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# ADR IS HERE: PRELIMINARY REFLECTIONS ON WHERE IT FITS IN A SYSTEM OF JUSTICE

Jean R. Sternlight\*

## I. INTRODUCTION

For twenty-five years or more we have been debating the proper role of alternative dispute resolution ("ADR")<sup>1</sup> in our system of justice. While the birth of the modern ADR<sup>2</sup> movement is often linked to the 1976 Pound Conference,<sup>3</sup> heated discussions as to the desirability of ADR continued long after that date.<sup>4</sup> Although many have heralded non-litigation forms of dispute resolution as quicker, cheaper, more empowering, and otherwise superior to litigation,<sup>5</sup> others have expressed concern that ADR, or at least particular forms of ADR, may be detrimental to the public interest,<sup>6</sup> may harm minorities or women,<sup>7</sup> and

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\* John D. Lawson Professor of Law, University of Missouri-Columbia. All rights reserved. This essay was part of a symposium, "Perspectives on Dispute Resolution in the 21st Century," held at the University of Nevada, Las Vegas. I am grateful to Jeff Stempel for inviting my participation. I am also grateful to my research assistant, Alyson Carrel, for her many excellent contributions.

<sup>1</sup> Personally, I prefer the phrase "appropriate" dispute resolution to "alternative" dispute resolution, making the point that the so-called "alternative" has arrived. See also Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way – We Earn It!*, 4 NEGOT. J. 55, 62 (1988) (coining the term "appropriate" dispute resolution); Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 8 (1999) (urging lawyers to engage in "appropriate dispute resolution"). Cf. Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 300 n.2 (1996) (opting for the term "alternative" to reflect ADR's recent arrival on the legal scene).

<sup>2</sup> In a prior article, I cautioned that the term "ADR" is no longer particularly useful in that differences between mediation, binding arbitration, and other techniques are so great. 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. Yet, I find myself using the term. At least I predicted that this might happen. *Id.* at 110 (explaining that "[t]he term is still useful where we seek to refer to those dispute resolution processes other than litigation").

<sup>3</sup> In particular, Frank Sander's speech at that conference introducing the concept of the "multi-door courthouse" has been identified by many as a key event in the birth of modern ADR. See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

<sup>4</sup> For a reflection on the development of ADR, see Stempel, *supra* note 1.

<sup>5</sup> See, e.g., STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 8 (3d ed. 1999) (summarizing goals of ADR); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2 (2d ed. 1997) (listing five motives inspiring interest in alternatives to litigation).

<sup>6</sup> See, e.g., Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 677 (1986) (stating a fear of pushing ADR into areas of novel legal issues and public interest without the "checks of government institutions"); Owen M. Fiss,

may not in fact be cheaper or quicker than litigation.<sup>8</sup> These sorts of debates took place as jurisdiction after jurisdiction considered whether to implement particular forms of ADR as part of their federal or state courts, or administrative agencies.

The recent conference at the William S. Boyd School of Law, University of Nevada, Las Vegas, of which this essay is a part, reflects that discussions regarding ADR have moved to a new level. We are no longer debating whether jurisdictions should adopt new and unconventional forms of dispute resolution. Rather, while debates continue, they recognize that ADR has clearly arrived in a big way. Many, if not most, federal and state jurisdictions include ADR methods in their court rules.<sup>9</sup> Federal and state administrative agencies are increasingly relying on non-litigious methods to resolve disputes.<sup>10</sup> More and

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*Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that ADR and settlement undermine the purpose of a civil litigation system when dealing with cases of unequal bargaining power, parties who are unable to provide authoritative rights to settle, and cases with long term agreements needing the continued presence of judicial involvement); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999) (discussing the inability of employment discrimination cases settled through arbitration to address the public interest of ending workplace discrimination because such settlements lack the capacity to yield uniform or precedential results, to deter wrongdoers, or to educate and form public values).

<sup>7</sup> See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (asserting mediation's inability to empower women because the process deemphasizes past experiences and fault or right-based claims, and creates a false impression of an equal power balance between disputing parties, thus embodying an even more dangerous and oppressive process for women than adversarial litigation); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 (claiming that informal processes' allowance for "participants' emotional and behavioral idiosyncrasies" creates an atmosphere conducive to prejudicial behavior while the formality of court proceedings stifles such behavior and "increases the minority group member's sense of control").

<sup>8</sup> JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT XXXIV (1996) (often referred to as "The Rand Report") (finding "no strong statistical evidence that . . . time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management [were] significantly affected" utilizing mediation or neutral evaluation programs).

<sup>9</sup> See, e.g., The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58, 652(a) (requiring each district court to have litigants in all civil cases consider using ADR, and to provide at least one ADR process to litigants); NANCY H. ROGERS & CRAIG A. McEWEN ET AL., *MEDIATION: LAW, POLICY, PRACTICE* app. B (1999 & Supp. 2000) (listing territory, state, and federal legislation on mediation). See also ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 15-17 (1996) (providing a comprehensive table listing all ADR processes provided by federal district courts).

<sup>10</sup> For good discussions of federal programs, see Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79 (listing federal agencies utilizing various ADR processes, including the U.S. Postal Service, federal Justice Department, Equal Employment Opportunity Commission, and the Air Force); Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709 (2001) (listing additional agencies utilizing various ADR processes, including the Department of Health and Human Services, Environmental Protection Agency and Community Conflict Resolution Centers).

more, disputants are *required* to use mediation<sup>11</sup> or another form of ADR,<sup>12</sup> rather than just being offered the opportunity to use it if they so desire. Today, it is clear that far more disputes in the United States are resolved through negotiation, mediation, and arbitration than through trial.<sup>13</sup> But, the arrival of ADR does not mean that the questioning and critiquing has ended or must end, but rather that it should take a different form.

