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Beyond Settlement: Reconceptualizing ADR as “Conflict Process Strategy”

DEBORAH THOMPSON EISENBERG*

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I. Introduction

“Alternative dispute resolution” or “ADR” has reached a paradoxical moment: it is both ubiquitous and at risk of extinction as a distinct concept and field. The use of ADR has expanded exponentially since the Pound Conference of 1976, the event recognized as a catalyst for the widespread development of ADR in the United States.¹ ADR is no longer “alternative,” but mainstreamed throughout courts, legal institutions, government, corporations, and society.² Every law school offers ADR courses and specialized programs to varying degrees.³ Given its focus on conflicts and process, dispute resolution weaves through every area of substantive law.⁴

ADR’s pervasive “success” may have the unintended consequence of diluting its distinctiveness and quality. ADR has become synonymous with myriad processes—negotiation, mediation, settlement conferences, arbitration, restorative justice, collaborative law, dispute system design, private judging, negotiated rulemaking, and the list continues.⁵ For some, ADR essentially means “anything but litigation”—with much confusion about the differences between various types of disputing processes and the relationship of ADR to the law.

The problem gets worse within particular branches of ADR, in which underlying process definitions and theoretical underpinnings are unclear. Mediation, for example, often equates to any attempt to settle a case outside of court, regardless of the quality or coerciveness of that process. As Nancy Welsh once observed, mediation “has become the new ‘Kleenex’ or the new ‘Xerox.’” Those breakthrough products became so successful and ubiquitous

¹ See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

² See, e.g., Thomas O. Main, *Mediation: An Unlikely Villain*, 34 OHIO ST. J. ON DISP. RESOL. 537 (2019) (arguing that mediation led federal courts to abandon trials and promote settlement).

³ Every law school offers ADR courses as upper-level electives, some have incorporated ADR components into the required curriculum, and others have ADR specialty programs and centers. See 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. ON DISP. RESOL. 25 (2010) (analyzing survey of ADR curriculum at U.S. law schools).

⁴ See *id.* at 45 (noting ADR professors teach across the law school curriculum).

⁵ The American Bar Association Dispute Resolution Section identifies at least twenty-two different dispute resolution processes. See *Dispute Resolution Processes*, ABA SECTION OF DISPUTE RESOLUTION, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/ (last visited May 1, 2020).

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that others quickly copied them,” but in ways that undermine the quality and unique characteristics of the original product.⁶

ADR has become so popular in name, fractured in practice, and jumbled in theory⁷ that it risks a metaphorical “genericide.”⁸ In trademark law, “genericide” occurs when a product name is used so widely, and incorrectly, in the public lexicon that the mark becomes generic and confusing.⁹ Instead of being a product of distinct quality, excessively popular brands such as Kleenex, Aspirin, Xerox, Band-Aid, etc., become coterminous with an entire category of (potentially inferior) goods, no longer unique and worthy of special protection. In short, the mark loses its ability to act as a source identifier.¹⁰ Ironically, the more successful a brand name, the more likely it suffers genericide.

Analogously, the ADR name has been applied to so many different processes and concepts that its meaning has become rather muddled and its

⁶ Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 11 (2011).

⁷ This is true not only for ADR generally, but also for the constituent branches of ADR, especially negotiation and mediation. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 26 (3d ed. 2004) (noting that within the ADR field “few items spark more controversy than the definition of mediation”); Adrian Borbély, Noam Ebner, Chris Honeyman, Sanda Kaufman & Andrea Kupfer Schneider, *A “Grand” Unified Negotiation Theory . . . in Context*, 2017 J. DISP. RESOL. 145, 157 (noting cacophony of negotiation theories and concluding that a “grand,” unified negotiation theory would be difficult because negotiation theory is context-specific).

⁸ For a simple explanation of genericide, see Whitson Gordon, *How a Brand Name Becomes Generic*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/smarter-living/how-a-brand-name-becomes-generic.html> (“If a brand name is understood by the public to refer broadly to a category of good and services rather than a brand’s specific good or service, a company may be at risk of losing its trademark.”).

⁹ See U.S. PATENT & TRADEMARK OFFICE, *TRADEMARK MANUAL OF EXAMINING PROCEDURE* § 1209.01(c) (2018) <https://tmepl.uspto.gov/RDMS/TMEP/current#/result/TMEP-1200d1e6993.html?q=1209&ccb=on&ncb=off&icb=off&fcb=off&ver=current&syn=adj&results=compact&sort=relevance&cnt=10&index=5>.

¹⁰ See, e.g., *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921) (ASPIRIN generic for acetyl salicylic acid); *DuPont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75 (2d Cir. 1936) (CELLOPHANE generic for plastic wrap); *King-Seely Thermos Co. v. Aladdin Indus.*, 321 F.2d 577 (2d Cir. 1963) (THERMOS generic for insulated vacuum containers). Additional examples can be found in the “Trademark Graveyard.” *Trademark Graveyard*, U.S. PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/kids/graveyard.html> (last visited Oct. 21, 2020).

governing principles diluted.¹¹ Judicial, commercial, and institutional enthusiasm for and propagation of ADR processes outpaced the development of an ADR academic field in the legal academy and body of theoretical literature.¹² Many ADR processes—instituted largely based on efficiency grounds—developed as “atheoretical enterprises,”¹³ with the underlying normative values, ethical constraints, and governing standards unclear or perverted when institutionalized.¹⁴

In 1985, nearly a decade after the Pound Conference, political scientist Christine Harrington observed that the broad scope and fragmentation of the ADR movement made it “difficult to talk about alternative dispute resolution as a movement or field.”¹⁵ In 2020, the ADR field is well embedded in the legal academy. ADR derives from a “rather promiscuous or multi-heritage ancestry” that includes intellectual and theoretical influences from a “broader pastiche of the social sciences (anthropology, political science, international relations, sociology, psychology, history, economics, and game theory) and

¹¹ See Moffitt, *supra* note 3, at 29 (“Like many areas, ADR struggles with boundary definition”).

¹² See Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1125 (2014) (exploring how “problem-solving” courts emerged as an “atheoretical enterprise”); Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 484 (2012) (“The market economy of alternative processes has produced a dizzying array of dispute resolution offerings. Whether these offerings represent actual progress or just additional ‘gaming of the system’ is an important inquiry for ADR scholars to undertake.”).

¹³ Boldt, *supra* note 12, at 1125 (noting that the development of problem-solving courts has been an atheoretical enterprise guided by a “pragmatic set of instincts”); see also Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 394 (2004) (“Alternatives to litigation are institutionalized, not because they are most appropriate,” but because they are the most expedient). That is not to say the field lacks a theoretical canon. The point is that ADR innovations and practice often developed more quickly than the theorization of the field. A forthcoming book, *DISCUSSIONS IN DISPUTE RESOLUTION: THE FORMATIVE ARTICLES* (Art Hinshaw, Andrea Kupfer Schneider & Sarah Rudolph Cole eds., forthcoming 2021), collects some of the seminal articles with commentaries from ADR scholars.

¹⁴ See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the “Law of ADR,”* 19 FLA. ST. U. L. REV. 1 (1991) [hereinafter *Pursuing Settlement*]; Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721 (2017) (analyzing potential reforms to promote procedural justice in court-based mediation); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L. REV. 787 (2001).

¹⁵ CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 1* (1985).

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their more multidisciplinary social activist spinoffs, such as peace studies, social movement theory and practice, and conflict resolution.”¹⁶

As a relatively young field within law schools, however, we continue to grapple with who we are, where we fit, and what we *should* be in our teaching and scholarship.¹⁷ From its inception, the field has been mired in a bipolar “litigation” versus “settlement” straw man sketched by ADR critics.¹⁸ This intellectual scrimmage is healthy to the extent it forces the ADR field to continuously reexamine and articulate its purpose and relationship to governing legal norms and legal institutions more precisely. But it also has been a distraction. Framing the field as “anything but litigation” keeps the field saddled by the misperception that the ADR field is universally anti-litigation and settlement-centric.

The objective of the theoretical debate about “adjudication” versus “settlement” has never been a zero-sum game.¹⁹ The debate serves the valuable

¹⁶ Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 4, 11–12 (2004) [hereinafter *From Legal Disputes*] (footnotes omitted). See also Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000) [hereinafter *Mother and Fathers of Invention*] (exploring the interdisciplinary theoretical roots of the ADR field).

¹⁷ See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004) (“The first obstacle to an understanding of the role of ADR is the sheer breadth and diversity of activities to be taken into account, a breathtaking range of approaches and strategies that we lump under the heading of ‘ADR’ (an outdated acronym that survives as a matter of convenience).”) Some ADR scholars and practitioners engaged in an online “theory of change” conversation about the future of the ADR field. See THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 19 (John Lande ed., 2020).

