circumstances require a heightened level of public accountability. Thus, there is a need for a targeted, tailored rebalancing in this context between transparency and confidentiality. The Family Model Standards could serve as both precedent and template.

This option likely would encounter its own logistical and political challenges, but they should be much fewer than those that would occur with an attempt to engage in a wholesale revision of the Model Standards. Thus, from a cost-benefit perspective, this is the strongest option. It responds to the particular circumstances that require increased transparency, avoids encroaching on other areas of mediation practice, and is the most likely to be adopted and implemented.

norms of fairness.

Id.

194. Ass’n of Family & Conciliation Courts, Model Standards of Practice, supra note 167, ¶ C (at end); see also Lydia Nussbaum, Mediator Burnout, 34 OHIO ST. J. ON DISP. RESOL. (forthcoming, on file with author) (manuscript at 46) (also concerned about mediation quality) (“[C]ourt administrators who oversee mediation staff or a roster of contract mediators could adopt a policy to define efficiency not by settlement rates but by other metrics, such as party perceptions of fairness and satisfaction with the process, which would require a commitment to use appropriate survey instruments to gather parties’ feedback. Or, judges could adopt new court rules that would require all judges to include, in a prove-up of any mediated agreement, questions to assess whether the parties felt pressured to settle by the mediator and rejecting agreements where parties say ‘yes’.”).
In reviewing and deciding to support the CFPB’s Arbitration Reporting Proposal, the ABA Section of Dispute Resolution found the benefits of the Proposal to be three-fold. First, the availability of redacted filings and other information was intended to equalize to some degree the knowledge of “one shot” users of consumer arbitration in comparison to “repeat players.” The Section concluded that such knowledge was likely to assist these “one shot” users as they considered whether to pursue arbitration, which arbitrators to select, and how to prepare for their arbitration proceedings.195 Second, the Section found that the availability of this information would permit public

195. See generally Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc’y Rev. 95, 97-100 (1974) (noting the significant advantages that repeat players enjoy in comparison to one-time players—e.g., experience leading to changes in how the repeat player structures the next similar transaction; expertise, economies of scale, and access to specialist advocates; informal continuing relationships with institutional incumbents; bargaining reputation and credibility; long-term strategies facilitating risk-taking in appropriate cases; influencing rules through lobbying and other use of resources; playing for precedent and favorable future rules; distinguishing between symbolic and actual defeats; and investing resources in getting rules favorable to them implemented—and contrasting these to disadvantages borne by one-time players—e.g., more at stake in given case; more risk averse; more interested in immediate over long-term gain; less interested in precedent and favorable rules; not able to form continuing relationships with courts or institutional representatives; not able to use experience to structure future similar transactions; limited access to specialist advocates); Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 EMP. RTS. & EMP. POL’Y J. 189, 195 (1997); Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 MCGEORGE L. REV. 223, 225–27 (1998) (observing that repeat-player employers fare better in arbitration than one-shot employees, that when repeat-player employers lose, damages are lower than for one-time employers, and generally that enforcement of pre-dispute arbitration agreements allows employers to structure the arbitration process to their advantage); Menkel-Meadow, supra note 42. Empirical research consistently indicates that repeat players in consumer arbitration are more likely to “win”—but it must be noted that this is also true in litigation. See Welsh, Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses, supra note 6, at 419-20 (summarizing empirical research examining the occurrence and potential reasons for repeat-player bias in consumer arbitration). Recent empirical work indicates that this pattern may have more to do with companies’ representation by lawyers who have become extreme repeat players, since individual consumers are very unlikely to be represented by lawyers who are extreme repeat players. See Horton & Chandrasekher, supra note 6. There are now suggestions that one-shot players might increase transparency and improve their experience in consumer arbitration if they are trained to identify key procedural elements and then upload these and other information to an online platform that would be widely accessible. See Amsler, supra note 6.
oversight and enable an overall, systemic picture of the consumer arbitration process’s operation and effects. For example, to the extent that some type of systematic frequency or lack of frequency of appointment of certain arbitrators and the outcomes of those cases could be evaluated, required reporting and publication would provide a means for the CFPB and other public entities to engage in oversight and assessment. Third, the fact of disclosure would make it less likely that dispute resolution providers would engage in behaviors or relationships that raised doubts regarding their impartiality or legitimacy, and transparency would assure parties and the public of such impartiality and legitimacy. Ultimately, the Section found that:

[T]he reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the strong federal policy in favor of arbitration that has been expressed by the Supreme Court.\textsuperscript{196}

The Section also concluded that transparency was particularly important when one of the parties to a dispute was imposing a dispute resolution process upon the other party, and the courts might be asked to enforce, and thus lend their coercive power and legitimacy to, the award produced by the process. These characteristics of mandatory pre-dispute consumer arbitration in the context of financial services and products were particularly important to the Section as it assessed the likelihood that the CFPB’s proposal would assist with achieving fairness, efficiency, accountability, and good governance.\textsuperscript{197}

The Section also observed that dispute resolution organizations, arbitrators, and parties should \textit{welcome} reporting requirements and potential public scrutiny. Transparency would enable analysis, improvement, and

\textsuperscript{196} Letter from Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson, Office of the Executive Sec’y, Consumer Fin. Prot. Bureau (July 29, 2016).

comprehension\(^{198}\) of a consumer arbitration system that had been largely opaque.

All of this reasoning applies just as strongly to mediation as it does to arbitration, particularly as mediation is being imposed by courts, legislatures, or contracts of adhesion, and the courts are exercising both deferential review and expedited enforcement of the resulting settlement agreements. In this context, mediators should also welcome a targeted rebalancing of transparency and confidentiality—“measured transparency”—to support the integrity of, and public confidence in, the mediation process. Meanwhile, the current interest in revising the Model Standards of Conduct for Mediators creates the opportunity to achieve such rebalancing through the development of a set of ethics standards customized for imposed mediation.

It is time to establish dispute resolution neutrals’ ethical obligation to support transparency. And mediators can lead the way.

Mediators and Substantive Justice: A View from Rawls’ Original Position

ELLEN WALDMAN* & LOLA AKIN OJELABI**

ABSTRACT This article explores substantive justice and mediation from the philosopher John Rawls’ concept of the original position. Whether mediators do or should care about substantive justice is a question that continues to bedevil the field, theorists, and practitioners alike. In some parts of the world, opinion leaders and influential trade organizations have weighed in, promulgating ethics codes that, in large part, divest mediators of concern with the substantive justice of the agreements they facilitate. While consideration of a mediator’s proper relationship to justice usually revolves around Kantian concerns for disputant autonomy, little attention has been paid to the role of more modern deontologists like John Rawls. This paper argues that as mediation becomes a fixture in a world of ever-increasing inequality, Rawls’ central message gains resonance. Rawls’ theory of justice held that society should strive toward equality of opportunity and that, where inequality exists, societal rules should be formulated to advantage the least resourced among us. In our view, mediation’s ethical codes should be structured to protect the least advantaged of mediation’s participants.

In an effort to bring Rawls into the dialogue on mediation ethics, this essay places the mediation participant in the original position and asks how he or she might approach issues of substantive justice in a mediation process. It surveys, briefly, a number of ethics codes drawn from different regions in the world and notes that different jurisdictions have struck different balances regarding the mediator’s relationship to justice. We ask, what would a code drafted by mediation enthusiasts operating under the “veil of ignorance” look like? And, given mediation’s use in dispute contexts characterized by unequal distributions of power, why doesn’t Rawls’ theory of justice hold more sway?

I. INTRODUCTION

II. MEDIATION’S REACH AND GROWING INEQUALITY

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III. Mediation’s Progressive or Regressive Relationship to Justice: The Debates

IV. Codes from Around the World—Does Substantive Fairness Matter?
   A. The Definition of Mediation
   B. The Role of Mediators
   C. Procedural and Substantive Justice

V. A Rawlsian Approach to Mediation Ethics
   A. How can a mediator assess substantive justice when justice has no enduring content and represents mere subjective preferences?
   B. How can a mediator assess substantive justice when they lack the necessary expertise to do so?
   C. How can a mediator, bound by the profession’s codes and best practices to be impartial, have any obligations for outcome fairness?
   D. If your Rawlsian mediator is not telling the parties what is fair and what to do, how does your mediator differ from standard conceptions of the mediator role that task the mediator with responsibility for process fairness alone?

VI. Application: An Actual Case for the Rawlsian Mediator

VII. Conclusion

I. Introduction

In his runaway bestseller, The World is Flat, New York Times columnist, Thomas Friedman, described a global landscape leveled and knit together by lightning fast fiber-optics, open source software and global supply chains.\(^1\) Citing the growing trends of uploading, outsourcing, and off-shoring, Friedman describes a world where information, ideas, money,

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\(^1\) Thomas Friedman, The World is Flat: A Brief History of the Twenty-First Century (1st ed. 2005).
and opportunity travel freely, unimpeded by political or geographic barriers.2 Friedman’s flat world, however, was not recognizable to some commentators, who witness, instead, a more vertiginous economic topography: a “spiky” world where, “the tallest peaks—the cities and regions that drive the world economy—are growing ever higher, while the valleys mostly languish.”3 An interesting analogy could be drawn to mediation’s broad march across the globe and the implications of that march on questions of social justice.4

Mediation continues to be a growth industry, both in developing nations and developed economies. As an alternative to traditional adversary forms, mediation has established a beachhead in virtually every region around the globe. Movement into previously uncharted subject matter areas parallels this geographic expansion. Parties who, in earlier times, would most certainly have pled their case before a judge, find themselves embarked instead on facilitated negotiations.

That this growth is taking place in a period that some have dubbed “the New Gilded Age”5 requires a reexamination of mediation’s ethical canon. This canon has been shaped in large part by two aspects of the field’s identity: (1) the conviction that procedures structured to maximize autonomous decision-making will yield maximally fair outcomes and (2) postmodern skepticism regarding the existence of universal public values and objective, verifiable “truths.” These two intellectual and moral commitments have led to a set of ethical mandates centered almost entirely on party self-determination and a conception of justice that is almost entirely procedural rather than substantive.

The question of substantive justice and whether a mediator can or should be held accountable for the fairness of the mediated outcome remains hotly debated and unsettled.6 This lack of consensus is apparent both from a

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2 Id. at 51–199.
4 Robert A. Baruch Bush & Joseph P. Folger, Mediation and Social Justice: Risks and Opportunities, 27 OHIO ST. J. ON DISP. RESOL. 1, 3 (2012) (defining social justice to mean “a state of affairs in which inequalities of wealth, power, access, and privilege—inequalities that affect not merely individuals but entire classes of people—are eliminated or greatly decreased.”).

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review of the academic literature as well as a sampling of authoritative ethical codes and standards. The codes we review universally require mediators attend to party self-determination and mediator impartiality, but split in their assessment as to whether mediators have any responsibility for the substantive fairness of the agreements they help create. We contend that mediators should attend to the substantive fairness of the agreements they foster and use John Rawls’ theory of justice for support. We apply Rawls’ concept of the “original position” to the formulation of ethical codes for mediators, and conclude that Rawls’ arguments imply enhanced accountability for outcome fairness, operationalized in ways that do not unduly trench on other important mediation values.

Our argument proceeds in four parts: In part two, we set mediation’s increasing global expansion within the context of rising income and wealth inequality; part three reviews the rich and contentious literature surrounding mediation’s relationship with substantive justice and mediator accountability for outcome fairness; and part four discusses five ethics codes from mediation-friendly regions throughout the world and examines their divergent treatment of mediator role and accountability for substantive fairness. Our last part asks what ethical responsibilities would a mediation participant cloaked in Rawls’ “veil of ignorance” ascribe to her mediator? If, according to Rawls, societal structures should be organized in ways that benefit the least advantaged, how might that insight be translated to the formulation of ethical mandates in mediation? We conclude by suggesting that an exclusive focus on party self-determination, while institutionally pragmatic, provides too little in the way of party protection and offers too little ethical ballast in a world of pervasive extra-legal disputing and profound inequality.

II. MEDIATION’S REACH AND GROWING INEQUALITY

As an institutionalized alternative to costly and cumbersome judicial procedures, mediation has enjoyed considerable popularity in the United States, England, Canada, and Australia for several decades. In each of these countries, mediation receives support from courts at all levels seeking to reduce backlog, streamline dockets, and improve efficiency.7 Mediation


7 See Nadja Alexander, International Comparative Mediation: Legal Perspectives 53, 55 (1st ed. 2009); Deborah R. Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System, 108 Penn
practice in Europe received a boost from the EU Parliament’s 2008 passage of the Mediation Directive, which encouraged member states to use commercial mediation for cross-border disputes and had the subsidiary effect of catalyzing member nations’ domestic programs. In response to the directive, Ireland’s Law Reform Commission proposed new mediation-enabling legislation. Italy adopted a mandatory mediation requirement for litigants in a diverse array of suits.

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10 See Francesca De Paolis, *Italy Implements Mandatory Pre-Trial Mediation in Civil and Commercial Matters*, 65 DISP. RESOL. J. 16 (2010). It should be noted that Italy’s mandatory mediation law has traversed a rocky road toward implementation. In December 2012, Italy’s Constitutional Court suspended this law declaring it an unconstitutional denial of access to justice. See Sonya Leydecker, Alexander Oddy & Anita Phillips, *Italy’s Constitutional Court Rules Mandatory Mediation Unconstitutional*, LEXOLOGY (Nov. 5 2012), http://www.lexology.com/library/detail.aspx?g=855928ae-b90e-45ff-b764-ad1b75c3836a. The law was substantially rewritten and re-enacted and now contains an opt-out provision whereby attorneys and their clients can withdraw from mediation at an early stage. Incentives were included, however, to encourage parties to continue in the process. Where a party is considering withdrawal, the mediator may propose a solution to the dispute. If it is rejected and the case goes to trial, the judge may shift onto the rejecting party all mediation and litigation costs, if the judgment is consistent with the mediator’s proposal. See Martin Svatos, *Mandatory Mediation Strikes Back*, MEDIATE (Nov. 2013), http://www.mediate.com/articles/SvatosM1.cfm.

\footnote{See Amy J. Cohen, Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal, 11 HARV. NEGOT. L. REV. 295 (2006) (discussing how U.S.-led aid programs, particularly those aiming to establish or reestablish the rule of law in developing or transitional states, employ mediation as a foundational element).}


\footnote{See Fatahillah A. Syukar & Dale M. Bagshaw, Court-Annexed Mediation in Indonesia: Does Culture Matter?, 30 CONFLICT RESOL. Q. 369, 369 (2013).}

\footnote{See Laura Nader & Elisabetta Grande, “From the Trenches to the Towers” Current Illusions and Delusions About Conflict Management—In Africa and Elsewhere, 27 L. & SOC. INQUIRY 573, 591 (2002).}
Mediation’s migration into new geographic regions has been accompanied by a shift into new subject matter terrain. Once primarily a creature of industrial trade or community relations, mediation is now an institutionally encouraged procedural step in both civil and criminal contexts. The use of mediation in patent infringement, human rights violations, housing foreclosure, attorney discipline, and end of life decision-making underscores the process’s incursion into species of conflict that would earlier have been reserved for more formal modes of dispute processing. If, in the 1960s and ‘70s, mediation was confined to collective bargaining negotiations, neighbor-neighbor disputes, and the rare “hippie” divorce; today, it is equally likely that the process will be invoked in

16 See Nolan-Haley, supra note 8, at 999–1009 (in some jurisdictions, mediation is not voluntary but rather mandated by judicial authority).


19 See JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1 (2d ed. 2006) (discussing development following World War II of the Federal Mediation and Conciliation Service, whose mandate is to provide mediation services to private sector union and management personnel engaged in collective bargaining).


21 See generally O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS (1978) (divorce mediation was still an experimental innovation in the late 1970s when therapist O.J. Coogler began working
violent domestic disputes in Indonesia,\textsuperscript{22} eve-of-foreclosure talks between struggling mortgagees and banks in Ireland,\textsuperscript{23} and injured medical malpractice victims seeking redress in Malaysia.\textsuperscript{24}

Mediation's global ubiquity must be assessed in the context of growing inequality between the haves and the have-nots. Discussion of the decline of the middle class and the rise of modern-day plutocrats has moved beyond the lecture halls of academic economists and into mainstream news outlets and political stump speeches. We live in a modern-day Gilded Age.\textsuperscript{25} In the United States, income gains and wealth accumulation at the top and bottom segments of the socioeconomic pyramid are diverging at rates not seen since the 1920s.\textsuperscript{26} Between 1979 and 2007, the incomes of the top 1% of the population grew by 275% while the incomes of the middle class rose less than 40\%.\textsuperscript{27} Comparative assessments of wealth are even starker. The top 20\% of American households garners 87.2\% of the nation's wealth, while the bottom 40\% of households is effectively unable to accumulate wealth at all.\textsuperscript{28}

Studies of social mobility reveal that life horizons are profoundly shaped by with separating couples who wished to bypass the hostilities occasioned by the adversary system).

\textsuperscript{22} See Tackling Domestic Violence in Indonesia's Papua Province, IRIN (Dec. 13, 2013), http://www.irinnews.org/report/99331/tackling-domestic-violence-in-indonesia-s-papua-province (discussing the prevalence of domestic violence in this region and identifying various processes, including mediation, used to resolve such disputes).

\textsuperscript{23} See Mark Paul, AIB Agrees 120 Mortgage Deals, Including Write-Down, IRISH TIMES (Feb. 3, 2014), http://www.irishtimes.com/business/financial-services/aib-agrees-120-mortgage-deals-including-write-down-1.1676937 (discussing pilot mediation program in Ireland that settled roughly 120 bank-mortgagee disputes. According to the report “[a]bout 26 of the deals involved the property being sold or surrendered. About half of those involved got the remaining debt completely written off. The rest involved monthly payments on the residual debt, following sale, for up to seven years.”).

\textsuperscript{24} See Tan Shiow Chin, Opting for Mediation, STAR ONLINE (Dec. 16, 2012), http://www.thestar.com.my/story/?file=9%2F2012%2F12%2F16%2Fhealth%2F12288851 &sec=health (Medical Defense Malaysia, a medical defense organization as well as Medico Legal Society of Malaysia are both encouraging medical malpractice plaintiffs to take their cases to mediation instead of the courts).


\textsuperscript{27} See Rob Reich & Debra Satz, Ethics and Inequality, in Occupy the Future 47, 47 (David B. Grusky et al. eds., 2013).

\textsuperscript{28} See David Grusky & Erin Cumberworth, Economic Inequality in the United States: An Occupy-Inspired Primer, in Occupy the Future 13, 17 (David B. Grusky et al. eds., 2013).
parental class, education, and income. Income inequality skews opportunity and dampens intergenerational mobility. Moreover, education, a perceived escape route from privation, is largely failing to transport those not already born to some advantage. In 1984, the children of the top quintile of earners were 75% more likely to graduate from college than the bottom quintile. In 1993, that number stood at a stubborn 69.5%. As growth and the rewards from labor slow, accumulated capital and inheritance play a greater role. Movement up the socioeconomic ladder from one generation to the next is slow and limited. The class into which we are born exerts a greater gravitational pull than our rhetoric of equal opportunity would allow.

Inequality is increasing in most economies throughout the globe. The Gini coefficient, a measurement tool developed by an Italian statistician in the early twentieth century, measures trends toward equality or inequality of income and wealth distribution, with 0 representing complete equality and 1 representing complete inequality. Between 1990 and 2010, the Gini coefficient for disposable income increased in nearly all European economies. Inequality also rose in most economies in Asia and the Pacific, the Middle East, and North Africa. If one were to rank the world’s nations according to where they fall on the spectrum of inequality, South Africa and Namibia would lead the pack with Gini coefficients of 60 and above. Brazil, Bolivia, Colombia, and several other Latin American countries would come

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29 See Raj Chetty et al., Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility, 104 AM. ECON. REV. 141, 141–47 (2014). See also Janny Scott & David Leonhardt, Shadowy Lines that Still Divide, N.Y. TIMES, May 15, 2015 ("Because income inequality is greater here, there is a wider disparity between what rich and poor parents can invest in their children. . . . ‘Being born in the elite in the U.S. gives you a constellation of privileges that very few people in the world have-ever experienced. . . . Being born poor in the U.S. gives you disadvantages unlike in Western Europe and Japan and Canada.’").
31 Piketty, supra note 26, at 377–78 (arguing that “Whenever the rate of return on capital is significantly and durably higher than the growth rate of the economy, it is all but inevitable that inheritance (of fortunes accumulated in the past) predominates over saving (wealth accumulated in the present) . . . . Almost inevitably, this tends to give lasting disproportionate importance to inequalities created in the past, and therefore to inheritance.”).
35 Id. at 7.
in a close second with Gini coefficients hovering around 56. China, India, and a few select countries in Asia, such as Malaysia and Thailand, would rank next with Gini coefficients estimated at 50–54, and the United States and Russia would follow closely behind with coefficients of 49 and 42 respectively. Given that economists perceive wealth dispersion in both Russia and the United States to be at dangerously skewed levels, it is clear that in many regions throughout the world, the problem of inequality is creating a code-red situation.

To date, mediation scholars have paid scant attention to whether mediation’s methods and goals should respond to this new economic reality. A few vocal critics aside, the mediation community has largely viewed inequality in the world as simply part of the substrate within which the mediator works. Inequality is a fact to be accepted and managed, but not challenged or remediated. In the words of one scholar-practitioner, “[M]ediators do not encourage the lamb to stand up to the lion; rather the imbalance created by the lion’s strength and the lamb’s vulnerability is part of the setting within which the parties and the mediator negotiate.” In the next section, we review these debates by examining the different definitions of justice that mediation advocates and critics hold and how those definitions lead to different conclusions regarding the scope and limits of the mediator’s role.

III. MEDIATION’S PROGRESSIVE OR REGRESSIVE RELATIONSHIP TO JUSTICE: THE DEBATES

Almost from its very inception as a modern dispute resolution method, critics have argued that mediation is antithetical to justice. The first wave of mediation detractors were left-leaning social justice activists who viewed

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37 Id. at 8 (noting correspondence between the rapid rise of the Gini coefficient in Russia in the early 1990’s and an increase in death rates and decrease in life expectancy.”). See also id. at 11–12 (noting that the affluent and well educated in East-Central Europe, Hungary, Lithuania, Estonia and Poland enjoy a longer life expectancy rate than those limited to a primary education).
38 See Howard Bellman, Mediation as an Approach to Resolving Environmental Disputes, Environmental Conflict Practitioners Workshop, Proceedings (1982)) (defending mediator neutrality on the grounds that after the mediation, the lion remains a lion, the lamb remains a lamb, and the mediator’s job is to “make the lion-lamb relationship clear to the lamb.”) (cited by Bush & Folger, supra note 4, at 31).
informal justice as another form of state oppression. These critics saw mediation functioning as a negative force in three distinct ways: intrusion, individuation, and diffusion. By insinuating itself into the formerly private spaces of community and domestic life, mediation extended the reach of a tyrannical state. By characterizing disputes as interpersonal scuffles, driven by emotion and idiosyncratic tensions, mediation individuated conflict, obfuscating its economic or political features. And by tamping down the flares of righteous discontent, mediation diffused and siphoned off the

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41 See Judy H. Rothschild, Dispute Transformation, The Influence of a Communication Paradigm of Disputing, and the San Francisco Community Boards Program, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES, at 265–66 (Sally E. Merry & Neil Milner eds., Univ. Mich. Press 1993) (arguing that the San Francisco Community Boards adopted a "communication paradigm of disputing" that leads to an emphasis on the relational aspect of conflicts and neglects the social, legal, and economic dimensions of disputes). See also Harrington, supra note 39; Harrington, supra note 40, at 62 (describing Neighborhood Justice Centers as part of a large decentralization movement that reduces problems like "violence against women, neighborhood quarrels, and landlord tenant problems" to "individual problems. The origins of these disputes are depoliticized or ignored, and the resolutions . . . internalized by the individualized form of participation.")
reforming energy of consumers, workers, and other aggrieved groups. For many of these early activists, the state was the enemy, the goal was to reshape an oppressive capitalist order into softer socialist forms, and community organizing and collective political action was the way forward. Informal justice was viewed as a method for securing the quiescence of the poor and marginalized and maintaining the power base of social and political elites.

The second wave of mediation skeptics held very different assumptions. Their critique emanates from a fundamentally more benevolent view of the state and its potential to liberate, civilize and uplift. According to this view, mediation’s menace lies not in its capacity to bring the state’s tentacles into previously private spaces, but in its dampening effect on the commonwealth’s ability to articulate and enforce morally desirable public norms. Owen Fiss, the most celebrated expositor of this view, described the ADR movement’s focus on the satisfaction of private interests over the elaboration and instantiation of public values.

The task of the judge, Fiss

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42 See Christine B. Harrington, Community Organizing Through Conflict Resolution, in The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, 401, 429 (Sally E. Merry & Neil Milner, eds., Univ. Mich. Press 1993) (explaining that to the extent that the ethos of individualism replaces that of empowering a community for the purpose of redistributive social change, neopopulist movements like SFCB will break from “‘authentic’ or ‘genuine’ populism.”); Abel, supra note 39, at 267, 286 (“[A]dvocates of informalism identify culture as the genesis of significant social problems—not capitalism, class struggle, racisms, sexism, or autocratic power. . . . [T]hey deny the existence of basic cleavages in American society and seek to restore a consensus they locate in the silent fifties by exhorting grievants to moderate their demands.”).


44 Abel, supra note 39, at 296.


46 See Fiss, supra note 45, at 1082, 1085 (“The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process. It supposes that the judge’s duty is to declare which neighbor is right and which wrong . . . .” Fiss then explained, “[T]he purpose of adjudication . . . is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statues: to interpret those values and to bring reality into accord with them.”).
asserted, was not simply to settle a private dispute, but to give force to society’s moral commitments as embodied in authoritative texts. School desegregation cases might settle quietly and on terms that satisfy individual litigants, but the resolution would not reaffirm the importance and necessity of racial equality. Informal dispute mechanisms deprive courts and other public bodies the opportunity to provide normative guidance on unsettled social questions and invite parties to evade the legal principles that, in Fiss’ view, define a society and give it its identity and “inner coherence.”

Underlying the anxiety of Fiss and his fellow “litigation romantics” is the conviction that something we can identify as substantive justice exists and that it is embodied in the rule of law. They maintain that substantive justice is achieved when authoritative public bodies articulate and apply norms predictably, consistently, and equally regardless of the race, creed, color, or socioeconomic status of the litigants. These romantics assumed that legal norms worked in favor of social justice and they wanted those norms in play when Americans came together to work out questions of who is owed what from whom. Fiss and his fellow travelers pointed to the reforms of the civil rights, labor, and feminist movements to demonstrate that courtrooms had become friendlier venues for those on the bottom rungs of

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47 See Owen M. Fiss, Foreword to The Forms of Justice, 93 HARV. L. REV. 1, 11, 14 (1979) (“The values embodied in such non-textually-specific prohibitions as the equal protection and due process clauses are central to our constitutional order. They give our society an identity and inner coherence—its distinctive public morality. . . . The task of a judge, then, should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated.”). Fellow ADR skeptic, Judge Edwards, pointed out in a related caution that in many cases—for example the civil rights struggles in the South and other regions—local norms and customs were at odds with formal law’s insistence on the cherished value of equal protection. See Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 HARV. L. REV. 668, 679 (1986) (“One essential function of law is to reflect the public resolution of . . . irreconcilable differences; lawmakers are forced to choose among these differing visions of the public good. A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law.”).


49 See Geoffrey C. Hazard & Paul D. Scott, The Public Nature of Private Adjudication, 6 YALE L. & POL’Y REV. 42 (1988) (private justice should embody important characteristics of the public system of justice); David Luban, Settlement and the Erosion of the Public Realm, 83 GEO. L. J. 2619, 2631 (1995) (“Fiss insists that the unique genius of the courts is their twin requirements of independence and dialogue. Independence guarantees an impartial use of reason, and dialogue guarantees that courts must listen to all comers and reply with reasoned opinions.”).
American society. They did not want to see vulnerable disputants shunted into forums where those recently earned legal endowments would not hold sway. Power imbalances, which could be managed and contained in formal legal proceedings, appeared particularly threatening in the freewheeling, normative tabula rasa that mediation presents.

The mediation community has generated a number of responses to both first wave and second wave attacks. The first wave “social control” critique has itself been dismissed as highly theoretical and insufficiently grounded in actual assessments of how mediation works. Professor Amy Cohen, in examining claims that the export of Western style ADR necessarily results in the “flourishing of hegemonic colonial forms,” counters with descriptions of mediation projects that are highly political and encourage collective action. Similarly, legal sociologist, Patrick Stuart, drew from his study of housing cooperatives to conclude that “communal justice within employee work groups, neighborhood residence groups, mutual support, and self-help groups, . . . are likely to do more to modify the shape of capitalist legality than the collective justice of cooperatives, communes, and other more socialistically oriented orders . . . .”

The response to second wave attacks has taken several forms. Some negotiation enthusiasts sided with Fiss with regard to “significant cases” involving “deep moral disagreement,” but maintained that more ordinary


cases could be disposed of in mediation. Others agreed that litigation may, but need not always, work to affirm public values, while asserting that mediation can serve important norm-affirming functions as well. Still others simply concede that mediation is a suboptimal process for securing justice as embodied in legal rights and entitlements, but note that the process has other virtues.

The most radical response turns traditional understandings of justice on its head by denying both the existence of universal values and their embodiment in the rule of law. Although not explicitly or unanimously declared, many mediation advocates are value skeptics, doubtful that absolute moral verities exist. They approach disputes not as contests between right and wrong or more or less ethically correct viewpoints, but as instances where party interests, narratives, or understandings have not been sufficiently explored, fractionated, and aligned. They tend to be moral pluralists who survey the divergent moral commitments that animate different cultures and conclude that what constitutes justice is both culturally and temporally contingent. As Fisher, Ury, and Patton explained in their best-selling book, Getting To Yes, truth is not a distinct ontological state but rather “an argument—perhaps a good one, perhaps not—for dealing with . . . difference.”

Mediators’ skepticism extends to the relationship between legal norms and substantive justice. For many mediation scholars, there is little correlation between positive law and intuitions of justice. Joseph Stulberg, in an article entitled Mediation and Justice: What Standards Govern?, makes

53 See Robert Mnookin et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes 107 (2004) (noting that some cases should not settle, including cases in which “a party has a strong desire to create a lasting legal precedent”); Frank E. A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure, 10 NEGOT. J. 49, 60 (1994).


55 Susan Sturm & Howard Gadlin, Conflict Resolution and Systemic Change, 1 J. DISP. RESOL. 1 (2007).


the point that "simply because something is required by the 'law' or the 'organizational rule' does not mean 'justice' has been secured, even if a judge applies those rules uniformly and consistently." Moreover, "It is possible that positive laws appear on their face to be fair but the manner in which they are applied can generate morally perverse—and unjust—outcomes." Stulberg's perspective builds on two assumptions widely shared within the mediation community. First, legal rules, far from embodying sacred social ideals, are morally neutral road signs that simply organize the chaotic traffic of human interaction. Second, generalized rules formulated by remote authorities, even if sensible in the abstract, often do mischief when applied to the particularized circumstances of distinct groups and individuals. These convictions are central to the field's willingness to shrug off legal norms as almost irrelevant to the justice of a private disputing process.

Take, for example, the construct that Professors Lela Love and Jonathan Hyman adopt in their poetically titled article, What if Portia Were a Mediator?. In that piece, Love and Hyman posit that in an adjudicatory system, we define justice as the impartial application of "properly created standards or rules to 'facts' as determined by the adjudicator." Justice inheres in the source of the laws (democratically elected legislators and properly appointed judges) and their neutral and consistent application. Mediation, they write, works with a different definition of justice—"justice-from-below." This type of justice emanates from the parties themselves and emerges from their good faith participation in the process. What is most important is that "the mediated outcome rest easy with parties' values, principles, and interests, addressing their needs—psychological, moral, and practical—as they judge those needs to be."
As others have noted, the mediation field takes seriously the postmodern inquiry into the knowability of “objective” facts and values, asking, “[i]s there really any there.” Professor Carrie Menkel-Meadow, in her article, The Trouble with the Adversary System in a Postmodern, Multicultural World, explicitly links postmodern explorations into the provisional and layered nature of truth with alternative dispute resolution’s rejection of rigid binary thinking and openness to multiple stories, perspectives, and possibilities. She connects the deconstruction of literary texts with the recognition that partisan “authors” with interests of their own construct judicial opinions. And, she weaves together postmodern anxieties regarding the existence of a unitary interpretive self with mediation’s choice to bypass the central authority of the courts in favor of the parties’ autodidactic construction of remedial options. As Menkel-Meadow notes, postmodernism throws up a basic challenge to traditional legal authorities and methods in its insistence that we may lack the epistemological tools to evaluate anything. In the wake of Derrida, Foucault, Lyotard and their assault on Enlightenment rationality, mediation’s turn away from authoritative enunciations of justice in favor of multiple shifting iterations of “what can work” seems both unsurprising and inevitable.

To sum up, then, if traditional understandings of justice involve the application of universal public values to a readily verifiable fixed set of facts, mediation theorists question the existence and reliability of both values and facts. Retreating from any substantive conception of justice, theorists have instead focused on pure process. Ethics in the mediation realm is thus largely a matter of identifying the conditions most likely to give effect to party voice and deliberation and restraining mediators from distorting the process with their own substantive preferences. If those conditions and restraints are in place, it is assumed the resulting outcome will be just.

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69 With apologies to Gertrude Stein. See Gertrude Stein, Everybody’s Autobiography 289 (1937).
71 Id. at 6, 13.
72 Id. at 20–21.
73 Id.
74 Id.
75 See Stulberg, supra note 60, at 222–23, 227–28 (arguing that mediators can “build conditions or constraints into the conception of the mediation procedure that minimize” injustice including voluntariness, inalienability of interests, publicity of outcomes, dignity and respect, informed decision-making, and toleration of conflicting fundamental
To borrow from John Rawls’ vocabulary, the claim is that mediation presents a system of “pure procedural justice,” a system where no independent criterion exists to ascertain the “right result” other than the criterion that the proper process has been followed. It is only a few “justice contrarians”—the authors included—who continue to object that in many instances, social and legal norms serve as valuable external criterion by which mediated outcomes can and should be assessed. In the next section, we review five ethics codes from around the world and note the lack of consensus on the relationship between mediation and questions of substantive justice and the role of the mediator in ensuring outcome-fairness.

IV. CODES FROM AROUND THE WORLD—DOES SUBSTANTIVE FAIRNESS MATTER?

Sidestepping the question of what a content-full notion of substantive justice might require, mediation’s ethics codes work mainly toward fulfilling Rawls’ criteria for pure procedural justice: the creation of a “scheme of cooperation” such that any result emanating from that cooperation can be said to be fair. In Rawls’ schema, equality of opportunity is a central condition for the creation of societal institutions that provide pure procedural justice. For mediators, maximal party autonomy and the absence of untoward mediator influence are essential conditions for a process that will produce just outcomes. Following deontologist Immanuel Kant’s dictum that individuals should not be treated merely as means to other’s ends, but as

values). Most mediation theorists agree with Professor Stulberg that—with certain process safeguards—mediation is a system of “pure procedural justice”—a process where importing external criterion to assess the substantive fairness of the outcomes reached is not only unnecessary, but unwise. But see Lola Akin Ojelabi, *Mediation and Justice: An Australian Perspective Using Rawls’ Categories of Procedural Justice*, 31 Civ. Just. Q. 318, 324-29 (2012) (arguing that mediation does not fit neatly into any of Rawls’ categories of procedural justice).

76 *See JOHN RAWLS, A THEORY OF JUSTICE* 85 (1971).

77 Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 Hastings L.J. 703 (1997); *See WALDMAN, supra* note 67, at 124–30 (arguing that there are three approaches to consideration of norms in the mediation field: the norm-generating, norm-advocating, and the norm educating models); Lola Akin Ojelabi, *Mediation and Justice: An Australian Perspective Using Rawls’ Categories of Procedural Justice*, 31 Civ. Just. Q. 318, 335–39 (2012) (arguing that there is a need for objective standards by which to evaluate substantive justice in mediation, and that legal norms may be useful in this regard).

78 *RAWLS, supra* note 76, at 88.
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ends unto themselves, the bedrock ethical commandment for mediators is to respect parties as the primary decision-makers, not as conduits of information for other decision-makers. The ethics codes that we review emphasize the mediator’s duty to ensure procedural justice, while leaving the question of outcome fairness and substantive justice very much in the shadows.

A. The Definition of Mediation

Most codes of conduct define mediation as involving a third party who facilitates a conversation between the parties in order to assist them in reaching a settlement of issues in dispute between them. The Australian National Mediator Accreditation Scheme (NMAS) practice standards define mediation as a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about the future actions and outcomes. The purpose of mediation, according to this code, is to maximize the participants’ decision-making. It is the parties’ responsibility to resolve the dispute based on mutual terms. The role of the mediator is to “support” the parties to make their own decision. The mediator assists the parties to identify issues, generate options, consider alternative processes, and reach an agreement.


80 NAT’L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2; PRACTICE STANDARDS § 2 (MEDIATORS STANDARD BOARD 2012). The analyses in this paper are based on the Australian Standards applicable until June 2015. A revised Standards came into effect after July 1, 2015. Where relevant, this paper will identify differences between the old and new standards and how that might change the argument presented. The definition in the 2015 Standards is similar and promotes party self-determination. See NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.2 (MEDIATORS STANDARD BOARD 2015).

81 NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.5 (MEDIATORS STANDARD BOARD 2012). Under the 2015 NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.1, a mediator assists “participants to make their own decisions . . .”

82 NAT’L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2.1 (MEDIATORS STANDARD BOARD 2012).

83 NAT’L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2.2 (MEDIATORS STANDARD BOARD 2012); NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.4 (MEDIATORS STANDARD BOARD 2012); NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.2 (MEDIATORS STANDARD BOARD 2015).
Standards describe mediation as primarily facilitative—not advisory, evaluative, or determinative.\textsuperscript{84} Similarly, the U.S. Model Standards for Mediators define mediation as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.”\textsuperscript{85} The Model Standards explicitly warn against undermining party self-determination for reasons “such as higher settlement rates, egos, increased fees, or outside pressures . . . .”\textsuperscript{86} The International Mediation Institute (IMI) Code of Professional Conduct defines mediation as “a process where two or more parties appoint a third-party neutral (‘Mediator’) to help them in a non-binding dialog to resolve a dispute and/or to conclude the terms of an agreement.”\textsuperscript{87} As in the U.S. and Australian codes, the IMI definition clarifies that the parties are engaged in a dialogue that, without more, has no legal effect and that the mediator is in a secondary, supportive role.

Mediation, according to the European Code of Conduct for Mediators, “means any structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person.”\textsuperscript{88} Once again, the definition makes clear that the mediator enters the process to assist the parties who remain the primary actors and decision-makers.\textsuperscript{89}

The definition of mediation is not outlined in the Singapore Mediation Code of Conduct. However, on its website, the goal of mediation is described as finding “a practical solution and settlement that is acceptable to all involved” and that the “[k]ey to mediation is that parties make their own decisions, often with the help of their lawyers. They are in complete control

\textsuperscript{84} NAT’L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2.3 (MEDIATORS STANDARD BOARD 2012). This particular description of mediation does not appear in the revised 2015 Standards, but it stipulates that a “mediator does not evaluate or advise on the merits of, or determine the outcomes of, disputes” except when using a “blended process” with the parties’ consent. NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 2.2, 10.2 (MEDIATORS STANDARD BOARD 2015).

\textsuperscript{85} MODEL STANDARDS OF CONDUCT FOR MEDIATORS Preamble (AM. BAR Ass’n 2005).

\textsuperscript{86} MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard (I)(B) (AM. BAR Ass’n 2005).


\textsuperscript{88} EUROPEAN CODE OF CONDUCT FOR MEDIATORS Introductory Statement (EUR. COMMISSION 2004).

\textsuperscript{89} /d.
of the outcome and do not run the risk of having an unfavorable decision imposed upon them by a judge or arbitrator." Obviously, party self-determination lies at the core of the Singapore Mediation Center's practices as well as its presentation to consumers.

The Professional Mediators' Association (PMA) Members' Code of Conduct and Practice Standards direct mediators "to conduct mediation based on the principle of party self-determination and informed choice." Mediators are required to "respect, value and encourage the ability of each participant to make individual decisions." Overall, the definitions indicate a preference for party self-determination and autonomy in decision-making.

B. The Role of Mediators

One way to ensure that party autonomy receives full expression is to limit the scope of the mediator's role in order to reduce, as far as it is possible, incursions on party self-determination. Each of the codes surveyed contains requirements that the mediator conduct herself in impartial fashion, favoring neither a particular party over the other nor any particular outcome over another. Additionally, mediators are limited in the sort of information they can provide and the ways that they provide it.

The Australian NMAS provides that the mediator is not to give advice, evaluate, or determine the dispute unless utilizing a "blended process," which involves different forms of evaluation, is more directive, and is used with the parties' consent. Acknowledging that parties may request information during the course of negotiations, the Standards urge mediators to encourage parties to seek information and advice from outside professionals. If parties do look to the mediator for "expert information," this information may be provided if it falls within the mediator's particular competence, is couched in general terms, and delivered in non-prescriptive fashion. While informed consent is critical to party decision-making, the mediator is not responsible for ensuring that parties obtain relevant information and must not provide legal advice.

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91 MEMBERS' CODE OF CONDUCT AND PRACTICE STANDARDS AND COMMENTARY § 1 (PROF'L MEDIATORS' ASS'N 2012).
92 Id.
93 NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.5, (MEDIATORS STANDARD BOARD 2012). See also NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 2.2, 10.2 (MEDIATORS STANDARD BOARD 2015).
The U.S. Model Standards mirror the Australian Standards in a number of respects. They also emphasize that parties should make "free and informed choices as to process and outcome" and similarly absolve mediators from serving as the guarantor of informed consent.\footnote{See MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard (1)(A)(2) (AM. BAR ASS'N 2005) ("A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions.").} Like the Australian Standards, the Model Standards suggest that when parties are in need of information, the first line of response is to suggest recourse to outside professionals.\footnote{Id. at Standard (VI)(A)(5).} Where the mediator chooses to provide information to parties, she must ensure it is within her area of expertise and remember that doing so poses risks. The Model Standards contain the warning that, "The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession"—say, for example, that of a lawyer—"is problematic and thus, a mediator should distinguish between the roles."\footnote{Id. at Standard (1)(A)(1).} Although little explicitly is said, the Model Standards make clear that mediators should be wary of providing information and must be conscious that doing so may undermine the process' overall goals of nurturing party self-determination.\footnote{CODE OF PROF'L CONDUCT § 3.2.2 (INT'L MEDIATION INST.), https://imimediation.org/imi-code-of-professional-conduct (last visited Feb. 22, 2016).}

The IMI Code is silent on the mediator's role in providing or refraining from providing relevant information or advice. Rather, the Code addresses only the mediator's obligation to ensure parties "have the opportunity to ... obtain legal or other counsel before any final resolution."\footnote{CODE OF PROF'L CONDUCT § 3.2.3 (INT'L MEDIATION INST.), https://imimediation.org/imi-code-of-professional-conduct (last visited Feb. 22, 2016).} Whether or not the parties do in fact seek counsel, the mediator must be satisfied that the parties "knowingly consent" to any resolution reached.\footnote{MEDIATION SERV. CODE OF CONDUCT § 8.1 (SING. MEDIATION CTR. 2013).} The Code, then, assumes the importance of informed consent, but does not delve into the question of how the parties are to obtain the information they will need to make knowing and informed decisions.

The Singapore Mediation Centre’s Mediation Service Code of Conduct provides that, "The mediator will not evaluate the parties' case unless requested by all parties to do so, and unless he is satisfied that he is able to make such an evaluation."\footnote{MEDIATION SERV. CODE OF CONDUCT § 8.1 (SING. MEDIATION CTR. 2013).} The PMA Members’ Code of Conduct prohibits the mediator from providing "participants with legal advice, therapy,
counselling, or other professional services during the mediation." Additionally, it follows the common approach of suggesting the mediator be an informed consent cheerleader or watchdog, while not specifying exactly what role the mediator can or should play in the provision of necessary information.

It is obvious that the codes we have surveyed tend to follow a similar path. They place party autonomy at the center of the process. They state that mediation should aim toward agreements that reflect the parties' voluntary and informed consent, but are vague as to how the parties are to obtain the information that would render their consent truly informed. They suggest that mediators should urge parties to get the information they need from outside parties. If the parties choose not to do so, the codes provide a pathway for those mediators inclined to provide information themselves. However, the codes offer several cautions and make clear that a mediator who provides information does so at his or her own peril. If the mediator veers toward the provision of information so specific it could be interpreted as advice, then that practitioner has stepped over the line.

C. Procedural and Substantive Justice

Virtually every mediation code in existence, including the ones surveyed here, pay obeisance to the requisites of procedural justice. Affording parties equal time to speak and to be heard and treating parties with respect are standard fixtures in most mediation codes and align with the common mediation view that, if sufficient attention is paid to process, the resulting agreement will be substantively fair. Some mediation codes, however, adopt a somewhat paradoxical stance. They emphasize procedural justice and caution against excessive mediator influence. Yet, almost as a backdoor gesture, these same codes ask the mediator to be the last backstop against errant substantive injustice. While issuing no definite injunction, they allow the mediator to terminate the process if one party acts unconscionably or if an unconscionable agreement appears likely. Thus, while code authors are concerned that mediators not dominate or usurp party discussions, they remain uncomfortable with the threat that power imbalances, or other antecedent inequities, will turn the mediation setting into one of exploitation and abuse.

The U.S. Model Standards and the PMA Code illustrate the "pure procedural justice" approach where no mention is made of substantive

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101 Members' Code of Conduct and Practice Standards and Commentary §5 (Prof'l Mediators' Ass'n 2012).
justice. Standard VI of the U.S. Code, which is devoted to “Quality of the Process,” directs the mediator to conduct the process “in a manner that promotes . . . procedural fairness,” but makes no mention of fairness of the outcome. A mediator has the option of withdrawing if the mediation is being used to further criminal conduct, if there is violence between the parties, or if the mediator feels she cannot remain impartial, but there is no option for withdrawal where the agreement appears to the mediator to be substantively unfair. An omnibus direction exists for the mediator to “take appropriate steps,” including possible withdrawal if the mediator believes that participant conduct “jeopardizes conducting a mediation consistent with these Standards,” but since the Standards set no ceiling or floor with regard to the terms of resulting agreements, it would appear that this provision relates to procedural matters only. The PMA tracks the U.S. Standards, except it includes an additional warning for the mediator who might be tempted to apply external criterion to the parties’ discussions, cautioning that “the mediator must respect the culture, beliefs, rights and autonomy of the participants and should defer their own views to those of the participants . . .”

The more ambivalent aspects of the Australian, IMI, EU, and Singapore codes are salient upon quick perusal. The Australian code, for example, contains an entire section on procedural fairness and cautions the mediator against evaluating outcomes reached by the probable “litigated outcomes.”

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102 MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI(A) (AM. BAR ASS’N 2005).
103 Id. at Standard VI(A), II(C).
104 Id. at Standard VI(C).
105 MEMBERS’ CODE OF CONDUCT AND PRACTICE STANDARDS AND COMMENTARY § 1 (PROF’L MEDIATORS’ ASS’N 2012).
106 NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 9 (MEDIATORS STANDARD BOARD 2012) (“A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent,” which will ensure that parties have the opportunity to speak and be heard, support balanced negotiation, refrain from pressuring parties to reach an agreement and encourage parties to obtain independent professional advice). See NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 7.4 (MEDIATORS STANDARD BOARD 2015) (a similar provision in the 2015 Standards). See also NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 7.6, 8.5 (MEDIATORS STANDARD BOARD 2015) (provisions related to seeking professional advice; the 2015 standards do not contain any provision directed at the mediator pressuring parties to reach an agreement).
107 NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 9.7 (MEDIATORS STANDARD BOARD 2012). See NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 7.7, 10.1 (MEDIATORS STANDARD BOARD 2015) (the 2015 standards do not specifically outlaw consideration of probable litigated results; they provide that the
Although it does note that a mediator should support the parties in assessing
the practicality and feasibility of any possible agreement, that assessment
must be done according to the parties’ subjective understandings of
fairness.\(^{108}\) One might interpret this language to mean that any societal
consensus as embodied in legal rights and entitlements are secondary to the
parties’ own ideas and thus, not relevant to the process. At the same time, the
code does contain language that could be read to the contrary. The code
states that when assessing a proposed agreement’s feasibility, the interests of
“vulnerable stakeholders” should be considered.\(^{109}\) An entire provision
devoted to power imbalances requires mediators be trained to spot situations
where the bargaining table is dangerously uneven and be alert to instances of
subtle threat and intimidation.\(^{110}\) When discussing mediator competence, the
code requires training in the ethics of assuring “fairness and equity”\(^{111}\) and
when discussing the mediator’s limited role as information-provider, the
code suggests it is appropriate in some disputes for the mediator to turn
attention to a proposed solution’s impact on absent third party

\(^{108}\) Nat’l Mediator Accreditation Sys. Approval Standards § 9.7
(Mediators Standard Board 2012). For a somewhat similar provision in the 2015
Standards, see Nat’l Mediator Accreditation Sys. Practice Standards § 7.7
(Mediators Standard Board 2015). Under the 2015 provisions, the mediator is to
encourage parties to make assessments based on their needs, interests, issues and
viability of any agreement.

\(^{109}\) Nat’l Mediator Accreditation Sys. Approval Standards § 9.7
Practice Standards § 8.4 (Mediators Standard Board 2015).

\(^{110}\) Nat’l Mediator Accreditation Sys. Approval Standards § 5 (Mediators
Standards §§ 6.1, 10.1 (Mediators Standard Board 2015) (the 2015 Standards
provide that the “mediator must be alert to changing balances of power in mediation and
manage the mediation accordingly” and must have knowledge of “the nature of conflict,
including the dynamics of power and violence” and must have the “ability to manage
high emotion, power imbalances, impasses and violence.”).

\(^{111}\) Nat’l Mediator Accreditation Sys. Practice Standards § 7.3(c)
Practice Standards § 10.1(c)(v) (Mediators Standard Board 2015) (the 2015
Standards differs slightly by requiring the mediator to have an understanding of the
ethical principles in relation to “procedural fairness and equity in mediation including
withdrawing from or terminating the mediation process.”).
stakeholders. 112 Most importantly, when discussing termination of the process, the code states that the mediator may terminate when, in the judgment of the mediator, the parties are reaching a substantively unconscionable agreement.113 Thus, despite the code’s significant emphasis on mediator self-restraint, it ultimately places the mediator in the role of backstop, a final bulwark against the exploitation of the unwary by more knowledgeable and perhaps unscrupulous bargainers.

The IMI Code of Professional Conduct is similarly mysterious regarding the mediator’s relationship to the substantive fairness of the mediation agreement. On the one hand, the focus of the code appears initially to lie with questions of procedural fairness. One section entitled “Fairness and Integrity of the [P]rocess” requires the mediator to “conduct the process with fairness to all parties.”114 This requirement is further explained as ensuring the parties have an opportunity to be heard, be involved in the process, and consult with legal counsel.115 However, there is no corollary requirement that mediators attend to the terms of the agreement being discussed. However, the Code does vest the mediator with some duties of assessment in a provision discussing termination of the process. Like the Australian Code, the IMI Code provides that the mediator “may withdraw from a mediation if a negotiation among the parties assumes a character that to the mediator appears unconscionable or illegal.”116 Obviously, this last provision vests the mediator with the authority—and the burden—to determine when

113 NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 11.3 (MEDIATORS STANDARD BOARD 2012). This provision is not included in the 2015 Standards. Circumstances under which a mediator may suspend or terminate include “if they form the view that the mediation is no longer suitable or productive.” This will include where a participant “is unable or unwilling to participate,” “is misusing the mediation,” “is not engaging in the mediation in good faith,” and where the “safety of one or more participants may be at risk.” However, these are examples only and the list is non-exhaustive. See NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 5.1 (MEDIATORS STANDARD BOARD 2015). The provision in the 2015 standards that comes closest to speaking to outcome fairness is the one that requires the mediator to demonstrate ethical understanding in relation to procedural fairness and equity in mediation. This provision may be interpreted broadly to include equity in relation to the outcome of the mediation. See NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 10.1(c)(v) (MEDIATORS STANDARD BOARD 2015).
115 id.
116 id.
suspension, termination, or withdrawal is necessary based on an evaluation of the possible outcome as substantively unfair or inequitable.

The EU Code of Conduct for Mediators appears designed to sensitize mediators to the threat of substantive unfairness, but provides little guidance regarding the mediator’s role in preventing it. It notes helpfully that mediators should conduct the process “appropriately,” keeping in mind the possible existence of power imbalances and the rule of law as well as the parties’ possible desire to end the dispute quickly without affording themselves of all the protections that an adversary procedure might allow.117 “Process fairness” in this code means that each party will have an opportunity to speak and the mediator may terminate the discussions if the agreement reached appears illegal or unenforceable.118 It is notable that the last provision relating to termination places the mediator in the position of evaluating the outcome-fairness of the agreement reached, a position of critique or judgment that the remainder of the code provisions explicitly warns against. The Singapore Mediation Centre’s Code of Conduct similarly does not explicitly hold the mediator responsible for the substantive fairness of any agreement reached. But, it does allow the mediator to terminate the mediation if “any of the parties acts unconscionably,” thus suggesting that a mediator who brings her own assessments of what constitutes unconscionable behavior into the parties’ dispute is nonetheless acting appropriately and within the bounds of ethical mediator behavior.119

The codes we have surveyed reflect the vast majority of mediation ethics standards; they require mediators attend diligently to the requisites of procedural justice, but make few or no references to the substantive justice of the resulting agreement. Codes that do address the fairness of the mediation outcome do so in the context of terminating the mediation agreement. Some codes require the mediator to terminate the process if the resulting agreement is illegal, unfair, or unconscionable. Others simply raise termination as an option that remains at the mediator’s discretion. These termination provisions suggest that the mediator can, and in some instances should, subject the proposed agreement to an assessment based on criteria that differ from the parties’ own preferences.

118 Id.
We applaud these provisions. We think that they represent a positive development in the evolution of mediation’s ethical canon. Nevertheless, the provisions also reveal a central tension within the codes. If a mediator’s only ethical responsibility is to respect party autonomy and remain impartial, then, arguably, the mediator should not be assessing the fairness, legality, or unconscionability of the parties’ proposed agreement. What these termination provisions acknowledge is that sometimes mediation negotiations can lead to harmful or exploitative outcomes and that the mediator should be on the lookout for these disturbing outcomes, work to modify them, or seek to disassociate from them. Not every code contains these termination agreements, but those that do suggest a more layered and complex set of responsibilities for the mediator than do codes that focus exclusively on procedural fairness to the exclusion of other concerns. Although self-determination or party autonomy is a fundamental value of facilitative mediation, the codes, to cater for circumstances that may lead to unjust outcomes, are shifting from complete reification of self-determination to an acknowledgement that the mediator may have a role to play in protecting against gross exploitation or unfairness. The critiques that have dogged mediation from its earliest days acknowledge the threat that power imbalances and systematic inequities pose to a quality process. That literature of critique confronts directly what some mediation ethics codes hint at covertly—that the mediator has a role to play in ensuring that mediation agreements meet some sort of minimal threshold of justice—both for each party and for affected parties outside the mediation room. In our view, existing codes should formally recognize that self-determination and party autonomy are crucial, but not the single ethical basis for mediator’s conduct.

Thus far, we have argued that the question of mediator accountability for ensuring minimal levels of substantive fairness has been the subject of inconclusive debate in the mediation literature. We have further argued that existing mediation codes either ignore the question of substantive justice altogether or speak to questions of justice with a divided tongue. In the next section, we argue that shifting from a purely Kantian to a Rawlsian view of justice helps clarify and support our argument that substantive justice can and should become part of the mediation ethics canon.
V. A RAWLSIAN APPROACH TO MEDIATION ETHICS

John Rawls, arguably the most important political philosopher of the twentieth century, was a social contract theorist who sought to develop a theory of justice that functioned as an alternative to utilitarianism. Utilitarians, as Rawls explained, define right action as that which creates the greatest happiness for the greatest number. Morality becomes a question of maximizing happiness, while the dilemma of happiness distribution is put aside. One man of ten may be enslaved to tend to the needs of the other nine and the action would be “right” so long as the happiness of the nine free men exceeds the unhappiness of the one slave.

Rawls rejected this account and instead proposed a vision of right action that moves questions of distributional equity front and center. Rawls’ theory is crucially concerned with the appropriate division of social advantages and is devised to answer the question: [H]ow do we arrive at a just allocation of social goods in the face of competing claims? Rawls suggests that the answer can be arrived at procedurally by devising a social contract that members enter into while situated in what Rawls terms “the original position” operating behind the “veil of ignorance.”

The original position, it must be understood, is not an actual status or ranking in society. It is instead a “purely hypothetical situation characterized so as to lead to a certain conception of justice.” Operating behind a veil of ignorance, individuals in this position have no idea what status they occupy in society. They are ignorant of their social class, gender, and educational level. They do not know if they are born into affluence or poverty, if their dad is a janitor or hedge fund partner, if they are handsome or homely, able-bodied or disabled. Indeed, in the original position, people are unaware of their strengths and weakness. They are unaware of “[their] conception of the good... the special features of [their] psychology such as... aversion to risk or liability to optimism or pessimism.” The parties, however, are aware of “the circumstances of justice and whatever this implies.” These circumstances are those in which a moderate scarcity of resources exists warranting redistribution to everyone’s advantage.

120 RAWLS, supra note 76, at 22.
121 Id. note 26.
122 Id.
123 Id. at 12.
124 Id. at 12, 137.
125 Id. at 137.
126 Id.
127 Id.
Rawls assumes that the individuals placed behind the veil of ignorance are rational, self-interested decision makers. That is, all things being equal, Rawls' decision-makers "would prefer more primary social goods rather than less. [They would] . . . seek to protect their liberties, widen their opportunities . . . and enlarge their means for promoting their aims, whatever they are." However, standing in the original position with no knowledge of where they are situated in the social hierarchy, these individuals have every incentive to devise rules of engagement that are mutually beneficial to all ages, genders, socioeconomic classes, cultures, and ethnicities since it is unclear to which community, class, or affiliation they will belong. Working with this construct, Rawls hypothesized that decision-makers would cooperatively embrace the "difference principle," a distributive principle that "social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged." It is important to recognize that Rawls was bent on pursuing an object quite different from the construction of ethical standards in mediation. Rawls was interested in defending a theory of social governance and devising methods for the distribution of social advantages under conditions of moderate scarcity. He was concerned with societal institutions writ large, not with how individuals work out their disputes in private settings. Nonetheless, to the degree that Rawls sought to identify a method that would yield a just ordering of social institutions, his ideas can be usefully transposed to the project of identifying which set of ethical mandates will yield just outcomes in mediation.

Let us place a mediation party in the original position for a moment and wrap her in the veil of ignorance. She does not know her status in society. She does not know the nature of her dispute. She does not know whether she has the money or practical understanding to hire a legal representative. She does not know whether she is articulate or nearly mute, assertive or shy, in perfect mental health or suffering from trauma. She does not know with whom she is disputing, whether it is another individual or a large corporation. She does not know the extent of the resources the other party brings to bear on the mediation and she does not know whether the other side

128 Id. at 142–43.
129 Id. at 266 ("Social and economic inequalities are to be arranged so that they are both:
(a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and
(b) Attached to offices and positions open to all under conditions of fair equality of opportunity.").

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is telling the truth, operating in good faith, or using the mediation process for unscrupulous ends.

While secluded from any information about her personal circumstances that might bias her answer, we then ask the following: What sort of ethical responsibility do you think your mediator should assume when considering questions of justice? You have choices. You could limit your mediator's responsibilities to matters of procedure. That would mean that the mediator would have a responsibility for ensuring that you and your representatives have many opportunities to speak and be heard. Additionally, the mediator would have the responsibility to conduct the mediation with impartiality, favoring neither you nor your adversary and treating each of you with consideration and respect. If the mediator felt that you did not understand the goals and methods of the mediation process or the issues under discussion, she would be required to halt or terminate the discussion. In a purely procedural conception of justice, this would be the extent of the mediator's responsibilities.

Alternatively, you could impose upon the mediator an additional obligation. You could include within the mediator's ethical code an obligation to attend to the substantive fairness of the resulting agreement. You could make this requirement as stringent or as elastic as you like. You could specify simply that the mediation agreement should avoid terms that could be characterized as unconscionable, exploitative, or abusive to one or more parties. Alternatively, you could prohibit the mediator from assessing the substantive fairness of the mediation agreement in any way and include this prohibition in ethical codes of conduct. Your choice.

What choice would you make if you did not know what internal capabilities or external resources you could bring to the mediation process? What choice would you make if you thought it possible that you might be the weakest party in the room? Would you be confident that the procedural protections embedded in most mediation ethics codes would be sufficient to protect your interests or would you want the mediator to be sensitized to the possibilities of substantive justice and ethically authorized to raise substantive justice concerns if the circumstances warrant?

One can be certain that parties in the original position would be influenced by their circumstances to choose principles that will lead to everyone's advantage since each party would be ignorant about "his place in society, his class, position or social status . . . his fortune in the distribution of natural assets and abilities, his intelligence and strength." The parties would choose principles that will benefit the vulnerable. The parties would

130 id. at 137.
consider that if they happened to be affluent, powerful parties, they would be in a position to obtain the best outcome from the process and any alternative processes. If, on the other hand, they turned out to be the vulnerable, they would hope for some assistance from the mediator and would urge the adoption of ethical codes that allow mediators latitude to intervene to prevent unjust outcomes.

Knowing that legal rights are safeguards for ensuring justice, parties in the original position would want to ensure those safeguards are promoted in mediation processes. This way, parties can be assured they would not be denied important legal rights in mediation.

It is our view that the more disadvantaged party would likely prefer to participate in a process where the mediator is charged with ensuring not simply fair procedures, but some basic minimal standard of substantive fairness. We believe that this charge would provide assurance to parties who feel unconfident, either in their own negotiation capacities or in the competence of counsel, if they are fortunate enough to be able to access representation. In taking this position, we are well aware of the counterarguments likely to be advanced by “pure proceduralists.” We address these in turn.

A. How can a mediator assess substantive justice when justice has no enduring content and represents mere subjective preferences?

The first likely response, emanating from the postmodernist camp, would be that expecting a mediator to assess substantive justice is incoherent because no absolute, stable notion of justice exists. Concepts of justice simply reflect subjective preference, and there is no justification for imposing a mediator’s subjective preference on the parties.

We have two responses to that objection. First, we acknowledge that concepts of what constitutes just treatment can vary with the individual. However, at more general levels, we believe that it is not difficult to gain consensus as to what constitutes an agreement so unbalanced that it should not be concluded under mediation’s auspices. For example, although reasonable people might disagree regarding the exact proper division of a working spouse’s pension at the termination of a long-term marriage, most would agree that a division that would leave either spouse in penury for the duration of their old age would be unconscionable. Similarly, twenty lawyers might each develop twenty different proposals for what a just conclusion to a landlord-tenant dispute might involve, but likely, all twenty of them would agree that a resolution that requires a tenant to continue paying rent throughout the winter for an apartment that has no heat or hot water is unjust. The point is that we are not charging the mediator with the task of
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identifying the one permissible just resolution and trying to sell that to the parties. That would be problematic on any number of levels. Rather, we are proposing that the mediator remain alert to those few situations where a power imbalance in the mediation has led to a truly shocking and insupportable result. Acknowledging that cultural, political, and ideological commitments complicate efforts to identify content-full notions of justice to which we all subscribe, we are setting the bar for the mediator exceedingly low. We suggest the mediator disassociate herself from—and seek to dissuade the parties from binding themselves to—agreements that are unconscionable, that is, agreements that are so one-sided and unfair that they shock the conscience. By doing so, we believe the postmodern critique of justice’s indeterminacy loses much of its power.

