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SEPARATE AND NOT EQUAL: INTEGRATING CIVIL PROCEDURE AND ADR IN LEGAL ACADEMIA

*Jean R. Sternlight**

INTRODUCTION

A popular poster in the 1970s explained that a woman without a man was like a fish without a bicycle.¹ Some might argue that the relationship between civil procedure and alternative dispute resolution (ADR) is equally close, which is to say, not at all close. However, this Essay urges that by treating ADR and civil procedure as two separate fields, legal academia is doing a disservice to future legal practitioners and to the public.

I. THE SEPARATE AND UNEQUAL WORLDS OF CIVIL PROCEDURE AND ADR

Traditionally, academics specializing in ADR and civil procedure have not tended to deal with each others' issues. The typical civil procedure course focuses on litigation. Commencing with personal and subject matter jurisdiction, or occasionally with due process, the course then moves on to cover such matters as the *Erie*² doctrine, issue and fact preclusion, and many aspects of litigation (complaints, answers, discovery, motions to dismiss and for summary judgment, appeals, etc.).³ A significant minority of civil procedure courses reverse

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1 For some background on the purported origin of this phrase, see John S. Allen, *A Bit of Herstory*, at <http://www.geocities.com/SiliconValley/Vista/3255/herstory.htm> (last visited Sept. 22, 2004).

2 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

3 See, e.g., BARBARA ALLAN BABCOCK & TONI MASSARO, *CIVIL PROCEDURE: CASES AND PROBLEMS* (2d ed. 2001); JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND*

the order of these topics, commencing with the “pleadings” portion of the course before moving on to jurisdiction.⁴

A third and unique approach is taken by the text written by Professors Fiss and Resnik.⁵ Aiming “to introduce the structural features of all forms of legal procedure,”⁶ this text “probe[s] the conceptual continuities across adjudication, alternative dispute resolution (ADR), and dispute resolution (DR) and among processes labeled ‘civil,’ ‘criminal,’ or ‘administrative.’”⁷ Yet, while the Fiss/Resnik approach is something of an exception, and while most civil procedure texts contain at least some mention of ADR, the ADR portion of the course is usually small, whether measured in relative number of text pages or class hours.⁸

MATERIALS (8th ed. 2001); RICHARD H. FIELD ET AL., CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE (8th ed. 2003); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (3d ed. 2001); JOEL WM. FRIEDMAN ET AL., THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS (2002); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS (8th ed. 1999); ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS (2003); A. LEO LEVIN ET AL., CIVIL PROCEDURE: CASES AND MATERIALS (2d ed. 2000); LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE (2001); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE (3d ed. 2004); STEPHEN C. YEAZELL, CIVIL PROCEDURE (5th ed. 2000).

4 See, e.g., RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH (3d ed. 2000); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT (2d ed. 2004).

5 OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE (2003).

6 *Id.* at 1.

7 *Id.*

8 See BABCOCK & MASSARO, *supra* note 3, at 779–810 (including thirty-one pages on ADR in a chapter on decisionmakers and models in a 1214 page text); COUND ET AL., *supra* note 3, at 1334–76 (including a forty-two page separate chapter in a 1376 page book); FIELD ET AL., *supra* note 3, at 3–4, 29, 125–28, 289–314, 974–75 (including forty scattered references to phases of lawsuits, settlement, and other matters throughout a 1486 page book); FRIEDMAN ET AL., *supra* note 3, at 822–49 (including a twenty-seven page chapter in an 849 page book); HAZARD, *supra* note 3, at 47–48 (containing a two page mention in the introduction of a 1410 page book); IDES & MAY, *supra* note 3, at 24–38, 311, 383–84 (including seventeen pages of a 1180 page book, the bulk of which are contained in a separate chapter); LEVIN ET AL., *supra* note 3, at 634–51 (including a seventeen page separate chapter in a 985 page book); MARCUS ET AL., *supra* note 4, at 106–17, 444–79 (splitting forty-six pages between two chapters in a 1200 page book); SILBERMAN & STEIN, *supra* note 3, at 1035–74 (including thirty-nine pages in 1074 page book); SUBRIN ET AL., *supra* note 4, at 521–34 (including thirteen pages of a 1033 page book); TEPLY & WHITTEN, *supra* note 3, at 17–21, 245, 252–53, 278, 373, 408, 499, 556, 600, 644, 785, 863, 883, 955 (including nineteen pages in a 1022 page book); YEAZELL, *supra* note 3, at 576–627 (covering fifty-one pages of a 1017 page book, contained in a chapter, entitled “Resolution Without

My informal survey of civil procedure colleagues through the Association of American Law Schools (AALS) civil procedure listserve revealed that few spend more than a day or two on ADR issues and that most who do cover ADR treat it quite separately from the rest of civil procedure. Those civil procedure professors who spend any time on ADR most typically spend a day or so explaining to their students the definitions of mediation, arbitration, and various other approaches to dispute resolution. Also, some civil procedure professors discuss negotiation, often in the context of court-ordered settlement conferences. A few civil procedure professors at least assign their students to participate in role-playing exercises that enable them to begin to think about how ADR is considered by practicing attorneys,⁹ but even these exercises typically give students the impression that an either/or choice can be made between dispute resolution processes. While these discussions are certainly better than nothing, and do at least give students the basic definitions of the various alternative processes, they often do a poor job in helping students to understand how fluidly disputes move among the various dispute resolution processes.¹⁰

Trial"). The Fiss and Resnik text contains the most material on ADR. See FISS & RESNIK, *supra* note 5, at 43–46, 431–532 (including 105 of 1221 pages, the bulk of which are contained in chapter 4, entitled "Resolution Without Adjudication")

9 For example, some civil procedure professors use the "Daily Bugle" or "Burning Sailboat" exercises contained in RISKIN ET AL., INSTRUCTOR'S MANUAL WITH SIMULATION AND PROBLEM MATERIALS TO ACCOMPANY DISPUTE RESOLUTION AND LAWYERS (2d ed. 1997) and LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (abr. 2d ed. 1998) 93–99, 119–43 (1998). Such exercises ask students to counsel their imaginary clients on the choice of process or play out the same factual dispute through negotiation, mediation, and arbitration.

10 As has been noted, the Fiss and Resnik text is an exception. Seeking to expose students to procedural issues contained not only in civil litigation and ADR but also to those present in criminal and administrative contexts, that text is in many ways more revolutionary than the proposals made in this Essay. See FISS & RESNIK *supra* note 5. Also, in response to my informal survey, I learned of a few professors who seek to weave ADR and civil procedure together in their courses. One, for example, (Lea Vaughn) explains that she attempts to have both ADR and professional responsibility permeate her course. For example, she spends time in the first few days discussing disputes and how lawyers transform them, examining how the initial client interview transforms the client's and lawyer's approach to the dispute, counseling students on how to discern clients' interests as well as positions, and discussing when and how ADR options should be considered. Later in the course she also uses exercises on interviewing, mediation, and sometimes negotiation. Another professor (Jeffrey Parness) spends significant time examining federal and state arbitration statutes, looking at court-connected ADR, and examining courts' power to compel attendance and participation in settlement conferences.

Similarly, some pretrial litigation courses might contain a discussion, invariably at the end of the course, about negotiation and/or mediation.¹¹ In those pretrial litigation courses that are based on role-playing litigation of a particular dispute, students are sometimes asked at the end of the semester to try to negotiate or mediate a resolution to the dispute. While pretrial litigation is the course that probably best illustrates the way that litigation and other approaches interrelate in practice, waiting until the very end of the course to consider the role of settlement, mediation, and other approaches to dispute resolution creates the misimpression that these forms of dispute resolution are less common or less important than litigation.

Equally, the typical ADR course devotes little or no attention to litigation, law, courts, or administrative institutions. The most frequently offered ADR courses are the ADR survey, negotiation, mediation, and arbitration.¹² A few schools also teach other ADR courses, including mediation clinics, mediation advocacy, cross-cultural negotiation, and multi-party dispute resolution. Whereas the survey and arbitration courses can be fairly large, the negotiation and mediation courses are frequently capped at relatively low numbers, such as twenty-four students.

ADR survey courses vary substantially, but the typical goal of the survey is to expose students to the most important ADR topics: negotiation, mediation, and arbitration. Often such courses focus more attention on negotiation and mediation than on arbitration, and they rarely discuss courts or how litigation relates to use or enforcement of results achieved through ADR.¹³

11 See, e.g., R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY AND PRACTICE 15–16, 533–629 (3d ed. 2001) (including ninety-eight pages on negotiation and ADR out of a 631 page book); ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 649–80 (5th ed. 2001) (including thirty-one pages on the “settlement process” in a 694 page book); THOMAS A. MAUET, PRETRIAL 354–82 (5th ed. 2002) (containing twenty-eight pages on settlement, including four pages on negotiation at a settlement conference, out of a 382 page book); J. ALEXANDER TANFORD, THE PRETRIAL PROCESS 331–87 (2003) (including fifty-six pages on negotiation in a 387 page book).

12 According to a survey conducted in 2003 by the ABA Section on Dispute Resolution, the survey course is listed by 141 schools, negotiation by 87, mediation by 79, and arbitration by 50, of a total of 184 schools. Am. Bar Ass’n Section of Dispute Resolution, *2003 Directory of Law School Dispute Resolution Courses and Programs*, at <http://www.abanet.org/dispute/directory.html> (last visited Sept. 26, 2004). As noted earlier, it should be recognized that schools do not necessarily offer, on a regular basis, all courses that are listed in their catalogues.

13 See, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 209–83, 375–426 (4th ed. 2003) (containing seventy-four pages on arbitration and fifty-one pages on courts and ADR procedures in a 601 page book); ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF

Some survey courses also cover interviewing and counseling, and most spend some time on lesser known processes such as med-arb, early neutral evaluation, summary jury trials, and mini-trials.¹⁴ Survey courses often ask students to think about ADR processes from the perspective of the neutral, the lawyer, and policy makers. They frequently include role-playing exercises and may also use videos, guest lectures, group projects, or other creative pedagogical techniques as well as lecture and discussion. ADR survey courses are often graded based on papers, presentations, or projects instead of exams.¹⁵

Negotiation courses typically focus on the skills and theory needed to be a good negotiator. Frequently examining both problem solving and distributive approaches to negotiation, as well as listening skills, psychology, and economics, such courses usually provide students with opportunities to participate in role-playing negotiation exercises. While some of these exercises place students in the role of attorneys, many other exercises have students playing the role of an individual negotiating on their own behalf. Negotiation courses rarely spend much if any time on court-ordered settlement conferences or the law or practical considerations on how settlement agreements can or should be enforced.¹⁶

LAWYERS 545–905 (3d ed. 2002) (containing fifty-one pages on courts and ADR procedures and 308 pages on arbitration in a 962 page book); RISKIN & WESTBROOK, *supra* note 9, at 502–88, 589–647 (containing fifty-eight pages on courts and ADR and eighty-six pages on arbitration in an 800 page book). A forthcoming ADR survey of which I am a co-author, CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION PROCESSES: BEYOND THE ADVERSARIAL MODEL* (forthcoming 2005), contains 163 pages of 936 on arbitration, and contains 45 pages describing public hybrid processes that largely bridge the worlds of litigation and ADR.

14 For examples of ADR texts, see GOLDBERG ET AL., *supra* note 13; CARRIE MENKEL-MEADOW ET AL., *supra* note 13; RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION*, *supra* note 13; RISKIN & WESTBROOK, *supra* note 9.

