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### Forgetfulness, Fuzziness, Functionality, Fairness and Freedom, in Dispute Resolution

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# FORGETFULNESS, FUZZINESS, FUNCTIONALITY, FAIRNESS, AND FREEDOM IN DISPUTE RESOLUTION: SERVING DISPUTE RESOLUTION THROUGH ADJUDICATION

Jeffrey W. Stempel\*

One of the central goals of this Symposium was to present analysis and commentary by scholars known for their independent thinking and reluctance to ride trends merely because they are trendy. In this panel, that tendency is evident as Professors Subrin, Brunet, Carrington, and Sternlight all make points many would find contrarian. In my contribution to this portion of the Symposium, I hope merely to add some modest insights to their work and to articulate what I believe to be common threads, not only of their comments, but also of the dispute resolution movement generally.

## I. SUBRIN'S GRADUAL SEMI-CONVERSION: A SURPRISING PASSAGE TO REAFFIRMING A TRADITIONALIST CANON

### A. *Subrin's "Conversion" and Case for Mediation*

Professor Subrin is a self-professed traditionalist who has been one of the most forceful defenders of what I might term neo-traditional "Clarkian" litigation. By that, I mean the model of civil disputing in which litigation is a primary vehicle. More important, the litigation is based on notice pleading, broad discovery, and a preference for adjudication on the merits.<sup>1</sup>

Key Subrin works over the years have focused on the historical path of the Clarkian model, which served to fuel much of the law revolution of the mid-

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\* Professor of Law, William S. Boyd School of Law. Thanks to the Symposium participants, Law Journal staff, Dean Richard Morgan, and the Boyd School of Law for their contributions to the Symposium. Additional thanks go to Mike and Sonja Saltman, Ann McGinley, and Carl Tobias. Preparation of this commentary was supported by a grant from the James E. Rogers Research Fund.

<sup>1</sup> The term "Clarkian" also connotes the view of civil litigation generally associated with Yale Law School Dean and Second Circuit Judge Charles Clark, who was the Reporter of the initial Advisory Committee on the Federal Civil Rules and is generally regarded as the primary author of the 1938 Federal Rules of Civil Procedure. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 139 U. PA. L. REV. 909, 983 (1986) (describing development of the Federal Rules and Clark's key role). See also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing extensive background of the judicial reform movement of the early Twentieth Century that led to the 1934 Act and the promulgation of the 1938 Civil Rules).

Twentieth Century, to the “new era” of civil procedure and dispute resolution that dominated the last quarter of the Twentieth Century.<sup>2</sup> Like others in what might be termed this “camp” of scholars,<sup>3</sup> Subrin has long defended the Clarkian model and championed it as a source of fairness, equality and social justice. But Subrin’s eclecticism distinguishes him from others, as does his current cautious embrace of mediation cum “medigation.”<sup>4</sup>

In his article for this Symposium,<sup>5</sup> this eclecticism reveals itself in a willingness to accept many aspects of the modern ADR movement of which he had previously been wary. But here again, Subrin is not a complete convert. Although no longer a “high church” member of the litigation synod of dispute resolution theology, neither has he become Pentecostal. Rather, he is reformist. He accepts many of the arguable benefits of ADR, particularly mediation, without making a complete conversion away from the traditional legal model. Like a religious moderate, Subrin has a view of law that combines both old and new and sees value and synergy in both. In the end, he concludes that Clarkian adjudication and nouveau ADR can indeed successfully co-exist, if only zealots from one camp do not overrun those of the other camp.<sup>6</sup>

In his impressionist but empirically accurate portrayal of these developments, Subrin describes the process of mediation being encouraged by the shadow of legal adjudication.<sup>7</sup> More important, Subrin has probably correctly

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<sup>2</sup> See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981).

<sup>3</sup> See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688-90 (1993) (dividing commentators into “preservationists” seeking to maintain “open courts” ethos of Clarkian era and “reformers” who view increased controls on court access, streamlined processes, and strictures on substantive legal rights as necessary to maintain functional disputing system). Perhaps most prominent in this camp is Judith Resnik. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995). By way of full disclosure, I probably should admit to falling within this group of defenders of the Clarkian model. See, e.g., Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965 (1998) [hereinafter Stempel, *Contracting Access to the Courts*]; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (criticizing Supreme Court decisions making summary judgment easier to attain and making trial less likely).

<sup>4</sup> In an earlier draft of his article, Subrin coined the term “medigation” to describe the operation of mediation as an adjunct part of the litigation process. A case is filed and pending, requiring the mediation (either by court order or in an attempt to resolve the dispute short of further adjudication). In the final version of his article, Subrin backs away from using “medigation” as a word, undoubtedly because of his strong sense of linguistic propriety. Not sharing that same commitment (or perhaps because I daydreamed at a crucial moment in eighth grade English class), I wish he had continued to use the term. “Medigation” may be a bit awkward or cute for some tastes, but it does quite a good job of describing the manner in which mediation and litigation have come to travel in tandem in recent years.

<sup>5</sup> Stephen N. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003).

<sup>6</sup> See Subrin, *supra* note 5, at 214-15.

<sup>7</sup> See Subrin, *supra* note 5, at 221.

explained the reasons for the trend. In addition, I agree with Subrin that mediation has worked pretty well. Its ascension has generally been a good thing, improving dispute resolution without substantial erosion of the traditional adjudicative model.<sup>8</sup>

However, as Subrin notes, and as I will discuss in this comment, mediation (both private and court-annexed) and other forms of ADR (both private and court-annexed) must be utilized with some caution by the participants and supervised by the courts in order to minimize potential negative side effects on the overall quality of American dispute resolution.

Subrin deserves particular praise for setting forth succinctly and persuasively an insightful, factually accurate, and understandable narrative about the rise of mediation.<sup>9</sup> Subrin's explanation of the reasons for the modern mediation boom, are, in my view, insightful and correct. The ascendancy of mediation stems not only from the perceived crowded shortcomings of courts but also because mediation's less absolutist approach fits well with post-modern philosophical trends. It also fits with modern market-oriented trends in business and regulation and comports with the prevailing political ideology of the time, which favors privatization over government programs. Mediation has the appeal of bringing greater privatization and self-selection to the dispute resolution process, something of a market-based approach to dispute resolution. It also presents the prospect of individually tailored dispute resolution that can be more creative than adjudication, as well as more volitional.

Subrin also restates briefly the conventional wisdom that mediation and other forms of ADR are significantly less expensive than litigation.<sup>10</sup> It is a bit unfair to suggest that discovery exists primarily as a lawyer's fee-generating toy. Despite all the complaints about discovery, disputants sure seem to want it. Frequently, perhaps usually, effective mediation or medigation cannot take place without at least some discovery or court-mandated disclosure to provide the disputants with enough reliable information to form a basis for mediation.

<sup>8</sup> See Subrin, *supra* note 5, at 198 (responding to and largely refuting several criticisms of mediation or mediation in combination with litigation).

<sup>9</sup> See Subrin, *supra* note 5, at 211 (discussing development of modern mediation).

<sup>10</sup> See Subrin, *supra* note 5, at 204-05. In an earlier draft of his article, Subrin included an amazing comment attributed to noted attorney Whitney North Seymour, who eulogized Charles Clark for providing lawyers with the "gift of discovery" that had "enriched the practising bar." Like the term "medigation," I wish the Seymour reference had survived to the final version of the Subrin article because it has considerable illustrative power as well as a point for discussion. Although I do not disagree with any particular vehemence, I want to at least note for the record that the amount of any cost savings from ADR has not been established with any reliability. A baroque mediation or arbitration can cost a lot of money, just as does a baroque trial.

In addition, in my continuing (but probably forlorn) quest to defend discovery when it becomes the whipping boy of choice for those attacking litigation (*see* Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 L. & CONTEMP. PROBS. 197 (2001)), I have to take some issue with Seymour. Discovery costs money and raises legal fees – but so do motions, particularly summary judgment motions (which have become much more popular with lawyers since the Supreme Court began encouraging more of them). Additionally, so does the basic investigation that would need to take place in the absence of discovery or that routinely accompanies discovery. Enforcing ADR agreements and engaging in ADR costs money, and it often comes in addition to litigation costs rather than in lieu of litigation.

There is also disagreement as to the degree to which different aspects of discovery contribute to escalation of litigation costs. Paul Carrington once in conversation suggested to me that depositions were the primary culprit. My own experience as a litigator was that depositions (including preparation) did not account for nearly as much time and expense (either individually or collectively) as did (sometimes excessive) document review, legal research, motion practice, or discovery battles (e.g., negotiating over discovery; seeking discovery or relief from discovery from the court, etc.). However, there is a lurking question not really addressed in the Subrin paper or most articles on mediation or other ADR efforts utilizing a third party neutral. Granted, mediation has the attributes noted by Subrin that make it popular – but negotiation does as well, without the presence of the third party neutral. Why has mediation become the darling of popular ADR while negotiation appears to be less in the focus by legislatures, courts, and commentators? I return to this query at the end of my commentary.

Subrin appears to have become more receptive to ADR as he has become less optimistic (or more pessimistic) about litigation. In his article, he appears to regard some of the “justice” and “equity” (meaning equitable treatment rather than the technical equitable injunctive relief often found in litigation) arguments in support of litigation as unattainable castles-in-the-air. Although he is perhaps correct, this still, to an extent, begs the question of why the litigation system has not been completely successful at attaining social equity<sup>11</sup> or total justice. Is it because courts are inherently limited in this regard? If so, this would suggest we should accept the limitations, embrace ADR for any efficiencies or opportunities for creative solutions it may offer, and move on.

But what if the shortcomings of litigation exist because we have been unwilling to invest sufficient resources or will in making adjudication achieve its potential? If so, this would suggest that we should consider improving litigation and adjudication insofar as feasible before engrafting too much ADR into the litigation system. Mediation may not be a bad thing but neither is it necessarily the optimal thing.

Interestingly, Subrin’s modest epiphany (from litigation traditionalist Saul to moderate mediationophile Paul)<sup>12</sup> and embrace of ADR leads him to recommend with vigor that judges adhere to their traditional role and simply try cases (or, perhaps more precisely, make prompt and crisp pretrial decisions that will move litigation along toward adjudication). As Subrin put it most pithily at the Symposium, the ADR revolution teaches us “judges should judge.”<sup>13</sup> By maintaining an adjudicatory role, judges will create the “shadow of the law”<sup>14</sup> and

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<sup>11</sup> By “social equity” I mean equitable treatment of society’s members by the courts and the social system, not a forced equality among participants or a parity of outcomes.

<sup>12</sup> See *The Acts of the Apostles* 9:3-18 as recounted in the BIBLE, describing the conversion of Saul, persecutor of Christians, into the apostle Paul. Although Subrin is something of a reformed traditionalist, his conversion, of course, is not nearly so great nor dramatic as that of Saul to Paul.

<sup>13</sup> See Subrin, *supra* note 5, at 227.

<sup>14</sup> The term, now essentially part of the mainstream vocabulary of dispute resolution, is taken from Mnookin and Kornhauser’s article, which set forth in print the insight intrinsically held by lawyers: disputing parties negotiate against a backdrop of the likely range of results if the matter is fully adjudicated at law. See Robert H. Mnookin & Lewis Korn-

default system of dispute resolution that will best enable alternative dispute resolution in all its forms to flourish (including the most common and optimal but judicially and academically overlooked mode of dispute resolution – negotiation – but more on this later in this comment).

Because mediation and other forms of ADR appear to have worked well when performed by persons other than judges, judges should recognize and appreciate this and try cases rather than trying to be mediators as well. This part of Subrin's paper, to a degree, meshes with Professor Edward Brunet's paper<sup>15</sup> in that Brunet's "judicial signaling" is a real judicial task and not quasi-mediation. As detailed in the Brunet paper and discussed below, a judge engaging in judicial signaling is making a non-binding, non-final, partial evaluation of the legal and factual strength of the claims and defenses in the case and communicating this to the parties.

In effect, the judge is offering a preview of likely adjudication outcomes. This is far different than a judge attempting to entangle herself in the dispute as mediator. Consequently, I view Subrin's suggestion that "judges judge" as perfectly consistent with Brunet's view that it does not violate the judicial role for courts to engage in a constrained amount of judicial signaling.

During the course of his article, Subrin appears to agree with the oft-made charge that much ADR scholarship has been fluffy, overly romantic about ADR, or vague in its observations and prescriptions.<sup>16</sup> The point to me seems inarguable. Much too much ADR scholarship has the tone of cultist conversion, religious fervor, or infatuation with all that is not litigation.<sup>17</sup> Subrin observes that what may strike a traditionalist as indeterminacy in ADR writings and initiatives may be inevitable because ADR, particularly mediation, is inherently a less determinative process than litigation. Subrin also wisely sees that mediation and other forms of ADR are not necessarily bound by the perhaps unrealistic ardor of some of their proponents. Rather, mediation in practice may exhibit effective pragmatism even though much of the literature of mediation and ADR is almost Pollyannish in its unalloyed optimism-cum-boosterism.<sup>18</sup> Subrin's work, like the recent work of other litigation and ADR

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hauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). See also ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97-106 (2d ed. 1991) (discussing the concept of BATNA, the Best Alternative to a Negotiated Agreement, which may range from formal litigation to walking away from a conflict).

<sup>15</sup> See Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003).

<sup>16</sup> See Subrin, *supra* note 5, at 198-99.

<sup>17</sup> See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 251-56 (arguing that much of the endorsement of ADR has been excessively uncritical and driven more by ideological support for ADR concepts rather than rational analysis of operation of ADR, particularly in the ongoing scholarly debate over what comprise "appropriate" styles of mediation).

<sup>18</sup> See Stempel, *supra* note 17, at 247 (mediation in practice is more elective and pragmatic than as preached by many of its advocates; in particular, real world mediation appears to utilize reference to legal standards and evaluation of the claims and defenses more than is acknowledged or accepted by many mediation advocates). See also Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997) (same); Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Medi-*

scholars, suggests that the legal profession is better off addressing the pragmatic operational questions of mediation and other disputing devices rather than arguing over what constitutes “true” or “acceptable” mediation.<sup>19</sup>

### B. *The Psychology of Settlement*

Subrin is also almost certainly correct in his assessment of why lawyers settle cases: to achieve an acceptable negotiated (or mediated) resolution in the face of uncertainty as to the likely litigation outcome. Where such uncertainty is high, attorneys will generally be more inclined toward settlement, unless the stakes are extremely small and/or a party wishes to manage the dispute as part of a larger economic, adjudicative, or commercial strategy. Where uncertainty is relatively low, this may of course also aid settlement by making it easier to draw up the zone of possible agreement (ZOPA in the vernacular of negotiation jargon)<sup>20</sup> bounded by fairly clear default legal rules and seemingly apparent facts. But low uncertainty may also reduce incentive to settle, at least for the party with the stronger litigation position, by making that party less likely to give an uncertainty discount to opponents.

Subrin’s observations on this point also raise what are, for me, interesting questions: is uncertainty in general increasing or decreasing? Are the effects of uncertainty becoming more asymmetric? That is, do uncertainty effects or certainty effects weigh more heavily on some classes of disputants than others? Does any such asymmetry enhance or impede opportunities for negotiated dispute resolution?

To illustrate, many observers have seen the past twenty to thirty years as something of a counter-revolution against the perceived “liberal” revolution in litigation that took place at mid-century (approximately 1938-1970) with eased requirements of pleading, expanded discovery, strong likelihood of jury consideration, and increased capacity to expand the scope of the lawsuit through devices such as the class action and liberal joinder. Among the steps in the counter-revolution have been increased availability of summary judgment and judgment as a matter of law; more constrained discovery, and heightened barriers to receipt of expert witness testimony.<sup>21</sup>

To the extent that these “legal” developments strengthen the position of a given class of litigants (e.g., defendants), this may either impede resolution by making these litigants more willing to (I use the term advisedly in light of the location of the Symposium and its journal of publication) “gamble” on contin-

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*ation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371 (suggesting that mediation styles and appropriateness for particular disputes is better assessed according to factors other than the bilateral inquiry, found in much of the literature, as to whether mediator is purely “facilitative” or whether mediator offers “evaluative” observations).

<sup>19</sup> See, e.g., Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 319; John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321.

<sup>20</sup> See FISHER & URY, *supra* note 14, at 66-76.

<sup>21</sup> See Stempel, *Contracting Access to the Courts*, *supra* note 3 (discussing these factors and arguable trends of civil disputing, noting commentary of others to this effect but also noting scholars with different perspectives); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993) (same).

ued litigation or trial in expectation of victory. Or, the “settlement value” of claims may have declined relative to the resources of the advantaged class of litigants.