B. How can a mediator assess substantive justice when they lack the necessary expertise to do so?

This objection differs from the previous one. It assumes that there may be standards of justice to which we all might subscribe but posits that the mediator is ill-situated to determine how that standard should be applied in the dispute at hand. The mediator, it is argued, is ill-suited for two reasons. First, the mediator has no particular access to the standards as embodied in legal norms, governmental ruling, or the teachings of particular disciplines, such as engineering, psychology, or otherwise. The mediator is a process expert, not a subject matter expert. If the case involves intellectual property, child psychology, collective bargaining agreements, bridge engineering, or landlord-tenant law, the mediator is likely a generalist and not equipped to determine which rule, law, principle, or contractual provision should govern. Second, the mediator has insufficient access to the facts of the dispute such that she could make a reliable determination as to how the relevant standards apply in the parties’ particular context. After all, many mediators receive no pre-mediation submissions, so all they know about the dispute is what the parties or their representatives reveal during the initial opening statement. There is nothing to prevent parties from selectively omitting unhelpful facts, and there is ample anecdotal evidence that parties do precisely that.

So what will be required of the mediator who is concerned about substantive justice? To answer this question, it is important to consider what this mediator is not being asked to do. The mediator is not being asked to wear a lawyer or a judge’s hat; she is not expected to be knowledgeable about every discipline, trade, or subject matter. She is not being asked to steer parties to a particular outcome. Our argument assumes the desirability of leaving to the parties the choice of the precise terms and conditions of settlement. What we are asking is that the mediator be prepared to serve as
the last backstop against unfairness. What this means is that when the parties
are moving toward a truly shocking outcome (which should be apparent to
even the mediator who is neither an expert on the facts or law relating to the
dispute), the mediator is prepared to raise with both the empowered and
disempowered parties her concern with the possible negative effects that
such an agreement might generate. In other words, where a conflict might
resolve in one hundred possible ways, and ten of those possibilities would be
unfair and exploitative for one of the parties, we would argue that the
mediator should bring this to the attention of the parties. The mediator need
not be an expert in either the law or the facts to identify the small percentage
of options that fall beyond the pale.

C. How can a mediator, bound by the profession’s codes and best
practices to be impartial, have any obligations for outcome
fairness?

A mediator who withholds her imprimatur from unconscionable
arrangements will either be pushing the parties to consider less unbalanced
terms or withdrawing in the face of seriously inequitable agreements. Either
way, the mediator will be benefitting the party who would otherwise be
binding herself to an agreement seriously skewed against her and
withdrawing a benefit from the party who would gain from the imbalance.
Won’t this behaviour violate the mediator’s duty of impartiality?

We think the only honest answer to this response is, “Yes.” Advocating
against extremely one-sided agreements or those that pose serious risks to
absent third parties does require the mediator to stray from a stance of formal
impartiality.131 If impartiality entails the absence of bias or partiality, not

131 See Susan Nauss Exon, How Can a Mediator Be Both Impartial and Fair: Why
Ethical Standards of Conduct Create Chaos for Mediators, 2006 J. DISP. RESOL. 387
(2006) (arguing that mediators’ ethical responsibilities sometimes conflict and that the
Standards do not adequately address this issue); Michael T. Collatella, Informed Consent
in Mediation: Promoting Pro Se Parties’ Informed Settlement Choice While Honoring
the Mediator’s Ethical Duties, 15 CARDOZO J. CONFLICT RESOL. 705 (2014) (arguing
that mediators cannot maintain impartiality if they are required to ensure informed
outcome consent). But see Jacqueline M. Nolan-Haley, Informed Consent in Mediation:
A Guiding Principle for Truly Educated Decision-making, 74 NOTRE DAME L. REV. 775
(1999) (arguing that the doctrine of informed consent in mediation ought to be more
concretized in order to ensure fairness); Hilary Astor, Mediator Neutrality: Making Sense
of Theory and Practice, 16(2) SOC. & LEGAL STUD. 221 (2007) (arguing that there is
need for a new approach to neutrality in mediation—which makes sense in practice and
in theory—suggesting a method of practice that requires (rather than outlaws) attention to
power relationships); Susan Douglas, Constructions of Neutrality in Mediation, 23(2)
only with regard to the parties but with regard to outcomes,\textsuperscript{132} then resisting unconscionable outcomes obviously compromises this stance. This is the cost of asking the mediator to guard against unjust outcomes.\textsuperscript{133} We think, though, that if the mediator approaches this task with humility, conscientiousness, and discretion, that the cost will be a small one.

Those who object to tasking the mediator with responsibility for minimal levels of outcome fairness imagine a highly interventionist mediator aggressively inserting him or herself into the parties’ negotiations to shape an outcome that corresponds with his or her own unique vision of justice. But, mediators can work to avoid grossly unfair outcomes without unduly intruding on the parties’ own negotiations. The mediator we imagine strives toward a noninterventionist stance and only inserts herself as a “fairness cheerleader” as a last resort when the bargaining process seems seriously askew. Even in that circumstance, the mediator will be sensitive to the possibility that the parties’ idiosyncratic needs and interests may be influencing the decision to deviate from an agreement that more closely tracks expected legal outcomes. After discussing the advantages and disadvantages of approaches that more traditionally incorporate social or legal norms with parties, the mediator will, in the great majority of circumstances, concur with the parties’ choices. It is only when the mediator suspects that one party has not adequately considered the long-term effect of the agreement on his or her best interests, or the outcome poses serious risks to absent stakeholders, that our mediator will continue as a dissenting voice and consider withdrawing from the mediation.

\begin{quote}
\textbf{AUSTRALASIAN DISP. RESOL. J.} 80–88 (2012) (discussing the Australian National Mediation Accreditation Scheme provisions in relation to neutrality and noting the tension between the requirement of impartiality and promoting fairness).
\end{quote}

\textsuperscript{132} It is important to note, however, that asking the mediator to resist unjust outcomes in no way compromises the mediator’s obligation to maintain an impartial stance vis-à-vis the parties. The Model Standards forbid the mediator from acting “with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation . . . .” \textbf{MODEL STANDARDS OF CONDUCT FOR MEDIATORS} Standard (II)(B)(1) (AM. BAR ASS’N 2005) (a mediator may follow this injunction, while at the same time refusing the endorse outcomes that fall below a minimal fairness standard); \textbf{RACHAEL FIELD, EXPLORING THE POTENTIAL OF CONTEXTUAL ETHICS IN MEDIATION} (2008), \textit{reprinted in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGING THE PROFESSION} 197 (Francesca Bartlett et al. eds., 2011) (exploring the potential of contextual ethics in mediation).

\textsuperscript{133} See Shapira, \textit{supra} note 6, at 28.
D. If your Rawlsian mediator is not telling the parties what is fair and what to do, how does your mediator differ from standard conceptions of the mediator role that task the mediator with responsibility for process fairness alone?

Perhaps the real difference between the functions of the Rawlsian mediator and standard conceptions is that the Rawlsian mediator functions more deliberately as a consciousness-raiser and a safety net. The Rawlsian mediator would begin her entry into the process consciously raising the parties’ awareness about the importance of substantive justice in the mediation process. This discussion would begin in pre-mediation sessions. The mediator would emphasize that ensuring procedural justice falls squarely within the mediator’s expertise and charge but that identifying what is substantively fair will require the parties to think deeply about their own values and that it is their responsibility to take steps to achieve fairness during negotiations. The Rawlsian mediator will reiterate the standard mediation script that the mediator is not responsible for determining who is right or wrong, who behaved well or badly, or how things should be made right. The mediator will point out, however, that the mediation process does strive toward just outcomes and that the parties will be called upon to formulate standards by which they, as individuals, would assess fairness. The standards may include legal, trade, professional, or individually devised criteria, whatever meets the parties’ understandings of what justice in their own situation requires. Where a party lacks the capacity or resources to formulate justice standards, the mediator will encourage them to seek legal advice or the support of a third party. And, if both parties seek to use the mediator as an informational resource and the mediator is qualified to serve in this role, then the mediator may be the source of information that helps the parties elaborate upon their own intuitions of what justice requires in their own situation. With the mediator’s help, the parties can generate fully fleshed out justice criteria that can then be applied to the options that each party has proposed for settlement. In sum, the mediator works to raise the parties’ consciousness about the goals of the process in terms of the outcomes reached and encourages the parties to think deeply about the justice criteria they choose to employ.

The mediator’s role as a safety net occurs toward the end of the process as the parties are narrowing in on the particular terms of agreement. The Rawlsian mediator has the responsibility for assuring that a proposed outcome or option is not so one-sided or disadvantageous to one party or absent third parties that it “shocks the conscience.” The assessment of what is conscience shocking will be based both on the criteria the parties have
articulated as well as external societal standards that the mediator, if requested, will have shared with the parties.

VI. APPLICATION: AN ACTUAL CASE FOR THE RAWLSIAN MEDIATOR

Let us concretize the approach we imagine a Rawlsian mediator would take in a hypothetical case, the Tongan Slip and Fall.

You are mediating a slip-and-fall personal injury case. The plaintiff, a newly arrived immigrant from Tonga, was injured when he stopped into the defendant’s convenience store to use the facilities on the way to a job interview. The defendant’s cleaning crew had mopped the restroom area in the back of the store, but neglected to post a sign alerting shoppers that the floor was wet. The plaintiff suffered serious injuries, including permanent nerve damage, in the fall and has incurred significant medical debt because he has no health insurance. Defendant is arguing that the plaintiff was not a customer, and thus, they owed no duty to him to maintain the restroom in a dry, safe condition. The plaintiff speaks little English and cannot follow the proceedings. His attorney, a fellow Tongan who has been practicing law in the United States for only four months, appears to misunderstand the relevant legal doctrines on landowner liability that supply his client with compelling arguments for recovery. Because the plaintiff has no job and is concerned about paying some portion of his debt to the health care providers who serviced him, he is preparing to settle with the defendant store owner for 10 percent of what you believe to be a $200,000 claim.134

What would the Rawlsian mediator do?

The Rawlsian mediator would first note that there are several features of this mediation that suggest that a power imbalance exists between the plaintiff and the defendant and that the negotiation could very well lead to an agreement that “shocks the conscience” and does not serve the injured Tongan well in the long run. The Tongan plaintiff is vulnerable because he does not understand English well, does not know his entitlements under the law, and is represented by a lawyer who is also uninformed about the law applicable to his client’s case. These facts have contributed to the willingness of the injured Tongan and his lawyer to accept a settlement figure, which

134 Waldman, supra note 67, at 135.
falls far short of what a court of law might award. Procedurally, our plaintiff lacks sufficient information to reach an informed decision about his options and this procedural defect threatens to lead to an unjust outcome.

The mediator following a code developed from the original position will take some responsibility for ensuring substantive justice. This would mean that the mediator, from the onset, would have alerted parties to the importance of substantive justice and explained that this is primarily the responsibility of the parties, with the mediator serving as a "backstop" or safety net. The mediator would explain that the parties should make use of the opportunity provided in the process to deliberate over and discuss what they would consider a fair outcome and by what standards they would measure fairness. At the same time, the mediator would work to level the unequal playing field between the defendant landlord and the Tongan plaintiff and his lawyer by ensuring that the language gap is closed, endeavouring to ensure the plaintiff gains a fuller understanding of the legal rights he is waiving, and, if necessary, intervening if a party is about to agree to terms that fall far short of what is acceptable by societal standards.

The Rawlsian mediator will need to engage in a number of interventions designed to ensure that the Tongan plaintiff is informed about the array of options available to him. At a minimum, the plaintiff needs to understand the likelihood of obtaining a more substantial recovery in court and the barriers and hurdles that might impede such recovery. The mediator must be prepared to adjourn the process for the plaintiff to seek legal advice or assistance of a trusted family member or friend. The mediator must be prepared to intervene to ensure that the injured Tongan and his lawyer have fully assessed the risks and benefits of settlement versus the risks and possible benefits of continuing to litigate the claim. This would include asking the injured Tongan about the legal advice he has received and the lawyer about his awareness of the law in the area including the likely court outcome. The Rawlsian mediator will not advise the plaintiff either to settle, or demand more money, or exit the mediation and hire another lawyer. However, the Rawlsian mediator must, at a minimum, ensure that the plaintiff has thought about what for him constitutes a sufficiently adequate settlement, such that it is worth forgoing the possible gains that future disputing might bring. Asking questions, such as, "If you were confident that a judge would award more money to you in court, would you ask for more money here in mediation?" Or, "What sort of investigation of landowner responsibilities have you done prior to this mediation?" Or, "Do you think $20,000 is going to be enough for you to pay your medical bills and get back on your feet after this injury?" These are all ways of pushing the plaintiff (and his lawyer) to think about what would be a substantively fair outcome and what role legal norms plays in that assessment.
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If, at the end of that intervention, the injured Tongan and his lawyer are still prepared to accept ten percent of a possible court outcome, the mediator would have to consider whether it would be appropriate to terminate or withdraw from the mediation on that basis. In our opinion, unless factors that render the process defective are present, the outcome is not so unfavorable that the mediation should feel duty-bound to withdraw. However, the mediator would have demonstrated her concern for the justness of the outcome and would have raised the consciousness of the parties as well.

VII. CONCLUSION

In this paper, we have explored the relevance of Rawls’ theory of justice to mediation ethics, arguing that, given the rise of inequality in most parts of the world and the ascendancy of mediation as a popular and frequently adopted dispute resolution process, Rawls’ theory of justice could form the basis of a revitalized mediation ethics. Mediation’s relationship to social justice is both muddled and fraught. A rich body of literature critiques mediation as a regressive process impeding disadvantaged groups’ access to justice, while mediation defenders reject rights-based notions of fairness and focus on the value of voice and autonomy in the disputing process. Ethics codes reflect this muddle, emphasizing both the importance of party self-determination and mediator impartiality, while, in some instances, suggesting that grossly one-sided agreements might require mediator intervention or withdrawal.

We have argued that importing Rawls’ theory of justice into the canon of mediation ethics creates space for standards of conduct that honor party autonomy while taking seriously the obligation to care for and nurture substantive fairness in mediation outcomes. To flush out what such a code might look like, we borrowed Rawls’ proposed method by which a fair social contract might be structured and adopted it to the mediation context. We placed a mediation party in the original position behind a veil of ignorance and asked: What sort of ethical responsibility do you think your mediator should assume when considering questions of justice? In our view, the ethical responsibilities would be those that lead to everyone’s advantage by requiring the mediator to serve as a fairness cheerleader and safety net for parties about to agree to unconscionable terms.

We discussed a hypothetical situation based on Rawls’ justice theory and addressed four anticipated criticisms. We clarified that while our intention is not to make mediators truth-finders, mediators should take some responsibility for identifying unconscionable terms in settlement agreements. Additionally, we noted that mediators need not be subject matter experts in all of the arenas in which they mediate but should be sufficiently familiar
with the topics in dispute to be able to spot potentially problematic settlement provisions; we suggested that mediators facilitate a discussion between the parties as to the social or legal norms by which they would want to assess the justice quality of generated options and serve as a safety net for a party about to sign off on an unfair agreement.

Rawls, as he elaborated upon the social contract that he thought would bring about a brave, more equitably constructed world, noted, "The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts."135

People come into mediation in different positions. Some are rich, others poor. Some are educated, others not. Some have access to diligent, skilled legal assistance; others do not. These are the facts that mediators face. And, while mediators are not called into disputes to reshape the existing power topography—nor would they likely be invited back if they did—mediation, as an institution, must deal with the "natural distribution" of party resources in a just fashion. The impartial mediator must be granted some latitude to serve as fairness cheerleader and safety net when mediation outcomes veer toward the unconscionable. This paper is a beginning effort, using Rawls' theories as the launching pad to nudge our thinking about ethics in a direction that takes better account of the vast levels of inequality that permeate our modern day world—and the many disputes that roil it.

135 RAWLS, supra note 76, at 102.
American Diversity in International Arbitration
2003-2013

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American Diversity in International Arbitration 2003-2013

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I. Introduction

When I was approached to return to issues of diversity in international arbitration, I decided to expand on the methodology I used in the 2003-2004 period in three earlier articles on American minorities in international arbitration by examining American diversity in international arbitration across the broader

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1 This article is adapted from a shorter article published in the American Bar Association Dispute Resolution Magazine of Winter 2014. I thank the ABA Dispute Resolution Magazine team (Gina Brown, Donna Stienstra, Nancy Welsh, and Joseph B. Stulberg) for suggesting this project to me. I thank Robert Jacoby for his research assistance. I thank Mireze Philippe, Sophie Nappert and the publisher of Transnational Dispute Management for their assistance with publicizing this project on OGEMID. I thank Mireze Philippe for her assistance in publicizing this project on ArbitralWomen. I thank Effie Silva for her assistance in publicizing this project in the Miami arbitration community. I thank Professor Llewellyn Gibbons of the University of Toledo College of Law for his suggestion of a method to review the discrete arena of domain name dispute resolution. As there has been discussion as to whether that can properly be characterized as international arbitration, I have not spread my net that far in this article, but may do so in a future article. I thank Professor Susan Martyn of the University of Toledo College of Law for her comments while drafting. All errors are the author's own.

target population for the ABA’s Goal III diversity efforts: American women, American minorities\(^3\), American lawyers with disabilities, and American LGBTQ lawyers. These four groups are the target population described in the American Bar Association’s Goal III: Eliminate Bias and Enhance Diversity which has two objectives: 1. Promote full and equal participation in the Association, our profession, and the justice system by all persons. 2. Eliminate bias in the legal profession and the Justice System.\(^4\) In addition to sending a survey to 413 international arbitration practitioners of whom I was aware or to whom I was referred, I forwarded it to the ICC Counsel Alumni members of which I am a member as well as The International Law Discussion Space listserv, the Society of American Law Teachers listserv, as well as the Contracts, Dispute Resolution and Minority Groups listservs of the American Association of Law Schools. Further, I greatly appreciate that OGEMID and ArbitralWomen were kind enough to share the survey in their online spaces. Thus, an attempt was made to reach as broad a group of international arbitration practitioners on all five continents. Finally, based on anecdotal evidence that women may get their first appointment as an arbitrator through the appointment of an arbitral institution, I contacted a diverse group of international arbitral institutions around the world to see if they would be willing to share data on their appointments of members of the target population.

Thirty-four individuals ultimately filled out the survey and three of the international arbitral institutions provided data which will be discussed below. I thank these persons and organizations for their participation and thank the other persons and organizations for taking the time to look at whether they would participate. All of their attention to these matters in a very busy time of year is greatly appreciated.

II. Background – A Celebration of Diversity and Inclusion in International Arbitration

From my personal experience and research, I am certain that women lawyers including American women, US minority lawyers, lawyers with disabilities, and LGBTQ lawyers have been involved in some

\(^3\) Race is, of course, a social construct. The vast literature on this subject and its discussion are excellently presented in Meera E. Deo, Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence, (August 26, 2013). Hastings Law Journal, Vol. 65, No. 3, 2014; Thomas Jefferson School of Law Research Paper No. 2315787. available at SSRN: http://ssrn.com/abstract=2315787 or http://dx.doi.org/10.2139/ssrn.2315787. For a concrete example, I have been socially constructed as an African-American in the United States. I have a Hispanic (from Cuba) grandmother, at least one Irish great-grandfather, a Native-American (Cherokee) great grandmother, and Chinese and Native-American (Blackfoot) ancestors according to my family lore, in addition to my ancestors of African origin whose presence in the United States dates back to at least 1800. Coming to recognize and feel ownership of that diverse history as part of living the social construct and self-identification as an African-American has been one of the most interesting aspects of this life. Coming to understand these and other diverse cultures through working with people in international arbitration is one of the pleasures of that work. I am certain that several Americans (and other Nationals) in international arbitration are similarly socially constructed as being of one race or another as they are perceived on the international plane. Experiencing these social constructs in countries with different cultures and histories can be both a liberating and constraining experience as one comes to understand opportunities and limitations in the expectations across borders. The key appears to be related to both the positive and negative impacts of explicit bias, implicit bias, and stereotype threat discussed later.

capacity in international arbitration over the past 35 or more years. It is true that, for most of that period, these persons may not have been seen in the classic roles of arbitrator, lead counsel, or leader of an international arbitral institution, but they have still been present in some aspect of arbitration working with an arbitrator, on the team of a party counsel, or within an international arbitral institution. The work of these persons in maintaining and enhancing the international arbitral edifice may have rarely been recognized openly, but I know they have been there and I take the opportunity of this article to salute their determined work.

I would like to highlight some particular pioneers. I start with Roberto Powers, the first African-American counsel in the International Chamber of Commerce in the period 1978-1986 who went on to a career in the United States Foreign Service. I have stood on his shoulders thanks to the many courtesies he provided me as I went through the hiring process at the International Chamber of Commerce International Court of Arbitration when I first joined it in 1986 and served at the Court through 1996 and then on to be a Director, Conference Programmes and Manager of the ICC Institute of World Business Law through 1999. I continue with the many women lawyers (juristes) and non-legally trained professionals who served as my assistants in those early years. I take this opportunity to honor Sylvie Kermoal, Tamsyn Taylor (British-American), Katharine Bernet, Irene Ezratty, and Odette Lagace all brilliant and two of them also brilliant lawyers. I also wish to honor the secretaries with whom I had the pleasure of working who pushed me to do better. When I was tasked my first summer at the ICC with writing a statement on behalf of the ICC in a case before the Obergericht des Kantons Zurich and ultimately the Swiss Supreme Court, Tamsyn’s (as secretary as she then was) trenchant critique as she typed pushed me to broaden my approach and I am eternally grateful to her. I also honor the late Cynthia Scharf who helped me learn the duty to manage and Michele Clergeaud who was ahead of me in my work. I wish to also honor Rita Ortega, Francoise Barriere, Ingrid Materner, Herta Pechenard, Marie-Chrisine Mosdier, Genevieve Pathiaud, Paule Daudin, Elisabeth Passedat, Sylvie Picard Renault and Josette Watrin for their work in keeping the ICC Secretariat running and growing. I honor the late Corinne Jarlot, Mireze Philippe, Michele Clergeaud, and Irene Ezratty who were instrumental on the team that developed the first generation Case Management System of the ICC in the 1989-1993 period as well as, for the latter two, their crucial roles in the famous International Fast-Track Commercial Arbitration Cases in 1992. I would like to honor the interns and short-term hires who worked on my team and came through the ICC from around the world many of whom have gone on to great things such as Michael Volkovitsch, Robert Smit, Sandrine Colletier, Pascale Lorfig, Masaaki Sawano, Ram Madaan, Nader Ibrahim, and Georges Affaki. I especially mention the writing one August 1993 with Michael and Odette of an article which was one of the great experiences of my life.

We must also honor the gatekeepers who also were door-openers. First for me is Eric A. Schwartz who interviewed me as a second year law student and put my name forward for a final interview with Gene Forcione when SG Archibald and Co (as it then was) included me in their summer associate program in Paris. That summer 1982, Kathie Claret and Kristen Karsten, Thomas Jahn, as well as Christopher Seppala opened my horizons to the world of international commercial arbitration. In my contracts class,

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5 Today this process might be easier thanks to the Vis Moot and the Vis Moot East work of Eric Bergsten and Louise Barrington that have opened the doors to international arbitration to so many around the world.
I speak each year of Christopher Seppala sitting down with me and going over word for word my first memo to him – an investment in me for which I remain indebted all these years later. I honor William L. Craig and Christopher Seppala for being references when I applied at the ICC. I honor Stephen R. Bond and Sigvard Jarvin who demonstrated the confidence to hire me as a counsel. I honor the late ICC Court Chairman Michel Gaudet and the late ICC Court Chairman Alain Planter for their insistence on excellence while teaching what it means to be a person working on the international plane: they remain my two primary mentors. I honor the late ICC Court Chairman Robert Briner, then head of the Commission on International Arbitration Paul Gelinas and the late head of the Institute of World Business Law Serge Lazareff for their support in putting into place Gaudet Day in 1998. I honor Louise Barrington and Michele Garzon for their assistance in my moving from the ICC Court to the ICC Institute. Louise broke new ground in opening ICC Hong Kong in the mid-90’s – the first overseas office of the Secretariat. I honor the other counsels and general counsels over those years from the doyen Jean-Jacques Arnaldez through Guillermo Aguilar Alvarez, Christophe Imhoos, Dominique Hascher, Raphael Jakoba, Michael Buhler, Eric Schafer, Hermann Verbst, Juan Ramon Iturriagagoitia, Christopher Koch, Fabien Gelinas, Joachim Kuckenburg, Fernando Mantilla Serrano and other Deputy Counsel such as Corinne Nguyen, Katarina Gonzalez Arrocha, and Cheng-Yee Khong who have gone on to great things in international arbitration and beyond. I honor all of the arbitrators, counsels and members of the Court and Institute with whom I had the honor to work in those years. In addition to Roberto Powers as an African-American pioneer at the highest level of international arbitration, we can think today of Calvin Hamilton, Douglas Earl McLaren (first African-American appointed an arbitrator by the ICC I believe), and Floyd Weatherspoon for their indefatigable work as counsel and/or arbitrators.

Some of the most significant early developments for women were the appointment of Tila Maria de Hancock in 1982 to be the Director of the ICC International Court of Arbitration. Gender diversity in the assistant role increased with Sami Houerbi being the first man so named in the early 90’s. A further development was the change of the title of assistants to Deputy Counsel in the early 1990’s and the promotion of Anne Cambournac (as she then was) from Deputy Counsel to be the first counsel who was a woman by then Secretary General Eric Schwartz. Anne-Marie Whitesell’s promotion from counsel to Deputy Secretary General in 1999 and Secretary General in 2001, a second generation appointment nearly twenty years after Tila Maria de Hancock. Another was the promotion of Jennifer Kirby from counsel to Deputy Secretary-General in 2005, as was the appointment of Mireze Philippe as Special Counsel in 2000. Mireze Philippe and Louise Barrington crystallized ArbitralWomen from an informal group in 1993 to a formal creation in 2005, a further milestone on the path. I take this occasion to honor certain American women pioneers such as Sally Harpole out in Hong Kong and Karen Mills in Indonesia who were working in Asia long before so many others as well as Gabrielle Kaufmann-Kohler, Eva Horvath, Teresa Giovannini, Antonias Dimolitsa, Delissa Ridgway, Lorraine Brennan, Jane Willems, Vera Van Houtte, Nancy Turck, Nayla Comeir-Obied, Dana Freyer, Caroline Malinvaud, Loretta Malintoppi, Sarah Francois-Poncet, Judith Gill, and so many others who started working in the vineyards of international arbitration in the 1980’s and 1990’s.
As this work causes men of many countries to spring to mind the *devoir de mémoire* (it is an international arbitration thing) requires that I honor in what might be termed a name collage the late Abdelhay Sefriou, Antonio Crivellaro, Mauro Ferrante, Lucien Simont, Otto Sandrock, Pieter Sanders, Diego Corapi, Albert J. Van den Berg, Jan Paulsson, Piero Bernardini, Giorgio Bernini, Pierre Lalive, Samir Saleh, Lord Dervaid, Spencer Boyer, Andreas Lowenfeld, Bernardo Cremades, the late Hans Smit, Tudor Popescu, Lawrence Newman, George Bermann, Antis Triantafyllices, John Beechey, Moses Silverman, Yves Fortier, Marc Lalonde, Pierre Bellet, Gerald Aksen, Nigel Blackburn, Abdul Aziz Gaballah, Theo Klein, Alain Prujiner, Pierre Tercier, John Kerr, Arthur Rovine, Toby Landau, Otto L.O. de Witt Wijnijn, Jean-Louis Delvolve, Arthur Marriott, Naël Bunni, Ercus Stewart, George Bermann, Marc Blessing, William “Rusty” Park, Peter Hafter, Pierre Karrer, Claude Reymond, Robert Karrer, Harry L. Arkin, Werner Melis, Julian Lew, V.V. “Johnny” Veeder, Ahmed El-Kosheri, Hans van Houtte, Amoz Wako, Werner Wenger, Bernard Hanotiau, James Carter, Philippe LeBoulanger, Andre Faures, Fabien Gelinhas, Nabil Antaki, Anton-Henry Gaede, Ottaordnt Glossner, Pierre Mayer, the late Nabih Bulos, Michael Polkinghorne, Eric Robine, Charles Kaplan, Thomas Webster, Pierre-Yves Tschanz, Axel Baum, Johan Erauw, Sir Edward Eveleigh, Edward Chiasson, the late Philippe Fouchard, Lord Wilberforce, Jacques Werner, Berthold Goldmann, Claude Bessard, Jose-Luis Siqueiros, Jean Robert, Raul Medina Mora, Gonzalo Santos, Jean-Francois Poudret, the late Neil Phillips, A.K. Bansal, David Rivkin, Emmanuel Gaillard, Charles Poncet, Mohammed Bedjaoui, Jacques Buhart, Peter Wolrich, David Brown, Aktham El-Kholy, the late George Cacoyannis, Stelio Valentini, Rene Bourdin, the late Sir Michael Kerr, Charles Brower, Howard Holtzman, Renato Roncaglia, Jacques El-Hakim, Emmanuel Jolivet, Fali Nariman, A.M. Singhvi, Andrea Giardina, Mark Littman, Toby Landau, Ignaz Seidl-Hohenveldern, D.C. Singhania, the late Jacques Revaclier, Christopher To, Michael Pryles, Michael Hwang, Claus Von Wobeser, Karl Heinz Bockstiegel, the late Michael Hoellering, Steven Smith, Richard Horning, Bola Ajibola, Aktham El-Kholy, Roland Amoussou-Guenou, Sami Habayeb, Lord Mustill, Andre Beyly, Wang Sheng Chang, Antoine Kassiss, Michel Soumrani, Khaled Kadiki, Abdel Hamid el-Ahdab, Moussa Raphael, Cecil Abraham, Michael Khoo, Michael Moser, Lawrence Boo, Philip Yang, Nigel Li, and so many others who through their example showed the path and extended courtesies to me. If I have not mentioned someone, rest assured that I have thought of you and see your face though part of your name has been lost to failing memory for which I beg your forgiveness.

Fast forward to the present and certainly the most significant developments for women – including American women - are the appointment of Meg Kinnear as the Secretary General of the International Centre for the Settlement of Investment Disputes, India Johnson as the President and Chief Executive Officer of the American Arbitration Association, Annette Magnusson as the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce, Kathy Bryan as the President and Chief Executive Officer and Beth Trent as Senior Vice President of CPR, Teresa Cheng as the Chairman and Chianne Bao as the Secretary General of the Hong Kong International Arbitration Centre, Julie Sager, Executive Vice President and Senior Financial Officer and Kimberley Taylor Senior Vice President and

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6 This collage of names is a work of memory, not a listing. I only indicated and only know of some who have passed - as might be said in Togo where I worked soon after my graduate studies - over to the spirit world.

7 I believe the first U.S. minority person to rise to this level. Her speech at the launch of Ladies in Litigation and Arbitration of October 10, 2013 in Hong Kong is remarkable.
Chief Operating Officer at JAMS, Nadia Darwazeh as Secretary General of the Jerusalem Arbitration Center, Sarah Lancaster as the Registrar of the London Court of International Arbitration, Lim Seok Hui as Chief Executive Officer and Tan Ai Leen as Registrar at the Singapore International Arbitration Centre. I have been pleased also to learn recently that Megha Joshi has been named in 2012 as the Executive Secretary/Chief Executive Officer of the newly minted Lagos Court of Arbitration, another addition to the Arbitral Women. We can think of extraordinary international arbitration practitioners such as Carolyn Lamm, Abby Cohen Smutny, and Lucy Reed who have come to the fore in the 2000’s. In the space of intersectionality, we can honor Gabrielle McDonald, first African-American woman appointed a judge at the Iran-United States Claims Tribunal. We can highlight Nancy Thevenin, Effie Silva, and Deborah Enix-Ross (the first African-American woman counsel at WIPO) for their pioneering roles as American minority women in international arbitration.

As inspiration to others who may have physical disabilities from childhood or later like me and to all in general, we can honor Neil Kaplan for his extraordinary work in Hong Kong as judge particularly in the transition period from British to Chinese rule, as well as for all the work as arbitrator and the personal kindnesses he extended to me. We can highlight David Larson teacher and arbitrator with all of his pioneering work in technology mediated dispute resolution. We can think of those who have surmounted deafness in one or another ear to become some of the top arbitrators and/or counsel in the world.

And, as I have become aware of you in the survey process, we can honor those counsel and/or arbitrators who are openly LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning) as the inspiration they give to those who feel the need to hide their sexual orientation and for the encouragement of minds to open of all in international arbitration.

III. The Survey

With regard to appointments as arbitrators or in roles as counsel, the evidence from the survey suggest that there are persons of all four groups (though not necessarily Americans) present in these roles.

A. Diversity of appointments in international arbitraction by International Arbitral Institutions

I contacted the American Arbitration Association, the Court of Arbitration for Sport/Tribunal Arbitral du Sport, the Chinese International Economic and Trade Arbitration Commission, CPR, the Hong Kong International Arbitration Centre, the Iran-United States Claims Tribunal, the International Centre for the Settlement of Investment Disputes of the World Bank, the International Chamber of Commerce International Court of Arbitration, JAMS, the Korean Commercial Arbitration Board, the London Court of International Arbitration, the Permanent Court of Arbitration, the Singapore International Arbitration Centre, and the World Intellectual Property Organization Arbitration and Mediation Center and asked if they could provide data for the number of US nationals appointed in international arbitrations for 2012 with a breakdown by gender and if possible by American minorities, American lawyers with disabilities and American LGBTQ lawyers. The Hong Kong International Arbitration Centre, the International Centre for the Settlement of Investment Disputes of the World Bank and the International Chamber of Commerce International Court of Arbitration responded with numbers or a means to calculate the
numbers by gender, with information on American minorities, American lawyers with disabilities and American LGBTQ lawyers not being available. The results from these three institutions are below:

Hong Kong International Arbitration Centre – Appointments by gender in 2012

<table>
<thead>
<tr>
<th>Arbitrator appointments of all kinds 2012 – HKIAC</th>
<th>USA Nationals (Appointed/Confirmed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>2 / 2</td>
</tr>
<tr>
<td>Women</td>
<td>Nil / 1</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
</tr>
</tbody>
</table>

International Center for the Settlement of Investment Disputes of the World Bank – Appointments by gender for cases started in 2012

<table>
<thead>
<tr>
<th>Arbitrator appointments of all kinds 2012 – ICSID</th>
<th>US Nationals</th>
<th>Other Nationals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>11</td>
<td>106</td>
</tr>
<tr>
<td>Women</td>
<td>0</td>
<td>11</td>
</tr>
</tbody>
</table>

International Chamber of Commerce International Court of Arbitration – Appointments by gender 2012

<table>
<thead>
<tr>
<th>Arbitrator appointments of all kinds 2012 – ICC Court</th>
<th>US Nationals</th>
<th>Other Nationals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointments of Men by the ICC Court</td>
<td>19</td>
<td>536</td>
</tr>
<tr>
<td>Confirmations of Men by the Secretary General of the ICC Court</td>
<td>59</td>
<td>555</td>
</tr>
<tr>
<td>Appointments of Women by the ICC Court</td>
<td>3</td>
<td>76</td>
</tr>
<tr>
<td>Confirmations of Women by the Secretary General of the ICC Court</td>
<td>6</td>
<td>47</td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>1214</td>
</tr>
</tbody>
</table>

For American women, if these numbers can be the most favorable proxies for all the international arbitral institutions, the numbers speak for themselves: there need to be more appointments of

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8 Due to the inability to determine exactly which year a given arbitrator was named – as opposed to the constitution of an arbitral tribunal – I include as a proxy for 2012 alone all the cases that started in 2012 knowing full well that some of the individual appointments may have happened in 2013.

9 This view is comforted by earlier work on appointments by gender at least. See footnote 9, Lucy Greenwood and C. Mark Baker, supra note 2 for 2011 reports on appointments by gender (but not by gender of Americans). (“The authors contacted the LCIA, SCC, ICDR, and the ICC requesting information on the gender of the arbitrators appointed in arbitrations administered by the institutions. In an email exchange with Lucy Greenwood on 17 February 2012 and subsequently followed up by a telephone call on 21 February 2012, the ICC confirmed that it did not maintain information on diversity. Note that Louise Barrington reported that in 1990 the ICC named 517
American women by parties and international arbitral institutions when they are seeking an American (for that matter, more women could also be appointed when Other Nationals are being considered). While at least the ICC (10.3 per cent) and HKIAC’s numbers (20 per cent, admittedly on a smaller base) for Americans and ICC (10.1 per cent) and ICSID numbers (10.4 percent) for Other Nationals are significantly better than they were in earlier periods, the process of arbitrator selection has to be opened up somehow by the gatekeepers/door-openers on these decisions. For Americans in international arbitration to reflect the American population, far more women need to be named which means that far more women need to be brought on the path up to the highest levels of the profession.

Based on the survey results below and extrapolating from this information on American women for American minority lawyers, American lawyers with disabilities, and Americans LGBTQ lawyers, the situation is probably even worse – though again, better than it was in international arbitration in the 1980’s and 1990’s. The gatekeepers/door-openers on these decisions need to find their path to the appointment of far more American minorities, Americans with disabilities, and American LGBTQ lawyers.

B. Diversity as expressed in the survey results from thirty-three persons

Twenty-two out of the thirty-four persons responding to the survey were or had been in private practice, Twenty-three out of the thirty-four persons had acted as arbitrators. The rest were a mix of other categories (employee in an arbitral institution, in house counsel, or judge) with the principal other one (nine) being professors (more than one category could apply to a given person). Fully twenty-five of the respondents had greater than 20 years of experience in international arbitration. The range of arbitrator, counsel or arbitral institution experience ranged from one to hundreds of cases with these persons having served in over 2500 cases in these roles over the past ten years (though it is possible some were including pre-2003 cases).

<table>
<thead>
<tr>
<th>Years in International Arbitration</th>
<th>1-5 years</th>
<th>6-10 years</th>
<th>11-15 years</th>
<th>16-20 years</th>
<th>Greater than 20</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>25</td>
</tr>
</tbody>
</table>

1) American minorities

Turning to American minorities, fourteen of the thirty-four responding had experience with American minorities in international arbitration in the following numbers:

Number of Experiences with American Minorities in International Arbitration

<table>
<thead>
<tr>
<th>African-American</th>
<th>Middle-East or Arab-American</th>
<th>Asian-American</th>
<th>Hispanic-American</th>
<th>Native-American</th>
</tr>
</thead>
</table>

arbitrators, of whom 4 (0.78%) were women and in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. Louise Barrington, The Commercial Way to Justice (Kluwer 1997). The Stockholm Chamber of Commerce responded to the author on 9 March 2012 that 6.5% of all appointed arbitrators (both party appointed and appointed by the SCC between 2003 and 2012) have been women and 8.4% of the arbitrators appointed by the SCC have been women. However, it did not maintain these statistics routinely. The LCIA reported to Lucy Greenwood by email on 20 March 2012 that of 336 arbitrator appointments in 2011, 22 (6.5%) were female. The ICDR did not provide statistics to the authors. The Arbitration Institute of the Finland Chamber of Commerce stated that 27 % of the arbitrators appointed by the FCC in 2011 were women, but indicated that ‘very few’ of the party-appointed arbitrators were female (email to Lucy Greenwood dated 20 June 2012).”)
In terms of their experience with American minorities as arbitrators, one Hispanic-American Chairman, two African-American coarbitrators, two Middle-Eastern or Arab-American coarbitrators, four Asian-American coarbitrators, two Hispanic-American coarbitrators, and one Asian-American Sole Arbitrator were noted. As to how these American minorities were appointed, those who responded noted that four were party appointments and one was a joint nomination by the parties and coarbitrators or the parties alone, and no information was provided for the others.

As to American minorities as counsels in arbitration cases, Twenty-seven African-Americans, twenty-two to twenty-four Middle-Eastern or Arab Americans, eighteen to twenty Asian-Americans, and twenty-two Hispanic-Americans were noted. As to their roles as counsel, whether Lead Counsel, Member of the Arbitration Team of the Claimant(s) or Respondent(s), Trainee/Intern, or Other, three were Lead Counsel, seven were members of the arbitration team of the Claimant(s) or Respondent(s), and two were in other roles (such as Administrative Secretary to the Tribunal).

As to American minorities as experts, three African-Americans, three Middle-Eastern or Arab-American, and two Asian-Americans were noted. These experts were essentially all party appointed experts with a very few being named by the Arbitral Tribunal or Sole Arbitrator, and none by an institution.

2) American Women

Twenty-six out of the thirty-four arbitration practitioners responding had experience with American women in international arbitration. At least Forty-seven to fifty-one of these experiences were with American women as arbitrators. About six of these were as Chairman and at least 30 were as coarbitrators. As to the manner of appointment (please note the numbers do not total correctly but are as indicated), at least fifty-one to sixty-one were party appointments as coarbitrator, jointly as Chair, or jointly as Sole Arbitrator. Six appointments were by arbitral institutions. As counsel, well over 204 to 217 American women were counsel (with some respondents indicating they had seen “numerous” and “dozens” of American women counsel beyond the ones indicated by those that could number them). At least twenty-one to twenty-four of these American women were lead counsel and at least 117 to 118 were members of the arbitration team of the Claimant(s) or Respondent(s). Some respondents spoke of many in these categories and an uncountable number of trainees. Turning to experts, twenty-one or twenty-two American women were named experts with (of those reporting experts) seventeen of them being party appointed experts and one being an expert in a court case.

3) American lawyers with disabilities

Only one respondent had experience with an American with disabilities in an international arbitration. A few commented that they had not seen Americans with disabilities much in the profession and others referred to non-Americans with disabilities as having been arbitrators at the “top of their game.” One person noted that “disability” might include the case of a lawyer who had retired being permitted to unretire for purposes of addressing a case — a new way of thinking of the term disability for me.

4) American Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTQ) lawyers

There may be more than this amount based on a number indicated by one person, but it appears they are referring to themselves.
Five respondents had experience with LGBTQ American lawyers in international arbitration and the rest either saying no or not knowing. Three LGBTQ American lawyers were noted as having been arbitrators though roles were only available for one as Chair and one other as co-arbitrator. Those who responded indicated that one was jointly nominated by the co-arbitrators and the parties and one by an arbitral institution. As to counsel, four LGBTQ American lawyers were noted as having been counsel, with one as Lead Counsel and the other three noted as Members of the arbitration team of the Claimant(s) or Respondent(s). One was noted as an interpreter and one other was noted as a party-appointed expert in an international arbitration case.

IV. Comments

A. General

While recognizing that these samples are far from perfect and are essentially slightly more than anecdotal information only, a few thoughts do come to mind. While recognizing there may be double-counting, it appears safe to conclude that as of today there are a significant number of American women (most likely white) in international arbitration in all phases of being counsel but not so many as arbitrators. To a much lesser extent than American women, while recognizing there may be double-counting, it appears safe to conclude that as of today there are a few American minorities active in international arbitration in all phases of being counsel but even less as arbitrators. To a much lesser extent than American women and minorities (and given the paucity double-counting here is unlikely), there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration. For me, the bright aspect in this picture as compared to when I worked in the field in the 1980’s and 1990’s is best captured in the paraphrase of an old Negro spiritual: there are not as many as there ought to be, but it is slightly better than it was.

B. What can be done?

1) The value proposition provided by the target population

In an earlier article, I noted seven particular currents that an American minority needs to manage to make a successful career in international arbitration, to wit:

a. Domestic US Current - how do you rise in the profession – prestigious international law firm practice
b. Foreign Based – Current – little or no data on this example - foreign office U.S. law firm or foreign law firms
c. Human Capital – Current – law degrees (prestige and from different countries), languages, bar memberships, nationalities, family ties, mentors – Willem Vis – Office of Legal Advisor State Department - Internships at International Arbitral Institutions
d. Cooptation Current – marketing articles placed in key journals, speeches, advisory boards, power to choose articles etc
e. Changing International Commercial Arbitration Current - openness to new areas in arbitration where hierarchies are not set such as (back in 2004) domain name dispute resolution, maybe investment, maybe online dispute resolution and arbitration
f. Lifestyle Current - what price you are willing to pay (family, travel, etc)
g. Cultural Diversity Current - what are the primacist vs. universalist visions?\(^{11}\)

It appears that these seven currents remain valid and their management is a key task for any member of the four groups in the target population.

2) A little help for all my friends from neuroscience?

a) Explicit bias, implicit bias, and stereotype threat\(^{12}\)

Related to these management tasks for the prospective member of the target population is a second aspect of how one gets chosen for the path to rise to the highest levels of international arbitration careers. For this, I might suggest what is being learned from neuroscience and validated cross-culturally can help inform the thinking of individual members of the target populations, as well as gatekeepers and door-openers in the legal profession and international arbitral institutions.

An emerging area in neuroscience is the study of implicit bias and stereotype threat. The subject is of concern to the legal community generally. The American Bar Association Section of Litigation has partnered with the National Center for State Courts to address the issue in the judicial system. The American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline has deepened its efforts to understand how this affects achievement in the pipeline from K-12, college and law schools. The concepts are derived from neuroscience and psychology and refer to the process by which schemas (what might be called “mental shortcuts’ or “templates of knowledge”) develop in the brain that become implicit cognitions (things we do without thinking) and may become implicit social cognitions (things that guide our thinking about social traits). These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge.

A personal example of this is with regard to my name: Benjamin G. Davis. On a sufficient number of occasions to make me conclude it is possible that this is an ambient implicit bias about me, I have been mistaken for the grandson of the famous American World War II General Benjamin O. Davis, Jr. who led the Tuskegee Airmen. I am no relation, but on occasion I have heard comments along the lines of “Your grandfather would agree with that!” etc from people who could not possibly have known my maternal grandfather or paternal grandfather (who died in 1939). One theory I have had about my own life is that

\(^{11}\) Descriptions of these in more detail of these concepts are available in Benjamin G. Davis, The Color Line in International Commercial Arbitration: An American Perspective, (presented at the American Bar Association, Dispute Resolution Section Mid-Year meeting April 16, 2004), 14 American Review of International Arbitration (Columbia University) 461 (2004)

what success I have had may be attributable to a significant degree to persons thinking that I am the grandson of this famous general and having a favorable disposition (or implicit bias) toward me because of their belief. That favorable disposition might work even more for me simply because I never make reference to him (I have no reason to). That lack of flaunting him might be construed as modesty (“not flaunting his anointed heritage”) which could be perceived as endearing. Notice that in all of this, what I am doing is happening in ignorance of these implicit social cognitions that are occurring in the people around me. It is as if one is swimming in a sea of implicit social cognitions while living one’s life.

Explicit bias is described as stereotypes and attitudes that we expressly self-report on surveys, recognize, and embrace. Implicit bias is dissociated from explicit biases and not self-reported on surveys. Both forms of biases are related but are in fact being found to be different mental constructs. The manner of measuring implicit bias has been through the Implicit Association Test (IAT) which measures reaction times when sorting categories of pictures and words. The IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier (therefore quicker) when closely related items share the same response key. Pervasive reaction time differences were found in every country tested and they were consistent with the general social hierarchies. In addition, social category may influence what sort of biases one is likely to have.

Consequences of these implicit biases have been seen in terms of frequency of callback interviews in Sweden, awkward body language in the presence of someone, friendliness of facial expressions, negative evaluations of ambiguous actions by an African-American, negative evaluations of confident, aggressive, ambitious women in certain hiring conditions, shooter bias – black vs. white in video games, and on and on.

The key feature of implicit bias is that the IAT scores appear to better predict behavior than explicit self-reports. In a sense this is suggesting how one presents oneself in self-reporting and how one seems to act in terms of implicit social cognitions are different mental constructs and that the implicit biases are more salient to suggesting one’s behavior than what one says.

That being said, implicit bias is malleable and can be changed. Depending on a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes (such as listening to musicians behind a screen) are examples in which implicit bias has been made malleable.

Stereotype threat refers to one being at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. The research has shown that performance in academic contexts can be harmed by the awareness that one’s behaviors might be viewed by others through the lenses of race, gender, or sexual orientation as well as in a number of domains beyond academics. Stereotype threat has been seen to lead to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Consistent exposure to stereotype threat can reduce the degree that individuals value the domain in question. Students may choose not to pursue the domain of study and, consequently, limit the range of professions that they can pursue. Research has shown that stereotype threat can harm the academic performance of any individual for whom the situation invokes a stereotype-based expectation of poor performance. In addition, within a stereotyped group, some members may be more vulnerable to its negative consequences than others; factors such as the strength of one’s group identification or domain identification have been shown to be related to ones’ subsequent vulnerability to stereotype threat. Stereotype threat might interfere with performance by
increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort. Many different means have been used to induce and to attenuate stereotype threat.

b) Cultural bias as explicit bias, implicit bias, or stereotype threat

In the comments, some of the international practitioners have been willing to highlight some of the positive and negative cultural attitudes that different members of the target population may face. These comments from various persons were passed along on a no-names basis or were one’s I heard in my years in international arbitration (I indicate the one’s I heard).

General:

“As per your request, I return herewith the questionnaire. I am afraid that I am not much of assistance. I don’t keep track of the arbitrators with whom I sit, nor counsel or experts appearing before me. They are all equal to me.”

“Arbitrations often had no American nexus.”

“For the younger practitioners who are interested in arbitration, I tend to take the old-fashioned approach of basic legal training in a broad scope of commercial matters, laying a strong foundation for career development. If that meat and potatoes approach is too boring, then I won’t be offended if you find other sources. In all cases, I’m enthusiastic about arbitration as a career area. It never ceases to be fascinating.”

Men

“Pale, Male and Stale” (I heard often.)

Women:

“I have seen certain cultures where women are less respected than men in business circles. One client called men by their names during a meeting, but the woman as only “the lady” or “senorita.”

“I have heard clients make sexual remarks about female colleagues of mine, as if that is acceptable or the norm. Or comments about women that are derogatory.”

“Foreign travel is a huge part of the work, often for more than a week or two. For women with children, this is not easy. The most challenging is travelling while the child is still breast feeding, in terms of leaving an adequate supply of breast milk behind, care for that child during that period, being able to pump while travelling etc. Law firms do not do enough to support women at this stage of their personal/professional life in my opinion.”

“Male colleagues have often seen foreign travel as a time to party/let off steam. Female colleagues are sometimes seen as more conservative or prudent and a hindrance to that lifestyle. For that reason, they may not be selected for a particular trip on account of their gender.”
"[In France], women are pressured to return to work after having kids. My wife, who decided to spend a bit of time with our kids, faced some very negative comments from her French female friends."

“They are on the team. So they participate as members of the team. I am unaware of any special status or treatment.”

“[In 2007], I saw the first [ICC] case (for me) decided by an arbitral tribunal composed of three women. As I was having lunch with one very experienced (and old) French arbitrator right thereafter, I told him how pleased I was about this. His reaction was to ask me, very seriously: “What? Three women? And how was it?”...

“I neglected to mention that there are quite a number of Nigerian women in the arbitration field, and I believe some men, but there seem to be more women. Of course they are not American. Why do you restrict your study to Americans? There are probably fewer American arbitrators than UK, European, Australian or Asian.”

“Women constitute a very high percentage of the associates in law firm arbitration groups, and there are increasing numbers of women partners, including several who lead their groups.”

“There are enough female names in America that it isn't a stretch for a lazy party to appoint.”

“Most women get their first appointment through an arbitration institution. This is true for 99% of them...”

“I believe that the reasons are gender neutral and linked to the expertise of the individual.”

“There are very few women in international arbitration. At one point, a few years ago, at a reception at the Hong Kong Vis Moot, I asked a fairly well-known international arbitrator how many women he thought there were who regularly served as international arbitrators. I suggested that there were perhaps four or five. He said, “Oh no! There are at least 10 or 12.”

Minorities

“Either not nominated by a party or not nominated by the institution. This assumes that there are American minority groups arbitrators or other related functions. I confess I have not met any in France or the UK (other than you of course).”

“In the Middle East, Far East and Latin America, I have witnessed overt racism towards “blacks” as opposed to those who are “brown” or “white” (and not to African-Americans, but usually black people from that country or working in that country). I remember one law firm in Brazil where all the lawyers were “white” – ie European origin and all the staff were black (ie Brazilian Black or Indian). Some even had to wear maid uniforms to serve tea and coffee. Whether in terms of jokes, stereotypes or otherwise, whether clients or simply getting around a city, it can be challenging due to how the local black population might be treated in that already, or what the majority of people of that country have viewed and perceived from the television of the media. Combine that with a career where you have to deal with people from different nations – and not just professionals but witnesses who may be uneducated or not used to seeing a black person – it becomes all the more challenging. I would love to recruit more African-Americans into the field, but I just do not get the resumes or interest from that
particular minority. Hispanic, Russian/CIS or Arab-Americans are plentiful in the field and I see many resumes from these minorities. I have often wondered whether African-Americans know the challenges they may face outside of the US in advance and do not choose this field as a result? Or is it something else.”

“Chinese do not like blacks.” (I was told this before my first trip to Hong Kong.)

“Indians do not like blacks.” (I was told this before my first trip to New Delhi.)

“I have found that American minorities do not gravitate toward international arbitration. In our firm’s summer associate program, for example, we always have minorities, but they are ordinarily not the ones who express interest in international arbitration.”

“Probably [lack thereof] due to lack of experience. A vicious circle!”

“They are generally present in cases where U.S. law firms are involved in representing one or other of the parties.”

“There are a few ethnic Korean Americans at the major Korean law firms, including [lawfirm A], [lawfirm B] and [lawfirm C]. ... Not many, but a few. At [Lawfirm B], several of the associates are female. At [lawfirm A], the deputy chair of the practice is Korean American. They are all playing the role of counsel. ... Very few non-Korean Americans speak Korean well enough to actually conduct business or hearings in Korean. Maybe two or three people, just because it is such a hard language to learn for foreigners.”

“They were not offered as part of the candidate pool.”

“I think there are not a lot of minorities in the law firms that typically handle international arbitration. Also, as to the lack of minority arbitrators, this is affected by the old boy network which largely rules the appointment of arbitrators. It has a paucity of minority members.”

Lawyers with disabilities

“No doubt there currently is an underrepresentation of disabled persons. This may be due to the particularities of our activity which often times requires intensive travelling.”

“One arbitrator has an arm withered by polio, so might be seen as disabled. Nevertheless, he can beat most people at tennis and is one of the most successful arbitrators I know. So I cannot consider him in any way “disabled” by his “disfigurement”.”

“Another is totally deaf in one ear. He is the busiest arbitrator and most prolific author I know, so he too is not in the least “disabled” by his physical limitation.”

‘I am not sure what is meant by disabled, but I have encountered very few disabled persons in law practice generally.”

“Lack of individuals who have disability.”

“I do not think very many disabled persons practice in the kinds of firms that typically handle international arbitration.”
LGBTQ

“There is less acceptance of LGBTQ, let alone tolerance, in certain cultures.”

“I have heard jokes about LGBTQ people from clients, as if it is acceptable or the norm.”

“There is no reason in San Francisco and I believe LGBTQ are fairly represented.”

“Foreign travel – it is possible that a lawyer may feel uncomfortable travelling with a gay colleague. While he/she may profess to be “okay” with the sexual preference when in the office, that may become different on the road (though unsaid of course). He/she would just choose someone else for the trip if more senior, or profess an excuse not to travel if junior.”

“I do not know of your experiences here, but to me France is funny when it comes to diversity. It’s unbelievably racist and sexist, yet seems to have an implicit don’t-ask-don’t-tell approach to gay men in particular which means that gay men in particular do not face some barriers that they might encounter elsewhere (but on certain conditions).”

“Not apparent that candidates fit into this category even after meeting appointed persons.”

   c) From cultural bias to cultural gymnastics

Recognizing from the neuroscience discussion that implicit social cognitions abound around the world and that they tend to be in the direction of the social hierarchies, one might ask what could address the types of implicit bias that may be present as members of the target population make their way toward and in this sea of schemas in international arbitration in the United States and/or overseas.

We focus first on the preparation of those of the target population for work on the international plane to get in the field. Karen Mills of Indonesia has said it best as to the kinds of preparation an American woman (and I would extend this to all Americans particularly in the target population).

“It is not that easy for a woman to break in to the arbitration field, at least not as arbitrator. The first thing she should do is join ArbitralWomen, which supports women in arbitration. But you really need to be involved in actual arbitrations which means you need to work in a firm that does them and get on the team so you can assist and observe before you have anything to sell yourself on. The Vis and other Moots are very useful and any student considering entering the field should become involved in the moots as a necessity. It is the best training a student can have.”

While there may be difficulties, being a member of the target population is not somehow an inherent block to getting on that path. To rise on that path requires what we have all come to know in the profession: hard work, pluck, luck and mentorship/sponsorship. What may be a bit more different in the international plane is that those four things may come together in different ways and may occur anywhere in the world. The key moment, that I have seen repeated for so many people in this field’s lives in some form, is the moment - usually fairly early in a career for those with high-level international arbitration careers - when someone asks them something like “Can you be in Bratislava next week?” The person may have little or no experience with Bratislava but has to have the confidence to say “Yes.” Those moments come around in cycles over one’s life and I describe them as the “international plane...”
calling” moments. The key is to recognize the earliest career ones and have the pluck to take the leap of faith to go toward the international plane. The first experience becomes a second and on and on as one becomes the “go-to” person for the international work. Beyond just sharing the experience with friends, to become the “go-to” person form the habit of providing written trip reports to the powers that be upon one’s return to one’s base – wherever in the world. It helps those with the power over your career to identify you for even further work on the international plane. Make it easy for someone to see you on the international plane through one’s preparation and one’s willingness to take on the gamble.

On cross-racial, cross-gender, cross-cultural or cross-whatever mentoring, as noted from my own experience described above, there are no rational reasons why more of this cannot be done. It is a question of commitment and enthusiasm of gatekeepers/door-openers. The impact of those kinds of supportive efforts in my own life, as described above, has been tremendous. And, as one rises, the impact of one on those around you can lead to opening paths for still others. One example of even modest serendipitous cross-racial and cross-cultural encouragement (let alone mentoring/sponsoring) that can open someone to this path is this note I received from a European lawyer:

“On a more personal level, your mail reminded me that you were the very person who prompted me to develop my arbitration activities and introduced me to ICC arbitration, during a conversation we had on a TGV in the mid-nineties, when we fortuitously met en route to our respective family ski holidays and engaged in a casual conversation between train neighbors... At the time, I could not have imagined that our accidental conversation would have so important consequences on my life, as I am now spending the most part of my professional activities as international arbitrator.”

From the gatekeeper/door-opener perspective, a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes in nomination processes for counsel and/or arbitrators would seem to be approaches through which implicit bias can be made malleable. These types of efforts at malleability might take the form of reaching out to target population persons to help them gain initial experience in the field as summer associates or interns to help whet their appetite for this path. Along their path, recognizing the presence of implicit social cognitions and finding ways to address them may be ways to provide an environment that is inclusive and encourages the target population. Institutional structures to recognize implicit bias and overcome it can be found in having employees of many cultures – so that one particular set of implicit social cognitions connected to one social hierarchy does not predominate and the work space has a more fluid set of implicit social cognitions present.

For the individual in the target population, the principal lesson would be that implicit bias is malleable and can be changed – with varying degrees of difficulty in that process that may call on one’s perseverance. For the individual in the target population, the second principal lesson is to not succumb to stereotype threat when one feels at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. This would include not succumbing to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Experience is the key and good experience is a buffer for the bad experiences. Remind oneself of the good experiences in which one has done well to create for yourself an experience of inconsistent exposure to stereotype threat and thereby not reduce the degree the one values the domain in question. Some people are simply made to work in the international plane while some come to it as an acquired taste: whatever one’s path, allow oneself to go on it.
When travelling, follow a paraphrase of Jean Monnet’s advice to not carry the implicit social cognitions in the form of “advice” that others give about “those people or cultures,” but go and make up one’s own mind about the new place. In my work with people on five continents, it is the common humanity that shines through if recognized and encouraged. See the world when one can or little bits of it where one lives meeting foreigners and learning from their cultures. Rather than shy away out of a sense of inadequacy or whatever self-limiting schema, students might choose to pursue the domain of study of international arbitration either domestically or overseas and, consequently, expand the range of cultural experience to prepare for a profession that they might pursue.

As stereotype threat might interfere with performance by increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort, the individual must consciously work to recognize and attenuate stereotype threat that they feel about themselves even when others are consciously or unconsciously inducing it in them. One particularly moment for this can be in an interview. I have mentioned to students the “(X+1) game” in which one presents a resume and the person evaluating for the position asks for something that is not on the resume. That experience or background not on the resume is of course made to be seen as the crucial characteristic for the work. One should be prepared to counter such approaches – whether sincere or gamesmanship on the other persons part. No one has a perfect resume or experience, but one’s experience can aid one in accomplishing more.

Finally, those rising to the international plane should be sufficiently self-aware to try to be sensitive to when their own implicit social cognitions are influencing their view of others, whether domestically or internationally. Each of us has places where we are very comfortable performing and places which stretch our abilities to cope and accomplish. Growing the space where one is comfortable is part of the path. This ability to navigate a sea of schemas is what I have come to call the ability to do cultural gymnastics whether domestically, regionally, or transnationally.

There are limits, no doubt. In the face of brutal negative stereotypes of others and one’s internal sense of self-worth, the contradictions between what one thinks of oneself and what the ambient social environment is saying may be experienced as too much of a contradiction. For those times, it might help to think of such moments as not so much moments of impasse, but rather moments of breakthrough to another level of deeper meaning and to arrive at a new cognitive state – sometimes called a nascent state. Others may react favorably or unfavorably to that new self grown through the fiery cauldron of these kinds of contradictions. Finding one’s way to where one’s approaches will be both recognized and valued remains the path to tread. I just hope that path is in international arbitration for more of the target population.

