

## ARTICLES

### ADR: DISPUTING WITH A MODERN FACE, OR BARGAINING FOR THE BARGAINING IMPAIRED?

Robert J. Condlin\*

#### ABSTRACT

*The Alternative Dispute Resolution (“ADR”) movement might turn out to be one of the most important chapters in the history of the American judicial system. Or, it might not. In its most grandiose form, ADR turns disputing on its head, transferring control over outcome from third-party decision-makers to the disputants themselves, and defining disputing procedure in ad hoc, party-constructed guidelines tailored to the circumstances rather than fixed, generic, and categorical rules applicable uniformly in all situations. In its less grandiose form, ADR simply institutionalizes a system of multi-party bargaining in which third-party neutrals help disputants identify individual interests and find common ground when they are unable to do so by themselves but who, unlike judges, do not tell the disputants how to act on that information once they have it. Think of this latter version of ADR as a system of bargaining for the bargaining impaired.*

*Each version of ADR has its distinctive advantages and disadvantages, but both are susceptible to the well-known propensity of administrative regulation generally to bureaucratize decision-making by defining rights in collective rather than individual terms, standardizing outcomes, and giving repeat players disproportionate*

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\* Professor of Law Emeritus, University of Maryland Carey School of Law. Special thanks to Richard Boldt, Neil Dilloff, Doug Frenkel, Charlie Goetz, Lee Hall, Thom Main, and Charlie Sullivan, for very helpful comments on earlier drafts of the article, and to Sue McCarty for her customarily excellent work in putting the manuscript in proper form.

This article was completed in late 2019 before the onset of the COVID-19 pandemic and thus does not discuss the effects of that pandemic (particularly the increased use of video technology in law practice generally), on the various forms of dispute resolution. My focus here is on the philosophical and psychological underpinnings of ADR generally, and not on the relative merits of different ADR system designs or institutional formats. I discuss online dispute resolution in Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 *CARDOZO J. CONFLICT RESOL.* 717, 753–55 (2017) and will revisit that topic at greater length in a future article.

*power to call the shots. If this happens with ADR, some of the most important commitments underlying the American system of adversary justice will be up for grabs. It is difficult to know how the ADR reform movement will play out, of course, since it is still early in the process and, given ADR's propensity to operate in secret, trustworthy data is hard to come by. But there is considerable reason to be concerned about the unintended side effects of ADR and thus every reason to keep it on a short leash.*

## I. INTRODUCTION

Proponents of the legal reform movement known as Alternative Dispute Resolution (“ADR”)<sup>1</sup> often ask why their approach to disputing is not used more widely for all types of civil disputes.<sup>2</sup> While acknowledging ADR’s widespread acceptance,<sup>3</sup> they lament the fact that many parts of the American civil<sup>4</sup> justice system still cling to the competitive and self-interested methods of adversarial adjudication at a time when (allegedly) the adversary system has become an anachronism and is on its way out.<sup>5</sup> The reasons for this

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<sup>1</sup> Some define ADR to mean “Appropriate Dispute Resolution,” though it is not clear whether “Appropriate” modifies “Dispute,” “Resolution,” or both. See *Appropriate Dispute Resolution Center*, U. OF OR. SCH. OF L., <https://law.uoregon.edu/explore/ADR> (last visited Dec. 9, 2019). Others use the term “process pluralism” as a synonym. See, e.g., Carrie Menkel-Meadow, *Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals Beyond Rule of Law and Democracy Development (Argentina and Chile)*, 3 INT’L J. CONFLICT ENGAGEMENT & RESOL. 3 (2015).

<sup>2</sup> Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 514 (2016) (describing “how the Quiet Revolution [of ADR] has in some ways fallen short of the promise of its early days”); See Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes? And Appreciation and Some Reflections*, 22 NEGOT. J. 485, 492 (Sept. 27, 2006); See also Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,”* 12 OHIO ST. J. DISP. RESOL. 253, 255 (1997) (finding that seventy-one percent of attorneys adopt a positional or hard bargaining strategy in resolving disputes); *id.* at 262–65 (lawyers describing why they continue to use adversarial dispute resolution methods).

<sup>3</sup> See generally Thomas O. Main, *Mediation: An Unlikely Villain*, 34 OHIO ST. J. DISP. RESOL. 537, 556–62 (2019) (describing the inroads ADR methods and systems have made into some parts of the civil dispute resolution world, both in expanding their own jurisdictional reach and shrinking the reach of formal litigation).

<sup>4</sup> I limit discussion throughout the article to civil dispute resolution. The overlay of constitutional rights makes criminal prosecution and plea bargaining substantially different processes.

<sup>5</sup> See Carrie Menkel-Meadow, *Legal Negotiation in Popular Culture: What Are We Bargaining For?*, L. & POPULAR CULTURE 583, 584 (Michael Freeman ed., Oxford Univ. Press, Nov. 19, 2004) (“[Analogies to] competitive sports or war-like struggles . . . no longer represent either the growing scholarship on effective, efficient and more just negotiation practices or the evolving

reluctance to go all in with ADR, I will argue, are relatively straightforward and reasonably clear. ADR systems are based on a not always warranted trust in the ability and willingness of humans to think and act from a communal perspective; an incomplete understanding of the origins and purposes of social cooperation; an excessive faith in the capacity of informal and often algorithm-driven systems to deal adequately with issues of fairness and justice;<sup>6</sup> and a Eutopian<sup>7</sup> belief in the possibility of a conflict-free social world. At some level those in charge of designing dispute resolution systems in this country seem to recognize this.

The debate over the comparative advantages of ADR is less intense today than it was in the 1980s when it first surfaced in the legal literature,<sup>8</sup> and for most in the dispute resolution community the debate is over, with ADR being the clear winner.<sup>9</sup> ADR's methods are thought to be as, if not more, effective than those of formal litigation, and writing about ADR is thought to be the prin-

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practice of legal negotiation in the real world.”); Main, *supra* note 3, at 540 (“[F]ederal courts abandoned their commitment to trials around 1985.”); Professor Main provides an excellent history of the “vanishing trial” and “managerial judging” programs, with citations to all of the relevant literature, and in an insightful addition, explains how the rise of ADR (mediation in particular), was in major part responsible for the demise of litigation. *See id.* at 562–68.

<sup>6</sup> Academics seem to have more faith than lawyers in the ability of algorithms to make fairness and justice judgments. *See* Orna Rabinovich-Einy & Ethan Katsh, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 *CARDOZO J. CONFLICT RESOL.* 637 (2017). Lawyers understand that legal rules need to be interpreted, not just translated, and that interpretation involves reasoning, not just thinking.

<sup>7</sup> Thomas More coined the term Utopia to describe a fictional island of nearly perfect citizens in the South Atlantic in his classic work of the same name. He fashioned the term from the Greek words οὐ (“not”) and τόπος (“place”), which translated literally mean “no place.” The concept has been narrowed somewhat in contemporary usage, however, and now is used principally to refer to a place that is considerably better than contemporary society but not perfect. The homophone Eutopia, derived from the Greek εὖ (“good” or “well”) and τόπος (“place”), to mean “good place,” is used to describe such a place.

<sup>8</sup> *See* Owen M. Fiss, *Against Settlement*, 93 *YALE L. J.* 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L. J.* 2619 (1995); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO. L. J.* 2663 (1995).

<sup>9</sup> It should be noted that many ADR types do not believe in winning and losing. A prominent member of the ADR community once scolded me in an email for thinking otherwise. After I had described us as being “on the same side” on an issue, she said: “You think there are sides, there aren’t.” That, of course is the statement of a side. *See also* Robert J. Condlin, “*Every Day and in Every Way We Are All Becoming Meta and Meta,*” or *How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 *OHIO ST. J. DISP. RESOL.* 231, 298–99 (2008) [hereinafter *Every Day*] (describing the legal dispute resolution debate); Robert J. Condlin, *The “Nature” of Legal Dispute Bargaining*, 17 *CARDOZO J. CONFLICT RESOL.* 393, 396–405 (2016) [hereinafter *Legal Dispute Bargaining*].

cial dispute resolution scholarship game in town.<sup>10</sup> Having conquered the world of theory, ADR understandably seeks to repeat its success in the world of practice<sup>11</sup> by convincing lawyers and judges to cast off the shackles of adversary advocacy and adopt a more informal, party-controlled approach to resolving differ-

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<sup>10</sup> Practice manuals and specialty journals excepted, not many dispute resolution scholars write about litigation or bargaining any more, unless it is about reforming the Federal Rules (and that discussion looks like it will go on forever). *See, e.g.,* Symposium, *The Future of Discovery*, 71 *VAND. L. REV.* 1775 (2017) (describing the debate over the proportionality, cooperation, and case management policies at the basis of the 2015 changes to the Federal Rules); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 *EMORY L. J.* 1 (2016). *But see* Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 *DENV. U. L. REV.* 407, 418 n.47 (2010) (noting that there has been “no major reform to the Federal Rules over the past forty years in which the idea of deciding cases ‘on the merits’ was the principled motivation behind the reform”). Colleen Shanahan and her clinical law colleagues are a notable exception. *See, e.g.,* Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 *WIS. L. REV.* 215 (2018); Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can’t Solve Inequality*, 148 *DAEDALUS* 128 (2019).

<sup>11</sup> Yogi Berra is reputed to have said that “in theory there is no difference between theory and practice, but in practice there is.” The more modern view would have it that “in theory there is a difference between theory and practice, but in practice there is not.” Or in the active voice: “In theory, theory and practice are different, but in practice, they are the same.” As you might expect, Berra did not say any of this. The original quotation comes from Benjamin Brewster, a Yale undergraduate, responding to a criticism that he had made a philosophical error in an essay published in a Yale student-run literary magazine. But Walter Savitch usually is given credit for the first mainstream publication of the line a little over one hundred years later, in 1984, when he published a computer textbook titled “Pascal: An Introduction to the Art and Science of Programming” that included the anonymous ascription (the statement is describing as having been “overheard at a computer science conference.” Where else?). *In Theory There Is No Difference Between Theory and Practice, While In Practice There Is*, QUOTE INVESTIGATOR (Apr. 14, 2018), <https://quoteinvestigator.com/tag/benjamin-brewster/#return-note-18386-1>.

ences.<sup>12</sup> So far, at least, that plan has had only partial success and I will explain why I think that is so.<sup>13</sup>

## II. ADR—THE VISION

Dispute resolution systems exist on a spectrum defined by formal litigation on one end and private party bargaining on the other.<sup>14</sup> These two pure types differ from one another principally in the way they allocate decision authority (i.e., to third-party deci-

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<sup>12</sup> One prominent ADR proponent describes the difference between ADR and litigation as the difference between being a Shark and a Dolphin, though the Dolphin metaphor does not work perfectly. See Lainey Feingold, *Forget the Shark and Be a Dolphin: Advancing Client Rights and Interests with Collaborative Negotiating Tools*, 2019 LAWRENCE LECTURE AND NEGOTIATION COMPETITION, OHIO ST. U., <https://moritzlaw.osu.edu/program-on-dispute-resolution/academics/archived-events/lawrence-lecture-2019/> (last visited Jan. 15, 2020). Dolphins have their bad moments. See Henry Nicholls, *Cute and Cuddly Dolphins Are Secretly Murderers*, BBC (Feb. 5, 2016), <http://www.bbc.com/earth/story/20160204-cute-and-cuddly-dolphins-are-secretly-murderers> (describing how dolphins “go in for sexual harassment, incest, and infanticide”); *Dolphin, Socialization*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Dolphin#Socialization> (last visited Nov. 21, 2019) (“Dolphins engage in acts of aggression towards each other. The older a male dolphin is, the more likely his body is to be covered with bite scars. Male dolphins can get into disputes over companions and females. Acts of aggression can become so intense that targeted dolphins sometimes go into exile after losing a fight.”). As a friend put it: “Sounds like Dolphins need a #MeToo movement.” And, as another friend put it, sharks can be pretty decent. See *Heartbreaking and Heartwarming Tales of Social Sharks, Ya Like Dags?*, SOUTHERN FRIED SCIENCE (Sept. 12, 2012), <http://yalikedags.southernfriedscience.com/heartbreaking-and-heartwarming-tales-of-social-sharks/>.

<sup>13</sup> *But see* Rabinovich-Einy & Katsh, *supra* note 6, at 638 (“While in the 20th Century ‘justice from below’ replaced ‘justice from above,’ the 21st Century is moving in the direction of ‘digital justice’ in lieu of ‘traditional justice.’”).