This, of course, is a distributional point rather than a procedural or dispute resolution point as such. The relative success of different disputants may seem unimportant when compared to the overarching ADR inquiry of whether disputes are getting resolved, how quickly they are getting resolved, and how much judicial intervention is required. That, to some extent, is my point – even if it is a point arguably outside the scope of Subrin’s paper. If the legal profession and the body politic become too absorbed in the narrow question of removing disputes from courts or making dispute resolution an end in itself, sight of arguably greater goals – accuracy, justice, fairness, compliance with the law – has been lost, or at least blurred. I would prefer that study of ADR not take excessive precedence over study of whether recent procedural and evidentiary changes have made the “playing field” of dispute resolution too uneven among classes of litigants.

### *C. Subrin on the Possible Impact of Gender on Dispute Resolution*

Subrin also makes an interesting, although perhaps politically incorrect as well as difficult to prove, observation that there is a partial sociological explanation for the rise of settlement. He, in essence, is asserting that women are better at facilitating settlement (oink?) and that, as women have become more prevalent and prominent in the legal profession during the past thirty years, a greater number and proportion of attorneys are now more temperamentally suited to successfully effecting dispute resolution.<sup>22</sup>

Subrin’s “woman is the settler of the world” argument obviously goes beyond the scope of this Symposium and merits more significant study and debate. My own amateur, armchair sociologist’s view is that he is on to something. The women attorneys with whom I have dealt over the past twenty years have, in my experience, been less saddled with some attorney traits that impede dispute resolution: ego; inappropriate competitiveness; insensitivity; an almost pathological need to appear tough (or to pretend to appear tough), particularly when posturing for clients. At the risk of opening another academic can of worms, my own view is that women attorneys are less linear and more flexible in their thinking and approach to cases, which both facilitates creativity in the combat aspects of litigation and in the cooperative dispute resolution corollaries to litigation. Women counsel may be more sensitive to the relationships of the disputants and the relational aspects of the case. This view, most prominently

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<sup>22</sup> See Subrin, *supra* note 5, at 207-08.



noted in the academic work of Carol Gilligan,<sup>23</sup> has been both controversial<sup>24</sup> and widely accepted.<sup>25</sup>

Although recent legal scholarship may contain less self-conscious discussion of these issues than during the 1980s and 1990s, the notion of gender-based differences in attorney and disputant orientation remains.<sup>26</sup> My personal view is that there is a “there, there”, to reverse and paraphrase Gertrude Stein’s famous put-down of Oakland.<sup>27</sup> However, there also is nothing resembling systematic study or reliable data on the matter.

Further, if law and policy analysis accepts feminist notions of difference in attorney behavior, it must not only look at the seemingly positive attributes of feminist lawyering (e.g., more resolution, less warfare) but also consider the potential dark side of this different voice of ADR. For example, is it possible that women attorneys and third-party neutrals focus on protection of relational interests to an extent that it undervalues legal rights and gives some parties a settlement that is not advantageous? Put another way, do female counsel leave too much on the table when negotiating (oink, oink)? Are they too accommodating of authority? Is this true, even if it may, on balance, bring better results for a client than the “often wrong but never in doubt” attitude of the perhaps caricatured macho male attorney? Client interests surely can be sacrificed to the interests of cocksure counsel. But, on the other hand, are “hensure”<sup>28</sup>

<sup>23</sup> See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

<sup>24</sup> See, e.g., CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* (2000); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM?* (1994); Kimberly M. Schuld, *Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal*, 1999 U. CHI. LEGAL F. 461 (challenging, even attacking, aspects of Gilligan’s research, conclusions, and thesis as well as other feminist writings concerned with lower value attached to female modes of thought and marginalization of women in educational institutions).

<sup>25</sup> Gilligan’s work has been cited in more than a thousand law review articles, usually by legal or social scholars who are in general agreement with her thesis as to the different cognitive orientations of men and women.

<sup>26</sup> Although clearly outside the scope of this comment and the Symposium, one might consider a systematic study of the influence of Gilligan’s work and the trend of the debate. My informal impression was that *In a Different Voice* made a big splash when it was published but has dissipated in influence. Limited empirical examination suggests my impression may be erroneous. According to a survey of the LEXIS law review database (conducted Sept. 25, 2002), Gilligan was cited only seventy-eight times during the law review literature of the 1980s but was cited 830 times during the 1990s and 204 times during the Twenty-First Century. Apparently, the different voice remains vibrant in its hold on legal scholars. See also BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* 20-22 (1994) (discussing origin and influence of Gilligan’s work on ethical theory as well as feminism).

<sup>27</sup> Gertrude Stein provided what is probably the ultimate urban easterner’s put down of the modern cities of the American West when she described Oakland by stating there was “no there, there.” See BARTLETT’S FAMILIAR QUOTATIONS 627 (Justin Kaplan ed., 1992) Stein’s comment is frequently, but apparently erroneously, described as pertaining to Los Angeles. This may also reflect the degree to which non-westerners think it’s all the same west of the Mississippi (or even the Hudson). See also Susan Silbey, *The Emperor’s New Clothes: Mediation, Mythology and Markets*, 2002 J. DISP. RESOL. 171, 174, n.6 (invoking Stein’s bon mot).

<sup>28</sup> At the risk of excessive stereotyping, I borrow the phrase from D.H. Lawrence’s essay, *Cocksure Men and Hensure Women*, D.H. Lawrence, *Cocksure Women and Hensure Men*, in *SEX, LITERATURE AND CENSORSHIP*, 46, 46-47 (Harry T. Moore, Ed., 1959). Although no

female counsel too unwilling to press a claim in the face of a certain but arguably insufficient settlement proposal or mediated resolution?

*D. Appreciating – and Being Wary of – the Implicit Assumptions Made by ADR Proponents*

This brings to the fore another concern that is arguably under-treated in Subrin's article, and in much of the ADR literature generally. Much of the discussion about ADR proceeds on the unspoken assumption that all participants in the process:

- (a) have equally legitimate positions in the dispute;
- (b) have equivalent levels of risk tolerance;
- (c) proceed in good faith;
- (d) genuinely wish to resolve the dispute through an ADR procedure.

All of these implicit assumptions are false. There are often two legitimate sides to a dispute, with each side having roughly equivalent legitimacy. In many cases, however, one side is legally "right" and the other is "wrong". Under these circumstances, a philosophy and infrastructure of ADR that emphasizes resolution may tend to systematically short-change the party with the stronger, more legitimate case.

Similarly, many cases may match disputants with roughly equivalent risk tolerances. However, many other disputes involve a mismatch of risk tolerance and risk aversion. In such cases, the operational infrastructure of ADR will tend to disadvantage the risk averse while tending to benefit the risk-preferring disputant. The risk averse disputant now has an easier path to bailing out. The risk acceptant disputant can take advantage of this by driving a hard bargain in ADR or only participating cosmetically in the ADR procedures. After all, the risk-preferring disputant is just as happy to roll the dice through adjudication unless it can get a really good deal in ADR.

*1. Beware the ADR Abuser*

Related to this is the problem of differential levels of good faith in ADR. While many, perhaps most, disputants participate in good faith; there are a non-trivial number who do not. They will use ADR not to sincerely attempt resolution of the dispute but to lengthen the process, increase the opponent's expense, gather information that might not otherwise be available, and use the ADR event not for a dose of neutral reality but as a quasi-focus group upon which it may test drive its various legal and factual arguments for a later trial.

One common complaint about, and suspicion of, court-annexed arbitration is that some litigants with repeat business and deep pockets misuse this additional procedural step for the bad faith purposes noted in the preceding paragraph. Many states, including Nevada, have specific court rules designed to deter such behavior.<sup>29</sup> Unfortunately, many states (including Nevada) have

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one will ever categorize Lawrence as a feminist hero, his traditional and perhaps stereotyped observation may not be all that different from that of feminists like Gilligan. Sometimes there is more power in quiet strength than in bellicose advocacy.

<sup>29</sup> See, e.g., Nv. ARB. R. 22(A) (2002) (requiring parties to participate in court-connected arbitration in good faith).

been toothless in their interpretation of these rules or statutes, effectively allowing bad faith behavior in court-annexed arbitration unless the offender virtually confesses to having ill motives.<sup>30</sup>

These problems of ADR, particularly court-imposed arbitration and mediation, are perhaps inevitable when some litigants simply would prefer to fight rather than settle – or at least prefer to settle as late as possible. For this class of disputants, ADR is not the early resolution, cost-saving panacea of its proponents. It is instead another ladder on the ever-longer litigation, arbitration, or mediation trail.

Disinterest in vigorous effort at ADR and earlier settlement may stem from some legitimate factors. A disputant may genuinely think it owes nothing and thus cannot bring itself to make even a modest settlement overture. Or the disputant may legitimately feel it needs to make a point, demonstrating that it is not easily shaken down for payment. Alternatively, it may see the dispute as one demanding adjudication in order to establish precedent or to test an issue that will surely arise repeatedly in other cases if only informally resolved.

But disinterest in ADR may also be the product of a simple strategy of profiting from delay. If a “mediation” or “arbitration” system permits its ADR infrastructure to be used in such a manner, ADR would appear to be counterproductive and abused. Even if mediation or arbitration works for the bulk of disputes, the judicial system probably needs to take greater steps to ensure that it is not an unwitting tool of delay and bad faith activity under the guise of ADR.

This is, of course, not a brief against court-imposed or court-connected ADR in general. Even without any institutionalized ADR, courts have long been plagued by the bad faith litigant whose bad faith is perhaps usually undetected if sufficiently subtle. When assessing the degree to which ADR procedures may be misused by “bad” disputants, policymakers cannot forget that traditional courts are also vulnerable to such misuse, particularly for a party whose strategy is delay.

Where ADR devices are not court-imposed or court-connected and are truly voluntary, improper behavior by disputants should be less of a problem in that the adversary system can serve as a more effective check where the “good” disputant can simply walk away from wasteful or counterproductive ADR with a “bad” disputant. But where the ADR is required by court, a party victimized by bad faith participation has little realistic opinion but to grit its figurative teeth, finish the meaningless ADR (preferably without giving away any secrets or tactics that could prove useful in an ultimate trial or other forum), and move on to the next procedural step in the case. Disputants may be required to complete the process even after it becomes apparent that the other disputant is not participating in good faith.

This problem admits of no easy answer. Few entities would be willing to enter into an ADR agreement that makes it too easy to exit the process. Undoubtedly, some of the very bad faith disputants that are the target of such

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<sup>30</sup> See, e.g., *Campbell v. Maestro*, 996 P.2d 412, 414-15 (Nev. 2000) (Nevada Supreme Court reverses trial court finding of failure to arbitrate in good faith despite trial court fact findings listing several areas in which automobile insurer’s arbitration activity – or non-activity – strongly suggests that participation in arbitration was not meaningful).

an opt-out clause would use the situation to their advantage by quitting ADR in mid-stream if it appeared they were losing ground in the process. Consequently, the best but clearly imperfect solution would appear to be putting more teeth into provisions designed to deter bad faith conduct in ADR and enforcement. This is no easy matter. A half-century ago, theologian Reinhold Niebuhr alerted us to the oft-forgotten simple truth that there are bad people in the world who will try to take unfair, even murderous, advantage of good people.<sup>31</sup> In a Twenty-First Century that appears to have more than a few bad actors (ranging from the murderous Saddam Hussein and Osama bin Laden types to the nonviolent but extremely costly Dennis Kozlowski, Bernard Ebbers, and Andrew Fastow), Neibuhr's axiom remains worth remembering.

## 2. *The Problem of Trust and Abuse in ADR*

Against this realistic backdrop, courts, policymakers, and commentators should also remember the lessons of the prisoner's dilemma and other cooperation/competition game theory. The prisoner's dilemma, as known to most post-1980 law school graduates (and perhaps even viewers of "A Beautiful Mind"),<sup>32</sup> posits the case of two criminal suspects arrested and placed in isolation. The interrogating officer seeks a confession from at least one of the suspects and offers an incentive to get it. The first suspect to cooperate will receive a dramatically lower sentence. The game theory hypothetical also assumes that the police need a confession or similarly helpful information from one of the suspects in order to make the case. If both suspects remain mum, there will not be enough evidence to convict and maybe not even enough to bring charges.<sup>33</sup>

Consequently, it is in the prisoners' collective best interests not to cooperate. However, the separated prisoners are unable to adopt this united front of defense unless they have great trust in one another. As a result, the likely outcome of the prisoner's dilemma is that one prisoner cracks and cooperates to make the best deal for himself at the expense of his co-suspect. The inability of the participants to fully trust one another and work cooperatively has been costly for both of them. Although this may be great for law enforcement on the

<sup>31</sup> See REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (1944).

<sup>32</sup> "A Beautiful Mind," for benefit of this historical record should this issue of the *Law Journal* ever make it into a time capsule, was a motion picture based on a book about John Forbes Nash, a renowned mathematician and game theorist, and his difficulties with mental illness as well as his brilliance. See SYLVIA NASAR, *A BEAUTIFUL MIND: A BIOGRAPHY OF JOHN FORBES NASH, JR., WINNER OF THE NOBEL PRIZE IN ECONOMICS* (1994). The movie and its director, Ron Howard, each won the Academy Award in 2002. Although, Nash is perhaps best known for the "Nash Equilibrium," he did considerable work in several aspects of game theory, which was reflected in the book and film. See, e.g., John Nash, *Two-Person Cooperative Games*, 21 *ECONOMETRICA* 128 (1953); John F. Nash, Jr., *The Bargaining Problem*, 18 *ECONOMETRICA* 155 (1950).

<sup>33</sup> See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). Of course, if the evidentiary situation is reasonably close, the prosecutor may press charges despite advice to the contrary in the hope that continuing legal pressure will prompt one of the conspirators to "crack" and provide the evidence necessary to make the case. Assuming the charges are not frivolous in the absence of cooperation from a suspect, this would presumably not be prosecutorial misconduct in violation of the Rules of Professional Conduct.

street and makes for good drama on TV crime shows, it also illustrates the degree to which potential gains in dispute resolution can be lost through non-cooperation. Similarly, a party who cooperates and discloses freely to one of Reinhold Niebuhr's "children of darkness"<sup>34</sup> is likely to be taken advantage of by the less dependable disputant. As a result, ADR efforts are susceptible of partial or complete failure, just as adjudication results may be incorrect.

Or, perhaps I should say that negotiation efforts are vulnerable on this basis. The presence of a third party neutral ADR figure (e.g., a mediator or early neutral evaluator) can reduce these tensions and facilitate trust and cooperation and can thus "add value" through ADR just as she may add value by providing the perspective that will enable the disputants to recognize the ways in which their own settlement goals may be out of touch with reality.<sup>35</sup>

Mediation and ADR thus have an answer to the prisoner's dilemma issues and the tension between cooperation and confrontation in dispute resolution. This though, is only a partial answer. The dilemma remains real and will systematically impede ADR efforts. Consequently, it is unrealistic to expect miracles in dispute resolution against this almost iron law of cognitive theory. Proponents of ADR should not forget this as well. Sometimes, the "gation" segment of mediation will be necessary to continue moving dispute resolution toward successful conclusion.

Perhaps what I am suggesting in overly long fashion is that the "new," ADR-friendly Steve Subrin, despite the nuanced care of his paper, tacitly supports the longstanding critique of ADR, most widely associated with sociologist Laura Nader, that the thrust of modern ADR focuses too much on achieving short-term peace and harmony and may thereby undermine justice concerns and the long-term health and harmony of society by artificially suppressing or deferring social conflict. At least this is my concern. Since this also applies to judicial signaling (the Brunet article) and to Jean Sternlight's commentary regarding the fit of ADR, I defer additional discussion of the "Nader critique" until the conclusion of this comment.

## II. BRUNET'S NEW TRADITIONALISM: THE LEGITIMACY OF THE (JUDICIOUSLY) RAISED JUDICIAL EYEBROW

Professor Edward Brunet has historically been less identified as a traditionalist than Professor Subrin. Although Brunet has written eloquently on the limits and potential pitfalls of arbitration,<sup>36</sup> he has been something short of a defender of the litigation status quo. His writings reflect sympathy for efforts to streamline litigation and an acceptance of the inevitability of judicial discretion as perhaps the leading tool for fighting adjudication gridlock.<sup>37</sup> Conse-

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<sup>34</sup> See NIEBUHR, *supra* note 31.

<sup>35</sup> See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 324-25 (1994).

<sup>36</sup> See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

<sup>37</sup> See Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LIT. 273 (1991). See also Edward Brunet, *Summary Judgment*

quently, it is perhaps not surprising that he endorses a judge's use of such discretion in his article in this Symposium.<sup>38</sup>

In essence, Brunet looks at perhaps the most common traditional settlement practice of judges – feedback suggesting the judge's view of the relative strength of the parties' positions – and finds it can play a legitimate role in modern dispute resolution.<sup>39</sup> Brunet's defense of judicial signaling comes as perhaps a bit of a surprise, however, considering the general tenor of recent commentary about the problems when judges become settlers. Considerable recent efforts of both the bar and the academy have argued for greater impartiality of both judges and others presiding over dispute resolution.<sup>40</sup> Brunet's position on judicial signaling arguably cuts against the grain to a degree by arguing that judicial ethics properly applied do not stand in the way of the judge signaling his or her position.