V. Conclusion

While preparing this article, I was asked to provide a legal training for the Secretariat of the ICC International Court of Arbitration this past September in Paris. It was in Room 12 at ICC Headquarters at 38 Cours Albert 1er, the room where so many plenary and special court sessions, PIDA’s, Arbitrator Colloquia, Advanced Arbitrator Trainings and other events of memory had occurred. A few short weeks later, the ICC was moving to its new locale, so this was both a return to a very familiar place and an

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13 See generally, the remarkable analysis of the nascent state in Francesco Alberoni, Movement and Institution (1977).
opportunity to say goodbye in the last training held in that room full of memories. As I walked around the room and shook hands with the counsel, deputy counsel, secretaries, and interns in a room where women held up half or more of the sky, in my mind’s eye I saw the ghosts of sessions in 1980’s when women would have been barely present. As now the stale male though not so pale fellow in the room full of such jeunesse, I was overjoyed to see the progress that had been made which gave me hope for the progress that can still be made in enhancing diversity (and especially American diversity) in international arbitration. Afterward, in one of those moments of serendipity on the international plane as I walked to my next appointment down the Cours Albert 1er, I ran into Maitre Philippe Nouel, the first lawyer that I had met on a case back in 1986. Clearly, the widening circle of international arbitration stays unbroken.
American Diversity in International Arbitration 2003-2013

By Benjamin G. Davis, Associate Professor of Law, University of Toledo College of Law

I. Introduction

When I was approached to return to issues of diversity in international arbitration, I decided to expand on the methodology I used in the 2003-2004 period in three earlier articles on American minorities in international arbitration by examining American diversity in international arbitration across the broader...
target population for the ABA’s Goal III diversity efforts: American women, American minorities, American lawyers with disabilities, and American LGBTQ lawyers. These four groups are the target population described in the American Bar Association’s Goal III: Eliminate Bias and Enhance Diversity which has two objectives: 1. Promote full and equal participation in the Association, our profession, and the justice system by all persons. 2. Eliminate bias in the legal profession and the Justice System. In addition to sending a survey to 413 international arbitration practitioners of whom I was aware or to whom I was referred, I forwarded it to the ICC Counsel Alumni members of which I am a member as well as The International Law Discussion Space listserv, the Society of American Law Teachers listserv, as well as the Contracts, Dispute Resolution and Minority Groups listservs of the American Association of Law Schools. Further, I greatly appreciate that OGEMID and ArbitralWomen were kind enough to share the survey in their online spaces. Thus, an attempt was made to reach as broad a group of international arbitration practitioners on all five continents. Finally, based on anecdotal evidence that women may get their first appointment as an arbitrator through the appointment of an arbitral institution, I contacted a diverse group of international arbitral institutions around the world to see if they would be willing to share data on their appointments of members of the target population.

Thirty-four individuals ultimately filled out the survey and three of the international arbitral institutions provided data which will be discussed below. I thank these persons and organizations for their participation and thank the other persons and organizations for taking the time to look at whether they would participate. All of their attention to these matters in a very busy time of year is greatly appreciated.

II. Background – A Celebration of Diversity and Inclusion in International Arbitration

From my personal experience and research, I am certain that women lawyers including American women, US minority lawyers, lawyers with disabilities, and LGBTQ lawyers have been involved in some

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3 Race is, of course, a social construct. The vast literature on this subject and its discussion are excellently presented in Meera E. Deo, Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence, (August 26, 2013). Hastings Law Journal, Vol. 65, No. 3, 2014; Thomas Jefferson School of Law Research Paper No. 2315787. available at SSRN: http://ssrn.com/abstract=2315787 or http://dx.doi.org/10.2139/ssrn.2315787. For a concrete example, I have been socially constructed as an African-American in the United States. I have a Hispanic (from Cuba) grandmother, at least one Irish great-grandfather, a Native-American (Cherokee) great grandmother, and Chinese and Native-American (Blackfoot) ancestors according to my family lore, in addition to my ancestors of African origin whose presence in the United States dates back to at least 1800. Coming to recognize and feel ownership of that diverse history as part of living the social construct and self-identification as an African-American has been one of the most interesting aspects of this life. Coming to understand these and other diverse cultures through working with people in international arbitration is one of the pleasures of that work. I am certain that several Americans (and other Nationals) in international arbitration are similarly socially constructed as being of one race or another as they are perceived on the international plane. Experiencing these social constructs in countries with different cultures and histories can be both a liberating and constraining experience as one comes to understand opportunities and limitations in the expectations across borders. The key appears to be related to both the positive and negative impacts of explicit bias, implicit bias, and stereotype threat discussed later.

capacity in international arbitration over the past 35 or more years. It is true that, for most of that period, these persons may not have been seen in the classic roles of arbitrator, lead counsel, or leader of an international arbitral institution, but they have still been present in some aspect of arbitration working with an arbitrator, on the team of a party counsel, or within an international arbitral institution. The work of these persons in maintaining and enhancing the international arbitral edifice may have rarely been recognized openly, but I know they have been there and I take the opportunity of this article to salute their determined work.

I would like to highlight some particular pioneers. I start with Roberto Powers, the first African-American counsel in the International Chamber of Commerce in the period 1978-1986 who went on to a career in the United States Foreign Service. I have stood on his shoulders thanks to the many courtesies he provided me as I went through the hiring process at the International Chamber of Commerce International Court of Arbitration when I first joined it in 1986 and served at the Court through 1996 and then on to be a Director, Conference Programmes and Manager of the ICC Institute of World Business Law through 1999. I continue with the many women lawyers (juristes) and non-legal professionals who served as my assistants in those early years. I take this opportunity to honor Sylvie Kermoal, Tamsyn Taylor (British-American), Katharine Bernet, Irene Ezratty, and Odette Lagace all brilliant and two of them also brilliant lawyers. I also wish to honor the secretaries with whom I had the pleasure of working who pushed me to do better. When I was tasked my first summer at the ICC with writing a statement on behalf of the ICC in a case before the Obergericht des Kantons Zurich and ultimately the Swiss Supreme Court, Tamsyn’s (as secretary as she then was) trenchant critique as she typed pushed me to broaden my approach and I am eternally grateful to her. I also honor the late Cynthia Scharf who helped me learn the duty to manage and Michele Clergeaud who was ahead of me in my work. I wish to also honor Rita Ortega, Francoise Barriere, Ingrid Materner, Herta Pechenard, Marie-Christine Mosdier, Genevieve Pathiaud, Paule Daudin, Elisabeth Passedat, Sylvie Picard Renault and Josette Watrin for their work in keeping the ICC Secretariat running and growing. I honor the late Corinne Jarlot, Mireze Philippe, Michele Clergeaud, and Irene Ezratty who were instrumental on the team that developed the first generation Case Management System of the ICC in the 1989-1993 period as well as, for the latter two, their crucial roles in the famous International Fast-Track Commercial Arbitration Cases in 1992. I would like to honor the interns and short-term hires who worked on my team and came through the ICC from around the world many of whom have gone on to great things such as Michael Volkvitsch, Robert Smit, Sandrine Colletier, Pascale Lorping, Masaaki Sawano, Ram Madaan, Nader Ibrahim, and Georges Affaki. I especially mention the writing one August 1993 with Michael and Odette of an article which was one of the great experiences of my life.

We must also honor the gatekeepers who also were door-openers. First for me is Eric A. Schwartz who interviewed me as a second year law student and put my name forward for a final interview with Gene Forcione when SG Archibald and Co (as it then was) included me in their summer associate program in Paris. That summer 1982, Kathie Claret and Kristen Karsten, Thomas Jahn, as well as Christopher Seppala opened my horizons to the world of international commercial arbitration. In my contracts class,

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5 Today this process might be easier thanks to the Vis Moot and the Vis Moot East work of Eric Bergsten and Louise Barrington that have opened the doors to international arbitration to so many around the world.
I speak each year of Christopher Seppala sitting down with me and going over word for word my first memo to him – an investment in me for which I remain indebted all these years later. I honor William L. Craig and Christopher Seppala for being references when I applied at the ICC. I honor Stephen R. Bond and Sigvard Jarvin who demonstrated the confidence to hire me as a counsel. I honor the late ICC Court Chairman Michel Gaudet and the late ICC Court Chairman Alain Plantey for their insistence on excellence while teaching what it means to be a person working on the international plane: they remain my two primary mentors. I honor the late ICC Court Chairman Robert Briner, then head of the Commission on International Arbitration Paul Gelinas and the late head of the Institute of World Business Law Serge Lazareff for their support in putting into place Gaudet Day in 1998. I honor Louise Barrington and Michele Garzon for their assistance in my moving from the ICC Court to the ICC Institute. Louise broke new ground in opening ICC Hong Kong in the mid-90’s – the first overseas office of the Secretariat. I honor the other counsels and general counsels over those years from the doyen Jean-Jacques Arnaldez through Guillermo Aguilar Alvarez, Christophe Imhoos, Dominique Hascher, Raphael Jakoba, Michael Buhler, Eric Schafer, Hermann Verbst, Juan Ramon Iturriagagoitia, Christopher Koch, Fabien Gelinas, Joachim Kuckenberg, Fernando Mantilla Serrano and other Deputy Counsel such as Corinne Nguyen, Katarina Gonzalez Arrocha, and Cheng-Yee Khong who have gone on to great things in international arbitration and beyond. I honor all of the arbitrators, counsels and members of the Court and Institute with whom I had the honor to work in those years. In addition to Roberto Powers as an African-American pioneer at the highest level of international arbitration, we can think today of Calvin Hamilton, Douglas Earl McClaren (first African-American appointed an arbitrator by the ICC I believe), and Floyd Weatherspoon for their indefatigable work as counsel and/or arbitrators.

Some of the most significant early developments for women were the appointment of Tila Maria de Hancock in 1982 to be the Director of the ICC International Court of Arbitration. Gender diversity in the assistant role increased with Sami Houerbi being the first man so named in the early 90’s. A further development was the change of the title of assistants to Deputy Counsel in the early 1990’s and the promotion of Anne Cambournac (as she then was) from Deputy Counsel to be the first counsel who was a woman by then Secretary General Eric Schwartz. Anne-Marie Whitesell’s promotion from counsel to Deputy Secretary General in 1999 and Secretary General in 2001, a second generation appointment nearly twenty years after Tila Maria de Hancock. Another was the promotion of Jennifer Kirby from counsel to Deputy Secretary-General in 2005, as was the appointment of Mireze Philippe as Special Counsel in 2000. Mireze Philippe and Louise Barrington crystallized ArbitralWomen from an informal group in 1993 to a formal creation in 2005, a further milestone on the path. I take this occasion to honor certain American women pioneers such as Sally Harpole out in Hong Kong and Karen Mills in Indonesia who were working in Asia long before so many others as well as Gabrielle Kaufmann-Kohler, Eva Horvath, Teresa Giovannini, Antonias Dimolitsa, Delissa Ridgway, Lorraine Brennan, Jane Willems, Vera Van Houtte, Nancy Turck, Nayla Comeir-Obeid, Dana Freyer, Caroline Malinvaud, Loretta Malintoppi, Sarah Francois-Poncet, Judith Gill, and so many others who started working in the vineyards of international arbitration in the 1980’s and 1990’s.
As this work causes men of many countries to spring to mind the *devoir de mémoire* (it is an international arbitration thing) requires that I honor in what might be termed a name *collage* the late Abdelhay Sefrioui, Antonio Crivellaro, Mauro Ferrante, Lucien Simont, Otto Sandrock, Pieter Sanders, Diego Corapi, Albert J. Van den Berg, Jan Paulsson, Piero Bernardini, Giorgio Bernini, Pierre Lalive, Samir Saleh, Lord Dervaird, Spencer Boyer, Andreas Lowenfeld, Bernardo Cremades, the late Hans Smit, Tudor Popescu, Lawrence Newman, George Bermann, Antis Triantafyllides, John Beechey, Moses Silverman, Yves Fortier, Marc Lalonde, Pierre Bellet, Gerald Aksen, Nigel Blackburn, Abdul Aziz Gaballah, Theo Klein, Alain Prujiner, Pierre Tercier, John Kerr, Arthur Rovine, Toby Landau, Otto L.O. de Witt Wijnen, Jean-Louis Delvolve, Arthur Marriott, Naël Bunni, Ercus Stewart, George Bermann, Marc Blessing, William “Rusty” Park, Peter Hafter, Pierre Karrer, Claude Reymond, Robert Karrer, Harry L. Arkin, Werner Melis, Julian Lew, V.V. “Johnny” Veeder, Ahmed El-Kosheri, Hans van Houtte, Amozs Wako, Werner Wenger, Bernard Hanotiau, James Carter, Philippe LeBoulang, Andre Faures, Fabien Gelinas, Nabil Antaki, Anton-Henry Gaede, Ottoarndt Glossner, Pierre Mayer, the late Nabih Bulos, Michael Polkinghorne, Eric Robine, Charles Kaplan, Thomas Webster, Pierre-Yves Tschanz, Axel Baum, Johan Eruaw, Sir Edward Evellegh, Edward Chiasson, the late Philippe Fouchard, Lord Wilberforce, Jacques Werner, Berthold Goldmann, Claude Bessard, Jose-Luis Siqueiros, Jean Robert, Raul Medina Mora, Gonzalo Santos, Jean-Francois Poudret, the late Neil Phillips, A.K. Bansal, David Rivkin, Emmanuel Gaillard, Charles Poncet, Mohammed Bedjaoui, Jacques Buhart, Peter Wolrich, David Brown, Aktham El-Kholy, the late George Cacoyannis, Stelio Valentini, Rene Bourdin, the late Sir Michael Kerr, Charles Brewer, Howard Holtzman, Renato Roncaglia, Jacques El-Hakim, Emmanuel Jolivet, Fali Nariman, A.M. Singhvi, Andrea Giardina, Mark Littman, Toby Landau, Ignaz Seidl-Hohenveldern, D.C. Singhania, the late Jacques Revaclier, Christopher To, Michael Pryles, Michael Hwang, Claus Von Wobeser, Karl Heinz Bockstiegel, the late Michael Hoellering, Steven Smith, Richard Horning, Bola Ajibola, Aktham El-Kholy, Roland Amoussou-Guenou, Sami Habayeb, Lord Mustill, Andre Beyly, Wang Sheng Chang, Antoine Kassis, Michel Soumrani, Khaled Kadiki, Abdel Hamid el-Ahdab, Moussa Raphael, Cecil Abraham, Michael Khoo, Michael Moser, Lawrence Boo, Philip Yang, Nigel Li, and so many others who through their example showed the path and extended courtesies to me. If I have not mentioned someone, rest assured that I have thought of you and see your face though part of your name has been lost to failing memory for which I beg your forgiveness.

Fast forward to the present and certainly the most significant developments for women – including American women - are the appointment of Meg Kinnear as the Secretary General of the International Centre for the Settlement of Investment Disputes, India Johnson as the President and Chief Executive Officer of the American Arbitration Association, Annette Magnusson as the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce, Kathy Bryan as the President and Chief Executive Officer and Beth Trent as Senior Vice President of CPR, Teresa Cheng as the Chairman and Chiann Bao as the Secretary General of the Hong Kong International Arbitration Centre, Julie Sager, Executive Vice President and Senior Financial Officer and Kimberley Taylor Senior Vice President and

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6 This collage of names is a work of memory, not a listing. I only indicated and only know of some who have passed - as might be said in Togo where I worked soon after my graduate studies - over to the spirit world.

7 I believe the first U.S. minority person to rise to this level. Her speech at the launch of Ladies in Litigation and Arbitration of October 10, 2013 in Hong Kong is remarkable.
Chief Operating Officer at JAMS, Nadia Darwazeh as Secretary General of the Jerusalem Arbitration Center, Sarah Lancaster as the Registrar of the London Court of International Arbitration, Lim Seok Hui as Chief Executive Officer and Tan Ai Leen as Registrar at the Singapore International Arbitration Centre. I have been pleased also to learn recently that Megha Joshi has been named in 2012 as the Executive Secretary/Chief Executive Officer of the newly minted Lagos Court of Arbitration, another addition to the Arbitral Women. We can think of extraordinary international arbitration practitioners such as Carolyn Lamm, Abby Cohen Smutny, and Lucy Reed who have come to the fore in the 2000’s. In the space of intersectionality, we can honor Gabrielle McDonald, first African-American woman appointed a judge at the Iran-United States Claims Tribunal. We can highlight Nancy Thevenin, Effie Silva, and Deborah Enix-Ross (the first African-American woman counsel at WIPO) for their pioneering roles as American minority women in international arbitration.

As inspiration to others who may have physical disabilities from childhood or later like me and to all in general, we can honor Neil Kaplan for his extraordinary work in Hong Kong as judge particularly in the transition period from British to Chinese rule, as well as for all the work as arbitrator and the personal kindnesses he extended to me. We can highlight David Larson teacher and arbitrator with all of his pioneering work in technology mediated dispute resolution. We can think of those who have surmounted deafness in one or another ear to become some of the top arbitrators and/or counsel in the world.

And, as I have become aware of you in the survey process, we can honor those counsel and/or arbitrators who are openly LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning) as the inspiration they give to those who feel the need to hide their sexual orientation and for the encouragement of minds to open of all in international arbitration.

III. The Survey

With regard to appointments as arbitrators or in roles as counsel, the evidence from the survey suggest that there are persons of all four groups (though not necessarily Americans) present in these roles.

A. Diversity of appointments in international arbitration by International Arbitral Institutions

I contacted the American Arbitration Association, the Court of Arbitration for Sport/Tribunal Arbitral du Sport, the Chinese International Economic and Trade Arbitration Commission, CPR, the Hong Kong International Arbitration Centre, the Iran-United States Claims Tribunal, the International Centre for the Settlement of Investment Disputes of the World Bank, the International Chamber of Commerce International Court of Arbitration, JAMS, the Korean Commercial Arbitration Board, the London Court of International Arbitration, the Permanent Court of Arbitration, the Singapore International Arbitration Centre, and the World Intellectual Property Organization Arbitration and Mediation Center and asked if they could provide data for the number of US nationals appointed in international arbitrations for 2012 with a breakdown by gender and if possible by American minorities, American lawyers with disabilities and American LGBTQ lawyers. The Hong Kong International Arbitration Centre, the International Centre for the Settlement of Investment Disputes of the World Bank and the International Chamber of Commerce International Court of Arbitration responded with numbers or a means to calculate the
numbers by gender, with information on American minorities, American lawyers with disabilities and American LGBTQ lawyers not being available. The results from these three institutions are below:

Hong Kong International Arbitration Centre – Appointments by gender in 2012

<table>
<thead>
<tr>
<th>Arbitrator appointments of all kinds 2012 – HKIAC</th>
<th>USA Nationals (Appointed/Confirmed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>2 / 2</td>
</tr>
<tr>
<td>Women</td>
<td>Nil / 1</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
</tr>
</tbody>
</table>

International Center for the Settlement of Investment Disputes of the World Bank – Appointments by gender for cases started in 2012

<table>
<thead>
<tr>
<th>Arbitrator appointments of all kinds 2012 – ICSID</th>
<th>US Nationals</th>
<th>Other Nationals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>11</td>
<td>106</td>
</tr>
<tr>
<td>Women</td>
<td>0</td>
<td>11</td>
</tr>
</tbody>
</table>

International Chamber of Commerce International Court of Arbitration – Appointments by gender 2012

<table>
<thead>
<tr>
<th>Arbitrator appointments of all kinds 2012 – ICC Court</th>
<th>US Nationals</th>
<th>Other Nationals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointments of Men by the ICC Court</td>
<td>19</td>
<td>536</td>
</tr>
<tr>
<td>Confirmations of Men by the Secretary General of the ICC Court</td>
<td>59</td>
<td>555</td>
</tr>
<tr>
<td>Appointments of Women by the ICC Court</td>
<td>3</td>
<td>76</td>
</tr>
<tr>
<td>Confirmations of Women by the Secretary General of the ICC Court</td>
<td>6</td>
<td>47</td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>1214</td>
</tr>
</tbody>
</table>

For American women, if these numbers can be the most favorable proxies for all the international arbitral institutions, the numbers speak for themselves: there need to be more appointments of

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8 Due to the inability to determine exactly which year a given arbitrator was named – as opposed to the constitution of an arbitral tribunal – I include as a proxy for 2012 alone all the cases that started in 2012 knowing full well that some of the individual appointments may have happened in 2013.

9 This view is comforted by earlier work on appointments by gender at least. See footnote 9, Lucy Greenwood and C. Mark Baker, supra note 2 for 2011 reports on appointments by gender (but not by gender of Americans). (“The authors contacted the LCIA, SCC, ICDR, and the ICC requesting information on the gender of the arbitrators appointed in arbitrations administered by the institutions. In an email exchange with Lucy Greenwood on 17 February 2012 and subsequently followed up by a telephone call on 21 February 2012, the ICC confirmed that it did not maintain information on diversity. Note that Louise Barrington reported that in 1990 the ICC named 517
American women by parties and international arbitral institutions when they are seeking an American (for that matter, more women could also be appointed when Other Nationals are being considered). While at least the ICC (10.3 per cent) and HKIAC’s numbers (20 per cent, admittedly on a smaller base) for Americans and ICC (10.1 per cent) and ICSID numbers (10.4 percent) for Other Nationals are significantly better than they were in earlier periods, the process of arbitrator selection has to be opened up somehow by the gatekeepers/door-openers on these decisions. For Americans in international arbitration to reflect the American population, far more women need to be named which means that far more women need to be brought on the path up to the highest levels of the profession.

Based on the survey results below and extrapolating from this information on American women for American minority lawyers, American lawyers with disabilities, and Americans LGBTQ lawyers, the situation is probably even worse – though again, better than it was in international arbitration in the 1980’s and 1990’s. The gatekeepers/door-openers on these decisions need to find their path to the appointment of far more American minorities, Americans with disabilities, and American LGBTQ lawyers.

B. Diversity as expressed in the survey results from thirty-three persons

Twenty-two out of the thirty-four persons responding to the survey were or had been in private practice, Twenty-three out of the thirty-four persons had acted as arbitrators. The rest were a mix of other categories (employee in an arbitral institution, in house counsel, or judge) with the principal other one (nine) being professors (more than one category could apply to a given person). Fully twenty-five of the respondents had greater than 20 years of experience in international arbitration. The range of arbitrator, counsel or arbitral institution experience ranged from one to hundreds of cases with these persons having served in over 2500 cases in these roles over the past ten years (though it is possible some were including pre-2003 cases).

<table>
<thead>
<tr>
<th>Years in International Arbitration</th>
<th>1-5 years</th>
<th>6-10 years</th>
<th>11-15 years</th>
<th>16-20 years</th>
<th>Greater than 20</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>25</td>
</tr>
</tbody>
</table>

1) American minorities

Turning to American minorities, fourteen of the thirty-four responding had experience with American minorities in international arbitration in the following numbers:

Number of Experiences with American Minorities in International Arbitration

<table>
<thead>
<tr>
<th>African-American</th>
<th>Middle-East or Arab-American</th>
<th>Asian-American</th>
<th>Hispanic-American</th>
<th>Native-American</th>
</tr>
</thead>
</table>

arbitrators, of whom 4 (0.78%) were women and in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. Louise Barrington, The Commercial Way to Justice (Kluwer 1997). The Stockholm Chamber of Commerce responded to the author on 9 March 2012 that 6.5% of all appointed arbitrators (both party appointed and appointed by the SCC between 2003 and 2012) have been women and 8.4% of the arbitrators appointed by the SCC have been women. However, it did not maintain these statistics routinely. The LCIA reported to Lucy Greenwood by email on 20 March 2012 that of 336 arbitrator appointments in 2011, 22 (6.5%) were female. The ICDR did not provide statistics to the authors. The Arbitration Institute of the Finland Chamber of Commerce stated that 27 % of the arbitrators appointed by the FCC in 2011 were women, but indicated that ‘very few’ of the party-appointed arbitrators were female (email to Lucy Greenwood dated 20 June 2012)."
In terms of their experience with American minorities as arbitrators, one Hispanic-American Chairman, two African-American coarbitrators, two Middle-Eastern or Arab-American coarbitrators, four Asian-American coarbitrators, two Hispanic-American coarbitrators, and one Asian-American Sole Arbitrator were noted. As to how these American minorities were appointed, those who responded noted that four were party appointments and one was a joint nomination by the parties and coarbitrators or the parties alone, and no information was provided for the others.

As to American minorities as counsels in arbitration cases, Twenty-seven African-Americans, twenty-two to twenty-four Middle-Eastern or Arab Americans, eighteen to twenty Asian-Americans, and twenty-two Hispanic-Americans were noted. As to their roles as counsel, whether Lead Counsel, Member of the Arbitration Team of the Claimant(s) or Respondent(s), Trainee/Intern, or Other, three were Lead Counsel, seven were members of the arbitration team of the Claimant(s) or Respondent(s), and two were in other roles (such as Administrative Secretary to the Tribunal).

As to American minorities as experts, three African-Americans, three Middle-Eastern or Arab-American, and two Asian-Americans were noted. These experts were essentially all party appointed experts with a very few being named by the Arbitral Tribunal or Sole Arbitrator, and none by an institution.

2) American Women

Twenty-six out of the thirty-four arbitration practitioners responding had experience with American women in international arbitration. At least Forty-seven to fifty-one of these experiences were with American women as arbitrators. About six of these were as Chairman and at least 30 were as coarbitrators. As to the manner of appointment (please note the numbers do not total correctly but are as indicated), at least fifty-one to sixty-one were party appointments as coarbitrator, jointly as Chair, or jointly as Sole Arbitrator. Six appointments were by arbitral institutions. As counsel, well over 204 to 217 American women were counsel (with some respondents indicating they had seen “numerous” and “dozens” of American women counsel beyond the ones indicated by those that could number them). At least twenty-one to twenty-four of these American women were lead counsel and at least 117 to 118 were members of the arbitration team of the Claimant(s) or Respondent(s). Some respondents spoke of many in these categories and an uncountable number of trainees. Turning to experts, twenty-one or twenty-two American women were named experts with (of those reporting experts) seventeen of them being party appointed experts and one being an expert in a court case.

3) American lawyers with disabilities

Only one respondent had experience with an American with disabilities in an international arbitration. A few commented that they had not seen Americans with disabilities much in the profession and others referred to non-Americans with disabilities as having been arbitrators at the “top of their game.” One person noted that “disability” might include the case of a lawyer who had retired being permitted to unretire for purposes of addressing a case — a new way of thinking of the term disability for me.

4) American Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTQ) lawyers

10 There may be more than this amount based on a number indicated by one person, but it appears they are referring to themselves.
Five respondents had experience with LGBTQ American lawyers in international arbitration and the rest either saying no or not knowing. Three LGBTQ American lawyers were noted as having been arbitrators though roles were only available for one as Chair and one other as coarbitrator. Those who responded indicated that one was jointly nominated by the coarbitrators and the parties and one by an arbitral institution. As to counsel, four LGBTQ American lawyers were noted as having been counsel, with one as Lead Counsel and the other three noted as Members of the arbitration team of the Claimant(s) or Respondent(s). One was noted as an interpreter and one other was noted as a party-appointed expert in an international arbitration case.

IV. Comments

A. General

While recognizing that these samples are far from perfect and are essentially slightly more than anecdotal information only, a few thoughts do come to mind. While recognizing there may be double-counting, it appears safe to conclude that as of today there are a significant number of American women (most likely white) in international arbitration in all phases of being counsel but not so many as arbitrators. To a much lesser extent than American women, while recognizing there may be double-counting, it appears safe to conclude that as of today there are a few American minorities active in international arbitration in all phases of being counsel but even less as arbitrators. To a much lesser extent than American women and minorities (and given the paucity double-counting here is unlikely), there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration. For me, the bright aspect in this picture as compared to when I worked in the field in the 1980’s and 1990’s is best captured in the paraphrase of an old Negro spiritual: there are not as many as there ought to be, but it is slightly better than it was.

B. What can be done?

1) The value proposition provided by the target population

In an earlier article, I noted seven particular currents that an American minority needs to manage to make a successful career in international arbitration, to wit:

a. Domestic US Current - how do you rise in the profession – prestigious international law firm practice
b. Foreign Based – Current – little or no data on this example - foreign office U.S. law firm or foreign law firms
c. Human Capital – Current – law degrees (prestige and from different countries), languages, bar memberships, nationalities, family ties, mentors – Willem Vis – Office of Legal Advisor State Department – Internships at International Arbitral Institutions
d. Cooptation Current – marketing articles placed in key journals, speeches, advisory boards, power to choose articles etc
e. Changing International Commercial Arbitration Current - openness to new areas in arbitration where hierarchies are not set such as (back in 2004) domain name dispute resolution, maybe investment, maybe online dispute resolution and arbitration
f. Lifestyle Current - what price you are willing to pay (family, travel, etc)
g. Cultural Diversity Current - what are the primacist vs. universalist visions?\textsuperscript{11}

It appears that these seven currents remain valid and their management is a key task for any member of the four groups in the target population.

2) A little help for all my friends from neuroscience?

a) Explicit bias, implicit bias, and stereotype threat\textsuperscript{12}

Related to these management tasks for the prospective member of the target population is a second aspect of how one gets chosen for the path to rise to the highest levels of international arbitration careers. For this, I might suggest what is being learned from neuroscience and validated cross-culturally can help inform the thinking of individual members of the target populations, as well as gatekeepers and door-openers in the legal profession and international arbitral institutions.

An emerging area in neuroscience is the study of implicit bias and stereotype threat. The subject is of concern to the legal community generally. The American Bar Association Section of Litigation has partnered with the National Center for State Courts to address the issue in the judicial system. The American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline has deepened its efforts to understand how this affects achievement in the pipeline from K-12, college and law schools. The concepts are derived from neuroscience and psychology and refer to the process by which schemas (what might be called “mental shortcuts’ or “templates of knowledge”) develop in the brain that become implicit cognitions (things we do without thinking) and may become implicit social cognitions (things that guide our thinking about social traits). These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge.

A personal example of this is with regard to my name: Benjamin G. Davis. On a sufficient number of occasions to make me conclude it is possible that this is an ambient implicit bias about me, I have been mistaken for the grandson of the famous American World War II General Benjamin O. Davis, Jr. who led the Tuskegee Airmen. I am no relation, but on occasion I have heard comments along the lines of “Your grandfather would agree with that!” etc from people who could not possibly have known my maternal grandfather or paternal grandfather (who died in 1939). One theory I have had about my own life is that

\textsuperscript{11} Descriptions of these in more detail of these concepts are available in Benjamin G. Davis, The Color Line in International Commercial Arbitration: An American Perspective, (presented at the American Bar Association, Dispute Resolution Section Mid-Year meeting April 16, 2004), 14 American Review of International Arbitration (Columbia University) 461 (2004)

what success I have had may be attributable to a significant degree to persons thinking that I am the
grandson of this famous general and having a favorable disposition (or implicit bias) toward me because
of their belief. That favorable disposition might work even more for me simply because I never make
reference to him (I have no reason to). That lack of flaunting him might be construed as modesty (“not
flaunting his anointed heritage”) which could be perceived as endearing. Notice that in all of this, what I
am doing is happening in ignorance of these implicit social cognitions that are occurring in the people
around me. It is as if one is swimming in a sea of implicit social cognitions while living one’s life.

Explicit bias is described as stereotypes and attitudes that we expressly self-report on surveys,
recognize, and embrace. Implicit bias is dissociated from explicit biases and not self-reported on
surveys. Both forms of biases are related but are in fact being found to be different mental constructs.
The manner of measuring implicit bias has been through the Implicit Association Test (IAT) which
measures reaction times when sorting categories of pictures and words. The IAT measures the strength
of associations between concepts (e.g. black people, gay people) and evaluations (e.g. good, bad) or
stereotypes (e.g. athletic, clumsy). The main idea is that making a response is easier (therefore quicker)
when closely related items share the same response key. Pervasive reaction time differences were
found in every country tested and they were consistent with the general social hierarchies. In addition,
social category may influence what sort of biases one is likely to have.

Consequences of these implicit biases have been seen in terms of frequency of callback interviews in
Sweden, awkward body language in the presence of someone, friendliness of facial expressions,
negative evaluations of ambiguous actions by an African-American, negative evaluations of confident,
aggressive, ambitious women in certain hiring conditions, shooter bias – black vs. white in video games,
and on and on.

The key feature of implicit bias is that the IAT scores appear to better predict behavior than explicit self-
reports. In a sense this is suggesting how one presents oneself in self-reporting and how one seems to
act in terms of implicit social cognitions are different mental constructs and that the implicit biases are
more salient to suggesting one’s behavior than what one says.

That being said, implicit bias is malleable and can be changed. Depending on a person’s motivation to
be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or
introduction of procedural changes (such as listening to musicians behind a screen) are examples in
which implicit bias has been made malleable.

Stereotype threat refers to one being at risk of confirming, as a self-characteristic, a negative stereotype
about one’s group. The research has shown that performance in academic contexts can be harmed by
the awareness that one’s behaviors might be viewed by others through the lenses of race, gender, or
sexual orientation as well as in a number of domains beyond academics. Stereotype threat has been
seen to lead to self-handicapping strategies, such as reduced practice time for a task and to a reduced
sense of belonging to the stereotyped domain. Consistent exposure to stereotype threat can reduce the
degree that individuals value the domain in question. Students may choose not to pursue the domain of
study and, consequently, limit the range of professions that they can pursue. Research has shown that
stereotype threat can harm the academic performance of any individual for whom the situation invokes
a stereotype-based expectation of poor performance. In addition, within a stereotyped group, some
members may be more vulnerable to its negative consequences than others; factors such as the
strength of one’s group identification or domain identification have been shown to be related to ones’
subsequent vulnerability to stereotype threat. Stereotype threat might interfere with performance by
increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort. Many different means have been used to induce and to attenuate stereotype threat.

b) Cultural bias as explicit bias, implicit bias, or stereotype threat

In the comments, some of the international practitioners have been willing to highlight some of the positive and negative cultural attitudes that different members of the target population may face. These comments from various persons were passed along on a no-names basis or were one’s I heard in my years in international arbitration (I indicate the one’s I heard).

General:

“As per your request, I return herewith the questionnaire. I am afraid that I am not much of assistance. I don’t keep track of the arbitrators with whom I sit, nor counsel or experts appearing before me. They are all equal to me.”

“Arbitrations often had no American nexus.”

“For the younger practitioners who are interested in arbitration, I tend to take the old-fashioned approach of basic legal training in a broad scope of commercial matters, laying a strong foundation for career development. If that meat and potatoes approach is too boring, then I won’t be offended if you find other sources. In all cases, I’m enthusiastic about arbitration as a career area. It never ceases to be fascinating.”

Men

“Pale, Male and Stale” (I heard often.)

Women:

“I have seen certain cultures where women are less respected than men in business circles. One client called men by their names during a meeting, but the woman as only “the lady” or “senorita.”

“I have heard clients make sexual remarks about female colleagues of mine, as if that is acceptable or the norm. Or comments about women that are derogatory.”

“Foreign travel is a huge part of the work, often for more than a week or two. For women with children, this is not easy. The most challenging is travelling while the child is still breast feeding, in terms of leaving an adequate supply of breast milk behind, care for that child during that period, being able to pump while travelling etc. Law firms do not do enough to support women at this stage of their personal/professional life in my opinion.”

“Male colleagues have often seen foreign travel as a time to party/let off steam. Female colleagues are sometimes seen as more conservative or prudent and a hindrance to that lifestyle. For that reason, they may not be selected for a particular trip on account of their gender.”
“[In France], women are pressured to return to work after having kids. My wife, who decided to spend a bit of time with our kids, faced some very negative comments from her French female friends.”

“They are on the team. So they participate as members of the team. I am unaware of any special status or treatment.”

“[In 2007], I saw the first [ICC] case (for me) decided by an arbitral tribunal composed of three women. As I was having lunch with one very experienced (and old) French arbitrator right thereafter, I told him how pleased I was about this. His reaction was to ask me, very seriously: “What? Three women? And how was it?”..."

“I neglected to mention that there are quite a number of Nigerian women in the arbitration field, and I believe some men, but there seem to be more women. Of course they are not American. Why do you restrict your study to Americans? There are probably fewer American arbitrators than UK, European, Australian or Asian.”

“Women constitute a very high percentage of the associates in law firm arbitration groups, and there are increasing numbers of women partners, including several who lead their groups.”

“There are enough female names in America that it isn't a stretch for a lazy party to appoint.”

“Most women get their first appointment through an arbitration institution. This is true for 99% of them...”

“I believe that the reasons are gender neutral and linked to the expertise of the individual.”

“There are very few women in international arbitration. At one point, a few years ago, at a reception at the Hong Kong Vis Moot, I asked a fairly well-known international arbitrator how many women he thought there were who regularly served as international arbitrators. I suggested that there were perhaps four or five. He said, “Oh no! There are at least 10 or 12.”

**Minorities**

“Either not nominated by a party or not nominated by the institution. This assumes that there are American minority groups arbitrators or other related functions. I confess I have not met any in France or the UK (other than you of course).”

“In the Middle East, Far East and Latin America, I have witnessed overt racism towards “blacks” as opposed to those who are “brown” or “white” (and not to African-Americans, but usually black people from that country or working in that country). I remember one law firm in Brazil where all the lawyers were “white” – ie European origin” and all the staff were black (ie Brazilian Black or Indian). Some even had to wear maid uniforms to serve tea and coffee. Whether in terms of jokes, stereotypes or otherwise, whether clients or simply getting around a city, it can be challenging due to how the local black population might be treated in that already, or what the majority of people of that country have viewed and perceived from the television of the media. Combine that with a career where you have to deal with people from different nations – and not just professionals but witnesses who may be uneducated or not used to seeing a black person – it becomes all the more challenging. I would love to recruit more African-Americans into the field, but I just do not get the resumes or interest from that
particular minority. Hispanic, Russian/CIS or Arab-Americans are plentiful in the field and I see many resumes from these minorities. I have often wondered whether African-Americans know the challenges they may face outside of the US in advance and do not choose this field as a result? Or is it something else.”

“Chinese do not like blacks.” (I was told this before my first trip to Hong Kong.)

“Indians do not like blacks.” (I was told this before my first trip to New Delhi.)

“I have found that American minorities do not gravitate toward international arbitration. In our firm’s summer associate program, for example, we always have minorities, but they are ordinarily not the ones who express interest in international arbitration.”

“Probably [lack thereof] due to lack of experience. A vicious circle!”

“They are generally present in cases where U.S. law firms are involved in representing one or other of the parties.”

“There are a few ethnic Korean Americans at the major Korean law firms, including [lawfirm A], [lawfirm B] and [lawfirm C]. ... Not many, but a few. At [Lawfirm B], several of the associates are female. At [lawfirm A], the deputy chair of the practice is Korean American. They are all playing the role of counsel. ... Very few non-Korean Americans speak Korean well enough to actually conduct business or hearings in Korean. Maybe two or three people, just because it is such a hard language to learn for foreigners.”

“They were not offered as part of the candidate pool.”

“I think there are not a lot of minorities in the law firms that typically handle international arbitration. Also, as to the lack of minority arbitrators, this is affected by the old boy network which largely rules the appointment of arbitrators. It has a paucity of minority members.”

Lawyers with disabilities

“No doubt there currently is an underrepresentation of disabled persons. This may be due to the particularities of our activity which often times requires intensive travelling.”

“One arbitrator has an arm withered by polio, so might be seen as disabled. Nevertheless, he can beat most people at tennis and is one of the most successful arbitrators I know. So I cannot consider him in any way “disabled” by his “disfigurement”.”

“Another is totally deaf in one ear. He is the busiest arbitrator and most prolific author I know, so he too is not in the least “disabled” by his physical limitation.”

‘I am not sure what is meant by disabled, but I have encountered very few disabled persons in law practice generally.”

“Lack of individuals who have disability.”

“I do not think very many disabled persons practice in the kinds of firms that typically handle international arbitration.”
LGBTQ

“There is less acceptance of LGBTQ, let alone tolerance, in certain cultures.”

“I have heard jokes about LGBTQ people from clients, as if it is acceptable or the norm.”

“There is no reason in San Francisco and I believe LGBTQ are fairly represented.”

“Foreign travel – it is possible that a lawyer may feel uncomfortable travelling with a gay colleague. While he/she may profess to be “okay” with the sexual preference when in the office, that may become different on the road (though unsaid of course). He/she would just choose someone else for the trip if more senior, or profess an excuse not to travel if junior.”

“I do not know of your experiences here, but to me France is funny when it comes to diversity. It’s unbelievably racist and sexist, yet seems to have an implicit don’t-ask-don’t-tell approach to gay men in particular which means that gay men in particular do not face some barriers that they might encounter elsewhere (but on certain conditions).”

“Not apparent that candidates fit into this category even after meeting appointed persons.”

   c) From cultural bias to cultural gymnastics

Recognizing from the neuroscience discussion that implicit social cognitions abound around the world and that they tend to be in the direction of the social hierarchies, one might ask what could address the types of implicit bias that may be present as members of the target population make their way toward and in this sea of schemas in international arbitration in the United States and/or overseas.

We focus first on the preparation of those of the target population for work on the international plane to get in the field. Karen Mills of Indonesia has said it best as to the kinds of preparation an American woman (and I would extend this to all Americans particularly in the target population).

“It is not that easy for a woman to break in to the arbitration field, at least not as arbitrator. The first thing she should do is join ArbitralWomen, which supports women in arbitration. But you really need to be involved in actual arbitrations which means you need to work in a firm that does them and get on the team so you can assist and observe before you have anything to sell yourself on. The Vis and other Moots are very useful and any student considering entering the field should become involved in the moots as a necessity. It is the best training a student can have.”

While there may be difficulties, being a member of the target population is not somehow an inherent block to getting on that path. To rise on that path requires what we have all come to know in the profession: hard work, pluck, luck and mentorship/sponsorship. What may be a bit more different in the international plane is that those four things may come together in different ways and may occur anywhere in the world. The key moment, that I have seen repeated for so many people in this field’s lives in some form, is the moment - usually fairly early in a career for those with high-level international arbitration careers - when someone asks them something like “Can you be in Bratislava next week?” The person may have little or no experience with Bratislava but has to have the confidence to say “Yes.” Those moments come around in cycles over one’s life and I describe them as the “international plane
calling” moments. The key is to recognize the earliest career ones and have the pluck to take the leap of faith to go toward the international plane. The first experience becomes a second and on and on as one becomes the “go-to” person for the international work. Beyond just sharing the experience with friends, to become the “go-to” person form the habit of providing written trip reports to the powers that be upon one’s return to one’s base – wherever in the world. It helps those with the power over your career to identify you for even further work on the international plane. Make it easy for someone to see you on the international plane through one’s preparation and one’s willingness to take on the gamble.

On cross-racial, cross-gender, cross-cultural or cross-whatever mentoring, as noted from my own experience described above, there are no rational reasons why more of this cannot be done. It is a question of commitment and enthusiasm of gatekeepers/door-openers. The impact of those kinds of supportive efforts in my own life, as described above, has been tremendous. And, as one rises, the impact of one on those around you can lead to opening paths for still others. One example of even modest serendipitous cross-racial and cross-cultural encouragement (let alone mentoring/sponsoring) that can open someone to this path is this note I received from a European lawyer:

“On a more personal level, your mail reminded me that you were the very person who prompted me to develop my arbitration activities and introduced me to ICC arbitration, during a conversation we had on a TGV in the mid-nineties, when we fortuitously met en route to our respective family ski holidays and engaged in a casual conversation between train neighbors... At the time, I could not have imagined that our accidental conversation would have so important consequences on my life, as I am now spending the most part of my professional activities as international arbitrator.”

From the gatekeeper/door-opener perspective, a person’s motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes in nomination processes for counsel and/or arbitrators would seem to be approaches through which implicit bias can be made malleable. These types of efforts at malleability might take the form of reaching out to target population persons to help them gain initial experience in the field as summer associates or interns to help whet their appetite for this path. Along their path, recognizing the presence of implicit social cognitions and finding ways to address them may be ways to provide an environment that is inclusive and encourages the target population. Institutional structures to recognize implicit bias and overcome it can be found in having employees of many cultures so that one particular set of implicit social cognitions connected to one social hierarchy does not predominate and the work space has a more fluid set of implicit social cognitions present.

For the individual in the target population, the principal lesson would be that implicit bias is malleable and can be changed – with varying degrees of difficulty in that process that may call on one’s perseverance. For the individual in the target population, the second principal lesson is to not succumb to stereotype threat when one feels at risk of confirming, as a self-characteristic, a negative stereotype about one’s group. This would include not succumbing to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Experience is the key and good experience is a buffer for the bad experiences. Remind oneself of the good experiences in which one has done well to create for yourself an experience of inconsistent exposure to stereotype threat and thereby not reduce the degree the one values the domain in question. Some people are simply made to work in the international plane while some come to it as an acquired taste: whatever one’s path, allow oneself to go on it.
When travelling, follow a paraphrase of Jean Monnet’s advice to not carry the implicit social cognitions in the form of “advice” that others give about “those people or cultures,” but go and make up one’s own mind about the new place. In my work with people on five continents, it is the common humanity that shines through if recognized and encouraged. See the world when one can or little bits of it where one lives meeting foreigners and learning from their cultures. Rather than shy away out of a sense of inadequacy or whatever self-limiting schema, students might choose to pursue the domain of study of international arbitration either domestically or overseas and, consequently, expand the range of cultural experience to prepare for a profession that they might pursue.

As stereotype threat might interfere with performance by increasing arousal, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort, the individual must consciously work to recognize and attenuate stereotype threat that they feel about themselves even when others are consciously or unconsciously inducing it in them. One particularly moment for this can be in an interview. I have mentioned to students the “(X+1) game” in which one presents a resume and the person evaluating for the position asks for something that is not on the resume. That experience or background not on the resume is of course made to be seen as the crucial characteristic for the work. One should be prepared to counter such approaches – whether sincere or gamesmanship on the other persons part. No one has a perfect resume or experience, but one’s experience can aid one in accomplishing more.

Finally, those rising to the international plane should be sufficiently self-aware to try to be sensitive to when their own implicit social cognitions are influencing their view of others, whether domestically or internationally. Each of us has places where we are very comfortable performing and places which stretch our abilities to cope and accomplish. Growing the space where one is comfortable is part of the path. This ability to navigate a sea of schemas is what I have come to call the ability to do cultural gymnastics whether domestically, regionally, or transnationally.

There are limits, no doubt. In the face of brutal negative stereotypes of others and one’s internal sense of self-worth, the contradictions between what one thinks of oneself and what the ambient social environment is saying may be experienced as too much of a contradiction. For those times, it might help to think of such moments as not so much moments of impasse, but rather moments of breakthrough to another level of deeper meaning and to arrive at a new cognitive state – sometimes called a nascent state. Others may react favorably or unfavorably to that new self - grown through the fiery cauldron of these kinds of contradictions. Finding one’s way to where one’s approaches will be both recognized and valued remains the path to tread. I just hope that path is in international arbitration for more of the target population.

V. Conclusion

While preparing this article, I was asked to provide a legal training for the Secretariat of the ICC International Court of Arbitration this past September in Paris. It was in Room 12 at ICC Headquarters at 38 Cours Albert 1er, the room where so many plenary and special court sessions, PIDA’s, Arbitrator Colloquia, Advanced Arbitrator Trainings and other events of memory had occurred. A few short weeks later, the ICC was moving to its new locale, so this was both a return to a very familiar place and an

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13 See generally, the remarkable analysis of the nascent state in Francesco Alberoni, Movement and Institution (1977).
opportunity to say goodbye in the last training held in that room full of memories. As I walked around the room and shook hands with the counsel, deputy counsel, secretaries, and interns in a room where women held up half or more of the sky, in my mind’s eye I saw the ghosts of sessions in 1980’s when women would have been barely present. As now the stale male though not so pale fellow in the room full of such jeunesse, I was overjoyed to see the progress that had been made which gave me hope for the progress that can still be made in enhancing diversity (and especially American diversity) in international arbitration. Afterward, in one of those moments of serendipity on the international plane as I walked to my next appointment down the Cours Albert 1er, I ran into Maitre Philippe Nouel, the first lawyer that I had met on a case back in 1986. Clearly, the widening circle of international arbitration stays unbroken.
Expanding Access to Remedies through E-Court Initiatives

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Expanding Access to Remedies through E-Court Initiatives

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ABSTRACT

Virtual courthouses, artificial intelligence (AI) for determining cases, and algorithmic analysis for all types of legal issues have captured the interest of judges, lawyers, educators, commentators, business leaders, and policymakers. Technology has become the “fourth party” in dispute resolution through the growing field of online dispute resolution (ODR), which includes the use of a broad spectrum of technologies in negotiation, mediation, arbitration, and other dispute resolution processes. Indeed, ODR shows great promise for expanding access to remedies, or justice. In the United States and abroad, however, ODR has mainly thrived within e-commerce companies like eBay and Alibaba, while most public courts have continued to insist on traditional face-to-face procedures. Nonetheless, e-courts and public ODR pilots are developing throughout the world in particular contexts such as small claims and property tax disputes, and are demonstrating how technology can be used to further efficiency and expand access to the courts. Accordingly, this Article explores these e-court initiatives with a critical eye for ensuring fairness, due process, and transparency, as well as efficiency, in public dispute resolution.

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INTRODUCTION

Individuals have historically resolved disputes through face-to-face (F2F) interactions, such as litigation or traditional arbitration, mediation, or negotiations. Alternative Dispute Resolution (ADR) theorists and practitioners have long assumed that empathy gained from in-person contact is necessary for resolving conflicts. Furthermore, the norm has been litigation, as individuals seek to avail their rights in courts of law. Public justice demanded that dispute resolution be exactly that, public and in full view. This has especially been true in the United States (U.S.), where one’s “day in court” is sacred.

Nonetheless, times have changed, and individuals have realized that litigation is too expensive and somewhat nonsensical in many cases. Individuals used to the digital age demand real remedies in real time. Time is money. This is especially true for small dollar, property tax, parking, and other similarly less complex cases. Consumers simply are not willing to spend the time and money it takes to file a claim in court or arbitration and travel to an in-person process. For small dollar claims, it is even too costly to seek redress through F2F small claims courts or litigation alternatives such as mediation, if one must pay for the mediator’s time and bear the costs of travel and time off work.¹

Meanwhile, we have become increasingly comfortable with transacting online.² The Pew Research Center recently did a study of online shopping and e-commerce and found tremendous growth in the way our commercial behaviors

¹. See generally AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION, (2017) (proposing an online remedy system to expand consumers’ access to remedies and to revive corporate responsibility in consumer contracting).

have changed.\textsuperscript{3} Surveys of U.S. consumers in 2015 indicated that Americans were spending nearly $350 billion annually online, and 79\% of Americans indicated that they make purchases online.\textsuperscript{4} Additionally, roughly half of Americans reported making online purchases using their cell phones, and many indicated their purchases were made on social media sites such as Facebook or Twitter.\textsuperscript{5} These percentages have presumably grown since that time.

At the same time, e-commerce sites such as Amazon and eBay have gathered loyal customers by providing online means for quickly resolving purchase disputes.\textsuperscript{6} This gave birth to the field of online dispute resolution, or “ODR.”\textsuperscript{7} ODR includes automated decision-making, as well as online negotiation, mediation, arbitration, community courts, and variations thereof. Its efficiency, accessibility, and ease expand access to justice that moves at the pace of technology, thus allowing for innovation.\textsuperscript{8} ODR also allows individuals to resolve disputes quickly and cheaply, without the costs or hassles of travel or taking time away from work.\textsuperscript{9}

These ODR attributes have sparked initiatives for furthering its use throughout the world. For example, the European Union (E.U.) has promulgated the ADR Directive and ODR Regulation, which work in tandem to require Member States to implement ODR systems for consumer

\begin{itemize}
\item[4.] Id. at 5.
\item[5.] Richard Susskind, Tomorrow’s Lawyers: An Introduction to Your Future 100–02 (2013).
\item[6.] See discussion infra Section I.B.
\item[7.] Id.
\item[8.] Id.
\item[9.] See Ethan Katsh & Colin Rule, What We Know and Need to Know About Online Dispute Resolution, 67 S.C. L. Rev. 329, 330 (2016).
\end{itemize}
claims. Furthermore, the United Nations Commission on International Trade Law (UNCITRAL) worked for many years in advancing guidelines on ODR for cross-border e-commerce through its Working Group III on Online Dispute Resolution. Although the Working Group never reached a consensus for such guidelines, it ended in 2016 with a strong recommendation for continuing development of ODR as imperative for efficient redress in cross-border claims. It is therefore not a surprise that the UNCITRAL Working Group IV recently expressed a desire to consider the role of ODR in its examination of cloud computing contracting and identity management.

Nonetheless, public courts have been slow to adopt ODR or develop e-courts. It may seem surprising that the U.S. has not moved more quickly in this direction, given that many of the leading innovators in legal technology are based in the U.S. That is not to say that there are no innovators in U.S. courts. Instead, some courts in Michigan, Ohio, New York, and elsewhere are developing pilot projects for ODR as a pre-cursor to trial, or for e-courts to handle specific

10. See discussion infra Section IV.A.


12. Rebecca Love Kourlis et al., IALS, A Court Compass for Litigants 11 (2016), http://iais.du.edu/honoring-families/publications/court-compass-litigants.1%20-%20Nov.ashx. Note that this Article uses both terms—e-courts and ODR—in discussing these various projects. However, there is a distinction between “e-courts” and “ODR.” Full discussion of the distinctions warrants another article. Suffice it to say in this limited space, however, that ODR programs generally facilitate settlement or substantive determination on the merits, while e-court projects are more limited to ending the dispute or providing a remedy or result based on limited parameters.

Groups such as the American Bar Association (ABA) are also developing ODR projects that will operate as an alternative to the courts in an effort to assist parties in resolving claims with only limited judicial assistance. At the same time, public ODR projects are taking shape in other parts of the world. Most notable have been online courts in Canada and China.

Indeed, forward thinking policymakers are learning that ODR programs improve judicial efficiency and access for litigants to “attend court” in a meaningful way. There is no reason to confine ODR to e-commerce. Instead, individuals in our increasingly wireless world prefer to resolve disputes online. Often, lack of physical access and real-time availability of all participants impede access to justice in F2F processes. For minor disputes, the time, money, and real or perceived risks involved with going to court are often not worth the cost or hassle. It is simply more cost-effective and convenient for most people to use ODR for small claims, traffic, landlord-tenant, and similarly smaller or less complex disputes.

Public bodies also benefit from ODR because it is more efficient than traditional judicial proceedings. The initial start-up costs often appear daunting, but are easily eclipsed by later savings in terms of time and money. Problem diagnosis built into ODR leads to dispute prevention, while users enjoy online negotiation and mediation that lead to

15. Id. at 19.
17. Id. at 1995.
18. Id. at 1996.
consensual and quick, resolutions. This saves the courts from the administrative burden of trial and helps clear court docket with minimal personnel costs. Online court systems also encourage fee and judgment payments by incorporating automatic notices and payments. Moreover, evidence suggests that ODR boosts citizen satisfaction.19

That leaves us asking why e-courts and public ODR are not the norm, especially for small-dollar cases. Why do we only see pilot projects in discrete locations and contexts? The answer seems to be, in part, fear of the unknown, fear of losing jobs and status, fear of start-up costs, and fear that technology will disrupt due process. This Article, therefore, aims to provide fuel for overcoming these fears to assist access to justice through expansion of e-courts and public ODR for small dollar and less complex cases. To that end, Part I will provide a brief background on the development of ODR, and reasons for moving remedy systems online. Part II will then give examples of ODR in U.S. courts, while Part III will add discussion of the international efforts toward online courts. These Parts will therefore set the stage for comparative analysis leading to Part IV, which will unpack important issues for policymakers to consider as these public ODR projects unfold. This aims to spark further debate, by discussing the essentials for building fair and efficient e-courts. Finally, Part V will conclude.

I. MOVING CONSUMER REMEDIES ONLINE

A. Basic Reasons for ODR

Consumers crave fast and easy means for obtaining remedies, especially with respect to smaller-dollar claims or smaller infractions, such as parking tickets and driving misdemeanors. ODR processes open a new avenue for individuals to obtain remedies for less time and expense. ODR goes beyond merely providing portals for consumers to

19. See id. at 2050.
post complaints. It uses online processes to end disputes without need for the travel, stress, inconvenience, and other costs of traditional F2F or telephonic dispute resolution measures. ODR systems may use facilitative or automated negotiation processes, as well as online mediation and arbitration aimed to end disputes and resolve complaints. These systems are generally user-friendly because they allow consumers to quickly fill out standard forms and upload related documents to obtain timely resolutions. They also may use real-time and asynchronous communications for maximum convenience and efficiency.

The American system for resolving disputes is largely legal. As one scholar notes, “[i]f Americans do not go to law, they face relatively few alternative means of remedy.” However, most consumers do not think about “law” or care to deal with litigation in seeking remedies for smaller dollar claims or less complex matters; they simply want easy access to assistance without needing to consult lawyers or physically go to court. ODR provides this sort of remedial process.

Much of ODR’s popularity stems from its speed and low cost. These systems are more convenient and efficient than

olution/consumerodr.authcheckdam.pdf.

21. Id.


24. Id. at 966 (emphasis added).


F2F dispute resolution processes because they eliminate travel costs and diminish the need for legal assistance.\(^\text{27}\) Furthermore, asynchronous communications and translation programs give ODR the advantage of allowing for multilingual processes and communications at times that fit parties’ schedules.\(^\text{28}\) Providing due process guidelines could reinforce ODR’s advantages by enhancing the fairness of these processes by imposing accreditation rules for systems designers and the neutrals who may facilitate online mediations and arbitrations.\(^\text{29}\)

That said, online communications do come with dangers.\(^\text{30}\) Some commentators warn that the anonymity of computer-mediated communication (CMC) allows for “cyber bullying” and use of abusive or combative language parties would not feel comfortable using in person or on the phone.\(^\text{31}\) CMC also may diminish empathy, which could lead to misinterpretations in online negotiations.\(^\text{32}\) However,
individuals have become increasingly adept at expressing themselves through standardized textual cues and emotive characters. CMC has become less sterile as individuals have developed means for virtually building rapport over the Internet.

Furthermore, the relative anonymity and comfort of communicating through a computer or smartphone may ease some of the social and power pressures of F2F communications. This is especially true for consumers who fear stereotypes or biases. For example, a woman with a strong Hispanic accent may worry that customer service representatives will not understand her and ignore her complaints over the telephone. In addition, some individuals are less adversarial online than in-person when the asynchronous nature gives them time to digest thoughts and dissipate anger before replying. Individuals also may be more cautious in composing e-mails due to awareness that their messages are easily retrievable.


36. See id. at 125–26 (noting benefits and drawbacks of online dispute resolution processes).


38. See Susan C. Herring, Computer-Mediated Communication on the Internet, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (2002); Larson & Mickelson, supra note 37, at 140–41 (explaining evidence that less bullying occurs through online communication than F2F).
In sum, most consumers know that the Internet can be effective for researching purchases and sharing information about products and services. However, consumers also want to have means for resolving their claims online. They do not want to have to pick up the phone or travel to a court. Instead, consumers seek ODR, such as online mediation and negotiation, to cheaply and easily obtain redress.

B. ODR Examples and Evolution

ODR systems already exist, and their use is growing as companies, consumers, and policymakers embrace their efficiencies and other attributes. For example, the retail website eBay has been at the forefront in providing ODR free of charge for its consumers. The eBay “Money Back Guarantee,” which applies when a buyer does not receive an item or the item is not as promised, gives the buyer the right to file an online complaint within thirty days after the latest estimated delivery date. The seller then has three business days to respond in the “Resolution Center.” If the seller does not respond or provide an adequate remedy, the buyer may ask eBay to assign an ODR neutral to consider the facts and make a determination. If necessary, eBay may enforce

39. For example, Utility Consumers’ Action Network (“UCAN”) provides an online forum for consumers to alert others regarding contract dangers and to offer suggestions for avoiding or responding to consumer issues. See Who is UCAN?, UTIL. CONSUMERS’ ACTION NETWORK, http://www.ucan.org (last visited Aug. 12, 2018).


43. Id.

44. See id.
ODR determinations via PayPal, eBay’s payment system provider, by setting aside a seller’s funds.45

EBay also provides an “Unpaid Item Policy,” which allows sellers to submit claims through the online Resolution Center against buyers who do not pay for purchased items within two days.46 If a buyer fails to provide proof of payment or a valid reason for not paying, eBay may grant the seller a final value fee credit and refund the fee for relisting the item.47 Similarly, eBay provides a “Verified Rights Owner Program” (“VeRO”) that allows intellectual property rights holders to submit a “Notice of Claimed Infringement” online with respect to items sold on eBay.48 Such notice prompts eBay to remove an item listing that arguably infringes intellectual property rights.49 The seller then may file a counter notice to have the item reinstated in ten days unless the holder of the intellectual property rights informs eBay that it is seeking a court order to restrain the relisting of the item in accordance with the Digital Millennium Copyright Act.50

At the same time, eBay recognizes the importance of reviews posted on its site to sellers’ businesses. Accordingly, under eBay’s “Independent Feedback Review” policy, a seller

45. Id. (giving both parties thirty days to appeal any determinations).


47. Valid reasons for not paying include improper price changes or shipping costs, seller suspensions, or account hacking. Id. (noting that accumulated unpaid items on the buyer’s account may result in a loss of buying privileges, although either party may appeal any determinations).


49. Id.

50. Id.
may challenge a review posting. eBay will then have an impartial third-party reviewer from a professional dispute resolution service examine the challenged posting and determine whether to affirm, withdraw, or take no action regarding the review. Additionally, under eBay’s “Vehicle Purchase Protection” program, eBay offers up to $100,000 to cover payment for a vehicle that is not as promised or received by the customer.

Despite these ODR programs, however, eBay also has a binding arbitration clause in its user agreement. Consequently, if parties cannot resolve their disputes online, their only means of recourse is small claims court or to initiate binding F2F arbitration. The only way for an eBay user to avoid this arbitration policy and retain the right to judicial action is for the user to file an opt-out form with eBay within thirty days after the date of accepting eBay’s user agreement. Arbitration, therefore, is the default for practical purposes, considering that few consumers will be sufficiently proactive to file the opt-out form in that time frame.


53. Vehicle Purchase Protection, eBay, http://pages.motors.ebay.com/buy/purchase-protection/ (last visited Aug. 12, 2018). If the buyer cannot resolve the issue with the seller, the buyer must request reimbursement no later than forty-five days after the listing end date. An independent service provider (the “VPP Administrator”) unaffiliated with eBay administers this program. Id.


55. Id. The arbitration will begin after a dispute remains unresolved after 30 days of the Notice of Claim under eBay’s User Agreement. Id. Small claims court is also an option. See id.

56. Id.
PayPal has a nearly identical arbitration policy. However, it also offers free ODR programs similar those offered by eBay, which generally make arbitration unnecessary. For example, PayPal offers ODR for claims related to items not received and for items “significantly not as described.” The PayPal policy allows parties to first attempt to settle their disputes through PayPal’s online “Resolution Center,” and then to escalate unresolvable disputes for determination by a third-party neutral. The ODR neutral then determines refund eligibility and administers any necessary consequences to the losing party.

Additionally, PayPal protects sellers from claims, chargebacks, or reversals based on unauthorized transactions or items not received. Under this policy, sellers may submit a notification to PayPal regarding the unauthorized transactions or other errors. PayPal will then investigate and issue a determination. Depending on its findings, PayPal may credit the seller’s account for the suspected error. Nonetheless, any resolution sought through PayPal precludes a purchaser’s ability to contact a credit card company for chargeback rights. This essentially prevents a buyer from “double-dipping” and obtaining the same remedy twice.