¹⁸ Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1660, 1663 (1985) (criticizing Fiss’s *Against Settlement* as attacking “a straw man” and a “caricature”). See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984). See also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2663–64 (1995).

¹⁹ See Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1145 (2009) (proposing that “Fiss’s overarching allegiance was less to specific institutional forms than to particular moral ideals. His arguments therefore transcend a straightforward distinction between adjudication and ADR.”); Michael Moffitt, *Three Things to Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1245 (2009) (“Because settlement and litigation are coevolved, symbiotic processes, to stand against one is to stand against the other.”) In the words of Mary Parker Follett, who theorized the notion of constructive conflict in the 1920s, “We should never allow ourselves to be bullied by an ‘either-or.’” Mary Parker

purpose of scrutinizing the underlying normative values, uses, limitations, and impacts of various disputing processes on law and society.²⁰ ADR raises important questions about whether courts and legal institutions are the only valid “authority” for the generation and enforcement of community norms. Should individuals have the choice to opt out of judicial adjudication and develop their own self-determined approach to their conflict? Is it appropriate to *mandate* non-judicial methods of dispute processing?²¹ The question of whether private dispute processing options undermine public values and legal rights, or provide a valid alternative source of decision-making authority, remains an important one to explore. That nuanced perspective often gets lost at the intersection of the rapid institutionalization of ADR based largely on “efficiency” grounds, and the critical interrogation of these processes in ADR scholarship.

Defining ADR as *any* non-litigation process renders ADR rather generic and not particularly distinctive. The lack of an overarching theoretical conception and scope portends the field’s potential genericide. While this metaphor may be dangerous in suggesting that ADR is simply a brand (which it is not), it is unquestionable that there is much confusion, in both theory and practice, about ADR generally and its constituent parts. We need to reclaim and clearly define the field’s overarching focus, theoretic precepts, and scholarly agenda. We need a clear answer to the question: what does the ADR field study and teach and why does it matter to the law and legal education?

We need a robust dispute resolution field in law schools now more than ever. Our society is experiencing intense political polarization²² and

Follett, *Constructive Conflict*, in MARY PARKER FOLLETT: PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S 86 (Pauline Graham ed., 2003).

²⁰ Menkel-Meadow, *supra* note 18, at 2664 (observing that the adjudication vs. settlement debate “while useful for explicitly framing the underlying values that support our legal system, has not effectively dealt with the realities of modern legal, political, and personal disputes”); *See id.* at 2655 (the question has always been “*when, how, and under what circumstances* should cases be settled?”) (emphasis in original).

²¹ To make my biases on this question clear, I believe ADR processes should be voluntary, not mandatory. That includes mandatory pre-dispute arbitration in employment and consumer adhesion contracts, which impairs access to justice, and mandatory mediation. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996). *But see* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997).

²² Of course, as historian David Moss writes, democracy “has always been a contact sport.” DAVID A. MOSS, *DEMOCRACY: A CASE STUDY 3* (2017). He continues: “Words like ‘cooperation’ and ‘consensus’ may sound appealing and even comforting, but American democracy has survived and thrived from one generation to the next on the basis not

social isolation,²³ challenging norms of democratic civil discourse. Community-based, dialogic ADR processes, such as restorative justice, are being applied to promote social justice goals in many different areas of substantive law.²⁴ Online dispute processes are emerging at break-neck speed, presenting profound normative questions for the law and legal institutions.²⁵ And, of course, ADR is the way that nearly all legal matters are resolved.²⁶ *We study and teach this stuff*—the sources, cycle, and psychology of conflict;²⁷ the forms, normative goals, design, and impacts of various methods of dispute and conflict processing in legal, organizational, and community-based contexts;²⁸ the theory and practice of negotiation and facilitated communication in bilateral, multi-party, institutional, and international contexts.²⁹

To prevent “genericide” of their brands, companies invest tremendous effort to protect their marks so the public uses them accurately. As the ADR

principally of harmony but of conflict—sometimes intense conflict—mediated, generally, by shared ideals.” *Id.* See Pew Research Center, Political Typology Reveals Deep Fissures on the Right and Left (Oct. 24, 2017), <https://www.people-press.org/wp-content/uploads/sites/4/2018/09/10-24-2017-Typology-release.pdf>; Pew Research Center, The Partisan Divide on Political Values Grows Even Wider (Oct. 5, 2017), <https://www.people-press.org/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt..pdf>.

²³ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001). This sense of social isolation has been compounded by the 2020 coronavirus pandemic, which has forced us to remain “socially distanced” from each other.

²⁴ See *infra* Part I(C).

²⁵ See, e.g., ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (Mohamed S. Abdel Wahab, Ethan Katsch & Daniel Rainey eds., 2012); Robert Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717 (2016).

²⁶ See *infra* Part I(A).

²⁷ See, e.g., BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE* (2000); JAMES A. SCHELLENBERG, *CONFLICT RESOLUTION: THEORY, RESEARCH, AND PRACTICE* 39–102 (1996); Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008); Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16.

²⁸ See *infra* Part II.

²⁹ See, e.g., Amy J. Cohen, *Negotiation, Meet New Governance: Interest, Skills, and Selves*, 33 LAW & SOC. INQUIRY 501 (2008); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter *Toward Another View*]; Gerald B. Wetlauffer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369 (1996).

field approaches a symbolic “mid-life” moment—nearly fifty years after the Pound Conference—it is time for renewed critical self-reflection about what ADR is, is not, and should be in modern legal thought and education. We need to define today’s dispute resolution field—which now reaches far beyond the traditional trifecta of negotiation, mediation, and arbitration—and reexamine its foundational normative values and governing principles. This project is urgent: as many of the pioneers of the ADR field retire, some law schools are not replacing them in a time of budget constraints.³⁰

This article explores the modern scope and relevance of dispute resolution in law and legal education. Part I considers what ADR is, and equally important, is not. It seeks to clarify several points of confusion about the dispute resolution field that arise, in part, from the three words that comprise our abbreviation. Part II reconceptualizes the work of the modern ADR field as “conflict process theory and strategy,” drawing lessons from Legal Process theory. A “conflict process” framing of the field may help to define and guide our collective scholarly and teaching agenda into the future. This project is too large for one article. My hope here is to present a unifying framing of the field as a starting point for continued scholarly conversation as the next generation of ADR scholars takes the helm.

II. WHAT’S IN A NAME? THE MUDDLE WE CALL “ADR”

Ask anyone in your law school what ADR means and you may get an oversimplified,³¹ wrong,³² or very long answer that recites myriad processes and concepts, without a clear unifying theoretic conception.³³ Few incoming law students know what ADR means. Many people outside of our field typically view ADR as one “black box,” lumping all processes together without appreciating the nuances between them. Worse, they view us as Pollyannaish proselytizers who believe that ADR can magically erase human conflict and produce a peaceful utopia.³⁴

³⁰ See John Lande, *What Will Be the Future of ADR in US Legal Education?*, INDISPUTABLY BLOG (Jan. 24, 2019), <http://indisputably.org/2019/01/what-will-be-the-future-of-adr-in-us-legal-education/>.

³¹ This takes the form of thinking that ADR consists of only one process, typically mediation.

³² This typically takes the form of confusing different processes, such as thinking mediation and arbitration are identical.

³³ I am guilty of this. It results from knowing *too much* about ADR.

³⁴ My esteemed colleague and friend Bob Condlin has written extensively about this perception of ADR and communitarian negotiation theories. See Robert J. Condlin, *ADR: Disputing with a Modern Face, or Bargaining for the Bargaining Impaired?*, 21 CARDOZO

This confusion comes as no surprise. Semantically, we are a bit of a puzzle. We are the only field in the legal academy represented by an initialism.³⁵ Psychologists teach us that such abbreviations can be alienating and mentally taxing for those outside of the field.³⁶ Furthermore, all three words that comprise our field’s moniker—Alternative, Dispute, and Resolution—are incomplete and define us in limiting ways. I do not advocate for a new name per se. There is great value, after all, in having broad name recognition.³⁷ ADR is a convenient shorthand (especially with word limits in law reviews). Nevertheless, unpacking the misperceptions arising from our descriptor may help us to identify a unifying conception of the field and put our future agenda into sharper relief.