The remarks of the speakers at this conference all reflect this new reality: that ADR is an important part of our existing system of dispute resolution. Professor Stephen Subrin, who highlights his prior “traditionalist,” “formalist” and “pro-adjudication” credentials,<sup>14</sup> states: “I think I now realize that mediation is a major portion of the new era of civil procedure. Moreover, I have come to believe that, despite some lingering reservations, this is a positive development in the evolution of American civil procedure.”<sup>15</sup> While Professor Subrin finds the tremendous growth of mediation to be salutary for many reasons, he also pleads with “judges to spend an increased portion of their time in

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<sup>11</sup> ROGERS & McEWEN, *supra* note 9 (listing forty-six states that legislate mandatory mediation in various legal arenas). See also John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 850-51 (1999) (asserting “the responsibility of courts that mandate litigants to mediation to provide a high-quality mediation program” and providing objectives to evaluate these programs in order to ensure their high-quality); 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 (2002) (discussing attitudes of attorneys toward mediation in a jurisdiction where it is not typically mandated).

<sup>12</sup> Although courts and government agencies generally do not, and constitutionally likely could not, mandate binding arbitration, they do sometimes mandate non-binding arbitration or early neutral evaluation. See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (2001) (providing that federal courts shall not mandate binding arbitration absent parties' consent). See also Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

<sup>13</sup> See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340-41 (1994). As Professor Subrin has noted, it is frustratingly difficult to find good data on the amount of ADR that is taking place in this country. Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 199 (2003). See also Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 589 (complaining about difficulty of ascertaining good information on how contract disputes are resolved by processes outside courts' mandate). However, we do know that most cases settle in both federal and state courts. Only 2.2% of federal civil cases reached the trial stage in 2000. *Annual Report of the Director of the Administrative Office of the United States Courts* at tbl. C-4 (Sept. 30, 2000). Some of these resolutions are due to cases being disposed of on pretrial motions. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (explaining that civil procedure reforms in the last seventy-five years have led to pretrial processes playing an increasingly important role). Still, it remains true that about seventy percent of cases do settle. Galanter & Cahill, *supra*, at 1339-40.

<sup>14</sup> Subrin, *supra* note 13, at 196-98.

<sup>15</sup> *Id.* at 198.

their more traditional role.”<sup>16</sup> Similarly, Professor Edward Brunet takes the significant presence of mediation for granted, and goes on to address questions as to what the differences should be between old-fashioned settlement conferences and more modern mediations.<sup>17</sup> Professor Paul Carrington, while attacking the continued growth of mandatory arbitration, clearly recognizes that the phenomenon has been approved by the Supreme Court and is here to stay, at least absent Congressional action.<sup>18</sup>

In another symposium with which I am familiar, participants similarly based their remarks on the premise that ADR has very much arrived. Professor Deborah Hensler’s lead article in the *Journal of Dispute Resolution* sharply criticizes our heightened reliance on mandatory mediation.<sup>19</sup> Asserting that there is no good empirical evidence that mediation is either cheaper or quicker than litigation,<sup>20</sup> she further contends there is no adequate evidence that disputants prefer mediation to litigation.<sup>21</sup> Here she draws on the procedural justice literature to suggest that disputants may prefer a hearing before a neutral decision maker to a facilitated negotiation.<sup>22</sup> Various other commentators in the same symposium take for granted our system’s increasing embrace of ADR and then discuss how we should respond to that phenomenon. For example, Professor Judith Resnik criticizes our move away from adjudication and trial and toward both managerial judging and settlement, arguing that whereas judges prefer settlement to trial, disputants in fact prefer trials or trial-like procedures such as arbitration.<sup>23</sup> Researchers Craig McEwen and Rochelle Wissler similarly took note of our system’s move toward mediation but respond more favorably, arguing that mediated settlements are often superior to non-assisted

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<sup>16</sup> *Id.* In particular, he urges that, especially as the amount of mediation increases, judges should “return to presiding over trials instead of expending time and energy on ad hoc case management and luring litigants to settlement.” *Id.*

<sup>17</sup> Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003).

<sup>18</sup> Paul D. Carrington, *Self-Deregulation, The “National Policy” of the Supreme Court*, 3 NEV. L.J. 259 (2003).

<sup>19</sup> Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 94 (suggesting that the move to use mandatory court-connected mediation has been based on a false theory that litigants preferred non-adversarial methods of dispute resolution, when in actuality litigants prefer to have their disputes resolved on the basis of fact and law by a third-party neutral). For another recent critique, see Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 950-51 (2002) (asserting that, by emphasizing ADR, “[w]e have created a segmented and hierarchical system skewed dramatically toward business litigants and a few other players – notably a few sectors of the personal injury bar”).

<sup>20</sup> Hensler, *supra* note 19, at 81.

<sup>21</sup> Hensler, *supra* note 19, at 84 (“In any event, neither statistical data about claiming rates nor public opinion surveys about lawyers lead directly to the conclusion that left to their own devices most Americans would prefer mediation to adversarial litigation and adjudication.”).

<sup>22</sup> *Id.* at 85-96.

<sup>23</sup> Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 163 [hereinafter Resnik, *Mediating Preferences*]. See also Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 944-49 (2000) [hereinafter Resnik, *Trial as Error*] (citing examples from as early as the 1950s of a push by judges to use pretrial conferences as a vehicle to promote settlement).

settlements.<sup>24</sup> Professor Lisa Bingham, drawing on research from outside the court setting, urges that facilitative and transformative mediation can provide disputants with a useful alternative to adjudication.<sup>25</sup> Finally, Professor Nancy Welsh, reviewing the same procedural justice literature examined by Professor Hensler, urges that we should take procedural justice concerns into account as we design mediation, litigation, and all forms of dispute resolution processes.<sup>26</sup>

Finally, I had the luxury of spending much of the Winter 2002 semester thinking big thoughts about dispute resolution, examining what it has looked like throughout time and within various societies.<sup>27</sup> Reviewing some of the anthropological and other literature regarding other societies' resolution of disputes,<sup>28</sup> I saw that historically many societies have placed far greater emphasis on harmony and healing, and far less emphasis on individualistic adversarial approaches, than we do in the United States today.<sup>29</sup> I also saw that a society's

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<sup>24</sup> Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131, 136 (stating that, given the fact that most cases settle prior to trial, it is preferable to compare non-mediated settlements with mediated settlements instead of comparing litigated with mediated resolutions).