ODR programs run by PayPal and eBay have garnered customer support because these programs allow customers

58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
to efficiently obtain remedies without the costs and hassles associated with traditional claims processes. Nonetheless, other websites also have ODR policies for limited types of claims, but they often go unused due to their limitations and ambiguous terms. For example, Facebook’s terms of service seem to indicate that a user’s only alternative is to submit all claims to litigation in California courts.\textsuperscript{64} However, a closer reading of the terms reveals that Facebook does offer an ODR mechanism through TRUSTe, an Internet privacy management service, for resolution of certain privacy disputes.\textsuperscript{65}

Through TRUSTe’s ODR program, Facebook customers can submit privacy-specific complaints, subject to important exceptions, for any complaint that “seeks only monetary damages,” “alleges fraud or other violations of statutory or regulatory law,” or “has been resolved under a previous court action, arbitration, or other form of dispute resolution.”\textsuperscript{66} Any determinations on the privacy claims through this ODR program do not bar an individual’s right to pursue other legal

\begin{itemize}
  \item \textsuperscript{64} \textit{Terms of Service}, FACEBOOK, https://www.facebook.com/legal/terms (last visited Aug. 12, 2018) (stating “[f]or any claim, cause of action or dispute that you have against us, which arises out of or relates to these Terms or the Facebook Products (“claim”), you agree that it will be resolved exclusively in the US District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.”). Notably, Facebook dropped its binding arbitration program in 2009. Greg Beck, Facebook Dumps Binding Mandatory Arbitration, CONSUMER L. & POL’Y BLOG (Feb. 26, 2009), http://pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html.

  \item \textsuperscript{65} \textit{Dispute Resolution FAQs}, TRUSTE, https://www.truste.com/consumer-resources/dispute-resolution/dispute-resolution-faqs/ (last visited Aug. 12, 2018); \textit{see also} Fran Maier, Facebook & TRUSTe, TRUSTARC BLOG (May 12, 2010), http://www.truste.com/blog/2010/05/12/facebook-truste/ (noting Facebook and TRUSTe’s business relationship).

  \item \textsuperscript{66} \textit{Dispute Resolution FAQs}, supra note 65 (answering “[w]hat constitutes an ineligible complaint?”).
\end{itemize}
action. However, parties must comply with TRUSTe’s determination or face removal from the TRUSTe program and possibly enforcement action by an appropriate law-enforcement body.

A global view suggests that ODR is the wave of the future. Merchants outside of the United States have embraced ODR, especially due to its ability to transcend borders and jurisdictional tensions. For example, the large online retailer Alibaba uses an ODR mechanism for resolution of buyer-seller disputes. Under the program, both parties may submit a complaint to Alibaba; if the parties do not resolve their dispute within ten days, they may refer the dispute to Alibaba’s online “Dispute Resolution Team.” Alibaba then makes a determination based on evidence provided by both parties. Alibaba may also

67. Id.

68. Id. Parties must first make a good faith attempt to resolve the privacy issue directly, and if that fails, then TRUSTe will facilitate settlement through e-mail communications. Id. (answering “[w]hat constitutes an eligible complaint?”). Based upon the facts of a particular complaint, TRUSTe may do any or all of the following: “[r]equire the Client to either correct or modify personally identifiable information, or change user preferences”; “[r]equire the Client to change its privacy statement or privacy practice”; “[r]equire the Client to submit to a third-party audit of its privacy practices to ensure both the validity of its privacy statement and that it has implemented the corrective action that TRUSTe required.” Id. (answering “[w]hat remedies are available to me as a Complainant?”). If TRUSTe makes a determination on the issue, then it can require the party deemed to have violated privacy rights to take corrective actions. If that party does not comply, TRUSTe may refer the matter “to an appropriate government agency, remove it from the TRUSTe program, and/or sue the party for breach of its License Agreement with TRUSTe.” Id. (answering “[w]hat remedies are available to me as a Complainant?”).


70. Rules of Enforcement Action, supra note 69.

71. Id.
“blacklist guilty suppliers’ accounts,” and uses a system of penalty points.\(^{72}\)

This section briefly outlined reasons for moving dispute resolution online, and examples of ODR in e-commerce. ODR is now growing and thriving in many companies. Furthermore, it has become common for e-commerce companies to provide e-chats instead of phone support for resolving complaints. While this can be frustrating in some cases, proper use of technology in dispute resolution can promote easy and effective access to remedies. It is therefore not surprising that courts are joining the bandwagon and exploring use of ODR.

II. E-Court Initiatives in the United States

ODR is in its infancy in U.S. courts. This is surprising, considering the benefits of ODR in terms of efficiency and access to remedies. For example, misdemeanors and traffic tickets account for more than half of the state trial caseloads, but most people do not hire attorneys to contest these cases in court.\(^{73}\) Furthermore, individuals do not really need an attorney in such minor cases because the decision-maker or prosecutor typically explains the rights, options, and consequences to the litigant.\(^{74}\) Therefore, litigants mainly avoid court due to reasons that are economic (e.g. costs of missing work and finding child care), physical (e.g. difficulty of travel to court, especially for rural citizens or those with disabilities), or psychological (e.g. court causes feelings of anxiety or shame).\(^{75}\) At the same time, with courts’ resources dwindling, it seems logical to move smaller matters online to both expand access to remedies and improve judicial

\(^{72}\) Id.

\(^{73}\) Prescott, supra note 16, at 2001–03.

\(^{74}\) Id.

\(^{75}\) Id. at 2005–07.
Nonetheless, developments in several states, such as Michigan, Ohio, and New York, indicate a movement toward e-courts and judicial ODR. Moreover, by the time this Article is published, there will be many more projects underway.

A. Pilot Programs

In the U.S., individual state, county, and city courts act as laboratories for new initiatives aimed at improving access to justice as well as judicial efficiency. This is one of the tenets of federalism. Accordingly, it is no surprise that most ODR experiments are occurring at the local level. This section describes these pilots per state. It also exemplifies how the courts are starting small by first deploying ODR for certain types of cases, such as tax, parking fines, and small claims. Furthermore, court administrators in these examples are gathering data during the pilot stages as they decipher best practices for moving forward into the new frontier of using technology to improve and expand access to justice.

1. Michigan’s Programs

In 2014, Michigan launched an ODR pilot program in collaboration with Matterhorn, a private ODR provider, for resolving traffic disputes in four counties: Bay, East Lansing, Highland Park, and Washtenaw. The core of the program is an online portal for defendants to submit their cases,

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76. Id. at 2009–10.

77. Id. at 2010.


including all arguments or explanations about why they cannot pay their fines.\textsuperscript{81} It also allows police and prosecutors to review cases before a judge makes a decision.\textsuperscript{82} In this way, the online format provides for the resolution of traffic disputes without the need for in-person court appearances.\textsuperscript{83}

Since 2014, Michigan has expanded its ODR program beyond the original four counties, and some of the Michigan courts utilizing the program have broadened their use beyond traffic tickets to resolve warrant disputes and misdemeanors.\textsuperscript{84} The ODR platform is fairly flexible and open to innovation, perhaps because it is a public/private partnership. Michigan essentially pays for Matterhorn software on a per case basis, instead of a subscription.\textsuperscript{85} Courts can therefore choose which types of disputes are best suited for online resolution, versus those that require in-person appearances. This promotes more conscious decision-making; instead of simply pushing cases into ODR to maximize an expensive subscription, courts are free to keep fees low through per case use.

The Matterhorn software goes beyond merely providing a communication portal for citizens, police, judges, and prosecutors. It includes other tools for citizen empowerment.\textsuperscript{86} For example, the software incorporates AI that searches court filings and informs individuals of their options when they have tickets to contest; it also provides users with information on whether they are eligible to have

\begin{itemize}
\item\textsuperscript{81} Id.
\item\textsuperscript{82} Id.
\item\textsuperscript{84} Id.
\item\textsuperscript{85} Id.
\item\textsuperscript{86} Prescott, \textit{supra} note 16, at 2021–26.
\end{itemize}
their dispute determined online.\textsuperscript{87} At the same time, the Matterhorn software benefits the decision-makers by letting them know what information individuals have submitted, and what additional documents will be necessary to proceed.\textsuperscript{88}

The data collected in Michigan regarding use of Matterhorn indicates that this ODR program has helped to generate efficiencies and expand access to remedies. For example, most cases have closed within seven to nine days using ODR, compared with the months it took to resolve these disputes through regular F2F processes. One researcher found that the average case duration has dropped from fifty days to just fourteen for users who elect online resolution.\textsuperscript{89} The program also has advanced access to remedies because it is mobile friendly, which is important in light of data suggesting that those of lower economic means often rely on mobile devices as their only access to the Internet.\textsuperscript{90} In fact, data in Michigan showed that 40\% of users of its pilot ODR program resolved their traffic cases on a mobile device.\textsuperscript{91}

Defendants also benefit from reaching resolutions with city prosecutors that will not cost “points” that lead to high insurance costs.\textsuperscript{92} Of course, individuals may strike such

\begin{flushright}
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 2022–23.
\textsuperscript{89} Id. at 2030.
\textsuperscript{91} Michigan Courts News Release, supra note 80.
\textsuperscript{92} Id. Bay County’s website also allows for defendants with failure to pay or failure to appear warrants to resolve them online. 74th District Court Online Case Review, COURTINNOVATIONS.COM, https://www.courtinnovations.com/MID74 (last

Electronic copy available at: https://ssrn.com/abstract=3374465
bargains without ODR but the current processes for reaching such agreements can be complicated and unevenly available. For example, in some counties, one must have the time and resources to take a day off work to sit at the courthouse on the date of their hearing and wait in line for their time to talk to city prosecutors to plea bargain.\(^93\)

At the same time, the online platform assists the government by encouraging easy ticket payment for those defendants found in violation of a traffic law. Only 2\%, or less, of the cases heard on Matterhorn are likely to end in default, compared to 20\% of traditional cases.\(^94\) Courts using Matterhorn also are likely to collect 80\% of fines within twenty-one days, compared to collecting 80\% of fines within three months in regular court.\(^95\) Surveys and interviews also reveal that 90\% of Matterhorn users find it “easy to use” and 92\% said they understood the status of their claims while using the online process.\(^96\) Furthermore, more than a third of users said they would have been unable to participate in a F2F adjudication, while 30\% of requests were made outside of business hours.\(^97\) Moreover, Michigan’s program encourages people to deal with traffic tickets rather than ignore them because it allows for “virtual” action without the time, costs, or stress of traditional court. In fact, 80\% of people who used the software would recommend it to a friend and 40\% said they would not have addressed their legal issue without it.\(^98\)

\(^93\) I personally experienced this in Boulder County some years ago, and finally gave up waiting because I had to get to class to teach at the University of Colorado.

\(^94\) Prescott, supra note 16, at 2034.

\(^95\) Id. at 2038.

\(^96\) Id. at 2044.

\(^97\) Id. at 2044–45.

\(^98\) Persky, supra note 83.
2. Ohio’s Pilot Projects

In 2017, the Franklin County Municipal Court Dispute Resolution Department started an ODR program using the Matterhorn platform.\(^99\) However, the program is distinct from the programs noted above in that it provides ODR for small claims actions that mainly deal with city tax disputes.\(^100\) It is available free of charge to its users, and provides parties with their own online “Negotiation Space” to communicate with the other parties, as well as a “court negotiator” (who is a third party mediator); the program also allows parties to upload files, and view, accept, or decline settlement offers.\(^101\)

Franklin County’s Matterhorn program is expected to catalyze other cities and counties in Ohio to adopt ODR.\(^102\) Specifically, the pilot program has focused on individuals’ disputes with the City of Columbus Division of Income Tax.\(^103\) With respect to these disputes in the nine months before the ODR pilot began, 39% of cases were dismissed; 12% agreed to a judgment; and 49% were default judgments.\(^104\) After the pilot began, 58% were dismissed; 17% agreed to a judgment; and 25% were default judgments.\(^105\) This seems to indicate that ODR expanded access to negotiated remedies, thus leading to a 20% increase

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100. Id.

101. Id.


105. Id.
in dismissals and 24% decrease in default judgments.\textsuperscript{106} This is important because the City had trouble collecting on these default judgements, while parties are much more likely to pay agreed settlements that result in dismissals.\textsuperscript{107}

The Franklin County Dispute Resolution Department has been tracking the success of the ODR program on various levels within different time periods. The Department reported that “[a]s of May 22, 2018, 224 small claims tax cases and 183 non-tax small claims and general division cases have been negotiated/mediated online[,]” while ninety-one “pre-file” mediations were “initiated” online.\textsuperscript{108} At the same time, nearly all of the sixty ODR users surveyed (97%) said that they would prefer to use ODR rather than go to court; 67% thought the agreement reached using ODR was fair, while 10% thought their agreements were not fair and 23% reached no agreement.\textsuperscript{109} Furthermore, 93% said that they would recommend ODR to others and 29% “strongly” agreed, and not merely “agreed,” that ODR increased their control over the outcome of their case.\textsuperscript{110}

The administrator of the ODR program’s data also showed that the majority of ODR processes began about thirty to forty-five days after filing a complaint, although in some cases it began as early as within three to four days of filing.\textsuperscript{111} The longest interval between filing and commencing

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\textsuperscript{106} \textit{Id.}.
\textsuperscript{107} Telephone interview with Alex Sanchez, Manager, Small Claims & Dispute Resolution, Franklin Cty. Mun. Court (June 20, 2018) [hereinafter Sanchez Interview].
\textsuperscript{108} Franklin Cty. Mun. Court Memorandum, \textit{supra} note 104.
\textsuperscript{109} \textit{Id.} Admittedly, it would be beneficial to have comparison data, but none was available.
\textsuperscript{110} \textit{Id.} The majority of survey respondents were white; 16% were black; and 4% were Hispanic. Most were between the ages of 35–54 (51%), 26% between ages 55–74; 18% between ages 18–34; and 3% age 75 and over (2% declined to provide this information). \textit{Id.}
\textsuperscript{111} Spreadsheet prepared by Franklin Cty. Mun. Court, Dispute Resolution
\end{flushleft}
ODR was seven months. On average, it took thirty-one days from filing a case until starting ODR, and 102 days until case disposition. The majority of the ODR processes took less than a day to complete, with one outlier case taking 137.4 days. Most of the cases were tax claims brought against individual defendants (83%) while a minority were brought against businesses (17%). Sixty percent of the cases were resolved and/or dismissed, while ODR was terminated 5% of the time, and 15% of the cases led to an agreed judgment (AJE).

The Dispute Resolution Department also provided charts with data from 2016 to 2017. These were outcomes captured with respect to the 135 pilot cases in the charts by income:

13% of claimants were low income (18 cases):
- 12 cases dismissed
- 4 cases defaulted
- 2 cases AJE

28% of claimants were moderate income (38 cases):
- 16 cases dismissed
- 12 cases defaulted
- 10 cases AJE

20% of claimants were middle income (27 cases):
- 16 cases dismissed
- 9 cases defaulted
- 2 cases AJE

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112. Id.
113. Spreadsheet prepared by Franklin Cty. Mun. Court, Dispute Resolution Dep’t, on ODR Charts for Ohio Income Tax ODR Data (2017) (on file with author) [hereinafter ODR Charts Spreadsheet].
114. ODR 2016–2017 Data Spreadsheet, supra note 111.
115. ODR Charts Spreadsheet, supra note 113.
116. Id.
117. Id.
23% of claimants were upper income (30 cases):
- 20 cases dismissed
- 6 cases defaulted
- 4 cases AJE

Interestingly, the moderate-income group reached agreed judgments at a greater rate than the other groups, and both the middle and moderate groups defaulted more often than the low and upper-income groups.\(^{118}\)

For comparison purposes, the Department also looked at a random sample of non-ODR tax cases during the same 2016–17 period. A review of 280 claims showed that 54.3% were resolved between 1–100 days; 30.7% between 101–200 days; 14.2% in 201–300 days and < 1% in >300 days.\(^{119}\) In contrast, the ODR cases took less time. The average ODR case took about three months to resolve (102 days).\(^{120}\) In addition, nearly half of the non-ODR cases proceeded to court while the vast majority of ODR claims were resolved through the online process and dismissed or otherwise settled (AJE).\(^{121}\) This means that ODR helped individuals end their disputes more quickly than they would in court, and to reach consensual solutions rather than face litigation. At the same time, this saved the courts from having to expend resources in providing the venue and personnel for trial.

Furthermore, the Franklin County Clerk reported that with the addition of 135 ODR pilot cases to the 2,057 non-ODR tax cases, the number of dismissals increased by 0.8% (seventy-seven cases), AJEs increased by 0.5% (twenty-three cases), and defaults decreased by 1.1% (thirty-three cases).\(^{122}\)

\(^{118}\) Id.

\(^{119}\) Spreadsheet prepared by Franklin Cty. Mun. Court, Dispute Resolution Dep’t, on Non-ODR Sample Cases (on file with author) [hereinafter Non-ODR Sample Spreadsheet].

\(^{120}\) ODR Charts Spreadsheet, supra note 113.

\(^{121}\) Id.; ODR 2016–2017 Data Spreadsheet, supra note 111.

\(^{122}\) E-mail from Alex Sanchez, Manager, Small Claims and Dispute
This seems to indicate that ODR opened access to negotiated settlements (dismissals) and agreed judgments (AJE), which are generally more beneficial than court judgments or defaults for taxpayers.\(^{123}\) It also assists with tax collection because defaults are very likely to go unpaid, especially when seeking payment is disproportionate to the likely amount collected.\(^{124}\)

Speed and access to the process are important and seem to inspire greater satisfaction. As stated in the preceding paragraphs, the pre- and post-Program data shows that using ODR has cut down on the time it takes to reach resolutions. At the same time, 44% of the ODR pilot participants responded to the county’s satisfaction survey (sixty individuals) and reported high levels of satisfaction.\(^{125}\) Only 3% of the respondents said that they would rather go to court.\(^{126}\) Meanwhile, 77% reached an agreement outside of court using ODR.\(^{127}\)

In sum, the Program seems to be a success for both the court and the parties. The city of Columbus has saved on costs of negotiating and mediating income tax small claims and has increased its collection of unpaid taxes. This is

\(^{123}\) Sanchez E-mail (June 14, 2018), \textit{supra} note 122.

\(^{124}\) This is a notable statistic, but it has no comparison data regarding ages of claimants in the non-ODR group. See Non-ODR Sample Spreadsheet, \textit{supra} note 119. There was a slight indication that those from moderate and upper-income groups are more willing to participate in ODR, although that may change as ODR gains acceptance and trust. See ODR Charts Spreadsheet, \textit{supra} note 113. Also, it was encouraging to find that all age groups were willing to use ODR, as the majority of participants in the pilot were between the ages of thirty-five and seventy-four. Franklin Cty. Mun. Court Memorandum, \textit{supra} note 104.

\(^{125}\) Franklin Cty. Mun. Court Memorandum, \textit{supra} note 104.

\(^{126}\) \textit{Id.}

\(^{127}\) Sanchez Interview, \textit{supra} note 107.
especially true with respect to those out of state, who generally defaulted in F2F processes. Accordingly, it appears that the program may continue to expand into non-tax civil cases. As with any pilot, however, it remains unclear how and where this expansion will occur in light of stakeholder resistance and start-up costs.

3. New York Proposals

Like Michigan, New York City (NYC) offers an online solution for traffic citations. Defendants can request an online hearing through which they may submit evidence. After the online hearing, the judge e-mails the defendant his or her decision. Additionally, NYC allows renters to file housing code complaints against their landlords online or through a mobile app. This program does not offer ODR for solving tenant-landlord disputes, but it does offer online advice for both parties and makes an online infrastructure available. By creating this online platform, NYC is primed to expand their ODR offerings in the future.

With this foundation, it is not surprising that the New York Unified Court System is also pursuing new ODR programs. It first proposed a program to alleviate legal issues with consumer debt through ODR. This was in response to the high number of consumer debt cases in which consumer defendants appear without counsel or are unfamiliar with the courtroom process. The Legal Services Corporation was expected to serve about one million

129. Id.
131. Id.
132. CASE STUDIES IN ODR, supra note 14, at 8–9.
133. Id.
Americans in 2017, only half the number of people without counsel in New York state courts alone. With the help of a large grant, the ODR project aimed to provide consumers with online sources to determine the severity of their debt issues, find legal assistance, and enter into negotiations and mediation at the convenience of the parties involved.

Experts believed that the process would have saved time and money for all involved. Nonetheless, due to push back from legal service providers, the task force that initially recommended the ODR system has discontinued the project in favor of a different ODR pilot. This project will focus on small claims ODR.

4. Texas Projects

Texas is also in the beginning stages of offering ODR pilot projects in discrete areas that are set to expand. For example, it found that civil case filings in 2017 continued to rise across district, county, and justice courts, up 12% from 2016. Moreover, 41% of civil filings occurred in municipal courts and 33% occurred in justice courts—with 30% of these filings resulting in a default judgment. Accordingly, the Texas Judicial Council began to explore ODR as a possible solution. Specifically, Travis County Justice of the Peace, Precinct Two will offer ODR in civil lawsuits. This will be

134. Id.
135. Id.
136. Id.
137. Id. at 10.
139. Id.
140. Id.
in partnership with software provider, Tyler Technologies, using a program called Modria:

Using Modria, the parties to a civil lawsuit will now be able to engage with each other with the desired outcome of reaching a resolution on their own, saving time, money and resources. In the event a resolution is not reached, members of the community will still have an opportunity for their day in court.142

Travis County includes Austin; therefore this is a large-scale project and will help many parties involved in a lawsuit to engage directly with each other to reach a resolution without going to court.143 “We believe Tyler’s Modria solution will not only facilitate quicker resolution in legal disputes, but it will also create greater access to justice for the many members of our community who cannot easily travel to the courthouse,” said Randall Slagle, Travis County Justice of the Peace, Precinct Two.144

At the same time, the Williamson County Commissioners Court approved a pilot program that aims to “cut the number of court appearances for individuals filing small claims lawsuits through a required online mediation process.”145 This program also uses Modria software and went into effect July 1, 2018.146 The Williamson County Justice of the Peace for Precinct Three noted that the ODR program promises to help with the flood of small claims

country-to-use-online-dispute-resolution-technology.

142. Id.


144. Id.


146. Id.
lawsuits that clog the justice of the peace courtrooms and consume valuable time and resources better spent elsewhere.147 “[T]he software will free up time in the courtrooms that cost $16,000 a day to operate by allowing judges to clear dockets and focus on jury and bench trials[.]”148 Accordingly, the ODR program aims to help the parties reach consensual agreements that will prevent them from having to seek further assistance in litigation.

5. Utah Small Claims Initiative

Utah plans to implement an ODR program for small claims cases statewide.149 The program began with an ODR Steering Committee formed by the Utah Judicial Council in June 2016, along with a working group aimed to improve access to remedies in small claims cases.150 The idea is to lower costs and improve accessibility within the Utah court system.151 Ultimately, the ODR program will be mandatory for small claims disputes, and provide users with means to access cases online, negotiate their resolution, and seek mediation assistance from facilitators.152 If necessary, users will also have access to judges to have their cases heard either online or in a courthouse.153

The ODR program will follow stepped process. The first step, Education and Evaluation, will provide information about the users’ claims and possible defenses.154 Users will

147. Id.
148. Id.
150. Id. at 6–7.
151. Id. at 7.
152. Id. at 8.
153. Id.
154. Id. at 9.
also be able to create a MyCase account to “e-file [their] claim and generate a summons to be served on the defendant.”\textsuperscript{155} Defendants will also be instructed to create a MyCase account in response to the summons.\textsuperscript{156} The second step opens a chat function on the site to allow parties to communicate about their dispute and negotiate a settlement.\textsuperscript{157} Parties who reach resolutions can then file their settlements online.\textsuperscript{158} If parties are unable to negotiate a settlement on their own, they move to the third step of the process in which a facilitator helps mediate the dispute.\textsuperscript{159}

If parties are unable to reach resolutions within thirty-five days, they move to the fourth stage, in which a trial will be arranged either online or in person depending upon the dispute’s complexity.\textsuperscript{160} In this fourth stage, the parties access a portal for submitting evidence online, as well as an “On the Record” chat area.\textsuperscript{161} After the parties obtain a judgment in the fourth stage, they still have access to a fifth stage for an appeal or enforcement measures.\textsuperscript{162}

As of the writing of this article, the project is only in the pilot stage. Leadership in Utah hopes that this project will reduce the currently high number of default judgments in small claims courts.\textsuperscript{163} It is expected that individuals will feel more empowered to respond to claims and engage in the

\begin{flushleft}
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 10.
\textsuperscript{157} Id. at 11.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 11–12.
\textsuperscript{161} Id. at 11–12.
\textsuperscript{162} Id. at 12.
\textsuperscript{163} E-mail from Clayson Quigley, Dist. Court Program Adm’r in the Greater Salt Lake City Area, Admin. Office of Utah Courts, to Andrew Johnson, Research Assistant to Professor Amy J. Schmitz, (Aug. 9, 2018, 12:27 CDT) (on file with author).
\end{flushleft}
process with the online option; as one court administrator explained, “half the battle is getting people to appear in court.”\textsuperscript{164} ODR opens new avenues to court that save the parties from the time and hassles of physically going to court. It also allows them to communicate at convenient times and places for all the parties involved. Utah plans to fully implement this new ODR program for all small claims case types statewide in late 2018 or early 2019.\textsuperscript{165} At the same time, they will gather and learn from information during the pilot stage in order to determine what changes need to be made.\textsuperscript{166}

6. Other Nascent Examples

There are at least fifty to sixty new courts looking to launch new projects. Many of these are not yet released, but they will be online soon.\textsuperscript{167} Tyler Technologies, through Modria, is taking on quite a few of these projects. For example, the 8th Judicial District Court of Clark County in Las Vegas, Nevada, has launched Modria’s ODR program “for access to efficient and timely justice in divorce cases for Clark County citizens.”\textsuperscript{168} This stepped process allows divorcing couples to “resolve differences online, avoiding delays in scheduling, driving to and from court, time off from work, and making it easier for residents to interact with the court.”\textsuperscript{169} “Generally, mediation for divorce cases involving children is mandatory, requires the development of a

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{169} Id.
parenting plan, may involve many trips to the courthouse, coordinating schedules between parties, and a significant involvement of staff resources. Tyler’s Modria ODR solution provides a new option for citizens and courts to help complete these requirements.”

Fulton County, Georgia, also recently signed a contract with Modria for Small Claims and Landlord Tenant cases. Furthermore, Modria has been expanding its programs through Tyler Technologies, its parent company, which is a key player in court technology worldwide.

B. Non-Court Complements

Public sector legal services also have started to collaborate more closely with private ODR providers. These efforts have aimed at increasing access to justice for pro se litigants, especially in light of cutbacks in legal aid. Examples have included the American Bar Association (ABA) and family law ODR projects. Again, these are not “e-courts” or public projects, per se, but are instead collaborative efforts that give pro se litigants options for reaching consensual resolutions without need for judicial services. Nonetheless, these examples are worth mention because they show how public/private partnerships can open new avenues for consumers to resolve their disputes without assistance self-represented litigants in these matters, which can be substantial. It will save the court a great deal of time and money as well, considering that in 2016, “the Ohio legislature passed a law granting the court statewide jurisdiction over public records requests. With one physical court location in Columbus, the Ohio Court of Claims realized they needed support to handle these requests that could potentially be generated from any of the 88 counties in the state.”

170. Id.

171. Travis County, Texas, First in State to Select Tyler Technologies’ Modria Solution, supra note 143.

172. Tyler Technologies’ to Provide Online Dispute Resolution Software to the Ohio Court of Claims, BUSINESS WIRE (Dec. 14, 2017, 9:17 AM), https://www.businesswire.com/news/home/20171214005058/en/Tyler-Technologies-Provide-Online-Dispute-Resolution-Software. This will be important for assisting self-represented litigants in these matters, which can be substantial. It will save the court a great deal of time and money as well, considering that in 2016, “the Ohio legislature passed a law granting the court statewide jurisdiction over public records requests. With one physical court location in Columbus, the Ohio Court of Claims realized they needed support to handle these requests that could potentially be generated from any of the 88 counties in the state.” Id.
consuming judicial resources. In this way, these programs assist efficiency as well as access to remedies.

1. ABA Free Legal Answers

ODR has become especially intriguing for its capacity to open doors to legal services and provide “justice” for those who cannot otherwise afford traditional legal services. Accordingly, the ABA and state bar associations have created technology-based solutions that focus on legal content.¹⁷³ For example, Tennessee Free Legal Answers was first developed by the president of the Tennessee Bar, Buck Lewis, as a way to expand access to justice for low-income individuals seeking legal advice in Tennessee.¹⁷⁴ Many low-income Tennesseans are unable to access courts due to travel difficulties, particularly in rural areas.¹⁷⁵ They also lack time and resources required to obtain attorneys, especially with cuts in legal aid.¹⁷⁶

For these reasons, Mr. Lewis spearheaded a free online legal service provider that would match low-income Tennesseans with licensed attorneys who would answer legal questions in civil matters.¹⁷⁷ This project, formed in concert with the Tennessee Bar Association and the Tennessee Alliance for Legal Services, has helped


¹⁷⁶. Id.

¹⁷⁷. Id.
individuals since the late 2000s. The program does limit access to those who prove their eligibility. Eligible users must be low income, which is defined as having an income below 250% of the federal poverty line. Qualified users pick a legal category and court date, then ask a question pertaining to civil legal issues. These questions are provided to all attorneys using the system; the user receives notice when an attorney posts an answer. The attorney and user will then privately communicate to protect the client’s privacy from others using the system.

Since that first project, the ABA Pro Bono and Public Service Committee has worked with others to launch ABA Free Legal Answers as a nationwide program following the Tennessee model. Since 2016, the program has served over 2,000 clients and is available, in some form, in over forty states. States also empower individuals pro se by allowing users to fill out legal documents online and then print, sign, and send them to the court.

2. LawHelp Interactive

Similarly, LawHelp Interactive is an online tool meant to bridge the gap in legal access between those with few

178. Id.
180. Id. Additionally, users may not be incarcerated, have more than $5,000 in total assets, or be under eighteen years of age. Id.
181. Id.
182. Id.
184. ABA Free Legal Answers, supra note 179.
185. See id.
186. See Prescott, supra note 16, at 2012. Similarly, the Illinois Legal Aid Online system allows a user to submit confidential questions to a pro bono attorney, who can then respond. Id. at 2011.
available resources and the rest of the general public. This program was developed by Pro Bono Net, an organization founded in 1999 for the purpose of increasing access to disadvantaged individuals in the legal system.\textsuperscript{187} It has built a large online document assembly platform for both low-income communities and legal aid providers, with 456,272 documents assembled and 817,839 guided interviews conducted in 2013.\textsuperscript{188} LawHelp Interactive essentially allows users to create legal documents on its website by answering a series of questions through an online interview with a LawHelp representative.\textsuperscript{189} Although family law issues remain the most significant subject for assistance, the site has also been useful for creating documents covering domestic violence, debt collection, foreclosures, evictions, and other areas.\textsuperscript{190}

LawHelp Interactive operates in a number of jurisdictions, including twenty-five U.S. states, the District of Columbia, and Ontario, Canada, and includes numerous subdivisions of the program.\textsuperscript{191} For example, LawHelpNY focuses on services to low-income New Yorkers with civil legal issues and provides information regarding free legal services available in New York. It provides information on legal rights in over thirty languages, as well as information regarding procedures specific to the New York state court

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\textsuperscript{188} About Us, LAWHELP INTERACTIVE, https://support.lawhelpinteractive.org/hc/en-us/categories/203506128-About-Us (last visited Nov. 15, 2018).
\textsuperscript{189} LAWHELP INTERACTIVE, https://lawhelpinteractive.org/ (last visited Feb. 2, 2019). Users who wish to revisit their interview answers must create accounts with the website in order to save answers. \textit{Id}.
\textsuperscript{190} About Us, LAWHELP INTERACTIVE, https://support.lawhelpinteractive.org/hc/en-us/categories/203506128-About-Us (last visited Nov. 15, 2018).
\end{footnotesize}
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system.\textsuperscript{192}

Nonetheless, these mechanisms do not fully allow individuals to “go to court” online in the same manner as seen in the e-court initiatives noted above or the ODR programs used by companies such as eBay and Amazon.\textsuperscript{193} Again, the legal justice system has been distrustful of automated and algorithmic processes and users may fear that the system is rigged against them.\textsuperscript{194} Therefore, government bodies must pay special attention to due process in using online platforms for empowering individuals to obtain legal resolutions without the constraints of a physical setting.\textsuperscript{195}

3. Family Law Partnerships

Family law ODR projects have developed alongside the courts to assist peaceful resolutions of conflicts during and after divorce cases. For example, coParenter is a private company that operates in Canada and the U.S. and serves an ADR-like purpose because its goal is to prevent custody from being litigated (or re-litigated) where possible.\textsuperscript{196} The tool seeks to bring parents together through a neutral platform that allows them to communicate, track scheduling, and manage responsibilities with respect to a parenting plan.\textsuperscript{197} In addition, the platform allows parents to set up online chats with mediators or therapists.\textsuperscript{198} Parents can therefore ask such professionals to sign up with coParenter and keep

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\textsuperscript{193} Prescott, supra note 16, at 2015.

\textsuperscript{194} Id. at 2017.

\textsuperscript{195} See id. at 2019.


\textsuperscript{198} Id.
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secure records via an app that can be used on mobile phones, or downloaded to a computer.\textsuperscript{199}

Our Family Wizard is a service similar to coParenter in that it also helps parties reach consensual agreements. The service offers tools to parents for scheduling and tracking childcare, as well as making reimbursement requests/payments, communicating with each other, and creating logs of the communication.\textsuperscript{200} This platform also allows parents to create third party accounts for therapists, or similar professionals who are involved in assisting the parties with their parenting plans.\textsuperscript{201} Professionals can use the platform for communication with clients, and may also use the app to monitor parent-to-parent communications in some cases with proper consents.\textsuperscript{202} The app does not connect these communication channels, however, to allow for collaborative contracting. The basic cost for Our Family Wizard at the time of the article was $99 per year per parent.\textsuperscript{203}

\section*{III. International Efforts Toward E-Courts}

Some of the most ambitious programs for ODR in the courts are occurring in Canada, the United Kingdom (U.K.), and China. They demonstrate how pilot projects again coalesce around small claims and less complex cases. These projects also add to the background by showing how pilot

\begin{itemize}
\item \textsuperscript{199} Frequently Asked Questions, coParenter, https://www.coparenter.com/frequently-asked-questions/ (last visited Jan. 23, 2019).
\item \textsuperscript{200} Our Family Wizard, https://www.ourfamilywizard.com/ (last visited Jan. 17, 2019).
\item \textsuperscript{201} Third-Party Accounts, Our Family Wizard, https://www.ourfamilywizard.com/third-party-accounts (last visited Nov. 26, 2018).
\item \textsuperscript{202} Id.
\end{itemize}
projects that start small may lead to further developments built on proven success. These examples also show how larger e-court projects may nearly replace traditional courts, as we see with the Hangzhou Internet Court discussed below. At the same time, policymakers must remain vigilant in safeguarding fairness and transparency, and providing means for in-person processes as a fallback to protect the voluntariness of the process.

A. Canada

1. Civil Resolution Tribunal and Other Online Programs in British Columbia (B.C.)

Canada has been a world leader in establishing ODR programs. The British Columbia Ministry of Justice has created a robust ODR court called the Civil Resolution Tribunal (CRT). It began when the British Columbia government passed the CRT Act in 2012 to call for creation of an ODR program to cover small claims and condominium property, or “strata,” disputes. A main impetus for the Act was the exorbitant costs of litigation in Canada, with the average two-day trial costing $31,330 in 2013, while the median Canadian family after-tax income was just over $50,000 in the same year. Additionally, the aim was to simplify the pursuit of strata disputes, and encourage faster resolution of neighbor disputes, which often involve pool access or pets.

206. Salter, supra note 204, at 118.
207. Id.
After years of development, the CRT first opened for strata claims on July 13, 2016, and then expanded into small claims of up to $5,000 Canadian Dollars (CAD) on June 1, 2017.209 Furthermore, jurisdiction will expand significantly in 2019, as the CRT will be able to resolve claims for personal injuries arising out of vehicle accidents occurring after April 1, 2019.210 Accident claims includes liability claims up to $50,000, as well as determinations regarding whether an injury is a “minor injury” and therefore subject to a cap on pain and suffering damages.211 This will also include disputes over accident benefits, such as medical and income benefits that insured British Columbians are entitled to, regardless of fault.212

The CRT process follows a stepped ODR process, thus beginning with a problem-solving wizard that helps complainants assess their problem and decide the best option for how to proceed in solving the issue.213 This can be compared to a Turbotax for legal disputes in that it provides guidance on likely options. The guided pathways are mapped with the assistance of subject matter experts and plain

tribunal-to-resolve-civil-disputes.


211. Id.


213. E-mail from Richard Roberts, Exec. Dir. & Registrar, Civil Resolution Tribunal, to Amy J. Schmitz, Professor of Law, Univ. of. Mo. (Nov. 13, 2018, 21:55 CST) (on file with author).
language “knowledge engineers.” There is an opportunity to expand the knowledge base in the future using AI and links to the CRT and court decisions.

If the user cannot resolve the issue through the wizard, the process moves to an ODR portal, which begins with party-to-party negotiation and moves to mediation, if that fails. If the parties are still unable to reach a mutually agreeable solution, an online adjudicator will make the ultimate decision after online or telephonic hearings. If hearings are not needed, the arbitrator may render a decision based solely on digital evidence and submissions.

This ODR program expands access to remedies in that it is available at any time of the day or night. Parties can access the portal on computers or mobile phones; the CRT also provides telephone services, and in rare cases, in-person hearings for oral presentations when requested and approved by the adjudicator. Users pay fees linked to the type of dispute; fees to initiate strata claims range from $125 to $150 (CAD), while small claims court fees range from $50 to $150 (CAD). There are also a number of other types of fees that might apply, such as a $30 (CAD) fee to request a default judgment if the other party never responds, and a $50 to $100 (CAD) fee if the matter is not resolved and proceeds to a hearing. All of the judgments rendered, whether voluntarily or through the adjudicator, are enforced by the

214. Id.

215. Id.

216. See The Civil Resolution Tribunal and Strata Disputes, supra note 209.

217. See id.; see also How the CRT Works, Civ. Resol. Tribunal, https://civilresolutionbc.ca/how-the-crt-works/ (last visited Aug. 2, 2018) (these decision makers are independent decision makers appointed by government for fixed terms).

218. The Civil Resolution Tribunal and Strata Disputes, supra note 209.


220. Id.
CRT is working toward the provision of processes that typically end most issues within sixty days, with overall costs that are much lower than they are for F2F proceedings. Additionally, the CRT seeks to ease costs for those with little income or assets by exempting them from filing and other fees in most cases. Furthermore, the CRT has used what it learned in the development and pilot stages to implement changes aimed to improve the process. The goal is to provide an understandable and simple process for the average Canadian to understand. This is especially important in that parties to claims in the CRT generally may not be represented by legal counsel, unless permitted due to minor status or other special permission.

At the same time, consumers in B.C. also have access to a range of online resources through the non-profit, Consumer Protection, B.C. This group even offers an online platform for resolving debt claims with collection agencies that have
registered as participants.\textsuperscript{228} Similarly, the Property Assessment Appeal Board of B.C. provides ODR for residential claims once they are deemed eligible.\textsuperscript{229} This ODR platform provides a chatroom for users to connect with a representative of the appeals board, where they can negotiate.\textsuperscript{230} If direct negotiation is not successful, the parties will have a mediator enter their chatroom to assist.\textsuperscript{231} If mediation is not successful, the ODR process will end, and the appeals board will assign a new representative to the case to make the final decision.\textsuperscript{232}

2. Cyberjustice Laboratory Projects

The Cyberjustice Laboratory in Montreal, Canada has been active in creating pilot ODR projects to advance access to justice. For example, it created the open source applications that were the foundation for the CAT-ODR system to resolve condominium disputes in Ontario, Canada.\textsuperscript{233} The CAT-ODR program uses a stepped process in which users first create an account and move through a negotiation phase where both parties can settle their dispute by posting proposals to one another to help negotiate a solution.\textsuperscript{234} The aim is for most disputes to end amicably through this initial negotiation process. This is especially

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\textsuperscript{230} Id.
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\textsuperscript{231} Id.
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\textsuperscript{232} Id. At this time, the process is not mandatory.
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important with respect to condo disputes, as the disputing owners are generally neighbors who must live together in harmony (of some kind). Nonetheless, if the parties are unable to negotiate a settlement at this point, then they may ask for an online hearing “in front of” a tribunal member tasked with rendering a decision through the platform. This decision-making phase allows the member to manage the schedule, obtain documents, and hear witness testimony electronically.

This CAT-ODR program is similar to the Platform to Aid in the Resolution of Litigation (PARLe), which the Cyberjustice Laboratory created as a pilot project with the Consumer Protection Agency in Quebec. The PARLe project has touted its success: “Almost 70% of the more than 1,300 cases filed through PARLe in its first year were settled. Furthermore, satisfaction rates with the process range from 86% (for merchants) to 96% (for mediators). Consumer satisfaction is at 89%.” This process also has saved parties’ time by providing resolutions in an average of twenty-eight days versus the twelve months it takes to obtain decisions through the courts. This faster timeline also frees time for courts, thus allowing them to allocate more resources to resolving complex cases that demand in-person processes.

B. Hangzhou Internet Court

The Hangzhou Internet Court in China seeks to move
the entire litigation process to the Internet, including “prosecution, filing, proofing, court hearing, and ruling[].” \(^{240}\)
The online process brings disputants across the country together to increase efficiency and “save judicial resources.” \(^{241}\) The court has a broad reach to cover copyright, contract disputes related to e-commerce, product liability, internet service provider disputes, conflicts over loans obtained online, and domain name disputes. \(^{242}\) Experts have viewed the court as one of the most ambitious of its kind.

The court’s process begins when the plaintiff registers on the site and is verified as a legitimate claimant. \(^{243}\) The plaintiff fills out an online form describing the conflict and allows the Internet Court to retrieve the case information. \(^{244}\) Each party obtains a “My Litigation” tab and enters a “query code” provided in the notice in order to review the complaint. \(^{245}\) Within fifteen days of filing the case, a mediator contacts both parties and conducts pre-trial mediation via the internet, phone or videoconference. \(^{246}\) If mediation fails, the lawsuit goes to the court’s “Case Filing Division” where the parties can track the case, and gather information about similar cases in order to determine likely outcomes that may assist them in reaching settlements before litigation. \(^{247}\)


\(^{241}\) Id.

\(^{242}\) Id.


\(^{244}\) Id.

\(^{245}\) Id.

\(^{246}\) Id.

\(^{247}\) Id.
As of February 2018, the experience in the four Hangzhou courts hearing online cases has been “encouraging” for advancing efficiency. During its first year, the court received filings for over 6,000 cases, of which about two-thirds were resolved or dismissed through online means. Participation is voluntary and defendants can demand that the case be heard off-line. Typical cases involved purchases from large e-commerce companies based in Hangzhou, which include Alibaba, Taobao and NetEase. This has caused some concern regarding power imbalances, as well as questions regarding the influence that these e-commerce giants may have in the court itself.

Nonetheless, the Hangzhou Internet Court has been so successful in creating efficiencies that China plans to set up internet courts in Beijing and Guangzhou, according to a statement from China’s Supreme People’s Court (SPC). Furthermore, the Hangzhou Court is setting trends broadly in consideration of technology’s role in litigation. Recently, the court in Hangzhou became the country’s first to accept “legally valid electronic evidence using blockchain.


251. Id.

252. See id. at 14. For example, in one case, a Chinese plaintiff bought a collectible battery-powered bank on Taobao, a popular shopping site, and tried to return it because the product was a counterfeit. Id. Next, he sued Taobao claiming breach of contract for allowing a seller to market counterfeit goods, but the court dismissed the claim. Id.

technology.” The plaintiff in an infringement case conducted an automatic capture of infringing webpages and the source code through a third-party platform, and uploaded them and the logs to Factom’s blockchain for document verification. The court accepted this means for submitting evidence, after finding that the blockchain technology complied with relevant standards to ensure the reliability of the electronic data. Chinese courts require strict verification procedures, and this case established that blockchain can be used as a legal method to determine the authenticity of an item of evidence, similar to a traditional notarization service commonly used in China.

C. United Kingdom

In the United Kingdom (U.K.), Her Majesty’s Courts & Tribunals Services (HMCTS) has begun a very ambitious court reform project that seeks to update the system to keep pace with technological changes. As part of this program, the Civil Justice Council released a 2015 report suggesting the creation of an online court, referred to as Her Majesty’s Online Courts (HMOC). Two major purposes of creating this online court would be to eliminate the need for judges in many cases, thereby increasing access to judges where they


256. Id.

257. Id.


are necessary for the resolution. Judges in the U.K. have been vocal in explaining the virtues of an online court and fostering public relations that should assist its implementation.

In this context, England and Wales have been touting reforms for “a courts and tribunal system that is just, and proportionate and accessible to everyone.” Under the Constitutional Reform Act of 2005, the judiciary has been vested with a significant leadership role in the reformation. Ultimately, the court system will reduce its staff by about 5,000 employees, and the number of cases heard in court by about 2.4 million per year. More than fifty initiatives have been designed toward that end.

The proposal for online determinations of low value, or small, claims envisions a three-tiered ODR system similar to that used elsewhere. The first tier is online evaluation, or problem-solving, which would help users diagnose their issues and options. The second tier offers online

260. Id. See also SUSAN BLAKE ET AL., THE JACKSON ADR HANDBOOK 261–63 (2d ed. 2016) (discussing creation of the online court in the U.K. and suggesting that international ODR courts would be developed).


263. Id.

264. Id.

265. Id. at 7.


267. Id. at 6.
facilitators to assist the parties in reaching resolutions through mediation and negotiation conducted over the Internet.\textsuperscript{268} Portions would be automated in order to reduce the need for human intervention, but the system would allow for telephone conferencing when needed.\textsuperscript{269} The third tier would utilize online judges to provide a final resolution based on online pleadings.\textsuperscript{270}

This online court for small claims is just one piece in the larger reform puzzle in the U.K. The U.K. also provides for online pleading for traffic offenses, as well as a divorce project, which seeks to allow for most divorces to be granted online by a “suitably trained and legally qualified professional judge.”\textsuperscript{271} The divorce project was launched in January 2017, when couples in the East Midlands began filing for divorce online.\textsuperscript{272} At the same time, the U.K. launched an online system for representatives of deceased persons to deal with the deceased’s property. Nonetheless, both the probate and the divorce processes are still working on devising means for authenticating documents such as birth certificates and marriage certificates.\textsuperscript{273}

Despite the excitement for online courts in the U.K., some have argued that the Ministry of Justice is advancing technology in the interest of efficiency over fairness.\textsuperscript{274} As Roger Smith has noted, it will be essential to articulate goals and audit the system to be sure it is safeguarding fairness.

\begin{enumerate}
\item \textsuperscript{268} \textit{Id.}
\item \textsuperscript{269} \textit{Id.}
\item \textsuperscript{270} \textit{Id.}
\item \textsuperscript{272} \textit{Id.} at 17.
\item \textsuperscript{273} \textit{Id.}
\item \textsuperscript{274} Roger Smith, Court-based ODR: the Need for an Access to Justice Audit, LAW, TECH. & ACCESS TO JUST. (May 30, 2018), https://law-tech-a2j.org/odr/court-based-odr-the-need-for-an-access-to-justice-audit/.
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He states:

We might divide the prospective audit up into three parts. We need to be able to interrogate a court digital project’s conception; its practical implementation; and its monitoring. If you accept an overall practical limit of ten questions then these sections get about three questions each. That implies one limitation. A further comes from the fact that we actually know very little in many jurisdictions about existing use of the courts and we may also lack any measure of calculating need. We will have to do the best we can.\textsuperscript{275}

D. Additional European Examples

As part of the continuing process of integration among European Union (E.U.) countries, policymakers have been pushing technology-based resolutions of cross-border disputes.\textsuperscript{276} For example, the E.U. created the E-Justice Portal in 2010 as a “one-stop shop” for E.U. citizens and legal professionals desiring legal documents regarding the E.U. The site is quite robust, containing over 12,000 pages of content on both E.U. law and the laws of the E.U.’s member states.\textsuperscript{277} Furthermore, the portal provides information in a variety of E.U. spoken languages, which furthers the ideals of cross cultural collaboration.\textsuperscript{278} Despite this goal, however, the portal has met criticism.\textsuperscript{279} For example, the E-Justice Portal is currently voluntary for E.U. member states.\textsuperscript{280}

Furthermore, the E.U. has established an ODR platform guided by two important principles: the provision of a “legal framework obliging member states to enable consumers and traders to submit disputes to ADR[,]” and the provision of

\textsuperscript{275} Id.
\textsuperscript{276} Xandra E. Kramer, \textit{Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU}, in \textit{EACCESS TO JUSTICE} 351, 351–52 (Karim Benyekhlef et al eds., 2016).
\textsuperscript{277} Id. at 353.
\textsuperscript{278} Id. at 364–65.
\textsuperscript{279} See id. at 363–64.
\textsuperscript{280} Id.
“tools facilitating independent, impartial, transparent, effective, fast, fair out-of-court resolution of disputes.”

This system was created under the E.U. ADR Directive and ODR Regulation calling for the establishment of an ODR platform to serve as “a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures.” Member States also must “ensure that ADR entities make publicly available on their websites, . . . and by any other means they consider appropriate, annual activity reports.” This E.U. ODR platform is revolutionary by serving as “an interactive website which can be accessed electronically and free of charge in all the official languages . . . of the Union.”

The E.U. ADR Directive requires that procedures should “preferably be free of charge” or limited to only a nominal fee for the consumers. “This Directive should be without prejudice to the question of whether ADR entities are publicly or privately funded or funded through a combination of private and public funding.” The Directive also “establishes a set of quality requirements which apply to all

281. Id. at 361. Notably, Russia intends to imitate the online dispute resolution platform released by the European Union; the platform will focus upon contract disputes involving online purchases. Russia intends to create online dispute resolution for e-commerce, EURASIATX.COM (Aug. 4, 2016, 11:01 AM), http://eurasiatx.com/economia/ (search “online dispute resolution for e-commerce; then follow “read more” hyperlink). Thus far, it does not appear that this plan has been implemented or been given a launch date.


283. Id. at 74.


286. Id. at 68.
ADR procedures carried out by an ADR entity which has been notified to the Commission.”287 “In order to ensure that ADR entities function properly and effectively . . . each Member States should designate a competent authority . . . [to] perform that function.”288 The goal is to ensure that “consumers have access to high-quality, transparent, effective, and fair out-of-court redress mechanisms no matter where they reside in the Union.”289

The E.U. ODR Regulation seems to be a step forward for consumers in the E.U., although there is a lack of empirical data on use and satisfaction.290 The ODR platform, however, is only available for consumers and merchants within the E.U., and it is only a platform and not a provider. There is no assurance how each Member State will implement the ODR processes, making this a far cry from an internet court, or holistic ODR court.

At the same time, smaller ODR processes have been appearing in various areas outside of the E.U. Platform. For example, the Dutch Rechtwijzer sought to use ODR in the Dutch court system.291 However, financial issues led to its replacement with an online divorce mechanism, called Justice42.292 Justice42 aims to cut lawyers out of the divorce process and steer the parties toward settlement through guided mediation.293 Its leadership has stated a focus on meeting the needs of parents that want to make a parenting

287. Id. at 67.
288. Id. at 69.
289. Id. at 70.
290. The system is still very new, and hopefully the data will be available soon.
292. Id.
plan, as well as partnering with other services such as mental health and financial services. This new program has been in operation since September 2017.

IV. ESSENTIALS FOR DEVELOPING BENEFICIAL ODR

International dialogue and comparative research regarding online courts must help inform system design. Many countries are beginning to integrate technology into their administrative justice processes and move certain dispute resolution processes online. Each provides a laboratory for investigation, from which others can learn. Furthermore, it is essential that policymakers consider core due process requirements and maintain healthy skepticism of the use of artificial intelligence (AI) and algorithms in making final case determinations. Indeed, any dispute resolution system is ineffective if it is unfair. Efficiency should not overshadow fairness. It is therefore essential to build ODR systems for particular contexts in consideration of due process standards.

A. Ensuring Due Process

Due Process is the bedrock of the United States judicial system, and every nation of the world strives for procedural justice in its courts. Accordingly, any establishment of ODR

294. Roger Smith, Online Dispute Resolution (ODR) and Access to Justice, LAW, TECH. & ACCESS TO JUST. (May 1, 2018), https://law-tech-a2j.org/odr/online-dispute-resolution-odr-and-access-to-justice/.


296. See PUB. LAW PROJECT, supra note 271, at 27–35.

in public courts must be procedurally fair and abide by standards of due process.\footnote{Leah Wing, Ethical Principles for Online Dispute Resolution: A GPS Device for the Field, 3 INT’L J. ONLINE DISP. RESOL. 12, 26 (2016).} As Professor Leah Wing has noted, however, it is difficult to set strict standards or codes of conduct for ODR due to its evolving nature. Nonetheless, the ODR community has begun to articulate shared values that help shape the ethical principles governing ODR practices.\footnote{Id. at 17.} Professor Wing also explains that the “tension of universality or generality” requires that the ethical principles be general enough to be applicable in different settings, cultures and jurisdictions, while also reflecting an overarching cohesion and offering durability over time.\footnote{Id.}


Safeguarding due process rises to an even higher level when dealing with public e-courts. At a very minimum, they must abide by the bedrock standards of confidentiality, impartiality, competence, and quality of process.\footnote{See Daniel Rainey, Third-Party Ethics in the Age of the Fourth Party, 1 INT’L J. ONLINE DISP. RESOL. 37, 42–52 (2014).} This means that courts and practitioners involved in the processes
must understand confidentiality risks and communicate those risks to clients and users. They also must ensure that all parties have an adequate opportunity to participate in the process and that parties can make voluntary and informed choices surrounding the procedures and outcome.

The International Center for Online Dispute Resolution (ICODR) has articulated standards for ODR that add to these core standards for courts to consider as they digitize. The ICODR list is as follows:

Accessible: ODR must be easy for parties to find and... should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.

Accountable: ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.

Competent: ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas.

Confidential: ODR must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.

Equal: ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard, and ensure that offline privileges and disadvantages are not replicated in the ODR process.

Fair/Impartial/Neutral: ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.

Legal: ODR must abide by and uphold the laws in all relevant jurisdictions.

Secure: ODR providers must ensure that... communications

303. Id. at 43.
304. Id. at 46.
between [participants are] not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.

Transparent: ODR providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.\textsuperscript{305}

The standards and principles noted are fairly self-explanatory, but they have varied applications when it comes to public use of ODR and e-courts. ICODR’s list was created for ODR more generally, and is not specifically for public courts per se. For starters, security and accountability have special import in a public setting. Courts will have to take special care to ensure that their systems cannot be “hacked,” and remain accountable to the taxpayers. Courts already have this security struggle when it comes to e-filing and similar digitalization, but this becomes even more pronounced with online mediations and court-connected ODR. Accordingly, e-courts and judicial ODR programs should be subject to security audits on a regular basis.

However, it is noteworthy that courts are already managing security issues by working with providers such as Modria (operated under Tyler Technologies) to provide court-connected ODR that is secure. Although Modria, through tylertech.com, collects some general information such as a user’s name, e-mail address, IP address, and access times, Modria and Tyler Technologies never sell, rent, or release

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customer mailing lists to third parties.\textsuperscript{306} Moreover, tylertech.com protects personal information (e.g., a credit card number) entered into the ODR program by complying with industry security standards.\textsuperscript{307} Furthermore, users who choose to customize a resolution flow for their case are also protected, as the Modria resolution flows are backed by a security certified, API-enabled case management system.\textsuperscript{308}

Nonetheless, such public/private partnerships, as seen with Modria and Matterhorn,\textsuperscript{309} raise impartiality concerns. Accordingly, the courts hiring outside providers will have to take special care to be sure that this public/private collaboration does not create even the appearance of bias, let alone bias. Of course, governments hire third parties to conduct many services, and this can be cost effective while allowing for greater innovation. However, these collaborations may be subject to higher levels of scrutiny when it comes to operating the justice system. That means that system audits will be very important to ensure that no conflicts of interest or biases infect the courts.

Audits and transparency go hand-in-hand. Transparency means not only that individuals have full information about a process at the outset. It also means that administrators should publish reports on the system and provide these reports to auditors with power and expertise to assess whether the use of technology is not only saving the government time and money, but also assisting individuals to obtain fair redress in the courts. For example, courts using ODR should gather data to analyze cost savings pre- and post-system implementation. They also should gather data


\textsuperscript{307} Id.

\textsuperscript{308} MODRIA, FEATURE COMPARISON CHART (2017), https://www.tylertech.com/Products/Modria/Modria-Feature-Comparison-Chart.pdf.

\textsuperscript{309} See discussion supra Part II.
on how many individuals are using and benefitting from a new system, when they are accessing the system, and whether they are able to access the system using a mobile device. Examining the time it takes to complete the process or otherwise obtain a remedy is also important.

Gathered data should not be limited to this quantitative information. It also should include qualitative research regarding satisfaction, perception, and user experience. This should include not only e-surveys, but also focus groups of system users who can offer more precise feedback and ideas for improvements. In this vein, proper survey design is essential for capturing unbiased reviews. Focus groups would also allow for deeper queries.

Indeed, the importance of transparency cannot be overstated. Each of the ICODR principles—and accompanying standards—deserves attention, but transparency remains especially important as courts develop and adopt ODR. Data collection and transparency open the door to conversations and comparative analysis that lead to improvements. As each pilot project completes a cycle, policymakers should gather to compare notes. International discussions will further inform this process, and ultimately a set of best practices will emerge.

Policymakers from around the world are already calling for this type of data collection and robust study of technology in the courts. For example, The Legal Education Foundation (LEF) in the U.K. is seeking to determine how best to measure the success of the new ODR programs in the U.K., discussed in Section III.C.\textsuperscript{310} It is calling for an evaluation of data related to the fairness of the justice system in relation to persons in vulnerable populations.\textsuperscript{311} The Foundation has stated that access to justice must include: “i. Access to the formal legal system; ii. Access to an effective hearing; iii.

\textsuperscript{310} See Byrom, supra note 262, at 6–7.
\textsuperscript{311} Id.
Access to a decision in accordance with substantive law; [and] iv. Access to remedy.” 312 Data collection related to the pilot projects must therefore include a wide variety of metrics, as detailed in the LEF’s recent report. 313

B. Cautious Use of AI and Algorithms

The discussion above regarding due process and ethical standards is only a starting point for developing best practices. Indeed, any conversations must also take into account the growing use of AI and algorithms in nearly every industry, including law. 314 While it is true that ODR programs may facilitate negotiation or mediation without any predictive analysis, there is a growing use of such analysis and use of AI in helping parties determine case value and likely outcomes as a catalyst for reaching a settlement. 315 It is even feasible that an e-court program could use AI to determine results based on an analysis of similar cases. Accordingly, this section will discuss some of the ways courts have used AI and algorithms and raise attendant cautions for policymakers to consider.

Actuarial scientists have long used predictive systems and algorithms to determine probabilities in the insurance industry, and now law enforcement and courts are joining the bandwagon with the advent of user-friendly programs

312. Id. at 14.
313. Id.
The problem is that these systems are not always accurate. For example, the blood alcohol ratio used for DUIs might be either too high or low for some individuals even if it is a helpful statistic taken together. Furthermore, individuals may game a system by strategically changing their behavior or entering false inputs. Coding errors and coders’ biases also may lead to skewed results.

Nonetheless, AI and well-built algorithms may help individuals make determinations that are more objective in some cases. They also may produce determinations without the delay involved with traditional in-court battles of the experts, deploying costly expert testimony put for by each party. For example, a judge in a personal injury case may have subjective reasons for skepticism about a plaintiff’s case, or the judge may have an inherent dislike of “AI attorneys.” Furthermore, it is typical for injury cases to involve hours or days of “expert” testimony on damages. In such a case, an AI-powered program could provide the judge with a case assessment that would help her arrive at a fair judgment, perhaps without the need for a long trial involving hired experts. Similarly, a consumer in a small claims action may benefit from a case value prediction in reaching a

317. Id. at 7.
318. Id. at 12–14. While this is sometimes problematic, designers of algorithms can respond to or preempt gaming through increasing model complexity, frequently changing the model, and gathering more or differently sourced information about the proxies to make gaming more difficult.
resolution with a contractor. In these ways, AI and algorithms may lead to faster and more accurate determinations or mutual resolutions.\textsuperscript{321}

At the same time, there are understandable concerns regarding biases that may lurk behind AI.\textsuperscript{322} As the Commissioner for Human Rights for the Council of Europe Parliamentary Assembly stated: “Artificial intelligence can greatly enhance our abilities to live the life we desire. But it can also destroy them. It therefore requires strict regulations to avoid morphing into a modern Frankenstein’s monster.”\textsuperscript{323}

One area that has seen a rise in use of AI is criminal law. Some judges use AI to set bail, or to help determine sentences for convicted persons.\textsuperscript{324} For example, courts in Arizona, Kentucky, and New Jersey now consider computer generated statistics in setting bail, rather than relying solely on judges’ discretion and intuition.\textsuperscript{325} Policymakers behind these programs argue that this allows judges to use objective algorithms based on facts in determining the flight risk of releasing defendants on bail. In other words, using AI helps eliminate disparities in treatment caused by judges’ implicit biases.\textsuperscript{326} AI programs now play a role in targeted policing as

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{321} Id.
\item \textsuperscript{323} Id.
\item \textsuperscript{325} See O’Brien & Kang, supra note 324.
\item \textsuperscript{326} Subjective human determinations in assessing the magnitude of an individual’s flight risk have been known to cause a substantial disparity in the treatment of poor and wealthier arrestees. See id. Using AI, courts can release
\end{enumerate}
\end{footnotesize}
well. Furthermore, researchers are testing a program that recognizes human deception better than juries do.

AI may also play a part in legal discovery. In *Winfield v. City of New York*, the court looked at the use of predictive coding to sort and gather documents relevant to a discovery request. In *Winfield*, plaintiffs charged that the City’s use of algorithms to influence document requests led to the underrepresentation of relevant documents in this case. The argument was that this resulted in skewed document review, and thus skewed results. The court disagreed, and

all individuals who pose the least threat of danger or flight; wealth is immaterial because money is not needed as a safeguard when the system deems an individual unlikely to commit another crime or skip court hearings. See id. One program, now used by New Jersey courts, is the “Public Safety Assessment” score; the program speeds up the process of arraignment by immediately sending the judge an individual’s risk score for use during a jailhouse video conference hearing. Id. There is minimal delay if the party is eligible for release, because no bail is required. As added insurance against failure to appear, the party receives text alerts reminding him of court dates. Id.


328. Michael Byrne, *AI System Detects ‘Deception’ in Courtroom Videos*, VICE: MOTHERBOARD (Dec. 19, 2017, 9:17 AM), https://motherboard.vice.com/en_us/article/zmqv7x/ai-system-detects-deception-in-courtroom-videos. One juvenile court in Ohio is testing case “care-management” software. Andrew Tarantola, *Watson is helping heal America’s broken criminal-sentencing system*, ENGADGET (Aug. 25, 2017), https://www.engadget.com/2017/08/25/watson-heal-america-criminal-sentencing/. In Montgomery County, OH, Judge Anthony Capizzi has partnered with IBM to use Watson in developing digital case files of information most relevant to his juvenile cases. Id. He distinguishes his “care-management system” from other case-management systems, in that the information in his system is not merely a record of past events but includes data such as recommendations by law enforcement, probation officers, and mental health providers, upon which he can make predictive decisions. Id. The pilot program is a “hybrid solution,” balancing any potential AI bias with “human decision-making.” Id.