15 See samples of ADR syllabi listed at the AALS, Alternative Dispute Resolution Section web page, at http://www.law.missouri.edu/aalsadr/DR_syllabi.htm (last updated Aug. 31, 2004).

16 Some of the books used most frequently in negotiation courses are: ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990) (containing no pages on settlement conferences or enforcement issues); ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991) (containing no discussion of enforcement or court processes); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 426–62 (2002) (containing thirty-six pages on enforcement issues in a 468 page book); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000) (containing no discussion of courts or enforcement issues); MELISSA L. NELKEN, *UNDERSTANDING NEGOTIATION* (2001) (containing no discussion of enforcement issues or court processes); ALAN SCOTT RAU ET AL., *NEGOTIATION* 296–326 (2d ed. 2002) (containing

Mediation courses typically attempt to teach students what mediation is, the differences between facilitative and evaluative approaches to mediation, how mediation differs from other dispute resolution approaches, and what skills are needed to be a good mediator. Often the first part of a mediation course is a short negotiation course, used to teach students the difference between interests and positions and to emphasize the need for a problem solving approach in mediation. While many mediation courses include a unit on the lawyer's role in mediation, i.e., mediation advocacy, this is often not the focus of the course.¹⁷ Popular mediation texts, similarly, tend to focus more on the process of mediation and the role of the mediator rather than on the role of the lawyer in mediation. Mediation courses frequently spend little, if any, time on court-ordered mediation, federal or state statutes mandating or regulating mediation, or the law that has grown up around the enforcement of agreements to mediate or agreements reached in mediation.¹⁸

thirty pages on enforcement issues in a 326 page book); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (1999) (containing no discussion of enforcement issues). A number of negotiation courses also have students read DOUGLAS F. STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2000), which does not focus on legal disputes at all.

17 See generally JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (2001); JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* (2000) [hereinafter COOLEY, *MEDIATOR'S HANDBOOK*]; KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (3d ed. 2004); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986); see also Alternative Dispute Resolution Section, Ass'n of Am. Law Schs., *Dispute Resolution Syllabi*, at http://www.law.missouri.edu/aalsadr/DR_syllabi.htm (last updated Aug. 31, 2004) (containing a sampling of mediation syllabi).

18 See Suzanne J. Schmitz, *What Should We Teach in ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 HARV. NEGOT. L. REV. 189, 210 (2001) (arguing that while the three major ADR texts do a thorough job of preparing law students for issues facing mediators, they do not address as thoroughly those issues facing lawyer representatives or advocates and that this focus is problematic because it gives students the sense that the mediator is the most important figure in the mediation, while far more lawyers will serve as advisors or representatives in mediation than will serve as mediators). For examples of texts commonly used in mediation courses, see JAMES J. ALFINI ET AL., *supra* note 17, at 244–55, 281–93 (containing eleven pages on statutory requirements to mediate and thirteen pages on enforcing mediated agreements in a 606 page book); JOHN W. COOLEY, *MEDIATOR'S HANDBOOK*, *supra* note 17, at 247–49 (containing two pages on court enforcement and advocacy issues in a 266 page book); KIMBERLEE K. KOVACH, *supra* note 17, at 356–86 (containing thirty pages in a 520 page book); CHRISTOPHER W. MOORE, *supra* note 17, at 248–61 (1986) (containing thirteen pages in a 298 page book). Even books focused primarily on mediation advocacy focus little attention on court-connected processes or enforcement of mediated agreements. See HAROLD I. ABRAMSON, *MEDIATION REPRESENTATIVE*

Arbitration courses are quite different than mediation and negotiation courses. The typical arbitration course focuses on Supreme Court cases dealing with commercial and/or labor arbitration. Rather than teaching students to be arbitrators, or to be attorney-advocates within the arbitration process, the course more frequently examines case law on such issues as when and whether arbitration clauses are valid, the nature of arbitrators' powers and authority, and the circumstances under which arbitral decisions are to be enforced or instead vacated.¹⁹ Most arbitration courses include substantial discussion of public policy issues. Some arbitration courses also include role plays of arbitration hearings. Few arbitration courses spend much, if any, time on non-binding arbitration, instead focusing far more heavily on binding arbitration.²⁰

The separation between civil procedure and ADR can also be illustrated by comparing the professors who teach the two courses. In another article, I once described the divide between typical arbitrators and mediators as "[p]in stripes meet birkenstocks."²¹ While of course stereotypical, the divide between civil procedure and ADR professors has a similar feel. Anecdotally one might say that where civil procedure professors tend to be more focused on rules, logic, and legal analysis, ADR professors tend to be more focused on emotion, psychology, and interdisciplinary connections: head vs. heart, adversarial vs. problem-solving, even yang vs. yin.²² While my attempts to find actual objective differences based on the AALS biographies of these two groups yielded surprisingly little of interest,²³ perhaps if a Myers-

SENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS (2004) (mentioning that some mediation is court-ordered but containing no special discussion of court-connected processes nor of enforcement); JOHN W. COOLEY, MEDIATION ADVOCACY 201-06 (2d ed. 2002) (containing five pages on court connected processes and enforcement in a 323 page text); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 344-45 (1996) (containing one page on the subject in a 530 page book).

19 See THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION (3d ed. 2003) (containing no discussion of court-connected arbitration); CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS (2002) (containing no discussion of court-connected arbitration); KATHERINE V.W. STONE, ARBITRATION LAW, 587-623 (2003) (containing thirty-six pages of a 624 page book on court-connected arbitration).

20 See texts noted *supra* note 19.

21 Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 102.

22 Perhaps those few of us who teach both courses have a foot in each camp.

23 Analyzing a sampling of both civil procedure and ADR professors reveals that the two groups are quite similar with respect to a variety of objective factors. Using the AALS Directory of Law Teachers (2003-2004), I compared twenty-two ADR

Briggs or other psychological examination were administered to groups of civil procedure and ADR professors, the differences would be significant.²⁴

ADR professors often train students to think differently than they do in their other courses such as civil procedure. Professor Susan Sturm has called the typical approach to legal education the “‘gladiator’ model,” in that it focuses primarily on “analytical rigor, toughness, and quick thinking.”²⁵ By contrast, ADR courses tend to be less adversarial in their orientation, focusing more on class discussion, exercises, and group projects as a means to help students learn not only the law but also the psychology and counseling techniques necessary to be a good lawyer.²⁶

As for equality, it is clear that civil procedure has a privileged position in legal academia relative to ADR. Although every law school now lists in its catalogue at least one ADR course,²⁷ and the status of ADR has greatly improved in recent years,²⁸ it is civil procedure and not ADR that is required to be taken by all law students.²⁹ As well, the

professors to twenty-two civil procedure professors, all of whom had ten or more years of teaching experience. Whether I included or excluded those ADR professors who focus on labor arbitration, I found remarkable consistency in terms of age, gender, years of practice experience and other factors I thought to examine.

24 For more information on the Myers Briggs Type Indicator, see <http://www.myersbriggs.org> (last visited Nov. 14, 2004).

25 Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119, 121 (1997).

26 For an early symposium studying how ADR can be taught, see Symposium, *Alternative Dispute Resolution in the Law Curriculum*, 34 J. LEGAL EDUC. 229 (1984); see also Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 6 (1999) (emphasizing that law schools must do a better job of teaching students to be problem solvers and not just litigators); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (describing the different “philosophical map” contained in the heads of prototypical litigators and ADR practitioners).

27 See Am. Bar Ass’n Section of Dispute Resolution, *supra* note 12 (listing 887 courses and programs at the 184 ABA approved law schools). According to the study, all 184 schools listed in the directory offer at least one dispute resolution course; 141 schools list a dispute resolution survey course; 50 schools list a course focused on arbitration; 79 schools list a course focused on mediation; 87 schools list a course in negotiation. Of course, it is possible that some of these listed courses are not offered on a regular basis.

28 Back in the 1980s, few law schools offered any ADR classes. See, e.g., Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 585–86 (1998) (describing the growth of support within the legal community for ADR course offerings).

29 There are a few exceptions. The University of Missouri-Columbia now requires all first-year law students to take a course titled “Lawyering” that focuses substantially

upper-level course offerings in litigation and civil procedure are more plentiful than those in ADR,³⁰ mock advocacy opportunities focus on appellate and trial disputes,³¹ and the Bar exam typically tests on civil procedure but not ADR.³² The end result of the separate and not equal status of ADR is that our students graduate with far greater exposure to litigation than to other forms of dispute resolution. They also graduate with a sense that these two fields are quite distinct from one another. To the extent that litigation students study ADR they often get the idea that the choice between litigation and other approaches, is made once, at an early stage in the dispute, and that there is little or no fluidity between litigation and the other processes. That is, law students often imagine that lawyers say to clients: "We will negotiate or mediate rather than litigate this dispute." For some students (whom I privately label "granolas")—those who are uncomfortable with the adversary process—this option sounds very attractive. They like the idea of resolving a dispute collaboratively with the other side, and also appreciate the possibility of looking to interests that are not purely legal in nature. For other students—those who see themselves as gladiators aiming to protect their clients through ultimate adversarial behavior—the ADR option seems wimpy and undesirable. They plan to avoid ADR altogether. Yet, as the subsequent sections will show, both views are misguided.

on ADR. See University of Missouri-Columbia School of Law, *For Current Students: Curriculum*, at <http://www.law.missouri.edu/current/curriculum/index.htm> (last updated Oct. 4, 2004).

30 A study of the top four law schools from each *U.S. News and World Report* tier reveals that more than twice as many litigation-related upper-level courses are listed as compared to ADR courses. Michele Baron, *Survey of Schools' Offerings in Civil Procedure & ADR* (2004) (on file with author). This statistic likely undercounts the disparity, in that more ADR courses than litigation courses likely have limited enrollment caps.

31 A study of the top four law schools from each *U.S. News and World Report* tier reveals that the vast majority of mock advocacy experiences are appellate arguments, some are mock trial, and only a few are focused on client counseling, negotiation, or mediation. Michele Baron, *Summary of Schools' Litigation and ADR-Related Competitions* (2004) (on file with author).

32 The web site for BAR/BRI, a private company that coaches students for the Bar exam, reveals that evidence is tested on the Multistate Bar Exam and that state and federal rules of civil procedure are often tested by essay. ADR is not mentioned. See BAR/BRI, *Bar Exam Information: Subjects Tested*, at <http://www.barbri.com> (last visited Sept. 22, 2004).

II. CIVIL PROCEDURE AND ADR ARE INTEGRATED IN PRACTICE

The relationship between civil procedure and ADR in practice is far different than in the academy. Looking at dispute resolution from the perspective of court administrators, private contracts, or private attorneys, one sees that there is a real-world blending between litigation and other dispute resolution approaches. Thus, whether one practices in federal court, state court, or before administrative agencies, “litigators” are now ADR practitioners.³³ Equally, ADR practitioners are typically also litigators, unless they practice exclusively as neutrals. While some initial advocates of ADR may have hoped that such processes would be totally distinct from litigation, the reality is that, increasingly, disputes commenced in ADR may later be litigated.³⁴ Also, disputes commenced in court increasingly are directed to ADR.

A. Court and Agency Connected Programs

Court and administratively connected ADR programs were one of the biggest ADR stories of the 1990s. The federal Alternative Dispute Resolution Act of 1998³⁵ mandated that every federal district court “shall authorize . . . the use of alternative dispute resolution processes in all civil actions.”³⁶ Similarly, most states now require that many

33 Martin Shapiro made this point over twenty years ago, observing that “mediation and litigation are invariably intimately interconnected and interactive rather than distinct alternatives for conflict resolution.” MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* viii (1981).