<sup>25</sup> Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 102 (also urging that further research needs to be done).

<sup>26</sup> Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 180 [hereinafter Welsh, *Disputants' Decision Control*]. See also Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 78-92 (2001) (suggesting steps that should be taken to ensure that mediation enhances rather than diminishes self-determination, a component asserted by procedural justice studies to be imperative to the perception of a fair process); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 860 (2001) [hereinafter Welsh, *Making Deals*] (arguing that court-connected third-party processes "should and must be judged against the standard of procedural justice").

<sup>27</sup> I owe this luxury to a development leave afforded by the University of Missouri-Columbia.

<sup>28</sup> Some of the most compelling works I read include 2 THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982); CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES (Kevin Avruch et al. eds., 1991) [hereinafter CONFLICT RESOLUTION]; STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000); LAW IN CULTURE AND SOCIETY (Laura Nader ed., 1969); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); and PETER STEIN, LEGAL INSTITUTIONS: THE DEVELOPMENT OF DISPUTE SETTLEMENT (1984).

<sup>29</sup> See, e.g., CONFLICT RESOLUTION, *supra* note 28 (including chapters discussing focus of dispute resolution system on harmony and balance in African, Pacific Island, and Mexican societies); Laura Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY, *supra* note 28, at 69-91 (describing approach to dispute resolution taken by Mexican Zapotec Indians as focused on keeping the society in balance and seeking to restore personal relations to an equilibrium, and suggesting similarities to Korean system as described by P.C. Hahm); Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 1994 N.M. L. REV. 175 (explaining that Navajo system of justice can best be described as "horizontal," in contrast to the Western "vertical" system of justice; where the vertical system relies on hierarchy and power to resolve disputes, the horizontal is instead best symbolized by the circle, in which no authority has to determine what is true, and the goal is healing and restoration rather than determining right and wrong); James A. Wall, Jr. & Ronda Roberts Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation*, 11 NEGOT. J. 45, 47 (1995) (explaining that term "ho'oponopono," used to describe Hawaiian form of dispute resolution, comes from concept of disentangling (as in fishing lines) and "putting things

approach to dispute resolution will depend on a number of geographic, sociological, historic, and other factors, and that the emphasis on harmony and community has both positive and negative aspects.<sup>30</sup>

In pondering the comments of the various symposia participants, I find myself attracted to aspects of each analysis. Thus, while the authors of these comments often see their works as conflicting, I am instead searching for ways to synthesize their perspectives. This attempt at synthesis leads me to offer five insights regarding how a society should go about deciding what type of dispute resolution process it ought to establish. These thoughts are quite preliminary, and will need to be spelled out in further detail in future works.

## II. FIVE INSIGHTS

### A. *It is a Mistake to Distinguish Litigation from Other Forms of Dispute Resolution in an Either/Or Fashion*

Many of us teach about various forms of dispute resolution as being distinct points, perhaps lying along a continuum. We often suggest, for example, that processes vary, from negotiation to mediation to arbitration to litigation, along such dimensions as binding/nonbinding, formality, and degree of party control.<sup>31</sup> This imagery is useful, and I have used it myself. As we attempt to

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right," such that the goal of the process is to acknowledge any wrongdoing with the attempt to make things right again both spiritually and interpersonally, and ultimately to achieve mutual forgiveness); SHAPIRO, *supra* note 28, at 14-15 (recognizing that, in societies characterized by mutual interdependence, there is a tendency to select mediation rather than strictly adjudicative approach, and that this can even occur within systems labeled as courts). See also MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* 7 (1968) (questioning the historic "command theory," which states that law only exists within the presence of the State, by examining cultures in which disputes are resolved without the centralized strong arm of the State as the enforcer).

<sup>30</sup> See, e.g., Laura Nader, *Harmony Models and the Construction of Law*, in CONFLICT RESOLUTION, *supra* note 28, at 41, 42 (suggesting that neither conflict nor harmony models are inherently better or worse than one another, but rather that each system can serve good and bad purposes, such as enhancing autonomy or controlling dissent); SHAPIRO, *supra* note 28, at 14-15 (describing how the importance of continued relationships leads many societies or subsets of societies to decide against litigious processes and in favor of more harmonious approaches).

<sup>31</sup> The continuum provides a convenient format onto which one can lay out the various processes for examination. See CHRISTOPHER MOORE, *A GENERAL THEORY OF MEDIATION: DYNAMICS, STRATEGIES, AND MOVES* 3 (1983) (detailing a continuum of conflict management and resolution approaches shifting from conflict avoidance, to cooperative problem solving, to litigation, to violence); R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: LAW, POLICY, AND PRACTICE* 569 (1991) (explaining dispute resolution processes along a continuum based on formality, expense, and party control). However, many other authors use more complex formats stepping away from a strictly linear approach. For example, one text uses a chart with various rows and columns to distinguish four primary and five hybrid dispute resolution processes. GOLDBERG, *supra* note 5, at 4-5. See also RISKIN & WESTBROOK, *supra* note 5, at 3-10 (categorizing processes as adjudicative, consensual, or mixed, and also reprinting the chart prepared by GOLDBERG, *supra* note 5); EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* § 5 (1996) (placing ADR processes on two axes, depending on the level of control and responsibility of the neutral or the level of control and responsibility of the parties). As one renowned author stated, "there is no comprehensive or widely-accepted system for identifying, describing, or classifying" the various

locate the various dispute resolution methods along these continua, we help students define the key differences among the techniques.