<sup>14</sup> In a sense, “lumping it” (i.e., living with a harm rather than trying to recover for it), defines the end of the dispute resolution spectrum opposite litigation, but lumping it is a dispute avoidance strategy more than a dispute resolution one. See Robert J. Condlin, *Bargaining Without Law*, 56 N.Y.U. L. REV. 281, 302–03 n.60 (2011-2012) (describing the option of “lumping it”). See also WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED* 9 (1988) (“One party [to a dispute] may decide to ‘lump it,’ dropping her claim or giving in to the other’s claim because she believes pursuing the dispute is not in her interest, or because she concludes she does not have the power to resolve it to her satisfaction.”). In the social science literature, the process of “dealing with harms and injuries by forbearance rather than by informing the wrongdoer and seeking redress is . . . [formally expressed as] avoidance or exit.” Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 2 (1996). Even ADR proponents lump it on occasion. See Talia Engelhart, *Knowing When to Accelerate and When to Brake*, TMG NEWSLETTER, Fall 2019, at 10 (mediator explaining her decision not to pursue a claim against a scooter company for medical damages caused when the brakes on a scooter she had rented from the company failed and she crashed: because “it didn’t seem worth it to transform . . . an unfortunate accident . . . [in]to a full-on dispute in which I would intentionally become an active participant. . . [and] would transform the experience from a kind of crazy thing that happened to me, to the bad feeling of having failed at something that I would have cared about more and more as

sion makers rather than the disputing parties); structure the collection and presentation of evidence and argument (i.e., in fixed, technical, and categorical procedures rather than *ad hoc*, personal, and narrative ones); base outcomes on different types of normative standards (i.e., legal rules, industry customs, and rules of professional conduct rather than practical exigencies, disputants' personal values and beliefs, and community practices); and express and enforce decisions and agreements (i.e., in public pronouncements and state-enforced orders rather than private contracts and voluntary compliance).<sup>15</sup> ADR defines the end of the spectrum characterized by informal procedures, flexible institutional structures, party-chosen normative standards, and voluntary compliance with agreed-upon resolutions. Litigation defines the other end and a wide variety of hybrid programs, distributed unevenly between the two pure types, makes up the middle.<sup>16</sup>

While ADR methods and systems come in many forms,<sup>17</sup> all are essentially communitarian<sup>18</sup> in nature based mostly on a set of

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I put in more time and energy.”). Ms Engelhart may have needed a lawyer, notwithstanding that she was one.

<sup>15</sup> These differences bleed into one another, of course, so that litigation and informal dispute resolution systems work in tandem with, as much as independently from, one another and have done so since the days of the Common Law and Equity. See Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism*, HARV. PUB. L. WORKING PAPER No. 15-13 (Jan. 15, 2015) (describing the relationship of Equity to the Common Law). See also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (Apr. 1979) (illustrating the relationship of law to private ordering).

<sup>16</sup> The most common ADR programs are: mediation (facilitated and evaluative), arbitration, negotiation (including facilitated negotiation), minitrial, summary jury trial, early neutral evaluation, pre-trial settlement conference, rent-a-judge, online dispute resolution, structured negotiation, and community-based restorative justice. The length of this list notwithstanding, ADR's most distinctive contribution to dispute resolution, as I see it, is its reconceptualization of disputing as a problem-solving rather than adjudicating process (this represents a “paradigm shift” if you will, in thinking about disputing, though use of that term should be an indictable offense), more than its creation of a new set of dispute resolution institutions, systems, and programs. See Robert J. Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype*, 14 CARDOZO J. CONFLICT RESOL., 676, n.228 (2013) (describing the origins of the term “paradigm shift,” its abuses by scholars over the years, and its inapplicability to the social sciences).

<sup>17</sup> Notwithstanding the variety of terms used to describe the different formats, Ken Kressel and his colleagues found that in operation almost all of them reduce to two: outcome focused, and relationship focused. See Kenneth Kressel et al., *Multidimensional Analysis of Conflict Mediator Styles*, 30 CONFLICT RESOL. Q. 135, 157 (Jan. 14, 2013). See generally Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. DISP. RESOL. 25, 26–27 (2010) (describing models used to describe dispute resolutions courses in American law schools).

<sup>18</sup> I use “communitarian” to make the link between ADR and the social and political theory that “began in the upper reaches of Anglo-American academia in the form of a critical reaction

beliefs and assumptions about disputes and disputing that include or extrapolate from the following:

- Adversarial litigation and the advocacy practices associated with it are inefficient, wasteful, polarizing, destructive, and ineffective in resolving disputes much of the time;<sup>19</sup>
- Disputes, at their core, are based on mistaken perceptions of interest<sup>20</sup> as often as competing conceptions of the good;<sup>21</sup>

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to John Rawls' landmark 1971 book *A Theory of Justice [and draws]* primarily upon the insights of Aristotle and Hegel . . . [to] dispute Rawls' assumption that the principal task of government is to secure and distribute fairly the liberties and economic resources individuals need to lead freely chosen lives. [The theory is grounded on] . . . methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about the social nature of the self, and normative claims about the value of community." Daniel Bell, *Communitarianism*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 4, 2001), <https://plato.stanford.edu/entries/communitarianism/> (last updated Mar. 21, 2016). On communitarianism generally, see DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* (CLARENDON PRESS 1993); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (CROWN PUBLISHERS 1993); ROBERT A. NISBET, *THE QUEST FOR COMMUNITY* (INTERCOLLEGIATE STUDIES INSTITUTE 1953); ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (Robert N. Bellah ed., 1985); ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (Vintage Books 1st ed. 1992); DEREK L. PHILLIPS, *LOOKING BACKWARD: A CRITICAL APPRAISAL OF COMMUNITARIAN THOUGHT* (PRINCETON UNIVERSITY PRESS 1993). The legal dispute resolution literature variously describes ADR as "collectivist," "cooperative," "integrative," "coordinative," "collaborative" and the like. See Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2004); James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. DISP. RESOL. 431 (2001-2002) (describing the self-styled "collaborative law" program).

<sup>19</sup> The critique of adversarialism was one of the foundational pillars of the Roscoe Pound Conference of 1976, and the Conference usually is understood as the starting point of the modern ADR movement. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979). See also Rabinovich-Einy & Katsh, *supra* note 6, at 640–41 (describing how courts are criticized for their "adversarial and rule oriented" nature); Shawna Benston & Brian Farkas, *Mediation and Millennials: A Generational Shift in Dispute System Preferences*, 39 PACE L. REV. 645–48, 653, 657 (2019) (describing the incompatibility of the "law-focused" "top down formalism" of litigation with the international experiences and interdisciplinary education of millennials). Learned Hand might be surprised to learn that millennials are the first to be "uniquely predisposed to" and "primed . . . at the margins, to avoid litigation more than prior generations." *Id.* at 645, 648. Hand is famous for "dread[ing] a lawsuit beyond almost anything else short of sickness and death." See Learned Hand, *The Deficiencies of Trial to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

<sup>20</sup> The "interest/position" distinction is one of the most well-known contributions of *Getting to Yes*, the first book on legal bargaining written for a general audience. See ROGER FISHER & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981). The distinction was far from self-evident forty years ago. see Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 28–30 (1992) (finding no significant difference between the concepts of interest and position), and it hasn't become any clearer with time.

<sup>21</sup> See Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 5 (2009) ("Under the interpre-

- Disputes are resolved best by identifying and reconciling interests, wants, and needs rather than arguing about rights, rules, and facts;<sup>22</sup>
- Trying to satisfy the interests of everyone in a dispute will produce a more lasting resolution than trying to satisfy one’s individual interests;
- Informal, *ad hoc*, flexible, and disputant-controlled methods of proceeding are more likely to produce stable outcomes than formal, generic, fixed, and third-party controlled methods;<sup>23</sup>
- Respectful and friendly relationships contribute more to the successful resolution of disputes than arguments about substantive rights;
- Reciprocal, transparent, and even-handed concessions lead to satisfactory resolutions of disputes more frequently than deceptive, self-interested and strategic offers and demands;
- The matters at stake in most disputes can be expanded to provide something for everyone;<sup>24</sup>
- Non-monetary concessions (e.g., apologies)<sup>25</sup> often are more important items of exchange than monetary ones;

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tive paradigm of mediation, the reality of the conflict does not exist outside the perceptions of the parties . . . .”); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 909 (2004) (“[S]tudies suggest there is often less ideological and practical distance between opposing moral communities than individuals on each side of a dispute realize.”).

<sup>22</sup> See generally Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can’t All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 8–16 (2007).

<sup>23</sup> See Rabinovich-Einy & Katsh, *supra* note 6, at 642 (describing benefits of informal dispute resolution processes); Benston & Farkas, *supra* note 19, at 656–58 (describing the benefits of party-controlled dispute resolution methods). It is difficult to test this “stable outcome” claim empirically, both because the necessary data is hard to come by, and because it is not clear what sort of data, over what time frame, would suffice as proof. For example, suppose a party walks away from an ADR proceeding believing that her legal rights have been abused, but decides to comply literally with the terms of the agreement anyway because not doing so would cost more than it would be worth, in the process, however, she loses all respect for ADR methods and tries to subvert the implementation of her agreement whenever possible. Is the resolution stable? The answer probably would have to be yes and no, and this illustrates only one of the difficulties in testing the stability of informal resolutions empirically.

<sup>24</sup> Max H. Bazerman, *Judgment: A Critical Look at the Rationality Assumption*, 27 AM. BEHAV. SCI. 211, 211–15 (1985) (criticizing the “mythical fixed-pie assumption” of distributive dispute resolution and implying that integrative trade-offs between party interests are always preferable and available). A “something for everyone” resolution is sometimes characterized as a “win-win” outcome—though that expression is confusing if one uses a consistent definition of “win” from the first “win” to the second. When someone wins, someone loses, by definition. Win-win captures only part of the process. There also is a lose-lose part. It probably is best to avoid breezy jargon of this sort altogether.

<sup>25</sup> Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1021 (1999) (describing how the communitarian move of apologizing “may . . . offer paths for spiritual and psychological growth”).

- Social, moral, and psychological reconciliation between parties is as important a goal in disputing as economic compensation and restitution;
- ADR methods and systems transform disputes from a formal, competitive, antagonistic, and stylized process into a flexible, cooperative, respectful, and conversational one, and (some would argue) disputants themselves from “risen apes” to “fallen angels.”<sup>26</sup>

This communitarian conception of disputing presupposes a world in which people are always at their best, a world of Houyhnhnms and not Yahoos<sup>27</sup> in which disputants “connect”<sup>28</sup> with one another as persons and convert what could be acrimonious fights into joint ventures<sup>29</sup> and sometimes even lasting friendships.<sup>30</sup> This, in turn, takes the hard edge off their disputing

<sup>26</sup> ROBERT ARDREY, *AFRICAN GENESIS: A PERSONAL INVESTIGATION INTO THE ANIMAL ORIGINS AND NATURE OF MAN* 47–48 (1961).

<sup>27</sup> See JONATHAN SWIFT, *GULLIVER’S TRAVELS* viii–xi (1996) (Dover Thrift Editions) (describing the difference between Houyhnhnms and Yahoos). Hippolyte Jean Giraudoux, the Nineteenth century French dramatist, is reputed to have remarked that “only the mediocre are always at their best,” though it is difficult to find where or when he said this. See *Chapter & Verse*, 109 *HARV. MAG.* 31 (Mar.–Apr. 2007) (“[M]any websites attribute this judgment to Jean Giraudoux but fail to provide a precise source.”). Even Wikipedia fails in this regard. See *Jean Giraudoux*, WIKIPEDIA, [http://en.wikiquote.org/wiki/Jean\\_Giraudoux](http://en.wikiquote.org/wiki/Jean_Giraudoux) (last visited Nov. 21, 2019). The *Yale Book of Quotations* suggests two other possible sources for the statement: Max Beerbohm (“[o]nly mediocrity can be trusted to be always at its best. Genius must always have lapses proportionate to its triumphs,” in *The Saturday Review*, Nov. 5, 1904), and Somerset Maugham, *Variations on a Theme, in THE PORTABLE DOROTHY PARKER* 602 (1944) (“Only a mediocre writer is always at his best . . .”). *THE YALE BOOK OF QUOTATIONS* 50, 502 (Fred Shapiro ed., 2006). The idea is counterintuitive. Even the mediocre must have good and bad days (at least for them).

<sup>28</sup> Leonard R. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 *HARV. NEGOT. L. REV.* 1, 56 (2002) (using the techniques of mindfulness meditation in negotiation will help a lawyer develop “a sense of . . . connection with other people”); Deborah M. Kolb & Linda L. Putnam, *Negotiation Through a Gender Lens*, 2 *NEGOTIATION* 59 (2004), reprinted in CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* 468, 472–74 (2d ed. 2005) (describing the concept of “connectedness” in dispute resolution through the lens of gender).

<sup>29</sup> John Stuart Mill’s description of his working relationship with Harriet Taylor captures the particular understanding of joint venture that I have in mind:

When two persons have their thoughts and speculations completely in common; when all subjects of intellectual or moral interest are discussed between them in daily life . . . when they set out from the same principles, and arrive at their conclusions by processes pursued jointly, it is of little consequence in respect to the question of originality, which of them holds the pen . . . .

JOHN STUART MILL, *AUTOBIOGRAPHY* 183–84 (Penguin Classics 1989) (1873).