A. “Alternative:” A Grounding but Confusing Term

First, let us consider “alternative,” which, on the one hand, serves as a helpful reminder that a range of processes—formal, legal adjudication to informal, self-determined approaches—exist for addressing conflicts and legal claims. “Alternative” emphasizes that the rule of law and judicial process are the predominant means for vindicating legal rights, maintaining social order, and resolving disputes in a democratic society. With courts as the guiding standard-bearer and enforcer of the law, individuals may opt for informal,

J. CONFLICT RESOL. 291, 299–300 (2020) [hereinafter *ADR: Disputing with a Modern Face*] (arguing that some in ADR field assume that “ADR methods and systems” will transform “disputants themselves from ‘risen apes’ to ‘fallen angels’” and form a “peaceable kingdom” or utopia); Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why Can’t All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1 (2008). Jennifer Reynolds urges ADR scholars to unpack “the utopian mythology of ADR” and critically examine the potential harm of ADR processes on participants and society. Reynolds, *supra* note 12, at 483.

³⁵ Technically, ADR is an “initialism” rather than an acronym. See *Initialism*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/initialism> (last visited May 1, 2020).

³⁶ Andrew H. Hales, Kipling D. Williams, & Joel Rector, *Alienating the Audience: How Abbreviations Hamper Scientific Communication*, OBSERVER (Jan. 31, 2017), <https://www.psychologicalscience.org/observer/alienating-the-audience-how-abbreviations-hamper-scientific-communication>.

³⁷ “The Artist Formerly Known as Prince,” a rock icon from the 1980s, offers a cautionary tale about how difficult it is to change one’s well-recognized public persona. After all of the hubbub, he changed his name back to Prince. See Emily VanDerWerff, *Why Did Prince Change his Name to a Symbol?*, VOX (Apr. 21, 2016), <https://www.vox.com/2016/4/21/11481686/prince-name-change-symbol-why>. Hat tip to Professor Lydia Nussbaum for this observation.

private, and self-determined processes. If those processes do not result in an agreement, judicial process and the rule of law remain as a safety net and the final word.³⁸

“Alternative” processes allow the parties most involved in a conflict to develop their own mutually agreeable outcomes, perhaps to blunt the potentially harsh or unsatisfying results that may result from judicial adjudication.³⁹ For example, a tenant may prefer to negotiate a payment plan with a landlord rather than have an eviction judgment on her record; divorcing parents may wish to work out custody and visitation plans on their own; companies with on-going dealings may prefer to negotiate a deal to retain positive business relations; an offender may want a chance to make amends and avoid a criminal record. For others, the notion of an alternative system prompts mistrust and concerns about a potentially abusive regime that will force uninformed or unrepresented parties into settlements, trading legal rights and justice for harmony and peace.

Yet, “alternative” is misleading to the extent it suggests that informal dispute processing is unusual. That is certainly inaccurate in modern society,⁴⁰ and may have never been true.⁴¹ A study of religion, philosophy, and the

³⁸ I frequently reassure students in the Mediation Clinic who express frustration if the parties do not reach agreement in a day-of-trial mediation: the mediation process is not a failure if the parties do not settle. That is what self-determination means. The worst thing that happens if the parties do not reach agreement is that a smart judge down the hall decides their case according to the rule of law.

³⁹ Here I am referring to consensual negotiation-based processes rather than arbitration, which is an adversarial adjudicative process.

⁴⁰ Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) (noting that adjudication practices “have shifted” and that ADR “increasingly dominates the landscape of procedure”); Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268–69 (1984) (stating that “[o]n the contemporary American legal scene the negotiation of disputes is not an alternative to litigation[;] . . . it is the central core.”).

⁴¹ KOVACH, *supra* note 7, at 28–29 (noting that mediation and informal dispute processes trace back thousands of years in ancient China, Japan, Greece, and many other cultures). *See also* Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 38 (1994) (discussing peacemaking processes used in Native American culture); KOVACH, *supra* note 7, at 31 (explaining that much of the modern ADR movement built upon the mediation and arbitration processes developed in the early 1900s to avoid labor-management strikes and industry shutdowns); WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 25 (2d ed. 1986) (explaining that Congress created the Department of Labor in 1913, authorizing the Secretary of Labor to serve as a mediator for labor disputes); DEBORAH M. KOLB, *THE MEDIATORS* 7 (1983) (explaining that in 1947, Congress created the Federal Mediation and Conciliation Service, which continues to mediate labor disputes for companies engaged in interstate commerce, private non-profit health facilities, and federal government agencies).

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common law reveals that humankind has always used informal processes as the predominant way to address conflicts and promote a range of normative objectives.⁴² Given the imprecision of the term, many in the field use the descriptor “dispute resolution”⁴³ or change the “A” in ADR to mean “appropriate” dispute resolution.⁴⁴

Under this (non-alternative) framing, the quintessence of the law itself is dispute resolution.⁴⁵ Litigation is one process among a continuum of dispute processing strategies. As Jeffrey Seul observed: “The popular image of litigation has become so bleak, one can easily forget that an essential purpose of litigation is to resolve disputes, not to perpetuate them.”⁴⁶ Indeed, Robert Pushaw has examined how the role of the court as a “dispute resolver” for

⁴² Douglas Lind, *On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence*, 10 *MEDIATION Q.* 119, 120 (1992) (explaining that “[e]ven a casual review of jurisprudential history shows that legal philosophers have for centuries pondered the practical forms and theoretical justification of various ADR techniques” such as mediation and arbitration); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979) (discussing the relationship of law to private ordering); Condlin, *ADR: Disputing with a Modern Face*, *supra* note 34, at 296 n.15 (observing that the differences between litigation and ADR “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.” (citing Henry 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 Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 *OHIO ST. J. ON DISP. RESOL.* 581 (2013) (providing a historical analysis of arbitration in colonial America).

⁴³ John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 *OHIO ST. J. ON DISP. RESOL.* 247, 248 n.2 (2010) (arguing “[t]he term ADR gives the false impression that litigation is the norm and all other forms of dispute resolution are unusual. Also, grouping all non-litigation approaches together under one rubric is problematic because mediation and arbitration, just to name two processes, differ tremendously from one another.”).

⁴⁴ Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the American Association of Law Schools*, 49 *J. LEGAL EDUC.* 5, 8 (1999) (urging lawyers to practice “appropriate dispute resolution”); Menkel-Meadow, *supra* note 18, at 2689–90 (arguing that “appropriate” should replace “alternative” to describe dispute resolution processes).

⁴⁵ STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 35 (2000) (“[T]he skillful management of conflicts is among the highest of human skills.”); *ADR: Disputing with a Modern Face*, *supra* note 34, at 305 (“Conflict is one of the defining features of much legal work and resolving it is one of the legal system’s principal tasks.”).

⁴⁶ See Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 336, 336 (Michael L. Moffitt & Robert C. Bordone eds., 2012).

private “controversies” is embedded in Article III of the Constitution.⁴⁷ Private ordering—or contracting for specialized tribunals or procedural rules—is common in most areas of law, especially in international and commercial contexts.⁴⁸ Of course, most disagreements do not evolve into formal legal “disputes” or cases, with most people “lumping it” or using informal or community-based ways to address the matter.⁴⁹

The word “alternative” creates another misimpression for law students: it suggests that there is a binary, static choice between litigation and ADR in legal practice.⁵⁰ To the contrary, there is an interdependent, fluid relationship between formal and informal processes.⁵¹ Throughout the life of a complex civil case, for example, the parties and their counsel may attempt to negotiate or mediate, then proceed with discovery and motions for summary

⁴⁷ Robert J. Pushaw Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 531 (1999) (explaining that while the phrase “cases or controversies” has been collapsed over time into one concept for justiciability doctrine, this merging of “cases and controversies” is historically inconsistent with the framers’ understanding of the terms. “Cases” were matters that required exposition and reasoned analysis by the court to establish precedent. “Controversies” required the court to be a neutral “umpire” and perform a dispute resolution function. In other words, “[t]he federal courts’ primary function in ‘Cases’ is exposition, whereas in ‘Controversies’ it is dispute resolution.”).

⁴⁸ See Resnik, *supra* note 40.

⁴⁹ William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC’Y REV. 631, 649 (1980–1981).

⁵⁰ Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 689 (2005) (explaining that the separate teaching of litigation and dispute resolution processes gives students the false impression that “there is little or no fluidity between litigation and other processes. That is, law students often imagine that lawyers say to clients: ‘We will negotiate or mediate rather than litigate this dispute.’”).

⁵¹ See Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 881 (2004) (arguing that “[l]itigation and negotiation are complementary, mutually reinforcing social processes, and each has a legitimate role to play in our nation’s moral discourse and the evolution of social norms.”); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS*, at viii (1981) (arguing that “mediation and litigation are invariably intimately interconnected and interactive rather than distinct alternatives for conflict resolution.”). This is true in the criminal context as well, with most cases resulting in a negotiated plea bargain rather than a trial. See *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (observing that plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019).