34 This is true not only for arbitration, where awards are often confirmed or possibly vacated in court, but also for mediation. See Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 512 (2004); see also James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 173 (2001) (discussing court enforcement of mediation agreements); Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 41–42 (2001) (discussing contract and mediation in the context of settlement enforcement); Duane W. Krohnke, *Mediation’s Case Appearances Are More Frequent in 1998*, 17 ALTERNATIVES TO HIGH COST LITIG. 1, 173 (1999) (discussing enforcement of mediation agreements).

35 28 U.S.C. §§ 651–658 (2000).

36 *Id.* § 651(b); see also ROBERT J. NIEMIC ET AL., *GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR* (2001); ELIZABETH PLAPINGER & DONNA STIENSTRA, *FED. JUDICIAL CTR. & CPR INST. FOR DISPUTE RESOLUTION, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1996) (describing federal programs).

cases filed in court be taken through an ADR process before the disputants should have access to a judge or jury.³⁷

The shrinking number of trials has led to a major investigation by the American Bar Association (ABA) and leading academics into the causes underlying the “vanishing trial.”³⁸ The demise of bench and jury trials is certainly attributable to many factors besides ADR.³⁹ As well, it is important to emphasize that cases can be disposed of through many means that are neither trial nor settlement.⁴⁰ Still, it is striking how many more disputes filed in court are now resolved through ADR rather than trial. The latest federal court statistics show that just 1.86% of filed cases were resolved through trial, 1.21% through jury trial, and 12.87% by dispositive motion.⁴¹ The state court figures, while more variable, are similar.⁴²

By contrast, large numbers of cases filed in federal or state court are now resolved through ADR, and especially settlement.⁴³ While

37 One article states that as of 1994 “[a] t least 46 states and some 1,200 courts now have some form of official ADR program in place.” S. Gale Dick, *ADR at the Crossroads*, DISP. RESOL. J., Mar. 1994, at 50.

38 See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUDS. 459 (2004). Other articles on this subject are contained in the same issue of the *Journal of Empirical Legal Studies*.

39 See, e.g., Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMP. LEG. STUDS. 783 (2004) (observing that the diminution in the numbers of trials in federal court may be due to a combination of the migration of trials to other venues such as administrative tribunals, as well as to a privatization of dispute resolution through increased reliance on ADR).

40 One of my pet peeves, as a civil procedure and ADR professor, is how often I see and hear the statistic that 95% or 97% of cases settle. This is simply false. While 1.8 or 3 or 5% of cases may go to trial in a particular jurisdiction, a significant number of the cases that do not go to trial are for example resolved by courts, on motions to dismiss or for summary judgment. See, e.g., Galanter, *supra* note 38, at 483–84.

41 See Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry: Federal District-Court Civil Cases*, at teddy.law.cornell.edu:8090/questata.htm (last visited Oct. 16, 2004) (providing access to federal court statistics for 2000).

42 Information compiled regarding twenty-two states by the Court Statistics Project for the National Center for State Courts shows that from 1976 to 2002, jury trials fell from 1.8% to 0.6% of total civil dispositions. In that same period, bench trials fell from 34.2% to 15.2%. Galanter, *supra* note 38, at 507 tbl. 4; Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMP. LEG. STUDS. 755, 768 (2004).

43 In fiscal year 2000, 53% of federal cases were dismissed, other than for lack of prosecution, default judgment, consent judgment or on pretrial motion, and 18.5% of cases resolved on “other” grounds. See Eisenberg & Clermont, *supra* note 41. Figures obtained from the National Center for State Courts with respect to twenty-seven states show that the percentage of cases ending in settlement or dismissal was 47%, with an average of 28% of cases resolved through “other” means. Court Statis-

data on the precise number of disputes sent to or resolved through facilitated ADR such as mediation or arbitration has proved quite elusive, it is clear that many disputes are now being sent to either private or court-connected ADR.⁴⁴ ADR devotees may sometimes criticize court programs, implying or even stating that such programs do not represent “real” ADR, charging that they are too evaluative or too focused on concerns of efficiency as opposed to individual empowerment.⁴⁵ Nonetheless, for better or quite possibly for worse, these court-connected experiences are what many attorneys know as ADR.⁴⁶

Additionally, there is a very close linkage between certain ADR approaches and some dispute resolution programs typically categorized as part of civil procedure. How does one distinguish between court-ordered settlement and pretrial conferences and determinations rendered by magistrates and special masters on the one hand, and ADR processes on the other?⁴⁷ Given their obvious commonalities it is not surprising that the two sets of processes raise similar is-

tics Project, Nat'l Ctr. For State Courts, *General Jurisdiction Court Civil Manner of Dispositions for 27 States, 2001* (on file with author); see also Galanter, *supra* note 38, at 507 tbl.4 (reporting that for the period 1976–2002, data provided for twenty-two states showed that civil jury trials fell from 1.8% to 0.6% of dispositions, and that the number of bench trials fell from 34.3% to 15.2%).

44 See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMP. LEG. STUDS. 843, 846–47 (2004); Galanter, *supra* note 38, at 514–15.

45 See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996). For two excellent discussions on the nature of court-connected mediation, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001) [hereinafter Welsh, *Making Deals*]; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

46 See Roselle L. Wissler, *Barriers to Attorneys’ Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 461–62 (2004) (“[A]ttorneys’ ADR use often is the result of a judicial referral . . . rather than the result of a voluntary, mutual agreement by both parties . . .”); see also Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 475 (2002) (describing ADR as a more routine part of the civil litigation process with the implementation of ADR programs in many state court systems).

47 Edward Brunet puzzles over the significant commonalities between judicial settlement conferences and mediation. See, e.g., Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 233–35 (2003) (observing that judges tend to use an evaluative mediation style, as opposed to a facilitative technique). For a discussion of settlement conferences and other dispute resolution processes, see Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

sues, such as whether good faith participation can be compelled,⁴⁸ whether and when discovery should be permitted prior to the process,⁴⁹ and the standards under which a particular outcome might be appealed. Devices such as special masters, summary jury trials, and short trials⁵⁰ lie on a divide between litigation and ADR.

Administrative agencies, similarly, are increasingly using ADR methods to resolve disputes in a less adversarial fashion.⁵¹ At the federal level, ADR is now widely used by such agencies as the Internal Revenue Service,⁵² the Equal Employment Opportunity Commission,⁵³ the General Services Administration (which handles government procurements),⁵⁴ and the Air Force.⁵⁵ While mediation has

48 Compare FED. R. CIV. P. 16 (allowing a judge to order a party, as well as its attorney, to attend a settlement conference), with John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 69 (2002) (discussing rules used to compel parties to attend or participate in mediations).

49 Federal Rule of Civil Procedure 16(b)(3) allows a judge or magistrate to hold a scheduling and planning meeting, at which the judge or magistrate may limit the time for discovery so that the process can be completed before any judicial settlement conferences, thereby increasing the chances of settlement at the conference. In the ADR context, the question of the proper timing of discovery has frequently been discussed.

50 See *infra* notes 153–65 and accompanying text for a description of the “short trial” used in Nevada.

51 Use of ADR at the federal level was spurred by passage of the Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 571–583 (2000)).

52 See Internal Revenue Service Restructuring and Reform Act of 1998 § 3465(a), 26 U.S.C. § 7123(b) (2000) (“[A] mediation or alternative dispute resolution (“ADR”) process is currently available in certain cases.”), available at <http://www.irs.gov/individuals/article/0,,id=97487,00.html>.

53 See *Policy Statement on Alternative Dispute Resolution*, 3 EEOC Compl. Man. (BNA) No. 229, at N:0181 (July 17, 1995), available at <http://www.eeoc.gov/policy/docs/adrstatement.html>.

The Equal Employment Opportunity Commission (EEOC) is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. Used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination, as well as Commission operations.

Id.

54 See U.S. Gen. Serv. Admin., *Office of Gen. Counsel: Gen. Law Legal Counsel*, at <http://www.gsa.gov> (last visited Sept. 22, 2004) (“The General Law Division is responsible for managing the agency’s alternative dispute resolution (ADR) program. The General Law Division’s attorneys coordinate and conduct the agency’s nationwide ADR training program. The General Law Division represents GSA in interagency ADR working groups.”).

proved particularly popular,⁵⁶ some of the U.S. agencies are also using other methods of dispute resolution including non-binding arbitration, partnering, and an ombuds process.⁵⁷ At the state level, similarly, ADR is often used to handle such issues as workers' compensation,⁵⁸ condominium disputes,⁵⁹ and construction defects.⁶⁰

In short, courts and many administrative agencies are now requiring that many cases filed as litigation matters proceed through ADR as, at minimum, a prerequisite to later litigation. While there is tremendous variation among jurisdictions and between practice areas, court-connected ADR has now come to dominate the work of some courts. In the Eighth Judicial Circuit in Nevada, for example, all cases brought for \$40,000 or less must proceed through non-binding arbitration.⁶¹ The practical effect of this requirement is that roughly fifty percent of civil cases in which answers are filed proceed through non-binding arbitration.⁶² Of these, seventy-five percent are resolved, meaning that no *de novo* trial is sought following the non-binding arbitration.⁶³ Similarly, Florida now requires that virtually all civil

55 See Mary L. Walker, Dep't of the Air Force, *Endorsement of Air Force ADR Program*, at <http://www.adr.af.mil> (last visited Sept. 22, 2004).

As the General Counsel of the Department of the Air Force, I proudly endorse our Air Force Alternative Dispute Resolution (ADR) Program Office. The Air Force ADR Program is the exemplar program in the federal government, having received numerous awards for its efforts to bring resolution to costly and time-consuming disputes.

Id.

56 See JEFFREY M. SENDER, *FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT* (2004).

57 See Philip J. Harter, *Federal Dispute Resolution Coming of Age*, *DISP. RESOL. MAG.*, Winter 2004, at 24 (reviewing SENDER, *supra* note 56).

58 See, e.g., MO. ANN. STAT. § 287.460 (West 1993 & Supp. 2004).

59 See, e.g., FLA. STAT. ANN. § 718.501(1)(d) (West 1993 & Supp. 2004).

60 See, e.g., NEV. REV. STAT. ANN. 40.680 (Michie 2002 & Supp. 2003).

61 See NEV. REV. STAT. ANN. 38.250 (Michie 2002 & Supp. 2003) (effective through Dec. 31, 2004).

62 Arbitration Commissioner Chris A. Beecroft, Jr., reports that in 2003, answers were filed in 7107 civil cases, and arbitration files were opened in 3687 of those cases. E-mail from Chris A. Beecroft, Jr., Arbitration Commissioner, Nevada Eighth Judicial Court District, to Jean R. Sternlight, Professor of Law, Boyd School of Law, University of Nevada, Las Vegas (July 20, 2004, 7:34 AM PST) (on file with author). During the first half of 2004, answers were filed in 3698 cases and 1819 of these were assigned to arbitration. *Id.*

63 See Chris A. Beecroft, Jr., Eighth Judicial District Court, *Arbitration*, at http://www.accessclarkcounty.com/district_court/arbitration.htm (last visited Sept. 22, 2004).

cases go to mediation.⁶⁴ In many jurisdictions, mediation is mandatory at least with respect to child custody disputes.⁶⁵ Some praise the huge role of court- and agency-connected ADR⁶⁶ and others are more critical,⁶⁷ but it is clear that the phenomenon of court- and agency-connected ADR has had a major impact.