Yet, these useful distinctions can also create the impression that the various dispute resolution techniques being discussed are more distinct than they really are. I concur with the point Professor Martin Shapiro made, over twenty years ago, when he stated “mediation and litigation are invariably intimately interconnected and interactive rather than distinct alternatives for conflict resolution.”<sup>32</sup> Several of the Nevada symposium’s speakers have also emphasized this point. Professor Subrin argues that mediation can be used to explore legal rights.<sup>33</sup> He explains that whereas mediation has been criticized for being non-legal and insufficiently emphasizing rights, in fact mediation allows disputants and lawyers to explore their rights more fully than often would happen absent mediation.<sup>34</sup> Similarly, Professor Brunet emphasizes that “[b]ecause case evaluation from a judge is the essence of both judicial mediation and a settlement conference, there is not a great deal of difference between these terms.”<sup>35</sup> Thus, we see a blurring of the lines between dispute resolution processes. As Brunet points out, a judge, through the course of various hearings, cannot help but signal some of her intentions to the parties, thereby encouraging settlement.

Like these commentators, I see that an intertwining between litigation and other forms of dispute resolution is inevitable. Some disputants will always choose to settle their disputes, and there seems to be no way that a society could force them to resolve the dispute through litigation rather than through settlement.<sup>36</sup> Just as settlements occur in the “shadow of the law,”<sup>37</sup> that is, that the possibility of a litigated solution is often what drives disputants to resolve the dispute through mediation or negotiation, so too does litigation take place in the shadow of settlement.<sup>38</sup> As lawyers and disputants litigate cases they do, or at least should, always keep in mind the possibility of negotiation or

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ADR processes. Leonard L. Riskin, *Understanding Mediators’ Orientation, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 8 (1996).

<sup>32</sup> SHAPIRO, *supra* note 28, at viii. Shapiro goes on to explain that whereas courts are conventionally defined by their independence, adversarialness, decisions according to preexisting rules, and winner-take-all decisions, these “propositions are incorrect, or at least incomplete and misleading.” *Id.* Instead, drawing on a series of examples from various societies, he argues that mediation and litigation tend more toward blending into one another, and ultimately concludes that courts are a mix of conflict resolution, social control, and lawmaking. *Id.* at 63-64.

<sup>33</sup> Subrin, *supra* note 13. He explains that “[i]ronically, mediation, which is accused of, or applauded for, being lawless, frequently does much more to bring law to bear on facts than traditional litigation.” *Id.* at 218. As Professor Subrin notes, the term “mediation” is inspired in part by the term “litigotiation,” used by Marc Galanter and Mia Cahill. *See* Galanter & Cahill, *supra* note 13, at 1342.

<sup>34</sup> Subrin, *supra* note 13, at 218-21.

<sup>35</sup> Brunet, *supra* note 17, at 238.

<sup>36</sup> Even if a society were to forbid or discourage settlement once litigation had been initiated, it would not seem feasible for a society to proscribe pre-filing settlements.

<sup>37</sup> *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>38</sup> *See also* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2676 (1995) (noting “‘dialogic’ or interactive relation between adjudication and settlement processes”).



mediation.<sup>39</sup> Thus, it is generally a mistake to consider that one form of dispute resolution is entirely a substitute for others.

*B. Despite the Entanglement of Various Forms of Dispute Resolution, Significant Choices Must be Made Among the Forms of Dispute Resolution*

Recognizing that various forms of dispute resolution are intertwined by no means implies that they are the same, or that it does not matter how a society chooses to resolve its disputes. Clearly, various forms of dispute resolution have different impacts on individual disputants and on society as a whole. The dispute resolution methods not only vary across such dimensions as speed and cost, but also vary with respect to the educational and psychological impact they will have on the disputants, other closely related persons, and society as a whole.

For example, when disputes are handled publicly, such as through litigation or a public facilitation, the disputes and their resolution will have an impact upon all of society. This influence may be formal, through the setting of precedent, or informal, through notifying members of the society how the issues have been resolved. In contrast, when disputes are handled privately, for example through a private negotiation or mediation, the outcome will have a much smaller impact.<sup>40</sup> As well, when disputes are resolved through adjudication, where one party wins and the other loses, the impact on disputants and the community will be very different than if that same dispute were resolved through a compromise. Depending on the societal goals, one approach may be preferable to the other.

Thus, even though it may be impossible to make sharp delineations between various forms of dispute resolution, it is clear that societies must make self-conscious choices as to which dispute resolution methods should be preferred for particular disputes. We must also make choices as to how to regulate these various forms of dispute resolution.

*C. More Research is Needed Regarding What Disputants Want in a Dispute Resolution System*

Most of us would agree that it is important for disputants to feel that they have been treated fairly and justly by society's dispute resolution systems.<sup>41</sup>

<sup>39</sup> See Dessem, *supra* note 31 (urging attorneys to "explore with clients ADR possibilities" during the pre-trial stage). Binding arbitration is somewhat different, in that once a choice has been made to resolve a dispute through binding arbitration, that dispute cannot be litigated. However, even in this case, the alternative to litigation is intertwined with litigation in that the courts often become involved either to order a dispute to arbitration or to enforce an arbitral award. Also, disputants would have the option to transfer a case from litigation to binding arbitration.

<sup>40</sup> Of course, settlement need not necessarily be kept private. When settlements are publicized, they may have a significant public impact. See Menkel-Meadow, *supra* note 38, at 2681 (noting that when important settlements receive substantial news coverage, they may have a public impact exceeding that of reported decisions).