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judgment, followed by additional attempts at settlement negotiations or mediation before, during, and even after a trial.⁵²

“Alternative” also incorrectly implies that those in the field oppose litigation as a method of dispute resolution. Most ADR legal scholars⁵³ are not “against litigation,” adversarial processes, or competitive negotiation tactics. Many come to the field from litigation backgrounds and understand the interconnection among all disputing processes. Indeed, some private ADR processes involve adversarial litigation—such as arbitration, private judging, and neutral evaluation—albeit in a conference room rather than a courtroom, with a private third-party decision maker rather than a judge, mediator, or facilitator.

Thus, ADR explores the notion of “process pluralism”⁵⁴ or “fitting the forum to the fuss.”⁵⁵ ADR legal scholars study and teach the theoretical underpinnings, uses, limitations, design, impacts, and risks of various dispute processing options—from self-determined, problem-solving based models (negotiation, mediation, collaborative law, restorative justice), to authoritative adjudicative processes (arbitration and litigation), to pre-dispute systems design and conflict prevention.⁵⁶ This pluralistic approach is consistent with the view that conflict is inevitable and can be a constructive or destructive force, depending upon how the parties involved handle it.⁵⁷

As every litigator and procedural scholar understands, the structure, governing rules, and quality of process profoundly affect outcomes. *Process matters*—procedural rulings have, over time, affected everything from the

⁵² See Moffitt, *supra* note 19, at 1244 (suggesting that “[p]erhaps the future of law school curricula will be one in which the line between litigation-focused courses and settlement-skills-focused courses will be blurred. Litigation and settlement are so intertwined in practice that I would think it difficult to teach them as though they were distinct.”).

⁵³ I say “ADR legal scholars” here deliberately. An “anti-law” sentiment exists among some non-lawyer conflict resolution practitioners and scholars who theorize that those most involved and affected by the conflict should determine norms and social order. See, e.g., Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3–4 (1977).

⁵⁴ Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 10–11.

⁵⁵ Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801 (1987); Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 10–32 (2006); Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994); ROBERT MNOOKIN, BEYOND WINNING 367 (2000) (discussing how lawyers use a multitude of procedural skills).

⁵⁶ See *infra* Part II(A).

⁵⁷ See *infra* Part I(B).

initial consideration of who has “voice” and the opportunity to be heard,⁵⁸ to questions about who has decisionmaking authority,⁵⁹ to the range of available remedies, to the ultimate outcome.⁶⁰ ADR scholars are proceduralists who study and teach the impact of process choices, including dynamics “for designing, choosing, and advising about what processes to use for what purposes.”⁶¹

In the final analysis, “alternative” may be most useful in keeping alive the continual juxtaposition of the underlying values, operation, and outcomes of judicial process with private and community-based conflict processes. Alternative means different, but not necessarily better. Judicial and informal dispute processes can serve as mirrors and checks on each other’s failures and excesses. The creation of alternative processes, for example, offers insights into the perceived procedural or substantive shortcomings of the law and traditional litigation. Likewise, legal norms inform the ethical limits and potential process dangers of private conflict structures. As Amy Cohen observed, the word alternative “signals that the field, as it changes over time, remains a window into how scholars and reformers conceptualize the problems with the center and imagine possibilities for transformation.”⁶²

⁵⁸ See generally Welsh, *supra* note 14; Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 1 J. DISP. RESOL. 1, 2 (2011) (exploring how “psychological construct” of “procedural justice, provides an important perspective on how ADR systems can help maintain societal values that are consistent with the rule of law.”); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009) (arguing that scaling certain dispute resolution models may perpetuate existing social inequalities); Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, J. DISP. RESOL. 81 (2002); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

⁵⁹ This is the adjudication versus settlement debate discussed *supra* pp. 3–4.

⁶⁰ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (restricting class actions); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011) (expanding the scope and enforceability of mandatory arbitration in consumer and employment contexts); *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009) (limiting the ability of civil rights plaintiffs to seek redress by heightening pleading standards).

⁶¹ Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes: Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure*, 94 GEO. L.J. 553, 580 n.113 (2006) (urging that the theory and practice skills associated with “process diversity and variation” should be taught as “[p]rocess in law schools”). See also Lande & Sternlight, *supra* note 43, at 248.

⁶² E-mail from Amy Cohen, Professor of Law, Ohio State University Moritz College of Law, to author (May 7, 2020) (on file with author).

B. “Dispute:” A Central, but Incomplete, Part of the Story

The bulk of ADR theory and practice focuses on, in the words of Frank Sander, “varieties of dispute processing.”⁶³ The word “dispute” accurately describes the core of the field, but is incomplete. “Dispute” sounds reactive in nature, focused on matters that have already evolved into an oppositional posture or litigation. The broader concept of “conflict” better captures the full scope of our work.⁶⁴ Although most, including Merriam-Webster, would consider “conflict” and “dispute” to be synonymous terms, in ADR theory a conflict is simply a difference of some sort that may, or may not, transform into a formal legal dispute.⁶⁵ As Carrie Menkel-Meadow explains, “dispute resolution in law has expanded to include the fuller story of human conflict situations.”⁶⁶

Mary Parker Follett, one of the adopted intellectual founders of the field, explained that conflict is “neither good nor bad” and can be a constructive or destructive force.⁶⁷ Follett theorized: “[a]s conflict—difference—is here in the world, as we cannot avoid it, we should, I think, use it. Instead of condemning it, we should set it to work for us.”⁶⁸ Follett posited “three main ways of dealing with conflict: domination, compromise and integration.”⁶⁹ Domination means “a victory of one side over the other.”⁷⁰ In Follett’s account, domination “is the easiest way of dealing with conflict, the easiest for the moment but not usually successful in the long run.”⁷¹ The use of compromise or settlement—in which “each side gives up a little in order to

⁶³ Frank E.A. Sander, *Varieties of Dispute Processing, in Addresses Delivered at the Nat’l Conference on the Causes of Popular Dissatisfaction with the Admin. Of Justice*, 70 F.R.D. 111 (1976).

⁶⁴ See Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 7.

⁶⁵ FOLLETT, *supra* note 19, at 67 (defining “conflict” as “difference”). See also William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* 15 LAW & SOC’Y REV. 631 (1980-81) (analyzing how legal disputes emerge and transform); and John Burton, *Conflict Resolution as a Political Philosophy*, 3 GLOBAL CHANGE, PEACE & SECURITY 62 (1991) (defining a dispute as a short-term disagreement revolving around conflicting, but negotiable, interests, and a conflict as a more deep-seated, nonnegotiable issue of basic ontological human needs).

⁶⁶ Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 7.

⁶⁷ FOLLETT, *supra* note 19, at 67; see also Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16, at 7 (discussing Follett’s work).

⁶⁸ FOLLETT, *supra* note 19, at 67–68.

⁶⁹ *Id.* at 68.

⁷⁰ *Id.*

⁷¹ *Id.*

have peace”⁷²—is “the accepted, the approved, way of ending controversy.”⁷³ Although the most common way of resolving conflict, “no one really wants a compromise, because that means a giving up of something.”⁷⁴ Using compromise or domination to squelch conflict will “achieve only a brief respite; the conflict will go underground and will eventually resurface in a more virulent form. A better way is to find the integrative solution, the approach that solves a conflict by accommodating the real demands of the parties involved.”⁷⁵

In the 1920s, long before *Getting to Yes*⁷⁶ popularized interest-based bargaining, Follett advanced the concept of an integrated approach to conflict, particularly in organizational contexts.⁷⁷ The integrated approach views conflict as a path to progress, which Follett explained in scientific terms as “setting friction to work, making it *do* something.”⁷⁸ In her theory of integration, conflict is not a negative force to be extinguished, but a sign of health in organizations. She wrote, “[I]t is hoped that we shall always have conflict, the kind which leads to invention, to the emergence of new values.”⁷⁹ The goal is not to eliminate conflict, but to find the “plus-value” or what she called the “plusvalent” that emerges from exploring, and potentially integrating, differences.⁸⁰

Interest-based negotiation and mediation theory echo these themes of using an integrative approach to conflict. Integration seeks to reconcile multiple interests and, when possible, create a new understanding or approach. This may be most achievable in the context in which Follett was working—labor and employment relations and business organizations, where on-going relationships matter, and where settling an isolated claim may not resolve on-going systemic problems that are likely to reemerge if ignored or suppressed. She acknowledged, however, that integration is not “possible in all cases.”⁸¹

The dispute resolution field examines this potential for “‘creativity’ in human conflict resolution.”⁸² In this account, conflicts—in all their messy rawness—can be vehicles for norm creation. Nils Christie, recognized as one

⁷² *Id.*

⁷³ *Id.* at 69.

⁷⁴ *Id.*

⁷⁵ *Id.* at 21 (describing Follett’s theory of conflict integration).

⁷⁶ ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Houghton Mifflin 2d ed. 1991).