<sup>30</sup> See, e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 7 (2d ed. 1991) (“[m]any people recognize the high costs of hard positional bargaining . . . [and] . . . hope to avoid them by following a more gentle style of

and makes it less antagonistic, less competitive, less deceptive, less manipulative, less selfish, and less mean-spirited than it otherwise might be. In the process, parties to disputes create a kind of temporary peaceable kingdom in which self-interest is not naked, force is not brutish, entitlement claims are not legalistic, and everyone acts in the spirit and to the limits of their communal potential.<sup>31</sup> This is a hopeful vision of social life, and when true, is a source of great comfort in a divided and fractious world. But sadly, the communitarian conception of disputing is too idealized to serve as reliable guide for resolving real-life disputes much of the time, and communitarianism's foundational dogma—that dispute outcomes are natural, self-evident, and complementary<sup>32</sup>—is based on a vision of a world without scarcity and incompatible conceptions of the good.<sup>33</sup>

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negotiation. Instead of seeing the other side as adversaries, they prefer to see them as friends.”). On the nature of friendship, see Robert J. Condlin, “*What’s Love Got To Do With It?*” “*It’s Not Like They’re Your Friends For Christ’s Sake*”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 250–70 (2004).

<sup>31</sup> The human belief in a peaceable kingdom, one without enmity, rivalry, competition, conflict and the like, goes back to pre-biblical times and ancient myths. The basic story had it that things once were perfect, now they’re screwed up, and something (i.e., original sin) or someone must be responsible for that. Typically, women were blamed (e.g., Eve in the Garden of Eden), which is ironic given the dominant role of women in the modern ADR movement. See generally THE UTOPIA READER 17–26 (Gregory Claeys & Lyman Tower Sargent eds., 2d ed. 2017) (describing “Utopianism before Thomas More”).

<sup>32</sup> See, e.g., Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem-Solver*, 28 HOFSTRA L. REV. 905, 916 (2000) (describing the “important observation of social psychologist George Homans . . . [that] people often have complementary interests . . . and do not always value things exactly the same (sic) way,” using the familiar ADR “icing and cake” example as an illustration). This dogma may be true principally for disputes between what Anthony Appiah calls “constitutionally antagonistic groups,” though even these groups sometimes want what the other group wants simply because the other group wants it. See Kwame Anthony Appiah, *Negation as Affirmation*, in THE ETHICS OF IDENTITY 138–41 (2005).

<sup>33</sup> Professors Benston and Farkas argue that the present generation of millennials is uniquely adapted to interacting with others in a spirit of compromise and collaboration, highlighting their common interests and moving past their surface level differences. See Benston & Farkas, *supra* note 19, at 655, 665 (“[Millennials’] financial risk aversion, interdisciplinary educations, and unprecedented exposure to diverse communities nationally and internationally” make them more “likely to be able to promote a greater spirit of compromise and collaboration, regardless of background.”). Perhaps this is true, but the claim seems to overlook the nationalism, isolationism, and wall-building xenophobia widespread among millennials, and to contradict one of the most basic principles of social organization, that “tools evolve, people don’t.” See John Gray, *Getting Better All the Time?* N.Y. REV. BOOKS, Dec. 19, 2019, 76 (reviewing ALLEN BUCHANAN & RUSSELL POWELL, *THE EVOLUTION OF MORAL PROGRESS: A BIOCULTURAL THEORY* (2018)) (“A commingling of ethical and evolutionary concepts and theories is one of the cardinal confusions of modern times,” and “Evolution is one thing, progress in ethics and politics another.”). See also PETER FRANKOPAN, *THE SILK ROADS: A NEW HISTORY OF THE WORLD* (2017)

Disputing is a complex social phenomenon in which the need to trust, share, and cooperate co-exists with the need to deceive, conceal, and compete (“create” and “claim” in Lax and Sebenius’ felicitous concepts<sup>34</sup>). Disputes can be about conflicts that are real as well as perceived,<sup>35</sup> be based on incompatible values and beliefs as much as mistaken perceptions of interests and facts and be resolved by argument<sup>36</sup> and compromise as much as investigation and discovery. Lawyers seem to recognize this complex nature of disputing and mix communitarian and adversarial methods and techniques together in their practice in a kind of dispute resolution pastiche, responding to different kinds of disputes (and different kinds of issues within disputes), in different kinds of ways. They seem to understand that communitarian behavior is an essential part of disputing, but also that an exclusively communitarian approach will produce gifts as well as fair distributions, and that gift giving (at least the unselfconscious and unintended kind), is not a necessary part of resolving disputes.

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(describing how the Mongols dealt with the same issues of social organization facing modern day societies and resolved them in much the same way).

<sup>34</sup> See DAVID LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29–41 (1986) (describing the “Negotiator’s Dilemma: Creating and Claiming Value”).

<sup>35</sup> *But see* Albertstein, *supra* note 21; Seul, *supra* note 21, at 909 (describing how conflict does not exist outside the perception of the parties); Welsh, *supra* note 18, at 753 (equating perceptions of fairness with fairness in fact in disputing). *But see* Benston & Farkas, *supra* note 19, at 664 (“[M]illennial lawyers and mediators will be particularly equipped to find common ground among disputants in the *process* and not just the *result*.”). The view that good process can substitute for bad outcome ignores the truism that “process fades, results last.” See, e.g., Paula Reed Ward, *Girl’s Mother Calls Settlement with Pittsburgh Public Schools Unfair*, PITTSBURGH POST-GAZETTE, Aug. 5, 2010, at B5 (example of a settlement amicably arrived at did not prove adequate over time).

<sup>36</sup> John Stuart Mill once explained why substantive disagreements can be worth arguing over:

Those, who having opinions which they hold to be immensely important, and their contraries to be prodigiously hurtful, and [who] have any deep regard for the general good, will necessarily dislike, as a class and in the abstract, those who think wrong what they think right, and right what they think wrong . . . .

MILL, *supra* note 29, at 57. An aversion to error, continued Mill, partakes “in a certain sense, of the character of a moral feeling.” *Id.* This does not mean that one should be a “fanatic,” or “insensible to good qualities in an opponent,” but one should “throw [one’s] feelings into [one’s] opinions” since it is “truly difficult to understand how anyone, who possesses much of both, [could] fail to do [this].” *Id.* This can be true even when the differences between contending positions are about matters that are thought sacred. See, e.g., BART EHRMAN, *LOST CHRISTIANITIES: THE BATTLES FOR SCRIPTURE AND THE FAITHS WE NEVER KNEW* 160–61, 181–202 (2003) (describing the “vitriolic attacks,” “polemical treatises,” and “personal slurs” used by early Christians in arguments over dogma).

## III. ADR—THE ASCENDANCE

Legal reform movements, particularly large and successful ones like ADR, usually are a response to a wide variety of concerns and serve a wide variety of interests, and the ADR movement is no exception. Several forces, both intellectual and practical, have combined to give it life. The first, as I have mentioned, is the now widely held belief that the American system of adversary litigation no longer works (at least for many types of civil disputes).<sup>37</sup> The argument is a familiar one. Litigation was intended to be a fair-minded, deliberative, and respectful process for resolving good-faith disagreements about rights and obligations in accordance with consensus legal norms,<sup>38</sup> but in operation it often devolves into stylized shouting matches in which practical leverage, lawyer skill, and forum selection have a greater influence on outcome than the strength of the parties' legal claims.<sup>39</sup> Even when litigation works as designed, it forces courts to resolve disputes in reductionist, win-lose terms<sup>40</sup> that often ignore the idiosyncratic features and comparative merits of different types of legal rights.<sup>41</sup> Moreover, access to skilled representation gives institutional litigants who can afford the best lawyers a powerful advantage over one-time players who cannot; and lawsuits can take so long to conclude that a party's claims can become moot as a practical matter long before they are resolved as a legal one.<sup>42</sup> For a wide variety of

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<sup>37</sup> See Condlin, *Every Day*, *supra* note 9, at 238–45 (describing the critique of adversarial litigation); Condlin, *Bargaining Without Law*, *supra* note 14, at 289–90 (same). Again, I limit my comments to civil litigation. The criminal judicial system presents a different set of issues and concerns.

<sup>38</sup> See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 669 (1976) (describing argument as “that area of rational discourse . . . where men seek to trace out and articulate the implications of shared purposes . . . [that] serve as ‘premises’ or starting points”). In legal disputing these starting points consist of “norms of general applicability derived from sources outside the immediate dispute.” *Id.* In Fisher, Ury and Patton’s well-known phrase, such norms are described as “objective criteria.” FISHER, URY & PATTON, *supra* note 30, at 81–93 (describing objective criteria).

<sup>39</sup> See Benston & Farkas, *supra* note 19, at 655 (“The litigation process is designed to magnify areas of disagreement, whether or not those areas are central to the underlying dispute”).

<sup>40</sup> See Benston & Farkas, *supra* note 19, at 651 (“[M]illennials can be particularly frightened of the prospect of an all-or-nothing resolution”).

<sup>41</sup> See Main, *Mediation*, *supra* note 3, at 547 n.52 (describing the “demerits” of litigation as “binary outcomes; unpredictable results; publicity and lack of privacy; generalist (non-expert) judges; ignorant, emotional, and/or biased juries; and formalities that can intimidate, marginalize, and chill.”).

<sup>42</sup> DELAYING PROCEEDINGS UNTIL THEY NO LONGER ARE COST EFFECTIVE TO PURSUE OFTEN IS DONE FOR STRATEGIC REASONS. See MARY ANN GLENDON, *A NATION UNDER LAWYERS*:

reasons, these and others, large parts of the Academy and Bar have given up on litigation as an adequate system for resolving many types of ordinary civil disputes.

Dissatisfaction with litigation, by itself, would not have produced a program to remake civil dispute resolution in its entirety had there not been a fully developed substitute to put in litigation's place. Lawyers and legal scholars would have lived with litigation's deficiencies, as they had for generations, on the principle that a broken system is better than no system at all. But ADR came to the rescue by providing a set of procedures, normative standards, decision-making techniques, and institutional structures that (allegedly) would resolve civil disputes more efficiently,<sup>43</sup> conveniently, and fairly than formal litigation,<sup>44</sup> and if this is true it would be too good of an opportunity to pass up. The hard question is whether it is true.

Informal dispute resolution is not new with ADR. Private, face-to-face bargaining has been part of the system of adversary adjudication for as long as there has been a system of adversary adjudication. But in the 1970s and 1980s legal scholars reconceptualized private party bargaining in systemic and institutional terms, transforming what had been a lawyer skill practice into a formal decision-making system and institution in its own right.<sup>45</sup> These scholars then combined this reconceptualization with real life empirical data drawn from private programs for resolving low-stakes,

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HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 56 (1994) ("The Diaghilev of discovery seems to have been the late Bruce Bromley, a leading partner at Cravath, Swaine & Moore. Bromley once boasted to an audience of Stanford law students, 'I was born, I think, to be a protractor . . . I could take the simplest antitrust case and protract [it] for the defense almost to infinity . . . [One case] lasted 14 years . . . Despite 50,000 pages of testimony, there really wasn't any dispute about facts . . . We won that case, and, as you know, my firm's meter was running all the time – every month for 14 years.'").

<sup>43</sup> The efficiency argument has several strains. See Main, *Mediation*, *supra* note 3, at 546 n.47 ("For some, ADR offered an escape from the formality of court processes; . . . Others saw efficiency gains based on predictability, by substituting expert decisionmakers for lay Juries. Still others viewed ADR as an opportunity to offload a public expense.").

<sup>44</sup> ADR's business plan, so to speak, is to provide a free-standing alternative to the litigation system and steal that system's customers by offering lower prices and better service. One might think of ADR as a kind of dispute resolution Blockchain.

<sup>45</sup> The Roscoe Pound Conference of 1976 usually is given as the starting point for the emergence of ADR as a phenomenon in its own right, but there are informal dispute resolution systems and institutions dating back to the 1930s. Professor Main provides an excellent history of the slow and incremental nature of the rise of ADR in all of its manifestations over that longer time period, while also acknowledging the central role of the Pound Conference. See Main, *Mediation*, *supra* note 3, at 542–49 (describing "The birth of the modern ADR movement [as] the enduring legacy of the Pound Conference.").

commercial disputes arising mostly out of online transactions, to argue that ADR could work as effectively (and be accepted as legitimate), in large-scale public disputes as in small-scale private ones. Several public entities (e.g., nation states,<sup>46</sup> states of the union, and government agencies), were intrigued by the argument and decided to test it by creating formal ADR programs of their own.<sup>47</sup> Those tests are still being graded.