#### A. Criteria for Fairness in Judicial Signaling

Although I consider myself something of a "hawk" on judicial ethics who, on the whole, would rather see more rather than fewer recusals,<sup>41</sup> I also find myself largely in agreement with Brunet's position. If judicial signaling is constrained and not excessive, it should not run afoul of the impartiality expectations we place upon judges. I am implicitly including in my list of necessary conditions for proper judicial signaling the following:

- The judge's knowledge of the case and conclusions about the case must be judicially acquired during the course of regular and legitimate judicial activity. The judge may not have come to the views expressed to counsel or hinted at on the basis of extra-judicial sources;
- The judge's impressions of the case cannot, in significant part<sup>42</sup>, be the result of any *ex parte* proceeding;

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*Materials*, 147 F.R.D. 647, 679 (1993); Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS L. REV. 93, 138 (1988).

<sup>38</sup> See Brunet, *supra* note 15, at 256.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 944-49 (2000) (noting judicial push toward facilitating settlement and away from procedural process and adjudication since 1950s); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153 (1999); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answer for the Adversary Concept of Lawyers' Responsibility*, 38 TEX. L. REV. 407, 421 (1997). Jean Sternlight has similar concerns about judicial signaling. See Sternlight, *ADR is Here: Preliminary Reflection on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 303 n.69 (2003).

<sup>41</sup> See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 632-43 (1988) (arguing that many of the accepted practices of judges in hearing cases in fact call into reasonable question the court's impartiality, in violation of 28 U.S.C. § 455, general federal statute governing judicial disqualification).

<sup>42</sup> The discerning reader undoubtedly will ask whether there can be "insignificant" impact on the judge from *ex parte* activity. I think the answer is yes. For example, counsel for one of the parties may apply for a temporary restraining order (see FED. R. CIV. P. 65) and even get it through an *ex parte* application process in which counsel understandably will spin the facts as favorably as possible (including the facts that justify the *ex parte* approach to the court). However, ethical counsel should not misrepresent facts to the court nor engage in extended argumentation based on facts that will be contested at any proceeding in the matter.

- Any expression of judicial reaction to aspects of a case should both appear non-final and in fact be non-final. It is permissible for the court to make tentative conclusions based on judicially acquired information, but the court's conclusions should not become fixed except as authorized by the Civil Rules;<sup>43</sup>
- The judicial signaling is non-coercive in that the judge provides information but does not threaten adverse consequences if a party does not take the judicial hint that a case is weak or a demand too large. The judge signals but does not strong-arm;
- Corollary to this is the proviso that the judge does not retaliate (at least not consciously) against a party that fails to understand a judicial hint or act as the court had hoped in response to judicial signaling.
- The judicially signaling court has ruled evenhandedly and accurately during the process of acquiring the knowledge upon which the judicial signaling is premised. For example, judicial signaling would be worthless or counterproductive if, on the road to the court's signal, the judge had systematically denied one party necessary discovery. Even if such errors are not intentional, they make signaling suspect. Consequently, judges should be highly confident that their pre-signal rulings and administration of the proceeding have been largely correct before engaging in signaling; and
- Judicial signaling and settlement offers do not include bullying by the judge, or even anything that can be construed as bullying or anger.<sup>44</sup>

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Under these conditions, the court can accept the *ex parte* argument that the status quo should be preserved through a TRO but not have been improperly led to any hasty conclusions about the ultimate merits of the case. A TRO application, *ex parte* or contested, does not engage in fact finding or make legal determinations on the merits as does a preliminary injunction decision which, by definition, occurs after a hearing.

Where, however, the judge forms opinions based significantly on the *ex parte* representations of one side, the judge should not use this information as a basis for tentative determination of the merits of the case in a way that is communicated to counsel except for perhaps this exception. As Professor Brunet points out, judicial signaling can be used to alert a party of a need to provide additional information to the court. If a judge hears something during an *ex parte* contact that may prejudice the judge against the other party (or unduly bias the judge toward the moving party), it may be perfectly proper for the court to bring this material to the surface so that it may be rebutted by the party that was absent from the *ex parte* proceeding.

<sup>43</sup> This, of course, does not mean the court must allow every dispute to come to full-dress trial. For example, in deciding a summary judgment motion, it would be perfectly proper for the court to come to a final conclusion that there is no genuine dispute as to a material fact so long as the court observed proper procedure in deciding the summary judgment motion and the record supported the court's conclusion. See generally FED. R. CIV. P. 56; JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶¶ 56.01-.50 (1997 & Supp. 2002).

<sup>44</sup> I realize this point is repetitive to a degree of a prior point, but I believe there is a difference between substantive coercion (e.g., a suggestion that failure to settle will likely be followed by a partial summary judgment ruling against the non-settling party) and judicial intemperance that may stampede a party into undesired settlement. An example will perhaps illustrate what may be a distinction that exists only in my mind.

I once was involved on the periphery of a pretrial conference that involved a claim for insurance benefits of \$150,000 under a homeowner's policy for a house destroyed by fire. The insurer was essentially asserting arson as the cause of the fire and refusing to pay. It had a pretty good case. The fire was suspicious in origin. The policyholder had recently run up

Of course, before wringing our collective hands over the situation too much, we should also remember that American litigation is an adversary system that requires a certain amount of intestinal fortitude by counsel. My judge discussed in footnote forty-four did nothing tangible against the lawyer with the list of forty-five witnesses. No one forced the lawyer to go from zero to \$75,000 regarding settlement in less than a minute. Nonetheless, despite our warrior-like expectations of litigators, my own view is that judges must be exceedingly temperate lest their outbursts erroneously be regarded as commentary on the merits or hostility toward counsel. Had insurer counsel survived the outburst (which was very rare for this judge, who was known to be extremely kind to counsel), I am confident that the case would have been tried with no prejudice toward counsel or the insurer. But settling counsel apparently did not share that confidence.

What Brunet describes has been going on for a long time. It predates both the original ADR movement (commercial arbitration in the early Twentieth Century) and the "new" ADR of the past thirty years and continues to survive and thrive. This indicates to me the continued value of the tool.

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six figures in gaming debts. The policyholders were conveniently "away" at the time of the fire. The deposition testimony of the policyholders (husband and wife) was inconsistent and suspicious.

Faced with these facts, the policyholder's counsel took a most interesting tack at the conference before the judge. He pointedly asked how he was to prepare for trial when the insurer had designated some forty-five or fifty witnesses in its portion of the final pretrial order. For anything other than large, complex litigation, forty-five witnesses is, of course, a lot of witnesses. Certainly, this was the judge's view. He, to be charitable, went ballistic when his attention was drawn to the witness list.

Insurer counsel attempted to explain that the list was long simply to preserve his options since many of the witnesses were fungible and that the trial would only last a week, but it was to no avail. The damage had been done. The judge was fuming over the long list of witnesses and also managed to wonder why the case had not settled. Obliging, insurer counsel plopped \$75,000 on the table (hedging a bit about needing to clear this with the client), which was eagerly grabbed by policyholder counsel. The case ultimately did settle, I believe for that amount.

I have often wondered how the insurer reacted to this resolution of the case. I presume insurer counsel had authority for something like the \$75,000 figure but I also presume that it was the outer limit of authority, to be used during trial if things were going badly. Yes, I know that juries are disinclined to label an average citizen an arsonist, but still the case reeked of arson. I have, on occasion, been accused of being pro-policyholder about insurance coverage questions. See William P. Shelley & Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 TORT & INS. L.J. 749, 772 n.108 (1998) (making this criticism of JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 155 n.4 (1994) (See also my rebuttal in Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing The "Absolute" Exclusion in Context and In Accord with its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 57 n.219 (1998)). But if I were a juror, I would have backed the insurer on this one.

Did the judge improperly coerce settlement? I really don't think so. Did the judge improperly suggest hostility toward one side's lawyer? Yes, and this in my view warped the resolution of the case.



*B. Classifying Signaling: Judging or Mediation?*

But is “judicial signaling” really a form of mediation or is it simply an aspect of judging? I think the latter.<sup>45</sup> There are, of course, other views and considerable debate over the classification of mediator styles and their permissibility.<sup>46</sup> Although we generally associate judging with formal rulings on motions, the judicial task regularly and appropriately encompasses a wide range of activity: pretrial conferences; rulings on non-dispositive motions such as discovery disputes and pleading issues, even when the controversy between the parties may be trivial; jury selection; evidence rulings; jury instruction; trial and pretrial administration; in-camera review to evaluate claims of privilege.

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<sup>45</sup> On the issue of mediation generally, I have a marginal or nitpicking difference with Brunet in that he appears to divide the mediation world according to two axes: (1) judicial-private; (2) evaluative-transformative. I have two qualms about these dichotomies.

First, as discussed more extensively in text, I do not regard judicial signaling as real “mediation.” Some of the shuttle diplomacy and creative settlement efforts done by judges may constitute mediation, but it is considerably more truncated than mediation by others. Consequently, I am hesitant to label this type of judicial activity as mediation. It is settlement effort and it is a form of ADR, but calling it mediation can be misleading. In making this observation, I am ironically making an assessment similar to that of traditional mediation “facilitists,” who have criticized the presence of legal assessment in mediation (and my writings in support of such “evaluation”). These commentators admit that evaluation occurs and may even admit its unavoidability, but strongly argue that any process with an evaluative aspect should not be deemed “mediation.” See, e.g., Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIGATION 31 (1996).

Second, “transformative” mediation remains a relatively small subset of the mediation conducted in the world. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). The larger, although in my view overly crude or even false, dichotomy discussed by most commentators is over “evaluative” mediation and “facilitative” mediation. My own preferred lexicon suggests that most mediation is largely facilitative with significant elements of evaluation or reference to the applicable legal framework. I prefer to refer to this modal mediation as “eclectic.” See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247; Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309; Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371; Dwight Golann, *Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41; Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949 (1997).

<sup>46</sup> See, e.g., Leonard Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for The Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (arguably the article that initiated and framed the inquiry and debate); James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991) (an important article of empirical research reflecting variance in mediator styles and the presence of significant evaluative reference to the law during many mediations); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295 (appreciating reference to the law and presence of evaluation in ADR generally but arguing that mediation is and should be as primarily, even purely, facilitative); Joseph P. Stulberg, *Facilitative Versus Evaluative Mediation Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

In short, judging can mean a lot of things. Can it mean communicating a judge's thoughts and preliminary evaluations on aspects of the case to counsel? If so, what are the purposes?

As Brunet points out, a common use of judicial signaling is to guide counsel as to the adequacy of submissions to date. Similarly, the court may signal – or even specifically request – additional briefing or discovery. This is not an improper judicial expression on matter reserved for the jury. It is a form of judging with considerable value. It not only provides rulings and moves the case along but also helps counsel understand the issues in the case that need further development if the court is to accept counsel's contentions. Negative signaling tells the lawyer that the message is not getting through. Lawyers can improve or repackage the presentation to achieve better presentation and persuasion.<sup>47</sup>

Seen in this light, judicial signaling of the type discussed by Brunet is no more inappropriate than a court's memorandum explaining its basis for a ruling. For example, if a judge rejects a motion to dismiss or a motion for summary judgment and explains why, this gives counsel a roadmap for possible rehabilitation of its position. The court may even rule again on essentially the same issues through the filing of a motion for reconsideration or a second (or even third) motion on the topic (multiple motions on the same issue are frowned upon by the court but may be permitted if based on different legal grounds or emerging factual information). Informal judicial signaling may be distinguished, but it may be a distinction without a difference.

On the whole, informal judicial signaling seems closer to judging than to mediation, which is part of the problem if one is concerned about possible judicial bias or lack of procedural process. Although I have argued that mediation is eclectic and frequently contains evaluative elements and reference to the law, it is unquestioned that mediation is substantially a facilitative process that involves the mediator drawing out the goals, needs, and concerns of the disputants in order to attempt to assist the disputants in resolving the matter. Mediators attempt to add value not only through the "reality check" of evalua-

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<sup>47</sup> I can attest to the value of such arguably negative feedback. I once was part of a litigation team representing a manufacturing plant that had been sold a defective biomass boiler. Instead of crisply consuming the biomass product and producing energy from the plant, the boiler chronically was fouled (even if a boiler is well-designed, biomass fuel presents more challenges than cleaner burning fuels such as natural gas), forcing shutdowns of the boiler and the plant. The plant's claims against the boilermaker were brought in arbitration.

On the first day of the arbitration, it became clear that the arbitrators were having trouble visualizing and understanding the mechanical problems afflicting the boiler and the plant. Fortunately, the case was large enough to support a multi-lawyer team. While part of the team continued to present evidence, another lawyer and I flew to the afflicted plant and made a "day in the life video" of the plant, which showed quite graphically the nature and scope of the problem. We returned to the arbitration, showed the video, and appeared to receive a heightened level of understanding from the arbitrators. The final arbitration was quite favorable to the claimant, suggesting that the arbitrators indeed understood the seriousness of the problem. Would this have been clear without the visual aid? I am skeptical. Should I, or one of the other lawyers, have thought of the video before the hearing? Yes, of course. But we didn't, which made the arbitrator feedback and flexibility of the process extremely valuable. Although this example stems from a formal hearing, it could have easily emerged from a pretrial conference in a case that was litigated rather than arbitrated.

tive feedback but also through enabling the parties to articulate alternative means of achieving their goals. Mediators also attempt to expand the universe of possible solutions, as well as to assess a zone of possible agreement and attempt to relocate disputants into that zone.

All of this takes considerable time and expertise. Almost all mediations of which I am aware consume a minimum of half a day. More commonly, anything but the simplest matter requires a full day of mediation. Although the process need not be an exercise in protracted navel gazing, neither can it be rushed if a successful settlement is to be achieved.

Contrast this to a typical judge's settlement conference. The standard issue here is one-half hour. For the occasion of larger cases, a judge or magistrate may be involved in ninety minutes or two hours of settlement brokerage. Seldom, if ever, does a judicial officer begin to approach the time investment of the average private mediator for a similar matter.

This time disparity alone suggests that what judges do is not mediation even if it is seeking settlement. Rather, judicial signaling looks more like informal, tentative judging that acts almost in the nature of a significant non-dispositive ruling that does not control the case but has clear implications upon which counsel may act. A range of responses to the judicial signal is possible. At one end of the continuum, counsel is free to respond with renewed or increased litigation efforts. Near the other end of the spectrum, counsel can settle quickly based substantially on the handwriting the court has placed (albeit in pencil) on the wall.

A brief examination of negotiation theory and technique, like mediation theory and technique, also strongly suggests that judicial signaling is better classified as a part of the judicial process and not a separate ADR technique. The modern tenets of negotiation are well set forth in the classic work *Getting to Yes*, first published in 1981,<sup>48</sup> and continue to be refined in excellent recent explorations of the topic.<sup>49</sup> Axioms of effective negotiation include to "separate the people from the problem," to avoid "bargaining over positions," "to use principled negotiations with objective standards."<sup>50</sup>

To perhaps state the obvious, all of this takes time and a depth of understanding of the underlying dispute that ordinarily is not readily possessed by the court. Courts see the metaphorical tip of the iceberg in a dispute. Even as discovery, briefing, motion practice, and trial may educate the court as to the legal aspects of the dispute, comparatively little time and resources are invested in educating the court as to the extra-legal or sub-legal factors that bear on a negotiated resolution of the matter (whether achieved bilaterally through the parties alone or with the assistance of a mediator). Under these circumstances, it becomes even more difficult to characterize even activist judicial signaling as more mediation/ADR rather than a branch of judging.

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<sup>48</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 1997).

<sup>49</sup> See, e.g., RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (2002); ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

<sup>50</sup> FISHER & URY, *supra* note 48, at 13.

### C. *Appreciating the Potential Pitfalls of Judicial Signaling*

Brunet correctly notes that excessive judicial zeal in signaling can lead judges to cross over the ethical line into unfair prejudgment of a matter.<sup>51</sup> Although I concur with Brunet that this danger can be minimized and that judicial signaling should not be barred or unduly limited, it may be that his article nonetheless understates the potential dangers of the practice.

By potential dangers, I mean not simply the risk that specific, isolated parties will be bludgeoned into settlement, but also the risk that the development of the law will be slowed, skewed, or warped by judicial signaling that discourages complete adjudication in cases where this may be necessary for establishing legal precedent and public policy.

In other words, one should not underplay the dangers of the snap decision or the flight to the status quo by a judge who is (completely innocently) attempting to signal skepticism about a case in hopes of seeing a (relatively modest) settlement rather than face the burden of writing a long opinion explaining why the court is rejecting a novel theory of liability or other legal argument.

For example, for nearly twenty years after passage of Title VII of the 1964 Civil Rights Act, comparatively few people appeared to think that sexual harassment of a female employee was a violation of the Act so long as the sexual harassment was not central to an adverse hiring or firing decision. In essence, there was not solid legal or social acceptance of the now-established concept that a woman worker could be constructively discharged or materially adversely affected in her job because co-workers or boss were making unsuccessful passes at her, however ham-handed and unsuccessful, or generally harassing her.