<sup>41</sup> Professor Subrin states "it is critical that litigants feel that they have been treated fairly." Subrin, *supra* note 13, at 216. I would expand this to include not just litigants but all disputants.

The subjective perception of fairness is critical, because even assuming objective fairness, the system could not function well if it were perceived to be unfair or unjust. Thus, it is rather shocking how little we actually know about what disputants want, and what they perceive to be fair. As Professor Hensler states, it is clear that more empirical research needs to be done.<sup>42</sup>

Unfortunately, some people who opine on dispute resolution issues have a tendency to say that they or we know what disputants really want, when in fact the evidence is quite sparse. Thus, some mediation advocates overstate their case, suggesting that most everyone would prefer a conciliated, non-legal solution to a trial. Along somewhat the same lines, an increasing number of judges and lawyers tend to say that trials are terrible, and too much of an uncontrollable gamble for disputants, although it is not clear disputants actually share this view.<sup>43</sup> Some lawyers feel it is their responsibility to educate disputants as to the failings of our litigation system.<sup>44</sup> At the same time, some trial advocates also overstate their case, suggesting that most, or all, litigants would prefer to resolve their disputes in the public and adversarial courtroom.

One important body of work, the procedural justice literature, does begin to answer these questions.<sup>45</sup> Drawing on laboratory and field research, these studies have shown that perceptions of procedural justice are more influential than perceptions of distributive justice, with respect to how disputants will assess the fairness and legitimacy of the entire system.<sup>46</sup> This rich literature

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<sup>42</sup> Hensler, *supra* note 19, at 95 ("The question of whether (and when) people prefer dispute resolution based on public legal norms to dispute resolution based on ad hoc privately negotiated norms unfortunately has not been subjected to much investigation to date."). See also Bingham, *supra* note 25, at 122-23 (urging that further research be done to determine the effectiveness of mediation, and that such research must take into account numerous differences in the ways mediation may be set up).

<sup>43</sup> Judith Resnik discusses this phenomenon at length. See Resnik, *Mediating Preferences*, *supra* note 23, at 156-59. She notes that "[j]udges repeatedly opine that 'a bad settlement is almost always better than a good trial.'" *Id.* at 158 (quoting *Hispanics United v. Village of Addison*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997)).

<sup>44</sup> Many repeat this famous statement from lawyer Abraham Lincoln: "Discourage litigation. . . . Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time." Abraham Lincoln, *Notes for a Law Lecture* (July 1, 1850), in FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 102 (1906). Judge Learned Hand's remarks to the same effect are also frequently quoted: "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address Before the Association of the Bar of the City of New York (Nov. 17, 1921), in 3 *LECTURES ON LEGAL TOPICS* 89, 105 (1926).

<sup>45</sup> Much of the key work in this area has been done by Laurens Walker, John Thibaut, E. Allan Lind, Tom R. Tyler, and their students or former students. See, e.g., Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APP. SOC. PSYCHOL. 295 (1974); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 247 (1993); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents to Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850 (1994); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 65 (Joseph Sanders & V. Lee Hamilton eds., 2001).

<sup>46</sup> Welsh, *Making Deals*, *supra* note 26, at 817-18. Indeed, perceptions as to whether the system is procedurally fair are likely to impact disputants' opinions of whether the result was

has too often been neglected by persons setting up or analyzing systems of justice.<sup>47</sup> As Professor Nancy Welsh explains, procedural justice researchers have found three key elements to disputants' experience of procedural justice: (1) their perception that they had an opportunity to voice their concerns and present evidence to a third party, and that they had some control over this presentation; (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.<sup>48</sup>

Yet, while dispute resolution scholars are now beginning to focus on procedural justice,<sup>49</sup> they are learning that more studies need to be done to assess how particular approaches to dispute resolution are or might be viewed by disputants. The existing studies allow expert researchers to draw quite disparate conclusions from the same data. For example, Professor Hensler reviews the procedural justice literature and concludes that disputants want third-party neutrals to resolve their disputes based on fact and law.<sup>50</sup> In contrast, Professor Welsh, having reviewed the same studies, questions Hensler's conclusion that disputants view processes as more fair when they cede decisional control to a third party.<sup>51</sup> Rather, argues Welsh, the 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."<sup>52</sup> In other words, we may be able to establish forms of ADR that meet disputants' desires for procedural justice without having third-party neutrals make factual and legal determinations.<sup>53</sup>

It is clear that additional research must be done on what disputants want from a system of justice. It also seems intuitively obvious that disputants' goals and desires will vary at least somewhat from society to society. While a few studies on subjects from Hong Kong and Japan showed that they shared certain procedural justice perspectives with United States subjects,<sup>54</sup> those stud-

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substantively fair. *Id.* at 818. Most of these studies have been done in the United States, but, as will be discussed, to some degree the results have been duplicated elsewhere.

<sup>47</sup> Of course, as Professor Bingham points out, procedural justice literature is not the only body of work that is or could be useful in evaluating the effectiveness of various approaches to dispute resolution. Bingham, *supra* note 25, at 108.

<sup>48</sup> Welsh, *Making Deals*, *supra* note 26, at 820.

<sup>49</sup> See Hensler, *supra* note 19; Welsh, *Making Deals*, *supra* note 26.

<sup>50</sup> Hensler, *supra* note 19, at 95.

<sup>51</sup> Welsh, *Disputants' Decisional Control*, *supra* note 26, at 185.

<sup>52</sup> *Id.* at 187.

<sup>53</sup> Professor Welsh spells out some of the ways in which she believes procedural justice principles should be applied to court-connected mediation in Welsh, *Making Deals*, *supra* note 26, at 838-58 (concluding, for example, that disputants should not be excluded from the mediation process, that joint sessions are important, that evaluative mediators should refrain from giving issue evaluations too early, that disputants should have a chance for actual brainstorming of creative agreements as opposed to template-based agreements, and that it is critical that attorneys adequately express their clients' views or allow their clients to express their own views).