In addition to a dissatisfaction with adversarial litigation and the availability of a full-fledged alternative to it, the rise of ADR also is based on the strongly held belief among many legal scholars and lawyers that the resolution of disputes (as well as the practice of law generally), is excessively and unnecessarily conflictual.<sup>48</sup> It may seem odd to think of lawyers and legal academics as uncom-

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<sup>46</sup> See, e.g., Louis Del Duca et al., *Facilitating Expansion of Cross-Border E-Commerce: Developing a Global Online Dispute Resolution System*, 1 PENN. ST. J. L. & INT'L AFF. 59 (2012) (describing the "Anatomy of a Global ODR System"); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485, 492-510 (2014) (describing ODR programs in India, Mexico, Canada, and the European Union); Colin Rule, *Technology and the Future of Dispute Resolution*, DISP. RESOL. MAG., Winter 2015, at 6 ("Many national governments and international agencies have examined the challenge of cross-border redress over the past 10 years and concluded that ODR is the future."); Jason Tashea, *Order in the (Virtual) Court*, ABA J., Winter 2019-2020, at 26 (describing the Chinese system of virtual courts); ONLINE DISPUTE RESOLUTION ADVISORY GROUP, CIVIL JUSTICE COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS (2015), <https://www.judiciary.gov.uk/wpcontent/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> (report of the Civil Justice Council of England and Wales making the "case for ODR" and recommending the creation of an online dispute resolution program for English courts); LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: INTERIM REPORT 75-88 (2015), <https://www.judiciary.uk/publications/online-dispute-resolution-for-low-value-civil-claims-2/> (describing the implementation of a new online dispute resolution program for England and Wales).

<sup>47</sup> I describe some of these programs in Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 724-33 (2017).

<sup>48</sup> See Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 516, 531 (2005) (describing how some lawyers do not "relish" the standard adversarial conception of lawyer bargaining role and would like to change it to create a work environment that is more personally compatible); Julie Macfarlane, *The New Advocacy*, in AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, THE NEGOTIATOR'S FIELDBOOK 513 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (reporting the account of one lawyer as: "My nature, my personality has always been much more collaborative. I struggled to get that adversarial model to begin with. It never felt right."); Menkel-Meadow, *Whose Dispute*, *supra* note 8, at 83 GEO. L. J. 2663 (1995) ("I have trouble with polarized argument, debate, and the adversarialism that characterizes much of our work."). Whether lawyer comfort should play a role in determining the best dispute resolution system for clients is a difficult question. Sometimes it is better if lawyers who do not like conflict refer clients to other lawyers who are not similarly encumbered.

fortable with conflict.<sup>49</sup> Conflict is one of the defining features of much legal work and resolving it is one of the legal system's principal tasks. Moreover, the sentiment seems particularly out of place in a country whose "taming factions" structure of government assumes that conflict is inevitable and needs to be managed rather than suppressed,<sup>50</sup> and whose economic system is based on the "unhindered competition of selfish and ambitious interest groups."<sup>51</sup> Hoping for conflict-free disputing in a culture defined by conflict seems quixotic at best.

These concerns notwithstanding, many in the legal academy and profession have written evocatively about the destructive effects of conflict in life generally and their admiration for those who have been able to eliminate it from their legal work.<sup>52</sup> A former academic expresses the point this way: "Conflict is dangerous, all our trade-flapdoodle notwithstanding. It can be very costly and given its interactive essence none of us can safely assume that we can handle it well enough to avoid those costs. Time, money, emotional wear, frayed relationships into the future, diminished self-esteem, the impact of the self-perception that one has lost, the fear that the other's self-perception of having lost will result in retaliation are just a few of the costs. Thus, minimizing conflict, whether through reframing or avoidance, has a great deal to recommend it much of the time. Selecting when to confront is an art form unexplored in our trade. The raw material with which we work—us—is very poorly fitted to the purpose of sensibly resolving conflict."<sup>53</sup>

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<sup>49</sup> Or, maybe not. Just as sociopaths to psychiatry, children to puppies, and moths to flames, wusses may be drawn disproportionately to law. Professor McClurg explores one of the possible causes. Andrew Jay McClurg, *Neurotic, Paranoid Wimps—Nothing Has Changed*, 78 *UMKC L. REV.* 1049, 1052 (2010) (describing "the neurotic, paranoid wimpiness" of first year law students).

<sup>50</sup> See *THE FEDERALIST NO. 10*, at 71–79 (James Madison) (Clinton Rossiter ed., 1961) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of factions.").

<sup>51</sup> See JOSEPH J. ELLIS, *AMERICAN CREATION* 166–67 (2007) (describing the framers' acceptance of the Adam Smith argument that the "unhindered collision of selfish and ambitious interest groups" is the driving force of capitalism).

<sup>52</sup> See, e.g., Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 *GEO. L. J.* 553, 560 (2006) ("In the back of my legal services office was one woman lawyer, who, instead of bringing dramatic class action lawsuits, quietly cultivated relationships and negotiated good outcomes for her clients."); Benston & Farkas, *supra* note 19, at 662 ("[M]illennials . . . reject careers based on adversarial methods of problem-solving").

<sup>53</sup> Email to author (Nov. 1, 2009) (on file with author). See also Susan L. Podziba, *Conflict, Negotiation, and Public Policy Mediation in the Trump Era*, 35 *NEGOT. J.* 177 (2019) ("[C]onflict is expressed as passions that simplify all things complex and obscure doubt."); Engelhart, *supra* note 14, at 10 (a mediator describing how it wasn't worth pursuing a personal claim for medical

This is a *cri de coeur* as much as a factual claim or policy argument, of course, and nothing short of eliminating conflict from disputing altogether will satisfy it completely.<sup>54</sup> ADR systems and methods do not promise to eliminate conflict from disputing altogether, but they do promise to move disputing in that direction and that makes ADR “any port in a storm” for many in the dispute resolution community. For understandable reasons, therefore, reconfiguring civil dispute resolution along ADR lines has moved to the top of the reform agenda for many legal academics and lawyers, but difficult questions remain. If ADR is the cure for litigation’s evils why has the profession not already remade litigation along ADR lines? What does this hesitancy tell us about ADR’s limitations and, more importantly, what does it tell us about its future?

#### IV. ADR—THE CONCERNS

The American legal system’s reluctance to adopt ADR methods across the board for all types of civil disputing seems based on a number of factors, four of which stand out: 1) a fear of unintended consequences in reconfiguring a complex and long-standing regulatory system all at once;<sup>55</sup> 2) a concern that the advantages of ADR are not all they are made out to be; 3) a worry that ADR will

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damages because it would turn a “crazy thing that happened” into a “bad feeling at having failed at something.”). *But see* Daniel Ortiz, *Nice Legal Studies* 1, 5 (Univ. of Va. Sch. of Law Pub. Law & Legal Research Paper Series, No. 2009-12, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474402](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474402) (“I suggest we need to face up to . . . conflict. Niceness may make us feel better but only because we fail to see its partiality and violence. . . . Disagreement and conflict can . . . serve a healthy social function. If nothing else, they can focus us on our ideals, our imperfections, and our differences and let us see—sometimes painfully—how law actually works. And just as important, the discomfort they bring can galvanize us into productive . . . action.”); Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 69 (2010) (“In all deliberative theories, disagreement, conflict, arguing, and the confrontation of reasons pro and con are crucial to the process.”); Rabinovich-Einy & Katsh, *supra* note 6, at 656 (“[T]he goal [of ADR] is not—and should not be—to eliminate all conflict, This is neither possible nor desirable.”); Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L. J. 115, 125 (2010) (“[W]e will not approach a problem-free world, for people are capable of identifying or inventing new problems as quickly as the old ones are solved.”).

<sup>54</sup> The dogmatic, in-your-face manner in which the comment is framed almost guarantees disagreement and thus conflict. In a sense, the statement is a conflictual response to the existence of conflict, embodying the quality it criticizes, seemingly without irony. Expressions of this nature often are more about exercising personal demons than making analytical points.

<sup>55</sup> *Cf.* Main, *Mediation*, *supra* note 3, at 565–67 (describing the unexpected effects of the development of mediation on the pleading and summary judgment Rules of the Federal Rules of Civil Procedure).

create new fairness problems in the process of resolving old ones; and 4) reservations about the ability and willingness of humans to resolve differences in an exclusively cooperative manner.

Start with whole-system reform. With all of its warts, the American system of adversary justice has worked more or less successfully for several generations and correcting its deficiencies would seem to be a more manageable task than replacing it completely. The decision to start over needs an additional explanation, and the principal candidate is a kind of “enough already” argument based on what one might think of as a problem of social entropy. Social systems, like physical systems, can degrade with age. Parties become skilled at exploiting a system’s weaknesses for individual advantage; when the exploitation becomes widespread, the systems’ weaknesses become more salient than its strengths; and when compensating for the weakness on a case-by-case basis becomes a never-ending story, starting over<sup>56</sup> begins to look like a more attractive option. It is not surprising, therefore, that pressure for a whole-system reform of adversarial adjudication would emerge at a time when the Federal Rules of Civil Procedure (and their state law equivalents) have come to be seen as instruments for “beating every ploughshare into a sword”<sup>57</sup> more than efficient and fair procedures for collecting evidence and structuring legal analysis and argument. The Rules have been rewritten many times in their seventy-plus year history, yet the problems persist,<sup>58</sup> so it was only a matter of time before sentiment for something entirely new and different would emerge (at least for small-scale, routine, and standardized disputes), and ADR embodies that sentiment.

Whole system reform has problems of its own, however, and until one has a sense of how it will play out, it is difficult to know whether it will be worth the candle. In considering the question of how ADR will play out, one might take a lesson from an equally ambitious dispute resolution reform project of an earlier era—the creation of Equity Jurisprudence and the Courts of Chancery in Thirteenth Century England. If ADR is the second coming of Eq-

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<sup>56</sup> Like theories of statutory interpretation, the reform movement dominant in any body of thought at any point in time usually identifies where one has broken in on a circle rather where one is located on a developmental track. It is important to continue to try understand things at a deeper level, of course, but expecting one’s insights to be something completely new under the sun is myopic.

<sup>57</sup> MARVIN FRANKEL, *PARTISAN JUSTICE* 18 (1980).

<sup>58</sup> See, e.g., Honorable Paul W. Grimm, *The Future of Discovery*, 71 *VAND. L. REV.* 1775 (2018) (describing the changes in the Civil Discovery Rules over the years to respond to and prevent abuses). See also *supra* note 10.

uity, and in a limited sense it is,<sup>59</sup> it is fair to expect that it will follow a similar life path: begin as an uncomplicated and efficient system for resolving disputes the existing judicial system does not handle well; become encrusted with embellishments, add-ons, and modifications over time as it confronts unanticipated problems and identifies previously unrecognized wants and needs; be tweaked, retrofitted, and refined to counteract the unexpected effects of the embellishments, add-ons, and modifications; and ultimately be absorbed into the existing system altogether when the tweaks, retrofits, and refinements become unworkable in their own right.<sup>60</sup>

Equity was a procedural and substantive reform designed to provide an alternative to Common Law courts for certain kinds of claims, but it ended up being a gloss on the Common Law system more than an alternative to it, and the transaction costs in making this transition were considerable.<sup>61</sup> If this is ADR's destiny, and there is evidence that it may be,<sup>62</sup> it might make more sense to work on adapting adversary adjudication to modern disputing than to reconstruct the system of disputing from scratch.<sup>63</sup> The weaknesses and limitations of adjudication are well known and can be neutralized, circumvented, and overcome by skilled practitioners, judges, and lawmakers on a case-by-case basis,<sup>64</sup> but the weaknesses and limitations of ADR will remain under the radar for some time to come, doing real but unrecognized damage. An idealized conception of any regulatory system can be a useful yard-

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<sup>59</sup> See generally Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005). ADR also traces its lineage, in part, to the American Small Claims Court system but it differs from both it and Equity in significant ways. ADR resembles Equity, for example, in allowing parties to tell their stories in an informal and narrative manner, and it resembles Small Claims Court in making this process inexpensive and convenient, but it differs from both on the all-important feature of control over the outcome.

<sup>60</sup> Tweaks, retrofits, and refinements always will be needed in a regulatory system grounded in moral and political values and beliefs. Morality and politics are not static states.

<sup>61</sup> See Smith, *supra* note 15.

<sup>62</sup> The embellishment process already may have begun. The most prominent example at the moment is the proposal to create a separate and distinct set of rules of professional conduct for ADR practice. See, e.g., Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 28 S. TEX. L. REV. 404, 407–54 (1997); Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L. J. 1, 49–87 (2002).

<sup>63</sup> But see Shanahan & Carpenter, *Simplified Courts*, *supra* note 10, at 131–32 (Court simplification reforms “do not solve the symptoms of the larger underlying problem: state courts . . . have been stuck with legal cases that arise from the legislative and executive branches failure to provide a social safety net in the face of rising inequality.”).