As we now know through hindsight, Katherine MacKinnon, then an attorney, and others did not share this view and set out to establish sexual harassment as gender discrimination, illegal under Title VII. MacKinnon's book, *Sexual Harassment of Working Women*, published in 1979,<sup>52</sup> was a significant early salvo in the battle and was accompanied or followed by test litigation. In a relatively short time-span (for law), she and others were successful in establishing sexual harassment as forbidden conduct in violation of Title VII.<sup>53</sup> The issues surrounding the law of sexual harassment remain, of course, open to a degree, as evidenced by the Supreme Court's continued visitation of the issue in the years since *Meritor Savings Bank* was decided.<sup>54</sup>

A minute's indulgence in thought experiment demonstrates that excessive judicial signaling has quite a capacity to chill the sort of development of the law reflected in the recognition of a right of action for sexual harassment. Prior to *Meritor*, a signaling judge might easily persuade a plaintiff and employer to

<sup>51</sup> See Brunet, *supra* note 15, at 256.

<sup>52</sup> See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). MacKinnon subsequently entered academia and is now the Elizabeth A. Long Professor of Law at the University of Michigan Law School.

<sup>53</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>54</sup> See, e.g., *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

settle such matters relatively inexpensively in order to avoid their twin respective fears of a defense judgment and bad publicity. Undoubtedly, such signaling probably did occur during the pre-*Meritor* days of sexual harassment claims and probably did, on occasion, have the effect of fostering settlements that may well have hindered the development of the law.

Illustrations like this serve to remind that judicial signaling can become close-minded rejection of necessary law reform, law extension, or the recalibration of the technical fine points of the law. Brunet does not endorse this sort of “erroneous” or “wrongful” judicial signaling. However, we must remember that it lurks in the shadows almost every time a judge gives informal feedback to the parties or counsel. Unlike errors made on the record or as part of a formal ruling, these settlement-creating errors are not subject to appeal.

To some extent, this concern about judicial signaling reprises the long-running debate on the limits of appropriate judicial management of cases. Critics of managerial judging, such as Judith Resnik, have convincingly argued that too much straying from the traditional adjudicative role is fraught with danger.<sup>55</sup> Although judicial management seems not to have been greatly curtailed as a result of these criticisms, it is likely that such managerial efforts have at least been more restrained because of the dialogue. At a minimum, the concerns raised by the critics of managerial judging should serve as caution to the profession to refrain from embracing too aggressive a version of judicial signaling.

Like managerial judging and the hydraulic pressure for settlement and peace over full adjudication, judicial signaling can truncate the growth and development of law by permitting courts to cling too tightly to conventional wisdom. In addition, these court activities come against a backdrop of civil disputing developments that tend to discourage a full airing of legal and factual arguments:

- FED. R. CIV. P. 11 (which discourages innovative claims to a degree even if it has been substantially defanged in the 1993 Amendments to the Civil Rules);<sup>56</sup>
- The *Daubert*, *Joiner*, *Kumho Tire* trilogy of Supreme Court evidence holdings making admissibility of expert testimony more difficult, a development that generally falls more heavily on the party with the burden of persuasion (e.g., plaintiffs);<sup>57</sup> and
- Modern Summary Judgment practice derived from the Supreme Court’s 1986 trilogy of cases, which makes attainment of summary judgment easier than was traditionally the case, another development generally favoring the party without the burden of persuasion (e.g., defendants).<sup>58</sup>

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<sup>55</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>56</sup> See GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1992).

<sup>57</sup> See Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court’s Trilogy of Expert Testimony in Toxic Tort Litigation*, 64 LAW & CONTEMP. PROBS. 289 (2001).

<sup>58</sup> Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

Brunet in particular should appreciate this concern. His treatise on summary judgment notes the greater availability of summary judgment and its extensive potential for ending cases.<sup>59</sup> In this Symposium's article, Brunet is now quite bullish on judicial signaling as well as summary judgment. This is consistent but arguably dangerous in the hands of a judge who is too eager to foster non-adjudicative resolution of a matter. Judicial signaling may be seen as a threat of dismissal or summary judgment if the disfavored party does not cooperate in settling the matter.

Judicial signaling therefore holds the danger of becoming a self-fulfilling prophecy. The judge signals a litigant with the temerity to resist, who then suffers summary judgment (e.g., "Ms. MacKinnon, I can't believe you won't accept defendant's offer of a nuisance value settlement to get rid of this sexual harassment suit. But no matter, I find that no reasonable jury could side with you, so I'm entering Summary Judgment for the defense on the ground that Title VII as a matter of law does not create a claim for relief based on sexual harassment.").

In the universe of tools designed to thin court dockets, I prefer judicial signaling, even aggressive judicial signaling, to more stretched use of summary judgment, Rule 11, or evidence barriers. But the attractions and dangers of all these devices are not all that disparate. Nonetheless, if decoupled from other case management or pretrial disposition devices and stripped of a judge's personal prejudices, judicial signaling can play the positive role envisioned by Brunet.

### III. CARRINGTON'S VICTORIAN SHOCK ABOUT THE SUPREME COURT'S CHEAP AND SHALLOW AFFAIR WITH ARBITRATION – AND ENFORCED PRIVATE ORDERING

In his contribution to the Symposium, Paul Carrington sounds the horn of alarm regarding the judiciary's excessive zeal – its "judicial activism" if you will – in promoting arbitration and privatization generally. With considerable force, Carrington accuses the United States Supreme Court of having moved toward reduction – even abdication – of the judicial role. According to Carrington, the Court, in its zeal to support privatization of dispute resolution, has distorted the meaning of the Federal Arbitration Act and been excessively credulous of the claimed virtues of arbitration and ADR.<sup>60</sup>

#### A. *Carrington's Map of the Road to Arbitration Perdition*

I find Carrington's critique largely persuasive, perhaps because it echoes my own long-held view that the Court has been almost embarrassingly simplistic and partisan in its cheerleading for arbitration and ADR generally.<sup>61</sup> In a

<sup>59</sup> See EDWARD BRUNET ET AL., *SUMMARY JUDGMENT* (2d ed. 2000).

<sup>60</sup> See Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259 (2003).

<sup>61</sup> See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION-INTERNATIONALIZATION* (1992); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996) [hereinafter Stempel, *Bootstrapping and Slouching Toward Gomorrah*]; Jeffrey W. Stempel,

line of cases stretching over the past forty years, the Court has moved from its historical distrust of and resistance to arbitration agreements,<sup>62</sup> to increased solicitude for labor arbitration,<sup>63</sup> encouragement of commercial arbitration,<sup>64</sup> federalization of the law of arbitrability,<sup>65</sup> and elimination of most statutory restrictions on arbitrability.<sup>66</sup> These decisions and other post-1990 holdings of the lower federal courts were in considerable contrast to prior Supreme Court decisions that predated *Moses H. Cone* and *Southland v. Keating* which had found statutorily-based exceptions to arbitrability.<sup>67</sup>

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*Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259.

<sup>62</sup> See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953) (holding that disputes arising under the Securities Act of 1933 are not arbitrable notwithstanding clear party agreement to arbitrate such disputes). The Federal Arbitration Act was enacted, in large part, at the behest of commercial interests who had become frustrated with the judiciary's historical resistance to the enforcement of pre-dispute arbitration agreements. See Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1380-83 (1991) [hereinafter Stempel, *A Better Approach to Arbitrability*]. See, e.g., *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 232 F. 403 (1916) (Learned Hand, then a district judge, refuses to enforce an extremely clear arbitration agreement in a commercial contract, finding that such agreements impermissibly oust courts of jurisdiction.). This resistance persisted, to a degree, in both the Supreme Court, as evidenced by *Wilko v. Swan*, and in lower courts. See, e.g., *N. & D. Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976) (court gives language of arbitration clause extremely narrow reading to avoid committing particular contract dispute to arbitration).

<sup>63</sup> See, e.g., *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). In this "Steelworkers Trilogy," the Court took an expansive approach to the arbitrability of labor disputes and endorsed arbitration as a favored means of achieving industrial peace. These cases were, however, technically not Federal Arbitration Act cases but were decided under Section 301 of the Labor-Management Relations Act, which has historically governed labor arbitration. Nonetheless, the Steelworkers Trilogy appears in retrospect to have been the beginning of the Supreme Court's movement from resistance to embrace regarding arbitration.

<sup>64</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). See also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (enforcing forum selection clause in towing contract that functioned as equivalent of ADR or arbitration clause).

<sup>65</sup> See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). As discussed below, Professor Carrington sees *Southland v. Keating* as the key case in shaping the Court's modern arbitration doctrine. Others may take issue. For example, Professor Sternlight views *Moses H. Cone* as the key case setting the Court on its current path. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 660 (1996).

<sup>66</sup> See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that workers may be bound by arbitration clauses that are a condition to attaining a job, despite seemingly contrary language of Section 1 of the Arbitration Act, 9 U.S.C. § 1); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (implicitly finding that there was no Age Discrimination Act to arbitrability); *Rodriguez De Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953) and holding that claims arising under the Securities Act of 1933 may be arbitrated); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987) (holding that claims made pursuant to the Securities Exchange Act of 1934 are arbitrable).

<sup>67</sup> See, e.g., *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984) (civil rights claims pursuant to 42 U.S.C. §1983 may not be arbitrated); *Barrentine v. Ark.-Best Freight Sys., Inc.* 450 U.S. 728 (1981) (Fair Labor Standards Act claims not subject to arbitration);

Although there have been some anomalous decisions during this time period,<sup>68</sup> Carrington's characterization is correct. Most of the past forty years of Supreme Court ADR jurisprudence has been an extolling of the virtues of arbitration and a steady march toward privatization. Unlike many of the other important, law-shifting decisions of the late Twentieth Century Court, the arbitration rulings were largely not 5-4 imbroglios in which a particular voting coalition (usually the conservative wing of the Court) triumphed over Justices more supportive of government, remedial legislation, consumers, and legal liability.<sup>69</sup> LBJ confidant Abe Fortas wrote an important early opinion in the trend<sup>70</sup> while liberal paragon Justice Brennan authored another key opinion.<sup>71</sup>

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Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Title VII claims not subject to arbitration).

Also see, e.g., Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (enforcing arbitration clause in form lending agreement); Doctor's Ass'n., Inc. v. Casarotto, 517 U.S. 681 (1996) (enforcing arbitration clause in franchise agreement that was highly favorable to franchiser despite state statute setting conditions on arbitration agreements by requiring clear presentation of the clause); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995) (enforcing arbitration clause in pest eradication service contract marketed to homeowners); Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528 (1995) (Carriage of Goods at Sea Act does not limit application of arbitration clause). One prominent arbitration authority characterized these cases as "characteristically supportive of arbitration" and concluded that by the mid-1990s, the "wall of judicial policy that protects arbitration is solid and looms large, and appears increasingly impossible to scale." See Thomas E. Carbonneau, *Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration*, 6 AM. J. INT'L ARB. 1, 2 (1995). See also 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 (1998).

<sup>68</sup> See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) (arguably backing away from the "separability" doctrine of *Prima Paint v. Flood & Conklin Manufacturing Company*, 388 U.S. 395 (1967), and requiring judicial examination of reach of arbitration clause in contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that New York law's traditional restriction on award of punitive damages in arbitration is not incorporated into arbitration and choice of law clauses in securities agreement that bound individual investors).

<sup>69</sup> See, e.g., *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (5-4 majority of Court holds that Section 10b of the Securities Exchange Act of 1934 and SEC Rule 10b-5 do not create cause of action for aiding and abetting violation of securities laws; Dissent notes that such actions had largely been recognized by lower courts in the thirty years prior to Court's decision; Court aligns on largely ideological basis with Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas in majority with Justices Stevens, Souter, Ginsburg, and Breyer in dissent).

<sup>70</sup> Justice Fortas was the author of *Prima Paint v. Flood & Conklin Manufacturing Company*, 388 U.S. 395 (1967), which held that, in a sale in a contract with an arbitration clause, questions of fraud in the inducement of the contract should in first instance be decided by the arbitrator. The *Prima Paint* approach is arguably inconsistent with the Court's approach to the division of authority between arbitrators and courts found in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). The Supreme Court largely continues to follow *Prima Paint*, however. See *Howsman v. Dean Whitter Reynolds*, 123 S. Ct. 588 (2002). See also Richard C. Reuben, *Howsam, First Options, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, SMU L. REV. (forthcoming 2002) (arguing in favor of *First Options* approach and for abandonment or restriction of separability approach of *Prima Paint*).

<sup>71</sup> Justice Brennan was the author of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), an important step in the modern pro-arbitration trend and



Divided as it might be on other issues, the Supreme Court has largely been unified in its support for arbitration.<sup>72</sup>

*B. A Differing View of the Source of Arbitral Error*

I generally agree with Carrington's general historical-sociological-political explanation of the modern judicial trend supporting arbitration to the point of almost uncritical lionization.<sup>73</sup> I also generally agree with Carrington that this is "bad" jurisprudence and public policy. However, my agreement with Carrington's excellent, even stem-winding, call to action is limited in the following ways.

First, I do not believe that the chief error of the Court was in federalizing the substantive law of arbitration through a rereading of the Act. Rather, the substantive error was failing to give an appropriate interpretation to Section 1 of the Act, which quite clearly states that arbitration agreements in employment contracts are not enforceable.<sup>74</sup> Thus, in my view, the "worst case" of the Court's modern era of arbitral infatuation is not *Southland v. Keating*<sup>75</sup> (as suggested by Carrington's article) but rather *Circuit City v. Adams*<sup>76</sup> or *Gilmer v. Interstate Johnson Lane Corporation*,<sup>77</sup> both of which essentially held that arbitration agreements could be crammed down the throat of an employee.

Although *Circuit City v. Adams* is, in my view, a wrongly decided case and the case that directly and concretely (and finally) puts the Court on record as limiting the reach of Section 1 of the Arbitration Act, one can argue that it is not nearly as important as the earlier cases in the arbitration trend which, through the uncritical embrace of arbitration, made it unlikely that the Court could in 2001 limit arbitrability under Section 1 grounds. In addition, there is a long history of lower court case law reading the Section 1 exception narrowly.<sup>78</sup> In my view, it is horribly erroneous case law<sup>79</sup> but it is nonetheless

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a building block of *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the case most criticized by Carrington as excessively pro-arbitration.

<sup>72</sup> The exception of sorts to this rule has involved possible statutory restrictions on arbitration. For example, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), involving the arbitrability of Title VII and employment claims, reflected a considerably more divided (5-4) Court, as did *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), in which the Court (by a 5-4 vote) enforced a standard form arbitration agreement in a consumer contract even though it did not appraise the consumer that it would share responsibility for paying the costs of the arbitration.

<sup>73</sup> See Stempel, *Bootstrapping and Slouching Toward Gomorrah*, *supra* note 61; Stempel, *A Better Approach to Arbitrability*, *supra* note 62 (arguing that modern pro-arbitration jurisprudence of the Supreme Court has failed to give adequate examination of and respect for issues of genuine consent to arbitration).

<sup>74</sup> See Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259.

<sup>75</sup> 465 U.S. 1 (1984).

<sup>76</sup> 532 U.S. 105 (2001).

<sup>77</sup> 500 U.S. 20 (1991).

<sup>78</sup> See, e.g., *Signal-Stat Corp. v. Local 475, United Elec., Radio and Mach. Workers*, 235 F.2d 298 (2d Cir. 1956), *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450 (3d Cir. 1953).

<sup>79</sup> See Stempel, *supra* note 74, at 280-302 (arguing that restrictive reading of Section 1 is inconsistent with prevailing approaches to correct construction of statutes).

precedent that has been relatively unchallenged for many years. My point is not so much to identify one “worst” case in forty years of problematic Supreme Court jurisprudence about arbitrability. Rather, I am arguing that the “villain” in this drama is not *Southland v. Keating* and the federalization of American arbitration law so much as it is the federal common law of arbitrability adopted by the Court.

Second, I do not think that the modern substantive law favoring arbitration is the problem nearly so much as the Court’s wooden, formalist, excessively textual, and crude contract interpretation. Many of the arguably unsatisfactory judicial decisions mandating arbitration would be reversed or acceptably modified if the Court had evidenced any ability to consider consent issues seriously and to read arbitration clauses and other contract provisions in context.<sup>80</sup>

### C. Another Look at the Historical Route of the Court’s Modern Arbitration Doctrine

Carrington also correctly criticizes the Court and *Southland* for taking a somewhat ahistorical approach to its important role of judicial interpretation. For example, the *Southland* majority opinion does not even mention *Bernhardt v. Polygraph Company*,<sup>81</sup> a case squarely at odds with – even overruled by – the *Southland* holding. One might at least expect a nation’s Supreme Court to be candid and explicit when it was making a dramatic change in the law. Only Justice O’Connor’s *Southland* dissent notes that modern cases prior to *Southland* had regarded the Arbitration Act as only a procedural statute applicable in federal court rather than as substantive national law applicable in all courts.<sup>82</sup> For the *Southland* majority to make this pivot so suddenly and without any serious discussion of its departure from prior law is a bit bizarre, even disingenuous.<sup>83</sup> In addition to its many other attributes, Carrington’s work is important in reminding the profession of the potential importance of a single case and the tendency toward *fait accompli* in the law. People (and Justices) tend to have short memories and to accept as legitimate what was or should have been controversial at the time. The winners write history. Once a case is decided, it is hard to reverse field. The case, even if poorly reasoned and incorrectly

<sup>80</sup> See Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153 (1995); Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 61-69 (1995) (Court’s contract jurisprudence reads as though justices were consumed by “blinding fog” of free market rhetoric); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 113 (1995) (traditional contract values lost ground during 1970s to law and economics-driven values); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 436 (1993) (Court’s contract interpretation decisions of the late Twentieth Century are part of sweeping, “even radical, pro-market jurisprudence.”).