⁷⁷ Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16, at 7.

⁷⁸ FOLLETT, *supra* note 19, at 71.

⁷⁹ *Id.* at 72.

⁸⁰ *Id.* at 49, 50, 52.

⁸¹ *Id.* at 72.

⁸² Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 8.

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of the theoretical founders of the restorative justice movement, argues that communities do not have *too many* conflicts, but *too few*.⁸³ He viewed conflict as “social fuel” and lawyers and courts as “professional thieves” that “steal” conflicts and norm-clarification opportunities away from the individuals and communities most affected by and involved in the conflict.⁸⁴

Thus, we see at least two paths in ADR thought. The “dispute” resolution strand examines various modes of processing conflicts and legal disputes. This may include statutes or regulations, judicial adjudication, community-based or in-house mediation programs, court-based ADR, private ADR, or a range of other process configurations that supplement or supplant litigation. The dispute processing function seeks primarily to resolve the matter, through negotiation, mediation, or a decision by a third party (judge, private arbitrator, or neutral evaluator). Dispute resolution processes also explore proactive, “upstream” conflict prevention strategies, before the conflict arises or snowballs into a larger, more complex dispute.

The second, more ambitious and sometimes controversial,⁸⁵ sect in the ADR field analyzes the norm-creating, justice-promoting, equity-enhancing, and relationship-building potential of conflicts and the processes through which they are funneled. This includes dialogic processes such as restorative justice⁸⁶ and mediation,⁸⁷ as well as ombuds programs that provide “feedback

⁸³ Christie, *supra* note 53, at 3–8.

⁸⁴ *Id.*

⁸⁵ See, e.g., BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2007).

⁸⁶ See, e.g., RESTORATIVE AND RESPONSIVE HUMAN SERVICES (Gale Burford, John Braithwaite & Valerie Braithwaite eds., 2019); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?* 3 ANN. REV. L. & SOC. SCI. 161 (2007); Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583 (2018).

⁸⁷ Some mediators use a directive, settlement-focused approach, and others use a relational, problem solving approach. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (analyzing mediator orientations along an axis from a narrow focus on legal claims to a broad focus on relational concerns and mediator interventions along an axis from directive to facilitative); Kenneth Kressel et al., *The Settlement-Oriented vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 68 (1994) (a study comparing mediators who use a settlement-oriented style (SOS) and problem-solving style (PSS) and finding that PSS “produced a more structured and vigorous approach to conflict resolution during mediation, more frequent and durable settlements, and a generally more favourable attitude toward the mediation experience. SOS was not necessarily bad, but PSS was better”). Some mediation frameworks articulate specific social goals beyond the facilitation of dialogue and negotiation. Maryland Community Mediation has developed an “inclusive mediation” model to “bring the radical inclusion already deeply woven into

loops” about systemic issues that need to be addressed in a workplace or agency.⁸⁸ This branch also encompasses public conversation and dialogue initiatives,⁸⁹ public policy conflict resolution,⁹⁰ and dispute system design.⁹¹ As Carrie Menkel-Meadow explained: “While ‘disputes’ may be about legal cases, conflicts are more broadly and deeply about human relations and transactions. Conflict ‘handling’ may be both more and less involving and complicated than ‘dispute settlement’ or ‘conflict management.’”⁹²

C. “Resolution:” A Limiting Frame

Finally, “resolution” may be the most undertheorized and limiting—yet most important—word in our descriptor. Nancy Welsh has cautioned that there has been too much focus on the “A” in ADR, but not on the other letters.⁹³ She observes, “the evolution and institutionalization of mediation—as well as the courts’ embrace and enforcement of mandatory arbitration outside of the commercial context—reveal the danger of defining our field solely in terms of

the community mediation movement to the mediation table as a core belief and practice.” Caroline Harmon-Darrow, Lorig Charkoudian, Tracee Ford, Michele Ennis & Erricka Bridgeford, *Defining Inclusive Mediation: Theory, Practice, and Research*, 38 CONFLICT RESOL. Q. 305 (2020). Transformative mediation is based on surfacing “empowerment” and “recognition” in conflicts. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 13 (2d ed. 2004). Narrative mediation combines principles of family therapy and storytelling with mediation. John Winslade et al., *A Narrative Approach to the Practice of Mediation*, 14 NEGOT. J. 21, 24–27 (1998).

⁸⁸ Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 10.

⁸⁹ See The federal Community Relations Service uses structured dialogue to advance civil rights, address community divisions, and de-escalate conflicts. See BERTRAM LEVINE & GRANDE LUM, *AMERICA’S PEACEMAKERS: THE COMMUNITY RELATIONS SERVICE AND CIVIL RIGHTS* (2020). See also Richard Chasin et al., *From Diatribe to Dialogue on Divisive Public Issues: Approaches Drawn from Family Therapy*, 12 MEDIATION Q. (1996).

⁹⁰ See, e.g., The Ohio State Moritz College of Law’s Divided Community Project. See William Froehlich, Nancy H. Rogers & Joseph B. Stulberg, *Sharing Dispute Resolution Practices with Leaders of a Divided Community or Campus: Nine Strategies for Two Crucial Conversations*, 35 OHIO ST. J. ON DISP. RES. 781 (2020).

⁹¹ Cathy A. Costantino & Christina Sickels-Merchant, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE & HEALTHY ORGANIZATIONS* (1995); William L. Ury et al., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

⁹² Menkel-Meadow, *From Legal Disputes*, *supra* note 16, at 12.

⁹³ Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 51 (2004).

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‘resolution.’”⁹⁴ Welsh has urged the field to refocus on the role of *justice* in resolution.⁹⁵ Carrie Menkel-Meadow has described *process* as “the human bridge between justice and peace.”⁹⁶

“Resolution” perpetuates the stereotype that a conflict or dispute needs to “settle” for a process to be successful. ADR has been criticized as elevating harmony and peace over concerns about inequality, legal rights, and power imbalances.⁹⁷ Resolution sounds coercive in nature and mushy in result. As Mary Parker Follett put it: “no one really wants compromise, because that means giving up of something.”⁹⁸ More recently, Bernard Mayer has observed that defining a field based on the “resolution” of conflict “misread[s] the essential nature and challenge of conflict.”⁹⁹ He proposes that the conflict resolution field focus instead on “conflict engagement,” which would involve “helping people to raise, escalate, and continue a conflict” as well as resolve them when appropriate and desired.¹⁰⁰

Mayer was discussing the non-law conflict resolution field, not ADR in the legal context. His point has greater salience for lawyers, however, who are in the powerful position of being able to design dispute processes, advocate for clients in adversarial, litigation contexts, and negotiate for clients in deal-making and problem-solving contexts. Most people seek out lawyers when they have a crisis or conflict because they want the attorney to help them vindicate or protect their rights, seek redress for injury, be made whole, or solve a problem. The lawyer must understand the conflict from the client’s perspective, what Bernard Mayer called a “client-centered conflict

⁹⁴ *Id.*

⁹⁵ *See id.*; *see also* Welsh, *supra* note 14 (analyzing mediation and procedural justice). Ellen Waldman has examined mediation and substantive justice. Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls’ Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391 (2016) (analyzing the applicability of Rawls’ theory of justice to mediation). Dispute resolution scholars have analyzed questions of access to justice and ADR. *See* Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 OHIO ST. J. ON DISP. RESOL. 303 (2018).

⁹⁶ Menkel-Meadow, *supra* note 61, at 579.

⁹⁷ Jerold S. Auerbach, *Justice Without Law?*, 33 CATHOLIC U. L. REV. 517 (1983); *see* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (criticizing informal dispute resolution as elevating harmony and peace over concerns of substantive justice).

⁹⁸ Follet, *supra* note 19, at 69.

⁹⁹ MAYER, *supra* note 85, at 120.

¹⁰⁰ *Id.* at 39.

specialist.”¹⁰¹ When a person feels wronged and angry, the idea of a settled “resolution” rather than court victory may seem insulting and inadequate.¹⁰²

Indeed, sometimes the best resolution of a conflict is no resolution at all. The desired objective may be best achieved through protest, storytelling, or dialogue, without a settlement. This has been explored as the “deliberative democracy” function of ADR.¹⁰³ The conflict has intrinsic value in demanding attention and raising public consciousness (about injustice, inequality, etc.), inviting dialogue, and challenging or clarifying community norms.¹⁰⁴ This notion echoes Nils Christie’s characterization of conflicts as valuable “property” that are necessary for the clarification of societal norms outside of formal legal processes.¹⁰⁵ The Black Lives Matter and #MeToo movements offer recent examples of conflicts that have power in their own right—the goal is not necessarily to *resolve* a particular dispute, but to surface and examine the larger systemic problem of racial and gender oppression to raise public awareness and prompt social change.