330. Id. at *5

331. Id.
affirmed that predictive coding was a viable means of achieving reasonable and proportional document production.\textsuperscript{332}

As another example of using AI in the law, courts across China have introduced a robot called Xiao Fa to answer questions submitted via a keyboard or verbally.\textsuperscript{333} The government continually updates the platform with new information, which already houses details of over 40,000 legal procedures, 30,000 frequently asked questions (adapted to regions), 7,000 laws, and 5,000,000 cases.\textsuperscript{334} Referring to relevant case histories, verdicts, laws and expert opinions, the robot provides individuals with information about how to bring a lawsuit, how to investigate their legal rights, and how to obtain evidence.\textsuperscript{335} This approaches the sort of robo-lawyer that some have feared. As of November 2017, the robots were receiving 30,000 requests for information daily and answering 85\% of them immediately.\textsuperscript{336}

At the same time, a Cornell study has concluded that AI is better at recognizing deception than humans.\textsuperscript{337} In 90\% of Cornell’s courtroom simulations, the computer correctly determined when the subject was lying.\textsuperscript{338} The Cornell study also found that AI is better and fairer than judges are in making bail determinations.\textsuperscript{339} It therefore concluded that AI systems can cut crime rates by 24.8\% by increasing the

\begin{footnotesize}
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\item[332.] Id. at *11–12 (so holding but allowing plaintiffs to review a random sample of non-relevant documents to determine whether relevant documents which should have been produced were improperly omitted).
\item[334.] Id.
\item[335.] Id.
\item[336.] Id.
\item[337.] Byrne, \textit{supra} note 328.
\item[338.] Id.
\item[339.] Tarantola, \textit{supra} note 328.
\end{itemize}
\end{footnotesize}
accuracy of determinations to deny bail.\textsuperscript{340} It also found that AI systems for bail reduce the prison population by 42\% without increasing the crime rate by suggesting the release of arrestees who are least likely to commit another crime.\textsuperscript{341}

In contrast, programs such as Compas, which courts have used for sentencing, have faced sharp criticism.\textsuperscript{342} Compas determines an outcome based on the statistical analysis of 100 factors including sex, age, and criminal history, to assess an individual’s likely rehabilitation or recidivism.\textsuperscript{343} However, a study by ProPublica found that Compas is incorrectly flagging black convicts as likely to be recidivists at twice the rate it incorrectly flags white convicts.\textsuperscript{344} This raises serious questions regarding the built-in biases of the algorithms Compas uses for its predictions.

Again, concerns about AI also flow into the development of e-courts. AI and algorithms may be used in e-courts and court-connected ODR to provide parties with predictive analysis of case outcomes, or even final determinations. Predictive analytics that provide case assessments based on prior similar cases can help parties reach fair decisions and may even help eliminate implicit and explicit biases that infect F2F interactions and determinations. Nonetheless, there is evidence that people tend to defer to statistical data instead of using the data to help form an independent judgment.\textsuperscript{345} Furthermore, AI and algorithms reflect the value judgments and priorities of the individuals who create

\textsuperscript{340} Id.

\textsuperscript{341} Id.


\textsuperscript{343} Id.

\textsuperscript{344} O’Brien & Kang, supra note 324.

\textsuperscript{345} Id.
and design them.\textsuperscript{346} A “garbage in, garbage out” problem occurs when the foundation for AI is skewed data. Although AI may arguably learn and improve over time, it is susceptible to human bias, especially where “the underlying data reflects stereotypes, or if you train AI from human culture.”\textsuperscript{347} Accordingly, it is essential that individuals in the court system and societal watchdogs have access to the datasets and rules used by the algorithms.\textsuperscript{348} In addition, policymakers should consider the ICODR standards and principles noted above as they create best practices for ODR platforms and software design.\textsuperscript{349} Policymakers may also consider using open-source software to improve transparency and seeking public input to improve court processes.\textsuperscript{350} Moreover, AI cannot replicate essential human capabilities necessary for good governance and reasoned decision-making.\textsuperscript{351} Legal futurists who predict that “robot lawyers” will eventually perform all legal work may view the rule of law as providing a “clear prescription” that can be plugged into algorithms to produce legally correct

\textsuperscript{346} See \textit{id.}
\textsuperscript{347} Buranyi, \textit{supra} note 327.
\textsuperscript{348} See \textit{id}. In criminal cases, it is clear that parties must be able to understand why they were denied bail or how their sentence was determined. A 2016 study by San Francisco-based Human Rights Data Analysis Group showed that PredPol software (used by police departments to identify areas likely to experience high crime rates), targeted mostly-black neighborhoods at twice the rate of white neighborhoods in Oakland.\textit{Id.} But when statisticians modelled the likely criminal activity based on national statistics, “hotspots” were more evenly distributed across the city.\textit{Id.} Because the software relies on prior arrest data, the learning process leads to over-policing in certain areas.\textit{Id.} The system becomes self-reinforcing, sending law enforcement back to areas where arrests were made, thus leading to more arrests in that area and further reinforcing the prediction that crime will occur in that location.\textit{Id.}
\textsuperscript{349} See \textit{supra} pp. 142–43 and note 305.
\textsuperscript{350} Watney, \textit{supra} note 324.
However, it is often impossible to reduce laws or regulations to simple inputs, and it “is almost impossible . . . to reduce knowledge and judgment to a series of propositions a machine could apply.”

Rather than seek to replace humans with machines, humans should seek to use machines to improve their performance. AI can serve as a tool to aid decision-makers in analyzing information, while mitigating bias and other human failings. Technology has immense potential to help individuals assess fair settlements of small claims, for example, and may inform judicial determinations in these and similar cases. However, it is again imperative that the algorithms and AI be transparent, and that legal professionals and court administrators remain vigilant in abiding by “cyberethics” and best practices built on ICODR standards and principles.

Moreover, e-courts and public ODR programs should allow individuals to maintain control over the process. Professor Ayelet Sela conducted an experiment at Stanford University using sixty-eight undergraduate and eighteen graduate students to assess their experiences using a semi-synchronous ODR program. She asked: 1) is a disputant’s
perception of procedural justice affected by whether she engages with a person or AI software?; and 2) is her perception of procedural justice affected by the degree of control she has over the outcome? In assessing the data, Professor Sela concluded: 1) people’s perception of fairness varies with their control over process and decision-making, and 2) people are less comfortable giving up their control over decision making to software than to other people.

Again, ODR is slowly becoming part of the judicial system, as it opens new avenues for cost-effective access to remedies. Accordingly, courts should continue to expand their use of technology to assist settlement and provide determinations, where necessary, with greater efficiency and personalization of the process. Nonetheless, caution is necessary. Technology may be a “fourth party” to assist dispute resolution, but it should not take over and become the only and final decision-maker. Instead, courts should use stepped processes as noted above in some of the pilots (with online negotiation and mediation as a precursor to online determinations), with the help of predictive analysis to assist parties in negotiations and mediation prior to a final determination. As Professor Sela’s study confirmed, participants perceive such hybrid processes as more

358. Id. at 97.
359. Id. at 115.
360. Id. at 94.
361. Id.
362. See Id. at 98–110. The author distinguishes “instrumental” from “principal” ODR systems. Id. at 100. In the instrumental model, the system acts as a “specialized communication platform” through which the parties and a (human) third party neutral submit information and engage in dispute resolution. Id. In the principal model, AI automates the role of the third party in identifying the parties’ interests, deciding which rules apply, “calculating optimal results,” and suggesting options for resolving the dispute. Id. Most systems today are hybrid models, starting with an automated process and allowing human intervention only if necessary. Id. at 101.
procedurally just and leading to the greatest satisfaction.\textsuperscript{363}

C. Considering Particularities and Politics

Due process and cautious use of AI and algorithms are essential in designing e-court and public ODR projects. However, there are also particularities and politics that often connect with fairness and efficiency concerns for courts to consider before implementing ODR. The following includes discussion of several of these issues, including determining case type, keeping it voluntary, addressing the digital divide, and considering lost jobs and political difficulties.

1. Case Types

First, courts need to decide which types of cases are appropriate for ODR because some cases are too complex, or otherwise improper for online determination. For example, complex business cases may not fit the confines of an online process. Furthermore, final determinations of child custody in family law cases that need special attention for the best interests of the child, are generally not proper for e-court or online processes. Instead, ODR processes should assist divorcing parties in reaching their own mutual agreements and monitoring parenting plans as noted in some of the pilots.

\textsuperscript{363} The participants’ experience of procedural justice varied with their perception of the process as instrumental (human) or principal (machine). Disputants experienced a higher level of procedural justice in mediation when they engaged with a “perceived software mediator” than with a human. Yet the opposite was true in the binding arbitration process. In that case, participants experienced a higher level of procedural justice when the neutral was a human. In both instances, the primary factor affecting participants’ sense of procedural justice was their ability to have a “voice” that is, to “effectively participate” in the dispute resolution process. Interestingly, participants perceived the software to be more fair, effective and attentive than human neutrals, and experienced greater certainty and fewer negative emotions during the process. They perceived themselves to have nearly 30% greater “voice” in the instrumental mediation. Nonetheless, the instrumental arbitration participants rated human neutrals as more respectful and trustworthy, and felt that they had more voice and greater informational justice in a human-powered process. See \textit{id.} at 107–136.
discussed above. For example, the Modria ODR program in Las Vegas sets a nice example for using ODR to promote consensual resolutions as a precursor to (and preventer of) litigation.\(^{364}\)

Specific case types that are appropriate for ODR include small claims, parking fines and driving misdemeanors, property and income tax disputes, and other government fine cases that individuals may otherwise have no feasible avenue to contest due to disproportionate costs of litigation. Additional case types may arise, such as landlord tenant and condominium disputes, as noted in Canada. Of course, as pilot projects progress, courts will be able to learn from their experiences and improve the process. As ODR programs improve, they will expand and encompass further case types. However, this must proceed with caution with a focus on fairness and due process.

2. Voluntariness

The rush to digitize should expand access to justice, but should not eliminate an individual’s access to in-person processes all together. For example, it is questionable whether online hearings should be mandatory in small claims cases. Utah and the CRT seem to be striving for mandatory ODR for small claims, along with online hearings.\(^{365}\) Telephonic and in-person meetings should, however, still be available; this is especially true for those who do not have access to or comfort with online processes. The digital divide is most acute when it comes to age. The Pew Research Center found, in 2013, that smartphones virtually eliminated the digital divide among races and ethnicities, with 80% of “White, Non-Hispanic,” 79% of “Black, Non-Hispanic,” and 75% “Hispanic” having some

\(\text{364. See Clark County Court Uses New Technology from Tyler to Resolve Disputes Online, supra note 168.}\)

\(\text{365. See discussion supra Sections II.A.5, III.A.1}\)
Internet access once you add smartphone access to home broadband.\textsuperscript{366} However, that same 2013 study indicated that smartphones widen the divide between eighteen and twenty-nine year-olds and those who are over age sixty-five. The gap was thirty-seven percentage points when only considering home broadband access, and the gap increased to forty-nine percentage points when taking smartphones into account.\textsuperscript{367}

At the same time, e-court processes should not be mandatory to the extent that they preclude access to class action relief. It is true that opening online access that is free or cheap for pursuing small claims may ease need for class actions by lowering the barriers to entry that currently exist for consumers seeking remedies on small dollar claims.\textsuperscript{368} Note also that e-courts in small claims may assist companies by eliminating the need for class actions in some situations. In some cases, consumers will have better access to remedies through e-courts for small claims than they would obtain in a class action. For example, a consumer with a broken cell phone may be more likely to collect full redress through a cheap or nearly free e-court than a class action that may take many years to complete and result in each consumer getting five cents on the dollar.\textsuperscript{369}

Nonetheless, there are claims that deserve attention that consumers will forego even with access to ODR and e-courts. For example, a consumer is unlikely to file a small court claim of any kind to contest a “cramming” charge,


\textsuperscript{367} Id. at 4.

\textsuperscript{368} See generally Amy J. Schmitz, Remedy Realities in Business to Consumer Contracting, 58 Ariz. L. Rev. 213 (2016) (emphasizing the difficulty consumers face when seeking remedies on low dollar claims, especially when arbitration clauses cut off their access to class actions).

which occurs when a phone company adds third-party charges to one’s phone bill. However, most consumers would gladly join a class action to obtain some redress and bring light to this generally deceptive practice. Indeed, class actions serve private attorney general functions that go beyond merely providing remedies.\textsuperscript{370}

Accordingly, ODR should remain voluntary in the courts and e-courts should not cut off consumers’ access to class actions. ODR and online hearings will still be very effective in saving courts time and money, as most individuals with small or simple claims will choose to resolve their disputes through these new avenues. ODR also will help individuals to access remedies on their small dollar or lower significance claims, as explained above. This is especially true when the processes are free or low-cost, user-friendly, fair, impartial and transparent.\textsuperscript{371} In this way, technology is simply adding another door to the “multi-door courthouse.”\textsuperscript{372}

3. Digital Divide

Judicial ODR and e-courts must be mobile friendly to help ease the digital divide. As noted above, mobile phones have opened new avenues to the Internet and ODR for those with lower income and resources.\textsuperscript{373} Furthermore, mobile access to the Internet and technologically assisted communications have become central in connecting individuals with each other. This is especially true for

\begin{itemize}
\item\textsuperscript{370} \textit{Id.} at 261–62.
\item\textsuperscript{371} \textit{See} Schmitz, \textit{Remedy Realities, supra} note 368, at 240–61 (2016) (discussing need for fast, fair, and low-cost access to remedies in low dollar claims).
\item\textsuperscript{373} Flávia de Almeida Montingelli Zanfardini & Rafael Tomaz de Oliveira, \textit{Online Dispute Resolution in Brazil: Are We Ready for This Cultural Turn?}, 24 REVISTA PARADIGMA, Jan./June 2015, at 68, 69 (Braz.) (emphasizing how mobile phones have been a game-changer for Brazilian expansion of Internet access and e-commerce).
\end{itemize}
younger generations that have grown up using cell phones as their primary communication device. Accordingly, it seems logical that citizens should be able to connect with the government and judicial remedies through mobile devices.

Mobile friendly ODR methods that individuals can complete on a cell phone also helps ease fear of the courts in that they promote a social aspect of dispute resolution. Cell phones have become an avenue to social connections. Moreover, phone users can rely on voice and video recording, rather than text-based interaction, which is far more effective in reaching users with less education or facility with language than traditional e-mail systems.\textsuperscript{374} Mobiles would also allow dispute professionals an easier means for coordinating meetings, and would enable non-present parties to be kept in the loop while away from their computers.\textsuperscript{375} The key is to develop easy-to-use systems that help lower the digital divide, while providing meaningful access to justice.

That said, some cases may be too complex for resolution through a smartphone or mobile device. Although smartphones have increased their utility with the advent of new technologies, they may not be as usable as a computer with a home Internet connection—i.e., uploading and editing documents, and costs of data usage under smartphone plans. Accordingly, those with greater resources with home computers and broadband access may have an advantage over those with less means who are limited to mobile access. To address this, there should be court kiosks available for those without adequate devices or online access. Court kiosks could provide a cost-effective avenue for parties to resolve disputes without the time and money involved with in-person court processes.

\textsuperscript{374} Colin Rule & Chittu Nagarajan, \textit{Crowdsourcing Dispute Resolution over Mobile Devices, in Mobile Technologies for Conflict Management} 93, 95–96 (Marta Poblet ed., 2011).

\textsuperscript{375} \textit{Id.} at 98.
For example, courts would still save time and money in moving resolution of traffic ticket disputes online, even after paying the costs of providing computer kiosks in the court lobby or libraries for individuals to use in resolving their claims. This would also allow individuals to contest their tickets cheaply without the time and stress of facing a judge or city prosecutor in person at the court during an allotted time that may or may not be convenient for the individual.

4. Politics and Job Loss

Politics and concern for lost jobs has prevented implementation of e-court and other court ODR programs. Many of the administrators in the courts fear that technology will replace them, or they will have trouble learning new systems. To address this issue, courts may be wise to start with small projects, train the individuals in that area, and then have the newly trained administrators train the next group—and so on. A county could adopt online resolution for traffic disputes, and then after a successful pilot, the individuals in that county could help the next county to move traffic disputes online. Individuals learn by doing. Furthermore, they generally feel most comfortable learning from others who can explain the process in regular language (minus tech jargon). Court administrators who had been bogged down shuffling papers under the old system could move their talents to better uses, and spend time assisting consumers with using the new online processes.376

Technology is a “disruptor” and its use in the courts may lead to some job elimination or changes. While this may save costs for the courts, it may cause distress to those impacted. However, some predict that there will be new and better jobs created with technology as individuals will have more time to focus on tasks that require human empathy and logic that

go beyond AI. Furthermore, judges will have more time to focus on the cases that need human resolutions. Online processes also may cut down on judicial backlog and lead to faster resolutions. The CRT, noted above, exemplified how online processes can dramatically save consumers time and money in resolving small claims. This generates greater satisfaction, and opens doors to remedies in cases that consumers may otherwise “give up” on out of exhaustion with traditional F2F processes.

At the same time, politics and start-up costs should not dissuade cities, counties and states from developing ODR and e-courts. Again, these projects are showing success in expanding access to remedies and saving government costs and time. As noted regarding the CRT, it is much cheaper for a court to hire an online mediator than to pay for in-person mediations with court-annexed mediation programs. When it comes to fines and taxes, ODR also increases tax collections. Governments make money by cutting down on default judgements and creating means for individuals to reach tax and fine resolutions that they can and will pay. Moreover, this is especially true for individuals who do not live in the jurisdiction issuing the fine or tax.

Of course, these are only starting points for development as we are slowly devising and implementing public ODR. Most of the examples above are pilot projects, which will produce data for policymakers to use in reforming and constructing further systems. Again, the key is to foster transparency in the use of technology and engage developers on a global level to share experiences and devise best practices; ODR systems should take heed of the ICODR

377. See id.
378. See discussion supra Section III.A.1.
379. See discussion supra Section III.A.1.
380. See discussion supra Section III.A.1.
381. See discussion supra Section II.A.2.
principles and standards noted above.\textsuperscript{382} It is an exciting time for ODR developers and access to justice advocates to work together for a common good.

V. CONCLUSION

Virtual courthouses, AI, and algorithmic analysis for all types of legal issues have captured the interest of judges, lawyers, and policymakers. At the same time, technology has become the “fourth party” in dispute resolution through the growing field of ODR, which includes the use of computer-mediated-communication and other technologies in negotiation, mediation, arbitration, and other dispute resolution processes. ODR has gained traction because it saves parties’ time and money. It also has capacity to expand access to remedies and improve process satisfaction, especially in small dollar claims. For these reasons, e-commerce companies like eBay and Alibaba implemented ODR for consumers’ purchase claims many years ago. They learned that individuals crave the fast and easy resolutions ODR can provide.

In contrast, e-court and public ODR pilot projects are in early stages, contained to particular contexts such as tax, traffic, and small claims disputes. Nonetheless, these projects are demonstrating how technology can be used to further efficiency and access to remedies if implemented with intentional, and user-centric, design. Projects in Michigan and Ohio, for example, make it easier for individuals to resolve traffic ticket and property tax disputes, while Utah and New York are developing ODR programs for small claims cases. Outside of the U.S., the CRT in Canada and the Hangzhou Internet Court in China are paving the way for use of e-courts to save the governments’ time and money.

That said, it is imperative for policymakers to be cautious in crafting ODR systems that do not myopically

\textsuperscript{382} See \textit{supra} pp. 142–43 and note 305.
strive for efficiency to the detriment of fairness. Balance is essential. Accordingly, this Article has explored e-courts and public ODR projects with a critical eye for ensuring fairness, due process, and transparency, as well as efficiency, in public dispute resolution. The ICODR principles and standards provide a starting point for developing best practices to further these goals. However, policymakers from around the world should compare notes based on data from pilot projects in order to inform further development of public ODR to advance access to justice.
Online Dispute Resolution and Family Disputes

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This paper explores the potential role of online dispute resolution (ODR) in family disputes. Following recent reforms in family law in Australia, primary dispute resolution processes (PDR) such as mediation have become the default process for the majority of cases in which there are disputes over parenting or property. PDR processes can potentially be enhanced by the use of information and communication technology. But despite potential benefits for some categories of disputants, the application of ODR to family disputes has been little explored. We identify and classify nine ODR systems that have relevance to family disputes. While further research and system development is needed, we conclude that ODR remains an interesting if not yet fully developed new tool for family dispute resolution practitioners. As the increased use of information and communication technology and the Internet influence the way in which services are delivered, practitioners and providers of dispute resolution services would do well to anticipate that some clients will want ODR offered as an option for facilitating family disputes.

Key Words: Family Disputes; Primary Dispute Resolution; Information and Communication Technology; Online Dispute Resolution

Those families in transition who need assistance are offered a range of dispute resolution processes under the Family Law Act (1975). Primary dispute resolution (PDR) refers to dispute resolution processes that do not use litigation in the Family Court for determination of a dispute about separation, parenting, or both. These include facilitation, mediation or negotiation of settlement of property, maintenance and parenting arrangements subject to the overriding aim of the Act regarding the best interests of children involved (Altobelli, 2003).

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The trend to promote PDR in family law disputes has accelerated in recent years. With the introduction of the Family Law Rules 2004, parties commencing an action in the Family Court are required to comply with pre-action procedures for financial and parenting cases including mediation, conciliation, negotiation, and counselling. More recent amendments to the Family Law Act strongly encourage and will eventually require most parents to make a genuine effort to resolve disputes before applying to the Family Court. Separating families are to be given affordable assistance to negotiate parenting arrangements “through information, advice and dispute resolution services (such as mediation)” (Attorney-General’s Department, 2006). These changes mean that PDR is now at the core of the dispute resolution processes for family disputes and separation in Australia.

As an alternative to litigation, PDR aims to resolve or limit disputes in an effective and efficient way, to provide procedural fairness and to achieve outcomes that are broadly consistent with public and party interests (National Alternative Dispute Resolution Advisory Council [NADRAC], 2001a). Astor and Chinkin (2002) summarised the strengths and benefits of PDR in family disputes as: flexibility to deal with the variability of family disputes; inexpensive service (at least where successful); that it can occur; the capacity to meet the needs of children for certainty about their future and an end to parental conflict in a short time frame; the ability to incorporate legal, financial, and counselling support to assist parties to negotiate a fair resolution that takes their needs and the needs of children into account; better capacity than litigation to preserve the relationship between parents and children after divorce.

The reservations about PDR in family disputes have also been well canvassed by, for example, Astor and Chinkin (2002). PDR may have limited applicability or may indeed be inappropriate where the power relationships between the parties are significant, where there is a history of family violence, allegations of child abuse, or neglect, or where parties may for other reasons, such as mental illness, be unable to represent themselves adequately.

Fisher and Brandon (2002) are among the many commentators and researchers who have outlined practices and policies that have been developed to mitigate issues of power imbalance and violence and to protect the best interests of the child. Clearly, however, there are cases in which such attempts at mitigation would be inappropriate and in which some form of arbitration is required.

At the same time, the use of information and communication technology has the potential to offer new ways of dealing with a number of the traditional reservations. It offers new ways to address questions of accountability and accessibility, fairness, effectiveness, and costs (Astor & Chinkin, 2002). NADRAC (2002) suggested that:

Information technology provides opportunities to facilitate communication and so assist in prevention and management of disputes . . . to provide information to parties and to complement,
In this paper, the current state of ODR is described, with specific reference to family disputes. Following this, is a review of nine ODR systems that have been developed for family disputes.

Online Dispute Resolution

Online dispute resolution refers to dispute resolution processes conducted with the assistance of information and communication technology, particularly the Internet (Conley Tyler & Bretherton, 2003). This can include facilitative processes such as online mediation, advisory processes such as online case appraisal, and determinative processes such as online arbitration or adjudication (Sourdin, 2005a). It also includes processes conducted through a computer program or other artificial intelligence that do not involve a “human” practitioner (NADRAC, 2001b). Similar terms are “online alternative dispute resolution (ADR)”, “eADR”, “iADR”, “virtual ADR”, “cyber mediation” and “cyber arbitration” (Cho, 2002).

In short, ODR refers to the substantial use of electronic or digital technology by parties, a third party, or both, in the dispute resolution process – the creation of a “virtual space” for dispute resolution (Bouille, 2005). Where it supplements the role of a third party, it has been termed the “fourth party” in dispute resolution (Katsh & Rifkin, 2001).

ODR has been available since 1996. According to Katsh and Rifkin (2001), its development has quickly passed through three broad stages: a “hobbyist” phase where individual enthusiasts started work on ODR; an “experimental” phase where foundations and international bodies funded academics and nonprofit organisations to run pilot programs; and an “entrepreneurial” phase where a number of for-profit organisations launched private ODR sites. Conley Tyler and Bretherton (2003) see ODR as now entering a fourth “institutional” phase where it is piloted and adopted by a range of official bodies, including courts and other dispute resolution providers.

Two main forces have driven the development of ODR (Katsh & Rifkin, 2001; Rule, 2002):

• the difficulty of utilising traditional dispute resolution methods in low-value cross-border online disputes;
• the potential of the online medium to provide more effective dispute resolution techniques for both online and offline disputes.

As of March 2006, at least 149 ODR sites and services had been launched worldwide, settling more than three million disputes (Conley Tyler, 2006). This follows on from previous research that identified 76 ODR sites in 2003 (Conley
Forum

Tyler & Bretherton, 2003) and 115 ODR services in 2004 (Conley Tyler, 2005). While most early activity took place in North America, other regions have now started to adopt ODR, with significant growth in the Asia Pacific (Hattotuwa & Conley Tyler, 2006). There are now ODR services in each region.

ODR uses a range of tools such as email, voice conferencing, instant messaging, bulletin boards, and video facilities to enable resolution of disputes where it would be impossible or inadvisable to meet in person (Kaufmann-Kohler & Schultz, 2004). There is wide variability in the number of cases dealt with by ODR sites: from only one case to over one million disputes (Conley Tyler, 2005).

ODR has been used to resolve both “online disputes” arising through or because of online activity and “offline disputes” such as neighbourhood and employment disputes arising in the “real world” (Rule, 2002). ODR services identified offer examples of using technology to resolve everything from eBay disputes to commercial litigation, and from gaming disputes to the Sri Lankan peace process. A small but growing number of ODR services focus on family disputes. These are discussed later.

Some ODR services charge for their services, while others are provided by government, by membership organisations, or by online communities as a free service (Conley Tyler & Bretherton, 2003). While many ODR providers adhere to voluntary policies, there is currently no regulation of ODR standards and no restriction on who can set up an ODR service (Conley Tyler & Bornstein, 2006).

Client satisfaction levels can be high: for example, 80% of the customers surveyed by SquareTrade.com said they would use the service again (Conley Tyler & Bretherton, 2003, p. 24). While figures are not available for all services, it appears that settlement rates are similar to those found in many offline dispute resolution processes handling similar cases (Conley Tyler & Bretherton, 2003, p. 2).

Demand for online dispute resolution is surprisingly high. A needs assessment conducted in Victoria, Australia, in 2003 using focus groups and hard-copy and online surveys found that more than 70% of respondents were willing to try ODR to settle a dispute (Conley Tyler, Bretherton, & Bastian, 2003). This result is particularly striking given the cross-section of citizens surveyed: of those who completed hard-copy surveys, 10% had never used a computer and 14% used a computer less than once a month.

Where disputants try ODR, they are positive about the results: a study in Canada found 80% of disputants exposed to ODR reported that they had no trouble expressing their ideas, concerns, and issues online and were confident that the other participants understood them. Interestingly, 82% said they had no difficulty expressing their emotions online (Hammond, 2003).

Many of the ODR systems designed to date involve ingenious solutions to meet human problems such as overcoming distance, providing a low-cost solution
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to international disputes, or providing automatic translation to deal with the language barrier (Conley Tyler & Raines, 2006). Some ODR systems enable communication when it would be literally impossible. A good example is Info-Share, which enables the parties in the peace process in the Sri Lankan conflict to engage in dialogue despite security and safety concerns (Hattotuwa, 2005). Another example is the Federal Court of Australia’s eCourt facility which includes videoconferencing for Native Title hearings in remote areas (Tamberlin, 2005).

In the Philippines, where mobile phones have much more penetration than personal computers, ODR is offered via mobile phone short messaging service (SMS) (Hattotuwa & Conley Tyler, 2006; Parlade, 2003). ODR can also be incorporated into face-to-face dispute resolution processes; for example, the Retail Tenancies Unit of New South Wales uses online communication for case management while still employing face-to-face mediation (Conley Tyler & Bretherton, 2003).

Benefits of ODR include bridging distance, saving travel and venue costs, and enabling parties to access expertise outside their local area. In some circumstances where parties are geographically dispersed, it may be the only financially feasible settlement option (Rule, 2002). ODR improves transfer, retrieval and storage of data and enables delayed communication 24 hours per day (Rule, 2000).

ODR also improves access to justice for some groups by mitigating disadvantages such as geographic isolation, confinement or imprisonment, disability, threat of physical violence, shyness in face-to-face settings, and socioeconomic status cues. It is argued that by contrast, traditional dispute resolution mechanisms advantage people who are physically attractive, articulate, well-educated, or members of a dominant ethnic, racial, or gender group (Conley Tyler & Bretherton, 2003; Gibbons, Kennedy, & Gibbs, 2002).

However, ODR clearly has some disadvantages. Text-based methods can reduce communication cues that can in turn lead to misinterpretations, negative interpersonal behaviour, and frustration due to delays in response (Gibbons et al., 2002). In addition, Boulle (2005) suggested that ODR can facilitate misrepresentation of identity. Online communication also advantages those who are familiar and comfortable with the relevant technology and tools (Eisen, 1998; Sourdin, 2005a; 2005b). Furthermore, ODR systems may be culturally inappropriate for some groups (Femenia, 2000; Law & Leonard, 2005; Primerano, 2005; Rao, 2005), or may be inaccessible to others because of lack of hardware or software (“the digital divide”) (Parlade, 2003; Sourdin, 2005a; Sourdin, 2005b; Wahab, 2005). Finally, Conley Tyler, Bretherton, and Bastian (2003), in their study of citizen demand for ODR, have shown that there is a small but significant group who are simply not interested in making use of online communication tools. This suggests that ODR should be an addition to rather than a substitute for existing dispute resolution processes.
ODR and Family Disputes

Looking specifically at family disputes, ODR potentially offers advantages over face-to-face primary dispute resolution in the following circumstances:

- ODR makes it possible to provide family law mediation services to parties who are geographically remote. Processes surrounding separation and divorce for such families can involve correspondence and litigation that is even more expensive and time-consuming than normal. Even if litigation is avoided, processes tend to involve greater than normal costs in time, travel, and accommodation. Given that the settlement of a divorce comes out of the one pool of assets, any process that reduces costs is likely to be of benefit.

- Where violence or abuse has been a factor, but parties nonetheless wish to negotiate rather than litigate, ODR offers an opportunity to do this without the need for face to face meetings.

- Use of the Internet allows for the prompt and virtually immediate delivery of progress made during the mediation and of settlement proposals.

- ODR can be used in combination with face-to-face dispute resolution. For example, it can be used to clarify stories and issues before a meeting and to facilitate postmediation session actions, negotiations, and drafting the terms of settlement (Boulle, 2005).

In relation to the best interests of the child, it has been demonstrated that unresolved, chronic conflict is most harmful. Interventions that either improve this, effectively buffer children against self-blame and the trauma of adult conflict, or both, significantly impact on a child’s longer-term wellbeing (McIntosh, 2003; Moloney & Fisher, 2003; Strategic Partners, 1998). An online environment has the capacity to give family members some breathing space at a time of high emotion and distress. Technology may also have a role in reducing parental conflict through the use of collaboration software. Stonestreet (2003), for example, reported that such software can improve communication between divorced parents by:

- providing a neutral environment to reduce the hostility between the parents
- helping the parents be more organized, which can lead to more consistency and stability in their children’s lives
- providing an alternative to using the children as a means of communication between parents.

Collaboration software is described more fully in the “Examples” section of this paper.

The application of ODR to family disputes is not new. One of the first four ODR systems launched in 1996 dealt specifically with family disputes (Katsh, 1996). However, it is fair to say that ODR for family disputes has not received as much critical attention as has its application in a number of other areas.
A search of the ODR Library (Conley Tyler & Allen, 2005) – the main bibliography for ODR information – reveals no articles that have the words “family”, “separation”, or “divorce” in their titles. A search of all articles in the ODR section of Mediate.com’s library (Helie, 2006) revealed two articles (Melamed, 2002; Stonestreet, 2003) relating to ODR and family disputes.

The most comprehensive studies of ODR to date, which have focused on documenting and describing ODR, have found that few ODR systems deal with family disputes. For example, Conley Tyler (2005) found that of 115 ODR sites and services, only five dealt specifically with family disputes. Three of these appeared to deal with a very wide range of disputes, including family disputes. Only two providers focused mainly on family ODR.


This is not just a problem for ODR and family disputes. Overall, the state of research into ODR is unsatisfactory, with few rigorous scientific studies available to date. Exceptions include Tan, Bretherton, and Kennedy (2005) and Hammond (2003), which are rare in employing a clear scientific method. There has been some analysis of key issues such as demand for ODR (Conley Tyler, Bretherton, & Bastian, 2003) and ODR settlement rates (Conley Tyler & Bretherton, 2003) – but even here the figures used were self-reported. This points to the fact that ODR is an emerging area of practice.

However valuable anecdotal material is now appearing which shows that practitioners in family disputes are using ODR.

Jim Melamed, co-founder of Mediate.com, claims that the Internet is changing the way divorce mediation is practised in the USA and is becoming an integral part of effective and affordable divorce mediation services and programs. Examples cited by Melamed (2002) include:

- parties seeking mediators through an Internet search
- mediators describing their services through professional web sites
- mediators distributing information to clients by email with attachments and web pages links
- mediators and parties corresponding separately or jointly by email
- draft agreements being used to track changes in the negotiations
- mediators utilising web resources to obtain information and to educate the parties
- parties and mediators obtaining statutory, regulatory, child support, and other information online
Melamed (2002) noted that:

More participants are using the Internet to consider modifications to their arrangements, especially when parents live at a distance. The reality is that many divorced parents are already using email as the primary means of communicating both at work and in their parenting relationship. Extending this to include mediation discussions is more and more natural. If getting together is in any way difficult or costly we will find more and more modification discussions taking place online. (Distance and Post-Decree Modification section)

Drawing together the work to date, the following typology can be suggested for the potential application of ODR to family disputes:

- facilitating negotiations about property and maintenance issues
- facilitating negotiations about parenting
- assisting parties to develop their negotiation strategies
- providing mediation and other primary dispute resolution services online
- supporting face-to-face dispute resolution through the use of videoconferencing, teleconferencing, and email
- supporting face-to-face dispute resolution through document drafting and other collaboration tools
- allowing for the exchange of information and the storage of data applicable to the settlement of property and financial interests or in order to manage ongoing parenting arrangements.

The following section considers examples of ODR systems launched to date that attempt to make use of this potential.

Examples of ODR for Family Disputes

This section describes and categorises nine ODR systems focusing on family disputes that have been developed to date. It assesses whether they are fulfilling the potential application of ODR to family disputes discussed in earlier sections of this paper.

- Family Mediation Canada (Canada)
- FamilyWinner (Australia)
- OurDivorceAgreement (international)
- OurFamilyWizard (international)
- SmartSettle (Canada)
- Split Up (Australia)
- Square Trade (international)
- University of Maryland Online Mediation Project (U.S.A)
- UpToParents (U.S.A)
Facilitated Negotiation

Up To Parents (www.uptoparents.com) encourages parents to consider and assess their commitments to their children using the site’s web-based software. A standard form contract is provided on which parents mark the undertakings they are able to make. The system records any clauses on which both parents are able to agree and produces a parenting agreement. This tool meets the task that Fisher and Brandon (2002) identified for mediators as helping “the couple to redefine the relationship from that of spouses to that of parents jointly responsible for their children” (p. 47). It allows direct negotiation between the parties, but controls negotiation tightly to reduce the potential for escalating conflict.

OurDivorceAgreement (www.ourdivorceagreement.com) enables couples that seek an uncontested divorce to complete their divorce agreement online. Although this website is based in the USA, it provides online an Australian uncontested divorce agreement and forms for filing with the Family Court of Australia. While parties may not be in dispute about the separation, the website provides for negotiation and mediation: it offers access to a parent scheduling website and mediation services through a link to the USA based mediation service, MediationFirst (www.mediationfirst.com), which offers mediation by teleconference, online audio, or videoconference as well as face-to-face.

Negotiation Support

By contrast, two systems go beyond facilitating communication and provide negotiation support (expert systems that assist parties to plan for and conduct negotiations) (Kersten, 2005).

Smart Settle (www.smartsettle.com) offers a family-conflict resolution process that uses analytical software to support face-to-face mediation and online mediation sessions. Parties identify and rank their preferences and are taken through a process of trading off various preferences to achieve an optimal negotiation result (Thiessen & Zeleznikow, 2005). Smart Settle also offers to handle the entire family mediation process online, if the parties are unable to meet face-to-face because of geographical distance or other reasons.

FamilyWinner is an Australian computer program designed “to provide negotiation decision support” within the Australian family law system (Bellucci & Zeleznikow, 2005; Zeleznikow & Bellucci, 2004; Zeleznikow & Bellucci, 2005). The Family Winner system requires the couple to separately indicate issues of importance and to assign each issue a weight. The program uses the information provided to form trade-off rules for the couple and to generate outcomes for their consideration. According to Zeleznikow and Bellucci (2004), the FamilyWinner program assumes the dispute can be modeled using principled negotiation; that weights can be assigned to each of the issues in dispute; and that sufficient issues are in contention to allow each side to be compensated for losing an issue.
Artificial Intelligence
Another system developed by John Zeleznikow over the last decade, Split Up, focuses on the decision-making of each party and assists parties in calculating the division of property in family law proceedings (Sourdin, 2005a; The Economist, 2006). It is an artificial intelligence system that searches a database of Australian family-law decisions to give an indication of the likely result of a particular negotiation demand. The effect of using the system is to give parties feedback on the likely results of extreme demands and thus produces a moderation of negotiating behaviour.

Collaboration Software
Collaboration software allows people to connect by exchanging information and planning schedules (Stonestreet, 2003):

This type of software frequently consists of tools such as a calendar, message center, address book, tasks, etc. Information contained in these tools can be shared between parents and can improve scheduling and communication by providing a better means of organizing the large volume of data inherent in child rearing. Information such as the time and location of the school play, addresses for the child’s barber, doctor and dentist, the parent responsible for buying the soccer shoes this year, etc., can be stored in one shared location that multiple parents can view whenever and wherever they have access to a computer and the Internet. (Collaboration Software Can Help Parents Get and Stay Organized section)

Use of collaboration software minimises nonverbal interaction, can help to reduce hostility, and allows information to be logically organised, searched, and stored for a historical communication log. According to Stonestreet (2003), this can remove many opportunities for conflict between parents and can help the parents to have a more businesslike relationship for the sake of their children’s wellbeing.

OurFamilyWizard (www.ourfamilywizard.com) is a collaboration software system designed for family disputes. It was developed in the USA but is now expanding internationally. In recognising that “shared parenting is not easy”, one of the site’s aims is to reduce opportunities for parental conflict through enabling the storage and access of family information on an encrypted and password protected website. OurFamilyWizard offers online service calendars, a message board, a reminders facility, a journal, a family information bank, access to important documents, and a family resource section. A range of family members can be given access to use the facility.

Online Mediation
A family dispute mediation process has also been offered online through the University of Maryland Online Mediation Project (Katsh, 1996). This was one of the first four ODR systems launched in 1996 as a pilot project of the University of Maryland. It provided mediation services via email for family and health disputes under Maryland law.
Square Trade (www.squaretrade.com), the largest provider of ODR, has also become involved in family mediation almost by accident. Raines (2004) reported that Square Trade initially referred requests for family mediation to face-to-face mediators, but found that those who requested online family mediation resisted being referred and had specific reasons for requesting online communication, such as distance. Consequently, Professor Raines, a trained family therapist and family mediator, began to provide online divorce mediation through Square Trade because there was demand and an experienced family mediator available (S. Raines, personal communication, July, 2004).

Family Mediation Canada (Brannigan, 2004) has also made use of new technologies to provide web-broadcast teleconferencing and joint document collaboration facilities as a service to its members mediating family disputes.

Information Resources
Finally, it is worth noting that information and communication technology can play a useful support role in providing information to parties in dispute. While this is far short of providing ODR, this can have a useful ancillary role.

In Australia, the Internet has been used to support family law mediation through the Family Court of Australia website (www.familycourt.gov.au) or the Relationships Australia website (www.relationships.com.au). Both provide extensive information about the processes of the Family Court and the issues faced by separating couples.

With the amendments to the Family Law Act coming into operation on 1 July, 2006, the Federal Government has established two new websites: a Family Law Courts website, www.familylawcourts.gov.au, and Family Relationships Online, www.familyrelationships.gov.au. These two websites expand the information available online to families and separating couples to include the new options available for resolving family disputes, organisations to contact for support or counselling, or dispute resolution services.

Other sites include www.divorce.com.au, set up by a family law firm, which offers an online divorce application service and www.idont.com.au, which aims to be a broad online divorce directory. While falling far short of providing ODR processes, such websites fulfill a useful informational role.

Implications
The examples of applying ODR to family disputes as outlined in the present paper are interesting, thoughtful, and imaginative uses of the Internet for providing dispute resolution services. However, the efficacy of these applications is not established, and at this point these examples can only be drawn upon to illustrate what may be possible.

The ODR systems developed to date have broadly made use of the potential of information and communication technologies. Family ODR systems use both
the communication and analytical powers of information technology. They have been applied to various stages of the dispute process. Family ODR systems have been developed to allow rich real time interaction (e.g., videoconferencing) or highly distanced communication (e.g., standard form contracts). However, it is notable that none of the systems provides the entire range of ODR processes relevant to family disputes. At present, each is offering parties only some of the possible tools.

It is difficult to guess what further developments in ODR systems are likely. Commercial development of family ODR systems remains difficult due to high development costs and lack of a clear business model. There may be a potential role for Family Relationship Centres in driving these developments.

Significant advances in online family law mediation are likely to take place when software is developed that assists the parties at intake or as early as possible to classify the issues in agreement and in dispute – and provides a range of tools to assist with the whole range of issues needing negotiation. These include how to parent children, how to reduce parental conflict, how to identify the best interests of the children, the principles for property distribution, including the impact of superannuation and other contingencies, and the principles that inform child and spousal maintenance.

If the use of information and communication technologies in family disputes continues to grow, this is likely to have important implications for dispute resolution practitioners.

Most professionals involved in family disputes will already make use of information technology at a minimal level. For example, practitioners routinely direct parties to relevant websites. Other common uses of the online environment are the exchange of documents as attachments to email and through email to keep a record of communications. All of the above does not replace, but rather acts as an additional support to face-to-face dispute resolution.

However, the growth in ODR suggests that dispute resolution providers will need to adapt to society’s adoption of new technologies and expectations for online services. Although traditional forms of dispute resolution will still be in demand, it is likely that online tools will need to be a part of dispute resolution practice (DeSteven & Helie, 2000). This in turn will require practitioners to make changes to their knowledge, skills, and attitudes – and potentially changes to accreditation systems (Conley Tyler & Bornstein, 2006).

The broad challenge for online mediation is no different to face-to-face mediation – how to create an environment and process in which the parties feel safe, are encouraged to discuss their concerns, and are able to negotiate a fair resolution (Pyser & Figallo, 2004). But the actions needed for effective online communication may differ. This challenges dispute resolution practitioners to translate to the online environment the many skills used in face-to-face dispute resolution processes.
Raines (2004, 2005) outlined a range of skills that face-to-face mediators need to develop when moving to the online environment. Conley Tyler and Bretherton's (2003) list of skills that dispute resolution practitioners need to learn include:

• maintaining constant communication (Rule, 2002)
• mastering the hardware and software of new technology
• multitasking between multiple spaces for private sessions with the parties and the joint session
• learning how to re-create online “rituals” (NADRAC, 2001b) and “ceremonial moments” (Katsh, Rifkin, & Gaitenby, 2000) without face-to-face contact
• learning to control information flow through quick and active intervention (Katsh & Rifkin, 2001, p.141)
• “active reading” between the lines and asking questions that identify and attend to feelings involved (Katsh & Rifkin, 2001, p.152).

A possible problem is that many face-to-face mediators may not currently be interested in learning these skills. They may have pursued careers in dispute resolution precisely because they are “people people” and may have an aversion to the perceived impersonalisation of technology. According to Conley Tyler and Raines (2006):

Most alternative dispute resolution practitioners still regard the role of technology in dispute resolution as something of a fringe issue. Usually known as online dispute resolution or by its acronym, ODR, this area can appear specialist, technical and irrelevant to some dispute resolution practitioners. (p.333).

However, as the Internet becomes more a part of our daily lives, the manner in which we communicate will inevitably be modified by the use of information and communication technology. Melamed (2002) envisioned “a day when the context and medium for mediation discussions may in fact become primarily electronic, with face-to-face meetings being the augmentation, perhaps even the exception” (Beyond Face-to-Face Dialogue section). This is arguably already happening among younger generations (Larson, 2003; Syme, 2006). Changed communication patterns will inevitably change family-dispute resolution practice.

Conley Tyler and Raines (2006) urged dispute resolution practitioners to look at hard evidence to test their assumptions about the role of technology, particularly the idea that it is depersonalising. For example, intriguing evidence suggests that sometimes it is more effective to have parties negotiate via instant online communication than face to face (Tan, et al., 2005) Results such as these cast doubt on one of the key objections to ODR.

At the same time, ODR will never be a complete substitute for existing dispute resolution processes. It is one option available to practitioners and will not always be the best option for the parties or the practitioner. In addition, regardless of the medium, all professional mediators need to use intake procedures that assess the suitability of
a dispute, as well as the suitability of the parties and dispute resolution practitioner for a dispute resolution process. For example, the assessment of a family’s online capabilities would be part of the intake process through the mediator ensuring:

• that the parties and children have independent, secure access to a computer and the Internet and have separate email addresses;
• that all the parties are comfortable in the online environment.

More specific guidelines on the conduct of online dispute resolution that assist in translating the general rules of good dispute resolution practice to the online environment can be found in NADRAC (2002).

ODR is currently an interesting if not yet fully developed new tool for family-dispute practitioners. As the increased use of information and communication technology and the Internet influence the way in which dispute resolution services are delivered, practitioners and providers of dispute resolution services would do well to anticipate that some clients will want ODR and proactively educate themselves in this area.

References


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Raines, S. (2005). The practice of mediation online: Techniques to use or avoid when mediating in cyberspace. In M. Conley Tyler, E. Katsh, & D. Choi, (Eds.), Proceedings of the Third Annual Forum on Online Dispute Resolution. The International Conflict Resolution Centre, The University of Melbourne in


EndNotes
1 A further three ODR systems that potentially apply to family disputes were identified by Conley Tyler, 2005 Sopra Mediation and e-consens from Germany and Mediate.com from the USA. These systems were not included in this discussion as they appear to apply generally to a broad variety of disputes rather than focusing specifically on family disputes.
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—Tina Sibbitt, Associate Staff Attorney, Access to Justice Program - New Mexico Administrative Office of the Courts
THE PUBLIC BELIEVES PREDISPUTE BINDING ARBITRATION CLAUSES ARE UNJUST: ETHICAL IMPLICATIONS FOR DISPUTE-SYSTEM DESIGN IN THE TIME OF VANISHING TRIALS

Victor D. Quintanilla* & Alexander B. Avtgis**

INTRODUCTION

One troubling cause of the decline in civil trials is the growing ubiquity of predispute binding arbitration clauses in adhesion contracts.1 Over the past decade, two interacting patterns have come to encourage transactional attorneys to engage in zealous advocacy when crafting such clauses. First, recent U.S. Supreme Court jurisprudence broadly defers and delegates authority to those who create binding arbitration clauses in adhesion contracts with little oversight.2 Second, members of the public rarely read or understand these clauses buried in boilerplate language.3

These clauses displace the legal backdrop of fair, legitimate, and just public legal institutions with the dispute-system procedure most preferred by those who draft and design adhesion contracts.4 Therefore, norms of zealous

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1. See J. Maria Glover, Disappearing Claims and the Erosion of Substantive Law, 124 YALE L.J. 3052, 3074–75 (2015); Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 DUKE L.J. 745, 752 (2010) (“As trials have declined, private arbitrations have grown exponentially. . . . [A]lternative dispute resolution (ADR) has gained a life of its own.”).
advocacy may collide with a wider and more virtuous ethic that considers third parties and the public’s desire for a fair, legitimate, and just civil justice system.5

Before turning to the dialectic between these two ethical principles, we report a psychological experiment conducted with the American public.6 The study randomly assigned members of the public into conditions that varied the amount they learned about the procedure (for example, a legal definition, an example clause, a New York Times article) and asked them to rate the fairness and justice of binding arbitration. The experiment reveals that the more the public learns about predispute binding arbitration clauses, the more they believe this dispute-resolution procedure is unjust and illegitimate. Yet, the vast majority of participants mistakenly believed that they had never agreed to a binding arbitration clause.

Drawing on these findings, we discuss the pressing need for a wider ethic that applies to transactional attorneys who design binding arbitration clauses within adhesion contracts. We also draw lessons from behavioral legal ethics and social psychology. These lessons reveal that this wider ethic may be endangered by the situational influences that currently operate within law firms (and in-house) due to these two intersecting patterns. We discuss ways of altering the regulatory environment to encourage the wider ethic to flourish.

I. PRIOR EMPIRICAL STUDIES ON PREDISPUTE BINDING CONSUMER ARBITRATION

While the number of empirical legal studies on predispute binding consumer arbitration has increased since AT&T Mobility LLC v. Concepcion7 and American Express Co. v. Italian Colors Restaurant,8 this body of literature has been eclipsed by the rise in the use of binding arbitration clauses in adhesion contracts9 and the power of these clauses as reinforced by the post-Concepcion, post-Italian Colors legal regime.10


6. The authors conducted this survey, which is referenced repeated throughout this Article as Victor D. Quintanilla & Alexander B. Avtgis, Survey on Binding Arbitration (Aug. 2016) (on file with the Fordham Law Review) [hereinafter Survey].


Legal scholars have empirically examined several important issues that relate to whether consumers meaningfully consent to predispute binding consumer arbitration. For example, a body of literature examines consumers’ general understanding of standard-form contracts and included contract terms. This research reveals both that consumers rarely read the fine print in adhesion contracts, and even in the rare instances when they do, they seldom understand the meaning and effect of binding arbitration clauses.

Recent empirical legal studies that explore predispute binding arbitration clauses, and particularly those clauses with class waivers, focus on the growing prevalence of these clauses themselves or the content, legal implications, or varying effects that such clauses have for consumers and employees. These studies find that predispute binding consumer arbitration clauses and class action waivers are ubiquitous and that their use is rising. Furthermore, these studies reveal that members of the public, as one-shot players, often fare poorly in binding arbitration. Not surprisingly, the mere existence of a predispute binding consumer arbitration clause or class action waiver reduces the likelihood of securing counsel.

These lines of inquiry surely deepen our knowledge of the extent to which consumers and employees truly consent to these terms and the effect of this legal backdrop, while leaving open the question of what an ordinary member of the public thinks and feels about these clauses after learning their effect. In short, a gap exists in the body of empirical work.


14. For example, David Horton and Andrea Cann Chandrasekher examine an extensive dataset of American Arbitration Association complaints as well as report filing rates, outcomes, damages, costs, and case lengths. See Horton & Cann Chandrasekher, supra note 10, at 91–102.


17. See, e.g., Jean R. Sternlight, Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection, 80 BROOK. L. REV. 1309, 1334 (2015) (“[G]iven the economics of how plaintiff-side employment attorneys are compensated, when employers impose mandatory arbitration clauses they make it more difficult for employees to secure legal representation.”).

18. See, e.g., Peter B. Rutledge, Arbitration Reform: What We Know and What We Need to Know, 10 CARDOZO J. CONFLICT RESOL. 579 (2009).
Prior studies underscore that the public fails to grasp what these terms in adhesion contracts mean when seeking goods, services, credit, or employment. Here, we investigate what the public thinks and feels about binding consumer arbitration after learning about the actual meaning and significance of predispute binding arbitration clauses in adhesion contracts. Our study seeks to simulate the critical moment in which a member of the public learns from a legal professional, after his or her dispute has arisen, that the dispute is bound by a predispute binding arbitration clause. We will also describe the implications of this experience on the ethics of dispute-system design in our general discussion.

II. EMPIRICAL LEGAL STUDY: HOW DOES LEARNING ABOUT PREDISPUTE BINDING ARBITRATION CLAUSES AFFECT THE PUBLIC’S PERCEPTION OF THE DISPUTE PROCEDURE?

Our empirical legal study examined the extent to which learning about predispute binding arbitration clauses affects the way in which ordinary members of the public view the dispute procedure. We conducted a psychological experiment that investigated the hypothesis that the more that ordinary members of the American public learn about the meaning and significance of predispute binding arbitration clauses, the more they think the practice is unfair and unjust. We hypothesized that, relative to providing them (1) no information (and simply testing their lay beliefs); (2) a legal definition of binding arbitration; or (3) a sample predispute binding arbitration clause, after learning about the meaning of predispute binding arbitration clauses in a *New York Times* article reporting how ordinary Americans are affected by the dispute-resolution procedure, their beliefs about the justice and fairness of binding consumer arbitration would diminish.

A. Method: Design and Participants

Our study employed a single-factor, between-subjects design consisting of four conditions that cumulatively increased exposure to information: (1) a “no information” condition, (2) a “legal definition of binding arbitration” condition, (3) a “legal definition of binding arbitration and an example predispute binding arbitration clause” condition, and (4) a “legal definition of binding arbitration, an example predispute binding arbitration clause, and a *New York Times* article” condition. We recruited 400 participants ($N = 400$) from Amazon Mechanical Turk. Amazon Mechanical Turk is widely employed within the behavioral and social sciences as a platform to recruit nationally representative samples of the American public. Of the total

19. See generally Krista Casler et al., *Separate but Equal?: A Comparison of Participants and Data Gathered via Amazon’s MTurk, Social Media, and Face-to-Face Behavioral Testing*, 29 COMPUTERS HUM. BEHAV. 2156, 2156–60 (2013); John J. Horton et al., *The Online Laboratory: Conducting Experiments in a Real Labor Market*, 14 EXPERIMENTAL ECON. 399 (2011); Gabriele Paulacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411 (2010). Participants received a $1.00 payment as compensation for participation in our study.
recruited, seventy-one participants failed the study’s manipulation check (described below) and were excluded from analyses. Thus, the final sample consisted of 329 adults who passed the study’s manipulation check. This sample included 190 males (57.8 percent) and 139 females (42.2 percent) and comprised the following self-reported racial/ethnic groups: 75.4 percent Caucasian/white, 8.5 percent Asian/Asian American, 5.8 percent African American/black, 7.3 percent Hispanic, 0.3 percent Native American and 2.7 percent other. Geographically, participants resided in thirty-nine states. The majority of participants either graduated from a four-year college/university (40.7 percent) or had studied at such a college/university (13.4 percent). The average age of the sample of the American public was 36.19 years ($M = 36.19, SD = 12.23$).

B. Procedure

After reading an introduction for the research study, participants gave their informed consent to participate in an online survey about dispute-resolution procedures. Participants were then randomly assigned by the Qualtrics platform to one of the following four conditions.

In the “no information” condition, participants read this prompt: “In this survey, you will be asked for your opinions about two procedures for resolving disputes that consumers bring against financial companies, such as credit card issuers, banks, private student loan companies, and mobile wireless companies. These two procedures are (1) binding arbitration and (2) trial.” After reading this introductory statement, the participants proceeded to the next page of the survey where they rated the dependent measures described below.

In the “legal definition of binding arbitration” condition, participants read the introductory statement and the legal definition of binding arbitration, and they were then provided an example binding arbitration clause, which stated:

Black’s Law Dictionary defines arbitration as follows: arbitration n. A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.—Also termed (redundantly) binding arbitration—arbitrate, vb.—arbitral, adj.20

In the “example binding arbitration clause” condition, participants read the introductory statement and the legal definition of binding arbitration, and they were then provided an example binding arbitration clause, which stated:

Applicable Law; Arbitration. This website is arranged, sponsored, and managed in the state of Washington, USA. The laws of the state of Washington govern this Agreement and all of its terms and conditions, without giving effect to any principles of conflicts of laws. You agree that any action at law or in equity arising out of or relating to these terms and conditions shall be submitted to confidential arbitration in Seattle,

20. This quote is drawn from Arbitration, Black’s Law Dictionary (10th ed. 2014).
Washington, except that, to the extent you have in any manner violated or threatened to violate our intellectual property rights, we may seek injunctive or other appropriate relief in any state or federal court in the state of Washington, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrator’s award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.

Unbeknownst to the participants, this was virtually the same clause governing their employment as workers of Amazon Mechanical Turk.

In the “New York Times article” condition, participants read the introductory statement, the legal definition of binding arbitration, the example binding arbitration clause, and a New York Times article entitled “Arbitration Everywhere, Stacking the Deck of Justice” by Jessica Silver-Greenberg and Robert Gebeloff, dated October 31, 2015. This article was the first in an important trilogy of articles reporting an investigation conducted by the New York Times on how binding consumer arbitration affects ordinary members of the American public. For most members of the public, this article was their introduction to the real-world meaning and significance of predispute binding consumer arbitration clauses. The article begins with the statement:

On Page 5 of a credit card contract used by American Express, beneath an explainer on interest rates and late fees, past the details about annual membership, is a clause that most customers probably miss. If cardholders have a problem with their account, American Express explains, the company “may elect to resolve any claim by individual arbitration.”

Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.21

After reading and learning the information in each of the conditions, they turned to the dependent measures described in detail below. Participants completed a manipulation check to ensure that they correctly understood the information presented, also described below. Afterward, participants

completed a short demographic questionnaire (about, for example, gender, age, race, education, and residential state). They then indicated which of several statements applied to them, such as, “I am a person who has signed a binding arbitration clause.” Participants then indicated whether and how certain they were that, “[b]y using Mturk, have you entered into a binding arbitration clause with Amazon?” Finally, they were asked to “[p]lease explain your response so that we can understand your answers.”

C. Measures

This section describes the dependent measures that the participants completed.

1. Familiarity

On a seven-point scale ranging from one (“not at all familiar”) to seven (“very familiar”), we asked participants to rate for trial and binding arbitration: “How familiar are you with the following procedures for resolving disputes that consumers have with financial companies, such as credit card issuers, banks, private student loan companies, and mobile wireless companies?”

2. Justice and Legitimacy Items

Participants were then asked to rate trial and binding arbitration on six items that relate to perceived fairness, unfairness, justice, accuracy, effectiveness, and legitimacy: “Using the scales provided, please rate trial and binding arbitration as ways of resolving disputes that consumers bring against financial companies, such as credit card companies, banks, private student loan providers, and mobile wireless companies.” We asked participants to rate trial and binding arbitration on each of these six items, again, on a seven-point scale ranging from one (“not at all”) to seven (“very”): how fair, unfair, just, accurate, effective, and legitimate are the following procedures? As described below, these six measures were highly correlated with feelings toward binding arbitration and converged on a single underlying factor, referred to as an “anticipated experience of justice.”

3. Feelings Toward Trial and Binding Arbitration

A seven-point scale assessed how participants feel toward trial and binding arbitration as ways of resolving disputes (very negative, negative, somewhat negative, neutral, somewhat positive, positive, very positive).

23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
4. Favorability Toward Binding Arbitration

Participants also rated how favorable or unfavorable they feel toward binding arbitration (very unfavorable, unfavorable, somewhat unfavorable, neutral, somewhat favorable, favorable, very favorable), and they were asked to explain those feelings toward binding arbitration “so that we can understand your impressions.”

5. Manipulation Check

A manipulation-check item assessed whether participants correctly recalled the information that they read about binding arbitration. Participants were asked:

In today’s study, you were presented with and read, (1) Black’s Law Dictionary’s definition of arbitration, (2) Black’s Law Dictionary’s definition of arbitration AND an example arbitration clause, (3) Black’s Law Dictionary’s definition of arbitration, and example arbitration clause, AND a New York Times article on binding arbitration, or (4) None of the above. I simply recorded my impressions of trial and binding arbitration.

D. Results

This section describes the results of the survey and how we analyzed them.

1. Measuring Results: The Analytic Strategy

Before turning to results, we describe our analytic strategy. First, an initial analysis of variance (ANOVA) omnibus test examined whether there were statistically significant differences between conditions for each dispute-resolution procedure: trial and binding arbitration. Next, if the omnibus test indicated that the conditions significantly differed, Tukey honest significant difference (HSD) post hoc tests probed for differences between the information conditions to specifically examine whether the New York Times article condition was different from all other information conditions. All means and standard deviations for each dependent variable (by label) are reported in table 1 in the appendix.

2. Familiarity

An ANOVA revealed that participants’ prior familiarity with binding arbitration did not statistically differ across information conditions, $F(3, 325) = 0.92, p = .431, \eta_p^2 = .01$. In addition, participants’ prior familiarity with trial did not differ across information conditions, $F(3, 325) = 0.93, p = .427, \eta_p^2 = .01$. As such, the randomization of

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29. Id.
30. Id.
31. See infra Table 1.
participants with different levels of prior familiarity for these procedures between conditions was successful.

3. Justice and Legitimacy Items

(i) Fairness. An ANOVA revealed that information had a significant effect on perceptions of the fairness of binding consumer arbitration, $F(3, 325) = 21.07, p < .000, \eta^2_p = .16$. Tukey tests explored potential differences between the New York Times article condition and all the other information conditions. Results revealed that the New York Times article condition ($M = 3.27, SD = 1.58$) differed from all other conditions: no information condition ($M = 3.99, SD = 1.36$) ($p = .011$), definition condition ($M = 5.00, SD = 1.37$) ($p < .000$), and sample clause condition ($M = 4.57, SD = 1.43$) ($p < .000$). The more participants learned about the meaning and significance of predispute binding consumer arbitration clauses, the more their ratings of the fairness of binding arbitration decreased.

(ii) Legitimacy. An ANOVA revealed that information also had a significant effect on perceptions of the legitimacy of binding consumer arbitration, $F(3, 325) = 19.05, p < .000, \eta^2_p = .15$. Tukey tests explored potential differences between the New York Times article condition and all the other information conditions. Results again revealed that the New York Times article condition ($M = 3.59, SD = 1.69$) differed from all other conditions: no information condition ($M = 4.71, SD = 1.66$) ($p < .000$), definition condition ($M = 5.51, SD = 1.49$) ($p < .000$), and sample clause condition ($M = 5.02, SD = 1.58$) ($p < .000$). As participants learned more about how ordinary Americans are affected by predispute binding arbitration clauses, their ratings of the legitimacy of the procedure decreased.

The pattern of results observed for “fairness” and “legitimacy” was replicated across all seven justice and legitimacy dependent measures, including the remaining measures of “unfairness,” “justness,” “accuracy,” and “effectiveness.” In short, the more the public learns about how predispute binding arbitration clauses operate, the more unfair and unjust they find the dispute procedure.