<sup>54</sup> See E. Allan Lind, Tom R. Tyler & Yuen J. Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERS. & SOC. PSYCHOL. 767, 777 (1997) (conducting research on U.S. and Japanese students and concluding "procedural justice is defined in much the same way across widely different cultural contexts"); Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A*

ies also revealed some important cultural differences.<sup>55</sup> Moreover, a great deal more work needs to be done to determine the dispute resolution preferences of persons from countries more dissimilar to the United States.

Once this research has been conducted, I believe it will ultimately show that disputants are generally looking for three benefits from a dispute resolution system: (1) a system that provides them with a substantively fair/just result; (2) a system that meets the procedural justice criteria of voice, participation, and dignity as set out above; and (3) a system that helps them to achieve other personal and emotional goals, such as reconciliation, or that at least does not leave them feeling worse, emotionally and psychologically. The first two points seem fairly obvious. It is hard to imagine that any system can be tolerated as fair and just in the long term if it in fact consistently yields unfair results. In addition, although the social science literature on procedural justice needs to be developed further, and while its applicability to other kinds of societies needs to be verified, as a preliminary matter, it seems clear that the *perception* of justice is quite important to disputants.<sup>56</sup>

The third goal is the least obvious, at least to those of us who are used to Western conceptions of justice. We recognize that disputants have emotional needs and desires. They may seek revenge, forgiveness, or reconciliation, among other things. However, we in the West have been trained to think that these emotional needs should not necessarily be served by a system of justice, or at least by a system of law.<sup>57</sup> Instead, since the Enlightenment, we have become accustomed to thinking of a justice system in an almost mechanical fashion, as an institution designed to resolve disputes fairly, effectively, and according to neutral legal principles. Yet, not all societies share this limited

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*Cross-National Study*, 53 J. PERS. & SOC. PSYCH. 898 (1987) (concluding that subjects from both Hong Kong and the U.S. viewed adversarial procedures as the fairest ).

<sup>55</sup> Kwok Leung et al., *Effects of Cultural Femininity on Preference for Methods of Conflict Processing: A Cross-Cultural Study*, 26 J. EXP. SOC. PSYCH. 373 (1990) (comparing dispute resolution preferences in high-masculinity culture, here Canada, to those of high-femininity cultures, here the Netherlands, and concluding that the Dutch had a greater preference for non-confrontational techniques than did the Canadians); Leung, *supra* note 54 (observing that Hong Kong Chinese liked non-binding processes more than the American subjects, and that American subjects liked adjudicatory procedures more than the Hong Kong subjects).

<sup>56</sup> Professor Tyler has observed that disputants' interests may evolve as they interact with the justice systems. Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 894 (1997) ("Prior to dealing with the courts people have an instrumental orientation toward their problem" and "[f]or example . . . are strongly influenced by assessments about likely gain or loss. However, once people actually deal with legal authorities, their concerns change and they focus more directly on issues of participation, trustworthiness, respect, and neutrality.").

<sup>57</sup> Professors McThenia and Shaffer make a point that is related to mine, suggesting that advocates of adjudication, such as Professor Owen Fiss, have defined justice too narrowly, essentially defining it as law and the resolution of claims of rights. Andrew McThenia & Thomas Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1660-64 (1985). They suggest that justice and law should not be equated, and that justice ought to include concepts such as reconciliation. *See id.* at 1664-65 ("Justice is what we discover – you and I, Socrates said – when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from."). Yet, in contrast to McThenia and Shaffer, I see no reason why this broader conception of justice could not also be part of our system of law. Also, in contrast to McThenia and Shaffer, my own views are not religiously based.

vision as to the goals of a system of justice. Instead, many see the purposes of justice more broadly, as bringing the members of society back into balance or harmony.<sup>58</sup> I believe there is no reason why we should not continue to have our system of justice serve these emotional needs, as well as the other goals set out above. Why should we not take into account psychological and emotional factors, as well as other social policies, when we set up our legal system? Surely these factors can be considered in drafting our legal procedures, just as they are considered when we adopt substantive laws. Indeed, given the inevitability that the manner in which we structure a system of procedure will impact disputants, psychologically and emotionally, do we not have an obligation to try to make this impact positive rather than negative?

*D. We Need to Consider Societal as Well as Individual Interests in Setting Up a System of Justice*

The discussion above has focused on what individual disputants or members of a society might want from a system of justice. While certainly relevant, this should not be the only criterion as societies decide how to design their legal institutions.<sup>59</sup> The nature of our legal system has implications far beyond the interests of the disputants involved in an immediate dispute, and I believe it is important and possible to take account of both individual and societal interests. As Steve Subrin puts it: "The very term 'dispute resolution' has bothered me through the years because it implies that the central reason for adjudication is to get rid of disputes, rather than concentrating on the application of law and vindication of rights."<sup>60</sup> Indeed, political philosopher Stuart Hampshire has recently argued that "justice is conflict," suggesting that the process of airing multiple perspectives serves the public interest.<sup>61</sup> In economic terms, our system of justice is a public good, and also imposes public costs.

For example, to serve the public good of justice, our legal system should be designed to enforce the laws chosen by a society, and to help educate society as to the meaning and scope of those laws. Using a formal legal system such as courts, we can serve these interests by having legal disputes resolved publicly through decisions that are broadly disseminated. The legal system should also be designed in such a way that it earns the trust and respect of the society, or else lawlessness and violence may occur. Thus, we need to ensure that the system is sufficiently accessible and that it is perceived to treat like claims equally.

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<sup>58</sup> See *supra* notes 29-30 and accompanying text. In this section, I am emphasizing individual emotional concerns, distinct from societal concerns, which will be discussed below.