There has been increased attention in legal scholarship and practice about a broader range of process approaches that can facilitate authentic participation by voices left out of traditional legal systems¹⁰⁶ and promote

¹⁰¹ *Id.*

¹⁰² Robert J. Condlin, *The “Nature” of Legal Dispute Bargaining*, 17 *CARDOZO J. CONFLICT RESOL.* 393 (2016) (analyzing the implications of cognitive neuroscience on legal dispute bargaining).

¹⁰³ Kruse, *supra* note 13, at 395–96 (questioning whether “harmony” is the goal of ADR theory and practice and noting that “in a pluralistic society, the features of fluidity and openness to continued challenge may be just as important as quelling of disputes.”); Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347, 348 (2004–2005) (exploring the “articulation of a process-oriented model of democratic deliberation and discourse”).

¹⁰⁴ Kruse, *supra* note 13, at 396 (describing the concept of “authentic participation” as part of the theory of justice in a deliberative democracy). *See also* David Bohm et al., *Dialogue—A Proposal*, INFED (1991), http://infed.org/archives/e-texts/bohm_dialogue.htm (describing the purpose of meaningful dialogue is to expose the incoherence in our thought and generate “collective learning”); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: VOLUME 2, THE CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1987).

¹⁰⁵ Christie, *supra* note 53, at 13.

¹⁰⁶ Kruse, *supra* note 13, at 392 (arguing that ADR theory needs to have “a vision of ‘authentic participation’ that can distinguish legitimate . . . engagement in a process from its strategic manipulation”); Welsh, *supra* note 93, at 54 (applying social justice theory to mediation and ADR and exploring “the potential of the meditation process to empower and organize the powerless”).

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systemic legal reform.¹⁰⁷ The most recent example centers on the application of restorative justice, mediation, and other conflict engagement strategies to a range of complex social issues such as intimate partner violence,¹⁰⁸ sexual harassment and assault,¹⁰⁹ criminal legal reform,¹¹⁰ school discipline and the “school-to-prison pipeline”,¹¹¹ the foreclosure crisis,¹¹² the eviction crisis,¹¹³ community polarization and violence,¹¹⁴ and workplace discrimination.¹¹⁵

Thus, the “R” in ADR should not simply mean “resolution” in the sense of a settlement or case closure. “R” also may mean process strategies

¹⁰⁷ Jennifer W. Reynolds, *The A is for Activism*, in 2 THE NEGOTIATOR’S DESK REFERENCE 743 (Chris Honeyman & Andrea Kupfer Schneider eds., 2d ed. 2017) (exploring the relationship between activism and ADR); Jennifer W. Reynolds, *The Activist Plus: Dispute Systems Design and Social Activism*, 13 U. ST. THOMAS L.J. 334 (2017). See also Howard Gadlin & Susan Sturm, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1.

¹⁰⁸ See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); Leigh Goodmark, *Restorative Justice as Feminist Practice*, 1 INT’L J. RESTORATIVE JUST. 372 (2018); C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311 (2012).

¹⁰⁹ Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334 (2006); Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242 (2014).

¹¹⁰ Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalisms in the United States*, 104 MINN. L. REV. 889 (2019); DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019).

¹¹¹ See MARYLAND COMMISSION ON THE SCHOOL-TO-PRISON PIPELINE AND RESTORATIVE PRACTICES: FINAL REPORT AND COLLABORATIVE ACTION PLAN (2018), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1003&context=cdrum_fac_pubs.

¹¹² Lydia Nussbaum, *ADR’s Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889 (2013).

¹¹³ Deborah Thompson Eisenberg & Noam Ebner, *Disrupting the Eviction Crisis with Conflict Resolution Strategies*, 41 MITCHELL HAMLIN L. J. PUB. POL’Y & PRAC. 125 (2020).

¹¹⁴ Nancy H. Rogers, *When Conflicts Polarize Communities: Designing Localized Offices that Intervene Collaboratively*, 30 OHIO ST. J. ON DISP. RESOL. 173 (2015).

¹¹⁵ Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. RICH. L. REV. 487 (2016); Elayne E. Greenberg, *Bridging Our Justice Gap with Empathic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, 32 OHIO ST. J. ON DISP. RESOL. 441 (2017).

that advance rights, relationships, reform, responsive regulation,¹¹⁶ reconciliation,¹¹⁷ restoration,¹¹⁸ reclamation,¹¹⁹ or reckoning.¹²⁰ As political scientist Christine Harrington observed in her analysis of neighborhood justice centers: “Taking rights seriously can mean taking problem solving seriously.”¹²¹ She urged:

We need to turn our attention to the substantive rights and claims for justice that are expressed in the dispute-processing context. Once we understand that the exercise of rights, making claims of rights, is an expression of social problems (e.g., social and economic inequality), then we can move forward with the view that rights are one context or framework in which social problem solving takes place.¹²²

III. RECONCEPTUALIZING ADR AS “CONFLICT PROCESS STRATEGY”

Unpacking common misconceptions about ADR helps us to take stock of the historical roots and modern breadth of our work. As we look into the future, our challenge is to situate the field under a unified frame that captures the vast, diverse, impressive, and motley array of our scholarly and teaching

¹¹⁶ JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 29 (2002) (defining responsive regulation).

¹¹⁷ Truth and Reconciliation Commissions have been characterized as a form of alternative dispute resolution. See Michal Alberstein, *ADR and Transitional Justice as Reconstructing the Rule of Law*, 2011 J. DISP. RESOL. 1.

¹¹⁸ Restorative justice theory combines the notion of holding an offender who has violated community norms accountable while repairing the harm and reintegrating the offender and the person(s) harmed back into the community. See Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 596, 598–600 (2002).

¹¹⁹ Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 135 (2020) (“[R]eclamation changes the narrative from individual to collective responsibility by obligating institutions, systems, and decisionmakers to not only understand the ways in which Black men, women, and children are criminalized in various aspects of their lives, but also to take the affirmative steps necessary to detach them from their interactions with the criminal legal system.”).

¹²⁰ DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019).

¹²¹ HARRINGTON, *supra* note 15, at 173.

¹²² *Id.*

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interests. A “conflict process strategy” framing helps us to explain the scope and relevance of the field to law, as well as to alternatives to traditional legal approaches.

Overall, ADR tends to be a *how*-focused field—how the trifecta of negotiation, mediation and arbitration processes are used, how they should be conducted, how these processes impact the parties and other stakeholders, and how these processes compare to litigation.¹²³ We also expound on the *when* of ADR—the considerations and criteria to examine to evaluate when a particular process may be appropriate for a particular type of conflict or dispute. Given our focus on process, this makes sense. In addition to continued exploration of *what* is happening in practice and *how* those processes affect parties, courts, and other constituencies, as a field we must remain ever vigilant about interrogating the *why* (and why not) of ADR.

How do we look beyond the traditional “how” and “when” analysis of ADR processes and articulate a unifying theory that captures the full scope, purpose, and potential of our work? A common theme running through dispute resolution scholarship is, of course, *process*. Much like other legal scholars who focus on procedure, ADR legal scholars study and teach the theoretical underpinnings, uses, limitations, design, impact, and risks of various disputing processes. In this regard, we echo themes from the “Legal Process” movement from the 1950s.¹²⁴ The next section explores lessons that this school of thought may offer to the modern ADR field.

¹²³ Roselle Wissler’s empirical mediation work has been formative in the field. *See, e.g.,* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002); *see also* Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOL. Q. 7 (2017). For empirical work regarding arbitration, *see*, Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2014); Hiro N. Aragaki, *A Snapshot of National Legislation on Same Neutral Med-Arb and Arb-Med Around the Globe* (Loyola Law Sch. Legal Rsch. Paper No. 2020-11, Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583173.