B. Contractual ADR

ADR is also increasingly called for in contracts parties may have entered prior to when the particular dispute arose. For example, in certain fields such as construction,⁶⁸ international business,⁶⁹ and franchising,⁷⁰ many, if not most, contracts call for arbitration, perhaps preceded by negotiation and/or mediation, should a dispute arise. Virtually all securities brokers require their customers to arbitrate future disputes.⁷¹

In other areas, although predispute dispute resolution agreements may not be the norm, they are increasingly common. Many employers now offer or require that their non-unionized employees

64 See FLA. R. CIV. P. 1.700. The exceptions to this rule are: bond estreatures, habeas corpus and extraordinary writs, bond validations, civil or criminal contempt, and other matters as may be specified by administrative order of the chief judge in the circuit. *Id.*

65 See, e.g., N.C. GEN. STAT. § 50-13.1 (2003) (requiring child custody disputes to be mediated); NEV. 8TH JUD. CIR. R. 5.70 (requiring mediation of all child custody disputes before a judge may hear them).

66 The movement toward court-connected ADR has been praised for saving time and money, increasing disputant satisfaction, and providing more choices to disputants. Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 327-28 (2003).

67 See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2170 (1993) (arguing against mandatory federal arbitration programs); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 212 (1995) (examining the future of ADR).

68 See, e.g., Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303 (1998) (using construction contracting as a model).

69 See, e.g., GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 7 (2d ed. 2001).

70 See Christopher R. Drahozal, *Arbitration Clauses in Franchise Agreements: Common (and Uncommon) Terms*, 22 FRANCHISE L.J. 81, 81 (2002) (reporting that slightly less than half of the studied franchise agreements contained arbitration clauses); Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 91 (2001) (stating that arbitration and mediation agreements are important for franchisors in franchise agreements).

71 See Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 447 (2003).

resolve legal claims with the employer through arbitration;⁷² consumers are often required to arbitrate disputes with lenders, manufacturers, or service providers;⁷³ and mediation and other forms of ADR are increasingly used with respect to health care disputes.⁷⁴

The existence of all these ADR contracts means that many disputants who previously would have litigated will now, instead, at least begin the dispute resolution process through a non-litigation form of dispute resolution. Although a client may go to an attorney anticipating a trial as the solution to her problem, the attorney may well read the relevant contractual documents and conclude that litigation is foreclosed or at least must follow a non-binding form of ADR.

C. *Post-Dispute Agreements to Use ADR*

Even when ADR is not compelled by either court rules or pre-dispute contracts, some parties voluntarily agree to resolve their disputes through negotiation, mediation, arbitration, or another form of ADR. Sometimes this choice is made pre-suit, and other times after the suit is filed. We know that far more litigated disputes are resolved through settlement than any other means.⁷⁵

72 See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

73 One study showed that the "average Joe" consumer in Los Angeles was required to arbitrate disputes arising out of roughly one-third of the consumer transactions in his life. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer, 67 LAW & CONTEMP. PROBS. 55 (2004). See generally David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (arguing that contractual arbitration clauses systematically reduce corporate defendants' legal liability); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (critiquing the Supreme Court's support for binding arbitration clauses).

74 See Scott Forehand, *Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 907, 926 (1999); Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, LAW & CONTEMP. PROBS., Winter 1997, at 154; Nancy Neveloff Dubler, *Heroic Care Cases: When Difficult Decisions About Care Are Near, Mediation Can Help Bridge Communications Gap*, DISP. RESOL. MAG., Spring 1999, at 7.

75 Federal court statistics for 2000 show that 1.86% of civil cases were resolved by trial, 1.21% through jury verdict, and 0.65% by dispositive motion. See Eisenberg & Clermont, *supra* note 41; see also Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 77 (1997) ("[A]pproximately ninety to ninety-five percent or more of civil lawsuits not dismissed by courts in the early stages of litigation settle short of trial."); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 638 ("[P]retrial activity that does not result in dispositive adjudication is producing fewer abandoned cases and twice as many settlements as was the case fifty years ago.").

D. *The Intertwining of ADR and Litigation*

Despite the great prevalence of ADR, it has by no means replaced litigation. Instead what we see is a real intertwining and intermingling of dispute resolution techniques. Just as negotiation takes place in the shadow of the law,⁷⁶ so too does ADR more generally take place in the shadow of litigation. But, it is also true that litigation takes place in the shadow of ADR. A few examples will help make the point.

At an early stage, litigation can be used to determine whether a particular dispute can or must be sent to ADR given relevant statutes, court rules, or contractual agreements. The Supreme Court has now heard numerous cases as to whether particular disputes are subject to contractual arbitration agreements.⁷⁷ Jurisdictional issues can be important with respect to matters intended to be resolved through ADR, just as they can for litigated matters.⁷⁸ Indeed, and rather ironically, the typical arbitration course is based almost exclusively on litigated cases.⁷⁹ Similar disputes can arise with respect to negotiation, mediation, or non-binding arbitration, as judges may be called upon to determine whether a particular contract, court rule, or statute requires that a particular dispute be taken through one of those processes.⁸⁰

Once it has been determined that a particular dispute will be sent to ADR, litigation is still highly relevant. When participating in a non-binding form of ADR such as a settlement conference, mediation, or non-binding arbitration, parties will often consider their litigation op-

76 See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (examining how the legal system affects private negotiations upon dissolution of marriage).

77 See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996).

78 See, e.g., Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91 (1998) (examining application of federal jurisdiction doctrines to question which court can and should handle motions to compel arbitration).

79 See, e.g., CARBONNEAU, *supra* note 19; DRAHOZAL, *supra* note 19; STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION CASES AND MATERIALS* (1998); STONE, *supra* note 19.

80 See, e.g., *Kirschenman v. Superior Court*, 36 Cal. Rptr. 2d 166, 168 (Cal. Ct. App. 1994) (holding that the trial court lacked statutory or other authority to require parties to commercial litigation to participate in mediation despite an oral agreement between the parties to do so); *Annapolis Prof'l Firefighters Local 1926 v. City of Annapolis*, 642 A.2d 889, 895 (Md. Ct. Spec. App. 1994) (enforcing a written agreement to submit a future dispute to a form of ADR); *Prod. Credit Assoc. v. Spring Water Dairy Farm, Inc.*, 407 N.W.2d 88, 91-92 (Minn. 1987) (en banc) (upholding statutory requirements to participate in mandatory mediation in good faith).

tion as their BATNA—"best alternative to a negotiated agreement."⁸¹ Thus, litigation options, or the lack thereof, will affect the nature of a negotiated or mediated resolution and will impact a party's decision on whether or not to seek a trial de novo following issuance of a non-binding arbitration award. Moreover, litigation may be used to resolve disputes that arise during a negotiation, mediation, or non-binding arbitration, such as whether a subpoena may be used or discovery obtained, who may or must or may not participate in the hearing, or whether or not parties participated in the process in good faith.⁸² With respect to binding arbitration, courts may be asked to intervene to order preliminary relief,⁸³ enforce a subpoena,⁸⁴ or help run an arbitral class action.⁸⁵

After a dispute has seemingly been resolved through a non-litigation process, litigation may still have a role. Disputants may litigate the validity of the resolution that was supposedly reached;⁸⁶ whether or not things that were said or done in the course of ADR are protected by privilege⁸⁷ or a confidentiality agreement;⁸⁸ or how a settlement agreement can be enforced against a non-cooperative party.⁸⁹ Similarly, issuance of a binding arbitration award does not end litigation. Courts may, for example, be involved to enforce the arbitrator's award,⁹⁰ to vacate that award,⁹¹ or to consider whether an arbitral award precludes subsequent legal actions based on principles of res judicata or collateral estoppel.⁹²

81 See FISHER & URY, *supra* note 16, at 97–106 (introducing "BATNA" as an abbreviation for "best alternative to negotiated agreement").

82 For an article discussing the good faith issue, see Lande, *supra* note 48.

83 2 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 25 (1994 & Supp. 1999).

84 3 *id.* § 34.2.1.2 (1994 & Supp. 1994).

85 See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 39–44 (2000) (discussing courts' possible role in running arbitral class actions).

86 One frequent issue is whether oral agreements are enforceable. See, e.g., *Catamount Slate Prods., Inc. v. Sheldon*, 845 A.2d 324 (Vt. 2003).

87 See, e.g., *Rojas v. Superior Court*, 93 P.3d 260, 264 (Cal. 2004).

88 See, e.g., *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 56 (9th Cir. 1980).

89 See, e.g., *Cary v. Cary*, 894 S.W.2d 111, 111 (Tex. App. 1995); *In re Marriage of Ames*, 860 S.W.2d 590, 594 (Tex. App. 1993).

90 See, e.g., 9 U.S.C. § 9 (2000) (governing the confirmation of arbitration awards in federal court).

91 See, e.g., 9 U.S.C.A. § 10 (West 1999 & Supp. 2004) (governing the vacating of arbitration awards in federal court).

92 For a discussion of this issue, see G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623 (1988).

E. The Practitioner's Experience of ADR and Litigation

In short, in the world of practice, ADR and litigation are inextricably linked. Few practitioners involved in the representation of clients⁹³ can say that they only litigate or that they only are involved with ADR. While some have suggested that clients ought to employ one lawyer to litigate their disputes and another to try to settle that dispute,⁹⁴ such dual representation is obviously expensive and only makes sense, if at all, in cases involving significant sums. Thus, the typical attorney must keep litigation alternatives in mind while working on negotiation, mediation, or arbitration, and must equally consider ADR alternatives while drafting complaints, filing motions, and conducting discovery on behalf of her client. The "litigation" attorney must be prepared to counsel a client as to when it makes sense to employ an alternative to litigation and as to when a particular settlement is desirable. Even an attorney who focuses particularly on representing clients in mediation, negotiation, or arbitration ought to be aware of litigation options and also potential litigation implications depending on whether or how the matter is resolved in ADR.

It is not easy for a lawyer to pursue or even consider both ADR and litigation options simultaneously, as the two approaches may require quite different mindsets.⁹⁵ The divergence between approaches is most stark when one contrasts the less adversarial forms of ADR, mediation, and negotiation to litigation. To be an effective negotiator or an effective advocate in mediation one must consider the weaknesses of one's own position and the strengths of the opponent's position. One must also be prepared to focus on interests outside of the narrow litigation box. Yet these open-minded traits may undercut the

93 Obviously those practitioners who work exclusively as mediators or arbitrators do not have direct involvement with litigation. On the other hand, those practitioners who work as judges do increasingly find themselves conducting settlement conferences or mediations as well as judging cases.

94 See, e.g., Roger Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221, 1223 (1983) (suggesting the need for professional negotiators); Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139, 148-66 (1996) (arguing that given divergences between the incentives and psychology of a lawyer and a client, it may often be preferable to retain separate negotiation counsel); Marguerite S. Millhauser, *Gladiators and Conciliators: ADR: A Law Firm Staple*, B. LEADER, Sept.-Oct. 1988, at 20, 21 (urging that ADR specialists can help clients and attorneys to consider nonlitigation options, convince other parties to participate in a particular process, and negotiate ground rules).

95 Cf. Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 149 (2001) ("[L]awyers are unlikely to possess the personalities, predispositions, skills, and training necessary to mediate in a purely facilitative, non-evaluative way.").

effectiveness of the pure litigator, whose goal is to represent her client's case in the most favorable light possible. The attorney who is too good at seeing the weaknesses in her own case and the strengths in the opponent's case may not be particularly good at writing a brief or making an oral argument on her client's behalf.⁹⁶ Exceptional attorneys may be capable of handling both tasks well.

III. IMPLICATIONS OF THE REAL WORLD INTEGRATION OF CIVIL PROCEDURE AND ADR

To what extent are we, as legal academics, adequately recognizing the ways in which traditional civil procedure and ADR relate to one another? I suggest that we can do a much better job, both as teachers and as scholars.