32. See infra Table 1.
33. For all means and comparisons, see infra Table 1.
34. See infra Table 1.
35. For all means and comparisons, see infra Table 1.
36. See infra Table 2. Above, we report the influence of learning about predispute binding arbitration clauses on attitudes toward binding arbitration. Here, we report the influence of learning about predispute binding arbitration clauses on attitudes toward trial. Taken together, the information read did not significantly affect perceptions of fairness of trial $F(3, 325) = 1.47, p = .224, \eta^2_p = .01$ ($M_{\text{Grand}} = 5.28, SD_{\text{Grand}} = 1.34$), perceptions of the unfairness of trial, $F(3, 325) = 0.143, p = .934, \eta^2_p = .00$ ($M_{\text{Grand}} = 2.84, SD_{\text{Grand}} = 1.44$), perceptions of the accuracy of trial, $F(3, 325) = 2.06, p = .105, \eta^2_p = .02$ ($M_{\text{Grand}} = 4.93, SD_{\text{Grand}} = 1.30$), or perceptions of the justness of trial, $F(3, 325) = 1.44, p = .231, \eta^2_p = .01$ ($M_{\text{Grand}} = 5.23, SD_{\text{Grand}} = 1.38$). The information read marginally affected perceptions of the effectiveness of trial, $F(3, 325) = 2.12, p = .098, \eta^2_p = .02$ ($M_{\text{Grand}} = 5.14, SD_{\text{Grand}} = 1.34$), and the legitimacy of trial, $F(3, 325) = 2.41, p = .067, \eta^2_p = .02$ ($M_{\text{Grand}} = 5.75, SD_{\text{Grand}} = 1.31$).
4. Feelings Toward Trial and Binding Arbitration

An ANOVA revealed that learning about binding consumer arbitration had a significant effect on feelings toward the dispute procedure, $F(3, 322) = 27.19, p < .000, \eta^2_p = .20$. Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results revealed that the *New York Times* article condition ($M = 2.58, SD = 1.53$) differed from the no information condition ($M = 3.93, SD = 1.47$) ($p < .000$), the definition condition ($M = 4.74, SD = 1.42$) ($p < .000$), and the sample clause condition ($M = 4.26, SD = 1.62$) ($p < .000$). As compared to the other conditions, after participants read the *New York Times* article depicting how ordinary Americans are affected by the dispute-resolution procedure, they had greater negative feelings toward binding arbitration. The information provided did not have a significant effect on feelings toward trial, $F(3, 325) = 1.61, p = .187, \eta^2_p = .02$ ($M_{\text{Grand}} = 4.98, SD_{\text{Grand}} = 1.39$).

5. Favorability Toward Binding Arbitration

An ANOVA revealed that learning about binding consumer arbitration had a significant effect on the favorability toward this dispute procedure, $F(3, 325) = 27.18, p < .000, \eta^2_p = .20$. Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results revealed that the *New York Times* article condition ($M = 2.61, SD = 1.53$) differed from all other conditions: no information condition ($M = 4.00, SD = 1.61$) ($p < .000$), definition condition ($M = 4.78, SD = 1.35$) ($p < .000$), and sample clause condition ($M = 4.35, SD = 1.67$) ($p < .000$). As compared to the other conditions, when participants learned about how ordinary Americans are affected by binding arbitration, they found the dispute-resolution procedure less favorable.
Figure 1: Categories in this figure and in table 1 in the appendix reflect reading information and cumulate as follows: No information, Black’s Law Dictionary definition, Sample clause from Amazon Mturk agreement, and New York Times article. Means and 95% CI are represented.

6. Anticipated Experience of Justice

After establishing the interitem correlation of the justice and legitimacy items, we conducted an exploratory factor analysis to test the extent to which these measures form a single composite and load onto a single latent factor. Ultimately, we concluded that these seven measures converged on a single underlying factor—an anticipated experience of justice with binding consumer arbitration. We then conducted a one-way ANOVA to examine the influence of learning about binding arbitration on anticipated experiences of justice.

To begin, table 3 in the appendix reveals the interitem correlation between these dependent measures. As can be observed, the variables are highly correlated, with all interitem Pearson’s R rising above .446. This indicates that the psychological experiences reflected by these dependent measures are highly correlated.

Next, we conducted an exploratory factor analysis, which revealed a Cronbach’s α of .936. This evidences a high reliability that these items reflect an underlying construct. Therefore, we conducted an exploratory factor analysis, which revealed that all seven dependent measures are explained by a single underlying factor. The cross-scenario solution yielded one significant eigenvalue of 5.10 for all seven measures, respectively, cumulatively explaining 72.79 percent of the total variation. The KMO statistic was .935 with a significant Bartlett’s Test of Sphericity (p < .001), indicating the appropriateness of the factor analysis.
An ANOVA revealed that learning about binding consumer arbitration had a significant effect on anticipated experiences of justice, $F(3, 325) = 28.46$, $p < .000$, $\eta^2_p = .21$. Tukey tests explored potential differences between the New York Times article condition and all the other information conditions. Results revealed that the New York Times article condition ($M = 3.22$, $SD = 1.29$) differed from all other conditions: no information condition ($M = 4.20$, $SD = 1.20$) ($p = .001$), definition condition ($M = 4.99$, $SD = 1.16$) ($p < .000$), and sample clause condition ($M = 4.61$, $SD = 1.27$) ($p < .000$).

As compared to the other conditions, when participants learned how ordinary Americans are affected by binding arbitration, their anticipated experiences of justice in this dispute-resolution procedure greatly diminished.

Figure 2: Categories reflect reading information presented and cumulate as follows: No information, Black’s Law Dictionary definition, Sample clause from Amazon Mturk agreement, and New York Times article. Means and 95% CI are represented.

7. Beliefs the Public Holds About Whether They Have Entered into Binding Arbitration Clauses

After responding to these measures, participants then completed a brief demographic questionnaire, which asked them to “[p]lease mark any of the following statements that apply to you.” The first category was, “I am a person who has signed a binding arbitration clause,” and it was listed first.

41. See infra Table 1, infra Figure 2.
42. For all means and comparisons, see infra Table 1.
43. Survey, supra note 6.
and quite conspicuously before several other categories. The list also contained a “none of the above” option below these categories.

Troublingly, 71.4 percent (235 participants) marked “none of the above,” and only 14.9 percent (49 participants) indicated that they have signed a binding arbitration clause. These responses are patently incorrect for at least two reasons. First, the Consumer Financial Protection Bureau’s empirical research reveals that binding arbitration clauses are ubiquitous and that tens of millions of consumers use consumer financial products or services that are subject to predispute arbitration clauses, including mobile wireless phones (87.5 percent of contracts covering 99.9 percent of the market).

Second, by definition, all of these participants (100 percent) as workers on Amazon Mechanical Turk’s online platform have entered into a predispute binding arbitration clause with a class action waiver. Indeed, by registering

44. These additional categories were “I have legal training or experience,” “I am an arbitrator,” “I own or run a business,” “I am a person who has a claim or dispute that involves or involved a binding consumer arbitration clause,” “I am affiliated with a public interest group,” “I am a person who has filed a claim in court,” “I am a person who has defended myself against a claim in court,” and “None of the Above.” Id.
for and using the site, all workers had agreed “to be bound by all terms and conditions of this agreement,” which included virtually the precise predispute binding arbitration clause used in the study.45

Finally, we asked participants, “By using MTurk, have you entered into a binding arbitration clause with Amazon?”46 Most participants marked “no” (66 percent, 217 participants); some participants marked “yes” (34 percent, 112 participants).47

Figure 4: Beliefs Amazon Mechanical Turk (AMT) workers hold about whether they have entered into a binding arbitration clause with Amazon.

Beliefs AMT Workers
Hold About Having Entered into a
Binding-Arbitration Clause with Amazon

[Yes]: By using Mturk, have you entered into a binding arbitration clause with Amazon?
[No]: By using Mturk, have you entered into a binding arbitration clause with Amazon?

66.00%
34.00%

Importantly, we then followed up by asking them, “How certain are you of your response?” on a zero (not at all certain) to 100 (very certain) scale.48 The median indicated uncertainty (Median = 40). We combined the dichotomous scores with the continuous score to create a score for each participant ranging from −100 (very certain that they did not enter into a binding arbitration clause with AMT) to 100 (very certain that they entered into binding arbitration clause with AMT). The mean score on this scale

45. See Amazon Mechanical Turk Participation Agreement, AMAZON MECHANICAL TURK, https://www.mturk.com/mturk/conditionsofuse (last updated Dec. 2, 2014) [https://perma.cc/2WG5-JKS4]. The only alteration to the clause was replacing “Amazon” and “Amazon Mechanical Turk” with “We” and “Our” to retain anonymity.
46. Survey, supra note 6.
47. See infra Figure 4.
indicated that most participants were very uncertain but tilted toward believing (mistakenly) that they had not entered into a binding arbitration clause with Amazon Mechanical Turk ($M = -7.98$, $SD = 56.03$, 95% CI $[-14.05, -1.90]$). Illustrative explanations included, “I do not know,” “I don’t believe there is a binding arbitration clause with Amazon, but I signed up with Mturk long enough ago that I don’t remember all the terms and conditions,” “I feel that binding arbitration clauses are common with a lot of companies,” and “Probably was in the fine print.”

III. IMPLICATIONS ON THE ETHICS OF DISPUTE SYSTEM DESIGN

This empirical legal study reveals that, when members of the public learn how predispute binding arbitration clauses operate, they feel that the arbitration process is unfair and unjust. Hence, the empirical study highlights a situation in which zealous advocacy norms conflict with ethical ideals that seek to mitigate harm to third parties and the public. Mainly, if transactional attorneys zealously advance their client’s economic interest when crafting predispute binding arbitration clauses within adhesion contracts, this may degrade the rule of law, including rule-of-law norms and rule-of-law culture, imperiling the long-term viability of our legal institutions. Given the extant legal landscape in which the U.S. Supreme Court has delegated broad discretion to firms to craft binding arbitration clauses in adhesion contracts with little judicial oversight, psychological influences within law firms and companies make it more likely that transactional attorneys will serve as zealous advocates rather than virtuous agents who consider the long-term harm to the public caused by the degradation of legal institutions. Even so, structural changes in the legal landscape may alter these dynamics and make it more likely that the wider ethical ideal will flourish.

A. The Public Learns the Significance of Predispute Binding Arbitration Clauses After Disputes Arise

The more the public learns about predispute binding arbitration clauses, the more the public believes binding arbitration is unjust and illegitimate. Yet most members of the public first learn how predispute binding arbitration clauses affect them after their disputes arise, and especially after they consult with legal professionals. Much like the New York Times reporting on binding arbitration clauses, legal aid providers and plaintiffs’ lawyers will be the first

to explain that binding arbitration largely favors the drafters of adhesion contracts and that there is very little ground for court review.\textsuperscript{52}

This moment of interaction between laypeople and legal professionals is fundamental to understanding how predispute binding arbitration clauses degrade the rule of law and the legitimacy of public legal institutions. These legal professionals must explain the actual meaning, significance, and effect of binding consumer-arbitration clauses. For example, they will likely explain that binding arbitration often favors industry as a repeat player and seldom the one-shot player,\textsuperscript{53} that there is seldom any ground for judicial review of an arbitrator’s decision,\textsuperscript{54} and that in many jurisdictions, an arbitrator need not even explain his or her decision.\textsuperscript{55} Similarly, if the member of the public is an employee who has a grievance against an employer, these legal professionals will explain that employees win less often and less money in arbitration than in litigation,\textsuperscript{56} that arbitration is not a hospitable venue for unrepresented claimants,\textsuperscript{57} and that predispute binding arbitration clauses, given the prevalence of class action waivers, essentially eradicate class actions and group litigation.\textsuperscript{58}

Finally, plaintiffs’ lawyers will explain that given the likelihood that the claimant will not prevail and, hence, that these legal professionals will not be compensated with contingency fees or prevailing statutory fee awards, the aggrieved member of the public will likely be unable to secure legal representation.\textsuperscript{59} If members of the public have claims that they cannot reasonably present on their own pro se, then it is virtually certain that they will fail to receive meaningful legal relief or access to justice. From this

\textsuperscript{52} Members of the public rarely know that a contract contains a predispute binding arbitration clause. See \textit{Consumer Fin. Prot. Bureau}, \textit{supra} note 9, at 18–22 (“[O]ver three-fourths stated that they did not know whether their card issuers used pre-dispute arbitration clauses (78.8%).”). Hence, lawyers and legal aid providers are often the first to inform claimants about the significance of predispute binding arbitration clauses.


\textsuperscript{54} See Welsh, \textit{supra} note 4, at 206–09.


\textsuperscript{59} See Sternlight, \textit{supra} note 17, at 1334–40.
angle, one observes a perspective in which predispute binding arbitration clauses prevent the effectuation of rights, including important civil rights enacted under federal law.60

B. Firms Are Incentivized to Use Predispute Binding Arbitration Clauses to Reduce Litigation Exposure

From another angle, one can understand why predispute binding arbitration clauses are attractive to firms, businesses, and multinational companies.61 To begin, the Supreme Court has diffused and delegated decision-making authority to firms, allowing them to craft binding arbitration clauses and related dispute procedures with little judicial oversight.62 Professor Nancy Welsh has described this diffusion and delegation as a form of institutional self-help, an opportunistic search for the funding and personnel that courts need to conduct fact-finding and decision making in cases that courts view as routine.63 Professor Margaret Radin has observed that the Supreme Court’s decisions are predicated on theories of private ordering and individual freedom.64

As profit-seeking actors, firms seek to maximize their economic self-interest within the wide discretion afforded by the Supreme Court.65 By way of analogy, it is within this extant legal structure that Justice Oliver Wendell Holmes Jr. famously elaborated that an actor will behave as a “bad man” going as far as the law will permit him to go, irrespective of ethical considerations or externalities that harm third parties or the public.66 For

60. See Resnik, supra note 2, at 2851 n.228.
62. See DirectTV, Inc. v. Imburgia, 136 S. Ct. 463, 476 (2015) (Ginsburg, J., dissenting) (“Today’s decision steps beyond Concepcion and Italian Colors. There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts.”); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311 (2013) (“[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.” (emphasis added)).
65. Cf. J. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26–27 (R.H. Campbell et al. eds., 1976) (4th ed. 1786) (“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”).
example, a firm may act in its own economic interest to reduce both exposures to liability and aggregate annual litigation expenditures by crafting adhesion contracts with predispute binding arbitration clauses. Existing legal structures tolerate—indeed, perhaps encourage—adhesion contracts with predispute binding arbitration clauses.67

Firms, therefore, harness the authority delegated to them under the Federal Arbitration Act (FAA) to shield themselves as far as possible from liability.68 For example, many firms require consumers to enter into adhesion contracts with binding arbitration clauses that ban class actions. The difficulty is that when consumers have claims that are too small to rationally pursue on an individual basis (i.e., the negative-expected-value-suit problem69), these class action bans have the effect of negating liability for these harms.70 Moreover, some firms have crafted adhesion contracts that bar injunctive and declaratory relief.71 Others employ adhesion contracts that require consumers to travel to distant forums to arbitrate.72 Finally, scholars have written about the incentives that these firms may have to capture arbitral bodies and the extent to which the repeat-player effect and funding sources may bias and influence arbitrators’ decision making.73

C. The Societal Effect Is a Tragedy of the Commons
That Degrades the Rule of Law and Civil Justice System

While each firm acts in its own independent economic self-interest, taken together the cumulative effect of this conduct is a tragedy of the commons.74

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68. See Glover, supra note 1, at 3061–32.


70. See Eisenberg et al., supra note 13, at 888; Imre Stephen Szalai, Correcting a Flaw in the Arbitration Fairness Act, 2013 J. DISP. RESOL. 271, 282.


74. Cf. RADIN, BOILERPLATE, supra note 64, at 36. It bears noting that firms, executives, and elite lawyers exhibited a high degree of coordination when devising a legal strategy to broaden the liability shielding power of these predispute binding arbitration clauses with class action waivers. See generally Ross v. Am. Express Co., 35 F. Supp. 3d 407 (S.D.N.Y. 2014), aff’d, 630 F. App’x 79 (2d Cir. 2015); Myriam Gilles, Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 MICH. L. REV. 373, 398–99 (2005); Nancy A. Welsh & Stephan J. Ware, Ross et al. v. American Express et al.: The Story Behind the Spread of Class Action-Barring Clauses in Credit Card Agreements, 21 DISP. RESOL. MAG. 18, 18–19 (2014).
As the prevalence of these clauses rises and most transactions that consumers enter contain predispute binding arbitration clauses, the legitimacy and justness of our civil justice system and the rule of law erode. Increasingly, firms conclude that it is in their independent economic interest to “defect” from or opt out of public legal institutions by adopting predispute binding arbitration clauses that subtly bias the results of this dispute procedure in their favor. When wide swaths of the public learn that their grievances must be arbitrated using a dispute-resolution procedure that favors the repeat player and that there is no judicial review, trust in the courts and the rule of law wanes, and the perceived legitimacy and justness of our civil justice system degrades. Professor Radin refers to the effect of mass-market boilerplate rights-deletion schemes as “democratic degradation.” In short, the interaction of these conditions and clauses operates to diminish the legitimacy and justness of our legal institutions.

D. Zealous Advocacy Is a Cause and Consequence

Transactional attorneys serve clients and draft adhesion contracts within this legal landscape and, thus, face tension between the norm of zealous advocacy and a wider virtuous ethic that seeks to limit harm to third parties and takes responsibility for the quality of justice. A transactional attorney, whether in-house or outside counsel, drafts adhesion contracts for clients who seek to advance their economic interests, regardless of harm to public institutions. Consent to adhesion contracts is illusory as the public neither reads nor understands their terms. Therefore, transactional attorneys have marked leeway and power to draft binding arbitration clauses within adhesion contracts that members of the public will “accept.”

A transactional attorney who serves as a zealous advocate will seek to maximize his or her client’s economic interest with zeal. In this regard, the ABA Model Rules of Professional Conduct state, “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a

75. See Consumer Fin. Prot. Bureau, supra note 9, at 16–17; Glover, supra note 1, at 3074–76.
76. See Radin, Boilerplate, supra note 64, at 15–18, 33; Reuben, supra note 55, at 279, 309–18; cf. Tyler, supra note 5, at 375 (“Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power.”). This erosion to the democratic backdrop complicates the theory that adjudication is purely a private good. See generally William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235 (1979).
77. Scholars have noted that the Supreme Court now treats binding arbitration clauses more favorably than other clauses within adhesion contracts; for example, other clauses within adhesion contracts are subject to a variety of contract-related defenses. See Peter B. Rutledge & Christopher Drahozal, “Sticky” Arbitration Clauses?: The Use of Arbitration Clauses After Concepcion and Amex, 67 Vand. L. Rev. 955, 974 (2014) (“[A] nonarbitral class waiver . . . poses greater risks of court invalidation. After Concepcion, the FAA provides a substantial degree of protection for arbitral class waivers; nonarbitral class waivers have no such federal law backing.”); Thomas J. Stipanowich, The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration, 22 Am. Rev. Int’l Arb. 323, 389–90 (2011).
lawyer zealously asserts the client’s position under the rules of the adversary system.”78 From this perspective, the primary ethical principle governing transactional lawyers is to advocate their client’s private interest with zeal, rather than to weigh whether the public’s interest in a just, fair, and legitimate civil justice system is inimical to their client’s interest.79 The principle of zealous advocacy points these transactional attorneys toward taking their clients as far as they can go within the broad delegation and discretion of decision-making authority that the Supreme Court allows. Zealous advocacy makes it likely that transactional lawyers will encourage their clients to opt out of public legal institutions and into binding arbitration and to craft predispute binding arbitration clauses within adhesion contracts that robustly advance their client’s economic interests.80

In short, it is highly unlikely that those who zealously draft and design adhesion contracts will consider the public’s perspective or enact dispute resolution procedures that truly lead to neutral, unbiased, and just outcomes. Instead, these zealous advocates will engage in zero-sum thinking and maximize one side—their client’s interest—when crafting adhesion contracts irrespective of degradation to civil justice and the rule of law. Zealous advocacy impairs the legal infrastructure that supports private ordering and comes at the expense of the public’s ability to rely on a just legal infrastructure that the public demands in a vibrant democracy that abides by the rule of law.81

E. A Wider, More Virtuous Ethical Ideal

Surely it is erroneous to conclude that these transactional attorneys must act as zealous advocates when crafting binding arbitration clauses within adhesion contracts. Does the ethical principle of zealous advocacy even

78. MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR. ASS’N 2016); see also id. r. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”). The principle of zealous advocacy as expressed within the professional rules has waxed and waned across time. For example, the ABA Model Code of Professional Responsibility previously stated, “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.” MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (AM. BAR. ASS’N 1980). While the ABA’s Ethical Considerations were not mandatory, they were aspirational and represented the objectives toward which every member of the profession should strive and constituted a body of principles upon which lawyers can rely for guidance in many specific situations. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 11 (1988) (discussing how wide and narrow understandings of this principle have dueled across time); see also Carol Rice Andrews, Ethical Limits on Civil Litigation Advocacy: A Historical Perspective, 63 CASE W. RES. L. REV. 381, 427–35 (2012); William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1084–90 (1988).


81. Cf. RADIN, BOILERPLATE, supra note 64, at 15–18, 33.
apply to transactional attorneys who craft adhesion contracts? According to Lon Fuller, the purpose of adversarialism is to ensure that, when legal officials deliberate, they are presented with plural perspectives. That is, adversarialism ensures that legal officials are adequately presented with each party’s account so that these legal officials can take the perspective of all sides before rendering a legal decision. The site in which transactional attorneys labor, however, is far outside the courtroom or a context in which work product is zealously prepared to present a narrative to an impartial adjudicator. As Professor David Luban has concluded, it would be error to enter a blanket claim of moral nonaccountability given how far we are from the purpose of adversarial ethics.

There are, however, wider and more virtuous ethical principles that apply to transactional attorneys who create binding arbitration clauses within adhesion contracts. Indeed, attorneys have an ethical responsibility to protect the public’s interest in the quality of justice. For example, the preamble of the Model Rules of Professional Conduct state: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Lawyers, moreover, serve a unique, indispensable role that mediates between their client’s interest and the public’s interest. Alexis de

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82. Commentators are divided on whether the principle of zealous advocacy applies to lawyers beyond the litigation context. See Anita Bernstein, The Zeal Shortage, 34 Hofstra L. Rev. 1165, 1171 n.36, 1193 (2006); Christopher J. Whelan, Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice, 54 Buff. L. Rev. 1067, 1069–70 (2007). Leaving to one side the issue of whether transactional attorneys must act as zealous advocates under the model rules, the principle of zealous advocacy is a powerful social norm that influences the thoughts, feelings, and behavior of transactional attorneys. See Bruce A. Green, The Criminal Regulation of Lawyers, 67 Fordham L. Rev. 327, 359 n.144 (1998); Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1244–45 (1991). See generally Mark C. Suchman, Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation, 67 Fordham L. Rev. 837 (1998). Socialization in the legal profession may transmit this social norm. See Michael Hatfield, Professionalizing Moral Deference, 104 Nw. U. L. Rev. Colloquy 1, 5–7 (2009) (“From the beginning of law school, a lawyer is idealized as a zealous advocate for her client’s objective.”). Finally, the Model Rules of Professional Conduct, when contrasted with the Model Code of Professional Responsibility, narrow the obligation to represent clients with zeal. Compare Model Code of Prof’l Responsibility EC 7-1 (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.”), with Model Rules of Prof’l Conduct r. 1.3 cmt. 1 (“A lawyer is not bound, however, to press for every advantage that might be realized for a client.”).


84. See, e.g., Luban, supra note 5, at 851; see also David Luban, Legal Ethics and Human Dignity 62–64 (2007); Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern Multicultural World, 38 Wm. & Mary L. Rev. 5, 38–40 (1996).

85. See Model Rules of Prof’l Conduct pmbl. See generally Model Code of Prof’l Responsibility pmbl.; Canons of Prof’l Ethics pmbl. (A.M. Bar Ass’n 1908).

Tocqueville elaborated this wider ethic, Talcott Parsons expounded on it, and Louis Brandeis also advanced this more virtuous principle. This ethical principle would require lawyers not to engage in actions that erode the legitimacy of the civil justice system or public institutions. Finally, drawing on Aristotelian virtue ethics, the role of an attorney should be imbued with an ethical responsibility that goes beyond maximizing their client’s self-interest—attorneys have an ethical role and responsibility to protect the interest of the public as well. In sum, under this wider and more virtuous ethical ideal, transactional attorneys behave unethically when crafting adhesion contracts that erode our civil justice system and the legitimacy of legal institutions.

Doubtless, there is tension between the ethical principle of zealous advocacy and this wider ethical ideal. On the one hand, zealous advocacy advances the economic interests of a client and may result in adhesion contracts with manifestly unjust clauses. On the other hand, a wider and more virtuous ethical ideal would have transactional attorneys protect the public’s interest in the rule of law and the viability of just legal institutions when engaging in dispute-system design.

F. Implications of Behavioral Legal Ethics and Social Psychological Research

Even so, we should not conclude that transactional lawyers who do not abide by this wider and more virtuous ethical principle are unethical people. Decades of social psychological research underscore that situational influences and roles within environments powerfully shape the way people

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88. See Talcott Parsons, A Sociologist Looks at the Legal Profession, in Essays in Sociological Theory 370, 370–71 (rev. ed. 1954) (elaborating the role of lawyers as serving both clients and the public interest, a role that maintains stability and dynamism in democratic society); Talcott Parsons, The Professions and Social Structure, in Essays in Sociological Theory, supra, at 34, 38.


think, feel, and behave. Professors Jennifer Robbennolt, Jean Sternlight, Andrew Perlman, and others have elaborated an approach known as behavioral legal ethics, which weaves together social psychology and legal ethics to better understand the experiences of lawyers within firm cultures and the way they make meaning within their environments. \(^{92}\) Importantly, social psychological research on the fundamental attribution error (also referred to as the correspondence bias) reveals that we overestimate the extent to which people’s actions, especially their apparently virtuous or unethical actions, reflect the kind of people that they are and that we underestimate the extent to which their conduct is the product of situational influences. \(^{93}\) Regarding such situational influences, Kurt Lewin developed the “field theory,” which explores the causes and conditions that influence people within a given situation. \(^{94}\) According to Lewin, a “field” refers to the psychological context that individuals experience in a particular point in time. \(^{95}\) Lewin identified two opposing forces present in any given field: “channels” that drive people toward a goal\(^{96}\) and “barriers” that inhibit movement toward that goal.\(^{97}\)

Transaction lawyers, both in-house and within law firms, encounter a context in which clients seek to maximize their economic interest in all of their transactions, including when creating adhesion contracts. In the parlance of Lewin’s field theory, there are many “channel factors” that make it much more likely that these lawyers will serve as zealous advocates rather than rise to a wider and more virtuous ethical principle. For example, a salient norm in these environments is the norm of serving a client’s economic interest. \(^{98}\) Far less salient is the ethic of contemplating and avoiding various courses of actions that harm the public’s long-term interest in the quality of justice. Moreover, social psychological research reveals that face-to-face encounters with clients (and senior partners) increase the likelihood that midlevel transactional lawyers will zealously advance client interests when

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94. See KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE (1951); see also THOMAS GILOVICH & LEE ROSS, THE WISEST ONE IN THE ROOM: HOW YOU CAN BENEFIT FROM SOCIAL PSYCHOLOGY’S MOST POWERFUL INSIGHT 42–70 (2015).

95. LEWIN, supra note 94, at 48–53.

96. Id. at 174.

97. Id. at 40.

98. See Cramton, supra note 91, at 1603; Dolovich, supra note 91, at 1682; Morgan, supra note 91, at 1797; see also Sung Hui Kim, Gatekeepers Inside Out, 21 GEO. J. LEGAL ETHICS 411, 437 (2008); Robert Eli Rosen, “We’re All Consultants Now”: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 ARIZ. L. REV. 637, 670–72 (2002).
crafting dispute-resolution clauses within adhesion contracts.99 Further, research on the foot-in-the-door technique suggests that these lawyers will likely behave as zealous advocates of their clients’ interests when drafting predispute binding arbitration clauses given the many other transactions in which these lawyers already seek to advance their client’s economic interests.100

Finally, research on cognitive dissonance suggests that lawyers may reappraise their conduct as reasonable and normative.101 For example, social psychological research reveals that our past behavior influences the way we feel and think about that behavior.102 Indeed, a consistent finding in the behavioral science literature is that people’s behavior is often more predictive of their attitudes than their attitudes are of their behavior.103 Rather than believing that they are behaving unethically, these transactional lawyers will likely reappraise their past actions as rational, necessary, and just. For example, they may rationalize predispute binding arbitration as faster, cheaper, and better.104 Or perhaps they may reappraise their conduct as normative, believing it would harm their client’s interests not to employ these clauses with terms that reduce their client’s liability exposure, especially when many other companies are engaging in the same practice.

99. See GILOVICH & ROSS, supra note 94, at 45–46; see also ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 282 (1988) (“[A]lthough large-firm lawyers embrace the ideology of professional autonomy in the abstract, when it comes to questions of legal policy that pertain to their practice they strongly identify with their clients’ positions and interests. . . . [T]he reported incidence of disagreements between lawyers and clients is extremely rare, never occurring in the careers of three or four lawyers in my four-firm sample.”); Andrew M. Perlman, Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology, 36 HOFSTRA L. REV. 451 (2007) (“[L]awyers frequently find themselves in the kinds of contexts that produce high levels of conformity and obedience and low levels of resistance to illegal or unethical instructions. The result is that subordinate lawyers . . . will find it difficult to resist a superior’s commands in circumstances that should produce forceful dissent.”).


There are certainly barriers to a wider ethic as well. For example, the ethic that considers the long-term public interest is not salient within these environments. Moreover, there are no clear exit options out of this ethical dilemma. Transactional lawyers who wishes to rise to a higher ethical ideal must opt out of the default norm of zealously advancing their client’s economic interest, perhaps by confronting their client, which may well imperil their livelihood.105 The interaction of these channels and barriers underscores that it is much more likely for transactional attorneys to reappraise their conduct as reasonable and just and to draft predispute binding arbitration clauses that zealously advance their client’s interests.

G. Changing Default Rules and Allowing the Wider Ethical Principle to Flourish

When taken together, the wider ethical principle is frustrated by the interaction of the broad delegation of authority to firms that harness predispute binding arbitration clauses with little oversight, the incentive to maximize a client’s own economic interest, and the situational influences that transactional lawyers encounter within their working environments. As a practical matter, the interaction of these powerful causes and conditions endanger the wider ethical ideal. Urging transactional lawyers to rise to a wider, more virtuous ethic will have little effect on the status quo.106 Yet the wider ethical principle may flourish if the default rules that broadly defer and delegate authority to firms are restructured. For example, greater regulatory or judicial oversight of predispute binding arbitration clauses will alter the behavior of firms and, by implication, the transactional lawyers who draft these clauses on behalf of their clients.107 Professor Radin has argued that greater oversight and regulation are justified based on the theory that firms should be allowed to maximize their own profit, but within limits.108 Mainly, firms should not be permitted to erode the background legal conditions that make private ordering possible. Instead, regulatory and judicial oversight should allow these firms to act in their self-interest, so long as they do not erode or degrade the commons of a viable, legitimate, and just

105. See, e.g., DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 47 (2007) (“[A]fter lawyers have offered their ‘quiet counsel,’ they will still have to press forward with the representation if the client won’t be dissuaded. Perhaps the lawyer can say that she gave morality the old college try, and her heart is pure. Our worry, however, was not about impure hearts, but about dirty hands.”); cf. GILOVICH & ROSS, note 94, at 60 (“Even if participants decided that they wanted to get off the path they were on, it wasn’t at all clear how to do so. There was no clear exit out of the (traumatic) situation in which they found themselves.”).


107. Cf. Client Alert: CFPB Attacks Pre-Dispute Arbitration Clauses, VORYS (Mar. 16, 2015), http://www.vorys.com/publications-1459.html [https://perma.cc/NH7Q-3PZB]. Note that even the title of the article “alerts” clients to the possible regulation on the horizon, putting them on notice of the change in trade winds. See id.

Moreover, while our legal culture imbues predispute binding arbitration clauses with legal meaning, symbolism, and qualities such as choice, consent, volition, and a sense of being bargained for, we should recall that from an ecological perspective, members of the public neither read, appreciate, understand, nor consider these clauses when coping with the actual demands of daily life. Professor Arthur Leff noted several decades ago, “[S]uch clauses are things, the products of non-bargaining, similar to ‘unilaterally manufactured commodities.’” Regulators and courts, therefore, have an important role to play in monitoring this boundary when deciding the permissibility of various forms of dispute-system design within adhesion contracts that force the public out of the formal civil justice system and that may impair our public legal institutions.111

There are many other models of oversight across the globe that offer comparative guidance. Indeed, the United States is one of the few Western liberal democracies where there are relatively few limitations upon the arbitrability of consumer disputes.112 Within the European Union, member states review clauses for fairness, and Sweden declares these clauses invalid.113 The United Kingdom and Germany impose other important limitations.114


110. See Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 147 (1970); see also Resnik, supra note 2, at 2870.


112. See DirectTV, Inc. v. Imburgia, 136 S. Ct. 463, 478 (2015) (“The Court’s ever-larger expansion of the FAA’s scope contrasts sharply with how other countries treat mandatory arbitration clauses in consumer contracts of adhesion.”). In the United States, there are several areas in which predispute binding arbitration clauses are curtailed. See, e.g., 12 C.F.R. § 1026.36 (2016) (prohibiting mandatory arbitration clauses in loan documents for mortgage and home equity loans); Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68797 (Oct. 4, 2016) (to be codified at 42 C.F.R. § 483.70(n)) (“[W]e are prohibiting the use of pre-dispute binding arbitration agreements.”); cf. 12 U.S.C. § 5518 (2012); Arbitration Agreements, 81 Fed. Reg. 100 (May 24, 2016) (“[P]roposing regulations governing agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services.”).


114. See generally Zivilprozessordnung [ZPO] [CODE OF CIVIL PROCEDURE], §§ 1025–1066, translation at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3524 (Ger.) (German Arbitration Act) [https://perma.cc/2GKD-9L92]; Practice Guideline No. 17, Guidelines for Arbitrators Dealing with Cases Involving Consumers and
By changing the regulatory environment, the incentives of firms and transactional attorneys would better align with the wider ethical ideal. For example, predispute binding arbitration clauses in adhesion contracts could be deemed legally unenforceable. Instead, if firms wish to engage in binding arbitration with consumers and employees, these firms could be limited to using binding arbitration agreements that are entered into separately from the primary contract, after a dispute has arisen. Indeed, New Zealand harnesses this model of regulatory oversight.

In this example, binding arbitration agreements would be enforceable only if they are entered into after a dispute has arisen and with the bona fide consent of both parties. This change would make it more likely that a wider ethical standard would flourish and less likely that zealous advocacy would endanger this wider ethic. As our empirical legal study suggests, members of the public learn about the meaning and significance of different dispute-resolution procedures only after disputes arise. Therefore, members of the public would consent to these clauses only if they perceived a benefit in doing so. For example, members of the public would enter into these agreements if they believed that binding arbitration reduces cost and delay and that binding arbitration is truly as fair, just, neutral, and trustworthy as a formal legal proceeding. When making this assessment, many members of the

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115. See Therese Wilson, *Setting Boundaries Rather Than Imposing Bans: Is It Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness to Consumers?*, 39 J. CONSUMER POL’Y 349, 354–55 (2016) (arguing that predispute arbitration clauses should be unenforceable). For an example of an area in which such clauses are unenforceable, see Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. at 68,797 (“[W]e are prohibiting the use of pre-dispute binding arbitration agreements.”). Other plausible alternatives bearing familial resemblance include permitting a member of the public to opt out of a mandatory predispute arbitration clause or requiring that a member of the public affirm their willingness to comply with a mandatory predispute arbitration clause if a dispute arises.


117. Laudably, due process protocols have been developed to improve the fairness of arbitration. *See, e.g.*, Nat’l Consumer Disputes Advisory Comm., Am. Arbitration Ass’n, *Consumer DUE Process Protocol: Statement of Principles* (1998), https://adr.org/aaa/ShowPDF?doc=ADRGST_005014 [https://perma.cc/2BPE-ZTZV]. If arbitration offers comparable fairness and outcome justice with the advantages of cost and delay reductions, then consumers will most likely agree to arbitration after disputes arise. Hence, these protocols will have an even greater influence on consumer decision making after disputes arise. Further, in this scenario, independent third-party assessments, such as an arbitration fairness index, would increase in importance. *See* Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 Kan. L. Rev. 985 (2012).
The public would likely consult with legal professionals about the significance of
these postdispute binding arbitration clauses.

This altered legal landscape would create a social-psychological channel
that would make it more likely for a wider ethical ideal to flourish. The
lawyers who draft these postdispute binding arbitration clauses would need
to empathize with and take the perspective of third parties while at the same
time advancing their clients’ interests.

This perspective taking is incredibly important in allowing the wider, more
virtuous ethical ideal to flourish. Of note, especially given the dialectic of
the two ethical principles that animates our discussion, when transactional
attorneys anticipate that plaintiffs’ lawyers will zealously guide members of
the public into appropriate and fair dispute-resolution procedures, they will
be far more likely to embrace a wider ethical ideal that considers the public’s
concerns. The ethic of zealous advocacy, therefore, plays a role in the social
psychological dynamic that shifts defense-side interests to embrace a wider
ethical ideal. Stated differently, if transactional attorneys anticipate that
plaintiffs’ lawyers will serve as zealous advocates who will direct clients to
less expensive, less time-consuming procedures only if these procedures are
equally just and fair, then defendants’ lawyers who craft these postdispute
agreements will have a wider concern for creating just and fair dispute
procedures. Indeed, the success of these postdispute agreements would in
large part be based upon the ability to engage in perspective taking. Further,
this legal landscape would create powerful social psychological barriers that
would make it far less likely for a one-sided adversarial ethic to prevail.
Again, postdispute binding arbitration agreements would require both sides
to provide true consent. As a result, transactional lawyers who craft and
design these clauses would craft them so that the parties receive a mutual
benefit sufficient to choose postdispute binding arbitration.

This wider, more virtuous ethical perspective is crucial to prevent
democratic degradation and the tragedy of the commons that endangers and
threatens the vitality of our legal institutions. Enhancing judicial and
regulatory oversight of predispute binding arbitration clauses will both
reduce the channel factors that incentivize transactional attorneys to
zealously craft binding arbitration clauses within adhesion contracts, while at
the same time diminishing the social psychological barriers that endanger the
more virtuous, ethical ideal. Ensuring the quality of justice is a collective
and fragile endeavor, one demanding that transactional attorneys who craft
and design adhesion contracts balance both the interests of their client with
the needs and perspective of the public. This synthesis will sustain and
protect the fairness, legitimacy, and justice of our civil justice system in this
era of vanishing trials.

APPENDIX

The following pages contain the three statistical tables referenced
throughout this Article.
Table 1: Binding Arbitration

<table>
<thead>
<tr>
<th>Dependent Measure</th>
<th>News Article</th>
<th>No Information</th>
<th>Definition</th>
<th>Sample Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M (SD)</td>
<td>95% CI</td>
<td>M (SD)</td>
<td>95% CI</td>
</tr>
<tr>
<td><strong>Familiarity</strong></td>
<td>3.74 (1.67)a</td>
<td>[3.33, 4.15]</td>
<td>3.32 (1.70)a</td>
<td>[2.97, 3.68]</td>
</tr>
<tr>
<td></td>
<td>3.63 (1.67)a</td>
<td>[3.27, 4.00]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Fairness</strong></td>
<td>3.27 (1.58)a</td>
<td>[2.88, 3.66]</td>
<td>3.99 (1.36)b</td>
<td>[3.70, 4.27]</td>
</tr>
<tr>
<td></td>
<td>4.57 (1.43)c</td>
<td>[4.26, 4.89]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Unfairness</strong></td>
<td>5.00 (1.54)b</td>
<td>[4.62, 5.38]</td>
<td>3.61 (1.55)a</td>
<td>[3.29, 3.94]</td>
</tr>
<tr>
<td></td>
<td>3.34 (1.45)a</td>
<td>[3.02, 3.67]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Justness</strong></td>
<td>3.03 (1.62)a</td>
<td>[2.63, 3.43]</td>
<td>4.12 (1.44)b</td>
<td>[3.82, 4.42]</td>
</tr>
<tr>
<td></td>
<td>4.43 (1.49)b, c</td>
<td>[4.10, 4.75]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Accuracy</strong></td>
<td>3.47 (1.52)a</td>
<td>[3.10, 3.84]</td>
<td>4.02 (1.38)b</td>
<td>[3.74, 4.31]</td>
</tr>
<tr>
<td></td>
<td>4.35 (1.26)b, c</td>
<td>[4.08, 4.63]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Effectiveness</strong></td>
<td>3.59 (1.86)a</td>
<td>[3.13, 4.05]</td>
<td>4.27 (1.54)b</td>
<td>[3.95, 4.59]</td>
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<tr>
<td></td>
<td>4.49 (1.36)c</td>
<td>[4.64, 5.24]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Legitimacy</strong></td>
<td>3.59 (1.69)a</td>
<td>[3.18, 4.01]</td>
<td>4.71 (1.66)b</td>
<td>[4.36, 5.06]</td>
</tr>
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<td>5.02 (1.58)b, c</td>
<td>[4.68, 5.37]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Feelings</strong></td>
<td>2.58 (1.53)a</td>
<td>[2.21, 2.96]</td>
<td>3.93 (1.47)b</td>
<td>[3.62, 4.24]</td>
</tr>
<tr>
<td></td>
<td>4.26 (1.62)b, c</td>
<td>[3.90, 4.62]</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Favorability</strong></td>
<td>2.61 (1.53)a</td>
<td>[2.23, 2.98]</td>
<td>4.00 (1.61)b</td>
<td>[3.66, 4.34]</td>
</tr>
<tr>
<td></td>
<td>4.35 (1.67)b, c</td>
<td>[3.99, 4.72]</td>
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<tr>
<td><strong>Experiences of Justice</strong></td>
<td>3.21 (1.29)a</td>
<td>[2.90, 3.54]</td>
<td>4.20 (1.20)b</td>
<td>[3.95, 4.46]</td>
</tr>
<tr>
<td></td>
<td>4.61 (1.27)b, c</td>
<td>[4.33, 4.88]</td>
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</tr>
</tbody>
</table>

Note: Means on the same row with unlike subscripts different at alpha = .05 according to the Tukey HSD procedure.
### Table 2: Statistical Reporting of Justice and Legitimacy Items

Omnibus F-statistic, effect size, contrasts between New York Times condition and other conditions

<table>
<thead>
<tr>
<th>Dependent Measure</th>
<th>Omnibus F-statistic</th>
<th>$\eta^2$</th>
<th>Difference, 95% CI</th>
<th>p-value</th>
<th>Difference, 95% CI</th>
<th>p-value</th>
<th>Difference, 95% CI</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairness</td>
<td>F(3, 325) = 21.07, $p &lt; .000$</td>
<td>0.16</td>
<td>[-1.31, -0.12]</td>
<td>$p = .011$</td>
<td>[-2.32, -1.13]</td>
<td>$p &lt; .000$</td>
<td>[-1.91, -0.69]</td>
<td>$p &lt; .000$</td>
</tr>
<tr>
<td>Unfairness</td>
<td>F(3, 325) = 19.87, $p &lt; .000$</td>
<td>0.16</td>
<td>[0.74, 2.04]</td>
<td>$p &lt; .000$</td>
<td>[1.14, 2.44]</td>
<td>$p &lt; .000$</td>
<td>[0.99, 2.32]</td>
<td>$p &lt; .000$</td>
</tr>
<tr>
<td>Justness</td>
<td>F(3, 325) = 21.34, $p &lt; .000$</td>
<td>0.17</td>
<td>[-1.72, -0.47]</td>
<td>$p &lt; .000$</td>
<td>[-2.52, -1.27]</td>
<td>$p &lt; .000$</td>
<td>[-2.03, -0.76]</td>
<td>$p &lt; .000$</td>
</tr>
<tr>
<td>Accuracy</td>
<td>F(3, 325) = 11.20, $p &lt; .000$</td>
<td>0.09</td>
<td>[-1.12, 0.02]</td>
<td>$p = .060$</td>
<td>[-1.79, -0.66]</td>
<td>$p &lt; .000$</td>
<td>[-1.46, -0.30]</td>
<td>$p = .001$</td>
</tr>
<tr>
<td>Effectiveness</td>
<td>F(3, 325) = 18.62, $p &lt; .000$</td>
<td>0.15</td>
<td>[-1.31, -0.05]</td>
<td>$p = .030$</td>
<td>[-2.30, -1.04]</td>
<td>$p &lt; .000$</td>
<td>[-1.99, -0.71]</td>
<td>$p &lt; .000$</td>
</tr>
<tr>
<td>Legitimacy</td>
<td>F(3, 325) = 19.05, $p &lt; .000$</td>
<td>0.15</td>
<td>[-1.79, -0.45]</td>
<td>$p &lt; .000$</td>
<td>[-2.58, -1.25]</td>
<td>$p &lt; .000$</td>
<td>[-2.12, -0.75]</td>
<td>$p &lt; .000$</td>
</tr>
</tbody>
</table>

Note: Contrasts were conducted using Tukey tests. C1 indicates no-information condition, C2 indicates definition condition, C3 indicates sample clause condition, and C4 indicates New York Times article condition.
Table 3: Bivariate Correlations Between Items Forming Anticipated Experience of Justice

<table>
<thead>
<tr>
<th>Measure</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Fairness</td>
<td></td>
<td>.658**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Unfairness (rxx)</td>
<td>.684**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Justness</td>
<td>.738**</td>
<td>.541**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Accuracy</td>
<td>.665**</td>
<td>.446**</td>
<td>.692**</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Effectiveness</td>
<td>.716**</td>
<td>.544**</td>
<td>.757**</td>
<td>.679**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Legitimacy</td>
<td>.797**</td>
<td>.626**</td>
<td>.771**</td>
<td>.682**</td>
<td>.632**</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Feelings</td>
<td>.797**</td>
<td>.620**</td>
<td>.771**</td>
<td>.682**</td>
<td>.632**</td>
<td>.704**</td>
<td></td>
</tr>
</tbody>
</table>

Note: ** p < .01
TRANSFORMING BUSINESS THROUGH PROACTIVE DISPUTE MANAGEMENT

Deborah Masucci* and Shravanthi Suresh**

I. Introduction

We have come a long way from confining dispute resolution to using solely litigation to an age where a myriad of Alternative Dispute Resolution (“ADR”) processes are recognized and widely accepted. However, as society evolves, commerce becomes more global, and we develop new technologies, the dispute resolution field needs to adapt to the growing needs and requirements of the business community to expand opportunities, reduce frictional costs, and integrate social responsibility into their models. What does the business community of today need? What are the aspects of a business model that impress investors of the future? Businesses and investors of today are very aware of the high risks and costs attached to litigation. They are also aware of the diverse customer and vendor base requiring a fresh look at who are the dispute resolvers of the future. Having a dispute prevention and resolution mechanism embedded into the business system that meets these needs will not only attract investment, but also profit companies.

It is a time for a revolutionary adjustment in the system, with a focus on embedding dispute prevention and resolution systems into the grassroots of the formation of any business relationship. Businesses already acknowledge the importance and value of dispute prevention, not only as a mode of avoiding disputes, preserving their brands, and incurring minimal damage to their businesses, but also as fostering profit making incentives.

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** Shravanthi Suresh is a graduate of the LLM program in Dispute Resolution and Advocacy from the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law.

1 Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. It is normally thought to encompass mediation, arbitration, and a variety of “hybrid” processes by which a neutral facilitates the resolution of legal disputes without formal adjudication. Robert H. Mnookin, Paper 232: Alternative Dispute Resolution, (John M. Olin Ctr. for L., Econ., & Bus., paper 232, 1998).
Proactive businesses today are moving towards a dispute management framework where high importance is given to customized dispute prevention and resolution systems. Dispute prevention is most important in joint ventures, licensing agreements, technology partnerships, integration agreements and, an enduring relationship, including the relationship with competitors and suppliers. The idea of “dispute management” has been a part of discussions and ideas. Unfortunately, not much action has been taken to bring it to life, and to implement it. However, we are looking at a future with more potential for implementation and recognition of dispute prevention and resolution systems in businesses.

The first part of this article deals with “midnight clauses,” referring to the low level of importance placed on drafting a dispute resolution clause during the course of structuring a deal. The design of the clause should be multi-dimensional and not focused on a single process. Further, there needs to be a shift in attitude towards the drafting of dispute resolution clauses across the business and not limited to one transaction. This part also highlights the important role played by the lawyer/advisor\(^2\) in the drafting and formulating dispute resolution clauses in agreements in collaboration with their client. Part II of this article deals with dispute prevention and resolution mechanisms that can be embedded into business systems. The discussion starts with the idea of establishing a conflict resolution specialist into the company as an expert guide for ADR processes. We then examine Planned Early Dispute Resolution as a model structure. Then we look at conflict as commerce and the Monsanto model as an example of dispute resolution systems that can be adopted into business systems in the industry and the inherent benefits in doing so. In Part III, we look at who the dispute resolvers of today are, who the neutrals of the future should be, and the need for diversity.

\(^2\) The term lawyer/advisor is used throughout the article to recognize that often times the person filling the role of providing advice about ADR processes may not be a lawyer but someone with expertise in the field.
II. PRIORITIZING DISPUTE RESOLUTION CLAUSES

In 2016, the International Mediation Institute (“IMI”)\(^3\) launched the Global Pound Conference (“GPC”).\(^4\) Between March 2016 through July 2017, forty events are scheduled in thirty-one countries to determine the future of commercial dispute resolution. Through this initiative, information is being collected about how dispute management and resolution should adapt to meet corporate user needs and requirements. In 2016, IMI also published the results of its International Mediation and ADR Survey\(^5\) (“IMI Survey”). These two instruments add dimension to how clients and lawyer/advisors interact in the ADR sphere.

When asked what processes and tools should be prioritized to improve the future of commercial dispute resolution, the number one response in the GPC events held in 2016 was “pre-dispute and escalation clauses.”\(^6\) The results of this question point to the importance of dispute management and resolution clauses to businesses and dispute resolvers. Well-crafted dispute resolution clauses effectively resolve a dispute without incurring unnecessary costs. However, today dispute resolution clauses are the last issue considered in the course of negotiations and dispute management systems are rarely adopted or, if a system is in place, it is relegated solely to one aspect of business. Therefore, the valuable experience of lawyer/advisors, whether transactional or litigation focused, are not tapped sufficiently to aid in the crafting of a clause that anticipates the inevitable dispute or developing integrated dispute management systems.

\(^3\) IMI is a not for profit established in 2008 to promote high standards for the practice of mediation globally.

\(^4\) The GPC is a series of events organized by The International Mediation Institute. The GPC’s goal is to create a conversation about what can be done to improve access to justice and the quality of justice around the world in civil and commercial conflicts. GLOBAL POUND CONFERENCE, www.globalpoundconference.org.


\(^6\) Aggregated Data Report, GLOBAL POUND CONFERENCE, Session 3, Question 2, http://www.globalpoundconference.org/Documents/Aggregated%20Data%20Report%20GPC_28Dec.pdf?mtk_tok=eyJpIjoiTXpJeFlqQXxXvplRvFJhTkRvMC1sInQjJyZmOEw0Tk00Mk1VK1RKc3RZY1Bd00MrOVbPRXY2WUNleDBQKpoR2pUSFZua0fJWJxatE5xOFhvRDez5GdRWhnFyV2dTV2hDXXCd0ihxaUF3RnhYT1Bos2sydmg1ZWdUd3d3MzI4eEhKNSybFRMDR4idjA5dXBzNjJzK1o5SGVVTdlgiQ%3D%3D.
A. Midnight Clauses to Morning Clauses

In the journey from negotiating a business deal to bringing in lawyers to formalize legal agreements, most often than not, discussions about predicting potential business conflicts and looking into a dispute resolution system ends up being one of the least emphasized events leading up to finalizing a business deal.

Corporations have long accepted the value and importance of dispute management to address disputes that arise. However, the dispute resolution clause is the most neglected part of drafting an agreement for future business. Such clauses are often added at the last minute and addressed at the end of contract negotiations with very little thought and consideration given to the consequences and intricacies of the clause, hence earning the name “midnight” clause. The excuse for this late consideration by some is fear that negotiations will break down by damaging the optimistic structuring of a deal by introducing the idea that something might go wrong. As a result, dispute resolution clauses are simply recognized as standardized, boilerplate clauses just added into the agreement at the end. Many ADR providers offer ideas for boilerplate dispute resolution agreements that parties can consider. The American Arbitration Association offers a service called “Clause Builder” that helps parties tailor a clause to meet their needs. In fact, many advocates of boilerplate clauses believe that standard clauses benefit parties because their validity has been tested through the courts. However, businesses are realizing that adding standardized boiler-plate dispute resolution clauses into business agreements could actually act against the interest of the company by creating unintended consequences when triggered. Therefore, it is time we move away from “midnight” clauses and invest time and

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7 Dan Rafter, Best Decision May Be to Avoid Court: Many Firms Use Alternative Dispute Resolution to Avoid the Hassle and Expense of Litigation, Chi. Trib. (Mar. 17, 2003), http://articles.chicagotribune.com/2003-03-17/business/0303170013_1_mediation-and-arbitration-dispute-resolution-small-business-owners (noting that “large corporations have long known the benefits of settling potential litigation outside the courtroom.”).

8 JAMS International Clause Workbook (July 2014), http://www.jamsinternational.com/hubfs/PDFs_resources/JAMS-Clause-Workbook.pdf?hsCtaTracking=ddf341d2-fb3-4fc3-b3-29-f0684e9186e%7C2ea6c217-0ba5-47f4-87f15-077a6826724 (last visited Jan. 5, 2017) (providing sample dispute resolution clauses and for insertion into a contract prior to a dispute arising).

thought into crafting customized dispute resolution clauses and developing the dispute resolution clauses as negotiations proceed, therefore move to “morning” clauses.

B. The Role of Lawyer/Advisor

The importance and use of dispute resolution clauses in business agreements are advanced and promoted through the combined efforts of transactional and litigation lawyers who work and influence the dispute resolution mechanisms in corporations. This is mainly because clients are influenced by the advice and counsel of their attorneys. Many reasons are offered for this premise including the fact that clients continually seek expert advice on risk to supplement their own knowledge base before making decisions. Evidence suggests attorneys are the gatekeepers to ADR. But today there is a divide about who knows most about ADR—the client or the lawyer/advisor?

The GPC and IMI Survey results offer insight in this area. Based on an analysis of the data—it is the client who drives the process, but the advice of the lawyer/advisor is highly weighed. Perceptions between advisors and their clients vary with respect to the level of knowledge possessed about ADR and mediation. Advisors perceive their clients to be markedly less familiar with mediation and conflict management than clients themselves feel about mediation and conflict management. Advisors also have much higher perceptions of their own familiarity of both conflict management and mediation than clients have about their advisors. However, advisors overwhelmingly feel that knowing how best to use mediation is a valuable part of their work.

So, how important is advice from a lawyer/advisor when clients are determining which type of dispute resolution process to use and how to structure a dispute resolution clause? Three factors are identified as most important by responders to the GPC ques-

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12 See 2016 International Mediation & ADR Survey, supra note 5, at 17.

13 See id.
Advice from lawyers/advisors was one of the top three factors. The other two factors are predictability of outcome, and efficiency in terms of cost and time saving.

So, where does this information lead us? Transactional lawyers of today are very aware of the value and function of ADR. One of the goals of transactional lawyers is to promote the business interests of their respective company/clients. To do so they should educate the client about the ADR process and its benefits and most importantly how ADR helps foster and preserve business relationships, and creates a beneficial atmosphere for investors and potential clients.

It is vital that Chief Executive Officers (“CEO”) and leaders of businesses understand the importance and value of investing time and resources into drafting an effective dispute resolution clause early and building a dispute prevention system after carefully taking into consideration the culture and practices of the company. Transactional lawyers who develop expertise and training in ADR have the ability to convert midnight clauses into morning clauses as well as influencing clients to develop dispute management systems that are discussed below. However, it is imperative that they have the support of the executives of the company through this process. The value of dispute resolution clauses must be elevated to that of drafting any other important clause in an agreement. This kind of a change is only possible if acknowledged, supported, and promoted by the leaders of businesses.

Transactional lawyers have an opportunity to provide a value-added role in representing their client’s interests in the business deal through the dispute resolution clause. To do so effectively, the transactional lawyer should partner with litigation counsel who has experience with dispute resolution clauses that go bad. These pathological clauses lead to unnecessary litigation or results that were not foreseen during drafting. Litigation lawyers often mop up these mistakes so they are in a good position to advise about how to avoid the problems in the initial drafting.

III. PART TWO

Businesses increasingly understand the importance of dispute prevention and resolution systems as part of their organizational

14 See Aggregated Data Report, supra note 6, at Session 1 Question 2.
structure. The most common example is where a business adopts an employment dispute resolution program to address employee disputes or an Ombuds program to resolve customer complaints. Too often, that is where the structure ends and no thought is given to expand the structure into other parts of the business. In addition, the systems implemented are driven by the legal department, which has a narrow view of what areas the program should address. There are more expansive dispute prevention and management ideas that could benefit businesses and lead to investment opportunities. A specialized role in the organization coupled with implementing planned early dispute resolution is such an opportunity.

A. Conflict Resolution Specialist: A Much Needed Position

Businesses that want to focus on ensuring they have a good dispute management system in place might create a specific role in their organization for a professional dispute resolution specialist. Thomas J. Stipanowich and J. Ryan Lamare note that, “the establishment of an office dedicated to managing a dispute resolution program may serve as a direct proxy for the presence of an integrated conflict management system. For example, such an office is among key criteria for an integrated workplace ADR system.”\textsuperscript{15} In evaluating data on whether corporations have an office or position for dispute resolution, a study published in 2014 noted that the results appear to confirm the assertion that no more than about one-third of respondent firms in the Fortune 1000 actually have integrated conflict management systems for their workforce.\textsuperscript{16} Many companies already have such a position embedded into their system in the form of an employment dispute resolution program. A Conflict Resolution Specialist, however, is a specialized individual working to understand the intricacies of the company, the company’s business model, and helps the company build an entire dispute resolution framework crafted for the specific needs of the company. A dispute resolution professional in this capacity could either hand over the roles and responsibilities in maintaining the


\textsuperscript{16} See Stipanowich & Lamare, \textit{supra} note 15, at 59.
dispute resolution framework after it is developed to specific parts of the company or have a continuing role in ensuring the efficient functioning of the dispute resolution system in place, and be responsible to regularly recommend modifications and improvements to the system based on regular audits of the functioning of the created system.

B. Creating a Dispute Prevention Framework: The Key to Success

ADR as an informal dispute resolution mechanism has evolved over the years with more room for innovation and improvement. Businesses have too long spent time and resources reacting to disputes that arise instead of focusing on how to, not only prevent, but effectively address future disputes. John Blankenship argues, “the process should be fashioned to fit the dispute, rather than the dispute to the process.” By moving away from a reactionary posture that supports a one-size fits all attitude, we will begin to develop processes that fit the specific needs of a business model. John Lande echoes these concerns when he noted that, “[p]rocedures are inanimate phenomena that should be means to ends, not ends in themselves.” It is time for a historical change in the system, with a focus on embedding dispute prevention into the fabric of every business relationship.

The idea of dispute prevention is not an unfamiliar concept. Dispute prevention has been around for years under limited programs such as, “mandatory in-house grievance procedures.” These early review processes are differentiated from a systematic “Dispute Prevention” system because of its limited scope. Planned Early Dispute Resolution (“PEDR”), introduced by the American Bar Association (“ABA”) Dispute Resolution (“DR”) Section promotes early dispute resolution as a method of dispute prevention. PEDR is a general approach designed to enable parties and

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19 John Lande, Shifting the Focus from the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter, 6 Cardozo J. Conflict Resol. 191, 210–11 (2005).
their lawyers to resolve disputes as early as reasonably possible. The DR Section’s user guide\textsuperscript{21} to PEDR notes that a comprehensive PEDR system includes: (1) general plans for preventing and resolving disputes; (2) early warning systems for issues that may lead to disputes; (3) identification and monitoring of disputes; (4) early case assessments to determine the best way to manage each dispute; and (5) efficient and effective procedures for handling and resolving disputes.

C. \textit{Do Not Let the Conflict Turn Into a Dispute}

PEDR is a form of strategic risk and conflict management thinking that allows clients to flag early issues and layout the process through which any conflict should be addressed. One of the most attractive feature of implementing a PEDR system is that it allows parties to retain control over the dispute management process and take control of early dispute resolution instead of letting minor issues slip into litigation. PEDR promotes handling conflicts before they turn into disputes. PEDR processes include flagging early issues and using mediation, arbitration, or combined processes (med-arb) to resolve conflicts. Combining adjudicative and non-adjudicative processes, for example, arbitration/litigation within mediation/conciliation was ranked as the most effective commercial dispute resolution process in the information collected by the GPC.\textsuperscript{22} One of the best advantages of integrating a PEDR system into a business is that it shows clients and investors that the business values preserving business relationships through de-escalating conflict. Although the value of business relationships is measured differently across cultures, there are many cultures that would certainly respect and pay closer attention to preserving business relationships.\textsuperscript{23}


\textsuperscript{22} See \textit{Aggregated Data Report}, \textit{supra} note 6, at Session 2 Question 5.

\textsuperscript{23} See Lisa Brennan, \textit{What Lawyers Like: Mediation}, \textit{Nat’l L.J.}, Nov. 9, 1999 (reporting that half of the outside lawyers and in-house counsel responding to survey that mediation preserves relationships).
D. Need for a Cultural Shift

Businesses have already acknowledged the importance and value of dispute prevention, not only as a mode of preventing disputes and incurring minimal damage to their businesses, but also as an established profit making goal. Dispute prevention is most important in joint ventures, licensing agreements, technology partnerships, integration agreements, and an enduring relationship, including the relationship with competitors and suppliers. The idea of “dispute management” has been a part of discussions and ideas. Unfortunately, not much action has been taken to bring it to life, and implement it. However, we are looking at a future with more potential for implementation and recognition of dispute prevention and resolution systems in businesses. A recent study on why some companies use PEDR systems when some companies do not has shown that where dispute management is in the control of legal departments working within a fixed budget, there is little incentive for innovation and change given the need to cut costs and avoid bad results. The study further noted that top executives generally have other priorities and are reluctant to interfere with the operation of legal departments. The study suggested that for PEDR systems to take hold and endure, organizational cultures must shift from instinctive consideration of conflict as a threat, to that of a potential business opportunity, and that the companies that adopted PEDR systems most effectively did so by making them part of a cultural shift in the way they handle disputes.

For PEDR to become more widely accepted, there is a need for a clear and concise understanding of PEDR in the legal industry. However, as it has been proven over time, most lawyers are risk averse and reluctant to innovation or change. Incorporating a PEDR system into the fabric of a company’s dispute resolution framework is a big step. However, once business leaders acquaint themselves with precedents and data available that show that establishing this process into the fabric of the company’s dispute management system will not just help resolve disputes but will also preserve the company’s brand, improve profits, and attract investors to the company. The study also noted that executives can be bought in to the PEDR system after showing that millions of dollars could be saved after implementing the PEDR system.

It is only a matter of time before executives see that PEDR systems reduce cost and time in resolving disputes and lead to improved company financial performance. Companies should assign the role of research and development of a PEDR system to one individual person who will be completely responsible to design a system and continue following up to improve the system after its implementation. Thought should be given to reporting responsibilities of this initiative. The role might report to the Chief Financial Officer or Audit Committee instead of having the function report to the General Counsel or Chief Legal Officer. Such direction would emphasize the importance of the role to the organization and its financial impact.