<sup>81</sup> See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956).

<sup>82</sup> See 465 U.S. at 22 (O’Connor, J., dissenting, joined by Rehnquist, J.).

<sup>83</sup> To this extent, Subrin’s history and Carrington’s critique merge: The Pound Conference and the ADR movement (both 1960s neighborhood justice center and 1970s business embrace of ADR) softened up the Supreme Court for a major pro-arbitration agreement. It was also no accident that *Southland* was written by Chief Justice Warren Burger, the driving force of the Pound Conference and a relatively early cheerleader for arbitration. One need not be much of a legal realist or a cynic to fault the Burger and Rehnquist Courts for seeming to place ideology ahead of legal analysis.

decided, creates a system that will affect the lives of all that follow. For that reason, the Court owes the public a duty of greater care and candor – and explanation – than it displayed in *Southland v. Keating*.

Carrington's work thus also opens a most interesting window on stare decisis. *Southland* was seriously questioned within a decade of its rendering and is now more subject to serious questioning with the critique of Carrington and his colleague, Paul Haagen.<sup>84</sup> But Justice O'Connor, alleged champion of states' rights, will not revisit the issue.<sup>85</sup> Although stare decisis and stability are generally good things, they should not provide an iron wall around problematic, poorly reasoned, or result-oriented precedent.

Despite my admiration for Carrington's tour de force critique of the Court's arbitration jurisprudence, I have some differences with Carrington regarding the degree of error he posits in *Southland v. Keating*. Carrington suggests that the legislative intent underlying the Federal Arbitration Act was curbing *federal* court refusal to enforce pre-dispute arbitration agreements.<sup>86</sup> I have reviewed the entire official legislative history of the Act and a good deal of secondary authority about the Act, much of it contemporary to passage of the Act. None of these materials suggests that the perceived problem spurring the Act was confined to federal courts. Rather, American courts as a whole – both state and federal – appear to have been hostile to arbitration agreements. In light of this background, it does not seem improper to me that the Act evolved to be interpreted as creating a federal substantive law of arbitration rather than a rule of procedure applicable only in federal court.

To be sure, Carrington raises interesting historical points that buttress his view that the Court had made the right decision in the 1957 *Bernhardt* decision<sup>87</sup> and should have resisted the "free" market's call for reinterpretation in the 1984 *Southland* decision. In 1925, when the Act was considered and enacted, the American notions of interstate commerce were more restrained. Hence, the enacting Congress might even have thought it had no power to dictate arbitration law in state courts. The Arbitration Act also predated the Rules Enabling Act of 1934<sup>88</sup> and the 1938 promulgation of the Federal Rules of Civil Procedure. Perhaps the Congress passing the Arbitration Act simply could not visualize a federal law that controlled state procedure regarding arbitrability at a time when a state's rules of procedure generally dictated procedure for the federal courts located in that state.

But in making this argument, Carrington is implicitly suggesting that only statutory text and concrete, specific legislative intent are authoritative guides to statutory intention. On this point, there is considerable debate. Many, perhaps most, in the legal profession agree that the more general statutory purpose of a statute can, under the right circumstances, be as authoritative an interpretative

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<sup>84</sup> See Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997).

<sup>85</sup> See Paul D. Carrington, *supra* note 60, at 280.

<sup>86</sup> *Id.* at 264-65.

<sup>87</sup> See *Bernhardt v. Polygraph Co. of Am.*, 350 U.S. 198 (1956).

<sup>88</sup> See 28 U.S.C. § 2072.

tool as text of legislative history.<sup>89</sup> A smaller but still significant part of the profession also finds “dynamic” or evolutive statutory interpretation a legitimate means of interpreting a statute to meet current legal and social needs, even if this works some activist “updating” of the statute.<sup>90</sup>

Purposive or dynamic interpretation is arguably quite consistent with the *Southland* result. The Arbitration Act was designed to ensure that courts did not “discriminate” against arbitration agreements so that national commercial needs might be served. Under these circumstances, a reading of the statute that also forbids state legislative discrimination against arbitration may not be inevitable, but it is hardly the most serious mistake the Supreme Court has made in this area.

To some degree, of course, statutory interpretation is a matter of taste. My tastes run more toward purposivism and dynamism, particularly if this is not inconsistent with statutory text or legislative intent. On this basis, I have argued that Section 1 of the Arbitration Act, which makes arbitration agreements in employment contracts unenforceable, should be interpreted to protect all workers, not merely those directly involved in the transportation industry.<sup>91</sup> Case law to the contrary was based on an arguable (but probably incorrect and excessively narrow) interpretation of the legislative history of the Act.<sup>92</sup> Section 1 was added at the behest of the Seamen’s Union of America, ergo (reason these cases) Section 1 must apply only to sailors or similarly mobile workers.<sup>93</sup> At the risk of repeating myself, I can only reiterate that I find this to be eighth grade sort of hyper-narrow, formalist, simplistic reasoning.<sup>94</sup> Nonetheless, this reasoning and this line of cases carried the day in 2001 when the Court ruled that Section 1 does not protect a worker in a retail electronics store from the force of an arbitration agreement that was standardized, adhesive, and a condition of employment.<sup>95</sup>

What’s wrong with this picture (besides the obvious problem that it, by judicial interpretation, takes away worker protection obtained in the legislative process to expand arbitrability and private sector power, an issue upon which Carrington and I agree)? To me, the problem is not so much that the Court interpreted dynamically in *Southland v. Keating*<sup>96</sup> but that it inconsistently took a different, static approach in *Circuit City v. Adams*<sup>97</sup> by focusing on perceived specific legislative intent, notwithstanding the broad language and purpose of

<sup>89</sup> See HENRY M. HART JR. AND ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1957); NORMAN J. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* (6th ed. 2001); William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

<sup>90</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31-43 (1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

<sup>91</sup> See Stempel, *supra* note 74.

<sup>92</sup> *Id.* at 263-72.

<sup>93</sup> *Id.* at 264-65. See, e.g., *Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, Local 437, 207 F.2d 450, 452 (3d Cir. 1953).

<sup>94</sup> See Stempel, *supra* note 74, at 280-302.

<sup>95</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). See also SINGER, *supra* note 89, at §47.17.

<sup>96</sup> 465 U.S. 1 (1984).

<sup>97</sup> 532 U.S. 105 (2001).

the statute. In other words, the Court seems to employ whatever methodology results in a victory for the party drafting the arbitration agreement and controlling the situation. The problem is not purposivism or dynamism – it is favoritism.

Carrington also argues that the Court's famous 1938 decision of *Erie Railroad v. Tompkins*<sup>98</sup> should have forced a rethinking and rewriting of the Arbitration Act.<sup>99</sup> Carrington reasons that since *Erie* eliminated the general federal common law regime of *Swift v. Tyson*, *Erie* must also foreclose an interpretation of the Act that creates a federal common law of arbitration.<sup>100</sup> This is interesting but strained. The Rules of Decision Act, the law interpreted by *Erie*, does say that, in diversity cases, the rules of the states shall be the substantive rules of decision – unless Congress has acted.

#### D. Not All Law Affecting Arbitration is Anti-Arbitration

One can legitimately argue that the Arbitration Act is such congressional action that was not designed to displace state law entirely. The Act is not an independent ground for jurisdiction.<sup>101</sup> Thus, the Act does not create federal question jurisdiction, making it more difficult to argue that the Act was designed to impose a federal rule of arbitration. Thus, Carrington's critique of *Southland v. Keating* and its reasoning gives me pause. Nonetheless, there remains so much history of judicial hostility toward arbitration and of congressional desire to alter that situation reflected in the legislative history of the Act. Under these circumstances, despite Carrington's critique, it is hard to say that *Southland v. Keating* is clearly wrongly decided; at least on the issue of whether the Act creates substantive federal law. Where the Court more arguably erred was in its refusal to be willing to harmonize the substantive federal law of the Act with state laws that are not anti-arbitration per se but seek to vindicate another purpose and may, in some instances, restrict the operation of a problematic arbitration clause.

What seems even more wrong is the formalist and aggressive attitude taken by post-*Southland* courts toward state efforts to ensure that arbitration is genuinely consensual and that arbitration agreements are not unconscionable. The Court's 1996 opinion in *Doctor's Associates v. Casarotto*<sup>102</sup> is perhaps the most prominent example. However, other federal court decisions mirror *Casarotto* in holding that any state law imposing any conditions on arbitration constitutes an anti-arbitration law in violation of the Act. This approach is simply too harsh, even though the Court has suggested that a general state law that is not limited to arbitration would survive scrutiny even if it imposes

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<sup>98</sup> See 304 U.S. 64, 78-79 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842) and holding that there was no general federal common law applicable in diversity jurisdiction cases, but that federal courts should apply the state law that would provide the rule for decision if matter had been litigated in state court).

<sup>99</sup> See Carrington, *supra* note 60, at 264.

<sup>100</sup> *Id.*

<sup>101</sup> See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983).

<sup>102</sup> 517 U.S. 681 (1996).

requirements of disclosure or consent that may prevent enforcement of many arbitration clauses.<sup>103</sup>

Similarly wrong, as demonstrated by Carrington, is judicial failure to realize that statutes passed subsequent to the Arbitration Act may make certain disputes inarbitrable if the arbitration forum will not be adequate for a full airing of the legal rights at stake. In making this point, Carrington is noting something that the Court seems to have overlooked: more recent statutes take precedence over older statutes if the laws are in conflict.<sup>104</sup> On this basis, Carrington argues for the inarbitrability of claims made pursuant to the Automobile Dealers Day in Court Act of 1956;<sup>105</sup> Petroleum Marketing Practices Act of 1978;<sup>106</sup> Truth in Lending Act of 1968;<sup>107</sup> Magnuson-Moss Act of 1975;<sup>108</sup> and Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970.<sup>109</sup>

Carrington makes good arguments that cases under these statutes should not be removed from the courts simply because of the Supreme Court's "national policy" in favor of arbitration, a policy announced in 1984 on the basis of a 1925 statute. Carrington's argument has particular force regarding the Automobile Dealers Act that is, after all, a "day in court" statute.

#### *E. Consent Should Still be "The" Question*

However, I still find it hard to get excited about these situations – so long as courts police contracts containing arbitration clauses so that we are confident that the arbitration agreement was sufficiently knowing, voluntary, and reasonable to merit enforcement. Carrington argues that arbitration is inconsistent with the regulatory schemes established by *all* of these statutes but I somehow remain skeptical.

Our system – both legal and economics – is one that vests a good deal of discretion in private actors. If a party wants to sue, it need not obtain judicial permission as a prerequisite. If a party wants to voluntarily dismiss it need not have court permission if it acts with sufficient speed. If a party wants to settle, the courts generally do not interfere. Not surprisingly, courts also are relatively indifferent to a party's use of an alternative forum or procedure for resolving the dispute. So long as neither party objects, the court will not forbid arbitration and require litigation. Disputants and citizens can waive even their most precious constitutional rights, provided the waiver is knowing and voluntary.

In the case of contested pre-dispute arbitration agreements, little is different except the problem of proof. If the facts establish that a party has agreed to arbitrate rather than litigate, it is hard to discern any law or public policy requiring litigation. One need not invoke a "national policy favoring arbitration" to get this result. One only need invoke the longstanding national policy of individual autonomy over contract terms and disputing strategies.

<sup>103</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

<sup>104</sup> See SINGER, *supra* note 89.

<sup>105</sup> See 15 U.S.C. §§ 1221-1225; Carrington, *supra* note 60, at 268-71.

<sup>106</sup> See 15 U.S.C. §§ 2801-2806; Carrington, *supra* note 60, at 272-73.

<sup>107</sup> See 15 U.S.C. §§ 1601-1615; Carrington, *supra* note 60, at 273-74.

<sup>108</sup> See 15 U.S.C. § 2301; Carrington, *supra* note 60, at 274-76.

<sup>109</sup> See 18 U.S. §§ 1961-1968; Carrington, *supra* note 60, at 277.

The problem, of course, is in determining whether a pre-dispute arbitration agreement at issue was validly elected by the party that now contests the arrangement. Was the objecting party defrauded, coerced, or misconstrued? Or is it simply attempting to wiggle out of a deal? The answers to these consent-related questions are more important than general legislative schemes designed to create legal rights that, by default, are enforced in court if the parties do not have an arbitration or other ADR agreement.

*F. Arbitration Doctrine Reflecting Sociopolitical Trends*

Seen in this light, *Southland v. Keating* does not seem so villainous. Even as late as 1984, there were judicial and legislative impediments to arbitration that could have been viewed by the Supreme Court as requiring a judicial pronouncement that the Act was substantive and enforceable law. Seen in this context, the Court's *Southland* decision seems reasonable. In retrospect, it may appear that the Court leaned too far in favor of arbitration. But this perception does not come from the national legal standard created by *Southland's* interpretation of the Act. Rather, the current problems stem from the Court's consistently formalist and crude conception of contractual consent.

Similarly regrettable, although a perhaps avoidable aspect of the litigation zeitgeist, is the Court's tendency to lapse into a simplistic model of the world and to embrace some arguments of interested parties as though they were scientific axioms of truth. Carrington makes a convincing case that much modern arbitration law is merely arbitration politics and another aspect of the prevailing sociopolitical trends.<sup>110</sup> The rise of ADR has taken place in a time when sociopolitical opinion was also dominated by fawning veneration of markets and extreme rhetorical attacks on government and regulation. As Carrington notes, anything that smacks of judicial or even congressional regulation has been disfavored.<sup>111</sup> In this environment, the traditional role of government (and particularly courts) as protecting against sharp practices has faded severely, leaving society the worse for it.

Between the time of the actual convening of this Symposium and the time its scholarly papers go to press, the ravages of some of this excess have become more apparent and worrisome. The stock market declined twenty to thirty percent. Corporate CEOs have gone from being treated like rock stars to being viewed as criminals. It indeed appears that some are criminals. Congress passed the Sarbanes-Oxley Act of 2002,<sup>112</sup> which restricted corporate governance prerogatives, expanded SEC powers, and effectively placed large auditing firms under public control. Alan Greenspan has gone from deity to devil, or at least to mere mortal.

Infatuation with arbitration and other private, non-judicial ADR is a piece of this trend; like any trend (Carrington's analogy to the Dutch tulip bulb fanatic-

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<sup>110</sup> See generally Carrington, *supra* note 60.

<sup>111</sup> *Id.* at 259.

<sup>112</sup> See H.R. 3763, P.L. No. 107-204, 116 Stat. 745 (July 30, 2002).

icism appears well-taken),<sup>113</sup> it can go too far and create new problems, new backlash, and new desire for synthesis.

Although Carrington correctly points out that the *Southland v. Keating* federalization of arbitration law is part of this era of uncritical praise of the private, his fine paper nonetheless appears to overlook additional aspects of the problem. On the one hand, Carrington correctly skewers the Supreme Court and body politic for its de-regulative fetish. On the other hand, his solution to the problem is more judicial decision making. But bad judicial decision making is at the very root of modern ADR problems in which nonconsensual and partisan arbitration arrangements may be crammed down the figurative throats of society's less powerful, in situations far beyond those envisioned by the enacting Congress. This may be dynamic statutory interpretation of a sort, but it is retro-dynamism because of its regressive character.

Which is why I keep coming back (like a broken record voice in the wilderness) to the micro-matter of contract formation and construction rather than the macro-issue of general systemic preferences for courts or arbitrators, public or private. If arbitration clauses and their container contracts are properly construed, I see nothing wrong with making the law of arbitrability a matter of federal common law. Although this may not be the preferred interpretation of Carrington and others, it is not an interpretation that is clearly foreclosed by statutory language, legislative intent, historical background, or statutory purpose.

Thus, despite the faults that Carrington correctly attaches to *Southland*, the decision and its progeny could be rehabilitated through sounder statutory interpretation and contract construction. The Federal Arbitration Act never mandated that courts forget about doctrines like adhesion, ambiguity, or unconscionability. Nor did the Act remove the element of consent in contract. Furthermore, the Act – even if treated as substantive federal law – is not nearly so incompatible with state contract regulation as supposed by the Supreme Court and lower federal courts. In this regard, the Supreme Court and others have erred by equating any state law touching specifically on arbitration as hostile to arbitration and in violation of the Act. Rather, the inquiry should focus on whether state regulation is truly discriminating against arbitration or is, instead, simply part of the state's general activity policing contractual fairness.