A. *Academia Needs to Improve the Teaching of Dispute Resolution*

As has been discussed, litigation and ADR are typically taught separately, with a great deal more attention being paid to the former than to the latter. The following section will focus on how this situation might be improved.

1. Improving Litigation Courses

We need to find a way to teach students how litigation and various ADR techniques relate to one another in practice. That is, our students need to learn that litigators are almost always thinking about settlement and that negotiators or participants in other ADR processes are often thinking about their litigation options and alternatives. Students in litigation courses should also learn that ADR is often required by either court rules or contract, so that litigation will not always be an option. Our litigation students additionally ought to learn that there is a great deal of law and litigation that is relevant to ADR processes such as how arbitrations are handled, when settlement agreements are enforceable, and how rules of mediation confidentiality should be applied.

96 See *id.*; Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1932 (1997).

Lawyers, especially litigators, know best how to litigate and how to fight in that controlled environment. ADR, at least in some forms, has required lawyers and some parties to solve problems in different ways—to consider future interests, on-going relations, long-term effects, implications for third parties, and even the public relations of the choices they make in litigation.

Id. Riskin, *supra* note 26, at 37–41 (discussing the positive and negative implications attorney involvement can have in mediation).

Our students should not graduate thinking that they have the choice *either* to take a dispute to litigation *or* to seek to resolve it only through ADR, as the real world often blends these options together. We disserve both those students inclined to be gladiators and those students who are uncomfortable with adversarialness by failing to explain how closely ADR and litigation are often tied together. While many disputes do settle, it is often in the context of filed or at least threatened litigation. The lawyer who announces to the other side that she only wants to negotiate and not litigate thereby almost inevitably weakens her settlement position.⁹⁷

I suggest that litigation courses such as civil procedure and pre-trial litigation should contain five key elements pertaining to ADR. First, students of litigation ought to be taught to consider whether a case should be filed in court at all, and what other alternatives might exist at the time of filing. Although deciding whether to file a claim is a fundamental part of what lawyers do, few civil procedure or pretrial litigation courses focus on this question. Instead, most begin with the filing of the complaint, at which point the critical decision to file has already been made. Even those pretrial litigation courses that contain a unit on interviewing and counseling do not necessarily cover this question, but may instead take for granted that the interview ought to result in the filing of a lawsuit. Second, and relatedly, we need to explain to students the definitions of and distinctions between the basic types of ADR. These processes are far too common for us to be graduating students who are unaware of these basics. We need to help our students to learn how to choose among these processes at appropriate times. Third, students of litigation ought to be taught that court-ordered ADR is commonly a part of litigation, and that contracts increasingly call for ADR instead of litigation. We should not be graduating students who will be surprised when courts require them to participate in non-binding arbitration, mediation, or settlement conferences. For those of us who teach in schools where many graduates will remain in-state, it makes sense to explain the approaches of the local state court. Those of us with more national students can instead focus on the approaches of typical federal courts. Fourth, we need to teach our students that ADR and litigation are inextricably linked, in practice. We ought to provide examples of how disputes

97 Note, however, that in the family law context there is a growing trend toward "collaborative" law, whereby the lawyer for both sides contract with their clients not to litigate the dispute. If settlement efforts fail the clients must retain different attorneys. See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1356 (2003).

move easily between the two sets of processes, and we need to point out that the choice of processes is not made just once, at an early dispute resolution stage. Fifth, and perhaps most critically, as we discuss procedural justice and due process, we must encourage students to consider whether less-formal procedures can be as just or more just than formal adversarial approaches. It is wrong for our discussions of justice to take for granted that litigation is the best way to resolve disputes.

For those who accept my argument thus far, the critical question is: how can these insights be taught, particularly given the incredible time pressures already felt by most civil procedure professors? Whereas civil procedure was once typically taught as a two-semester, six-credit course, an increasing number of schools have now chosen to limit the course to five or four credits, sometimes taught in a single semester.⁹⁸ While this shrinkage has also been imposed upon other first-year teachers, we civil procedure professors (of course) tend to believe we have been affected most severely. There is just so much critically important material to convey in civil procedure: the nature of courts (federal and state, trial and appellate), pleadings (complaints, answers, amendments, discovery, motions to dismiss and for summary judgment, pretrial conferences, impleader, counterclaims, cross-claims, class actions), personal jurisdiction, subject matter jurisdiction and removal, *res judicata* and collateral estoppel, choice of law, the *Erie* doctrine, jury trials, and due process. A recent AALS conference on civil procedure revealed that few of us cover all of these subjects, much less also covering ADR.⁹⁹ Thus, it is not surprising that respondents to my informal survey frequently pleaded that they taught little or no ADR in civil procedure, often seeking to justify the omission on the theory that their school had several specialty courses devoted to the subject.

This response is understandable. Indeed, I myself feel victimized by these very same pressures and must admit that I too have sometimes devoted less time to teaching about ADR in civil procedure than is probably desirable. Yet, upon reflection, I believe many civil procedure professors err critically in failing to focus their students' attention sufficiently on ADR. First, those civil procedure professors who fail to teach about ADR on the theory that their students can take

98 UNLV Boyd Sch. of Law, Curriculum Comparison Survey (2003) (on file with author). UNLV surveyed forty-six law schools. Twenty-seven of these schools limit civil procedure classes to three, four, or five credits. Civil procedure is taught in one semester for all fifteen schools that limit the course to three or four credits. *Id.*

99 AALS Conference on Civil Procedure: The Many Faces of Contemporary Civil Procedure (June 15–20, 2003).

electives on the subject disserve their students by furthering the conception that litigation and ADR are separable. Many students will not take ADR courses, even to the extent that they are available, because they will not realize how critical ADR is to the practice of both litigators and transactional attorneys. Second, a professor need not expend large numbers of hours to bring some level of understanding of ADR to the attention of their students. By permeating discussions, or even mentions, of ADR throughout the course, and particularly doing so from the outset, professors will teach their students that ADR is integral to today's practice of litigation. The following are some ideas on how to cover the five areas I have identified as most critical. It turns out that civil procedure professors will not need to extensively supplement the casebook in order to convey the material I believe is most important.

a. To Claim or Not to Claim

From an empirical standpoint, students should understand that many gripes do not lead to lawsuits. The work of Richard E. Miller and Austin Sarat,¹⁰⁰ though now somewhat outdated, makes this point very well using a nice pyramid graphic. Our students need to know that many people, without consulting a lawyer, make the determination (consciously or not) not to pursue what might have been a legal claim.

We also need to explain to our students that lawyers play an important gatekeeping role in helping their clients to decide whether it makes sense to pursue legal action. Many students may assume that plaintiffs' lawyers file claims on behalf of all persons who solicit legal advice when, of course, this is not so. I have found that it is useful to have students work through a cost/benefit analysis. What are the potential benefits to commencing legal action and what are the possible detriments? Whereas students and some professors may focus primarily or entirely on the legal merits of a claim, lawyers know that many other considerations are also relevant. Thus, I teach that in terms of the potential benefits of bringing a litigation claim, clients should consider the following: (a) their likelihood of convincing a court/jury that they are right (and note that this turns on available evidence as well as law, since a claim may be true but not provable), (b) the likely remedy that a court would afford if the client prevails, and (c) possible non-legal gains, e.g., psychic satisfaction or positive publicity or improvement in company morale. As to potential detriments of litiga-

100 Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1981).

tion, lawyers should help their clients consider: (a) the likelihood that they will lose (again considering facts as well as law), (b) the financial costs of litigation (including attorney fees and costs but also considering costs to the client's business), and (c) non-financial costs such as loss to reputation or psychic harm.

How are these concepts best taught? I suggest that they can be taught through any and every case in any civil procedure book. All that is required is a little imagination. For example, I use the Marcus and Redish casebook,¹⁰¹ and the first case in the book is *Band's Refuse Removal, Inc. v. Borough of Fair Lawn*.¹⁰² The casebook authors included this case in order to help students understand the adversary system, as the judge in the case goes far beyond what most would consider the appropriate role of the judge in an adversarial system. However, before I get into that aspect of the case I have the students consider how they would have counseled plaintiff with respect to the desirability of litigation had plaintiff come to them, prior to filing suit. Specifically, I have them break into groups of three or four and think about this question in advance. In class, I do a counseling exercise in which I play the role of the president of Band's Refuse Removal, Inc., and have the students explain my options and the costs and benefits of taking various steps. They can also ask me for more information that they may need in order to advise me. I use the blackboard to enumerate the pros and cons of filing a claim, and the students quickly see that sometimes it is preferable for a client to take no action than to embark on a course of litigation.¹⁰³ To provide this sort of advice students must consider not only the strength of the client's legal claims, but also their client's underlying interests. For example, how important is it, from a financial standpoint, for Band's Refuse Removal, Inc., to pursue this litigation? Will there be political, reputational, psychological, or other benefits or costs to pursuing the litigation?

The "litigate or not" lesson can be taught again using other cases in the book. In teaching *Pennoyer v. Neff*,¹⁰⁴ for example, one can inquire how Mr. Neff and his attorney should have gone about deciding whether it made sense to file litigation against Mr. Pennoyer. What were Mr. Neff's goals? What were his options? What should he have

101 MARCUS ET AL., *supra* note 4.

102 163 A.2d 465 (N.J. Super. Ct. App. Div. 1960).

103 This sort of exercise can also be used to briefly explore professional responsibility issues such as how the relationship between the attorney and the client should function. That is, a professor could ask students to consider which decisions should be made by the attorney and which by the client.

104 95 U.S. 714 (1877).

seen as the costs of pursuing such litigation? Periodically throughout the course I suggest that the professor should ask students to consider why the plaintiff chose to file suit and what other options might have existed. When I teach civil procedure, like many other professors, I have students read either *A Civil Action*¹⁰⁵ or *The Buffalo Creek Disaster*.¹⁰⁶ These books are ideal for helping students to think about whether and when the litigation option makes sense. For example, I ask the students to imagine themselves in the position of one of the real life characters in these books and to draft a short essay explaining what they were hoping for when they consulted an attorney. Students quickly see that litigation is not necessarily a desirable method for obtaining the relief sought by the plaintiffs.

Of course, defendants and defense attorneys also have options, and these too should be explored. A defendant who has been sued has no choice initially but to be involved in litigation, but such a defendant can choose to default or settle or suggest another form of dispute resolution. These issues are examined below.

b. Litigation Is Not the Only Game in Town

In order to help future attorneys assist their clients in deciding whether to commence litigation, we also need to teach our students the differences between negotiation, mediation, arbitration, and litigation and how these processes relate to one another. While it is not possible, in a single civil procedure course, to spend large amounts of time explaining all the nuances of each of these processes, we can and should teach students the fundamental definitions. Many civil procedure texts already include at least this minimal amount of information. All students should learn, for example, that mediators do not have the power to issue binding determinations or decide cases, but that participants in mediation can reach agreements that will be binding. Students should also learn that binding arbitration agreements are usually enforceable, and that binding arbitration decisions are harder to vacate than determinations by trial courts. The differences between binding and non-binding arbitration should be explained.

Professors may find it useful to use means other than lecture or reading to explain the differences among these processes. Whereas students have a good sense, from television and movies, of the nature of trials, most have never seen a mediation or arbitration. Other methods that can be used to explain these processes are videos, live demonstrations in or outside of class, and talks by guest speakers. Lo-

105 JONATHAN HARR, *A CIVIL ACTION* (1995).

106 GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

cal court administrators, judges, lawyers, or neutrals can often do a good job of both explaining the nature of ADR processes and also helping students to see how central these processes are to the life of the typical litigator. Recall that the movie *Erin Brockovich* contains a scene in which the plaintiffs' lawyers convince plaintiffs in a toxic tort suit that their purposes would be better served by arbitration than litigation.