¹²⁴ For an extensive analysis of Lon Fuller’s theorization of different modes of dispute processing, and the Legal Process work by Hart and Sacks, *see* Menkel-Meadow, *From Mothers and Fathers of Invention*. She writes:

The old Legal Process school has now given birth to several strains of “new legal process” sensitivity, recognizing that process is pluralistic and that different institutional arrangements of process are necessary to meet different kinds of individual and

A. Legal Process: Early ADR Theory?

Legal Process scholars attempted to synthesize a unified grand theory of the law and its institutional manifestations, including not only court adjudication, but also private ordering and public law. Henry Hart and Albert Sacks, leaders in the field, viewed law as “the aggregate of the processes of social ordering . . . [w]ith a view to promoting ends accepted as valid in the society.”¹²⁵ Hart viewed the law’s role as “the task of creating and maintaining the conditions for collaboration among the members of society.”¹²⁶

This view, like modern ADR theory, is rather optimistic in its view that the goal of the law “is “not [] dividing up a pie of fixed size but [] making a larger pie in which all the slices will be bigger.”¹²⁷ Hart continued: “in any situation of conflict of interest within a society it is always possible to work out a solution in which all interests are better off than they were before.”¹²⁸ If this sounds like the principles underlying *Getting to Yes*, that is no accident. Michal Alberstein has traced the lineage from the legal process school of thought of the 1950s to Roger Fisher’s negotiation and problem solving mediation theories of the 1980s, noting that “Roger Fisher himself acknowledged the influence of the legal process school on his work, and claimed to have adopted their attitude.”¹²⁹

While the Legal Process movement focused primarily on public law and the institutional relationship between legislative and judicial process, Hart and Sacks emphasized the importance of private ordering as part of law and the “broad dispersion of decisionmaking.”¹³⁰ They argued that “private

institutional needs. In one sense, the “new legal process” represented by ADR is a direct descendant of Hart and Sacks’s Legal Process school, recognizing a greater diversity of legal processes that are responsible for maintaining social order.

See Menkel-Meadow *supra* note 16, at 29.

¹²⁵ William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2037 (1994).

¹²⁶ *Id.* at 2039.

¹²⁷ *Id.* at 2037 (citing Hart’s Legislation teaching notes).

¹²⁸ *Id.*

¹²⁹ MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION (2002); Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 11 (2009) (internal citations omitted).

¹³⁰ Eskridge & Frickey, *supra* note 125, at 2043.

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ordering is the primary process of social adjustment,"¹³¹ dedicating a chapter to private ordering in their posthumously-published *Legal Process*. Hart and Sacks recognized court adjudication as "the slender tip of 'the great pyramid of legal order' and examined many other ways that disputes were resolved."¹³² They argued: "Speedy, orderly and amicable adjustments of private affairs are always to be preferred to controversy. Avoidable litigation never serves to maximize the satisfaction of human wants, or to promote the common good in any other way."¹³³

Given their emphasis on private ordering, Hart and Sacks viewed negotiation as a core competency for lawyers. They observed: "Negotiation is informal and flexible in its procedure whereas the procedure of adjudication is formal and rigid. Negotiation is far better adapted than adjudication to securing the pre-condition of a satisfactory agreement —namely, a sympathetic understanding of the other party's point of view."¹³⁴ They advised that lawyers must develop "skill in negotiation in finding the common ground of mutual advantage between the parties."¹³⁵

Sounding much like modern ADR professors, Hart and Sacks urged: "The principles and modes of autonomous ordering and its limitations, are of utmost importance for a lawyer to study and understand."¹³⁶ Specifically, their teaching materials emphasized that lawyers need to understand the range of public and private process options and select the best process for the unique circumstances. As Anthony Sebok noted: "A recurrent theme in *The Legal Process* is the idea that a good lawyer should develop the judgment needed to pick the technique appropriate for the type of problem at hand. The book, thus, frequently asks the student to weigh the comparative advantages of decision making through private agreement, majority voting, administrative dictate, arbitration, or adjudication."¹³⁷ As Kent Roach observed in his analysis of *The Legal Process*: "Hart and Sacks's defence of private ordering resembles contemporary advocacy of ADR. This includes not only praise for the speed and flexibility of negotiation, but also the tendency to subject adjudication to cost-benefit analysis without being concerned that private solutions may

¹³¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 77 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

¹³² Kent Roach, *What's New and Old About the Legal Process*, 47 U. TORONTO L.J. 363 (1997).

¹³³ HART & SACKS, *supra* note 131, at 24.

¹³⁴ *Id.* at 645.

¹³⁵ *Id.* at 373.

¹³⁶ *Id.* at 132.

¹³⁷ Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1577–78 (1996).

replicate existing power distributions.”¹³⁸ Like those in the ADR field, “they were aware that self-regulation could preserve privacy, speed, good will, and continuing relationships.”¹³⁹

Lon Fuller, another member of the Legal Process school, expounded on various process-based forms of social ordering, including adjudication, mediation, arbitration, and more. Fuller conceived of law as “a ‘problem solving activity’” that included a range of different disputing processes, each with their own uses, morality, and limitations.¹⁴⁰ Like Hart and Sacks, Fuller explored: “What kinds of human relations are best organized and regulated by adjudication, and what others are better left to other procedures, such as negotiation and voluntary settlement, majority vote, or expert managerial authority?”¹⁴¹ Fuller urged that a lawyer served an important function as “architect of structure”¹⁴² or “process architect.”¹⁴³

Fuller likewise theorized that private dispute processes are part of the infrastructure of the law and provide opportunities for norm creation.¹⁴⁴ He observed, for example, that “mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.”¹⁴⁵ He suggested that “[a] serious study of mediation can serve . . . to offset the tendency of modern thought to assume that all social order must be imposed by some kind of ‘authority’.”¹⁴⁶

Fuller, as well as Hart and Sacks, did not simply set forth a taxonomy of process options. They were not *against* adjudication *or* settlement but for a multiplicity of processes to improve the overall human condition and social order. They theorized the benefits and limits of adjudication and other private

¹³⁸ HART & SACKS, *supra* note 131, at 372–73.

¹³⁹ *Id.*

¹⁴⁰ Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971). Carrie Menkel-Meadow eloquently summarizes Fuller’s work as “purposively directed towards enabling voluntary transactions and contracts, preventing violence, defining ideals and standards for civil participation, as well as providing a means for settling disputes and preserving social harmony.” Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16, at 315.

¹⁴¹ LON L. FULLER, *The Lawyer as Architect of Social Structures*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 281 (Kenneth Winston ed., 2001).

¹⁴² See Fuller, *supra* note 141, at 285–92.

¹⁴³ Carrie Menkel-Meadow has synthesized Fuller’s impressive body of work and applied it to the modern dispute resolution field. See Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16.

¹⁴⁴ Ellen Waldman has explored the norm-creating role of mediation. See Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

¹⁴⁵ Fuller, *supra* note 140, at 308.

¹⁴⁶ *Id.* at 315.

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process structures and sought to develop in lawyers the ability to assess when disputes are best resolved by courts, and when they should be addressed by the parties most involved in the matter, who must abide by the result. Hart and Sacks wrote, for example: "To the extent that the resolution of the dispute depends essentially upon what Professor Fuller calls the principle of order by reciprocity, as distinguished from the principle of order through common ends (including the maintenance of a regime of reciprocity), the method of adjudication operates to eliminate the *best judges of a satisfactory exchange—namely, the parties to the exchange themselves . . .*"¹⁴⁷

Fuller appreciated the relational aspects of mediation. He recognized the "central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."¹⁴⁸ His view of mediation was formed largely by the collective bargaining context, in which the purpose of the mediator is:

[T]o induce the mutual trust and understanding that will enable the parties to work out their own rules. The creation of rules is a process that cannot itself be rule-bound; it must be guided by a sense of shared responsibility and a realization that the adversary aspects of the operation are part of a larger collaborative undertaking.¹⁴⁹

Fuller observed the "mutual understanding produced by the process of negotiation itself."¹⁵⁰ In a sentence perhaps well-known to contracts professors, he observed: "If you negotiate the contract thoroughly, explore carefully the problems that can arise in the course of its administration, work out the proper language to cover the various contingencies that may develop, you can then put the contract in a drawer and forget it."¹⁵¹ That is essentially what mediation entails—the negotiation of a contract (i.e., settlement agreement), with the potential to improve the parties' relationship and mutual understanding into the future. This may partly explain studies finding that

¹⁴⁷ HART & SACKS, *supra* note 131, at 645 (emphasis added).

¹⁴⁸ Fuller, *supra* note 140, at 325.

¹⁴⁹ *Id.* at 326.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 326–27.

agreements reached through mediation are less likely to require future court involvement or enforcement actions as compared to judge-imposed orders.¹⁵²

The Legal Process movement faded in the 1960s and 1970s in part because of the fracturing of legal theory between law and economics and critical legal theory, and perhaps because the field's leaders passed on without publishing their casebook and fully addressing issues of equality and civil rights.¹⁵³ Nevertheless, its fundamental precepts remain influential and provide several lessons and cautionary tales as the ADR field looks to the future. While this is only a brief snapshot of a deep and rich field of study,¹⁵⁴ the next sections explore how the insights about the relationship of informal dispute processing to the law from the Legal Process school may help the ADR field clarify its purpose and continuing relevance to law and legal education.

D. Lawyer as “Conflict Process Strategist”

The first lesson is that the theory of *process* and the practice of *process strategy* are central components of law and core competencies for lawyers. The Legal Process school did not view process options as a zero-sum, “adjudication versus private settlement” dichotomy. They did not simply list a taxonomy of process options and blanket criteria for the selection of each process. Rather, they theorized the potential uses, limits, and morality of each process as it pertained to the overall operation and development of the law. They recognized private disputing processes as core components and complementary sources of norm creation and social ordering in the law.