<sup>59</sup> Cf. Menkel-Meadow, *supra* note 38, at 2691 (recognizing that the design of a societal dispute resolution system will differ depending on whether the system is designed to serve only interests of disputants, or also those of society as a whole, and suggesting that, for her, the individual interests are more important).

<sup>60</sup> Subrin, *supra* note 13, at 216.

<sup>61</sup> HAMPSHIRE, *supra* note 28. In particular, Hampshire urges that, whereas people will likely never agree on substantive conceptions, the good "fairness in procedures for resolving conflicts is the fundamental kind of fairness, and . . . is acknowledged as a value in most cultures, places and times." *Id.* at 4-5. For Hampshire, this fair process is an adversarial one in which all sides are heard and arguments are balanced, and it corresponds to the internal conversations that all individuals have with themselves. *Id.* at 8-9.

At the same time, we must recognize that public trials can be very slow and costly. These costs harm the public, which has an interest in efficiency, and also harms particular disputants. Thus, it will not serve the public interest to have all legal issues resolved through costly public trials. Negotiated or mediated solutions will make more sense for some issues. As Carrie Menkel-Meadow has eloquently explained, settlements can sometimes serve the public interest in legal compliance as well or even better than could an adjudicated solution.<sup>62</sup>

*E. We Can Ask a System of Justice to Do More than Just Resolve Disputes or Enforce Rights*

The preceding section presents a conception of public interest that is too narrow, in that it suggests that only one type of public good can be achieved by a system of justice: resolving disputes in a fair and just manner through the application of publicly selected laws and rights. As noted earlier, this is the vision of justice that has evolved in the West since the Enlightenment: applying laws neutrally to protect the rights of individuals.

Yet, as we consider the justice systems of other societies, we see that other goals are possible.<sup>63</sup> Non-Western European societies have frequently counted on their system of justice to help create balance, harmony, or reconciliation among the members of the society. For example, James Wall and Ronda Callister have described the Ho'oponopono process, which they call "an integral and ancient part of Polynesian culture," and which later migrated to Hawaii. This process, used to resolve all manner of interpersonal and what would elsewhere be criminal matters, typically consists of twelve steps ultimately geared to untangle the disputants and make things right between them. Similarly, in describing the Navajo system of justice, Robert Yazzie explains that concepts of justice are closely related to concepts of healing, and that when Navajo describe law, they say "life comes from it." Through a process of talking, and community, they seek to work things out, as a community.<sup>64</sup> These concepts

<sup>62</sup> Menkel-Meadow, *supra* note 38, at 2674, 2678-79 (urging that, as compared to litigated solutions, settlements can sometimes more accurately reflect the legal complexities of a situation, and that settlements can also have precedential impact).

<sup>63</sup> Occasionally, persons within our own society also urge these goals as well. See, e.g., Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 12 (1989) (suggesting that mediation may serve the public good by supporting a relational rather than an individualistic world view); Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29, 32 (2000) (explaining that mediation can serve justice by allowing disputing parties to "tell their stories and explain their feelings and values to each other in a manner that might enable one another to understand more clearly and perhaps build or preserve their relationship"); Shaffer & McThenia, *supra* note 57, at 1664-66 (urging that societal goals, such as reconciliation, peace and even love, are appropriately considered part of our justice system).

<sup>64</sup> Legal anthropologists, having studied numerous African, Asian, or even early American societies, have often noted an emphasis on societal harmony throughout the world. See, e.g., JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (examining informal and non-adversarial forms of justice throughout American history); Nader, *supra* note 30, at 44-50 (discussing harmony models of justice in various countries in Africa and the Pacific, and citing relevant literature); Laura Nader, *Styles of Court Procedure: To Make the Balance*, in *LAW IN CULTURE AND SOCIETY*, *supra* note 28, at 69 (describing goals of Mexican Zapotec Indi-

can also be traced to ancient Greece, where philosophers Aristotle and Plato similarly emphasized the importance of all units of the society doing their part and working well together.<sup>65</sup>

Is an emphasis on harmony possible or even appropriate in a modern Western society? Some have suggested that a modern, mobile, capitalist society cannot rely on the informal forms of dispute resolution that worked in non-mobile, pre-capitalist societies.<sup>66</sup> Critics have also pointed out that harmony has its negative controlling aspects, as well as a potential positive allure.<sup>67</sup>

Without disagreeing with these perspectives, and without for an instant suggesting that a modern system of justice should abandon its emphasis on protecting rights and helping promulgate the law, I do believe that the modern system of justice should also aspire to do more. I see no reason why an emphasis on protection of rights has to be exclusive of an emphasis on improving relations among members of society. Why can we not look to our system of justice to help members of society come to a better understanding of themselves, others, and what we can accomplish if we work together? I do not see these goals as inconsistent with one another. Rather, in my view, we need to strive for a proper mix among these and other goals as we design our system of procedure.

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ans to keep the society in balance, and restore personal relations to an equilibrium, and also noting similarity to other societies that emphasize harmony). *See also* sources previously discussed, *supra* notes 29-30.

<sup>65</sup> *See* HAMPSHIRE, *supra* note 28, at 3 (explaining Plato's argument in the *Republic* that "justice consists in a harmony of the parts or elements, a harmony imposed by reason"); Plato, *The Republic Book IV*, in *GREAT DIALOGUES OF PLATO* 271, 283 (W.H.D. Rouse trans. 1961) (explaining justice as performance of proper role). *See also* THE POLITICS OF ARISTOTLE BOOK III(C) 119 (Ernest Barker trans., 1977) (explaining that laws must do more than merely protect rights; they must also promote good); McThenia & Shaffer, *supra* note 57, at 1665 ("Justice is what we discover – you and I, Socrates said – when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from."). Of course, it is quite difficult to transfer the Greek concepts to our own society. Translator Ernest Barker explains that the Greek word "Dike," often translated as justice, really means something more and different, perhaps something closer to "righteousness," or taking the right or straight path. THE POLITICS OF ARISTOTLE, *supra*, at lxix-lxxii.