In addition to explaining the basic differences between litigation, negotiation, mediation, and arbitration, we also need to help our students think about how to guide their clients in selecting among these processes. Here, too, any case in the civil procedure text can be of use. In discussing the *Band's Refuse* case from the Marcus and Redish text, I assign half the students to play the role of plaintiffs' attorneys and half to play the role of defense attorneys. In these roles, students are asked to think about how to counsel their clients on the pros and cons of these various procedural devices in addition to litigation. Would it make sense for plaintiff or defendant to suggest mediation, non-binding arbitration, or binding arbitration as an alternative to litigation? I also have my students consider this question from the perspective of clients described in *A Civil Action*¹⁰⁷ or *The Buffalo Creek Disaster*. The point of these exercises is to help students begin to understand that no particular process is best for all disputes in all situations. Rather, each process has its pros and cons.

To the extent that we teach about the pros and cons of litigation and the choices between litigation and other processes, we should also test on these concepts. This is not difficult to do. I frequently give students fact patterns and then ask them to advise their clients, *inter alia*, on what would be the best procedural approach. While there is no single "right" answer to these sorts of questions, students can and do reveal their knowledge (or lack thereof) regarding procedural options.

c. Court-Ordered and Contractually-Compelled ADR

We should also make sure our students know that the choice between litigation and other processes will not be completely up for grabs. Rather, they need to learn that many federal and state courts

107 The question of whether the dispute underlying *A Civil Action*, HARR, *supra* note 105, could or should have been mediated, and whether such mediation might have succeeded, was discussed at an ADR conference several years ago by some of the actual lawyers involved in the case. Whereas Jan Schlichtmann, now an ADR devotee, thought mediation might have proven quite useful, Jerry Facher and Bill Cheeseman were much more negative.

will compel that cases filed in court first proceed through settlement conferences, mediation, early neutral evaluation, or non-binding arbitration. Professors can provide this information by having students read relevant rules or statutes, by having guest speakers explain local processes, or by lecturing on the subject. I have found it useful to have students examine local rules and websites covering these issues, as these help students see that ADR is very much part of the legal world with which they will be dealing.

In addition, students need to be aware that clients may have entered into contracts, on a pre-dispute basis, that limit their procedural options. As the clients may not even be aware of these procedural constraints, lawyers need to be trained to look for pre-existing contracts that may limit procedural options. One nice way to make this point is to have students look at their own contracts, such as those governing credit cards, phone service, or banking services. One can also have students read any of the recent Supreme Court cases confirming that employees or consumers can be contractually mandated to resolve their disputes through arbitration.¹⁰⁸ The students will quickly see that they have already unwittingly (for the most part) waived their right to litigate disputes arising out of those contracts, in that they have instead agreed to take such disputes to binding arbitration.¹⁰⁹ Students should also be made aware that such pre-dispute agreements to mediate or arbitrate future disputes are extremely common in particular contexts such as the construction industry, shipping, franchise relationships, or international business deals.

d. The Inextricable Relationship Between Litigation and Other Forms of Dispute Resolution

One of the hardest concepts to convey to students is the way that litigation is linked to other forms of dispute resolution. Perhaps because of the way that we segregate litigation and ADR approaches from one another, students often get the sense that an irrevocable procedural choice is made early in the life of the dispute. To some degree, the approaches described above can exacerbate this problem if they are not handled properly. I have often had students either in class or in exams state that a particular dispute is appropriate for negotiation or mediation, but not litigation.

108 Examples of such cases include *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

109 One article that makes this point nicely is Demaine & Hensler, *supra* note 73 (reporting that approximately one-third of the major transactions in the typical consumer's life were covered by mandatory arbitration provisions).

The most direct way to handle this problem is to confront it directly. We must explain to students, for example, that a lawyer may not have the luxury of choosing negotiation over litigation. To obtain a good result for the client in negotiation, it may turn out that the lawyer needs to commence or at least consider litigation. Also, we must remind students that many disputes are commenced in litigation but then (voluntarily or by court order) shifted to negotiation, mediation, or nonbinding arbitration. As well, although lawyers and clients may decide at the outset to take a particular dispute to arbitration, litigation may become necessary if issues arise as to the enforceability of the arbitration agreement or award. Disputes that are negotiated or even settled may later be brought to litigation if disagreements occur as to the nature of the agreement that was supposedly reached.

- We can also convey this inextricable relationship between litigation and other forms of dispute resolution by continuing to bring up ADR at various points in our courses. The following are just a few examples of the myriad ways in which this can be done.
- In the context of Rule 11¹¹⁰ or discovery disputes we might ask students to consider whether mediation might be used to resolve such matters.
- When we talk about motions to dismiss or for summary judgment, and particularly partial motions, we can point out that these are often used to affect the settlement value of a case. We can also observe that pending motions or depositions often spark serious settlement discussions.
- When we discuss pretrial conferences we should examine the role judges and magistrates often play in settlements, and we can ask students to consider whether it is appropriate for judges or magistrates to act as mediators and in which cases.¹¹¹
- In looking at class actions we can let students know that ADR mechanisms are often used to resolve the damages portions of class actions after a settlement has been reached on the merits.¹¹² We can also point out that companies are using arbitration

110 FED. R. CIV. P. 11.

111 See James J. Alfani, *Mediation's Coming of (Legal) Age*, 22 N. ILL. U. L. REV. 153, 154 (2002) (identifying the Uniform Mediation Act as a premier example of the heightened interest, among lawyers and judges, in becoming mediators).

112 See, e.g., Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1616 (1995) (identifying that plaintiffs, in one case, were able to negotiate their individual damage awards with the Dalkon Shield claimants' trust once a settlement was reached with defendants on behalf of the entire class); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 514 (1998) ("[In mass tort cases], parties use ADR to provide some form of an individual-

clauses to try to eliminate class actions,¹¹³ and that class actions are sometimes handled by arbitrators.¹¹⁴

- As we examine personal jurisdiction doctrines we should note that when disputants agree in advance to negotiate, mediate, or arbitrate in a particular geographical setting they are consenting to that geographic forum, at least for the ADR purposes. That is, the Supreme Court's approach to forum selection clauses in *Carnival Cruise*¹¹⁵ should be analogized to the Supreme Court's approach to the approval of pre-dispute binding arbitration agreements.
- When we look at the case of *Louisville & Nashville Rail Road. v. Mottley*,¹¹⁶ exploring the nature of federal question jurisdiction, we can also point out that this suit arose out of a settlement agreement that was allegedly breached, using the opportunity to explain how settlement agreements are enforced.
- As jury trials are discussed, we can mention that one reason companies are increasingly requiring customers or employees to resolve disputes through binding arbitration is to avoid the risks entailed in jury trials.
- As we discuss appeals or preclusion we can mention the extent to which results achieved through ADR are or are not appealable, and may or may not have preclusive effect.

In short, it is easy to remind students of the many ways in which litigation and other forms of dispute resolution relate to each other, and we need not add many new readings to the text in order to foster such discussions.

ized assessment of either the legal merits and liability, or the amount of compensation to be paid to particular claimants or victims.”).

113 See, e.g., Sternlight, *supra* note 85, at 53–78 (explaining that clauses eliminating a claimant's right to bring a class action are frequently found in arbitration provisions and discussing both the proponents' and opponents' perspectives on this trend).

114 The Supreme Court's recent decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 447 (2003), holds that arbitrators must make the determination as to whether an ambiguous arbitration clause permits or proscribes arbitral class actions. But, assuming the arbitrator finds that the arbitral class action is available, the law is undeveloped as to the extent to which an arbitrator, or instead a judge, should make determinations regarding the scope of the class, the nature of the class notice, and whether a settlement should be approved. These choices raise fascinating due process concerns. See Sternlight, *supra* note 85, at 38–53. The American Arbitration Association web site, <http://www.adr.org>, now contains a roster of class action arbitration cases.

115 *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

116 211 U.S. 149 (1908).

e. Broadening the Due Process Discussions

Questions pertaining to the nature of procedural justice and due process underlie the entire civil procedure course, and many of us focus explicitly on procedural due process cases such as *Fuentes v. Shevin*,¹¹⁷ *Goldberg v. Kelly*,¹¹⁸ or *Mathews v. Eldridge*.¹¹⁹ As we examine the concepts of due process, it is important to ask students to think broadly about what procedural justice ought to entail. Although the Supreme Court has tended to focus on efficiency and accuracy concerns, together with the fundamental concepts of notice and a hearing, this approach tends to take for granted an adversarial litigation-oriented model. We can ask students to consider whether such hearings are the best or only way to resolve all kinds of disputes.¹²⁰

There are a variety of ways in which we can encourage students to broaden their thinking on the meaning of procedural justice. First, aspects of the psychological literature on procedural justice can be used to enrich our understanding of dispute resolution. In addition, students can be asked to consider whether the formal adversarial model is always the most just. For example, students can be asked to design the procedural system under which they would like to be governed if they were stranded with their classmates on a desert island.¹²¹ Or, they can be asked to design procedures for resolving student conduct disputes. Students can also be asked to think about how disputes are or have been handled by other societies, many of which rely far

117 407 U.S. 67 (1972).

118 397 U.S. 254 (1970).

119 424 U.S. 319 (1976).

120 As a technical matter, scholars do not agree whether or how the Due Process Clause applies to consensual dispute resolution processes. Compare Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187 [hereinafter Welsh, *Disputants' Decision Control in Court-Connected Mediation*] ("At a minimum, the procedural due process jurisprudence raises doubts regarding the applicability of procedural due process to court-connected mediation and other processes defined as 'consensual.'"), with Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 953–58 (2000) (urging that various forms of ADR are often required to meet constitutional due process requirements). But, regardless of differences of opinion regarding whether the Due Process Clause applies and what it might require, the policy question of what processes are "best" is up for discussion. Professor Welsh points out that the Supreme Court's instrumental approach to procedural due process has failed to take into account "an understanding of the inherent value of procedural justice that is separate from its instrumental effect on the outcomes in particular cases." Welsh, *supra*, at 190.

121 If this thought experiment is conducted on the first day of civil procedure, it may well produce far less adversarial results than if it is conducted on the last day of the course.

more heavily on conciliation and other non-adversarial approaches than we do. Within our own society, students can be asked to think about how disputes are or ought to be resolved within a family. These kinds of exercises will help them to see that the adversarial model is not the only alternative and these exercises do not require substantial additional materials.¹²²

f. What to Cut

I have tried to show that it is not necessary to spend large numbers of hours of class time to integrate more ADR into the traditional civil procedure curriculum. Instead, a great deal can be accomplished by spending relatively few hours and then hearkening back to those discussions at various points. However, given that many of us are being required to teach the basic civil procedure course in fewer and fewer credits, I know many readers will be saying: "I can't add more ADR because I would have to cut something else that is really core to civil procedure."

Yet, we owe it to our students and the public to rethink what is "really core" to civil procedure. Like many civil procedure professors, I try to teach it all. I often feel that if I don't teach a particular aspect of civil procedure, students will graduate knowing nothing about it and be unable to be competent practitioners. At my school we don't currently have an advanced civil procedure course, and even if we did, many students would not take it. We only offer pretrial litigation occasionally. Thus, I try to teach my students "everything": complaints, answers, amendments, Rule 11, formal and informal discovery, joinder of claims and parties, class actions, motions to dismiss, motions for summary judgment, jury trials, pretrial conferences, personal jurisdiction, subject matter jurisdiction, supplemental jurisdiction, *Erie*, choice of law, claim and issue preclusion—I am surely omitting some critical topics.