PEDR systems, just like ADR clauses, are to be designed after taking into consideration each individual company’s culture, practices, and independent needs in relation to the company’s existing and future clients. Companies can refer and adapt from various existing referral guides such as The User Guide of the ABA’s PEDR Task Force or International Institute for Conflict Prevention and Resolution’s (“CPR”) Early Case Assessment Toolkit or use it as a reference point in eventually building their own Early Case Assessment Toolkit. Additionally, Organizations such as CPR, the Association of Corporate Counsel, the ABA, the American Arbitration Association, the IMI, and JAMS create ongoing committees to assist those who want to develop PEDR systems for their companies.

E. Facing the Challenges of Implementing PEDR

There has always been some level of reluctance in adopting new and innovative methods of dispute resolution. There are undoubtedly many challenges to the adaption of the PEDR system. In recognizing the difficulties in the implementation of such a system, Lande and Benner note that companies that are open to innovation and whose leaders are not tied to a traditional “default to litigation” approach will be more receptive to adopting PEDR systems and that these companies are more likely to invest the time and effort needed to make the systems successful.

26 Lande & Benner, supra note 24.
For PEDR systems to operate efficiently, it is imperative to have the support of the executives of companies. CEO’s must direct and mandate that the functions of their in-house counsel should include and also focus on spending sufficient time to develop PEDR systems and make it a point to review their PEDR systems on a regular basis, just like they handle litigation cases. These practices must become a built-in culture within every company’s legal system. PEDR programs must be consistent with each company’s core values.

Although dispute prevention has been a part of discussions on effective dispute management, unfortunately not much action has been taken to bring it to life. However, looking to the future there is more potential for recognition of the benefits of such systems and their subsequent implementation.

Companies are increasingly embedding risk and compliance functions into their business units. Corporations are identifying potential conflicts and working towards getting ahead of them. Why not expand these efforts to include dispute management? Is dispute management not part and parcel of risk management?

F. Conflict as Commerce

Noting the high cost of litigation, in an attempt to avoid the high risks involved in trial, businesses will soon realize the need for alternative dispute resolution. Businesses are motivated to avoid incurring significant costs of preparation, discovery, and other incidental costs attached to litigation that eventually result into becoming twice the settlement amount. We need to move towards an approach where we view dispute prevention as a process that is not merely a dispute resolution mechanism, but is one that is proven to be commercially beneficial.

CPR was created in 1979 with an objective to emphasize the importance of actively managing disputes including a “pledge” to
resolve disputes through processes alternative to the courts.\textsuperscript{30} CPR recently honored \textit{Monsanto} and Scott Partridge, Vice President of Global Strategy, for utilizing CPR processes to create an industry-wide dispute management system.\textsuperscript{31} The award recognizes \textit{Monsanto}'s development and implementation of a unique, business-led dispute resolution process creating a proactive industry-wide dispute identification and resolution program.

Based on the premise that solid relationships are the key to success, the \textit{Monsanto} model focuses on CEOs and executives’ involvement in the process to build a framework for potential problems. Involvement of CEOs and executives is seen as highly crucial in the \textit{Monsanto} approach. With \textit{Monsanto}, dispute prevention is widely accepted. Dispute prevention is seen not only as a resolution mechanism but also as a benefit to business. It is only a matter of time before business executives and investors make dispute prevention mechanisms a requirement embedded into the business in the initial stages along with negotiations on all other areas of the business agreement. Businesses who spot potential disputes, and have a readily available resolution framework in place will be saving millions of dollars spent in litigation and attorney fees.

Parties in the midst of negotiations and deal-making often do not invest time into looking at the possible conflicts that could potentially arise in the future. However, investing time and developing a dispute management system like the \textit{Monsanto} model can help avoid high costs of litigation, and more importantly, help preserve relationships. Parties who acknowledge and identify potential conflicts will thus be at a competitive advantage in the industry. The rewards of adopting dispute prevention are now obvious, and avoiding the usage of dispute prevention is a risk that can now be avoided.

\textsuperscript{30} More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation. More than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation, including 400 of the nation’s 500 largest firms. \textit{ADR Pledges, INT’L INST. FOR CONFLICT PREVENTION & RES.}, https://www.cpradr.org/resource-center/adr-pledges.

IV. PART THREE

Today, we are a diverse, multi-cultural society not only domestically, but internationally. With a growing increase in cross-border transactions and international investments, companies are no longer confined by national and cultural borders. Companies have adopted sustainability programs that cover social responsibility including programs to protect the environment and create an open and diverse workforce. The demographics of businesses’ employees, customers, vendors, and others with whom they do business are diverse, so why not the dispute resolvers? It is imperative that dispute resolvers move away from the predominantly white male composition to one that is more inclusive, but how do we do that? Also, how do we raise the dispute resolution field to the level of a profession where trust is embedded into the fabric of the field? Here we describe the status of the field today and what can be done through certification or regulation to create a true profession.

A. Who Are the Dispute Resolvers of Today?

Among the various key aspects that go into the ADR process, the neutral chosen to work on resolving a conflict certainly holds one of the most important and significant roles in determining the success of the process. A third party neutral usually has some form of training, certification, or experience in ADR. As of today, there is no established career path for one who wants to pursue a role as a third party neutral. The IMI Survey data reveals that more than half of IMI respondents earned less than 50K annual as a neutral and most neutrals have a second source of income. As a result, most neutrals come to the position as a secondary profession after being trained and practiced in another field.

B. Need for Diversity

In looking at who are the neutrals of today, the results from multiple statistics available reveal that neutrals of today are

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33 See id. at 30.
34 ADR as First Career, http://adras1stcareer.blogspot.com/ (providing a video blog featuring stories of individuals who started out their professional careers in the ADR field).
predominantly white males\textsuperscript{35} with an upsettingly low representation of women\textsuperscript{36} and minorities.\textsuperscript{37} We now have a mass of literature pointing to the fact that the legal industry, and the ADR profession in particular, lacks diversity. This is a huge issue in the sense that a lack of diversity inherently impairs progress.

Authors have noted the need for diversity, highlighting that, “we live in an age where minorities are the majority of the United States and that we live in a time when growing diversity of our society combined with the dismantling of legal barriers has led to women and minorities filling positions and offices that would once have been virtually unimaginable: President, Secretary of State, Federal Reserve Chairperson, Senator, Homeland Security Secretary, Supreme Court Justice, and Attorney General.”\textsuperscript{38}

There have been many initiatives by various bar associations to recognize and increase diversity including initiatives by the New York State Bar,\textsuperscript{39} New York City Bar Association, The ABA Dispute Resolution Section,\textsuperscript{40} CPR’s Diversity Commitment,\textsuperscript{41} the AAA Higginbotham Fellows Program,\textsuperscript{42} Freshfield’s Women in

\textsuperscript{35} F. Peter Phillips, Diversity in ADR: More Difficult to Accomplish than First Thought, Disp. Resol. Mag., Spring 2009, at 14 (noting that “corporate counsel lament that they are being given the same short lists of the same arbitrators and the same mediators (presumably older white men) from whom to choose.”).

\textsuperscript{36} Gus Van Harten, The (Lack of) Women Arbitrators in Investment Treaty Arbitration, Colum. FDI Perspectives No. 59 (Feb. 6, 2012), http://ccsit.columbia.edu/files/2014/01/FDI_59.pdf (showing that of 249 known investment treaty arbitrations, only 6.5\% of all appointments were of women); Thomas J. Stipanowich, Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals, 25 Am. Rev. Int’l Arb. 297, 363 (2014) (identifying that only roughly fifteen percent of a sample of international arbitrators are women).


\textsuperscript{38} Beth Trent et al., The Dismal State of Diversity: Mapping a Chart for Change, 21 Disp. Resol. Mag. 21 (2014).

\textsuperscript{39} See DRS Diversity Scholarship, NYSBA, http://www.nysba.org/DRSDiversityScholarships/.

\textsuperscript{40} See Women in Dispute Resolution (WIDR) Committee, ABA, http://apps.americanbar.org/dch/committee.cfm?com=DRS59300.


\textsuperscript{42} See AAA Higginbotham Fellows Program, Am. Arb. Ass’n, https://www.adr.org/aaa/faces/s/about/diversityInitiatives/AAAHigginbothamFellowsProgram?_afrLoop=1157306044238541&_afrWindowMode=0&_afrWindowId=17fnumt4eb_52%40%3F_afrWindowId%3D17fnumt4eb_52%26_afrLoop%3D3%26_afrWindowMode%3D0%26_afr.ctrl-state%3D17fnumt4eb_76.
Diversity Pledge, ABA Model Diversity and Inclusion Plan for ABA Entities and Increased efforts by US Federal District Courts to focus on Diversity. Another example is of the Eastern District of New York (“EDNY”). The EDNY has a diverse group of litigants, and a diverse group of Judges and is working towards having the same amount of diversity and representation in their mediation and arbitration panels so that the panels reflect the diversity of those that the court serves.

Every industry sees the need for diversity. This is even more so important for dispute resolution professionals given that they work closely with the parties, and have a direct impact on the relationship between parties. As stated by Lande, “Mediation and other forms of dispute resolution are a paradigm that can lead to a peaceful and evolutionary revolution in the way people act and think in general.” It is very crucial for the progress of society as a whole that women and minorities are a part of this peaceful yet powerful evolutionary progressive process.

C. Neutrals of the Future

The non-existence of a defined career path is directly linked to the lack of regulation of the dispute resolution industry. There have been many attempts to regulate the industry in the past. An argument can be made that regulation will give the profession credibility. In fact, the IMI Survey indicates that dispute resolution resolvers seek certification to increase the level of trust for the clients who engage them. Once the profession is seen to be more credible, women and minorities would also have better opportunities to explore career paths in the industry and help make the industry more diverse. Regulation will enable Dispute Resolution as a field to move away from being a subsidiary of other fields and

45 ACR/ABA Mediator Certification Feasibility Study at 3 (2005). In a survey conducted by the ACR and the Dispute Resolution Section of the ABA as part of a study on the feasibility of mediator certification, most mediators opined that certification would enhance the public image of mediators.
46 See 2016 International Mediation & ADR Survey, supra note 5, at 33.
becoming an independent profession, thereby moving towards a better income range for neutrals and making such careers economically feasible. There has certainly been more progress and acceptance of careers in dispute resolution. For example, the Equal Employment Opportunity Commission’s adoption of a mediation program acts as a role model for businesses to develop more programs like it to resolve employee disputes, and could help the neutrals of the future have a better foundation and career path.

In addition to regulation, open access to neutrals and their profiles would make parties more comfortable in using dispute resolution as a method to resolve their conflicts. Neutrals should proactively ensure that their profiles are readily available online at the fingertips of potential clients. The IMI’s online directory is one example. The freely available directory has detailed information about the styles and performance of IMI certified neutrals. The information is gathered from actual users of their services. Additionally, in choosing a neutral, parties should demand that women and minorities are included in their list for consideration and they should make a conscious effort not to reject a neutral based on gender or race. These proactive measures will change attitudes and help diversify the field.

D. Certification Incentives

There is no rigid set of qualifications or requirements for the position of a neutral. IMI promotes high quality standards for the practice of mediation globally and credits certification with enhancing trust in the mediator. Most mediation trainers agree that for the best results, mediation training should have a mix of lecture, skills practice, and reflection. Neutrals should make use of certification and affiliations available to them. Professional affiliation credentials are qualifications established by an organization to

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50 See 10 Good Reasons to Be IMI Certified and Featured on the IMI Global Search Engine, IMI Mediation, https://imimediation.org/private/downloads/qQqE0vq7pIj3GpWUf9X4e6QM/10_good_reasons_to_be.IMI_Certified.pdf.
which a mediator belongs. Court annexed programs were developed with a goal to legitimize mediation, with specific guidelines and regulations of minimal requirements for training. Most bar associations now provide certification incentives. These incentives are a few tools that promote career aspirants to take on dispute resolution as a career.

V. Conclusion

This article argues the case for businesses to establish comprehensive dispute management systems. The systems should permeate the entire organization, have the support of senior managers, and foster collaboration between the business and its lawyers/advisors. The systems should include a philosophy to plan early dispute resolution starting with raising the importance of the dispute resolution clause early in the negotiation of every new deal. Strategically planning early dispute resolution will reduce frictional costs, enhance the brand, and lead to investor interest. For businesses to compete in today’s environment, they also need to promote diversity of their dispute resolvers and support the professionalism of the field to promote trust and integrity.

The tools are there to implement these ideas. All that is needed is commitment and resolve.

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52 Michael L. Moffitt & Andrea Kupper Schneider, Dispute Resolution: Examples & Explanations 65 (2008).
Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research

Maria R. Volpe
Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research

Maria R. Volpe*

As is true in a wide range of contexts, interest in advancing diversity in the dispute resolution field has been growing rapidly. There has been a proliferation of initiatives focusing on how to be more inclusive of unrepresented groups including the CPR diversity pledge; \(^1\) the ArbitralWomen Diversity Toolkit; \(^2\) the JAMS diversity and inclusion rider; \(^3\) the mindbug sheet; \(^4\) the Diversity Scorecard; \(^5\) special issues of publications, \(^6\)

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\(^3\) The inclusion rider option adopted in May 2018 that can be included in dispute resolution clauses states, “[t]he parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.” *JAMS Introduces Inclusion Rider, Promotes Diversity Initiatives in ADR, JAMS ADR* (May 29, 2018), https://www.jamsadr.com/news/2018/jams-introduces-inclusion-rider-promotes-diversity-initiatives-in-adr.

\(^4\) The mindbug sheet “is given to the entities and individuals actually engaged in making selections before any list of potential arbitrators is provided to them, it prompts them to think about diversity as a criterion.” Theodore K. Cheng, *The ADR Mosaic: Moving the Conversation Beyond Raising Awareness of Diversity, DIVERSITY & THE BAR MAGAZINE*, Fall 2018, at 10.

\(^5\) According to Ben Davis, “[t]he process involved would be to reach out to dispute resolution providers as well as court-appointed structures to get an indication of the appointments made over a calendar year. That data would be in turn aggregated to give a snapshot of the profession for each year.” Benjamin G. Davis, *Diversity Scorecard, AMERICAN BAR*, https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-resolutions/davis_diversity_%20scorecard_authcheckdam.pdf (last visited Feb. 11, 2019).

\(^6\) For example, the ABA Dispute Resolution Magazine devoted an entire issue to diversity. See Marvin E. Johnson & Maria R. Volpe, *Uncovering Race in Dispute Resolution*, DISP. RESOL. MAG. (Spring 2009).
programs, conferences and symposia; the ABA’s Diversity in ADR Resolution 105, targeted bar association efforts, and varied research projects, among countless other efforts. While there has been no shortage of diversity awareness activities blossoming since the early 2000s, it is important to note that there has been a long history of early diversity efforts which has gone largely unacknowledged.

Despite the increasing attention given to the topic, there has been an astonishing dearth of research measuring the extent of diversity. There is very little empirically based research from which to measure progress. Much of what is known has come from anecdotal information, what is observable at events, and oft-repeated comments that the practitioner field has been dominated by rosters of mostly white males. Needless to say, accessing data

7 For example, in 2003, Marvin E. Johnson and Homer LaRue started Access ADR, a project designed “to increase the number of Alternative Dispute Resolution (ADR) professionals of color and to enhance their access to ADR clients.” Homer C. LaRue & Marvin E. Johnson, Access ADR: A New Diversity Initiative Launched with the Support of the JAMS Foundation and the ABA, METROPOLITAN CORP. COUNSEL (May 2004), http://cebjournal.com/articles/3932/access-adr-new-diversity-initiative-launched-support-jams-foundation-and-aba. In 2017, a group of ADR leaders in New York started the ADR Inclusion Network aiming to enhance diversity and inclusion in ADR. See ADR INCLUSION NETWORK, https://www.adrdiversity.org.

8 Many conferences have included panel discussions, keynote talks, and workshops on diversity in the ADR field over the years. And some conferences have been devoted entirely to diversity like the Women/Arbitral conference in Nov 2018. Celebrating AW’s 25th Anniversary, ARBITRAL WOMEN, https://www.arbitralwomen.org/events/aw-diversity-toolkit-launch-gala-dinner-8-Nov-2018-new-york/ (last visited Feb. 11, 2019).

9 ABA Resolution 105 – Diversity in ADR, AMERICAN BAR, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf (last visited Feb. 11, 2019). The resolution states: “RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services to expand their rosters with minority, women, persons with disabilities, and persons of differing sexual orientations and gender identities (“diverse neutrals”) and to encourage the selection of diverse neutrals; and RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.”

10 On January 29, 2019, Toddr Drucker sent an email to the ADR-INCLUSION Listserv stating “The [New York] City Bar is pleased to offer a limited number of scholarships to the upcoming Basic Mediation and Advanced Commercial Mediation training programs in an effort to encourage diverse attorneys to consider adding Alternative Dispute Resolution (ADR) to their practices.”


12 Marvin E. Johnson & Maria R. Volpe, Roots of Diversity in Dispute Resolution: Preliminary Observations, 13 ACRESTATEMENT (Winter 2013).

13 A large number of articles have been published on how to promote diversity in a variety of ADR publications. See, Sasha A. Carbone & Jeffrey T. Zaino, Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal, 84 NYSBA JOURNAL 33, 33-34 (January 2012). Also available at https://www.adr.org/sites/default/files/document_repository/Increasing%20Diversity%20Among%20Arbitrators%200Arbitrators_0.pdf.

to gain clarity about the extent of diversity has been and remains a daunting undertaking. In a rare, high-profile arbitration, the celebrity Jay-Z shined the spotlight on the lack of diversity on a roster of arbitrators he received for his arbitration. He disclosed that only three of the 200+ arbitrators on the American Arbitration Association’s New York Large Complex Case Roster were African American arbitrators.\textsuperscript{15}

This article, which will address some observations and challenges of measuring diversity in the dispute resolution field, grows out of an invitation from Nancy Welsh to give a presentation at Texas A&M University Law School’s conference focusing on transparency, metrics, and empirical research.\textsuperscript{16} The theme of the conference provided a reminder not only about the necessity but also the urgency to deepen our thinking regarding diversity and inclusivity among dispute resolution neutrals by giving greater attention to the metrics needed for transparency and a better understanding of the field.\textsuperscript{17} What this article will illustrate is that the search for data on diversity-related efforts in the dispute resolution field raises more questions than answers.\textsuperscript{18}

I. DIVERSITY: WHAT IS IT?

Before proceeding, it is important to understand the concept being examined, namely diversity. The Merriam-Webster dictionary defines diversity as “the condition of having or being composed of differing elements.”\textsuperscript{19} Some of its synonyms include assortment, heterogeneity, and variety among others.\textsuperscript{20} In the contemporary discourse about diversity, there is no monolithic understanding of what it refers to. It has come to be used as “a very broad, catchall umbrella term that applies to many qualities and characteristics and is defined differently by different segments of society.”\textsuperscript{21}

Diversity is also a socially-constructed concept and has come to have many meanings depending on the context. In some instances, it is defined by


\textsuperscript{16} The 2018 Dispute Resolution Symposium at Texas A&M University School of Law on Shining a Light on Dispute Resolution: Transparency, Metrics, and Empirical Research was the inspiration for this article. Thomas Stipanowich, Dean of the Strauss Institute for Dispute Resolution, Keynote Address at the Texas A&M University School of Law Dispute Resolution Symposium: Shining a Light on Dispute Resolution: Transparency, Metrics and Empirical Research (Nov. 16, 2018).

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} There has been a constant theme in the contemporary dispute resolution field for passion versus studies documenting detailed efforts.


\textsuperscript{20} \textit{Id.}

\textsuperscript{21} Johnson & Volpe, \textit{supra} note 12.
law, in other instances, it is loosely referred to depending on the individuals’ frames of reference. In 2011, the United States federal government defined workforce diversity as

[A] collection of individual attributes that together help agencies pursue organizational objectives efficiently and effectively. These include, but are not limited to, characteristics such as national origin, language, race, color, disability, ethnicity, gender, age, religion, sexual orientation, gender identity, socioeconomic status, veteran status, and family structures. The concept also encompasses differences among people concerning where they are from and where they have lived and their differences of thought and life experiences.22

While the aforementioned is a comprehensive definition, if one randomly examines a variety of agencies and organizations, the result is that specific characteristics are referred to or emphasized in their diversity statements.23 For example, the NYC Office of Information Technology and Telecommunications adds “thinking style and background” to the more common categories of age, race, gender, nationality, sexual orientation, and physical ability.24 This is equally true for dispute resolution organizations. The AAA Diversity Committee refers to the following: gender, race, ethnicity, age, religion, sexual orientation, or other characterization.25 It states that its mission "is to promote the inclusion of those individuals who historically have been excluded from meaningful and active participation in the alternative dispute resolution (ADR) field."26 Note that "historical" exclusion is part of the statement.27 The mission of CPR's Diversity in ADR Task Force states that "[t]he mission of this group is to devise practical strategies to increase the participation and inclusion of women, minorities and other diverse individuals in mediation, arbitration, and other dispute prevention and resolution processes."28

Finally, the use of diversity-related phrases such as a ‘diverse individual’ or ‘diverse person’ is vague. Who is considered a diverse individual or a diverse person? Is the phrase ‘a diverse individual’ or ‘a diverse person’ used as a synonym for anyone who is visibly different? What is meant by ‘diverse individual’ or ‘diverse person’ often implies implicit understanding, but is left up to others to deconstruct.

22 Id.
26 Id.
27 Id.
II. WHY DIVERSITY MATTERS FOR DISPUTE RESOLUTION

For the dispute resolution field diversity matters, perhaps even more so than in other contexts for several reasons. First, ADR processes are informal and, for the most part, occur in spaces that are not publicly visible.29 As a result, an important feature of ADR processes is the reliance on the trust in the dispute resolvers who are providing these services.30 While trust is an important component of all dispute resolution work, it is particularly true for mediation since mediators are expected to create a comfortable context for parties to communicate amongst themselves and try to reach to an understanding about their concerns in a private environment, often behind closed doors. The very nature of informal dispute resolution settings gives rise to concerns about who individuals trust in informal, private spaces.

Second, since individuals come to processes like mediation with their own perspectives and perceptions, they rely on the mediator to be impartial in helping them to determine their own outcomes.31 Since we have evidence that everyone has implicit biases,32 mediators have to pay special attention to how their own understandings, behaviors, and process related actions are affected by their implicit biases.33 As a member of any group, one embraces different perceptions of situations, makes different assumptions, uses words differently, has different likes and dislikes, and subscribes to different values, beliefs and traditions by virtue of one’s lived experiences. As a result, it is crucial to have diverse backgrounds represented in a field where perceptions and experiences are an important part of the work itself.

Third, in addition to the need to pay attention to the role of setting and personal preferences and differences, Standard IX of the Model Standards of Conduct for Mediators prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution (now the Association for Conflict Resolution) reminds mediators that advancing the practice of mediation includes “fostering diversity within the field of mediation.”34 Along with all of the other standards, paying attention to the diversity of the field helps “serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”35

30 Id.
31 Core principles for mediation practice are impartiality and self-determination. See Id.
34 AMERICAN BAR ASSOCIATION, supra note 29.
35 Id.
A. Why research on diversity is needed

Research is needed to amass more extensive and systematic data about all aspects of dispute resolution processes and practices, a state of affairs that has been a longstanding concern of the dispute resolution field. Early in my career, many mediators and scholars testified before the New York State ("NYS") Assembly Judiciary Committee in support of efforts to mandate the mediation of child custody disputes. At the hearings, the legislators asked, "What evidence do you have about the effectiveness of mediation?" Those testifying expressed abundant enthusiasm for the process and had lots of anecdotal information about how wonderful it was. However, the research and metrics were missing. The year was 1985. While much has changed about the mediation field, practitioners continue to generally rely on anecdotal information due to the lack of extensive statistical data. 36 Given the contemporary commitment to achieve a diverse field, knowing who practices in what context is particularly urgent.

The need for data in furthering our understanding of diversity has been widely recognized. Recently, Benjamin Davis noted that,

"It is important to measure quantitatively the extent of the diversity in our field so that we can know how we are doing. Knowing how we are doing may help us develop paths for enhancing the ADR practices of these underrepresented groups in the profession. From what we have seen, this kind of data is essentially absent in the dispute resolution space." 37

Additionally, Deborah Masucci and Benjamin Davis have pointed out that "[o]ur underlying theory is that if it is not measured, it is not counted. So our task is to begin that measurement process. After that, the reasons for successes or needs for improvement can be addressed as another iteration of solving America’s ADR Diversity Issues." 38 The importance of measuring the extent of diversity has also been noted by the recently established ADR Inclusion Network in New York. Its ADR Inclusion Pledge encourages members to promote "[d]eveloping metrics and a system to measure the progress of encouraging ADR users to select, recruit and retain diverse neutrals." 39

Unlike other contexts where those involved in the work are identifiable through organizational structures such as judges in the courts, teachers in schools, professors in colleges, and others who can be counted, those


38 Davis & Masucci, supra note 36.

structures do not exist widely for the ADR field.\textsuperscript{40} Much of the ADR work is provided by those working in silos such as private practitioners practicing in solo or small group practices, program staff members operating in local communities, scholars attached to varied faculties in their universities, among others.\textsuperscript{41} Additionally, there are those in varied applied professions who describe what they do as dispute resolution-related work like human resources professionals, police officers, teachers, among others. In short, there is no centralized reporting system or easy way to identify who is doing ADR work.

B. Data Collection: What Exists?

Collecting and analyzing existing data about diversity in the ADR field can be daunting since databases and systematic surveys are virtually nonexistent. For other sources of information about who is practicing, one must search websites, newsletters, little known journals, and other places such as program office files that are not readily available, identifiable or known to scholars, practitioners, program administrators, policymakers, users or the public.

Although limited, there are emerging diversity databases where individuals can post their identity and be transparent about how they would like to be viewed. For example, the American Bar Association Directory of Minorities in Dispute Resolution Directory\textsuperscript{42} allows for “persons who self-identify as minorities, lawyers with disabilities, and/or LGBTQ lawyers” to be included. Since individuals were able to disclose their specific identities, the 74 individuals used the following descriptions: African, American Indian or Alaskan Native, Asian, Bicultural, Biracial, Bisexual, Black or African American, Disability Status [Attention Deficit Disorder, managed effectively with medication], Disability Status [Walks with a cane and has very limited feeling in legs and feet, and also substantial weakness; also has periodic episodes of nerve pain], Disability Status [ADHD Predominantly Inattentive Type, as well as a chronic neuromuscular disorder], Gay, Hispanic or Latino, and Lesbian.\textsuperscript{43} The Women in Dispute Resolution Committee of the American Bar Association Section of Dispute Resolution has also posted a Directory aimed at “increasing the selection and retention of women arbitrators, mediators, and other neutrals.”\textsuperscript{44} This directory included only gender without other descriptors that the Minority in Dispute Resolution Directory included.

\textsuperscript{40} See, e.g., Davis & Masucci, supra note 36 (beginning to identify dispute resolution providers to seek aggregate data on diversity is a priority for the ABA Section on Dispute Resolution).

\textsuperscript{41} See, e.g., Take Our Diversity & Inclusion in ADR Pledge, supra note 39.


\textsuperscript{43} Id.

\textsuperscript{44} Women in Dispute Resolution Committee, AMERICAN BAR ASSOCIATION (Sept. 2018), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/2018-widr-directory.pdf.
In instances where extensive dispute resolution databases do exist, the data are usually aggregated or there is a vague reference to diversity.\textsuperscript{45} For example, the ABA Section on Dispute Resolution “boasts over 11,000 members”\textsuperscript{46} without providing any specifics as to the composition of its membership.\textsuperscript{47} It could serve as an invaluable database to shed additional light on who is involved in ADR work. According to the State of Community Mediation: 2011 Report’s survey of community mediation programs, including volunteer mediators, Justin Corbett and Wendy Corbett stated that “there are an estimated 20,000 active volunteers who mediate at local community dispute resolution programs.”\textsuperscript{48} According to the study, the mediators “come from all walks of life and represent the broad diversity present within their local communities.”\textsuperscript{49} Overall, the authors conclude that “community mediation administrators should be pleased with the diversity, quality and quantity of their volunteer mediators.”\textsuperscript{50}

The aforementioned research, undertaken by the National Association for Community Mediators (NAFCM), “generated over 36,000 data points supplemented by over 250 qualitative accounts of program operations and impact.”\textsuperscript{51} Despite the emphasis placed on diversity and the amount of data that was collected, the report was silent on the specifics of what diversity referred to.\textsuperscript{52}

Since the data have been so difficult to collect, the bulk of the attention has been focused on the large provider organizations to disclose who are the practitioners on their rosters. As a result, there is an increasing amount of information being made available regarding the composition of the rosters, particularly the newer appointments to the rosters.\textsuperscript{53} What is still lacking is information on who in fact gets selected to serve and is compensated.\textsuperscript{54}

A Law.com article posted insights on demographics at leading providers of neutral rosters.\textsuperscript{55} It stated, an analysis of JAMS’s website consisting of

\textsuperscript{45} Id.
\textsuperscript{46} Section of Dispute Resolution - Section Membership, AMERICAN BAR ASSOCIATION https://www.americanbar.org/groups/dispute_resolution/membership/ (last visited Feb. 18, 2019).
\textsuperscript{47} Id.
\textsuperscript{49} Id. at 26.
\textsuperscript{50} Id. at 27.
\textsuperscript{51} Id. at 6.
\textsuperscript{52} Id.
\textsuperscript{53} Maria R. Volpe & Marvin E. Johnson, The Color of Money: Compensation Opportunities and Barriers, DISP. RESOL. MAG. (Summer 2017).
\textsuperscript{54} Id.
more than 350 neutrals, 25% are women and 7% are minorities. It also reported that over 95% are over the age of 50.56

To diversify its roster, FINRA noted that it “embarked on an aggressive campaign to recruit new arbitrators with a particular focus on adding arbitrators from diverse backgrounds, professions, and geographical locations.”57 It hired third-party consultants who reached out to FINRA dispute resolvers who were assured that the survey was voluntary, confidential, and anonymous.58 For the arbitrators, the findings showed that in 2018, females comprised 27%, Caucasians 83%, African Americans 7%, Hispanic or Latino 4%, Asian 2%, Multi-Racial 2%, American Indian or Alaska Native were less than 1%, LGBT 3%, 70 or older 38%, 69 to 61 years of age 26%, and 60 or younger were 20%.59 For the mediators, females made up 27% of the roster, age-70 or older 37%, 69 to 61 years of age 26%, and 60 or younger 20%, Caucasians 72%, African Americans 7%, Hispanic or Latino 4%, Asian 2%, Multi-Racial 2%, American Indian or Alaska Native less than 1%, LGBT 3%.60

The mission and vision statement of the American Arbitration Association asserts a “shared commitment to a diverse Roster of Arbitrators and Mediators.” The AAA Roster is composed of 24% women and minorities, and this figure is increasing. AAA division executives around the U.S. actively recruit women and minority candidates who meet the criteria established for panels.”61 In 2014, AAA reported, “[o]f the 306 panelists added to the AAA Roster in 2014, 25% are women and 31% are women or minorities.”62 In 2015 AAA stated, “[i]n 2015, 15% of arbitrator and mediator lists finalized in 2015, overall 78% were at least 20% diverse.”63 Furthermore, “in 2017, the AAA added 78 new women [and] minority to its roster.”64

Finally, the AAA has worked on “a nationwide organizational goal of making sure that at least 20% of the names included on lists of arbitrators

56 Id.
58 Id.
59 Id.
60 Id.
proposed on a case are women and minority panelists where party qualifications are met. For arbitrator and mediator lists finalized in 2017, overall 87% of lists sent to parties during this period met that goal.65

C. The Research Questions: Challenges Ahead

There are countless research questions that emerge when diversity in the dispute resolution field is addressed. A first step for researchers is to define what they are measuring, particularly diversity. As noted earlier, it is a catchall term. Moreover, what is meant by diversity in different ADR contexts? Some of the references to diversity are expansive and some are very narrow.66 To complicate matters, ADR itself is also a wide-ranging, umbrella term. Although it is often used to refer to mediation and arbitration, it is also used to refer to early neutral evaluation, negotiation, conciliation, and collaborative law.67 Like diversity, it too needs to be deconstructed in order to understand what constitutes its landscape.

What does “diverse ADR professionals,” a frequently used phrase, mean? Context and one’s frame of reference are very important. For example, it is common to hear individuals remark that an audience is not diverse, which assumes that they are referring to visible characteristics. Even then, it is possible that, in a room of males and females, one may hear someone remark that it is not a diverse group. It is challenging when defining who is diverse is left to the individual to determine. In a recent email, the NYC Bar stated that it “is pleased to offer a limited number of scholarships to the upcoming Basic Mediation and Advanced Commercial Mediation training programs in an effort to encourage diverse attorneys to consider adding Alternative Dispute Resolution (ADR) to their practices.”68 If individuals with invisible characteristics that are considered diverse respond and are selected, there still may not be visible diversity noted at the training programs.69

Diversity assumes that lived experience matters.70 When measuring diversity, depending on what is being researched, not all aspects of diversity are observable to researchers.71 The range is from the more self-evident, such as gender, race, religion (if symbols are visible), age, and visible disabilities to those that are invisible, such as sexual orientation and some disabilities.72

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65 Id.
66 Id.
67 Id.
68 Drucker, supra note 10.
71 See Saarheim & Schmidt, supra note 69.
72 Id.
For the latter, individuals would have to self-disclose their disability, something that not all are comfortable with. 73 These intricacies raise issues for the type of methodology used to examine diversity. If one chooses to merely observe a group without uncovering what may be invisible through self-disclosure, one would not obtain an accurate count. 74 Similarly, individuals who choose to not self-disclose will contribute to inaccurate results.

In addition to accounting for who constitutes the field, the following set of questions regarding diversity has yet to be fully addressed empirically: Does it matter if the mediator is of the same race as the parties, shares the same sexual orientation, religion, ethnicity, disability, and age? 75 Are all diverse characteristics weighed equally? Which criteria are more important? 76 What happens when some of the criteria intersect? In short, which lived experience matters, which matters more, and under what conditions? For example, is it more important that the mediator be a female than gay? Must the mediator be both a female and gay? Is it surprising then that when someone says the field is not diverse and inclusive it is not clear what is being referred to? Moreover, some types of diversity are easier to discuss than others. 77

Studying the impact of diversity in processes like mediation is challenging because mediation usually occurs behind closed doors. 78 Researchers cannot just pop-in unannounced as when observing open court sessions. 79 This is understandable since, in some instances, parties pay significant mediator fees to keep their matters private. 80

Additionally, if we wanted to study whether diversity matters in matching mediators and parties, there are some aspects of diversity that are hard to


76 *See An Overview of Diversity Awareness*, PENN STATE (2001), http://www.wiu.edu/advising/docs/Diversity_Awareness.pdf (discussing the impact of different forms of diversity).

77 Id.


79 Id.

ascertain. For example, what if the diversity identity carries a stigma? Because non-disclosure of one’s mental health diagnosis is the norm due to the stereotypes associated with it, how easy is it to match someone with lived mental illness experience with a mediator who also has a mental health diagnosis? According to the National Institute of Mental Health, approximately one in five American adults experience a mental health problem each year. If one wanted to do research on how many mediators have been diagnosed with a mental health illness, one may find very few. Dan Berstein, for example, is one of the few mediators who has been public about his bipolar disorder.

Due to the limited access to processes, concerns about implicit biases, stigmas, and other reasons for non-disclosure, the measurement of diversity in the dispute resolution field remains daunting. The implications of this may be that if the extent of varied backgrounds cannot be identified, efforts to attract future pools of applicants from them may be stifled because, among other reasons, they may not feel welcome.

III. Growing Diversity in the ADR Field: Prospects for the Future

There is no shortage of suggestions about how best to increase the diversity of the field. Some of the barriers are a result of the very nature of some of the processes. Mediation, as noted previously, often relies on relationships and networks, and, for the most part, occurs behind closed doors. While privacy and confidentiality are fixed features that sell mediation and are difficult to address without changing the process, much can be done about broadening who plays a role in helping to shape practices, building relationships, increasing transparency, and accessing networks. Suggestions range from individuals creating websites, mentoring, doing pro bono work, publishing, presenting, networking at professional associations, working on committees, to provider organizations and bar associations sponsoring meet-and-greet events, providing co-mediation or panel related opportunities, or creating pipeline opportunities, among others.

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83 See Patel, supra note 81.

84 Mental Illness, National Institute of Mental Health (Nov. 2017), https://www.nimh.nih.gov/health/statistics/mental-illness.shtml (“In 2016, there were an estimated 44.7 million adults aged 18 or older in the United States with AMI. This number represented 18.3% of all U.S. adults.”).

85 MH MEDIATE, http://mhmediate.com/about/ (last visited Feb. 7, 2019). Dan Berstein states that he “is public with his bipolar disorder to contribute to mental health awareness and counteract stigmas about mental illness.” Id.

86 Deborah Masucci, Moving Forward for the Benefit of our Members: Minorities in Dispute Resolution (MIDR), AMERICAN BAR ASSOCIATION, https://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-
IV. CONCLUSION

While it is relatively easy to make a strong case for diversity in the dispute resolution field, its measurement remains challenging. Much needed are (1) demographic statistics, (2) a more explicit characterization of diversity itself, and (3) how context impacts diversity in the dispute resolution field. Moreover, since the discussion about diversity among neutrals is dominated by the interest being listed on rosters and selection from them, the broader discussion about diversity metrics in other components of the dispute resolution field often gets ignored. For example, who are the law and other dispute resolution professors, who are the community mediators, who are the peer mediators in the schools, and who are the practitioners in solo practice, among others?

The potential for research regarding diversity in the dispute resolution field is tremendous. Without data, particularly readily accessible data, the implications for the future of the field itself could be at stake. Finally, in addition to the usefulness of knowing who is involved in the work of the field, there are other potential parties who may be interested, including funders, policymakers, program administrators, potential users, and future colleagues.

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Sukhsimranjit Singh

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Religious Arbitration and its Struggles with American Law & Judicial Review

Sukhsimranjit Singh**

I. INTRODUCTION

The practice of arbitration and, specifically, religious arbitration has recently been attaining special attention in academic literature. Current issues addressed in recent literature include: the choice of parties to be bound by religious arbitration, the enforceability of arbitration awards in American courts, and the effects of permitting religious arbitration tribunals to continue. Supporters of religious arbitration argue that it promotes cultural diversity and respect for religion, provided it is accompanied by greater safeguards of public policy through education about legal rights and greater regulation in general. Many point to the benefits of multiculturalism created by religious arbitration and argue that banning

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procedurally fair arbitration tribunals is unjustifiable. Critics argue against the expansive freedom of religious tribunals. They argue that religious arbitration does not follow the “uniform system of laws,” and that some religious arbitration contracts are against public policy and unconscionable.

At the heart of the debate, the right to religious dispute resolution focuses on the discussions of “old multiculturalism” versus “new multiculturalism.” Within multiculturalism’s framework lies a recent trend towards a ‘new multiculturalism,’ which focuses not simply on principles of recognition and inclusion, but on broader principles of group autonomy and self-governance." Professor Michael Helfand, defines old multiculturalism as focused on the recognition and integration of minority groups into the public sphere, and new multiculturalism as emphasizing group autonomy as opposed to recognition. Succinctly put, “[N]ew multiculturalism looks less for symbolic integration and more for jurisdictional differentiation.” Under new multiculturalism, proponents argue that it creates better opportunities for communities, but ethnic groups have been criticized for clinging to old values. Promoting religious accommodation is also associated with hindering gender inequality.

5. See Evan M. Lowry, Where Angels Fear to Tread: Islamic Arbitration in Probate and Family Law, a Practical Perspective, 46 Suffolk U. L. Rev. 159 (2013) (arguing for restrictive use or religious law, especially under the realms of family law, noting, “[W]hen arbitration, a system ordered around freedom of contract, allows the application of Shari’a at the expense of American substantive law, inequitable and irreconcilable results can easily follow.” Id. at 183.)
6. Id. at 179-81. See Greenberg, supra note 2, at 635.
8. See id.
9. Id.
10. Id. at 1235.
11. Citing a number of recent studies that show a connection between immigration, diversity and entrepreneurship, Andrés Rodriguez-Pose and Daniel Hardy of the London School of Economics recently warned that this year’s hard anti-immigrant turn in Britain would have negative consequences: ‘Recent legislation by the U.K. Home Office to restrict migration is likely to lead to a serious dent in entrepreneurship, affecting in turn the potential for employment generation and economic growth.

Discussions of in-group cultural identity and out-of-group identity are also in the forefront of religious arbitration debate. An example of out-of-group cultural identity is from November 2, 2010, when Oklahoma voters approved a proposed constitutional amendment that would prevent Oklahoma state courts from considering or using Sharia Law. Here, before the amendment could become effective, the federal district court granted an injunction to prevent the courts from certifying the result.

When a Muslim least educated young Muslims is close to [40%], and more than two-thirds of Pakistani households are below the poverty line.” Id.

Ayelet Shachar critiques the new multiculturalism model, calling it “insufficient for understanding the controversies at heart of the new cultural wars.” Ayelet Shachar, Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies, 50 McGill L.J. 49 (2005) (arguing that internal transformation must occur in the traditional citizenship model to allow for the right balance between interests of state and religion).

The trend of privatizing diversity—where citizens take their disputes away from public courts towards private settlement or to customary sources of law and authority—has led to both in-group and out of group controversies. For example, Ayelet Shachar discusses this dichotomy by considering the issues that women in some groups face. She notes, “Women’s legal dilemmas often arise . . . from their allegiance to various overlapping systems of identification, authority and belief, in this case, those arising from religious and secular law.” Ayelet Shachar, Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law, 9 THEORETICAL INQUIRIES L. 573-607 (2008).


Shariah means “the way to the watering hole.” It is Islam’s road map for living morally and achieving salvation. Drawing on the Koran and the sunnah—the sayings and traditions of the prophet Muhammad—Islamic law reflects what scholars describe as the attempt, over centuries, to translate God’s will into a system of required beliefs and actions.

Andrea Elliot, The Man Behind the Anti-Sharia Movement, N.Y. TIMES (July 31, 2011), http://www.nytimes.com/2011/07/31/us/shariah.html?pagewanted=all. Early versions of the law, which passed in Tennessee and then Louisiana, made no mention of Shariah, which was necessary to pass constitutional muster, Mr. Yerushalmi said. But as the movement spread, state lawmakers began tweaking the legislation to refer to Shariah and other religious laws or systems—including, in one ill-fated proposal in Arizona, “karma.” Id. By last fall, the anti-Sharia movement had gained new prominence. ACT for America spent $60,000 promoting the Oklahoma initiative, a campaign that included 600,000 robocalls featuring Mr. Woolsey, the former C.I.A. director. Mr. Gingrich called for a federal law banning courts from using Shariah in place of American law, and Sarah Palin warned that if Shariah law “were to be adopted, allowed to govern in our country, it will be the downfall of America.

Id.

Awad v. Zitriax, 670 F. 3d 1111, 1111 (10th Cir. 2012). The court noted: On May 25, 2010, the Oklahoma House of Representatives and Senate passed House Joint Resolution 1056 (HJR 1056). The resolution directed “the Secretary of State to refer to the people for their approval or rejection a proposed amendment to Section 1 of Article VII of the [Oklahoma] Constitution . . . [known as] the Save Our State Amendment.”

Id. at 1117.
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On November 2, 2010, Oklahoma voters approved a proposed state constitutional amendment preventing Oklahoma state courts from considering or using Sharia law. Seventy percent of Oklahoma voters approved SQ 755. On November 4, Mr. Muneer Awad sued the Oklahoma Election Board members to prevent the certification of the SQ 755 election results. The proposed amendment states:

The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression. Id. at 1118.

17. The original ballot was under the name “House Joint Resolution HJR 1056,” and the revised ballot was under the name “State Question 755” (SQ 755). Mr. Awad alleged that the Save Our State Amendment violated his rights under both the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution. As per Mr. Awad, his religion was singled out for negative treatment and that such implementation would have multiple adverse consequences, including, “disabling a court from probating his last will and testament (which contains references to Sharia law), limiting the relief Muslims can obtain from Oklahoma state courts, and fostering excessive entanglement between the government and his religion.” Id. at 1111.

18. Id.; See also O’Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005). Where a college faculty member and a student claimed their unwelcome exposure to a statute on their campus was hostile to their religion (Catholicism), and violated the Establishment Clause. The 10th Circuit held that “standing is clearly conferred by non-economic religious values . . . . Plaintiffs alleging non-economic injury must be ‘directly affected by the laws and practices against which their complaints are directed.’” The Court concluded that “allegations of personal contact with a state-sponsored religious image suffice to demonstrate this kind of direct injury.” 416 F.3d at 1223.

19. Appellants argued that there was no discrimination in this case as the amendment banned all religious laws from Oklahoma courts and Sharia law was used only as an example. In response, the Court noted:

The amendment bans only one form of religious law—Sharia Law. Even if we accept Appellants’ argument that we should interpret “cultures” to include “religions,” the text does not ban all religious laws . . . . the word “other” implies that whatever religions the legislature considered to be part of domestic or Oklahoma culture would not have their legal precepts prohibited from consideration, while all others would.

416 F.3d at 1240.

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fears of the “other.” What Oklahoma and several other states across United States are trying to do is stop the use of Sharia Law, or stop the use of “foreign law”—a term that several legislators have used to describe Sharia Law—in American courts. However, the use of Sharia Law is already present, mostly within the realms of private dispute resolution, including arbitration and mediation.

This treatment of us vs. them is not new. Other religious laws have faced the criticism of Sharia Law as “foreign law” as well. In 1963, Jewish law faced similar backlash, though primarily by courts. The Beth Din of America—the most prominent American Jewish arbitration tribunal—faced such struggles in its infancy. However, over the years, the American civil courts have accepted Beth Din as a valid religious dispute resolution body.

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20. The representative, a former fighter pilot named Rick Womick, said he had been studying the Koran. He declared that Sharia, the Islamic code that guides Muslim beliefs and actions, is not just an expression of faith but a political and legal system that seeks world domination. "Folks," Mr. Womick, 53, said with a sudden pause, "this is not what I call 'Do unto others what you'd have them do unto you.'"

Elliot, supra note 15.


22. For general dispute resolution practices within North American Muslim couples, see Julie Macfarlane, Islamic Divorce in North America: A Shari'a Path in a Secular Society (Oxford Univ. Press 2012).

23. The term "us and them" is borrowed from David Berreby. See generally David Berreby, Us and Them: The Science of Identity (Univ. Chicago Press 2008) (explaining the fundamental human urge to classify and identify with human kind and the reasoning behind such “us” and “them” classification).


25. Id. at 321-22 (declining to uphold a Beth Din’s decision regarding an employment contract by deferring the decision to a State civil law). Discussing the reason for the success of the Beth Din, Michael J. Broyde, who was member of Beth Din of America, notes the six pillars of the revised Jewish arbitration process:

(1) the BDA issued and publicized detailed and standardized rules of procedure; (2) in addition to its arbitration services, the BDA developed an internal appellate process; (3) the BDA provided choice-of-law provisions to facilitate accommodation of both Jewish and secular law where possible; (4) in addition to Jewish scholars, the BDA employed, as arbitrators, skilled lawyers and professionals who could provide expertise in the areas of secular law and contemporary commercial practices; (5) to ensure the effective resolution of commercial arbitrations, the BDA gleaned and abided by common commercial customs to the extent permitted by Jewish law; and (6) the BDA accepted that an aggregate of individual arbitrations gave rise to an active role in communal governance.


26. See id. at 288.

27. The U.S. Supreme Court has said, “[A party] could claim impedance of the practice of religion or creation of an unjust bias against religion, thereby depriving a [party] of its free exercise
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This Article contributes to the growing religious arbitration literature by specifically identifying the judicial response to religious arbitral award review and by proposing changes to the Federal Arbitration Act of 1925 (FAA).

Part II of this article provides a brief historical and legal framework of arbitration in the United States. It discusses how American courts provided more power to arbitral tribunals when, in the early 1800's, courts became the only institutions that were available to adjudicate a dispute.28

Part III provides background to the two well-established religious arbitration tribunals in the U.S.: Christian and Jewish arbitration tribunals. It then introduces the attempts by the American Muslim community to establish an Islamic Arbitration Tribunal and its struggles.

Part IV discusses constitutional law and the emergence of the "religious question doctrine." It provides a framework in which the Supreme Court created the "neutral principles of law" approach. This part concludes with cases that supported and solidified the doctrine.

Part V discusses religious arbitration from a freedom of contract lens. It shares courts' present practice with respect to religious arbitration award enforcement and concludes with discussion of FAA and UAA as it applies to religious tribunals.

Part VI aims at two goals: First, it introduces specific concerns with (a) Islamic Arbitration Tribunals, (b) Jewish arbitration tribunals, (c) community pressure, and (d) finality of arbitration awards. Second, it proposes specific judicial guidelines and additions to the FAA.

Part VII concludes by arguing for greater acceptance of religious arbitration as a process of promoting cultural diversity and respect for religion, but with higher safeguards of public policy through education and greater regulation of religious arbitration.29

This article reflects on the argument that multiculturalism created by religious arbitration is beneficial, though it cannot be left unchecked, and


29. See Wolfe, supra note 3, at 427. Wolfe notes that a refusal by civil courts to enforce religious arbitration awards would seriously weaken the power of religious tribunals. See also Grossman, supra note 3, at 170.
that banning procedurally fair arbitration tribunals is unjustifiable, however should be allowed in rare instances.30

II. THE AMERICAN ARBITRATION SYSTEM

The phrase “alternative dispute resolution” is revealing. The word “alternative” implies exceptional or secondary or even deviant in contrast to something that is normal or standard or ordinary. But, alternative to what? To Litigation? Hardly – for some of the standard alternatives such as negotiation, compromise, and mediation regularly feature such phases within litigation. To adjudication? If so, it is not just our theorists who are obsessed with the atypical: rather, court-centered thinking and discourses are deeply ingrained in our legal culture.31

However, commentators have placed limitations on the broad benefits of “ADR.” As per one, “First, we should consider whether an ADR mechanism is being proposed to facilitate existing court procedures, or as an alternative wholly separate from the established systems. Second we must consider whether the disputes that will be resolved pursuant to an ADR system will involve significant public rights and duties.” ADR refers to all methods of resolving disputes in ways other than litigation.32 Although arbitration falls within the definition of ADR, religious arbitration is said to be an alternative to ordinary ADR.33

30. Wolfe, supra note 3, at 466.
34. See Glenn G. Waddell & Judith M. Keegan, Christian Conciliation: An Alternative to "Ordinary" ADR, 29 CLUMB. L. REV. 583 (1999) (describing history of Christian Conciliation Services). ADR is defined as:
[A] set of practices and techniques that aim (a) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (b) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (c) to prevent legal disputes that would otherwise likely be brought to the courts.

William E. Craco, Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation, 57 Fordam L. Rev. 483, 483 (1988); see Henrey & Leiberman, Lessons from the Alternative Dispute Resolution Movement, 53 U. Chi. L. Rev. 424, 424-26 (1986). A newer term, “appropriate,” is used in the absence of “alternative” to signify a preference towards the field of dispute resolution as a more appropriate field of resolving conflicts. Some scholars have analyzed the term “alternative.” See e.g., Twining, supra note 31, at 380-83.
Religious arbitration, for the purposes of this article, is defined as a dispute resolution process conducted according to religious principles.\textsuperscript{35} Such religious arbitration predates the United States of America.\textsuperscript{36} In 1635, a Boston town laid down an ordinance that a congregation member must arbitrate a dispute before litigation.\textsuperscript{37} In Anglo-American legal history, the strong influence of religious law is readily apparent, dating from the eleventh century to the founding of the United States and beyond.\textsuperscript{38} In Colonial British America, religious justice was commingled with civil justice.\textsuperscript{39} In 1789, after the founding of the United States, Congress began separating civil and religious justice by proposing to the states the First Amendment.\textsuperscript{40} By the early 1800s, courts became the only institutions that

\textsuperscript{35} Although the focus of this article is not defining religion, it must be mentioned that many scholars have written about the impossibility of defining religion as “almost an article of methodological dogma.” Brian C. Wilson, \textit{From the Lexical to the Polythetic: A Brief History of the Definition of Religion, in DRILL, WHAT IS RELIGION? ORIGINS, DEFINITIONS, AND EXPLANATIONS} 141 (Thomas A. Idnulopulos and Brian C. Wilson eds., 1998) (as quoted in \textbf{W. COLE DURHAM AND BRETT G. SCHARFS, LAW AND RELIGION, NATIONAL, INTERNATIONAL AND COMPARATIVE PERSPECTIVES} 40 (2010)). “Some reject the term as too vague and ambiguous. Others point out that religion is a Western concept derived from European experience and argue that applying it to phenomena from other cultures necessarily misrepresents them.” \textit{Id.} at 40. For a general discussion on challenges of defining religion, see \textit{id.} at 39-47.

\textsuperscript{36} See Walter, \textit{supra} note 28, at 505-11 (discussing history of religious dispute resolution and arbitration). Walter argues that Divine and secular law were more intertwined than today. For example, he quotes, “In 1489, the English Chancellor, ruling in a trust dispute, held that ‘each Law is or ought to be, in accordance with the Law of God.’ For much of English history, church and state were mixed, and law was infused with religious principles.” \textit{Id.} at 505. As per Walter, “[E]ven though law and religion were interconnected, it is possible to trace the origins of religious arbitration back to pre-modern England and France.” \textit{Id.}

\textsuperscript{37} \textbf{JEROLD S. AUERBACH, JUSTICE WITHOUT LAW?} 23 (Oxford Univ. Press 1983).

\textsuperscript{38} \textbf{BRIAN TIERNEY, RELIGIOUS RIGHTS: A HISTORICAL PERSPECTIVE, IN RELIGIOUS LIBERTY IN WESTERN THOUGHT 43-44} (Noel B. Reynolds and W. Cole Durham, Jr., eds., 1996).

\textsuperscript{39} See Walter, \textit{supra} note 28, at 510. A distinct feature of Christianity, particularly in the West, is that “neither church nor state ever totally subordinate the other.” \textit{Id.} at 10. Brian Tierney has described the situation as this:

Because neither side could make good its more extreme claims, a dualism of church and state persisted in mediæval society and eventually it was rationalized and justified in many world of political theory. The French theologian John of Paris, . . . assigning to each power its proper function[,] [wrote in 1302,] “The priest is greater than the prince in spiritual affairs . . . and, on the other hand, the prince is greater in temporal affairs.

\textit{TIERNEY, supra note 38, at 36}.

\textsuperscript{40} 1 Stat. 97 (1789).
were available to adjudicate disputes. In the late nineteenth century, the courts believed arbitration usurped their jurisdiction because people could make their own law and even disregard the judicial process. In many ways, courts took the jurisdiction away from arbitration tribunals and expanded the review of arbitration awards.

However, by the early twentieth century, the business community, which used arbitration for commercial disputes, asked the American Congress to enact a law that initiated full support for arbitration. In 1925, isolated in time and purpose from judicial enforcement of religious arbitration awards, the Federal Arbitration Act was enacted. The primary groups in support of its passage were legal and commercial groups. Given the proponents of the Act, the legislative history, and other factors, there is strong support for the argument that modern applications of the FAA have gone far beyond what was envisioned by the Congress that enacted it.

A. Pro-Arbitration Law

In the 1960s, the U.S Supreme Court gave its support to the institution of arbitration by supporting the FAA; Congress created an unmistakably clear congressional intention for speedy justice. The majority rejected the argument that arbitration provides for unqualified neutrals to rule on legal issues. Article 2 of the FAA provides:


44. See Jean R. Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 638, 644-45 (1996) (claiming that Supreme Court is leading the liberal federal policy towards arbitration: "[T]he Supreme Court itself is leading the revolutionary transition from litigation to mandatory binding private arbitration, proclaiming federal policy favors arbitration, over litigation").


46. Id. at 431.


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A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.\textsuperscript{49}

This section of the FAA is interpreted to capture the commercial aspect of the Act—that this is the standard practice in which the actors in the business community deal with one another.\textsuperscript{50} The Court expanded the application of the section to state cases involving interstate commerce.\textsuperscript{51} Section 2 works in conjunction with Section 4 of the FAA to provide for the enforcement by specific performance of arbitration agreements.\textsuperscript{52}

When the court is satisfied that the agreement to arbitrate, or the failure to comply therewith, is not at issue, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."\textsuperscript{53} In the 1980s, the Supreme Court took the next step in strengthening the establishment of arbitration as an institution.\textsuperscript{54} It declared

\textsuperscript{49} 9 U.S.C. § 2 (Validity, irrevocability, and enforcement of agreements to arbitrate).
\textsuperscript{51} Prima Paint Corp., 388 U.S. at 404.
\textsuperscript{52} A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
\textsuperscript{53} Id.
\textsuperscript{54} 460 U.S. at 24-25.

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that sections 2 and 3 of FAA manifest a “liberal federal policy favoring arbitration agreements,” compelled arbitration of a securities dispute in Dean Witter Reynolds v. Byrd, and compelled arbitration to facilitate Congress’s vision of the FAA in Moses H. Cone Memorial Hospital v. Mercury Construction Corp. In Southland Corporation v. Keating, the Court added that in suits involving interstate commerce, the FAA preempts state statutes that restrict arbitration and contradict congressional intent, creating a duty on both state and federal courts to apply the FAA.

Continuing its policy to favor arbitration, in Gilmer v. Interstate/Johnson Lane Corp., the Supreme Court upheld mandatory arbitration of an employee’s suit under federal age discrimination law even though discovery provided in arbitration was more limited than that available in court. However, it was not until 1995 that the Court gave the FAA its broadest interpretation in Allied Bruce Terminix, Inc. v. Dobson, ruling that section 2 of the FAA should be read broadly, extending the Act’s reach to the limits of Congress’s Commerce Clause power. The Court noted that the primary purpose for the enactment of the FAA in 1925 was to purge the judiciary of its anti-arbitration bias, stating, “the FAA’s protection of arbitration from judicial prejudice applies wherever federal law can reach.” In particular, federal courts must apply the provisions of the FAA even when

55. Id. at 24.
57. 460 U.S. 1, 24-25 (1983).
59. Id. at 15-16.
60. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). “Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” Id. at 24. While dissenting, Justice Stevens questioned whether FAA even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue. He notes:

In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 et seq., to binding arbitration.

Id. at 36; see Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).
61. Gilmer, 500 U.S. at 23.
62. Allied-Bruce Terminix Co., Inc. v. G. Michael Dobson, 513 U.S. 265, 278 (1995). (“When Congress passed the Arbitration Act in 1925, it was ‘motivated, first and foremost, by a... desire’ to change this antiarbitration rule... It intended courts to ‘enforce [arbitration]agreements into which parties had entered’... and to ‘place such agreements ‘upon the same footing as other contracts’.”)
63. THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 202 (5th ed. 2007).
they exercise diversity jurisdiction over state litigation. State courts also must apply the FAA whenever a basis for applying federal law can be found, even in cases where the merits are otherwise governed by state law. A similar decision was reached in Volt Info. Sciences v. Board of Trustees.

In 1995, the Court decided Mastrobuono v. Shearson Lehman Hutton, Inc., holding that parties to arbitration agreements may determine whether or not they wish to provide arbitrators with power to award punitive damages. In Lapine Technology Corp. v. Kyocera Corporation, the Ninth Circuit held that mere inclusion of a generic choice-of-law in the contract was not sufficient basis for requiring the application of the chosen state law as to the scope of review of arbitral awards. This view aligns with the Supreme Court’s view in another case, where the Court pronounced

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64. Id. at 203. See Terminix, 513 at 272 (“The legal background demonstrates that the Act has the basic purpose of overcoming judicial hostility to arbitration agreements and applied in both federal diversity cases and state court, where it pre-empts state statutes invalidating such agreements.”).  
66. 489 U.S. at 478-79.  
In recognition of Congress’ principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which “require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” Southland Corp. v. Keating, 465 U.S. 1, 465 U.S. 10 (1984) . . . but it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . ., so too may they specify by contract the rules under which that arbitration will be conducted.  
68. Id. at 52.  
69. LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (While ruling in favor of expansive judicial review of the agreement by the parties to arbitration, the court ruled that when Kyocera and LaPine agreed to submit disputes to arbitration, they did so on the condition that the deferral district court would review the arbitrator’s decision for errors of fact and law. They did not agree to abide by an arbitration tribunal’s erroneous decision. The FAA does not prohibit that kind of agreement; it encourages it).  
70. The primary question raised here deals with choice of law. Can the parties to an arbitration award with mutual agreement expand the arbitration award’s scope of review as provided under the FAA? The court in Kyocera looked at the Supreme Court’s decisions applying and interpreting the FAA and held that such Supreme Court decisions make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreements’ terms, however, private parties lack the power to dictate a broad standard of review when Congress has specifically prescribed a narrower standard.

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that in almost any dispute, arbitration meets the parties' needs just as well as a court would.\footnote{Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 627-28 (1985) (suggesting that a party to an arbitration agreement does not forgo her substantive rights; she only agrees to have such rights arbitrated rather than litigated).}

The efficiency of the arbitration system has contributed to the current policy favoring arbitration to the extent that arbitration seems to be favored over litigation.\footnote{Jean R. Stemberg, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1, 17-18 (1997).} However, some of the reliance on arbitration seems to be misplaced. Scholars have termed this over-reliance as Court's "favorite myth" that "courts should favor arbitration over litigation."\footnote{Id. at 17 (stating that Supreme Court is proposing to lower courts to favor arbitration). See also Grossman, supra note 3.}

\section*{B. Federal Legislation}

In the 1960s, the U.S. Supreme Court supported the institution of arbitration and stated so by enacting the FAA. In doing so, Congress created an unmistakably clear congressional intention for speedy justice. The Court rejected the argument that arbitration provides for unqualified neutrals to rule on legal issues.\footnote{Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 396-97 (1967).} The judiciary has continued to develop an expansive interpretation of the Act.\footnote{Harding, supra note 45, at 402.} Similarly, the Uniform Arbitration Act (UAA) provides for broad enforcement of arbitration agreements.\footnote{USC § 1 (2000); RUAA § 6 (2000).} This is particularly significant because forty-nine States have laws enforcing arbitration agreements, thirty-five of those have adopted the UAA, and an additional fourteen have adopted Acts similar to the UAA.\footnote{Prefatory Note to the RUAA, UNIFORMLAWS.ORG (2000), http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf. See Policy Statement Revised Uniform Arbitration Act, UNIFORMLAW.ORG, http://www.uniformlaws.org/shared/docs/arbitration/arbpswr.pdf (last visited January 11, 2015).} The UAA makes no distinction regarding religious arbitration, providing a statutory support for the enforcement of religious arbitration awards.\footnote{See generally UAA, AM. ARB. ASS'N UNIV., https://www.aaau.org/media/5046/uniform%20arbitration%20act.pdf (last visited Jan. 11, 2014)(making no mention of religious arbitration).} If the arbitration case involves interstate commerce or maritime transaction, the FAA applies.\footnote{Pennsylvania Eng. Corp. v. Islip Res. Recovery A, 710 F. Supp. 456, 461 (E.D.N.Y. 1989).}

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“interstate commerce” as required by the FAA, have unilaterally held that very little “interstate” connection is necessary for the FAA to apply. \(^{80}\)

II. RELIGIOUS ARBITRATION TRIBUNALS

A. Christian Panels

Churches have been centers for dispute resolution for hundreds of years. \(^{81}\) Peacemaker Ministries, through its division The Institute of Christian Conciliation (ICC), administers cases with the use of mediation, mediation/arbitration, and arbitration. \(^{82}\) The ICC is the most prominent Christian arbitration tribunal to resolve disputes. \(^{83}\) During a Christian conciliation, adversaries read biblical passages, which emphasize loving and forgiveness. \(^{84}\) “They pray and memorize verses such as Ephesians 4:32: ‘And be kind to one another, tenderhearted, forgiving one another, as God in Christ forgave you.’” \(^{85}\) While in the application of law the ICC does not

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\(^{80}\) Id. at 757 (shipment of wool within the same state still involved interstate commerce because instructions for shipment came from outside the state); Starr Electric Co. v. Basic Construction Co., 586 F. Supp. 964 (1982) (interstate commerce was involved in a construction contract where building supplies came from out-of-state suppliers).