### G. *Appreciating the Benefits of Arbitration*

Notwithstanding all the force of the Carrington critique, a few good words need to be said for arbitration. In the commercial context, they are not Kangaroo courts, at least not in the AAA arbitrations or court-annexed arbitrations with which I am most familiar. One can even make a good argument that arbitration is better for the “little guy” in these cases when we have a rather conservative, formalist judiciary in federal courts and most states.

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<sup>113</sup> See Carrington, *supra* note 60, at 259-60, 280 (comparing American economic hubris of the 1990s and dot.com bubble to Dutch Tulip craze and economic bubble of the Seventeenth Century).



Judicial traditionalists have traditionally criticized arbitration and other forms of ADR as insufficiently attentive to the legal rights of disputants and suggested that some disputants, particularly those with less social and economic power, are disadvantaged by the rough justice, compromise character, or emphasis on resolution (as opposed to evaluation) found in ADR.

Because arbitration is largely a less formal means of adjudication, it is arguably less vulnerable to these criticisms than is mediation or mediation hybrids, which promote resolution and de-emphasize evaluation and judgments regarding the dispute. Certain arbitration forums, however, share some of this ADR orientation. But popular perception of the American Arbitration Association, a large-scale provider of commercial arbitration, is that its arbitrations adjudicate disputes (rather than compromise them) but that there is compromise of sorts in that awards smooth out the rough edges and extremes thought to be more common in the courts. For example, AAA arbitrations are significantly less likely to result in creatively large compensatory damages awards, punitive damages, or anything resembling injunctive relief.

Consequently, arbitration looks a lot like adjudication,<sup>114</sup> but with less sophisticated adherence to the law. Under these circumstances, it is a bit overboard for arbitration's critics to act as though the sky has fallen on disputants who are forced to arbitrate rather than litigate. If the arbitrator is competent and impartial, there is relatively little difference in the quality of decision-making between arbitrators and courts. Although certain complex, specialized, or emerging areas of the law may present particular issues, arbitration on the whole brings socially acceptable adjudicative results if properly supervised by the courts.

By proper supervision, I mean that courts must not let arbitrations become kangaroo courts. In the 1980s initial rush of euphoria about arbitration, courts seem to have shirked this role. However, the late Twentieth and early Twenty-First Century have seen courts interceding to forbid or correct arbitral forums that posed significant risk of unfairness to a disputant.<sup>115</sup> Perhaps most notable is judicial invalidation of the infamous arbitration clause issued by Hooters, which essentially established an arbitration system in which employer Hooters

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<sup>114</sup> In fact, arbitration proponents have criticized the evolution of arbitration into a more procedurally regulated, court-like process as arbitration has expanded and supplanted adjudication in many areas, such as securities brokerage disputes. See Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433 (1996) (federal appellate judge notes and criticizes tendency of arbitration to become more like adjudication through accretion of additional formality).

<sup>115</sup> See, e.g., *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (arbitration clause not enforced because it gave employer complete right to alter forum and procedure without notice to employee); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1133 (7th Cir. 1997) (arbitration agreement that permits employer to change terms at will is unenforceable); *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) (nonmutual arbitration agreement is substantively unconscionable); *J.M. Davidson, Inc. v. Webster*, 49 S.W.3d 507 (Tex. App. 2001) (arbitration clause unenforceable where one party has unilateral modification rights); *Sutton's Steel & Supply, Inc. v. Bell South Mobility, Inc.*, 776 So.2d 589 (La. Ct. App. 2000). See also *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (unfair for employer to impose arbitration agreement as a condition of employment; arguably overruled by *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)).

was unlikely to ever lose a claim brought by an employee.<sup>116</sup> Less obviously onerous arbitration provisions by employers with less problematic reputations have also been subject to judicial policing.<sup>117</sup>

So long as some significant judicial policing of arbitration clauses and arrangements occurs with sufficient frequency, arbitration can result in decisions equivalent in quality to those of courts. Although the Supreme Court's interpretative jurisprudence (arbitration, contract, and statutory) of the past twenty years has often been enough to make the strong weep, the future may be better than the past. Scholarly analysis has consistently criticized the Court and called for a more refined approach with more sensitivity to other legislation, public policy, and a less formalist and textual construction of contracts and the Act itself.<sup>118</sup> Although the winners write history (and the winners dictate the norms), all of this is unlikely to be lost on succeeding generations of judges, lawyers, and the law students who will eventually ascend to higher influence in law and politics. Ever the optimist, I foresee a more enlightened ADR Court as membership in the Court changes over time and the Court is better informed on the issues through new generations of law clerks and advocates with more sophisticated views of ADR enforcement. It may not happen in the near term of sharpened politics and occasionally blatant efforts to nominate predictable judges and justices supportive of the nominator's preferred interest group, but can occur in the long term.

Notwithstanding significant misgivings about the manner in which the Court mandates arbitration, the profession should not forget that, despite flaws, arbitration might result, on average, in better decisions than courts.<sup>119</sup> If the topic of dispute is technical (e.g., engineering, construction, commodities trad-

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<sup>116</sup> See *Hooters of Am. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (rejecting as unconscionable arbitration provision that limited remedies and depositions as well as binding only employee, among other abuses).

<sup>117</sup> See, e.g., *Dumais v. Am. Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002) (arbitration agreement invalid where it was illusory, lacked mutuality, and was unsupported by consideration); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002) (refusing to enforce relatively clear and fair securities account arbitration provision due to lack of consumer choice *vis-a-vis* standard contracts of other brokers). See also *Buckner v. Tamarin*, 119 Cal. Rptr. 2d 489 (2002) (refusing to enforce arbitration agreement in medical malpractice wrongful death case because decedent's signature did not bind survivors). But see *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002) (upholding arbitration agreement for law firm employee).

<sup>118</sup> See, e.g., sources cited in notes 70-84, *supra*; Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789 (2002); Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281 (2002); Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337 (2002); Linda Alle-Murphy, *Comment, Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable? A Contractual Analysis*, 75 TEMP. L. REV. 125 (2002); Jeremy Kennedy, *Comment, The Supreme Court Swallows a Legal Fly: Consequences for Employees as the Scope of the Federal Arbitration Act Expands*, 33 TEX. TECH. L. REV. 1137 (2002).

<sup>119</sup> See Marc I. Steinberg, *Securities Arbitration: Better for Investors Than the Courts?*, 62 BROOK. L. REV. 1503 (1996).

ing, financial instruments), an arbitration panel<sup>120</sup> can be the equivalent of a blue ribbon jury panel. In addition, the arbitration panel may interact with counsel in a manner that clarifies the issues and proofs. By contrast, most juries are prohibited from effectively asking questions or seeking clarification. Neither can juries usually take notes.<sup>121</sup>

Perhaps most important, if the object of dispute resolution is fairness and justice, one can argue that arbitration is better prepared to dispense fairness and justice because it is less bound by the letter of the law. The law may create rights; on that the litigation romanticists are correct. But what they frequently overlook is that the law often creates limits on recovery, technicalities that stand in the way of justice, and bright line rules for decision that may be inconsistent with the equities of a case. These harsh formalities of litigation and adjudication may fall particularly hard upon less sophisticated, less well-represented parties to a dispute. Consequently, arbitration may provide more satisfactory results when it accords these parties rough justice.

Consider the example of a hypothetical employment discrimination claim. In litigation, the claimant has a chance of winning big – but also has a not insignificant chance of losing big and receiving nothing. Even a strong factual case can be thwarted by a missed deadline or a legal stricture on recovery. In arbitration, the same claimant may stand a better chance of some relief. It may not be the degree of relief possible in litigation, but there may be less “downside risk” for the claimant.

Consider, too, the identity of the decision maker. Litigation advocates have criticized the tendency of arbitrators to be white men from the business community and suggested that these ADR adjudicators may not be as competent as courts for deciding matters, particularly claims such as employment discrimination. However, these critics of arbitration – including Carrington to a degree (although he is hardly a litigation romantic)<sup>122</sup> – forget that the quality

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<sup>120</sup> On this point, I also have to take small issue with Carrington. He asserts that the norm for arbitration is a single arbitrator and argues that a single arbitrator is more prone to error or idiosyncratic perceptions than a panel of arbitrators or a jury. See Carrington, *supra* note 60, at 282, 283. Although the single-arbitrator norm governs for most “low-stakes” consumer or small business arbitration such as controversies over credit card and other debt, most commercial or securities disputes of any significance in my experience involve a panel of three arbitrators, lessening Carrington’s concerns and providing some cross-fertilization of perceptions and expertise.

<sup>121</sup> One aspect of disputing reform that consistently appears consistently to be undervalued is trial reform in litigation. Permitting jurors to have comfortable seats, a flat surface on which to write, the prerogative to ask questions and take notes, and streamlined trial events might well produce faster, better, cheaper litigation dispute resolution.

<sup>122</sup> Carrington served as Reporter of the U.S. Judicial Conference’s Advisory Committee on the Federal Civil Rules, the group that largely considers and authors amendments to the Federal Rules of Civil Procedure. In that capacity, Carrington frequently supported and authored rule changes that were designed to respond to deficiencies of litigation. Even those who on occasion disagreed with these efforts (me included) must concede that they were not the work of someone blindly committed to the litigation status quo. Perhaps most notably, Carrington presided over and authored the 1993 Amendment to Fed. R. Civ. P. 11 that was designed to correct problems arising with excessive use of and satellite litigation over the 1983 Amendment to Rule 11.

of decision-making is comparative.<sup>123</sup>

Arbitration has other arguable advantages for many disputants because of its less formal, rigid, and “legalistic” structure. In court, you can lose completely, even without a hearing. In arbitration, you at least get heard – which may increase the equity of the proceeding. In arbitration, the decision maker is more likely to be forced to confront the equitable nuances of a dispute. A court has more options to essentially ignore these factors and render a pretrial decision as a matter of law. As for complex cases that turn more on legal points or mixed questions rather than fact questions, arbitration may be more effective because the proceeding is more attuned to having an exploratory conversation about the points of dispute.

I say this with some irony. Arbitration is supposed to be less legal than trial but may be better at dealing with the legal nuances. Consider the way witnesses, particularly experts, are examined in court. This is not conducive to telling and testing the story except by the theatrical means of cross-examination. In the less stylized and rigid form of proof at an arbitration hearing, the witnesses, particularly experts, may be more fully heard and understood by the decision-maker. Arbitrators are also not bound by the U.S. Supreme Court’s expert witness trilogy of *Daubert-Joiner-Kumho Tire*, which generally raised barriers to expert testimony and makes it quite likely that a proffered expert witness that would be heard in an arbitration would be barred from testifying in federal court.

#### H. *The Relative Comparison with Courts*

It is not enough to find fault with arbitrators or arbitration. One must compare it to the alternative in order to evaluate it. With arbitration, the obvious yardstick for comparison is litigation. If one’s concern is fairness, justice, adequate solicitude for the legal and equitable interests of the less powerful, and vindication of public policy against discrimination or other deprivations of civil rights, one can make a good case that federal courts are not necessarily superior to arbitration. The history of courts during the post-*Southland* period has largely been one of contracting the rights of claimants or raising their barriers to relief.<sup>124</sup> The Supreme Court got so carried away in this endeavor regarding employment discrimination and civil rights that a relatively conservative Congress was moved to enact the Civil Rights Act of 1991.<sup>125</sup> The Court’s preferential treatment of benefit plans subject to the Employee Retirement Income Security Act of 1974 (a statute Congress intended to protect the pension benefits of workers rather than to make it harder for them to collect promised health care benefits) spawned over forty states’ statutes designed to protect

<sup>123</sup> However, when the topic of the dispute moves away from traditional commercial issues, there is ample cause for concern that arbitral and other ADR forums are less favorable to those with lower social capital. See, e.g., Katherine Eddy, Note, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771, 776-77 (2001) (noting that only six percent of arbitrators on AAA panel list are women).

<sup>124</sup> See Stempel, *Contracting Access to the Courts*, *supra* note 3.

<sup>125</sup> See Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Theory of Democracy*, 22 U. TOL. L. REV. 583 (1991).

employee insureds from unreasonable conduct of HMOs and other health insurers.<sup>126</sup> In 2002, the Court permitted these plans to remain in force, but only by a 5-4 vote.<sup>127</sup>

One need not be a radical leftist to conclude that the current Supreme Court, and much of the federal judiciary, is no friend to the consumer, civil rights claimant, or small debtor. One need not be a rampaging legal realist to realize that conservative political forces have made a concerted effort during the past twenty years to appoint judges with judicial philosophies favorable to the very big business interests about which Carrington is (correctly) so concerned (e.g., automobile manufacturers, oil producers and refiners, manufacturers of consumer goods, lenders, creditors, and businesses that cut close to the line regarding fraud, misrepresentation, self-interest, breach of fiduciary duty, preferential treatment for insiders, and the limits of the securities laws).<sup>128</sup>

Although liberal political forces have also played this game, they have done considerably less well. Ronald Reagan elevated William Rehnquist to Chief Justice and appointed Antonin Scalia to the Court. The first President Bush appointed Clarence Thomas (although this was tempered by his appointment of David Souter). Bill Clinton appointed Ruth Bader Ginsburg and Stephen Breyer. As the cliché goes, “do the math.” The three conservative appointees lean dramatically more to the right than the three “moderate-liberal” appointees lean to the left. The then-Democratically controlled Senate refused to confirm District of Columbia Appeals Court Judge Robert Bork’s nomination to the Supreme Court, but like most of the liberal action in this area has been reactive and defensive rather than proactive and offensive. “Borking” became part of the national vocabulary not because it represented the actual confirmation process but because conservatives coined the term as part of their effort to argue that Bork had been unfairly treated, even smeared.

This pattern has largely been replicated in the lower federal courts. Ronald Reagan and the two George Bushes have sought to fill the bench with distinctly conservative jurists. Bill Clinton appointed judges that were more moderate and on occasion even liberal, but did not actively seek to recalibrate the bench after the Reagan-Bush years (in part no doubt because the Republican Senate, led by Judiciary Chair Orrin Hatch (R-Utah) would not let him).

Recent events suggest the trend and attendant battle lines continue. Recently, the Senate rejected (largely on party lines) President Bush’s nomination of Texas Supreme Court Justice Priscilla Owen for the Fifth Circuit.<sup>129</sup> Although this is a “victory” for “the left,” it was a minor, reactive victory and a

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<sup>126</sup> See *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) (noting existence of these HMO review statutes and upholding Illinois statute of this type, but only by 5-4 vote); Jeffrey W. Stempel & Nadia von Magdenko, *Doctors, HMOs, ERISA, and the Public Interest After Pegram v. Herdrich*, 36 TORT & INS. L.J. 687 (2000) (reviewing Court’s historically broad, problematic reading of ERISA as preempting many state laws designed to protect consumers).

<sup>127</sup> See *Moran*, 536 U.S. at 355.

<sup>128</sup> See e.g., Carrington, *supra* note 60, at 259-60.

<sup>129</sup> See Neil A. Lewis, *Judicial Nominee Says His View Will Not Sway Him on Bench*, N.Y. TIMES, Sept. 19, 2002, at 30A, col. 1 (describing pending appointment controversy over Tenth Circuit nominee University of Utah College of Law Professor Michael McConnell as well as Senate rejection of Justice Owen’s nomination).

temporary respite. The ideological “story” of the federal courts today is that President Bush chose to seek to elevate Owen, one of *the* most conservative state court justices or judges one could find. Although news accounts of the Senate’s rejection of Owen centered on her opposition to abortion and arguable efforts to support state interference with federal abortion rights, her body of work as a Texas Supreme Court Justice suggests she never met a defendant she did not like, or at least favor over the competing plaintiff.

If Justice Owen had become Judge Owen, a renewed possibility as the President has again brought forth her name, she would be unlikely to provide the sort of protection to retail auto dealership franchises, debtors, gas station franchisees, consumers, and other “little guys” about whom Carrington is rightly concerned. Further, although Owen is conservative, she may only barely outpace many other jurists favored by the recent presidents, governors, or voters (in states with an elected bench). For example, the Texas Supreme Court on which Owen sits has several other extremely conservative justices and has not been a friend to the groups about which Carrington is concerned.

The unspoken assumption of the Carrington critique is that courts are better than arbitrators in terms of accuracy and empathy. The assumption probably is wrong, at least in many cases. Although I would not want to appear before kangaroo court arbitrators in the hip pocket of a large, well-financed, repeat-player opponent, neither would I be very excited about appearing before many federal and state judges concerning the same case. There are, however, a large number of white, male (probably Republican and politically conservative) arbitrators on the AAA or New York Stock Exchange list who would give my hypothetical case a fair hearing. I might not have much success with a punitive damages claim, but neither would I be as likely to be dismissed without any remedy.