Yet, perhaps sadly, we need to distinguish between what we teach and what our students learn. Although I truly believe all those topics are critically important, and although I believe I teach them reasonably well, the reality (as revealed by my students' exams) shows that even as of the date of the final exam my students do not learn or retain all that I try to teach. How much of the details of civil procedure will they then retain by the time they graduate from law school? While we can comfort ourselves that at least some (many?) students will retain enough to realize there is an issue they ought to research,

122 For a short article discussing some of these issues, see Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289 (2003).

this may or may not even be true. What will even the best students retain about such subjects as Rule 19 (necessary and indispensable parties), the details of when amendments are permitted or relationship back allowed, the circumstances under which supplemental jurisdiction is allowed, the definitions of *res judicata* and collateral estoppel, etc., etc.

In contrast, I think that the information we convey about the nature of litigation and how it relates to other types of dispute resolution is so basic that it will more easily be retained by our students. While I have not tested the proposition empirically, I would be willing to wager that my students, upon graduation, still know the differences between the various forms of dispute resolution, have a sense how to help their clients choose among these processes, and have an understanding as to how these processes relate to one another. They likely also will have retained the idea that procedural justice may be broader than an adversarial hearing.

For me, therefore, the bottom line is that it is worth cutting some of the more technical aspects of the civil procedure course to make room to devote some attention to ADR and the way it relates to litigation. I will not be so presumptuous as to make specific suggestions of where cuts can or should be made, but will only suggest that professors ask themselves what material is both most important to new lawyers and also most likely to be remembered by our new graduates. I suggest that whereas ADR will make this cut, some other subjects may not.

2. Improving ADR Courses

Just as the typical litigation courses pay insufficient attention to ADR, so too does the typical ADR course pay insufficient attention to litigation. First, although the survey course inevitably asks students to compare various ADR approaches to litigation, it often does not give students a good sense of how choices are made between ADR and litigation in real life. For example, the typical survey course might have students read Frank Sander's and Stephen Goldberg's article, *Fitting the Forum to the Fuss*.¹²³ This excellent article, which I have myself often assigned, helps students to categorize various processes in terms of such factors as their ability to minimize costs, maintain privacy, improve relationships, make precedent, and maximize recovery. While this is a valuable exercise, it may lead students to think that lawyers

123 Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

choose a process, once and for all, at the outset of the dispute resolution process. We need to disavow students of this misperception.

ADR courses ought to spend significant time examining court-connected forms of ADR. After all, a great deal of the ADR to which lawyers and their clients are exposed is court-ordered. We therefore should be examining the nature of these court-connected processes, considering whether such processes are desirable from the perspective of prospective clients or the public at large, and analyzing legal and policy issues relating to court-connected processes. Aspects of ADR that are contained in rules of civil procedure should be part of the ADR course. Why don't we typically talk about offers of judgment, for example, in an ADR course?¹²⁴

Similarly, an ADR course ought to focus students' attention on the contracts that do or might require alternate forms of dispute resolution. Are such contracts desirable? Are they enforceable? How should they be drafted? Dispute resolution agreements are a major part of many lawyers' practice. If we don't examine them in an ADR survey, when will students learn about such contracts?

As well, ADR courses ought to consider the legal issues that arise with respect to various forms of ADR: when are dispute resolution agreements enforceable and when are they not?; what kind of participation can be mandated by courts?; what confidentiality and privilege rules apply?; how are results, obtained through an ADR process, enforced?; what kinds of preclusion apply to results obtained through ADR?

With respect to negotiation, in particular, while the typical negotiation course does contain a unit on the lawyer's role in negotiation and also covers legal questions pertaining to the propriety of lying in negotiation, many negotiation courses do not cover, or at least do not devote much time to, issues lawyers commonly face in practice such as the drafting of settlement agreements, the propriety (or not) of specific terms that might be included in negotiation agreements (e.g., confidentiality of results or prior conduct, agreements not to pursue future litigation, agreements to destroy records, agreements to depublish court decisions), the handling of multi-party settlements using *Mary Carter*¹²⁵ and other devices, the extent to which oral agreements can be enforced, etc. In addition, shouldn't negotiation professors spend some time helping students learn how to evaluate when it

124 FED. R. CIV. P. 68. The Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), analyzing how the offer of judgment rule ought to be applied in fee-shifting cases, is more often discussed in civil procedure than ADR courses.

125 *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967).

makes more sense to continue litigating than to settle? I recently taught both pretrial litigation and negotiation in the same semester and was shocked when I realized that I was only teaching about the drafting of settlement agreements in the pretrial litigation class. Does that make sense?

With respect to mediation, isn't it odd that such courses often devote only a week or so to mediation advocacy and typically spend little time on the enforceability of agreements to mediate or of agreements reached in mediation? Such legal issues as confidentiality are usually covered but are certainly not the focus of the course.¹²⁶ Court-connected mediation programs are likely mentioned, but issues of compulsory attendance or mediation in good faith are probably not central. Mediation mandated by statute or administrative rule is rarely emphasized. Nor do most mediation courses put much, if any, focus on the process by which courts approve or disapprove agreements reached in mediation.¹²⁷

Arbitration courses do certainly deal with litigation, as the typical arbitration course focuses substantially on Supreme Court and other cases examining the enforceability of arbitration agreements and awards. However, the typical arbitration course likely does not spend much time on fascinating issues that bridge the fields of arbitration and litigation, such as the choice of court in which arbitration clauses or awards should be enforced or attacked, the propriety of arbitral class actions,¹²⁸ the application of *res judicata* or collateral estoppel doctrines to arbitration awards, or the use of antisuit injunctions to deal with interjurisdictional disputes over the enforcement of arbitration clauses or awards.¹²⁹ Such courses often neglect court connected arbitration programs and may not discuss the drafting of arbitration clauses.

In short, while ADR courses certainly spend more time on litigation than litigation courses spend on ADR, the theme of such ADR courses tends to be whether or how to use ADR instead of litigation.

126 See KOVACH, *supra* note 17, which dedicates seventy-two of its 588 pages to confidentiality. Likewise, ALFINI ET AL., *supra* note 17, at 193–244, dedicates one section within one chapter to the topic (fifty-one of the book's 608 pages).

127 See ALFINI ET AL., *supra* note 17, at 284–91 (discussing enforceability in one section of one chapter (thirteen pages)); KOVACH, *supra* note 17, at 356–85 (addressing the issue of enforceability in one part of one chapter (twenty-nine pages)).

128 For a discussion of the propriety of arbitral class actions, see Sternlight, *supra* note 85.

129 For a discussion of the use of antisuit injunctions to deal with interjurisdictional disputes over the enforcement of arbitration clauses or awards, see Sternlight, *supra* note 78.

In part, the makeup of ADR courses reflects the preferences of the teachers of such courses. Professors of ADR typically like to teach courses that are different from traditional law school courses, and often include lots of role plays, videos, and other fun forms of learning. Such professors often prefer to focus on interests, problem solving, listening skills, creativity, psychology, and non-legal concerns. Indeed, many professors who teach the ADR survey course have said that they like the arbitration portion of the course the least, in large part because it (and arbitration itself) is so similar to the more traditional litigation-oriented law school course.

ADR professors who read this article are likely to say (and most understandably): "Why should I cover litigation when the rest of law school is devoted to litigation?" Yet, upon reflection, this defense fails our students. Omitting discussion of litigation from ADR courses leaves our students with the impression that there are lawyers who focus only or predominantly on ADR, rather than litigation, whereas in truth such advocates are extremely rare, if not nonexistent.¹³⁰ Moreover, ADR professors' reluctance to discuss litigation, combined with litigation professors' reluctance to discuss ADR, leaves our students largely, if not totally, ignorant as to some of the most important responsibilities they will have in practice. Practicing lawyers need to know how to decide among procedural processes throughout the life cycle of a dispute; they need to know how to evaluate the desirability of settlement relative to litigation; they need to know about offer of judgment rules; and they need to know how to draft settlement agreements. Yet, for the most part, neither litigation nor ADR courses see fit to teach about these important matters.¹³¹

ADR professors will likely complain: "How can I teach all this material on litigation when I don't even have time to teach all I want to teach about ADR?" Again, this response is most understandable, and certainly I have felt this pressure myself. Yet, as I urged the litigation professors to do, so too must the ADR professors step back and ask

130 An example of lawyers who have chosen to practice ADR, in lieu of litigation, are those who have elected to practice "collaborative lawyering." See *supra* note 97.

131 The segmentation of ADR from litigation is part of a more general phenomenon of segmentation in law school. Though we separate out the teaching of contracts, torts, criminal law, etc., from one another, in real life clients do not come to a lawyer with a problem from a single field. Instead, clients come to lawyers with problems that may well span multiple courses. One of a lawyer's toughest jobs is to figure out what claims or defenses a client may have based on the jumble of factual information that is presented. Yet, law schools do very little to prepare lawyers for this most difficult task. Clinical courses are one answer to this problem, as they inevitably require law students to draw from multiple courses.

themselves: "What are the most important lessons our students need to take from law school?"

From a teaching standpoint, we cannot continue to segment and segregate litigation from other forms of dispute resolution (administrative processes and ADR). While professors may defend their practice with the thought that students can always sign up for those "other" courses, this solution cannot solve the problem that (1) the ADR courses are almost inevitably given less attention, and (2) teaching these matters separately fails to convey to students the inevitable connection between multiple forms of dispute resolution. In addition, our segregation of ADR from litigation causes us to neglect important connections in our scholarship and public policy discussions, as discussed below.

B. Focusing on Justice

Whereas the bulk of this Article has focused on practical nuts and bolts issues, the segregation of litigation and ADR in our thinking and in our writing also has another possibly more pernicious effect: it undermines our full consideration of the nature and purpose of our entire system of justice. To put this more positively, by recognizing that litigation and non-litigation forms of dispute resolution are all part of our justice system, we can improve our policy analysis. Too many proceduralists focus only on the realm (litigation or mediation or arbitration or administrative proceedings) with which they are most familiar.¹³²

By focusing on formal and informal procedures, we can more readily consider the multiple purposes of our justice system. Too many litigation scholars tend to assume that the only, or at least primary, purpose of our justice system is to provide public justice, including such important features as public precedent, access, and conformity to the rule of law.¹³³ But equally, too many ADR scholars

¹³² Judith Resnik is a very important exception to this general trend. In a series of books, articles and presentations, she has been urging proceduralists to cross the boundaries between civil and criminal, and between litigation, ADR, and agency processes. See, e.g., FISS & RESNIK, *supra* note 5.

¹³³ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (identifying settlement as problematic because it creates a lack of a foundation for continuing judicial involvement, deprives courts of the opportunity to interpret disputes, and creates peace between the parties, but does not create justice because the decision does not become precedential for other citizens); see also Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 18 (1979) (arguing that "the ultimate subject matter of the lawsuit or focus of the judicial inquiry is not . . . particularized and discrete events, but rather a social condition that threatens important constitutional values and the orga-

tend to assume that the most treasured aspect of a justice system ought to be allowing individuals to choose the process or result that is best for them.

