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Symposium Introduction: Perspectives on Dispute Resolution in the Twenty-First Century

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SYMPOSIUM INTRODUCTION: PERSPECTIVES ON DISPUTE RESOLUTION IN THE TWENTY-FIRST CENTURY

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This issue of the *Nevada Law Journal* grows out of the presentation and scholarship done in connection with the live symposium, "Perspectives on Dispute Resolution in the Twenty-First Century." The live interaction of the speakers and commentators took place on the UNLV campus on January 25, 2002. In addition to the presentations and commentary contained in this edition of the *Nevada Law Journal*, the Symposium was greatly enriched by the participation and thoughtful commentary of Deborah Hensler[1], Linda Mullenix[2], and Lauren Robel.[3]

Like many law journal symposia, this one took a good deal of time to organize, implement, and publish. Searching for an ice-breaking introduction to the program, I seized upon a review of a Richard Posner book (one dare not say the "latest" Posner book for fear of another one being published prior to the reference) by David Brooks, a senior editor at the *Weekly Standard* and contributing editor at *Newsweek*. Brooks had these not altogether inspiring words to describe academic symposia:

> Just consider the serial posturings of your average panel discussion – the sycophantic introductions, the flattering references by the panelists to one another's work, the showtime vehemence of the professional radical, the slow-talking gravity of the emeritus thumb-sucker, the pompous pose of cognition that symposiasts adopt as they pretend to listen to the other speakers.[4]

Brooks then continues by criticizing Posner's attempt to explain the decline in public intellectualism according to supply and demand.[5] Although

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* Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to the Symposium participants and especially symposium co-organizer Carl Tobias, Dean Richard Morgan, and staff assistants Terri Eckersall and Diane Fouret, as well as to the *Nevada Law Journal*. Thanks also to Mike and Sonja Saltman for continued support of the study and teaching of conflict resolution and to Ann McGinley for ideas and support.

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[4] *See* David Brooks, *Notes From a Hanging Judge: Richard A. Posner Surveys the Work of Dozens of Public Thinkers, and Finds Every One of Them Wanting*, NEW YORK TIMES BOOK REVIEW, Jan. 13, 2002, at 9 (reviewing RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2002)).

[5] *Id.* at 9 ("None of this is reducible to supply and demand. Cornel West cannot be captured in a chart.").

as a co-organizer I am undoubtedly prejudiced, I found *Dispute Resolution in the Twenty-First Century* not to fall prey to Brooks's caricature. As the major papers in this issue illustrate, the authors have been hard-hitting and substantive. In addition, the Symposium is one for which there arguably is both supply and demand. The problems of effective conflict resolution and its relation to the civil justice system remain of substantial ongoing concern.

Without doubt, popular rhetoric puts forth the image of an American system of dispute resolution in need of reform and striving for reform. Whether reality accords with rhetoric is, of course, open to question. On the one hand, one can certainly argue that popular perceptions of a "litigation crisis" are overwrought and that as a whole, American dispute resolution is not doing all that badly. Everything is relative. American dispute resolution, like the American legal profession, may not be perfect, but it arguably is doing as well as or better than other American institutions such as the stock market, investment banking houses, Arthur Andersen, the FBI, the CIA, and Congress. I might even go out on a limb and suggest that the nation's system of dispute resolution (both civil and criminal) is doing a lot better than the Florida electoral machinery.

On the proverbial other hand, the American disputing system has certainly been amending itself with frequency and zeal, a pattern that normally reflects an effort to "fix" a system in need of repair. On the "litigation wing" of the system, the past quarter-century has seen five significant packages of amendments revising the Federal Rules of Civil Procedure, three of them substantial and controversial.[6] The Federal Rules of Evidence were enacted and the Evidence Advisory Committee buried and then resurrected to permanent status, from which it quickly swung into action, adding and amending federal evidence rules.

On the non-litigation wing of the dispute resolution edifice, alternative dispute resolution has, during the past twenty-five years, gone from being an idea to a fad to an institution, so much so that ADR has become a centerpiece of modern legal training and non-litigation dispute professionals prefer to delete the word "alternative" when describing the process.[7]

ADR – once a form of change in and of itself – has now itself seen significant changes. First came less formal efforts at achieving dispute resolution.

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[6] *See* Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396 (2001) (discussing recent discovery rule change); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 L. & CONTEMP. PROBS. 197 (2001) (reviewing history of rulemaking and arguing that amendment process has been driven more by political and institutional factors than by need to alter rules); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001) (discussing history and conflict leading up to amendment of Rule 26 to narrow scope of discovery available in federal court, particularly political forces working toward rule change).

[7] *See* Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289 (2003) (noting that forms of disputes resolution are so disparate that lumping them together as "ADR" may be misleading); 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. DISP. RESOL. 297, 309-21 (1996) (reviewing history of modern ADR movement); Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way – We Earn It*, 4 NEGOTIATION J. 55, 62 (1988) (preferring the term "appropriate dispute resolution" to "alternative dispute resolution").