### *I. Arbitration and Inconvenience: Time to Revive an Old Defense?*

In his discussion of the *Mitsubishi v. Soler Chrysler-Plymouth* case,<sup>130</sup> Carrington makes a good case that the geographic inconvenience and expense imposed on a retail auto dealer may be insurmountable, particularly where the matter is to be arbitrated in Japan, a country with rather different views of the antitrust laws than those found in American courts. But is even this situation as bad as Carrington paints? Although expensive, does foreign arbitration really mean you need to run up the white flag? I think not. Although arbitration in Japan gives one party a logistical and economic advantage, the key question is whether the forum is fair. If courts were to properly police this aspect of arbitration (as have many courts below the Supreme Court), many of the concerns about arbitral results can be alleviated, even in those situations that provide Carrington with his strongest arguments against the Court’s modern endorsement of arbitration.

Nonetheless, Carrington raises an excellent point that would be well worth more serious examination by courts as part of their arbitrability analysis. Is arbitration abroad suspect? How often is a foreign-based arbitral forum

<sup>130</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

unfairly stacked against the American claimant, either because of outright bias or implicit norms that improperly defeat the expectations of the claimant? Here, it is important to distinguish between foreign and domestic arbitration. Although many non-American arbitration forums may be problematic, most domestic arbitrations are (or can easily be made to be) essentially fair and impartial. The determination, as always, is one dependent on the facts and circumstances of a particular case. Consequently, what is needed is not a broad endorsement of condemnation of arbitration but serious judicial inquiry into the fairness of the arbitral forum when this is legitimately challenged by the party resisting arbitration.

To the extent that geographic inconvenience imposed by arbitration is a genuinely real problem for one disputant, the Court could revive in modified form the "seriously inconvenient forum" defense to arbitrability. Justice Hugo Black was a powerful exponent of this view.<sup>131</sup> Unfortunately, he took it to populist extremes, suggesting that anything but local arbitration was unfair for consumers.<sup>132</sup> Nonetheless, Black was on to something. The federal courts could legitimately invoke a moderate form of his approach without undermining basic principles of contract enforcement.<sup>133</sup>

For the immediate future, Carrington's idea of seizing on Breyer's suggestion of broad contract fairness provisions is a good one. In effect, the harshness of the Court's rejection of state law efforts to police arbitration serve as an invitation for the states to better police all contracts in order to promote disclosure, consent, and fairness. In this regard, the sins of arbitration may lead to redemption of contract law in general.

#### IV. THE LOST-FOUND-LOST ART OF NEGOTIATION

##### A. *Modern ADR Movements on Separate Tracks*

All of the excellent professors in this Symposium make insightful observations about various forms of ADR (mediation and "medigation," judicial signaling, and arbitration) and also ways in which these activities can be improved and controlled as necessary to increase the efficacy of the entire disputes resolution system. However, only Subrin's article touches upon an overarching point that, in my view, has received insufficient attention in the academic literature.

Most of the academic and judicial attention to ADR since the time of the Pound Conference has focused on ADR procedures or methods that involve use of a third party: arbitration; mediation; early neutral evaluation; hybrids (med-arb; summary jury trial). Judicial signaling obviously involves a third party (the judge). On one level, all this attention to ADR is wonderful (despite the

<sup>131</sup> See, e.g., *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167 (1963).

<sup>132</sup> See *id.* at 171 (suggesting a near phobia about ability of New York-based tribunal to fairly hear the contentions of a southerner). See also *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1963) (Black, J., dissenting) (arguing that appointment of agent for receipt of service inherently unfair in that it will force residents of rural areas to come to New York or other urban areas for dispute resolution).

<sup>133</sup> See Stempel, *A Better Approach to Arbitrability*, *supra* note 62, at 1397-99 (seriously inconvenient forum may be grounds for refusing to enforce arbitration agreement).

overly romantic views of the matter by some<sup>134</sup> and the tendency of some ADR scholarship to engage in excessive litigation-bashing). But on another level, this trend has been unfortunate in that it overlooks the leading source of dispute resolution: negotiation.

Ironically, the upsurge in ADR scholarship and judicial promotion of ADR has arisen during an era when negotiation has received more theoretical and academic attention. Contemporaneous with the Pound Conference, court-annexed arbitration, and greater judicial support for ADR was the Harvard Negotiation Project and its best-selling manifesto for improved negotiation, *Getting to Yes*, first published in 1981. During the past twenty years, negotiation has received increasing interest in the legal academy. Two recent scholarly treatments of negotiation are particularly strong,<sup>135</sup> but are hardly alone in providing insights about negotiation and raising public consciousness about negotiation.

What seems discordant is that there is relatively little overlap between the ADR communities and the negotiation communities in terms of curriculum, scholarship, or interaction on projects and initiatives. Although I may simply be failing to keep sufficiently abreast of developments in this field, it appears as though third-party ADR and bi-party negotiation exist in separate orbits.

Although this may be inevitable in an age of specialization and division of labor (securities lawyers do not regularly talk shop with employment lawyers),<sup>136</sup> it is arguably detrimental to the overall health of the dispute resolution system. By treating ADR as something quite separate from negotiation, a climate has been fostered in which many cases, capable of bi-lateral resolution early on, fail to get resolved until an ADR event with a third-party neutral takes place. Although this may be better than a full-dress trial on the matter (perhaps with appeal), it is probably not nearly as good for the parties or society as an earlier negotiated resolution (assuming, of course, that one party does not take undue advantage of another during the negotiation).

Perhaps worse, the overall consumption of resources spent on dispute resolution may even see a net increase if ADR simply becomes another unavoidable step on the road to resolution. Although mediation may settle cases in the

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<sup>134</sup> See Carrington, *supra* note 60, at 287 (concluding that many of the proponents of ADR have been "ill-used" by special interests that have used modern ADR movement to justify deprivation of fair hearing to consumers and others).

<sup>135</sup> See KOROBKIN, *supra* note 49; MNOOKIN, ET. AL., *supra* note 49.

<sup>136</sup> This certainly applies to the professoriate as well. Legal scholars tend to be focused on their own work and extensive collaboration is rare. Perhaps the most memorable example took place at Harvard Law School in the late 1960s. In one office, Professor Robert Braucher was serving as Reporter for the American Law Institute's *Restatement (Second) of Contracts*, which arguably moved mainstream contract law from the formalism of Williston to the functionalism of Corbin. In an office a few doors down, Professor Robert Keeton was working on an article that would launch the "reasonable expectations doctrine" for insurance law, arguing that in some cases a policyholder's objectively reasonable expectations as to the coverage provided in a policy should control over even clear policy language to the contrary. See Robert E. Keeton, *Insurance Law Rights at Variance With the Policy*, 83 HARV. L. REV. 961 (1969-1970). To say the least, Keeton was arguing for a strong shift of insurance law in the direction of Corbin's view of contract law. But according to available information, Braucher and Keeton never talked about their separate but quite related projects while working on them.



mid-to-latter stages of litigation, it is not at all clear that these same settlements would not take place at a final pretrial conference, perhaps with judicial signaling. Under those circumstances, the mediation has arguably increased costs and delay, perhaps with no corresponding benefit of better settlements or more cathartic exchange between the parties.

In other words, I am wondering if the ADR movement has created new hurdles on the road to dispute resolution even while the negotiation movement has been providing lawyers and disputants with good advice useful in resolving disputes with less cost, delay, and acrimony. To avoid this potential negative result, the legal profession – particularly the judiciary – might better serve society by trumpeting negotiation more and pushing third-party ADR processes or events less.<sup>137</sup>

### *B. Legal Education and the Historical Oversight of Negotiation*

Legal educators cannot escape criticism in this regard. We must ask ourselves whether our greater fixation on ADR processes and institutions has dis-served the profession and society by making resort to these ADR events more necessary because we have failed to adequately orient and train students for negotiation.

For example, the Boyd School of Law devotes six credit hours (rather than the more typical 4-5 credit hours) to the first-year civil procedures class, which is denominated “civil procedure/ADR.” Although we can give ourselves an institutional pat on the back for emphasizing ADR in the core curriculum more than many schools,<sup>138</sup> I doubt that we devote the equivalent of a full credit hour to ADR. I know that I do not and it appears that my colleagues do not, either. Rather, there is a tendency to use a good deal of the additional credit allocation for a more in-depth look at civil procedure that is, of course, litigation.

In this context, students can understandably be forgiven for perhaps viewing ADR (especially court-connected ADR) as another procedural event in litigation. As Subrin points out, attorneys have perhaps tended to be more litigation oriented for a mix of sociological reasons (less cohesion in the bar; “scrappy,” combative personality ethos among litigators, particularly older generation of “outsider” attorneys who needed an edge to make their way in the legal world).<sup>139</sup>

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<sup>137</sup> This applies regarding arbitration as well. If the enforceability of an arbitration agreement is vigorously litigated, the net costs of dispute resolution may increase rather than decrease, even if the case is ultimately arbitrated rather than litigated.

<sup>138</sup> ADR and lawyer problem solving is emphasized from the outset for incoming students at the Law School’s “Introduction to Law Week” as well as throughout the three semesters of “Lawyering Process” required for graduation.

<sup>139</sup> See 3 NEV. L.J. at 205, 207-08. Although some may cringe at Subrin’s abbreviated characterization of the social class history of lawyers, I find his candid insight holds a good deal of explanatory power and is also consistent with more extensive research on the topic. See JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) (describing initial waspy establishment of East Coast bar in Nineteenth Century and its hostility as those of different ethnic and social background joined the profession); Geoffrey C. Hazard, Jr., Russell G. Pearce, & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV.

1084 (1983) (noting that some of bar's opposition to lawyer advertising was in reaction to efforts by outsider attorneys to gain business through advertising).

The discrimination Subrin describes by the Boston Brahmin firms against Jewish attorneys was replicated throughout the country during the early-mid Twentieth Century. For example, the Minneapolis firm in which I was once an associate was founded by Samuel Maslon, a Harvard Law graduate (and Law Review member) who returned to his hometown fresh from a clerkship for Supreme Court Justice Louis Brandeis only to be spurned by the established law firms in town. To some extent, Maslon had the last laugh by establishing an elite law firm (Maslon Edelman Borman & Brand) that remains among the state's most prominent. Maslon did not succeed by being a shrinking violet. Although he was inactive by the time I joined the firm, the stories of his workaholic toughness remained legend in the firm. However, he was also known for his pragmatism in seeking to further client ends without undue litigation. But he clearly did this the old-fashioned way: bargaining in the shadow of litigation or potential litigation rather than mediating through third party neutrals.

On the issue of civility, I again question the conventional wisdom. In my years of practice and continuing bar association work, consulting, or expert witness activity, I have not seen anything to suggest that older lawyers consistently display more civility than younger attorneys. To the contrary, most of the loud, difficult, table-pounding counsel I have seen have been more senior attorneys. Many of them, consistent with Subrin's thesis, would be proud of their behavior, regarding it as "real lawyering." Shifts in professional attitudes may make for less combativeness and more mediation. But a more civil profession is not necessarily a more ethical profession. See Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25 (1999) (economic pressures are tempting attorneys to cut ethical corners but not necessarily to act with less civility).

Subrin's anecdotal information also raises another issue – the romance and nostalgia we often erroneously attach to law practice in bygone days. Much of today's legal literature suggests that lawyers in the late Nineteenth and early Twentieth Century enjoyed considerably more balance between work and personal or civil pursuits. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death with Each Passing Hour*, 20 STETSON L. REV. 419, 423 (1991). The conventional wisdom is also that lawyers of bygone days also had greater "civility" than the purported "Rambos" of the modern era. See ABA COMMISSION ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) as well as Kronman, Linowitz & Mayer, Kovachevich & Waksler.

Based on my own experience, this may well be a falsely nostalgic picture. As to workaholicism: although large law firms may have ratcheted up their expectations of associates, this does not mean the average lawyer is working more hours. Most lawyers, now as then, work in small offices or even as solo practitioners. Based on my conversations through the years with older (often now deceased) attorneys, it appears the successful small firm lawyers of a century ago routinely worked the eighty-hour weeks of which large firm associates now complain. The old guard also worked without computers, word processors, voice mail, email, and express delivery services. Although they may not have always been efficient or optimally productive under those circumstances, one can easily see that they were probably in the office more than one would think based on the popular image of the 1950s Ozzie Nelson (non-lawyer) father. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964); QUINTIN JOHNSTONE & DAN HOPSONG, JR., *LAWYERS AND THEIR WORK* (1967).

This raises another point touched on by Subrin. Women have entered the legal profession in substantial numbers during the past thirty years. In society as a whole, we have more two-income couples and more lawyer-lawyer couples. In these relationships, seldom found in the first half of the Twentieth Century, there simply is not the same potential for an attorney (usually male) to work the same bone-numbing hours that appear to have been put

In addition, negotiation is largely not taught in the first year curriculum. Although negotiation may be part of isolated class exercises, role-playing, or discussion, the major casebooks and the typical course syllabus do not devote any significant, separate attention to negotiation. This is true of even the newest casebooks.<sup>140</sup> For example, in Subrin's excellent civil procedure casebook,<sup>141</sup> there, are by my reckoning, approximately eighty pages (of a 1,200 page book) devoted to ADR and attendant issues (e.g., the adversary system, litigation crisis, managerial judging).<sup>142</sup> There really is not a specific discussion of negotiation.<sup>143</sup>

Undoubtedly, Subrin, his co-authors, and other casebook authors would respond that they were not writing negotiation books but casebooks dealing with the traditional first-year subject matters in question. Although this is a pretty strong rejoinder to my criticism, it does not necessarily refute the criticism and its implications for legal education. Civil Procedure is, for example, traditionally a course about litigation in federal court. But Subrin and his co-authors managed to effectively devote something approaching ten percent of the casebook to ADR, which is not about federal court litigation procedure. Although negotiation is not part of litigation procedure per se, it is about dispute resolution and arguably accounts for much more dispute resolution than is accomplished through the ADR methods that are now part of Subrin's and other civil procedure casebooks.<sup>144</sup>

The legal academy should ask itself whether law schools failed, to some extent, by making the mediator necessary, just as they may have "failed" in an earlier era by presenting litigation as the exclusive means of dispute resolution. Greater emphasis on negotiation in the law school curriculum may serve the useful purpose of reducing "unnecessary" mediation or ADR as well as "exces-

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in by traditional lawyers of 50 to 150 years ago. This may also contribute to a degree to the success of mediation and ADR. A less litigious approach may make for more sanity in counsel's personal life.

<sup>140</sup> See, e.g., DAVID G. EPSTEIN, BRUCE A. MARKELL, & LAWRENCE PONOROFF, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT (2002). Despite the provocative, negotiation-friendly title, this well-done new contracts casebook is largely addressing the "deal making" of contract formation rather than negotiation over the parameters of the contractual "deal" or negotiating a resolution of disputes arising out of a contract. Although there is useful discussion of the law's "considerable freedom for the party's lawyer to help structure the transaction in a manner that best serves the client's interest" (*id.* at 1127), negotiation theory, methodology, and technique are not discussed at any length.

<sup>141</sup> See STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT (2000).

<sup>142</sup> See *id.*, ch. 6.

<sup>143</sup> The closest encounters with pure negotiation are several excerpts on articles about the adversary system, a piece discussing some of the problems of court-connected ADR (see Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. Pa. L. Rev. 2169 (1993), reprinted in Subrin et al., p. 602), and Owen Fiss's noted defense of adjudication, which is, of course, a manifesto against negotiated resolution of disputes. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), reprinted in SUBRIN ET AL., p. 594.

<sup>144</sup> See, e.g., JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER, & JOHN E. SEXTON, CIVIL PROCEDURE, CASES AND MATERIALS (7th ed. 1997); RICHARD L. MARCUS, MARTIN H. REDISH, & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH (2d ed. 1995).

sive" litigation. One option is to try to introduce negotiation into the first-year curriculum, just as ADR has been introduced to the basic course on civil procedure. Another route is the regular offering of – and perhaps even mandatory enrollment in – a basic course on negotiation or a course that will require students to learn negotiation.

The academy has adopted ADR notwithstanding some significant scholarly concern over ADR efficacy. It seems odd that negotiation appears to have received comparatively less attention than ADR,<sup>145</sup> particularly since a modern upsurge of scholarly writing about negotiation parallels the rise of the modern ADR era. As Subrin notes (and I agree), the 1976 Pound Conference marks as good a measuring stick as any for the beginning of the modern ADR movement (as well as added impetus for the counter-revolution in civil procedure).<sup>146</sup> At approximately the same time, the Harvard Negotiation Project was engaging in the work that would result in publication of the seminal work *Getting to Yes* in 1981.<sup>147</sup> During the past twenty years, substantial scholarly attention has been paid to negotiation, creating a vibrant sub-field of the law.<sup>148</sup> However, law school course offerings have lagged in comparison while ADR offerings have been in relative bloom. Law schools need to examine the degree to which their priorities have been erroneously inverted. Perhaps negotiation is the horse and third-party ADR the cart.