Some of the best procedural scholars are beginning to cross these bridges by recognizing that our justice system has multiple goals. For example, Professor Carrie Menkel-Meadow's 1995 article, *Whose Dispute Is It Anyway?*, considers whether it should be public or private interests that determine whether settlement of a particular dispute is appropriate.¹³⁴ Professor Judith Resnik's work emphasizes that whereas ADR was once considered outside the judicial sphere, it has clearly now been brought inside that tent.¹³⁵ Resnik urges that we should examine all types of procedure, adjudicative, administrative, criminal, and ADR in considering "what constitutes fair and just process."¹³⁶ Professor Robert Baruch Bush has urged that mediation serves not only private interests, such as saving time or money, or restoring relationships, but also public interests in reconciliation, community, and the like.¹³⁷ Some of my own prior work also examines the relationship between formal and informal, adversarial and non-adversarial, forms of justice.¹³⁸

Focusing broadly on not only litigation but also on other forms of dispute resolution also allows us to explore more fully the nature of procedural justice. Beginning in the 1970s, some social psychologists

nizational dynamic that creates and perpetuates that condition" and, therefore, the public access and precedential values of adjudication are particularly important); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003) (identifying that some plaintiffs prefer public vindication of their rights to private resolution of their disputes); Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 [hereinafter Hensler, *Suppose It's Not True*] (recognizing that some litigants value the publicity of adjudication).

134 Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?*, 83 GEO. L.J. 2663 (1995).

135 E.g., Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 186–87 (2003) ("Techniques such as mediation, arbitration, and settlement conferences—once termed 'extrajudicial'—have become regular features of civil processes.").

136 JUDITH RESNIK, *PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES* 146 (2004); see also FISS & RESNIK, *supra* note 5.

137 Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989).

138 See Sternlight, *supra* note 122, at 296 ("Recognizing that various forms of dispute resolution are intertwined by no means implies that they are the same . . ."); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401 (2004) (comparing how employment discrimination laws are enforced in the United States, Britain, and Australia and using this data to consider the benefits of various approaches to dispute resolution).

did a series of empirical studies with respect to when disputants perceive a dispute resolution process to be "just." This research revealed that procedural justice (how the dispute is resolved) is at least as important to disputants as the ultimate substantive result.¹³⁹ Procedural justice researchers have found three elements are key to disputants' experience of whether a process is procedurally just: (1) their perception that they had an opportunity to voice their concerns and present evidence to a third party (whether directly or through an agent), (2) their perception that the third party actually considered these concerns, and (3) their perception that they were treated in a dignified and respectful manner.¹⁴⁰

Sadly, relatively little work has been done with respect to how these insights might apply to ADR as it exists today. The original procedural justice studies focused primarily on litigation, distinguishing between adversarial and inquisitorial processes at times.¹⁴¹ While subsequent work did purport to discuss processes called bilateral bargaining, mediation, and arbitration, researchers today have recognized that the definitions used do not comport with those used today.¹⁴² Even more frustrating, none of the processes examined resembled mediation as we define it today.¹⁴³

Equally sadly, although one might think that those emphasizing civil procedure would focus a great deal of attention on the meaning of procedural justice, in fact the subject is sadly neglected. While civil procedure scholars and teachers often ask themselves and their students to consider pieces of the justice question, such as how adversarial our system ought to be, or how much discovery we ought to allow, or how Rule 11 sanctions ought to be designed, or whether jury trials make sense, it is far rarer that a scholar or teacher focused on civil procedure would ask whether disputes are best resolved through negotiation or mediation or arbitration or administrative processes

139 A great deal of the original work in this area was done by Laurens Walker, John Thibaut, E. Allan Lind, and Tom R. Tyler. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); E. Allen Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 177 (Austin Sarat et al. eds., 1998) (summarizing studies); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *Handbook of Justice Research in Law* 65 (Joseph Sanders & V. Lee Hamilton eds., 2001); Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295 (1974).

140 Welsh, *Making Deals*, *supra* note 45, at 820.

141 Hensler, *Suppose It's Not True*, *supra* note 133, at 85–95 (citing John Thibaut and Laurens Walker's studies, the results of which may be found in Laurens Walker et al., *supra* note 139).

142 *Id.* at 86–87.

143 *Id.* at 87.

rather than through courts. Teachers and scholars of civil procedure have an understandable tendency to take courts for granted.

However, and most fortunately, two scholars have recently begun to focus on the procedural justice literature and specifically are looking at what insights that literature may provide with respect to choices between and among forms of litigation and alternative dispute resolution. Professors Deborah R. Hensler and Nancy A. Welsh have each begun to consider this question, albeit, and most interestingly, coming to quite different conclusions. Professor Hensler concludes, based on her review of the procedural justice literature, that disputants want third-party neutrals to resolve their disputes based on fact and law.¹⁴⁴ Yet, Professor Welsh, after reviewing the same studies, disputes Hensler's conclusion that disputants view processes as more procedurally fair if they cede decisional control to a third party.¹⁴⁵ Instead, argues Welsh, such studies show that "the locus of decision control is less important to litigants' perceptions of procedural justice than process elements—voice, consideration, even-handedness and dignity."¹⁴⁶ With respect to mediation, Welsh has, for example, shown that the precise way in which the mediation is set up can make a great deal of difference to disputants.¹⁴⁷ Regardless of whether one ultimately agrees with Hensler or Welsh, or yet another perspective, the key contribution both scholars have made is to apply the procedural justice literature to both litigation and other dispute resolution processes in an attempt to devise a more just procedural system.

Building on the work of all of these and other scholars, I have begun to consider, in several prior articles, where ADR fits in the broader scheme of a system of justice. Thus, in one article I preliminarily conclude that societies ought to consider broad categories of

144 *Id.* at 95.

145 Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation*, *supra* note 120, at 185.

146 *Id.* at 187.

147 Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004). In a study of voluntary mediation sessions between school district officials and parents of children in the special education program, Welsh found that while participants valued both evaluative and facilitative interventions, they were most appreciative of particular mediator actions that could occur in either context. *Id.* at 671. Parents particularly wanted the opportunity to express their views and be heard by the school district officials. The district officials most valued the extent to which the mediator helped the parents understand the district's perspective. *See id.* at 624–25. Private caucuses, while potentially valuable, were also dangerous in that parties sometimes feared the striking of private deals and the loss of mediator impartiality. *Id.* at 669–71.

both private¹⁴⁸ and public interests¹⁴⁹ as they establish an array of institutions to resolve legal claims. In a second article, I research how various countries resolve employment discrimination disputes and show that their varying approaches include litigation, arbitration, administrative processes, and mediation.¹⁵⁰ Interestingly, however, the countries each used multiple approaches and then also tended to cycle between the more and less formal approaches.¹⁵¹ I urge that this phenomenon results from each country's attempt, perhaps unconscious, to serve both public and private interests through its system of justice.¹⁵² While these and other scholars' articles are only beginning to address the comprehensive question of how societies ought to design a system of justice, they do at minimum help illustrate why it is so critical to consider both litigation and non-litigation approaches in asking such questions.

Another important benefit of merging our analysis of litigation and other dispute resolution processes is that it encourages us to consider the use of new dispute resolution techniques that may lie somewhere in between litigation and traditional forms of ADR (mediation, arbitration, and negotiation). For example, in my home jurisdiction of Las Vegas, the Eighth Judicial District Court has recently developed a procedural device known as the "short trial."¹⁵³ An amalgam of public and private, formal and informal, the short trial includes the following features:

- (1) The goal is to hear all cases within four months of filing.¹⁵⁴
- (2) Cases are presided over by a local lawyer (called a judge pro tem) rather than by a "real" judge;¹⁵⁵ pro tem judges are com-

148 I suggest that private interests include (1) securing a substantively fair/just result, (2) resolving claims in a procedurally just manner, and (3) achieving other personal and emotional goals such as reconciliation. Sternlight, *supra* note 122, at 299.

149 I urge that public interests include not only resolving disputes in a fair and just manner, equitably enforcing laws adopted by the society, and encouraging adherence to law, but also helping to create balance, harmony, and reconciliation among members of the society. *Id.* at 300.

150 Sternlight, *supra* note 138.

151 *Id.* at 1489.

152 *Id.* at 1487-89.

153 The Nevada Legislature approved the Nevada Supreme Court's right to authorize short trial as a legitimate alternative to court-imposed, non-binding arbitration in 1991. Act of May 28, 1999, ch. 334, 1999 Nev. Stat. 1380 (codified as amended at NEV. REV. STAT. 38.258 (2002)). The Short Trial program was implemented in July 2000. See SHORT TRIAL PROGRAMS: RULES & FORMS (2002), available at http://www.co.clark.nv.us/district_court/arbitration_forms/Short_Trial_Rules.pdf.

154 NEV. SUP. CT. R. Part V-B, NEV. SHORT TRIAL R. 2.

155 *Id.* R. 17.

pensated by the parties at a rate of \$150 per hour, to a maximum of \$1500 per case.¹⁵⁶

- (3) In jury cases a four person jury is used, taken from the regular jury pool, and this jury resolves cases by majority vote.¹⁵⁷
- (4) An emphasis is placed on speedy and efficient resolution of all claims. Each side is strictly limited to three hours in which to present its case (including opening, closing, direct and cross examination);¹⁵⁸ voir dire is limited to fifteen minutes per side;¹⁵⁹ no formal record is made of the proceedings unless paid for by the parties;¹⁶⁰ and no bailiff or court clerk is present to assist with the hearing.¹⁶¹
- (5) Nevada Rules of Evidence and Civil Procedure generally apply, although each side is required to file evidentiary objections in advance, and each side is permitted to provide the jury with a book of evidence.

Under the current system, short trials are heard only in those cases in which both sides agree, voluntarily.¹⁶² Awards made in the short trial program are subject to challenge only on the limited grounds by which binding arbitration awards may be vacated.¹⁶³ Under a reform proposal currently being considered by the Nevada Supreme Court, resort to the short trial would be mandatory for all cases in which a trial de novo was sought following mandatory non-binding arbitration and for all cases not resolved in voluntary mediation.¹⁶⁴ This proposal would also broaden appellate rights, to permit short trial determinations to be appealed in the same manner as local court rulings.¹⁶⁵

Whether one likes the idea of the short trial or not, certainly all must agree that such programs, whether voluntary or mandatory, raise

156 *Id.* R. 18.

157 *Id.* R. 5.

158 *Id.* R. 6. The fifteen minutes allowed for each side to conduct voir dire is not deducted from the three-hour time allotment for each side to present its case. *Id.* R. 5.

159 *Id.* R. 5.

160 *Id.* R. 4.

161 *Id.* R. 21.

162 *Id.* R. 1.

163 Short Trial Rule 16 permits review of an award only pursuant to Nevada Revised Statute 38.115 (for modification or correction of an award) and Nevada Revised Statute 38.145 (for vacating an award).

164 William C. Turner, Short Trial Committee, Proposed Short Trial Program Amendments & Revisions ADKT No. 310 (Oct. 30, 2003) (unpublished, filed with the Clerk of the Supreme Court of Nevada), *available at* http://www.nvsupremecourt.us/DOCS/reports/rpt_0311_ADKT310Supp.pdf.

165 *Id.* at 6.

fascinating policy and legal issues. To consider adequately the desirability and permissibility of such programs, policy makers and scholars will need to be well-versed in the theory and practice of both litigation and ADR.

CONCLUSION

It is critical that we break down the artificial walls between civil procedure and ADR. Whether from the perspective of teaching, practice, policy, or scholarship it should be clear that it makes no sense to cabin each of these procedural approaches exclusively into its own course or body of literature. As we celebrate the fifty-year birthday of *Brown v. Board of Education*,¹⁶⁶ it is also time to consider the integration of civil procedure and ADR as well as to reexamine the significance legal scholars pay to each field. Just as *Brown* has helped us move toward substantive justice, such rethinking will help us to work toward improvements in procedural justice.

166 347 U.S. 483 (1954).