<sup>66</sup> *See, e.g.*, Richard L. Abel, *Introduction* to THE POLITICS OF INFORMAL JUSTICE, *supra* note 28 (arguing that the characteristics of informal justice in precapitalist societies demonstrate why comparable institutions cannot be recreated under Western capitalism, in that the precapitalist society features a social structure in which relationships are multiplex and continuous, in which residential mobility is limited, and in which reputation is highly prized and easily lost); Sally Engle Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Information Community Justice in America*, in THE POLITICS OF INFORMAL JUSTICE, *supra* note 28, at 17, 33 (positing that mediation in urban America is "more perfunctory, more delayed, and less concrete than mediation in small-scale societies" because communities are fragmented and mobile, eluding the need to maintain cooperative relationships and, thus, the impetus to resolve the dispute).

<sup>67</sup> *See, e.g.*, Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

## III. CONCLUSIONS

At best, the analysis set out above helps us think about what questions we should ask, and what goals we should strive for in designing a procedural system of justice. Yet, merely asking these questions is a significant step forward as policy makers, and even law school professors, so rarely address the seemingly foundational question of what the purposes should be of a dispute resolution system.

Of course, determining the appropriate goals and then designing the system that best meets these goals will not be easy. Yet, I believe we have no viable alternative to taking on the task. In my view, it would be a real mistake either to simply allow our procedural system of justice to evolve on its own,<sup>68</sup> or to focus unduly on certain goals while ignoring others. As we first try to assess our goals for a system of justice, and then design the system that fulfills these goals, I believe policy makers will benefit from considering the interrelated nature of various types of dispute resolution, the preferences of disputants, and the multiple societal interests that are and can be served by a procedural system of justice.<sup>69</sup> It may well be appropriate to have a procedural system with multiple components in order to serve our multiple goals.<sup>70</sup>

Of course, if we devise a system that contains multiple procedures (e.g. both litigation and mediation), we will also have to solve the additional problem of determining how and by whom the choice should be made as to which disputes should be handled under which process.<sup>71</sup> I agree with Professors Subrin, Hensler, and Resnik that it is important for society to encourage judges to judge in certain cases.<sup>72</sup> However, I also see great value to using non-adju-

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<sup>68</sup> Professor Carrington's essay condemning the phenomenon of mandatory binding arbitration in the U.S. can be viewed in this light. Carrington, *supra* note 18. Allowing one set of disputants, businesses, to set up the form of dispute resolution that best serves their own interests may not serve the interests of the other disputants nor of society as a whole. For these reasons, the practice needs to be closely regulated.

<sup>69</sup> In some cases, we may well determine that a particular form of dispute resolution does not serve any of our interests. Although I agree with Professor Brunet that judges will necessarily impact disputants' settlement posture through their rulings, speech, and body language, I fear that encouraging or allowing judges to mediate their own cases is not likely to serve the interests of either the disputants or society as a whole. Brunet, *supra* note 17.

<sup>70</sup> Whereas Professor Subrin makes the point that both mediation and judging are valuable, I would add that mediation should be valued not only because it is a good means for exploring legal rights, but also because it can help achieve other aspects of justice. See Subrin, *supra* note 13. For example, mediation can help disputants and their lawyers learn that it is possible to advocate a position, while simultaneously listening to others and trying to engage in cooperative problem solving. *Id.* See also Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis* (draft, on file with author) (arguing that both formal and informal dispute resolution processes are important to allow us to serve our goals in enforcing laws prohibiting employment discrimination).

<sup>71</sup> In a somewhat different context, Professors Sander and Goldberg called this the problem of "fitting the forum to the fuss." 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).

<sup>72</sup> See Subrin, *supra* note 13; Hensler, *supra* note 19, at 96-99; Resnik, *Trial as Error*, *supra* note 23, at 1024-31.



dicative approaches in many situations.<sup>73</sup> Who decides which disputes go where? Elsewhere I have called this the problem of finding the appropriate “switching” mechanism, to choose between multiple dispute resolution tracks.<sup>74</sup> Professor Menkel-Meadow has suggested it may well be impossible to determine, in advance, which disputes should be handled by which process.<sup>75</sup> Yet, while I agree with Professor Menkel-Meadow that it is probably hopeless to try to assign cases to one process or another based on a set of pre-determined criteria, we must find a way of making such determinations. If we do not use pre-determined criteria, we must at least decide who will make these determinations, and on what basis.<sup>76</sup>

In short, we have our hands quite full as we try to assess where ADR does and should fit in a system of justice. I certainly do not have all the answers, but I do urge that we think about justice broadly as we examine these questions. ADR is exciting in part because it allows and encourages us to move beyond our existing conceptions. Without abandoning what is precious about our legal system, we must also be open to new possibilities as we begin to rethink our approach to procedural justice.

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<sup>73</sup> While Professor Hensler contends that veering away from fact and law should not occur inside the courthouse doors, I doubt that sharp lines can really be drawn between those types of mediation that are and are not law and fact based. Hensler, *supra* note 19, at 196-99. However, even if those lines could be drawn, I see no inherent reason why “justice” has to mean only decisions based on fact and law.

<sup>74</sup> See Sternlight, *supra* note 70.

<sup>75</sup> Menkel-Meadow, *supra* note 38, at 2694 n.139 (“I have abandoned any notion that we can assign cases *ex ante* to particular processes.”).

<sup>76</sup> A major question is whether it should be disputants themselves who select the process, or whether the larger society should play a role in this decision. Because disputes and dispute resolution affect the public as well as disputants, I believe this should be, in part, a societal decision, and not merely left to disputants.