\(^{82}\) Alternative Dispute Resolution, PEACEMAKER MINISTRIES, http://www.peacemaker.net/site/c.nuiWL7MOtE/b.5394441/k.BD56/Home.htm (last visited Mar. 25, 2015). “The Institute for Christian Conciliation (ICC) provides highly qualified and experienced mediators and arbitrators who will work with parties and attorneys to resolve a wide range of disputes using an alternate dispute resolution process that is biblically faithful.” Id.

\(^{83}\) Michael Fitzgerald & Lynne M. L. Fitzgerald, Mediation: A Systematic Alternative to Litigation for Resolution of Church Employment Disputes, 5 St. Thomas L. Rev. 507, 519-22 (1993). An example of a faith based arbitration clause is:

Any claim or dispute arising from or related to this Agreement shall be settled by mediation and, if necessary, legally binding arbitration, in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation. Such arbitration shall be held in Colorado unless otherwise agreed by both parties. Judgment upon an arbitration award may be entered in any court otherwise having jurisdiction.


\(^{85}\) The thing that’s so exciting about Christian conciliation is that many times, people come out friendly with each other and decide that whatever they were fighting about in the first place wasn’t that important . . . . That can never happen in litigation where one party wins—usually the lawyers—and the parties are forever hostile to each other.

Id.

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claim that its awards will be consistent with secular laws as claimed by BDA, it does state that "conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process." Courts have reviewed religious tribunals by applying UAA-based statues with the FAA and its policies in mind. For example, in Prescott v. Northlake Christian School, the court applied Montana UAA standard of review.

Even though the ICC procedures include rules that mirror secular arbitration guidelines (for instance, parties to conciliation have a right to legal counsel, evidence in conciliation, and confidentiality), a sense of compulsion can be read into how involved the church is in the process. Under Rule 17 of the ICC:

If a party who professes to be a Christian is unwilling to cooperate with the conciliation process or refuses to abide by an agreement reached during mediation, an advisory opinion, or an arbitration decision, the Administrator or the other parties may report the matter to the leaders of that person’s church and request that they actively participate in resolving the dispute.

86. Rules for Procedure, Rule 4, INST. CHRISTIAN CONCILIATION, http://peacemaker.net/wp-content/uploads/2015/02/F-GUIDELINES-PART-IV-RULES-OF-PROCEDURE-FOR-CC-V-4.6.pdf (last visited Feb. 28, 2015). Parties can, however, agree to a specific secular law under the terms of their contract. For example, “This agreement shall be governed, construed, and interpreted under the laws of the State of Colorado. Venue on any dispute arising from this Agreement shall be at Arapahoe County, Colorado, unless otherwise agreed by both parties.” See id.

87. Waddell & Keegan, supra note 35, at 593-96.


89. Id. (noting that “in a broad sense” arbitration pursuant to Montana Uniform Arbitration Act “is subject to the FAA”).

90. See Rules for Procedure, supra note 86, at Rule 13 (“Conciliation can affect substantial legal rights and responsibilities. Therefore, parties have the right to be assisted or represented by independent legal counsel throughout the conciliation process”).

91. Id. at Rule 14.

92. The rule states:

Because of its biblical nature, Christian conciliation encourages parties to openly and candidly admit their offences in a particular dispute. Thus, conciliation requires an environment where parties may seek freely, without fear without fear that their words may be used against them in a subsequent legal proceeding. Moreover, because conciliation is expressly designed to keep parties out of court, conciliators serving on behalf of the Administrator would not do so if they believed that any party might later try to force them to testify in any legal proceeding regarding a conciliation case. Therefore, all communications that take place during the conciliation process shall be treated as settlement negotiations and shall be strictly confidential and inadmissible for any purpose in a court of law, except as provided in this Rule.

Id. at § 16.

93. Id. at § 17.
The overarching principle of Christian panels is that the “resolution should be in accord with Bible.”

B. Jewish Arbitral Tribunals

The Jewish arbitration tribunal was created in 1960, and follows a set code of procedures, which were developed over many years. The rules provide for a hierarchy of authority, which is led by Av Beth Din (Chief Justice) who supervises the organization and appoints dayanim (arbitrators) to hear disputes. Special rules pertaining to arbitrator bias are included in the Beth Din Rules, which follow the vacature rules provided under FAA Sections 10 and 11. The Beth Din of America claims that it adjudicates disputes in a manner consistent with “secular law requirements for binding arbitration so that resolution will be enforceable in the civil courts of the United States of America, and the various states therein.”

Although many in beit din (plural for beth din) incorporate rabbinic court advocates (RCAs), the most prominent beth din, Beth Din of America (BDA) has a strict prohibition. Among other rules, the Beth Din

94. Waddell & Keegan, supra note 35, at 590.
95. See generally Beth Din of America, BETH DIN AM., http://www.bethdin.org (last visited Apr. 5, 2016). Although the BDA was founded in 1960 by the Rabbinical Council of America, it became an autonomous organization, headed by independent board of directors in 1994. “It is funded by a combination of fees for services, private donations and support by communal endowments and institutions.”
97. Id.
98. Id. These Rules and Procedures are designed to provide for a process of dispute resolution in a Beth Din, which is in consonance with the demands of Jewish law that one diligently pursue justice, which also recognizing the values of peace and compromise. See id.
100. Layman’s Guide to Dinei Torah, BETH DIN AM. 8, http://s589827416.onlinehome.us/wp-content/uploads/2015/07/LaymansGuide.pdf (last visited Apr. 5, 2016), Greenberg, supra note 99, at 641 (“Similar to a lawyer in secular court, a tosbe a representative of one of the parties. The Jewish court system does not expect the parties to have such representation, and the Beth Din of
procedures include a provision that when a claim under Beth Din is initiated, the opposing party has an option to opt out of Jewish Law, use another beth din, or find a mutually agreed upon third party. In such instances, as per the rules, the BDA will withdraw.  

In many ways, the success of Beth Din can be attributed to the civil procedure-like rules that the BDA laid down. Such rules, in short, provide for a discovery phase, exchange of relevant documents, sharing anticipated witnesses, notice as to the time and place of the hearings, and for a right to representation by counsel at any stage in the arbitration, including the pre-hearing conference. The Rules and Procedures also provide a balanced approach in terms of party fees, where, in the event of extreme hardship on the part of any party, the Beth Din may defer or reduce the administrative fee, including a provision for another arbitration about fees if any party fails to pay fees or expenses to the Beth Din in full.  

The success of beth din has not been without its challenges. The system, mainly due to the use of RCAs during adjudication at a beth din, has been criticized as “terrible and ridiculous.”

C. Islamic Arbitral Tribunals

As per Ahmed Moussalli, in the Arabian Peninsula, the birthplace of Islam, arbitration dates back centuries to the pre-Islamic societies. The first element that brings attention to Islamic Arbitration is the recent debate on Sharia (meaning path or road) in the western world. In Canada, the debate took prominence after Syed Mumtaz Ali announced in the Canadian media that the Islamic Institute of Civil Justice (IICJ) would start offering

America disallows such representation except, in certain cases, with the explicit agreement of all parties and the judges”).

101. Beth Din Rules, supra note 96, at 2. However, it is worth noting that the BDA retains jurisdiction until a “suitable” option is proposed. See id.

102. See id.

103. In such cases, the Av Beth Din may order the suspension or termination of the proceedings, pending payment in full, and inform the parties that one of them may advance the required payment (“If one party advances the payment owed by a non-paying party, the Av Beth Din or his designee may issue an award, separate from any other award ordered by the Beth Din, ordering the non-paying party to reimburse the other party for advances made on their behalf.”). Id. at 15.

104. Interview by AMF Magazine with Rav Hershel Schachter on “Terrible” Beth Din System (Oct. 12, 2011). See Greenburg, supra note 99, at 642 (“Rabbi Shachter describes the present beth din system as ‘terrible’ and ‘ridiculous,’ ‘a chutzpah (disrespect)’ and an overall ‘chillul Hashem’ (defamation of G-d’s name). In his opinion, the beth din’s current predicament is ‘worse than a crisis’ and he attributes much of the problem to RCAs.”).

arbitration in family disputes in "accordance with both Islamic legal principles and Ontario’s Arbitration Act, 1991."106 At the conclusion of the debate, all forms of religious arbitration, whether based on Christian, Jewish, Muslim, or other religious principles were excluded from the Act.107 Sharia is a set of Islamic codified laws. Ever since the announcement of the independent powers of Arbitration center in Canada, Islamic Arbitration has received more politicized attention than perhaps the field demanded.108 In fact, at least in the field of family law, studies have shown that there is more mediation than arbitration.109 As per Christopher Cutting,110 “The majority of clients seeking Muslim civil dispute resolution services in Ontario province are women in need of a religious divorce.”111 Based on empirical research with faith-based groups in southern Ontario from 2007-2009, Mr. Cutting notes that, “In all my research to date I have not found a single instance of formal signed arbitration (faith-based or otherwise) taking place


107. A vociferous debate ensued on the introduction of sharia law in Ontario in which the presumed incompatibility of sharia-based family law and women’s individual rights took centre stage. This debate reached its conclusion in September 2005 when Ontario Premier Dalton McGuinty announced that he would end all religious arbitration. In February 2006, the Ontario legislature passed amendments to the 1991 Act that allowed family arbitration only if it was based on Ontario or Canadian law, excluding any form of religious arbitration, whether based on Christian, Jewish, Muslim, or other religious principles.

108. Id.


110. Islamic law has developed through the centuries beyond the original revealed text of the Qur’an, covering numerous topics for which revelation did not provide explicit prescriptions. For this reason, there is a distinction in classical Islamic theory between Sharia and fiqh (positive law). Jocelyne Cesari, Foreword: Sharia and the Future of Western Secularism, in DEBATING SHARIA: ISLAM, GENDER POLITICS AND FAMILY LAW ARBITRATION (Anna C. Korteweg et al. eds., 2012). Cesari goes on to add that “the principal techniques for fiqh develop rules in the absence of divine edicts in the Qur’an or hadith; these techniques include, among others, qiyas, or analogical reasoning (applying a rule provided in revelation to a new situation), and ijma, or consensus of the scholars.”

111. In his work Cutting adds, “I found no Muslim leaders or organizations that were anxious to encourage couples or have these issues formally arbitrated, religiously or otherwise. This is not the case because Muslims now imagine faith-based arbitration to be legally forbidden. The demand for desire is simply not there.” Cutting, supra note 110, at 73.
in Muslim Communities. However, although no one appears to be arbitrating at all in Muslim communities of Ontario, a number of imams are assisting Muslims through faith-based mediation in the formation of separation agreements, wills, and prenuptial agreements.

With respect to the use of Sharia by American Muslims, the practice has received a politicized campaign, where a number of organizations have taken steps to propagate fear against "Islamic Law." As a result, a number of states have taken steps to ban Sharia or "Foreign Law." Even though there have been calls for a nationwide network of Sharia courts, very few have been established. The recent establishment of a Muslim tribunal in Dallas received criticism for fears that it "would open the door to extreme practices and corporal punishment."

Proponents of the application of Islamic ideals of justice state, "As long as religious law does not replace a given country's secular judicial system, Muslims should be allowed and encouraged to develop their own jurisprudence on the application of law to a specific set of matters consistent with the principles of that system." Some argue that religious tribunal's implementation allows for both religious and secular principles of justice to meet, that it does not mean such system will replace the United States secular judicial system.

112. Id. at 92.
113. Id. at 92.
114. See Asma T. Uddin & Dave Pantzer, A First Amendment Analysis of Anti-Sharia Initiatives, 10 First Amend. L. Rev. 363, 365 (2012). Noting "organizations include ACT! For America, Stop Islamization of America, and a variety of more general organizations that have echoed their messages." As per the authors, as of June, 2011, forty-seven bills in twenty-one states sought to ban the use of Sharia and/or category of international law. Id.
115. As an example, Wyoming "not only seeks to outlaw Sharia law, but also aims to prohibit the judiciary from citing other states that may permit the use of Sharia law." The Wyoming bill states:

When exercising their judicial authority the courts of this state shall uphold and adhere to the law as provided in the constitution of the United States, the Wyoming constitution, the United States Code and federal regulations promulgated pursuant thereto, laws of this state, established common law as specified by legislative enactment, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law. The courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law.

118. Rafeeq, supra note 2, at 111.
119. Id.
IV. U.S. CONSTITUTIONAL LAW AND RELIGIOUS ARBITRATION

The regulation of religious actions and manifestations presents several constitutional issues due to the complicated and tense relationship between religion and government in the United States. For example, should a particular religious freedom claim be protected? Or, will countervailing interests result in limitation of the right? This tension also brings out strong opinions as a result of the personal nature of religious beliefs. The combination of personal religious beliefs and constitutional constraints make religious arbitration a controversial and complicated issue.

Proponents of religious arbitration argue for freedom of religion. This freedom is guaranteed in the United States through the Constitution, which states under the First Amendment that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Under this single command, the Free Exercise Clause and the

120. As early as 1961, the Supreme Court recognized this tension in McGowan v. Maryland, 366 U.S. 420 (1961), noting:
It is a postulate of American life, reflected specifically in the First Amendment of the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their influences upon men’s conduct, free of the dictates and directions of the state. However this freedom does not and cannot furnish adherents of religious creeds entire insulation from every civil obligation. As the state’s interest in the individual becomes more comprehensive, its concerns and the concerns of religious perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

Id. at 461.

121. DURHAM & SCHARFFS, supra note 35. The authors define the phrase “religious autonomy” in a more specialized sense to refer to the right of religious communities to independently determine their own doctrines and teachings, their missions, their organizational and communal structures, their personnel, their internal normative and administrative structures, and in general, their own authentic nature and aspirations. See JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHAR‘I PATH IN A SECULAR SOCIETY (Oxford Univ. Press 2012). Macfarlane states that while she conducted research for her book on Islamic Divorce in North America, she was routinely asked by non-Muslims, “You mean they have divorce?” and often, “Don’t they just stone the women?” She noted, “These reactions to my study and to mine reflect pervasive public stereotyping of Muslims and largely uninformed public-policy making about the use of Islamic legal processes.” Id.


123. U.S. CONST. amend. 1.
Establishment Clause are joined together. The Free Exercise Clause forbids Congress, and the states through incorporation of the Fourteenth Amendment, from discriminating against religion, and "may require affirmative accommodation of free exercise in some contexts."

The Supreme Court has interpreted this to mean that individuals have the right to practice their religion; the Court in Epperson v. State of Arkansas opined that the "government in our democracy, state and national, must be neutral in matters or religious theory, doctrine, and practice." As per Professor Esbeck, the establishment clause severs the link between church and state, "but it does not disassociate religion from government.
"Therein lies the seed of a problem, for in practice it has proven difficult to accomplish the desired separation of church and state without adversely affecting the manner in which religion is permitted to shape democratic government."

According to one school of thought, the Court’s insistence on freedom of religion supports the idea that individuals are entitled to have their religious disputes arbitrated using the laws and practices of their chosen religion. The other school of thought suggests it is a limited freedom where individuals are entitled the freedom to make decisions based on their religious doctrine, but such freedom should not interfere with the secular law.

124. See id.
126. See e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) ("[T]he Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws.").
127. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").
129. Id. Professor Esbeck continues to add, "Because the state has no competence in religious matters, government is prohibited from sanctioning any particular religion by codifying its confession of faith into civil law." Id.
130. See generally Helfand, supra note 7 (contending that the current arbitration doctrine can meet the challenges of new multiculturalism).
131. Ginnine Fried, The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts, 31 FORDHAM URB. L.J. 633, 641 (2004) (noting tensions between Establishment Clause and enforcement of Jewish Beth Din awards). See Lowry, supra note 5 (discussing the differences between Shari’a from American law in the areas of divorce, child custody and probate law and the limitations of the Establishment Clause which "forces a judge to apply only neutral contract principles").
At multiple levels, the question of religious arbitration is a question of religious autonomy. The church-state relations in the United States have been dominated by the meaning of the Establishment Clause. There are two streams of thought, and as eloquently put:

[On one side is a separationalist stream, symbolized by Thomas Jefferson’s “wall of separation between Church & State.” On the other side is an accommodationist stream, illustrated by such texts as early presidential proclamations regarding Thanksgiving holidays, a generally friendly posture toward religion, and the willingness to grant exemptions to account for religious difference.]

In 1947, the U.S. Supreme Court decided Everson v. Board of Education, in which Justice Black wrote:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religion, or prefer one religion over another. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

He went on to say the “[First] Amendment required the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.” In the 1980s, the Court ruled that posting of the Ten Commandments in public schools was a violation of the Establishment Clause.

Critics of religious arbitration argue that the Establishment Clause does not support religious arbitration because allowing courts to evaluate an

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132. The term autonomy is synonymous with “liberty” or “freedom.” Religious arbitration is a much-discussed topic in the legal and religious world today, and one could argue that the United States Supreme Court has done its part in safeguarding the meaning of the Establishment Clause.


136. Id.

award of a religious tribunal, or be involved in a religious tribunal in any way, would involve the Court in a religious question.138

A. Religious Doctrine or Ecclesiastical Polity

An enduring principle of first amendment jurisprudence precludes civil courts from deciding issues of religious doctrine or ecclesiastical polity.139 As early as 1871, in Watson v. Jones, the Supreme Court established the basic tenet that “religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of law and the actions of their members subject to its restraints.”140

Trying to add more clarity to the principle, the New Jersey Supreme Court in 1991 commented that “courts can and do decide secular legal questions in cases involving some background issues of religious doctrine, so long as the courts do not intrude into the determination of the doctrinal issues”141 and recognized that religious tribunals were better equipped than civil courts to handle legal disputes involving questions of faith.142 The position that courts should refrain from engaging in questions of primary religious review was reinforced in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church143 and Serbian Eastern Orthodox Diocese v. Milivojevich.144 In 1990, Justice Scalia declared in Employment Division v. Smith that “no principle of law or logic” could guide courts in determining religious law.145


139. See Watson v. Jones, 80 U.S. 679, 728-30 (1871) (This decision came “prior to application of the first amendment to the States, but nonetheless informed by First Amendment consideration.”). Presbyterian Church v. Hull Church, 393 U.S. 440, 445 (1969).

140. The Court went on to add that civil courts to some degree, have a duty to protect state interests in the resolution of disputes over ownership and control of property. 393 U.S. at 714.

141. Elmora Hebrew Ctr. v. Fishman, 125 N.J. 404 (1991). “In such cases courts have arrived at several acceptable means for confining their adjudication to proper civil sphere. In disputes involving a church governed by a hierarchical structure, courts should defer to the result reached by the highest church authority to have considered the religious question at issue.” Watson, 80 U.S. at 727.

142. Id. at 733 (holding further judicial inquiry improper where issues of faith were already answered by highest religious tribunal).


B. Religious Property Disputes & the Religious Questions Doctrine

In terms of resolution of property disputes by religious bodies, the Court held that the "State has an obvious and legitimate interest in the peaceful resolution of property disputes and in providing a civil forum where the ownership of church property can be determined conclusively."146

Under the "neutral principles of law" test,147 a court must first determine whether property titled to a local church is held in trust for the general church organization with which the local church is affiliated. If it is, then the court will grant the control of the property to the councils of the general church. If the property is not held with the trust, then control of the local congregation is recognized.148 In the 1970s, the Supreme Court "constitutionalized the religious question doctrine, finding that the First Amendment prohibited courts from examining religious doctrine."149 Without regard to the governing structure of a particular church, a court may, where appropriate, apply neutral principles of law to determine disputed questions that do not implicate religious doctrine.150 "Neutral principles are wholly secular legal rules whose application to religious parties or disputes does not entail theological or doctrinal evaluations."151

In Serbian E. Orthodox Diocese v. Milivojevich,152 the dispute centered over the control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.153 The "Holy Synod" was located in Yugoslavia, and was serving as the sole authority to appoint the governing bishop.154 The dispute arose as to which bishop—the bishop elected in 1939 or the one appointed in 1963—controlled the property of the church.155 The

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146. Presbyt. Church v. Hull Church, 393 U.S. at 445. In Jewish Ctr. v. Whale, 86 N.J. 619 (1981), the New Jersey Supreme Court upheld the rescission of a rabbi’s employment contract on the basis of civil principles of fraudulent misrepresentation.
147. See Williams v. Bd. of Tr. of Mount Jezreel Baptist Church, 589 A.2d 901 (D.C. 1991) (The Court cited the rules of statutory construction as examples of the objective, well-established, "neutral principles of law" that civil courts may apply, consistent with the First Amendment, in resolving disputes involving religious organizations.).
150. 589 2.Ad at 908-09.
152. 426 U.S. at 696.
153. Id. at 698-99.
154. Id. at 699.
155. Id. at 702.
Illinois Supreme Court ruled that proceedings of the Church that removed the first bishop were procedurally and substantively defective under the internal regulations of the Church and were therefore arbitrary and invalid. The United States Supreme Court held that the actions of the Illinois Supreme Court constituted improper judicial interference with decision of the highest authorities of a hierarchical church in violation of the First and Fourteenth Amendments. "The fallacy fatal [to the lower court's reasoning] is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals ... and impermissibly substitutes its own inquiry." Here, even though indirectly, the Court once again acknowledged and relied upon the neutral principles of law.

Finally, courts have recognized that in making a neutral principle of law analysis, it is not sufficient to be able to identify relevant secular rules. It is also necessary to insure that there exist neutral facts to which to apply those rules. For example, in Avitzur, the majority upheld the terms of a Ketubah, a Jewish religious marriage contract, finding neutral facts that evidenced the agreement between the parties, to wit, "[D]efendant promised that he would, at plaintiff's request, appear before the [rabbinical tribunal] for the purpose of allowing that tribunal to advise and counsel the parties concerning their marriage." This promise constituted nothing more than "a civil contract to submit a dispute to a non-judicial forum." Neutral facts consist of "evidence from which the court may discern the objective intention of the parties." This includes "the language of the deeds, the terms of [a] local church charter, the State statutes governing the holding of church property, [and the like]" without resorting to matters of doctrine or dogma.

The Supreme Court provided clarity on the neutral-principles approach in Jones v. Wolf, a dispute that dealt with a Presbyterian church that had separated from the governing body with which it had affiliated. While reviewing the decision of the Georgia Supreme Court, which—relying on

156. Id. at 708.
157. "The First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." Id. at 709.
158. Id. at 708.
159. Id. at 722.
162. Id. at 108.
164. 58 N.Y.2d at 108.
the deed—awarded the church property to a majority of church members, the United States Supreme Court held that courts try to stay away from ruling on church property disputes if the dispute is doctrinal in nature.  

The fine line is that the Court can interfere if it is a religious property dispute, but not if it is a religious dispute, the resolution of which is ecclesiastical and not civil.  

The Court further clarified that courts can, however, look into whether the parties have an enforceable agreement to arbitrate and, if so, whether the underlying dispute between the parties falls within the scope of the agreement.  

"Even where the civil courts must examine religious documents in reaching their decisions, the 'neutral principles' approach avoids prohibited entanglement in questions of religious doctrine, polity and practice by relying 'exclusively upon objective, well-established concepts' of law that are familiar to lawyers and judges."  

Further elaborating on the parameters of neutral principles, the Court stated that, alternatively, the lower courts may look at church constitutions, charters, trusts, and even may adopt the stance that a majority always rules voluntary religious associations.  

To contrast this principle with other areas of arbitration, a related reasoning was applied in a labor arbitration case, where the Court held that


167. See Meshel v. Ohev Sholom Talmud Torah, 869 A. 2d 343, 354 (2005), where the District of Columbia Court of Appeal noted:

We are fully satisfied that a civil court can resolve appellants’ action to compel arbitration according to objective, well-established, neutral principles of law. Although the underlying dispute between the parties goes to the heart of the governing structure of Ohev Sholom and therefore may be beyond the jurisdiction of a civil court, the resolution of appellants’ action to compel arbitration will not require the civil court to determine, or even address, any aspect of the parties’ underlying disputes.


169. 443 U.S. at 603.

170. Id. at 607-08.
an arbitrator’s award settling a dispute “must draw its essence from the contract and cannot simply reflect the arbitrator’s own notions of industrial justice.”  

In another case, the United States Supreme Court added that the arbitrator’s “talk is to effectuate the intent of the parties” and he or she does not have the “general authority to invoke public laws that conflict with the bargain between the parties.”

The United States Supreme Court set forth its test for the Establishment Clause in Lemon v. Kurtzman, stating, “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” However, the original test has been inverted in significant ways. “Currently, the Supreme Court will invalidate legislation under Lemon’s first prong ‘only if it is motivated wholly by an impermissible purpose’ or when it can be said that the law’s ‘pre- eminent purpose . . . is plainly religious in nature.’ The practice and use of the Lemon test remains controversial in nature, where, for example, Justice Scalia referred to Lemon test as a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” On the other hand Justice Powell has stated that “respect for stare decisis should require us to follow Lemon.”


The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decision of lower courts. Id. at 37-38.


173. Id. at 53.


175. See Esbeck, supra note 129, at 515-16. Professor Esbeck adds:

Conversely, the Court has said that “a statute that is motivated in part by a religious purpose does not violate the purpose prong (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)), nor is it required that a “law’s purpose must be unrelated to religion,” for that would require government to “show a callous indifference to religious groups.” Id. (citing Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987)).

176. Justice Scalia continues to note that “[o]ver the years . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart . . . , and a sixth had joined an opinion doing so.” Lamb’s Chapel v. Center Moriches Union Free Schi Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

As per Richard Garnett, Justice Brennan’s warning in the Presbyterian Church case, that “[i]f civil courts undertake to resolve [doctrinal] controversies . . . the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern . . .” is “intriguing, elusive, and misleading.”

Far from being “purely ecclesiastical concerns,” . . . the content of religious doctrine and the trajectory of its development might instead be matters to which even a liberal, secular, and democratic state reasonably could, and perhaps should, attend . . .

[And so,] Justice Brennan’s warning presents “hazards” of its own, and . . . its premises—if uncritically embraced—subtly distort our constitutional discourse. The meaning, movement, and implications of religious teachings are and have been both the subjects and objects of government power and policy. In the end, governments like ours are not, and cannot be, “neutral” with respect to religion’s claims. And it is precisely because secular, liberal, democratic governments have an “interest” in the content . . . of religious doctrine—an interest that such governments will, if permitted, quite understandably pursue—that religious freedom is so fragile.

Others argue that using the secular courts to enforce the award of a religious tribunal or involving themselves in the issues surrounding religious tribunals would be considered a violation of the Establishment Clause, since it could be seen as “advancing” or “inhibiting” religion, or as impermissibly entangling the court system with religion.

However, this entanglement argument has been used by courts that support judicial involvement in this area as well. In Encore Productions, Inc. v. Promise Keepers, the district court stated that a “refusal to enforce the parties’ arbitration agreement could itself arguably constitute an impermissible entanglement.” If the government refuses to enforce religious arbitration awards, this inaction could be viewed as deciding that the religious arbitration awards will have less validity than other arbitration awards. Instead of viewing this as the government avoiding involvement in

180. Id. at 1649-50.
religion, others see it as the government making a value judgment about religion and individuals’ religious commitments.

As per the Supreme Court, the Establishment Clause and the Free Exercise Clause, severely circumscribe the role that civil courts may play in the resolution of disputes involving religious organizations.183 The Court reasons that “judicial intrusion in religious disputes can advance religion or otherwise impermissibly entangle the civil courts in ecclesiastical matters.”184 “Refusal to enforce the parties’ arbitration agreement could itself arguably constitute an impermissible entanglement.”185 As the Court stated, “a [party] could claim impedane [to] the practice of religion or creation of an unjust bias against religion, thereby depriving a [party] of its free exercise rights.”186

V. RIGHT TO RELIGIOUS ARBITRATION

A. The Many Faces of Multiculturalism

Multiculturalism is not an easy term to define. It can “refer to a demographic fact, a particular set of philosophical ideas, or a specific orientation by government or institutions towards diverse population.”187 For the purposes of this piece, the term multiculturalism is used as a political philosophy—“a philosophy centered on recognizing, accommodating, and supporting cultural pluralism.”188

One criticism of this multiculturalism is that multiculturalism, in this form, should not be allowed as parties with less power in traditional religious societies will continue to be less powerful in religious arbitration;189 if they are already vulnerable, they are at a greater disadvantage in the arbitration process.190 For example, Sebastian Poulter

184. Id. at 612-13.
188. Id.
190. Id. (criticizing the multicultural citizenship model, and explaining why it is insufficient for understanding the controversies at the heart of the new cultural wars); see also Ann Lauer Estin, Embracing Tradition: Pluralism in American Family Law, 63 MD. L. REV. 540, 542 (2004).
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analyzes the Islamic principle that Muslim women are prohibited from marrying non-Muslims, however, Muslim men can marry non-Muslim women. He declares that the purpose of this "differential treatment is to keep children within the Muslim faith, and children are assumed to follow the religion of their fathers." Sachar argues that such substantial inequality for women will continue if the arbitration system and the dispute resolution mechanisms continue to employ the "more rigid and conservative interpretation of the religious law." Another critique is that the "viewpoint, common among traditional cultures, that women are somehow more responsible in transmitting and preserving the culture often works against them—they can be 'subject to heightened control, constrained by rules that entrench their dependence and inequality within the community.'

The multicultural approach is also criticized for reducing assimilation and hence adding to the gap between different groups. An example of the multiculturalism critique comes from Canada. For example, in Quebec dispute is not over numbers of immigrants, "but how to accommodate them." In the 1970s, Canada "officially adopted the creed of 'multiculturalism,' a murky concept that celebrates cultural differences at the same time as pushing newcomers to integrate." English-speaking Canadians see multiculturalism as central to their national identity, ranking below universal health care and the Canadian flag in a recent survey by Environics, a research firm, but above ice hockey, the Mounties and the Queen.

192. Id. Poulter writes that although this aim is legitimate, the method of achieving it is "unreasonable and disproportionate." Id. at 160.
194. See Wolfe, supra note 3, at 461.
197. Id.
198. Id., see also Bloemraad, supra note 189, in which the author notes: Yet concerns over multiculturalism are also part of the political mainstream. In October 2010, German Chancellor Angela Merkel proclaimed that a multicultural approach had "utterly failed" in Germany. In February 2011, French President Nicolas
B. Multiculturalism and Religious Arbitration

Arbitration, be it religious or secular has existed in United States for at least a hundred years. Community-based religious arbitration has advantages over civil courts: arbitrators act as experts in their area of expertise with a cultural know-how and a religious understanding. Religious arbitration does provide several benefits for people seeking to resolve disputes amicably. For example, parties save on the costs of litigation. If followed and performed within the framework of arbitration, the dispute resolution mechanism is capable of achieving the binding force of state law. Generally speaking, arbitration has six characteristics:

1. All parties consent to have a dispute resolved by a private third party;
2. The parties select the venue of arbitration, often including the identities of specific arbitrators;
3. The arbitrators conduct proceedings and hears testimony regarding the dispute;
4. The arbitrator resolves the dispute and makes a binding award in favor of the prevailing party;
5. The arbitrator’s decision is subject to minimal judicial review in state or federal court; and
6. The arbitrator’s decision is enforced by the court as a final judgment.

The arbitration process is often touted as an inexpensive, speedy, informal, and private alternative to the judicial system. A summarized by Court: “the advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it

Sarkozy also called multiculturalism a failure, and British Prime Minister David Cameron indited his country’s policy of multiculturalism for failing to promote a sense of common identity and encouraging Muslim segregation and radicalization.

199. K. Seth Shippie, “Blessed are the Peacemakers”: Faith Based Approaches to Dispute Resolution, 9 ILSA J. INT’L & COMP. L. 237, 238 (2002). Even though, the Faith based faith-based dispute resolution has existed for more than a century, such “traditional, faith-based alternatives to the mainstream legal systems are alive and well, and, in many ways, busier and more influential than ever.”


Here, the judge had found that one of the more significant and characteristic spirits of the Ismaili sect was an enthusiasm for dispute resolution contained within the Ismaili community. His Lordship concluded that the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified. The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence.

201. See Christopher R. Lepore, Asserting State Sovereignty Over National Communities of Islam In the United States and Britain: Sharia Courts As A Tool of Muslim Accommodation and Integration, 11 WASH. U. GLOBAL STUD. L. REV. 669 (2012) (stating that “[a]rbitration, as provided for by the Act, enables parties embroiled in a civil dispute to have their case heard by an impartial tribunal without the costs of litigation.”).


normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties. 204

On the other hand, religious arbitration is also called unfair and undemocratic. 205 Some criticize the notion that religion deserves special protection or that it gets a preference. 206 Another criticism is that multiculturalism, in this form, should not be allowed because parties with less power in traditional religious societies will continue to be less powerful in religious arbitration; if they are already vulnerable, they are at a greater disadvantage in the arbitration process. 207

The multicultural approach is also criticized for reducing assimilation and hence adding to the gap between different groups. 208 For instance, traditional religious practices are questioned to favor men. “Women, for instance, are disadvantaged by both religious laws and the cultural views of male-female relationships within the religions.” 209 Arbitration, be it religious or secular, has existed in the United States for at least a hundred years. 210 Christian Conciliation Services 211 and Beth Din 212 are some of the

204. Id.
207. See Ayelet Shachar, Religion, State and the Problem of Gender: Re-imagining Citizenship and Governance in Diverse Societies, 50 MCGILL L.J. 49 (2005) (criticizing the multicultural citizenship model, and explaining why it is insufficient for understanding the controversies at the heart of the new cultural wars); see also, Ann Lauer-Estin, Embracing Tradition: Pluralism in American Family Law, 63 Md. L. REV. 540, 542 (2004).
208. See Kahn, supra note 197, at 59.
209. Wolfe, supra note 3, at 460.
210. R. Seth Shippee, “Blessed are the Peacemakers”: Faith Based Approaches to Dispute Resolution, 9 ILSA J. INT’L & COMP. L. 237, 238 (2002). Even though, the Faith based faith based dispute resolution has existed for more than a century, such “traditional, faith-based alternatives to the mainstream legal systems are alive and well, and, in many ways, busier and more influential than ever.” Id.
211. Id.; see also Encore Prods Inc., v. Promise Keepers, 53 F. Supp. 2d 1101, 1108-09 (D. Colo. 1999) (applying a strong federal policy favoring arbitration to a decision of the Christian Conciliation panel).
more historic services, whereas Sikh Arbitration Services is one of the newest.  

Religious groups derive their right to private dispute resolution from freedom of contract, similar to an arbitration contract.\textsuperscript{214} A religious arbitration, just like secular arbitration, if not challenged by one of the parties to the agreement, may never get questioned in a court of law. Courts have repeatedly emphasized the significance of contract freedom in the U.S. law of arbitration, stating, "arbitration under the Act is a matter of consent, not coercion."\textsuperscript{215} Understandably, the contract can be a decisive source of law in the American arbitral practice as the parties can modify terms of the FAA through a written stipulation.\textsuperscript{216} In other words, parties to a contract have freedom to agree to a method of resolution of conflict, be it religious or secular.

Once the parties have agreed to submit their disputes to a religious arbitration,\textsuperscript{217} courts have upheld that choice to be bound by religious arbitration.\textsuperscript{218} For example, in \textit{Elmora Hebrew Center v. Fishman}, when a question was raised as to whether a party was bound by the judgment of the arbitral tribunal, the court held, "it is appropriate that the Elmora Hebrew Ctr., like a party to a civil arbitration should be bound to observe the Beth Din’s determination of any issues that the Elmora Hebrew Ctr. agreed to submit to that tribunal."\textsuperscript{219} Although the court was quick to point out that it is not proper for a trial court to refer civil issues to a religious tribunals in the first instance.\textsuperscript{220}

\textbf{C. Enforcement of Religious Arbitration Awards}

Courts have actively enforced religious arbitral awards.\textsuperscript{221} Once a party questions either the binding nature of the religious arbitration award, or the

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\textsuperscript{214} See \textit{id.} at 387-88.

\textsuperscript{215} \textit{Volt Info. Sci.s, Inc. v. Board of Tr. of Leland Stanford Junior Univ.}, 489 U.S. 468, 479 (1989).

\textsuperscript{216} First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (giving parties ability to confer kompetenz-kompetenz authority upon the arbitrators if they agreed to remove contract inarbitrability questions from the jurisdictions of the courts under FAA Section Three).


\textsuperscript{218} \textit{id.} at 418.

\textsuperscript{219} \textit{id.}

\textsuperscript{220} Presbyterian Church, \textit{supra note} 182, at 451 ("The First Amendment prohibits a State from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards"); see \textit{Elmora Hebrew Ctr.}, \textit{supra note} 120, at 417.

arbitration award itself, and brings the dispute to a civil court, the Court may then rule one way or the other, after determining jurisdiction.\textsuperscript{222} Courts have granted the right to private dispute resolution to parties in conflict by favoring private dispute resolution of faith-based conflict.\textsuperscript{223}

Can a court of law entertain a dispute where the parties decide to resolve a religious dispute through a religious tribunal? In recent times, courts have laid down clear principles that answer this question. As discussed in Part IV, first, it is recognized that "the church is not above the law,"\textsuperscript{224} and second, courts have recognized that there are occasions in which civil courts may address the actions of religious organizations without violating the First Amendment.\textsuperscript{225} "Specifically, civil courts may resolve disputes involving religious organizations as long as the courts employ 'neutral principles of law' and their decisions are not premised upon their 'consideration of doctrinal matters,' whether the ritual and liturgy of worship or the tenets of faith."\textsuperscript{226}

Similarly, on the question of subject matter jurisdiction, the District of Columbia Court of Appeals held that "subject matter jurisdiction was proper where the court could apply well-established, objective, and secular principles, rather than internal religious principles, to resolve the questions of arbitrability and whether the organization was the congregation's alter ego."\textsuperscript{227}

\textsuperscript{222} See generally Serbian E. Orthodox Diocese of the U.S. of Am. and Canada v. Milivojevich, 426 U.S. 696 (1976).

\textsuperscript{223} In Jones v. Wolf, 443 U.S. 595 (1979), which involved a disagreement within the church about the ownership of some of the church's property, the Court examined whether it is required to give deference to the "authoritative tribunal" of a church. The Court ultimately held that the First Amendment requires deference be given to the determination of the religious commission. Id. In Church v. Mary Elizabeth Blue Hull Mem'tl Presby. Church, 393 U.S. 440 (1969), which involved a dispute between the general church and the two local churches as to who owned the property, the court held that "a civil court cannot make these property determinations that should be based on Church doctrine." Id. In Serbian E. Orthodox Diocese of the U.S. of Am. and Canada v. Milivojevich, 426 U.S. 696 (1976), the Court evaluated whether the defrocking of a bishop was proper,"whether the division of the diocese was enforceable, and whether the changes to the diocese's constitution had effect. Id. The Court overruled the lower court, and held that religious freedom includes this power for the religions to decide for themselves. Id. at 723.

\textsuperscript{224} United Methodist Church v. White, 571 A. 2d 790, 792 (D.C. 1990).


\textsuperscript{227} Meshel v. Ohev Sholomi Talmud Torah, 869 A. 2d 343, 354-60 (D.C. 2005).
However, may a secular court review the award resulting from religious arbitration? As Part IV suggests, the judicial review of religious arbitration panels has been limited by a series of court decisions.\textsuperscript{228} Taking guidance from the field of secular arbitration, the answer seems to be in the affirmative. Following the Supreme Court's guidance, "the Fifth Circuit has held that federal courts have the authority, and, indeed, the obligation, to conduct heightened judicial review of an arbitration award in accordance with the parties' agreement."\textsuperscript{229} However, the Ninth Circuit Court of Appeals sitting \textit{en banc} decided differently.\textsuperscript{230} In \textit{LaPine II}, the court held that a federal court may only review an arbitration decision on the grounds set forth in the Federal Arbitration Act.\textsuperscript{231}

\section*{D. FAA and UAA Requirements}

Both the FAA and UAA, despite differences, mandate basic rules of fairness to constitute a valid arbitration. The Court in \textit{Kovacs v. Kovacs}, held that courts would refuse to confirm an award from tribunals whose proceedings lacked basic fairness.\textsuperscript{232} The FAA states that "an agreement in writing to submit to arbitration an existing controversy . . . shall be valid irrevocable and enforceable,"\textsuperscript{233} a religious agreement that submits disputes to arbitration will fall under the FAA definition.\textsuperscript{234}

A party to arbitration can, however, limit the issues that will be arbitrated or the procedures under which arbitration will be conducted; they can do so by electing to govern their contractual arbitration mechanism by the law of a particular state.\textsuperscript{235}

\begin{thebibliography}{99}
  \bibitem{228} \textit{Id.} at 354-60.
  \bibitem{229} Gateway Techs., Inc., v. MCI Telecomm. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995).
  \bibitem{230} Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 299 F.3d 769 (9th Cir. 2002).
  \bibitem{231} 341 F.3d 987, 1000 (9th Cir. 2003).
  \bibitem{233} 9 U.S.C. § 2 (2000). The UAA uses a similar language; see UAA § 6 (e), 7 U.L.A. 22 (2000). UAA defines "Arbitration Organization" as "assocation, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator. "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate. UAA § 1, http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf (last visited Feb. 27, 2015).
  \bibitem{234} See Grossman, supra note 3, at 188.
  \bibitem{235} If the parties elect to government their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored—as long as the state law principle invoked by the choice of law provision do not conflict with the FAA's prime directive that agreements to arbitrate be enforced. See e.g., ASW Allstate Painting & Constr. Co v Lexington Ins. Co, 188 F. 3d 307, 310 (5th Cir. 1999); Russ Berrie & Co. v. Gantt, 998 S.W. 2d 713, 717 (Tex. Ct. App. 1999).
\end{thebibliography}
Since both the BDA and ICC require agreements to be enforceable by courts, such tribunals at “first glance fall within the scope of the FAA.”

However, it can be argued that religious law governs the agreements that parties sign before a religious tribunal to be bound by the religious arbitration.”

In Avitzur v. Avitzur, the court ruled that a Jewish marriage contract is not secular and is “indisputably in its essence a document prepared and executed under Jewish law and tradition.”

As per Grossman, in this sense “the contract is like a church charter, which embodies religious provisions that courts resist interpreting.”

Other concerns arise around the right to counsel. For example, the ICC reserves the right to exclude attorneys from the mediation/arbitration proceedings. The BDA deems the right to counsel waived if a party appears without representation during proceedings. Knowledge of religion restricts the selection of arbitrators for religious arbitration. Typically, the arbitrator must be a practicing member of the religion, and second, an overwhelming number of the arbitrators are men. When asked about whether women are reluctant to appear before an all-male arbitration panel at the Dallas Islamic Tribunal, the reply was, “women who are reluctant to go to a tribunal of men can meet first with a female counselor. El-Badawi said he would welcome women as a tribunal member if she is trained in Islamic Law.”

Lastly the due process of the arbitration process can be questioned under religious arbitrations as requirements of who can serve as witness can be inconsistent with secular law, including FAA and UAA. For example, under strict Jewish law, women, non-Jews, and the handicapped cannot act as witnesses.

236. Grossman, supra note 3, at 188.
237. See supra Part V.
239. Id. at 139.
240. Grossman, supra note 3, at 188.
241. See Rules of Procedure, supra note 86, at Rule 13(D) (permitting arbitrator to ban all counsel when only one party is represented).
242. Grossman, supra note 3, at 189; see Beth Din Rules, supra note 96, at 108 § 12(b).
243. “The prejudice of traditional religions against women and other minority subgroups has lead some to believe that independent, separate systems of religious arbitration can be harmful. Women, for instance, are disadvantaged by both religious laws and the current views of male-female relationships within the religions.” Wolfe, supra note 3, at 460.
244. Solis, supra note 103.
VI. A PROPOSAL FOR JUDICIAL REVIEW

A. Specific Religious Issues

1. With Islamic Arbitration Tribunals

Critics have questioned the use of religious arbitration and especially Sharia law in a formal legal setting. In the United Kingdom, the "civil and religious law" speech by the Archbishop of Canterbury, Rowan Williams, suggested that British Muslims who would like to avail themselves of Islamic law-based arbitration courts should be permitted to do so. After the remarks, Williams’ colleagues in the Church of England accused the Archbishop of undermining “Christian law” on which the country was based. The Archbishop made a distinction between religious and cultural needs. In many religious communities, in practice, the lines between religious and cultural practices are blurred. However, while cultural practices are negotiable, religious practices are not. While some argue for the benefits of Islamic arbitration in the U.S., others have pointed towards the problems that Sharia law poses to women’s equality and democratic values. Gender inequality concerns have also been raised against other forms of religious arbitration.

U.S. courts have faced the questions of whether Islamic law is compatible with the secular law when it pertains to family. In *Hosain v.*

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251 Batei Din is the plural of beth din. The U.S. incorporates rabbinic court advocates (RCA’s), but there is no female equivalent. Under the Beth Din, the RCA’s have been critiqued as the center of the problem.
Religious Arbitration and its Struggles with American Law

Malik, a custody order from Pakistan was held valid for considering best interests of child. However, child-custody arbitration is an evolving area of the law, “and the enforceability of such decisions remains in a state of flux.”

2. With Jewish Arbitration Tribunals

Critics of BDA argue that Jewish Beth Din is unfair as it relies on patriarchic laws. While speaking about the philosophy of kinyan (from the Hebrew word for acquisition or purchase), one-scholar comments, “[t]he partnership ideal, carried to its logical conclusion, would have meant abrogating the ancient concept of kinyan.” The ketubah (marriage contract; Hebrew verb: to write) discusses the wife’s entitlements in a Jewish marriage. Under the segment on the husband’s obligations, he is to provide clothing for the wife in accordance with her “station” in life, pay her medical bills, ransom her from captivity, and give her a proper burial.

Typically, like in other religions, the stability of marriage is promoted as an element for Jewish survival. By the same criterion, “unendurable” marriages had to be ended because they were “bad for the Jews” as a collectivity. Such “unendurable” conditions are used by Beth Din arbiters to compel the husband to give his wife a get. Among the different powers of a Bet Din, is that it could order the husband to divorce the wife by

253. Id.
254. Lowry, supra note 5, at 171 (2013); see also, Christina Fox, Contracting for Arbitration in Custody Disputes: Parental Autonomy vs. State Responsibility, 12 CARDozo J. CONFLICT RESOL. 547, 547 (2011).
256. Id. at 124. Kinyan defines the initiation and dissolution of a marriage as unilateral transactions by the man and implies absolute power over his wife as his possession. This is obviously incompatible with the partnership ideal, which defined the marital relationship as one of mutuality and interdependence, of “love, peace and companionship.”
257. The author adds, “The Talmud stipulates that the wife continue to own any property she brought in to the marriage, but the husband was to manage it as well as her dowry, income from both belonged to him.” Id. at 128.
258. Id. at 133.
259. Id.
260. Id. ("According to Talmud, if a man did not fulfill certain conditions that made the marriage "viable"—if he refused to fulfill her conjugal rights, was impotent, had a serious disease or a foul smell, did not support her appropriately (later licentious behavior and petty tyrannies were added)—the wife was entitled to a divorce.")
resorting to economic and social sanctions, or as per Talmud and Maimonides, “coercion until he says, ‘I am willing.’” On the other hand, a woman whose husband refused to grant a get because he was malicious or insane, or who deserted her or was otherwise missing, became an aguna, “an anchored woman”, a woman who cannot remarry under the eyes of Jewish religion.

3. With Community Pressure

Under the FAA and UAA, courts will not enforce an arbitration agreement where a party consented to the agreement under coercion or duress. Indeed, courts have clearly refused to enforce an arbitration agreement even under state law where a party consented to the agreement under coercion or duress. However, parties to a religious arbitration can feel obligated by such compulsions out of religious convictions. Minorities may prefer to settle disputes in their religious group instead of through secular courts. For example, courts consistently “hold that the issuance of a siruv from a beth din does not constitute duress sufficient to warrant vacatur of an arbitration award.” In Lieberman v. Lieberman, the plaintiff asked the Supreme Court of New York to invalidate an agreement to arbitrate before a beth din because she was coerced to arbitrate by the threat of a “siruv.” Here the dispute was adjudicated first before the arbitration panel, beth din, and then before the Supreme Court of New York, Kings County. The court held that when a dispute has been moved to arbitration, the party seeking to vacate the ultimate arbitration award must meet a heavy burden to vacate that award and an arbitrators award will be set aside as being in excess of authority only if it is totally irrational. Even though the court defined a siruv as a “prohibitionary decree that

261. Id.
262. There was a practice of “conditional divorces,” which would take effect if the husband failed to return from an absence after a certain period of time. The Shulchan Aruch states, “[I]t is permissible for the beth din to desecrate the Shabbat in order to hear the evidence of witnesses and imprison a husband who intends to desert his wife.” Id.
264. Id. at 650.
265. Id. at 639.
266. Id. (discussing why the members of the minority community may fear the secular courts will discriminate against them and thus prefer disputes to be settled internally by arbitrators who understand and identity with the religious doctrine and communal standards).
267. Baker, supra note 1, at 188.
269. Id.
270. Id.
subject the recipient to shame, scorn, ridicule and public ostracism by the
other members of the Jewish religious community”", it concluded, “[w]hile
the threat of a [s]hahar may constitute pressure, it cannot be said to constitute
duress.”

4. With Finality

For some Americans, binding religious law in any kind is seen as a
threat to the secular state and “as risk to the substantive rights guaranteed by
secular law.” Seeking review by a secular court may not be as easy as it seems; in Berman v. Shaites Lab., when both parties decided to limit the
resolution of their religious dispute by a religious tribunal, with no
possibility of an appeal, the court equated the tribunals’ decision to the
decision of the court in terms of resolution of dispute by ruling, “the
determination of the Din Torah was in the nature of a common-law award in
arbitration and acts as a bar to re-litigating essentially the same issue that
was decided thereby in the guise of the instant libel action.” In Gonzalez
v. Archbishop, the Supreme Court ruled that a decision about appointment
to a Roman Catholic chaplaincy must be left to religious authorities even if it
had a secondary effect on property rights. However, the court suggested
that a civil court may look to such inquiry if such an appointment is the
product of fraud, collusion, or arbitrariness. The ground of arbitrariness
was eliminated from the powers of the civil courts in Serbian Eastern
Orthodox Church v. Milivojevich. Under the current law, a religious
arbitration award, if challenged, must be pursued under the current
parameters of FAA or UAA. Under the FAA, one option is that the parties

271. Id. at 494.
272. Eliyahu Stern, Don’t Fear Islamic Law in America, N.Y TIMES (Sept. 2, 2011), 
274. The court went on to add, “[M]oreover as the parties chose to resolve their differences in
an ecclesiastical tribunal, temporal courts should not interfere with the binding results therein.”

Berman, 43 A.D.2d 736, 350 N.Y.S.2d 703 (citing Rodyk v. Ukrainian Autocephalic Orthodox
Church of St. Volodimir, 31 A.D.2d 659 (1968), affd., 29 N.Y. 2d 898 (1972)); United Kosher
276. 280 U.S. at 16.
277. Id. at 16.
278. Serbian Eastern Orthodox Diocese for the U.S. of Am. & Can. v. Milivojevich, 426 U.S
696 (1976) (inquiring as to whether decisions of a church tribunal complied with the church’s own
laws and regulations).
to secular or religious arbitration can challenge the arbitration award if proceedings were not rendered partially.\(^{279}\) However, in some motions challenging arbitration awards evidentiary hearings are required, which can be costly and time-consuming procedures. Such endeavors can be a deterrent for a litigant who wants to challenge a religious arbitration award under Federal Arbitration Award.\(^{280}\)

\section*{B. Proposed Guidelines}

\subsection*{1. Proposed Judicial Guidelines}

Based on the discussions under Part II-V, this part proposes a list of recommendations that are geared towards treating religious arbitration on equal footing with secular arbitration. This section addresses the premise that the FAA and UAA standard of review has failed as applied to religious panels. Section 10 of the FAA creates a rebuttable presumption that awards are valid,\(^{281}\) and strictly limits judicial review.\(^{282}\)

\begin{footnotesize}
\begin{enumerate}
\item \textit{9 USCS §10 (2002). With regard to vacation, grounds, and rehearing, the Code states:} In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration.
\begin{enumerate}
\item where the award was procured by corruption, fraud, or undue means;
\item where there was evident partiality or corruption in the arbitrators, or either of them;
\item where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced, or
\item where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
\end{enumerate}
\item (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
\item (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.
\end{enumerate}
\end{footnotesize}

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\item \textit{Id.} For example, in Sanko Steamship Co. v. Cook Indus., 495 F. 2d 1260, 1265 (2d Cir. 1973), the Court of Appeals reversed an order confirming an arbitration award. In Totem Marine Tug & Barge, Inc. v. North American Towing, 607 F. 2d 649 (5Cir. 1979), a hearing was held to determine whether arbitrators were involved with prejudicial misbehavior. There the court held that matters of misconduct or bias of the arbitrators cannot be gauged on the face of the arbitral record alone.
\item \textit{281. See Brentwood Med. Assoc. v. United Mine Workers, 396 F. 3d 237, 241 (3d Cir. 2005)} ("An award is presumed valid unless it is affirmatively shown to be otherwise.")
\item \textit{282. See 9 U.S.C. §§ 10-11.}
\end{enumerate}
\end{footnotesize}
Accordingly, the procedural protections of the FAA may not be waived simply by agreeing to religious arbitration. It is “both unreasonable and unrealistic” to remove them from scope of the arbitration statutes. Specifically, procedural protections of the FAA should extend to all parties to arbitration, regardless of the choice of law provisions in the contract specifying a particular religious doctrine, law, orthodoxy, or school of thought. Like others have argued, courts are capable of reviewing religious questions under the FAA and UAA.

Though an arbitrator/arbitration panel may conduct its own internal procedures regarding how the arbitration takes place and what award is granted, similarly to how a secular arbitrator might, it may not circumscribe the protections of the FAA. For example, in Kovacs v. Kovacs, when a party to beth din arbitration claimed that she was not permitted to make opening or closing statements, or cross-examine witnesses, and additionally claimed that the tribunal relied upon evidence which was not introduced in the proceedings, the court rejected her argument for three reasons: First, the court notes, “[T]here was no record produced of what transpired during the beth din proceedings, and thus no evidence of the procedural violations she alleged.” It continued, “Second, an arbitration that does not comply with the procedural requirements of the Maryland Uniform Arbitration Act (MUAA) is valid—so long as the litigants voluntarily and knowingly agree to the arbitration procedures.” Third, the arbitration proceedings “conformed to notions of basic fairness or due process” in the context of arbitration. In other words, a religious arbitration may not be conducted

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284. For example, in Lang v. Levi, 16 A. 3d 980 (Md. Ct. Spec. App. 2011), a party petitioned the Court of Special Appeals of Maryland to vacate the award of a beth din on grounds that the arbitrator exceeded his authority by irrationally reducing the final award. The court rejected this argument, holding that where an arbitrator relies on religious principles, a court “cannot delve into whether under Jewish law there is legal support” for arbitrator’s decision. Id. at 985-86.
285. As per Grossman, the Supreme Court has not held the religious question doctrine a matter of institutional competence, and the “prohibition is [not] based on the incapability of courts to use the same fact-finding techniques they would use in any area where expert testimony is used.” Instead, “[c]ourts consider routinely and neutrally whether something is part of religious doctrine, and can use standard fact-finding devices to review whether the arbitrator acted outside of what was standard under the religious procedure.” Grossman, supra note 3, at 205.
287. Id. at 432.
288. Id.
289. Id. at 433.
290. Id. at 432.
in a manner that would not be allowed in a secular arbitration. In other words, a religious arbitration may not be conducted in a manner that would not be allowed in a secular arbitration.

Similar to a secular arbitration, a religious arbitration may not restrict what is considered admissible evidence or who is considered a credible witness based on sex, gender, race, national origin, ethnicity, or religion. While religious law is the basis for the arbitrator's decision, how that is applied must be neutral. Awards in religious arbitration are subject to the same scrutiny as any other arbitration award. All arbitrations are subject to the same review criteria, whether religious or secular. Specifically, a court may review for: (1) whether the award was produced by corruption, fraud, or undue means; (2) whether the arbitrator showed evident partiality or corruption; (3) whether the arbitrator was guilty of misconduct; and (4) whether the arbitrator exceeded his powers.

When reviewing arbitration awards, a court should recognize that pressure applied by a religious community may constitute duress. While it has been recognized that an individual or group may wield influence that may constitute duress, a formal acknowledgement that a religious community may have the same effect is necessary to prevent loss of individual rights through community pressure. No award in religious arbitration should be enforced if it violates any state or federal law.

The following provides a brief summary of the recommended changes:

Proposed Judicial Guidelines:

1) The procedural protections of the FAA may not be waived simply by agreeing to religious arbitration.
   a) Procedural protections of the FAA extend to all parties to arbitration, regardless of the choice of law provisions in the contract specifying a particular religious doctrine, law, orthodoxy, or school of thought.

2) Though an arbitrator/arbitration panel may conduct its own internal procedures regarding how the arbitration takes place and what award is granted similarly to how a secular arbitrator might, it may not circumscribe the protections of the FAA.
   a) A religious arbitration may not be conducted in a manner that would not be allowed in a secular arbitration.

291. Id.
292. Id.
294. See Wolfe, supra note 3.
b) Specifically, a religious arbitration may not restrict what is considered admissible evidence or who is considered a credible witness based on:
   i) Sex/Gender;
   ii) Race;
   iii) National Origin;
   iv) Ethnicity; or
   v) Religion.
   (1) While religious law is the basis for the arbitrator’s decision, how that is applied must be neutral.
   (2) This is not necessarily an exhaustive list.
3) Awards in religious arbitration are subject to the same scrutiny as any other arbitration award.
   a) All arbitrations are subject to the same review criteria, whether religious or secular
   b) Specifically, a court may review for:
      i) Whether the award was produced by corruption, fraud, or undue means;
      ii) Whether the arbitrator showed evident partiality or corruption;
      iii) Whether the arbitrator was guilty of misconduct;
      iv) Whether the arbitrator exceeded his powers;
      (1) See 9 U.S.C.A. § 10
4) When reviewing arbitration awards, a court should recognize that pressure applied by a religious community may constitute duress.
   a) While it has been recognized that an individual or group may wield influence that may constitute duress, a formal acknowledgement that a religious community may have the same effect is necessary to prevent loss of individual rights through community pressure.
5) No award in religious arbitration should be enforced if it violates any state or federal law.

2. Proposed Additions to FAA

While a case-by-case approach is valid in some circumstances, growing religious arbitration in the U.S. warrants a modification to the current laws. The following provisions, or some variation upon them, should be added to the FAA:

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295. Grossman, supra note 3. The author notes:
A party may not waive their procedural rights guaranteed by the FAA, regardless of the choice of law to be applied in the arbitration; if the arbitration is conducted within the United States, whether or not under religious or any other law, it must be subject to the FAA to be enforceable.\textsuperscript{296}

An arbitrator may not exclude evidence or witnesses on the basis of sex/gender, race, national origin, ethnicity, or religion.\textsuperscript{297}

An arbitration award must be reviewable by secular courts; it must allow access to state and federal courts, as demanded, to review arbitration award for compliance with the FAA.

Any arbitration award which violates the law (in the broadest sense) of the jurisdiction in which it is sought to be enforced must be vacated.

Failure to follow these provisions would result in vacatur of the arbitration award.

These provisions and guidelines endeavor to put a check on the procedural aspects that have been a failing in the review of religious arbitrations, but they do not address the substantive fairness of awards.\textsuperscript{298}

\section*{VII. Conclusion}

The recent legislation by numerous states against religious law has raised a question: is there a right to religious arbitration?\textsuperscript{299} Even though

\begin{footnotesize}
\begin{itemize}
\item Courts have been almost correct in asserting that the standards of review in the FAA and UAA and the standard permitted by the religious question doctrine approximate each other. They have failed, however, to understand that when applying arbitration statutes to religious tribunals, the standard of review governing intra-church disputes cannot be substituted for what is in practice a broader standard of review created by the federal and state legislatures.
\item Id. at 208.
\item See \textit{id.}.
\item Sachar argues that legal systems that perpetuate this kind of inequality should not be allowed. Sachar, supra note 13, at 49.
\item See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) ("Section 2 of the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.")
\item The idea of right to religious arbitration can fall under the "religious freedom". As the U.N. Human Rights Committee has indicated: Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed.
\item Article 18 is not limited in its application to traditional religions or to religions and belief with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be subject of hostility by a predominant religious community.
\end{itemize}
\end{footnotesize}
some scholars criticize the notion that a religion should receive special protection or that it should be a preferred freedom, religious arbitration tribunals are here to stay. However, procedural fairness must be accounted for. For example, a court must be able to look to whether the religious arbitration agreement was voluntarily signed. The issues of consent are bound with the questions of due process.

Another approach that the court can take in religious arbitration cases is the case-by-case approach. In this approach, the court will run into the danger of being careful to not interfere with the ecclesiastical polity. One way to avoid this is for the court to define clear guidelines pertaining to religious arbitration in family matters. Of all the controversy surrounding the subject in North America, most scholars agree that religious arbitration in the family sector is the one that needs great attention.

From the perspective of religious arbitration tribunals, religious tribunals can adopt a uniform procedural code, and can define laws of religion and how they apply. Procedural justice and fairness is warranted in the American courts and when the religious tribunals can satisfy the concerns presented in Part VI, such procedural fairness is protected.

Indeed, one of the rights that litigants enjoy when they litigate disputes through a civil justice system in America is the right to procedural fairness. The established canons of statutory as well as common law provide the needed and necessary guidelines to litigants. Many of these procedural matters rely on parties’ expectations of the process. Parties to the arbitration

United National Human Rights Committee, General Comment 22, Article 18 (para. 2) (Forty-eight session, 1993).


302. Id. ("The more confident the court is that there is genuine consent to arbitration, the less it needs to police the process for due process.").


304. Id. (modifying the trial court’s order by striking order to arbitrate in a custody case).

305. "Procedural rules of arbitration project vulnerable parties," Wolfs, supra note 1, at 458 (also noting the procedural safeguards that a court looks at to uphold a religious tribunal’s decisions include: (1) whether the parties were properly served; (2) whether parties were represented; (3) whether attorneys were impartial; and (4) the parties inability to agree to the unreasonable restriction of their rights to notice and arbitrator disclosure or to waive the right to attorney representation).
process should know what to expect from the process, what procedural safeguards the process provides to them, what options they have to opt out of such process, and when and how they can challenge the outcome of the religious arbitration. Unfortunately, as it currently stands, the American religious arbitration system does not provide that clarity.