Of course, competent negotiation requires legal expertise, just as competent mediation or other ADR requires good lawyering skills and substantive legal knowledge. It also requires courts to cast the shadow of the law that will give rise to a framework for resolution.<sup>149</sup> Subrin's prescriptive bottom line holds for negotiation as well as mediation. Both will work better if courts stay focused on their adjudicative mission rather than diluting it by trying to play the dispute resolution roles better played by other institutional actors. To the extent the judicial system engages in mediation or other ADR efforts, it would better serve the public by doing this through the vehicle of different divisions of a multi-door courthouse, as suggested by Frank Sander at the Pound Conference so many years ago.<sup>150</sup>

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<sup>145</sup> Some law schools like Harvard, Stanford, Missouri, Ohio State and Pepperdine – all schools noted for their ADR expertise – appear to have significant offerings in negotiation. But these schools are exceptions and not the rule.

<sup>146</sup> See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

<sup>147</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981). *Getting to Yes* has also been published in second and third editions, most recently in 1997.

<sup>148</sup> See, e.g., KOROBKIN, *supra* note 49; MNOOKIN ET AL., *supra* note 49.

<sup>149</sup> See Mnookin & Kornhauser, *supra* note 14. (observing that negotiation takes place against a backdrop of party estimates of their respective legal entitlements and likely outcomes if dispute is adjudicated to conclusion).

<sup>150</sup> See Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Stempel, *supra* note 146, at 361-95.

## V. NAGGING CONCERNS ABOUT FORUM FAIRNESS AND DISPUTANT SATISFACTION

### A. *What Do Disputants Really Want?*

Subrin's article argues forcefully that many of the criticisms of mediation are overstated and that mediation cum medigation is a good thing.<sup>151</sup> In her comments upon these principle papers, Jean Sternlight has similar observations and generally supports the growth of ADR but raises significant questions regarding appropriate integration of ADR and traditional litigation.<sup>152</sup> The ability of mediation to bring around even traditionalists like Subrin should not blind us to the limitations of mediation and the utility of other means of dispute resolution.

For some time, commentators have expressed reservations about mediation, suggesting that its lack of formality and rights-orientation may disadvantage disputants with relatively less economic power or social capital.<sup>153</sup> Sternlight and I share these concerns,<sup>154</sup> as does Subrin, although he argues that the potential dangers can be controlled and that the potential benefits outweigh the problems presented.<sup>155</sup> I guardedly agree, provided that the dispute resolution infrastructure encourages mediators to contribute to the solution of fairness rather than the problem of power differential.<sup>156</sup> All participants in the debate would agree that neither mediation nor arbitration is a good thing if it becomes – or is perceived as – a biased forum.<sup>157</sup>

There is also another aspect of the evaluation that appears systematically to be overlooked by the legal profession and judicial system even as scholarly work has suggested that disputants may have more desire for the formal, rights-based aspects of resolution rather than the peacemaking aspects of the process. Perhaps most prominently, Deborah Hensler has suggested that the ADR movement, particularly court-annexed mediation, has assumed without adequate

<sup>151</sup> See Subrin, *supra* note 5, at 215-16.

<sup>152</sup> See generally Sternlight, *supra* note 40.

<sup>153</sup> See, e.g., RICHARD L. ABEL, *THE POLITICS OF INFORMAL JUSTICE* (1982) (contributors to this anthology generally argue that formal procedure acts to level playing field among disputants of disparate power); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 444-46 (1992) (suggesting that de-emphasis of legal rights in mediation disadvantages women due to power imbalance with husbands); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545-1546, 1545-1610 (1991) (suggesting that more informal procedures of mediation may provide insufficient protection to weaker parties such as women in many domestic disputes); Joseph Singer, *Nonjudicial Resolution Mechanisms: The Effects on Justice for the Poor*, 13 *CLEARINGHOUSE REV.* 569, 575 (1979) ("It is generally agreed that mediation between parties of significantly unequal power is inappropriate.").

<sup>154</sup> See Sternlight, *supra* note 40, at 300.

<sup>155</sup> See Subrin, *supra* note 5, at 221.

<sup>156</sup> See Sternlight, *supra* note 40, at 300-01; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 *WASH. U. L.Q.* 787, 860 (2001); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *HARV. NEG. L. REV.* 1, 78-92 (2001).

<sup>157</sup> Carrington's reservations about compelling arbitration would presumably be assuaged in large part if arbitrators were both neutral in orientation toward the disputants and adequately grounded in the legal and policy issues surrounding disputes.

foundation that disputants prefer a non-adversarial process when they may, in fact, prefer a decision on the facts and law of their dispute by a neutral decision maker.<sup>158</sup>

The work of Hensler and other legal and social scholars also suggests that many disputants want to have a relatively formal and dignified hearing on their dispute before a competent, unbiased decision maker – a “day in ADR” rather than a day in court, if you will – and that they will accept this resolution with as much or more satisfaction than results from non-adversarial processes.<sup>159</sup> The latter may obtain a resolution, but perhaps does so at the cost of forcing a disputant to feel it has pulled punches and been unable to voice its true concerns and contentions.

Seen in this light, the case for streamlined adjudication of some disputes (with true permission of the disputants) and ADR methods like arbitration grows stronger relative to mediation. Similarly, the concept of the multi-door courthouse gains currency as contrasted with the preferential promotion of mediation. When even traditionalists like Subrin embrace mediation and critical commentators like Brunet endorse something called judicial mediation, we may need to take the figurative step back and ask whether, by making judicial activity less adjudicatory, we are actually undermining rather than enhancing dispute resolution that is satisfactory to the participants.<sup>160</sup>

Reflecting on all of this brings to mind Laura Nader’s longstanding “Peace over Justice” critique of ADR. Nader has for years eloquently argued that too much of the modern ethos of ADR has been aimed in the direction of achieving agreement for agreement’s sake.<sup>161</sup> This may lower the temperature of modern

<sup>158</sup> See Deborah Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RES. 81, 94 (2002); Sternlight, *supra* note 40, at 297.

<sup>159</sup> See, e.g., Sternlight, *supra* note 40, at 297-98; Judith Resnik, *Mediating Preferences: Litigants’ Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 163; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 944-47 (2000); Stempel, *supra* note 146, at 353 (quoting comments of Sociologist Craig McEwen at panel discussion); Craig A. McEwen & Richard Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC’Y REV. 439 (1986). See also Craig A. McEwen & Roselle L. Wissler, *Finding Out if It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131.

<sup>160</sup> See, e.g., Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 950-51 (2002) (suggesting that ADR has replaced segmented, hierarchal elements of litigation system with similar elements of its own that aids business interests and some elements of personal injury bar but does little for other litigants and may simply add to disputing burdens).

<sup>161</sup> See, e.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993). See also Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99, 101 (1994).

ADR advocates, the people who followed the initial innovators, were so uncritical [of ADR]. [C]oercive harmony and, more generally, harmony ideology . . . produces an environment which discourages critical thinking, and which furthermore strips people of their rights as underwritten in our less than perfect judicial system. In other words, like the judicial system, ADR has problems. But unlike the judicial system, these problems and flaws are not made public [because harmony ideology has made many observers blind to the flaws in ADR].

*Id.*

disputing but also reduces the opportunity for illumination. Conflict is reduced, but so is the quantum of judicial decision-making and its attendant contributions to social development.

This is not to say that the bulk of cases require adjudication, certainly not full dress trial. Litigation romantics and ADR critics go too far in suggesting that settlement or ADR peace is always antithetical to the use of law as an instrument of social decision-making and progress (although, if Hensler is correct, non-adversarial ADR may still suffer from the problem of not really giving the litigants what they want).<sup>162</sup> But this perspective must be appreciated by the legal profession lest courts lose too much of their historical capacity to articulate social values and make political decisions neglected or mishandled by other branches of government.

### *B. When Resolution Clouds Rights: A Modest Illustration*

Perhaps most important, the quest for consensus, problem solving, or peace – and the ADR methods pursuing these goals – should not completely lose sight of the legal rights and factual equities of a dispute. The “danger” is, in my view, real indeed, as illustrated by an example.

The American Bar Association Law Student Division annually sponsors a forensic competition (calling it “moot court” would be inaccurate) on negotiation. As per my earlier comments in favor of more education about negotiation rather than less, I generally applaud the advent and growth of the Negotiation Competition.<sup>163</sup> But the authors of the competition problems have, on occasion, exhibited a disturbing tendency to design problems without much regard for the practical factual and legal strengths and weaknesses of the disputants’ relative positions. The 2001 problems demonstrate this with some vengeance.

The Negotiation Competition proceeds by rounds in regional competitions. The top teams in the regions go to the national round, usually held in conjunction with the ABA mid-year meeting. For the Fall 2001 regional rounds, the Round I problem involved negotiation of an executive employment contract and was not just unproblematic but pretty good in terms of relative balance between the sides. It was a realistic hypothetical not far removed from real life and it lent itself to the problem solving style of modern negotiation, with relatively little in the way of social or public policy stakes – and relatively little shadow of the law in that the problem did not involve a concrete claim of entitlement or for relief. Then came Round II.

In Round II, contestants were asked to assume that the employment contract was agreed upon and that the mythical executive Susan Cromwell joined the imaginary MacroTough, a large software business, as a District Manager. Cromwell came into the job with, depending on one’s perspective, a bit of a hidden agenda or a heightened sensitivity about MacroTough’s treatment of women workers, as MacroTough was reputed in the industry to be a den of male chauvinism. She hoped to move the company forward in this regard. Perhaps

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<sup>162</sup> See Hensler, *supra* note 158, at 94.

<sup>163</sup> In addition, Boyd School of Law has had considerable success to date in its three years of entering the Competition. One team tied for second, while two other teams finished near the top of a twenty-eight team regional round. Most recently, two Boyd Law teams finished first and second in the regional round and in the top ten nationally.

predictably, Cromwell came to believe the company was discriminatory and that she was herself the victim of discrimination. Cromwell filed suit, hoping to work toward class certification. According to the facts set forth in the Round II Problem, Macrotough was sufficiently concerned about class liability and bad publicity that it was prepared to offer as much as seventy million dollars to settle the claims of Cromwell and all potential co-plaintiffs.

Unfortunately, however, the facts of Round II did not do much to establish any discrimination or other wrongdoing by Macrotough. The hypothetical problem refers vaguely and blandly to “a pervasive pattern of discrimination and sexual harassment” but no specific facts are given. The ABA Round II Problem thus was remarkably light on any evidence (direct or circumstantial) that would support a finding of discrimination. Nonetheless, the instructions for the problem direct Macrotough to throw money (up to seventy million dollars) at Cromwell to make the case go away. As Fisher & Ury might say, the ZOPA (zone of potential agreement)<sup>164</sup> in Round II was substantial. Then came Round III.

In Round III, we are asked to assume that Macrotough and Cromwell have settled the Round II litigation and that Cromwell has returned to her job at Macrotough. A week later, the company, for no apparent reason, sacks her, obviously in retaliation for having instigated the earlier discrimination case. The Company articulates its reason for discharge as “insubordination,” with no specific supporting information. This tends to make Macrotough look like a dishonorable company that is quick to set forth a pretext for retaliation. Unlike Round II, in which there were murky facts, Round III presents what certainly appears to be a case of blatant, ugly, opportunistic, and mean discrimination by a large, economically powerful actor. Of course, discrimination is illegal. Retaliation is particularly contemptible because of its capacity to chill others and deter their potential claims for relief if they face discrimination in the future.

If Macrotough was on the hook for big money in Round II, one would have expected the Round III Problem to authorize substantial payments or other initiatives by Macrotough in order to resolve Cromwell’s retaliation lawsuit. Maybe not anything close to the seventy million dollars authorized for Round II, but substantial, with some arguable penalty for bad behavior. Instead, Round III calls for a maximum Macrotough offer of \$350,000 that Cromwell’s negotiators are expected to extract if they wish to do optimally well in the ABA Negotiation Competition. There is essentially no recognition of punitive damages or other significant injunctive relief as a possibility when a powerful company so blatantly discriminates in a manner so threatening to the law and policy of the nation (Goliath can smote David and then pay comparatively little in sanction).

In short, the ABA Negotiation Competition Round III Problem seems hopelessly out of sync with the Round II problem, appears to minimize the seriousness of Macrotough’s hypothetical misconduct, and also minimized the importance of the antidiscrimination values held by American law. Round III is exactly the type of case for which Owen Fiss could mount the soapbox and

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<sup>164</sup> See FISHER & URY, *supra* note 14.



insist on the social value of adjudication – or at least a civil plea bargain that had some sting for the perpetrator and some vindication of legal and social values.<sup>165</sup>

Instead, the blatant Round III discrimination is treated as trivial compared to the more ambiguous company conduct in Round II. Some of this undoubtedly stems from the individuality of Cromwell's retaliation claim versus the potential aggregation of the Round II claims. Although this is, of course, a legitimate factor for consideration in framing a settlement or negotiation posture, it does tend to send a message that the strength of the merits of an underlying case matters less than the mathematics of the dispute and the size of the exposure created for a defendant. The net message is, in my view, not a good one for those interested in law as a moral educator.

More important in the disconnect between Round II and Round III (in my view) is that the problem-solving ethos of negotiation and ADR blinded the author(s) of Problem III to the legal and moral issues presented by the retaliation hypothetical. The heinous conduct of the company was comparatively minimized, as were the undoubted emotions that must have arisen in plaintiff Cromwell. Problem III expected Cromwell and Macrotough to make nice as though they were coming together for the first time to work out the details of a shared halftime program between two rival high school bands. It would be more realistic to analogize the situation to a second encounter after one band had refused to yield the field or even interfered with the other band's routine. Under such circumstances, even high school students would be a bit more interested in standing on principle and exacting something in the nature of retribution or vindication rather than merely smoothing over past differences for a comparatively modest fee.

In addition, as previously noted, "problem solving" usually only works when all disputants are acting in good faith. The structure of Problem III and the prior history of the parties strongly suggests that Macrotough is acting in bad faith, yet Cromwell is still expected to have a warm and fuzzy encounter with the company that has just stabbed her in the back. Nowhere in Problem III is there any hint that Cromwell may be hopping mad and hungry for personal vindication, punishment for Macrotough, or a legal and practical precedential statement in support of anti-discrimination law. This is a Problem designed for use in a competition sponsored by the nation's *lawyers*!!

Although others may disagree, I regard the 2001 Negotiation Competition Problems as significant evidence of how quickly a peace-promoting ADR culture can drift quite rapidly away from the law and legal rights and focus myopically on resolution alone. Critics like Nader, Fiss, and Resnik are correct in cautioning against this, but Subrin and Sternlight are correct in arguing that, despite these dangers, ADR can avoid defanging the law and improve the overall quality of social disputing. As a practical matter, ADR has a functional beachhead and is now as much a part of the system as litigation.<sup>166</sup> It needs to be harnessed, supervised, and properly administered rather than bashed. But neither should ADR be permitted to undermine the fundamental pillars of the

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<sup>165</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>166</sup> See Sternlight, *supra* note 40, at 291.

legal regime with fuzzy thinking and a peacemaking ideology that unfairly suppresses adjudicative conflict resolution.

## VI. CONCLUSION: SITING THE SYMPOSIUM IN THE LANDSCAPE OF ADR

My perhaps excessively alliterative title for this comment attempted to make points that I hope have been supported in the body of the comment. Too much discussion of both litigation and ADR tends to forget the lessons of the past. Much of it, particularly the odes to ADR and the anti-conflict, anti-judgmental rhetoric is too fuzzy. Too little appreciation has been given to the means by which litigation and ADR activities actually function. Proponents and opponents seem endlessly to talk about ideal types rather than reality. Negotiations in the field and its outcomes have not been sufficiently examined. Enthusiasm for comparatively new modes of dispute resolution and docket relief has led many, particularly the U.S. Supreme Court, to minimize or overlook issues of fairness. ADR has been surrounded by large doses of rhetoric about freedom and self-determination, but ADR, in practice, reflects insufficient examination of the degree of freedom actually in evidence and the degree to which it is mal-distributed according to class, status, wealth, race, and gender.

At the end of this Symposium day, regarding the content of the papers themselves, however, many of my comments are in the nature of quibbles rather than fundamental criticisms. All three of the primary papers, as well as the extensive Sternlight comments, make excellent, valuable, and timely observations about the current state of ADR. Further, all are consistent.

Subrin embraces mediation coupled with litigation, but concludes that this will work best when courts engage in undiluted litigation, allowing mediation to function best in its sphere. Brunet endorses the judicial prerogative of signaling feedback on the law to help frame a dispute for greater ease and likelihood of resolution. Carrington notes the importance of the substantive law and illustrates the negative consequences that can ensue when the Supreme Court becomes faddish and uncritical in its embrace of arbitration. Sternlight argues for citing ADR selectively on the legal landscape and, much like Subrin, wants courts to act like courts rather than ombudsmen.

All of these commentators argue that rigorous, relentless, rights-conscious, traditional judicial activity will foster more effective operation of the emerging fields of ADR. One can only hope that judges and policymakers are listening.