<sup>64</sup> This happens on a regular basis. See, e.g., Order, *V5 Technologies v. Switch Ltd. et al.*, No. 2:17-cv-02349-KJD-NJK (D.C. Nev. July 19, 2018), <https://dlbjbjzgnk95t.cloudfront.net/1065000/1065270/https-ecf-nvd-uscourts-gov-doc1-11517243564.pdf>.

stick against which to judge more limited measures, of course, but ideal conceptions should be turned to in their own right only as a last resort<sup>65</sup> since they tend not to take the practical limitations of real-life circumstances and the psychological limitations of real-life people into account. While the ADR horse is out of the barn, so to speak, the direction and distance it will travel have yet to be determined, and somewhere the ghost of Santayana will be watching.<sup>66</sup>

Assuming that the prospect of an ADR makeover of civil dispute resolution is on the table, however—and it is—one must ask: “What are its benefits? What warrants the disruptions it will produce beyond the fact of disruption itself?”<sup>67</sup> ADR’s most frequently cited benefits are its lower cost and increased convenience.<sup>68</sup> ADR systems, it is said, are cheaper to install and easier to operate than litigation-based judicial systems because they do not require brick-and-mortar facilities, and they can be run, at least in large part, by software and machines; they do not rely completely on highly compensated humans.<sup>69</sup> They also are said to be more convenient to

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<sup>65</sup> Last resorts aren’t always what they’re cracked up to be. See THE EAGLES, *The Last Resort*, on HOTEL CALIFORNIA (Asylum Records 1976), <https://www.youtube.com/watch?v=8bOJiTskr6w>.

<sup>66</sup> See 7 GEORGE SANTAYANA, *THE WORKS OF GEORGE SANTAYANA: THE LIFE OF REASON* 82 (Prometheus Books, 1998) (1905) (“Those who cannot remember the past are condemned to repeat it”). Also, the ghosts of Hegel and Marx. See KARL MARX, *THE 18TH BRUMAIRE OF LOUIS BONAPARTE* 15 (2008) (“Hegel remarks somewhere that facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce.”). For an excellent discussion of not letting the perfect be the enemy of the good, the so-called Nirvana Fallacy, see Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 *YALE L. J.* 1219, 1230 n.33 (1994).

<sup>67</sup> CLAYTON CHRISTENSEN, *THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (2016) (describing the benefits of disruption); CLAYTON CHRISTENSEN, *THE INNOVATOR’S SOLUTION* (2013) (same). In law, unlike business, disruption is not always a good thing, but then it may not always be a good thing in business as well. See Jill Lepore, *The Disruption Machine: What the Gospel of Innovation Gets Wrong*, *THE NEW YORKER*, (June 24, 2014), <https://www.newyorker.com/magazine/2014/06/23/the-disruption-machine>; Andrew A. King & Baljir Bataartogtokh, *How Useful Is the Theory of Disruptive Innovation?*, *MIT SLOAN MGMT. REV.* (Sept. 15, 2015), <https://sloanreview.mit.edu/article/how-useful-is-the-theory-of-disruptive-innovation/>. See also *Disruptive Innovation*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Disruptive\\_innovation](https://en.wikipedia.org/wiki/Disruptive_innovation) (last visited Nov. 22, 2019).

<sup>68</sup> See Rabinovich-Einy & Katsh, *supra* note 6, at 639–40. ADR proponents usually describe these advantages as providing greater “access to justice,” *id.* at 642–44, but this phrasing conflates “access” (i.e., “cost and convenience”) with “justice” (i.e., fair treatment), and the two are not the same thing. “Access to justice” is a two-part expression, not a single word. See *infra* notes 119–121, and accompanying text.

<sup>69</sup> Some “automated” systems are run by humans. See David Lee, *Tech Firms Give Up Their Awkward Secret: Humans*, *BBC.COM* (Aug. 24, 2019), <https://www.bbc.com/news/technology-49455363> (describing how the processing of personal data by Microsoft, Facebook, Google, Amazon, and others often “includes both automated and manual [i.e., human] methods of process-

use than judicial systems because most of the time they require only the virtual, and not actual, presence of parties and evidence, and virtual presence can be arranged from almost anywhere.<sup>70</sup>

Cost and convenience are relevant factors to take into account in designing a dispute resolution system to be sure, but since an ADR makeover of civil disputing is likely to make more IA (intelligence augmented) than AI (intelligence substituted)<sup>71</sup> contributions to the final system design (removing humans from the tasks of collecting, sorting, computing, and organizing evidence and argument but not the tasks of judging the significance of that evidence and argument and explaining it to the world at large),<sup>72</sup> its benefits are likely to be limited to eliminating low-wage, clerical, administrative jobs more than high level, expensive, professional ones. This will result in some savings in some kinds of disputes (principally low-stakes, standardized, routine, and commodifiable ones), some of the time, and in those instances the savings often will be enough to justify the reform. But in absolute dollars, the money saved by an ADR makeover of civil disputing generally is likely to be small in comparison to the cost of a dispute resolution system as a whole, and in some instances it could even increase the cost.<sup>73</sup> The cost savings argument will support the case for ADR reform in some circumstances, therefore, but by itself it will not justify an across-the-board adoption of ADR methods for all types of civil disputing.

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ing,” though the companies do not always tell users that). Sometimes ADR makeovers replace lower paid judges with higher paid arbitrators, who often are the same judges now retired in order to be paid at the higher arbitrator rate.

<sup>70</sup> I once joked (though many did not see it as a joke) that in the ADR vision of heaven parties will resolve disputes sitting on a couch, in a bathrobe, with a drink in their hands, looking into a monitor, and typing on a keyboard, or talking to Alexa on an Echo.

<sup>71</sup> See Murali Doraiswamy, *Forget AI. The Real Revolution Could be IA*, Paper presented at the World Economic Forum Annual Meeting (Jan. 18, 2017), <https://www.weforum.org/agenda/2017/01/forget-ai-real-revolution-ia/> (describing the difference between IA and AI).

<sup>72</sup> See Condlin, *Online Dispute Resolution*, *supra* note 47, at 744–50 (describing the limitations of algorithms in making the reasonableness determinations required by complex questions of law and morality). There is no removing humans from the judgment part of dispute resolution short of dehumanizing the process.

<sup>73</sup> One of the principal reasons private ADR systems fail is because they are too expensive to operate and maintain. See Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 *MICH. J. INT’L L.* 485, 628–29 (2014) (“[M]ost, if not all, of the prior providers [of ADR services] have ultimately failed . . . due to cost associated with the maintenance, upkeep, and service of the [ADR] platform.”). If ADR’s cost savings are to be realized by moving dispute resolution online, as many ADR supporters propose, the savings also will have to be discounted by unequal treatment suffered by those with less access to, familiarity with, and skill at using online technology.

If cost and convenience were the only issues, the debate over ADR would be a lot simpler, but ADR systems introduce new fairness concerns that cost and convenience benefits, even if substantial, might not outweigh.<sup>74</sup> The biggest concern is ADR's failure to provide a body of publicly available decisions for parties to consult when considering whether to agree to a proposed resolution to a present dispute.<sup>75</sup> Humans are predisposed by evolution and natural selection to demand equal treatment in their disputes with others,<sup>76</sup> and not being able to compare a proposed resolution to a present dispute with the resolutions of similar disputes by others in the past denies disputants a major part of the information needed to know whether they are being treated equally. This lack of access to substantive precedent, so to speak, inevitably reduces disputing to strategic trading, the assertion of personal force, and the manipulation of practical leverage, and this in turn, deprives the process of much of its normative content and undercuts its claim to moral, legal, and political legitimacy.

Denying access to information about past outcomes seems particularly strange for a dispute resolution program whose principal structural innovation is the addition of a third-party "neutral" to the disputing process.<sup>77</sup> A neutral asks questions and makes

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<sup>74</sup> Equating saving money with doing justice seems overstated and may indicate that even ADR proponents feel the need to bolster the gravitas of their project.

<sup>75</sup> Given the popularity of confidentiality clauses in ADR, the lack of publicly available information about past decisions is almost a structural feature of the system. In effect, participants in ADR systems are denied the "analytics" available to parties who litigate. *See infra* note 91. This feature was criticized first by Owen Fiss (and discussed extensively by David Luban and Carrie Menkel-Meadow), in the 1980s, *see supra* note 8, though Professor Fiss was concerned about the harm to the dispute resolution system as a whole more than the harm to individual parties in particular cases.

<sup>76</sup> *See* Conklin, *Nature of Legal Dispute Bargaining*, *supra* note 9, at 405–07 (describing the basis of the neurobiological predisposition to be treated equally); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *GEO. L. J.* 1789, 1817–18 (2000) (describing the "Importance of Fairness" in negotiation and the relationship of the merits of a case to the legitimacy of a negotiated agreement); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 *WASH. U. L. REV.* 38, 389 n.32, 390–401 (2010) (describing a "long line of research in both psychology and . . . economics . . . establish[ing] that individuals care about the fairness of the outcomes they receive" in negotiation).

<sup>77</sup> *See* Main, *Mediation*, *supra* note 3, at 541 ("The modern ADR movement . . . promoted the idea that disputes could be resolved through intervention by trained professionals."). The addition of a neutral makes ADR a middle ground between private ordering and judicial litigation. Much like the tribal elder of the distant past, the neutral acts as a wise, impartial, and trusted third party who helps disputants define their disagreements and identify ways to accommodate them but does not tell them what to do. Also like the elder, the neutral has no personal stake in the dispute and seeks only to bring it to a conclusion as fairly, efficiently and conveniently as possible. The principal downside of such a system is the risk of unequal treatment. A

suggestions that help parties identify issues, clarify positions, and consider courses of action they would not have thought of on their own. In doing this, the neutral (in effect, if not literally) tells parties how others have managed the same kinds of disputes in the past<sup>78</sup> and draws on this knowledge to suggest ways to proceed in the present that would not have occurred to the parties had they been left to rely on their more limited personal experiences. It seems strange for ADR to include a mechanism for incorporating “process” information of this sort from past disputes into its system of dispute resolution, and yet not provide an equivalent mechanism for incorporating the often more important information about past outcomes. Not only are the two stances inconsistent in principle—one in favor of informed parties and the other against it—but failing to provide information about past outcomes gives repeat players (who can collect the information on their own) an advantage over one-time players (who cannot), and this in turn makes ADR susceptible to the familiar criticism of administrative regulation generally, that it promotes repeat player bias.<sup>79</sup>

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neutral is effective to the extent he or she is able to help disputants understand their differences and find common ground, but not all neutrals are skilled at these tasks (their advertised proficiencies notwithstanding) or adapted to all kinds of disputes. The fact that ADR operates in private adds to the problem since it effectively insulates neutrals from public review and this, in turn, makes it difficult for one-time participants (but not repeat players), to know what kinds of risks they are taking in working with one neutral versus another. Asking someone with no understanding of dispute resolution systems or providers to resolve differences in such circumstances is a little like asking them to compete in a curling match without telling them how points are scored.

<sup>78</sup> To be clear, I do not mean that a neutral says explicitly to the parties “this is the way others have dealt with this problem in the past and you should do it that way as well,” but instead, that a neutral’s suggestions, questions, and concerns about how to proceed inevitably will be based on practices observed in similar disputes in the past. What else?

<sup>79</sup> Repeat player bias often is discussed in the legal literature under the concept of “regulatory capture.” See generally Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 *STAN. L. REV.* 548, 624 (1969) (“Because regulatory commissions are of necessity intimately involved in the affairs of a particular industry, the regulators and their staffs are exposed to strong interest-group pressures. Their susceptibility to pressures that may distort economically sound judgments is enhanced by the tradition of regarding regulatory commissions as ‘arms of the legislature,’ where interest-group pressures naturally play a vitally important role.”); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 3 (1971) (“[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”); Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 *YALE L. J.* 871, 876 (1973) (“[A] kind of regular personnel interchange between agency and industry blurs what should be a sharp line between regulator and regulatee, and can compromise independent regulatory judgment. In short, the regulated industries are often in clear control of the regulatory process.”). Marc Galanter has perhaps the most widely known discussion. See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & SOC’Y REV.* 95, 97–103 (1974). See also Maximilian A. Bulinski & J.J. Prescott,

The risk of repeat player bias is a particular problem for dispute resolution systems that rely heavily on algorithms since algorithms are both secret and biased: secret in the sense that they are proprietary in nature and thus known only to their creators and owners, and biased in the sense that they tend to favor certain types of parties and certain types of claims.<sup>80</sup> Parties who use such systems on a regular basis are able to identify the normative standards embedded in the algorithms and manipulate those standards for individual advantage, but one-time users will learn only that they have won or lost, and not why. One could try to correct this imbalance by refining the algorithms to equalize the advantages for both parties, but ADR providers will have little incentive to do this since secrecy hides the bias and bias generates business. It is easy to see how.

The choice of a dispute resolution system typically is made at the beginning of a legal relationship, memorialized in the documents formalizing the relationship (in click-through agreements or small-font text), and controlled to a greater or lesser extent by the more powerful party to the relationship (e.g., landlord rather than tenant; creditor rather than borrower; employer rather than employee; acquirer rather than target; and the like).<sup>81</sup> Each party has

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*Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 218 (2016) (“[W]e know that knowledge of court proceedings is one of the primary advantages that repeat players have over individuals who only attend a single proceeding.”).