Then came renewed fondness for labor and commercial arbitration, joined by court-annexed arbitration, followed by the "new" arbitration of consumer and employment matters, a movement now mature enough to have engendered some significant degree of backlash. Subsequently, arbitration has faded to some degree as the ADR method of choice in favor of mediation, which is now required in many states for many sorts of claims. At the same time, there has been renewed scholarly interest in negotiated resolution of disputes without the presence of a third-party neutral. Then, there are, of course, the hybrid forms of dispute resolution.[8]

Arguably, there has been longstanding and ever-increasing "demand" for something different than what might be termed classic, full-dress litigation of the sort envisioned when Charles Clark and his cohorts drafted the original 1938 Federal Rules of Civil Procedure. Certainly, there has been no shortage of "supply." However, cynics may wonder whether a deaf ear has been turned to many of the academic analyses suggesting that some retention of traditional adjudication needs to retain centrality in any rational system of dispute resolution. Although many academic commentators have been critical of several of the recent changes in court rules or the efforts of the judiciary to be more ADR-like,[9] the trend appears to proceed apace.

One of the central goals of this Symposium was to present a series of analysis and commentary by scholars known for their independent thinking and reluctance to ride trends merely because they are trendy. In the first panel, that tendency is evident as Professors Stephen Subrin,[10] Edward Brunet,[11] and Paul Carrington[12] all make points many would find contrarian, as did commentators Deborah Hensler and Jean Sternlight.[13] The second panel continued in the vein of independent critical thinking, as reflected in the works of John B. Oakley[14] and Lauren Robel and the commentary of Linda Mullenix, Thomas Main,[15] and Carl Tobias.[16]

Professor Subrin discusses the interrelationship of litigation and mediation, which has emerged as the dominantly successful form of modern ADR. Despite being a self-described traditionalist, Professor. Subrin concludes that

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[8] For an overview of ADR methods in relation to traditional litigation, see STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 561-639 (2000) (reviewing development and excerpting examples of leading scholarship and commentary on the topic).

[9] *See, e.g.*, STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000); Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 180; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

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mediation has worked well as an adjunct to litigation in meeting the needs of society but offers several cautions about its continued development.[17]

Professor Brunet discusses the historical and modern practice of judges providing informal reaction to aspects of a case, often with the hope of influencing the parties and spurring a negotiated settlement. Despite the potential for semi-judging on an incomplete record through this practice, Professor Brunet gives a guarded endorsement to judicial signaling.[18]

Professor Carrington provides an at times searing but consistently well-reasoned attack on the U.S. Supreme Court's arbitration jurisprudence. He sites the Court's error and excessive deification of private arbitration within a larger trend of "self-deregulation," one he finds the Court should buck rather than foster in order to give full and fair scope to congressional legislation.[19]

Professor Sternlight comments on these primary articles and also grapples with the question of how ADR methods are best coordinated within a justice system that has becoming increasingly variegated.[20] In my contribution to this portion of the Symposium, I add some modest commentary to their work and attempt to articulate what I believe to be common threads not only of their comments but of the dispute resolution movement generally.[21]

Professor Oakley provides an update and reprise to his much-praised 1986 article[22] that examined the status of the federal rules in state court procedural systems. He finds that state imitation of the Federal Rules of Civil Procedure, which his first study found was less than commonly supposed, has, if anything, slipped during the intervening fifteen years. He ascribes much of this trend to the increasing frequency and controversy of Federal Rules amendments, which have left states unwilling to follow because of disagreement, uncertainty, or simple inability to keep up with the increased pace of modern federal amendments.[23]

Professor Main draws upon not only precedent, doctrine, and legal scholarship but also the writings of T.S. Eliot in commenting on the Oakley paper.[24] Finally, Professor Tobias, perhaps the nation's leading expert on federal appellate court administration and the Ninth Circuit in particular, concludes the Sym-

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[17] *See* Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003).

[18] *See* Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003).

[19] *See* Paul D. Carrington, *Self-De-Regulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259 (2003).

[20] *See* Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289 (2003).

[21] *See* Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Throught Adjudication*, 3 NEV. L.J. 305 (2003).

[22] *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

[23] *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).

[24] *See* Thomas O. Main, *"An Overwhelming Question" About Non-Formal Procedure*, 3 NEV. L.J. 388 (2003).

posium by assessing the likely future of state adherence to federal procedure and federal appellate court organization.[25]

Far from succumbing to caricature, *Dispute Resolution in the Twenty-First Century* proves to be a Symposium producing scholarly examination worthy of this challenging and important topic.

[25] *See* Carl Tobias, *The Past and Future of the Federal Rules in State Courts*, 3 NEV. L.J. 400 (2003).