<sup>80</sup> See Jonathan Shaw, *Artificial Intelligence and Ethics*, HARV. MAG. Jan.-Feb. 2019, at 44, 49–50, <http://www.harvardmag.com/pdf/2019/01-pdfs/0119-HarvardMag.pdf> (describing “just how difficult it can be to counteract bias” in AI systems, “to fight back against . . . the perception—still dominant within the machine-learning /AI community—that everything is fundamentally an *optimization* problem, or a *prediction* problem, or a *classification* problem.”). See also note 82 *infra*. On bias in algorithms, see generally *Algorithmic Bias*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Algorithmic\\_bias](https://en.wikipedia.org/wiki/Algorithmic_bias) (last visited Dec. 30, 2019). Professors Rabinovich-Einy and Katsh argue that algorithms will produce “more fair outcomes for various parties” because they will curb biases in human decision making by treating everyone (or every dispute) in the same way.” See Rabinovich-Einy & Katsh, *supra* note 6, at 648. But for this argument to be correct it needs an “of the same class” qualification. ADR systems treat all repeat players in the same way, and all one-time players in the same way, but they do not treat all repeat players in the same way as all one-time players. The argument also overlooks the fact that equal treatment is a component of justice, but not a synonym for it. Fair outcomes also are important. See Main, *Mediation*, *supra* note 3, at 546–47 n.47 (the argument that ADR will improve access to justice “splinters, with some emphasizing *access* and others *justice*.” See also Robert J. Condlin, *Online Dispute Resolution*, *supra* note 47, at 744–50 (describing “The Limits of Algorithmic Expertise”).

<sup>81</sup> See Stipanowich, *Quiet Revolution*, *supra* note 2, at 533–35 (describing how “for all practical purposes. . . assent [to a dispute resolution mechanism is] often not informed or knowing and the choice of process [often is made] unilateral[ly] by the company,”—discussing binding arbitration); Rabinovich-Einy & Katsh, *supra* note 6, at 533 (describing how the choice of arbitration is

an interest in choosing a system that gives it the best chance of having future disputes resolved in its favor, but the more powerful party to the relationship will be able to protect that interest more effectively than the weaker party by choosing a dispute resolution provider that has a reputation for being sympathetic (or unsympathetic) to its kind of claims.<sup>82</sup> Given this practical reality, choosing a dispute resolution system upon entering into a legal relationship is as important as choosing a forum in filing a lawsuit, since the choice will have a predictable effect on the outcome of future disputes and also will provide one of the parties with a home court advantage. The denial of a completely impartial system will be unfair to non-repeat players, of course, but there will be little they can do about it. In fact, given the low-visibility manner in which a dispute resolution system is selected, most of the time they will not even know that it has happened. The issue of forum selection, so critical in litigation, does not go away in ADR, it simply changes form.

Some respond to “fairness” criticisms of ADR by arguing that the ability to avoid fairness issues is one of ADR’s “primary advan-

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“to some degree practically foreclosed, or often effectively made by default”). *See also* Main, *Mediation*, *supra* note 3, at 564 n.135 (explaining that courts “enforce arbitration agreements in routine transactions involving customers and other vulnerable parties who entered into contracts of adhesion where the drafter of the clause chose the arbitrator and the claims concerned statutory rights”).

<sup>82</sup> *See, e.g.*, Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 336–37 (2016) (“Statistics show that [the World Intellectual Property Organization and National Arbitration Forum] rule in favor of trademark holders approximately 85% of the time,” in domain name dispute decisions); The ABA Task Force on Best Practices for ODR (Online Dispute Resolution) was concerned enough about the problem of repeat player bias to recommend that ODR providers disclose “the number of cases resolved in favor of businesses [and] the number of cases resolved in favor of the consumer” in “regular periodic statistical reports . . . published online that permit a meaningful evaluation” of the provider’s services.” ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORTS ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 3.6 (2016), [https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf); *id.* at 6 (recommending “disclosure of all matters that might raise a reasonable question about the impartiality of the ODR Provider,” including contractual relationships with merchants, trade associations, businesses, and personal relationships, financial interests, and the like). *See also* Main, *Mediation*, *supra* note 3, at 539 n.8 (describing the anti-litigation reforms of the “Fourth Era” on American Civil Procedure as having “anti-law enforcement and pro-business effects”). There may be a small market for truly neutral ADR systems, but it is not likely to be big enough to support a single business, let alone an entire industry. Parties who want a neutral dispute resolution system go to Court. Courts also have biases (documenting this is what judicial analytics is all about), but the bias is for substantive views about law and not types of parties or claims. Courts do not need to market their services to any particular constituency, their caseloads are provided to them, so they are free to decide disputes on an “objective” basis.

tages.”<sup>83</sup> It is enough, they say, to resolve disputes on terms that parties find “satisfactory:” if the parties are satisfied, then the resolutions are fair by definition.<sup>84</sup> Support for this argument comes mostly from responses to exit surveys in social-science, bargaining-game research in which participants express satisfaction with their experiences even when they do not do as well as other parties playing the same bargaining games, but it is difficult to know what to make of these responses. The parties could be expressing satisfaction with the disputing process itself,<sup>85</sup> for example, rather than the fairness of their results, saying that they were treated respectfully and could “live with” the results, not that they were happy with them.<sup>86</sup> Or, they could be saying that they thought the stakes in-

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<sup>83</sup> See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 826 (1984) (noting that one of the “primary advantages” of the problem-solving method “is that no judgment need be made about whose [legal] argument is right [and whose is] . . . wrong”). *But see* Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 191 (2002) (describing how “fairness issues abound in ADR”).

<sup>84</sup> See Benston & Farkas, *supra* note 19, at 656–57 (determining “the appropriate remedy or just distribution is for the parties themselves to do. . . [parties can have] differing perspectives on justice”).

<sup>85</sup> See Condlin, *Every Day*, *supra* note 9, at 276–96 (describing “The Empirical Case for Communitarian Bargaining”). The social science research often concludes, among other things, that bargainers are willing to concede substantive entitlement claims in return for being treated “fairly” (i.e., respectfully), in the negotiation process, particularly if the stakes involved are not large and the single dispute is the total universe of data on which the “outcome-process” trade-off is based. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1135–363 (2000) (describing the findings of social science research on dispute resolution); Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162, 163 (2009) (“As a first approximation, the legal merits of the lawsuit matter, of course. . . But there is much more to settlement negotiations than the facts of the dispute and the relevant legal rules. . . [because] the legal merits of a case cannot be measured precisely.”); Donna Sheshtowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L. J. 487, 490 n.12 (2007) (describing how research finds that under certain conditions laypeople are willing to trade “substantive justice” for “procedural justice,” if asked about it after the fact); Hollander-Blumoff, *supra* note 76, at 398 (“[P]eople reject outcomes that are economically favorable to them because they do not comport with norms of [procedural] fairness.”); Korobkin, *supra* note 76, at 1822–25 (describing the relationship between “Procedural Fairness” and “Substantive Fairness”). From a disputant’s perspective, trading substance for procedure often will be ill advised. A dispute usually is resolved quickly but its consequences could be felt well into the future. If the money traded for respectful treatment runs out sooner than expected, for example, or is less than the law authorizes, see, e.g., Ward, *supra* note 35 (describing a party who changed her mind about the fairness of a settlement agreement after the fact), the client will have learned that respect and fairness are not always the same thing, but it will be too late to act on that insight.

<sup>86</sup> See, e.g., Engelhart, *supra* note 14, at 10 (a mediator explaining that she decided not to pursue a personal claim for substantial medical damages because of the “significant emotional and resource costs” in resolving a conflict.”).

volved were not worth arguing about any further, particularly if holding out for more would cost additional time, unpleasantness, and stress, and not that the results were fair.<sup>87</sup> They might have seen the bargaining exercises for the games that they were.

If the survey responses reflect the parties' considered judgments that their results were fair, on the other hand, the answers might not mean what they say. Perceived fairness is not the same thing as fairness in fact, and to know whether results are fair in fact one would need to know (among other things) how they compare with the results reached by others resolving the same or similar disputes.<sup>88</sup> The parties might have mistaken their adversaries' respectful and attentive social behavior (points mentioned frequently in the answers), as evidence of fair results,<sup>89</sup> but there is no necessary connection between respectful and attentive social behavior and fair results.<sup>90</sup> Without information about other outcomes, form-over-substance standards of this sort are all that is left to judge how well one has done, but form-over-substance standards are notoriously easy to manipulate, particularly for repeat players who engage in the dispute resolution process over and over again,

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<sup>87</sup> See Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 *CONN. L. REV.* 63, 93 (2008) ("Ex ante attraction did not predict ex post global satisfaction when disputants used a nonadjudicative [dispute settlement] procedure.").

<sup>88</sup> It has long been known that reported satisfaction does not reflect actual satisfaction when the parties' ability to understand and report accurately on their mental processes is limited. See Richard E. Nisbet & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231, 255 (1977).

<sup>89</sup> The ADR literature describes the difference between respectful treatment and fair outcome as the difference between procedural justice and substantive justice. Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 *NEV. L. J.* 487, 490 n.12 (2007) (describing how research finds that under certain conditions laypeople are willing to trade "substantive justice" for "procedural justice"); *id.* at 491 ("Counterintuitively, people's ex post reactions to their dispute resolution experiences are not even driven by whether or not they 'won' their case. Rather, after the dispute has ended, disputants typically evaluate the procedure they used in non-instrumental terms, by considering how fairly they were treated rather than on the outcome they obtained.").

<sup>90</sup> Professors Benston and Farkas describe how law student subjects in a mediation role playing exercise reported that they were "willing to sacrifice a monetary outcome. . . for a collaborative rather than a hostile and adjudicative dispute resolution mechanism." See Benston & Farkas, *supra* note 19, at 657–58. The Professors do not say if the students knew how their outcomes compared with those of other students in the same exercise, however, and thus do not discuss the possibility that the students' satisfaction might have been based on the mistaken assumption that they did as well as everyone else. Being law students, at least some of them probably would have been unhappy to learn that others had done better. This may be another instance of perceived fairness being falsely equated with fairness in fact. See Welsh, *supra* note 18, at 753 (equating the perception of fairness with actual fairness).

day after day.<sup>91</sup> Without knowing more about the comparative value of the parties' individual results, therefore it is difficult to know how much weight to give their expressions of satisfaction in measuring the fairness of those results.<sup>92</sup>

Attempts by scholars to deal with this and other fairness issues in ADR largely miss the mark. The problem is a substantive one. To resolve disputes fairly, parties must examine and evaluate opposing views in an informed, norm-governed, open-minded, and evidence and reason-based manner,<sup>93</sup> but ADR systems hide much of the information needed to do this and the ADR literature provides guidance mostly on how to be sociable, respectful, psychologically sophisticated, and linguistically adept.<sup>94</sup> These latter qualities are important parts of disputing behavior no doubt, but by themselves they do not tell one how to resolve substantive disagreements accurately, or how to reach results that are best justified by the evidence and argument, and only the latter have a direct connection with fairness in fact. ADR's form-over-substance approach to dispute resolution seems based on the belief that

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<sup>91</sup> Informal collections of ADR decisions might spring up in response to this problem, of course, legal analytics is everywhere. (Except in France where it is a criminal offense to collect analytical data on courts and make it available (i.e., sell it) for use in legal representation. See Jason Tashea, *France Bans Publishing of Judicial Analytics and Prompts Criminal Penalty*, A.B.A. J. (June 7, 2019), <http://www.abajournal.com/news/article/france-bans-and-creates-criminal-penalty-for-judicial-analytics>. See also Tom Martin, *The Future of AI in Legal Tech: What Will the Law Allow?* L. PRAC. TODAY (Dec. 13, 2019), [https://www.lawpracticetoday.org/article/the-future-of-ai-in-legaltech-what-will-the-law-allow/?utm\\_source=Dec19&utm\\_medium=email&utm\\_campaign=Dec19LPTemail](https://www.lawpracticetoday.org/article/the-future-of-ai-in-legaltech-what-will-the-law-allow/?utm_source=Dec19&utm_medium=email&utm_campaign=Dec19LPTemail) (describing the "regulatory backlash against legal AI" across the world prohibiting offering services to clients without lawyers involved in the process). But most of the information in these collections is likely to come from repeat players and thus have the trustworthiness of gossip, the even-handedness of house history, and the continuing accuracy of telephone games.

<sup>92</sup> It would have been interesting to learn what the participants thought of their outcomes after they had been told the complete range of outcomes in all of the exercises. The problem is reminiscent of the debate about whether student course evaluations should be completed before or after grades have been released.

<sup>93</sup> I discuss how this is done in Condlin, *supra* note 14, at 311–27.

<sup>94</sup> The British Columbia Civil Resolution Tribunal (CRT) featured prominently at the recent ABA Techshow provides a representative example. See, e.g., Matt Reynolds, *Online and 'Intelligent' Dispute Resolution Benefits are Touted at ABA Techshow*, ABA J. (Feb. 27, 2020), <https://www.abajournal.com/news/article/aba-techshow-panelists-tout-benefits-of-online-and-intelligent-dispute-resolution>. In listing tips for productive negotiation conversation, for example, the CRT website advises one to "[l]isten carefully to learn. . . . Don't interrupt;" "Be calm, polite, and respectful;" "Use 'I' language, such as 'I would like us to . . . ' or 'I think. . . ;'" "avoid broad 'you' statements, such as 'You always' or 'You never. . . ." See, e.g., *Tips for Successful Negotiation*, CIV. RESOL.FALS TRIBUNAL, <https://civilresolutionbc.ca/wp-content/uploads/2017/07/Tips-for-successful-negotiation.pdf>. One searches the website in vain for advice on linking outcome with substantive standards.

arguments about legal rights are inevitably a waste of time because “there are [always] cases on both sides,”<sup>95</sup> but anyone who believes that does not believe in the rule of law.<sup>96</sup>

If ADR systems could overcome the problems of entropy, repeat player bias, and lack of substantive standards, it still does not follow that they would be an adequate substitute for formal litigation in all types of disputes. ADR systems are based on the assumption that parties to disputes are able and willing to resolve their differences from a communal perspective, sharing information openly and honestly, and protecting the interests of their adversaries equally with their own. But opportunities to exploit the weaknesses of others for individual gain arise regularly in disputing and asking parties not to take advantage of those opportunities asks them to act counter to basic neurobiological predispositions that humans inherit from evolution and natural selection.<sup>97</sup>

Consider the following commonplace example. A proponent of communitarian disputing (call him Joe), believes he can convince the other party to the dispute (call him Addie), and the participating neutral (call him Nevie), that what he (i.e., Joe) believes to be a false argument is in fact true.<sup>98</sup> Joe does not know if the

<sup>95</sup> See Robert J. Condlin, “*Cases on Both Sides*”: *Patterns of Argument in Legal Negotiation*, 44 MD. L. REV. 65 (1985).

<sup>96</sup> Professors Benston & Farkas may tacitly acknowledge this when they say legal “rules are designed to create fairness and predictability [but] . . . they can hamper creativity, honesty, and broader communication that can give disputants a fuller understanding of one another’s interests.” See Benston & Farkas, *supra* note 19, at 657.

<sup>97</sup> See Condlin, *The “Nature” of Legal Dispute Bargaining*, *supra* note 9, at 405–07 (describing the human neurobiological predisposition to compete). If taking advantage of another’s ignorance was consistent with ADR principles, it is not clear what would distinguish ADR from litigation. How would it be an “alternative” system?

<sup>98</sup> Cf. *Molotov-Ribbentrop Pact*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Molotov%E2%80%93Ribbentrop\\_Pact](https://en.wikipedia.org/wiki/Molotov%E2%80%93Ribbentrop_Pact) (last visited Dec. 22, 2019). I am not assuming that Joe will make up facts or law to support his argument. An argument can be “false” in the sense I use the term if an informed and intelligent person should not believe it and this could happen for many reasons. A witness needed to establish a factual predicate for the argument might no longer be available; new caselaw may have changed the dominant interpretation of the governing legal standard; a party’s interests, needs, and wants may have changed from those initially expressed; and other important factors known only to the party making the argument may have changed. Admittedly, argument based on made-up facts or law is rare, but weak arguments (i.e., those based on factual omissions, unreasonable interpretations of law, changed circumstances, and the like) are common in disputing, and using arguments of this sort to take advantage of an adversary’s ignorance will conflict with communitarian principles much of the time. A reader might think this kind of taking advantage could not happen in disputes between skilled and informed parties, but I describe an example of a pre-trial conference involving highly skilled, fully informed lawyers, and an experienced United States District Court judge resolving a complex Title VII Employment discrimination case, in which it did. There are many more such examples. See Robert J. Condlin, *Bargaining With a Hugger*, *supra* note 22, at 70–86.

argument will convince Addie (and Nevie), but if it does he (i.e., Joe) will get a much better than average result, and if it does not he will suffer no repercussions, now or in the future, for having tried it. If the argument convinces him, Addie will blame an unfavorable outcome on the weakness of his own argument,<sup>99</sup> will not resent Joe for having (what he mistakenly thinks is) the stronger argument and will accept the disappointing result as all that was possible under the circumstances. If the argument does not convince Addie, Joe will abandon it and it will play no further role in the dispute. Addie might even think his rejection of the argument was the reason Joe abandoned it and think more of Joe more kindly for having done so.

Trying to convince Addie (and Nevie) to believe a false argument, however, is a competitive move more than a cooperative one.<sup>100</sup> It is grounded in deceit, not honesty, and seeks to exploit ignorance, lack of preparation, weakness of will, intolerance for conflict, and other such personal qualities and features of the situation rather than deficiencies in Addie's substantive argument. Asking Joe not to make the argument when the upside return is great, and the downside risk is small, however, will be a hard sell most of the time, particularly if Joe believes that being friendly, personable, open-minded, and respectful in making the argument (which he will be) is being cooperative enough. He might even think that Addie can take care of himself in substantive conversation and that failing to make the argument would be paternalistic and insulting.<sup>101</sup> Opportunities to deceive with impunity (and justifications for doing so) arise over and over again in disputing and expecting Joe (or anyone) not to exploit them will prove disappointing most of the time, and understandably so.

The process of reciprocal concessions leading to an agreement is another taken-for-granted example of the inevitability of competition and deception in disputing. A party cannot know in advance

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<sup>99</sup> See Benston & Farkas, *supra* note 19, at 657 n.38 (describing how lawyers meeting privately with clients emphasize "weaknesses in one's own case to set realistic expectations").

<sup>100</sup> I describe how argument can be made in a respectful, friendly, and conversational manner in Robert J. Condlin, *Bargaining Without Law*, *supra* note 14, at 311–27. There is no contradiction between being respectful and friendly and taking advantage.

<sup>101</sup> Joe might say, echoing the view of some ADR proponents, that Addie's being convinced by the argument is enough to justify using it. Addie knew his situation better than Joe did, and something must have explained his acceptance of the argument. Sometimes this rationalization will be correct, and it always will be available as a justification for acting deceptively, but most of the time it is likely to be the invocation of wish, in the service of self-interest, at the expense of principle.

the most an adverse party will give (or the least it will take) to resolve a dispute, and thus must frame demands and offers in inflated terms to protect against leaving money on the table, avoid take-it-or-leave-it behavior that looks like a refusal to bargain, and provide room to back away from early positions that turn out to be unrealistic. When both sides to a dispute do this, the resulting sequence of mutual, reciprocal, and exaggerated demands and offers is dispute resolution's principal mechanism for enabling each party to learn the most the other will give (or take) to resolve the dispute. For the process to work, however, the parties must make demands and offers that are both true and false at the same time: true in the sense that the parties would be willing to resolve the disputes on the terms stated, but false in the sense that they also would be willing to give more (or take less) if pressed to do so. This bipolar quality of demands and offers makes the concession process in disputing both competitive and cooperative: competitive in the sense that the demands and offers are imbalanced in one's favor, but cooperative in the sense that one or more of the demands or offers might be in both parties' interests to accept.

Communitarians believe in disclosing interests, needs, and wants honestly, fully, and openly but disingenuous arguments, exaggerated demands, and stylized concessions are dishonest, misleading, and selective. One might think of demands and offers of this sort as just harmless hyperbole for effect, the sort of talk one expects in disputing and that no one takes literally. But overstated arguments and offers are intended to deceive, and when they work, as they often do, the party making them reaps real benefits at the expense of the adversary. One might expect communitarians to eschew behavior of this sort, but one would be disappointed. Like almost everyone else, communitarians seem to understand that it is not prudent to expose one's goals, options, resources, and plans unilaterally, and that it is sensible to give oneself room to back away from positions that turn out to be untenable, even if this means being deceptive in the process. At some level behavior of this sort simply reflects one of the most basic teachings of evolution and natural selection: that acting in one's individual interest is the best way to act in the interests of the group.

Some ADR scholars deal with the issues of deception and competition by arguing that humans should rise to the level of ADR rather than ADR sink to the level of humans, so to speak. Proponents of the theory of Transformative Dispute Resolution (TDR), for example, believe that using TDR methods can change

people from secretive, suspicious, insecure, self-centered, competitive, and greedy adversaries into transparent, trusting, confident, cooperative, and sharing colleagues.<sup>102</sup> The evidence for this hopeful claim comes mostly from “just so” stories<sup>103</sup> about single disputes in which parties using TDR methods allegedly changed character during the course of their disputing. It is not possible to prove a transformation from a single data point, however, and the TDR literature provides no examples of follow-up stories about future disputes, or personal ethnographies describing changes in other parts of the parties’ lives, to establish that transformations have occurred. Even the transformations in TDR’s “just so” stories can be explained in non-transformative terms.<sup>104</sup> TDR proponents seem to assume that character is formed in “Road to Damascus” moments that shake values, beliefs, and character to their foundations and remake personalities forever. But becoming a different person is a slow, relentless, repetitive, tedious, serendipitous, and self-critical process that is ill-adapted to the infrequent, context-specific, emotionally charged, and discontinuous nature of

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<sup>102</sup> See, e.g., ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). Or at least proponents of TDR used to say they believed this. The second edition of *THE PROMISE OF MEDIATION* created some uncertainty about what Transformative Dispute Resolution seeks to transform. The first version of the theory claimed to transform people, but after that claim was criticized for being psychologically naïve, proponents of the theory seemed to shift their focus from people to processes in the revised version of the theory and claim that TDR transformed disputing rather than disputants. The uncertainty arises from the fact that TDR proponents deny that they did this. *Id.* I discuss this issue at greater length in Condlin, *The Curious Case of Transformative Dispute Resolution*, *supra* note 16. Professors Shaffer and Cochran defended another version of the transformation argument, one grounded in religious doctrine, though they saw transformation as an experience visited by lawyers on clients for the clients’ own good. See Condlin, “*What’s Love Got To Do With It?*,” *supra* note 30, at 271–96 (discussing the Shaffer/Cochran view). See also Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 *NEGOT. J.* 217, 240 (1995) (“[M]ediation is transformative because it is educational. . . . [W]e learn about other people, other ways to conceptualize problems, ways to turn crises into opportunities, creative new ways to resolve complex issues and interact with each other.”).

<sup>103</sup> See RUDYARD KIPLING, *JUST SO STORIES* (1902) (“just so” stories are deliberately fanciful tales explaining animal characteristics to children). The stories often amount to little more than unverifiable and unfalsifiable illustrations of what the authors believe to be ideal behavioral practices. See Condlin, *The Curious Case of Transformative Dispute Resolution*, *supra* note 16, at 629 n.46, 646 (describing how “most of the case studies [used as evidence of party transformation] . . . are reconstructions of mediation sessions rather than verbatim transcriptions”).

<sup>104</sup> See Condlin, “*Nature*” of *Legal Dispute Bargaining*, *supra* note 9, at 631–45, 652–68 (reinterpreting the TDR “just so” stories to show no character transformations).

most disputing.<sup>105</sup> Disputing does not bring out the best in people unless it is ready to come out on its own.

## V. ADR—THE FUTURE

Its weaknesses and limitation notwithstanding, the ADR reform movement is likely to make a number of major changes to the dispute resolution landscape in this country and abroad. At a minimum, if law firm biographies are to be believed, it already has produced a new and sizeable cohort of lawyers with ADR dispute resolution skills of various types and at various levels of proficiency, who are available to help parties resolve disputes outside the formal judicial system, and more and more people will take advantage of that opportunity as it becomes more widely known.<sup>106</sup> One might think of these lawyers collectively as a dispute resolution system in their own right, lacking only a formal organizational structure for official institutional status.

In addition, public entities worldwide have created formal ADR systems of various types and are beta-testing them, in effect, as we speak.<sup>107</sup> Eventually, many of these systems are likely to become official institutions in their own right, dividing the dispute resolution workload with courts (and in some instances replacing courts altogether)<sup>108</sup> along a “big case/small case” line.<sup>109</sup> In this

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<sup>105</sup> I describe the moral and psychological dimensions of character change in greater detail in Robert J. Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 319–32 (David Luban ed., 1983). Character change, in part, is a therapeutic process and TDR theory disavows any claim to equip one to do therapy, though others in the ADR movement are less modest. See Jeffrey R. Seul, *How Transformative Is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 *OHIO ST. J. ON DISP. RESOL.* 135 (1999); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 *CLINICAL L. REV.* 605, 607 (2006) (“[L]awyers thus inevitably are therapeutic agents. Once this insight is absorbed, it is transformative.”); Benston & Farkas, *supra* note 19, at 658 (“[M]illennial students are more adept at parsing others’ personal and professional narratives and understanding their own roles in complex interpersonal interactions.”).

<sup>106</sup> Stipanowich, *supra* note 2, at 519 (describing the widespread distribution of mediation skills among lawyers). Pressure to use the skills could come from lawyers as well as clients. As one version of what often is referred to as Kaplan’s Law has it, “If you give a kid a hammer, [soon] he . . . [or she will discover] that everything needs pounding.” See *If Your Only Tool Is a Hammer Then Every Problem Looks Like a Nail*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2014/05/08/hammer-nail/#return-note-8840-8>.

<sup>107</sup> See *supra* note 46.

<sup>108</sup> The expectation in China is that all court hearings eventually will be held online. See Tashea, *supra* note 46, at 26 (“[I]t’s just a matter of time to get this technology nationwide.”).

vision of the future, ADR systems typically will be responsible for low-stakes, standardized, routine, and uncomplicated matters (both entire cases and issues within complex cases), where convenience, efficiency, economy, and predictability are the overriding concerns,<sup>110</sup> and courts will (continue to) be responsible for large scale, complicated, substantive disputes where legal, moral, and political judgments are called for.<sup>111</sup> This shift in the dispute resolution division of labor is likely to reduce the size of the docket for many courts and permit them to focus more extensively on complex matters in which interpreting the law is more important than resolving the disputes. Whether ADR and litigation will exist interdependently in such a world as complementary parts of a single institution or separately as free-standing entities, each having the authority to make final, binding, and preclusive decisions in its own right, is hard to say, though some versions of both models are likely to survive.<sup>112</sup> The only remaining issue will be defining the differ-

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<sup>109</sup> At the Pound Conference this line sometimes was described as one between “garbage cases” and “more important cases.” See Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99, 100–01 (1994). See also Rabinovich-Einy & Katsh, *supra* note 6, at 639–40, 650–51 (describing future relationship of ADR systems to courts in dividing the dispute resolution caseload).

<sup>110</sup> ADR methods and systems have a role to play in complex disputes as well as simple ones, of course, but it is more of a supporting role than a leading one. Mediation, for example, often is used to work out the details involved in implementing judicial decisions in class actions, civil rights, mass torts, and other complex, multi-party, multi-issue lawsuits, as well as resolve disagreements that arise in the enforcement of complex business deals, employment contracts (e.g., for sports and entertainment figures, and high-paid executives), mergers and acquisitions, and other complicated legal transactions and arrangements in which all of the issues that could become disputed at some point in time cannot be anticipated, and their resolutions worked out, fully, in advance. See, e.g., Elizabeth “Wendy” Trachte-Huber, *Mediating Multi-Party Disputes: Reflections on Leadership in Mediation*, 4 PEPP. DISP. RESOL. L. J. 195 (2004) (describing the work involved in mediating large, complex, multiparty disputes). As a consequence, complex transactions and arrangements of this sort often are left incomplete by design, in the belief that disputes about details inevitably will arise and that when they do the parties involved will have the best information about, and best access to, resources and methods for dealing with them. Whether ADR methods are equally useful in the initial decision stage of large-scale, norm-governed, legal disputes is not so clear.

<sup>111</sup> See Main, *Mediation*, *supra* note 3, at 565 (explaining how ADR methods do not provide the tools necessary to dispose of all kinds of disputes). Small cases sometimes can involve novel and difficult issues of law, morality, and politics with implications well beyond those for the parties involved in the disputes, and a complete dispute resolution system will include a procedure for moving such cases from the ADR to the judicial docket. Sometimes, “big” is just a synonym for “important,” and all kinds of cases can be important.

<sup>112</sup> See Main, *Mediation*, *supra* note 3, at 547 (“Without the infrastructure provided by courts . . . the outcomes of many ADR proceedings would be non-binding and unenforceable.”); James Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?*, 30 GA. ST. U. L. REV. 983 (2014).

ence between “big” and “small” cases, and if past experience with other judicial diversion programs is a guide, that problem will remain on the table for some time to come.<sup>113</sup>

While ADR in its most ambitious forms purports to remake institutions, values, character, and culture, ultimately it is likely to have its greatest effect on dispute resolution practices and skills, likely to produce a new Federal Rules, so to speak, more than a new Equity Jurisprudence. Apart from its structural reconfiguration of the tribal elder as neutral, ADR’s most notable contribution to dispute resolution reform to date has been the adaptation of a set of communication practices and techniques (e.g., “active listening,” “reflection,” “framing,” “reactive devaluation,” “anchoring,” and the like) that are useful for investigating, understanding, and reconciling conflicting views but that are not original with or unique to ADR. For the most part they are the skill practices of “client centered representation” introduced into legal education by the clinical education movement in the nineteen-seventies,<sup>114</sup> and the methods and techniques of the “heuristics and biases” model of human decision-making introduced into legal education by the behavioral economics literature in the 1990s.<sup>115</sup>

It does not diminish ADR to say that it resuscitates well-known concepts, skills, and methods, or that it is likely to produce a new Federal Rules rather than a new Equity Jurisprudence. Skill is the driving force behind the effective operation of any dispute

<sup>113</sup> See Sally T. Hillsman, *Pretrial Diversion of Youthful Adults: A Decade of Reform and Research*, 7 JUST. SYSTEM J. 361, 361–87 (1982) (describing attempts over the years to identify the types of juvenile criminal cases that should be included in pre-trial diversion programs, concluding that “there are endemic conditions in [the litigation process] that make it . . . difficult for [various alternatives to achieve the goals reformers and program operators intended].”).

<sup>114</sup> See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); DAVID BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); ROBERT REDMOUNT & THOMAS L. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* (1980); ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

<sup>115</sup> Korobkin, *supra* note 76, at 1789; Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017 (2006); Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597 (2006); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996). I discuss this literature in Robert J. Condlin, *Legal Bargaining Theory’s New “Prospecting” Agenda: It May Be Social Science, But Is It News?*, 10 PEPP. DISP. RESOL. L. J. 215, 217–24 (2010).

resolution system. It enables parties to identify and express interests and objectives clearly, understand differences accurately, circumvent and dissolve conflicts creatively, and build the social bonds needed for joint action.<sup>116</sup> Dispute system structures can be more or less supportive of different kinds of skills, but in the end, it is skill proficiency more than system design that makes dispute resolution work. Adding to the package of previously known skills is an important contribution to dispute resolution reform, therefore, even if it is not the identification of a radically new conception of disputing, or the invention of an innovative new system for resolving disputes.

Finally, ADR's jurisprudential effects may end up being as, if not more, significant than its institution-building and skill development ones.<sup>117</sup> In many types of disputes, for example, ADR may replace a legal rule-based system of decision-making with a bureaucratic processing one,<sup>118</sup> resolving disputes according to a set of practices and beliefs that treat disputes as commodities and resolutions as standardized. ADR systems operate in private, are not subject to any type of public review or critique, and thus are free to serve whatever interests they please, including their own, without fear of discovery or criticism. Resolving small scale, standardized disputes over and over again cannot help but become routine (and boring) and the most efficient way to deal with routine matters is to follow the same procedures and reach essentially the same results, often unselfconsciously, each time out. Routinizing dispute resolution in this way has the added attraction, at least for those who do not think carefully about it, of making the process seem fairer as well as more efficient, since treating everyone identically

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<sup>116</sup> Skill, as I use the term, has an emotional and cognitive dimension and is not just technique. For "active listening" to work, for example, the listener must be interested in what the speaker has to say, be open to the possibility that the comments could be correct, and want to understand what is being said, not just counter it.

<sup>117</sup> Professor Main describes how ADR already is responsible for "the [changes in the] pleading and summary judgment standards that exemplify contemporary practice . . . [as well as] the vanishing trial, . . . judicial case management and the pursuit of settlement by any means necessary." See Main, *Mediation*, *supra* note 3, at 542, 562–64.

<sup>118</sup> Ironically, the bureaucratization of dispute resolution coincides almost perfectly with Chief Justice Burger's call at the outset of the ADR movement for "new machinery for resolving disputes." See Warren E. Burger, *Agenda for 2000 A.D. – A Need for Systematic Anticipation*, 15 *JUDGES J.* 27 (1978). If hospitals and corporations could take advantage of business management techniques, Burger argued, so could the legal system. See WARREN BURGER, *The Courts on Trial*, Speech at the American Bar Association (Feb. 21, 1956), in *DELIVERY OF JUSTICE* 4, 6 (1990).

(rather than equivalently) can seem like treating them equally, and ADR is committed to equal treatment.

ADR proponents deny that this will happen, of course, and argue that ADR's flexible structure is better adapted to resolving disputes in individually tailored ways than is adjudication's fixed format. This may be true, but given the secrecy with which ADR operates, it will take a very long time to know for sure if it is, and in the end, again given the secrecy, we might never know. The architects of administrative regulation did not anticipate the problem of regulatory capture, for example, but it occurred nonetheless. The attractions of bureaucratic processing are considerable and there is no reason to believe ADR systems will be less susceptible to them than other administrative regulatory systems. In some ways, in fact, ADR systems may be more susceptible since, unlike administrative systems, they are not required to explain or justify their decisions in public where they can be monitored and criticized. ADR systems treat party satisfaction rather than correct legal judgments as the best evidence of successful performance and often equate satisfaction with procedure as the equivalent of satisfaction with results. But, as we have seen, parties who are treated respectfully can be satisfied with outcomes that are both incorrect and unfair. The standard objection to bureaucratization—that it represents a capitulation to modern social conditions more than an improved conception of justice<sup>119</sup>—has lost much of its force since the nineteen-eighties. In an increasingly congested and conflictual world, many now think of justice in collective rather than individualistic terms,<sup>120</sup> and equal treatment as the right to be treated identically rather than equivalently to others.<sup>121</sup> This paints a bleak picture of the future for those who believe that legal rights are individualistic and contextual in nature, but it may be ADR's most im-

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<sup>119</sup> See Fiss, *supra* note 8.

<sup>120</sup> This already is true for personal jurisdiction doctrine in lawsuits based on standardized transactions. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 590 (1991) (Plaintiffs bound by a forum selection clause they did not know about, had not read, and did not understand because the clause was fair to consumers in the aggregate). See also Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873 (2005) (describing efforts by victims of mass torts to circumvent the requirement of individual causation by filing actions on behalf of collective plaintiffs to impose liability on collective defendant-manufacturers).

<sup>121</sup> Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681 (1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

portant legacy.<sup>122</sup> If that turns out to be the case, welcome to 2081 and say hello to Harrison Bergeron.<sup>123</sup>

## VI. CONCLUSION

The ADR reform movement may turn out to be one of the most important chapters in the history of American civil dispute resolution, or it may not. Unlike its well-known ancestors—Equity Jurisprudence, Small Claims Court, and the Federal Rules—ADR turns dispute resolution on its head by transferring control over outcome from agents of the state and other third parties to the disputants themselves, and by redefining disputing procedure in *ad hoc*, party-constructed guidelines rather than fixed, generic, and categorical rules. In doing this, ADR rejects many of the principles of substantive and procedural justice underlying the American system of adversarial adjudication and replaces them with informal, collaborative, and communal substitutes. A transformation of this magnitude may be more than many ADR proponents have in mind, but it is one possible consequence of the widespread adoption of ADR reforms.

Looked at more modestly, on the other hand, ADR might simply be a next-generation version of private ordering, an augmented form of face-to-face, multi-party<sup>124</sup> bargaining in which third-party neutrals help disputants identify their individual interests and find common ground when they are unable to do so for themselves but, unlike judges, do not tell the disputants how to act on that information once they have it. A system of augmented bargaining of this sort, a kind of bargaining for the bargaining impaired,<sup>125</sup> has much to recommend it. It is inexpensive to

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<sup>122</sup> In a sense, some of the jurisprudential effects of ADR already have been felt. See Main, *supra* note 3, at 562–64 (describing how the availability of mediation changed the judicial interpretation of the pleading and summary judgment rules of the Federal Rules of Civil Procedure).

<sup>123</sup> See KURT VONNEGUT, *WELCOME TO THE MONKEY HOUSE; A COLLECTION OF SHORT STORIES* (New York, Delacorte Press 1968) (in the year 2081, the 211th, 212th, and 213th amendments to the Constitution declare that all Americans are absolutely equal “in every which way”—no one is allowed to be smarter, better-looking, or more physically able than anyone else).

<sup>124</sup> ADR is multi-party bargaining in the sense that the neutral is one more person to be convinced that one’s arguments are correct and one’s concessions are final. A party bargains with both the adversary and the neutral in an ADR system, in other words, and this added complexity is one more reason repeat players have an advantage.

<sup>125</sup> When parties are able to resolve disputes by themselves, they do so. And if they need someone to tell them what to do, they go to court. ADR is for parties caught between these two

implement and easy to use. It generates new business for lawyers and creates new scholarly agendas for legal academics. And it makes private party autonomy first-among-equals in the range of interests protected in the resolution of disputes. All of these features, but particularly the last, make ADR a natural vehicle for structuring disputing in a democracy.

If there is a fly in the ointment, and almost always there is, it is that ADR may fall victim to the familiar propensity of administrative systems generally to bureaucratize decision-making by defining legal rights in collective rather than individual terms, standardizing results, and giving repeat players disproportionate power over outcome. If this scenario materializes, and particularly if ADR is extended to all types of disputes both large and small, some of the most important commitments underlying the American system of justice will be up for grabs. There is no way to know for sure how things will play out, of course, it is still early in the game and trustworthy data is hard to come by. But there is reason to be vigilant about the unanticipated effects of ADR, and reason to keep it on a very short leash.

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options, who want to retain personal control over their disputes but need help to resolve them. Thus, "bargaining for the bargaining impaired." ADR scholars use the term "facilitated negotiation" as a synonym.