Legal Process theory did not view private dispute resolution as necessarily *better* than adjudication for all purposes and contexts. Rather, it depended upon the case and client-specific context. In their view, lawyers must understand the normative underpinnings of various adjudicative, legislative, and private dispute resolution processes. They also needed to develop the judgment and skills—both advocacy and negotiation skills—to navigate these processes.

¹⁵² See Charkoudian, Eisenberg & Walter, *supra* note 123.

¹⁵³ For a discussion of the decline of Legal Process and its modern relevance, see Eskridge & Frickey, *supra* note 125, at 2049–55.

¹⁵⁴ For a deeper analysis of the legal process and its connection to ADR theory, see ALBERSTEIN, *supra* note 129, and Menkel-Meadow, *Mothers and Fathers of Invention*, *supra* note 16.

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Likewise, modern ADR theory emphasizes the importance of process choices,¹⁵⁵ examining the fluidity between private and public processes and the lawyer's role as process strategist in various contexts. Situating ADR under the broader rubric of conflict process theory and strategy helps to account for the field's advancement beyond the traditional trifecta of negotiation, mediation, and arbitration. The conflict process conceptualization of the ADR field emphasizes the lawyer's role as process architect, advisor, advocate, negotiator, and problem solver within different process structures.

A process strategy frame emphasizes what we hope law students learn as they transition into their work as lawyers, judges, and leaders; that is, the processes they use to accomplish client goals, address conflicts, or effect positive change are as important as the governing substantive law. Without wise process decisions, substantive rights cannot be vindicated. At the same time, focusing on substantive rights to the exclusion of other considerations, such as financial and relational costs, can sometimes be counterproductive or harmful. In addition, the design and navigation of process choices have profound normative implications for access to justice, procedural justice, remedies, and public values. In this regard, ADR has much in common with public interest lawyering theory, which recognizes that a range of process strategies beyond litigation are necessary to facilitate legal reform and social justice.¹⁵⁶

E. *The "Science" of Conflict Process Strategies*

The ADR field has been criticized as being rather evangelical, advocating that certain types of processes are universally better than others,

¹⁵⁵ This theme of process choice was part of the early efforts to integrate ADR into the first-year curriculum at some law schools in the mid-1980s. See Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589 (1998).

¹⁵⁶ Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, FORDHAM URB. L.J. 603, 611 (2009) (describing how public interest attorneys "view legal advocacy as part of comprehensive campaign that deploys multiple strategies to advance local policy reforms"); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008) (describing use of litigation and collaborative strategies by public interest attorneys); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (comparing legal liberalism and legal pragmatist approaches in public interest lawyering).

regardless of context.¹⁵⁷ Within some subfields of ADR (mediation or restorative justice, for example), some claim that their approach to the practice is always superior. More ADR—or any particular process or practice framework—is not necessarily beneficial for all cases and contexts, and may present significant dangers or harms for some.

The ADR field must continue to turn the mirror inward, inviting scrutiny of the limitations, quality, and unintended consequences of various process strategies. The next generation of ADR scholarship is already digging into the “black box” of ADR to empirically test¹⁵⁸ and gather transparent data¹⁵⁹ about various processes. Rigorous research about the use and impact of various informal processes is underway, including examination of litigant process preferences,¹⁶⁰ empirical analysis of the impact of specific mediator techniques in various case contexts,¹⁶¹ and closer scrutiny of the use and outcomes of court-based mediation and arbitration. This research improves the quality of disputing processes and informs ADR theory and practice.

F. *The Morality of Conflict Process Strategies*

This leads to a final lesson from the Legal Process movement or, more importantly, from its ultimate demise: the ADR field must shift “beyond

¹⁵⁷ See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

¹⁵⁸ See Deborah Thompson Eisenberg, *What We Know and Need to Know about Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245 (2016) (summarizing ADR studies). For a compendium of recent ADR empirical studies, see also James Coben & Donna Stienstra, *ADR Empirical Studies (Summer 2013-Summer 2018)*, MITCHELL-HAMLINE DISP. RESOL. INST. (Mar. 2018), https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1000&context=dri_empirical.

¹⁵⁹ Nancy A. Welsh, *We Need Good Data to Know Whether What We Are Doing—and Espousing—Is Good*, in THEORIES OF CHANGE, *supra* note 17, at 254; Nancy A. Welsh, *Dispute Resolution Neutrals' Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823 (2019); Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 629–30 (2018).

¹⁶⁰ Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. Q. 69 (2018).

¹⁶¹ See the empirical studies cited in ABA SECTION OF DISPUTE RESOLUTION, REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 62–64 (2017), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf.

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settlement” and neutrality to tackle normative questions about the impact of process choices on substantive justice and the generation of public norms. Here, the ADR field must continue to examine, in Fullerian style, not only the uses, limits, and effectiveness of various processes but also the underlying morality and quality of the processes.

The ADR field sometimes asks: Do we teach ADR as it is practiced, or do we teach ADR as it *ought to be*? In our scholarship and in our teaching, the *ought to be*—the purpose, governing values, ethical limits, and integrity of the process—is essential. Returning to the genericide theme with which I began, if we do not continually question and theorize what ADR ought to be (and what it should not be), ADR will be reduced to a commodified, diluted product that equates to *whatever you want it to be*. When the legal system is adopting, and especially, requiring private dispute processes, we must continually interrogate their operation, including how they interact with legal norms and a lawyer’s “special responsibility for “the quality of justice.”¹⁶² These questions have been explored in prior ADR scholarship, and there is more work to do in this regard into the future.

A focus on conflict process theory and strategy provides a more comprehensive and nuanced account of how private and community-based dispute strategies intersect with traditional legal systems to prevent and engage conflicts and address injustice. It frees us to be nimble, adapting to changing societal and client needs, new process structures, and technologies.¹⁶³ A broader process lens frees us to explore not only *reactive* processes that respond to disputes but also *proactive and preventive* conflict processes (such as restorative justice, dispute system design, policy reform, processes aimed at consensus-building and organizational change).

The application of conflict process strategies to promote equity and social justice is likely to be the next frontier of ADR interdisciplinary scholarship. This work is animated by concerns of the voices left out of traditional legal, and conventional ADR, processes and is influenced by critical and feminist legal theory, deliberative democracy, and intersectionality. Legal scholars across many disciplines are studying and applying new process frameworks to systemic social issues to, for example, empower survivors of violence and assault, reform the criminal legal system, stem the school-to-prison pipeline, disrupt evictions, de-escalate violence, and reduce workplace discrimination. While no process is a panacea for any problem, conflict process theory and strategy provides a lens through which to

¹⁶² MODEL RULES OF PROF'L CONDUCT PREAMBLE & SCOPE 1 (AM. BAR ASS'N 2000).

¹⁶³ See Noam Ebner, *Teaching the World: Educational Pivots for the Second Half of the ADR Century*, 35 OHIO ST. J. ON DISP. RESOL. 825 (2020).

examine the uses, benefits, and shortcomings of various process structures in accomplishing social goals, such as equity, accountability, and justice.

IV. CONCLUSION

The dispute resolution field is in a time of transition, with many of the pioneers who blazed trails for us moving on or close to retirement. While we celebrate the tremendous growth of ADR over the past few decades, some are concerned, if not downright panicked, that the future of ADR in the legal academy and in the courts looks bleak.

Consistent with our field's mantra of turning crisis into opportunity, let us welcome this challenge with the same candid self-reflection and open-minded creativity that we ask of mediation participants. This article takes stock of what the ADR field is, and is not, to help identify our future path. In many ways, that picture is hopeful: ADR is well embedded within legal education and implemented in courts, legal institutions, businesses, and communities. But there are ominous signs. Rapid institutionalization of ADR practices without clear governing norms has diluted the quality of some processes and often outpaced theorization and scholarly scrutiny. In addition, our descriptor misrepresents the field as remaining in opposition to litigation, while our work has expanded far beyond the traditional trifecta of negotiation, mediation, and arbitration.

Drawing lessons from Legal Process theory and the increasing interest in alternative processes as affirmative means to vindicate rights and promote social justice, one path forward is to reconceptualize the work of the ADR field with a simple unifying theme: *conflict process theory and strategy*. This framing is both broader and more precise, capturing the focus and scope of our collective teaching, scholarship, and practice. With this conceptual foundation, the ADR field can continue to explore the uses, benefits, limitations, dangers, and morality of various conflict process strategies and structures to accomplish a range of goals in law and society "beyond settlement." In a world full of inevitable conflict, we will always have much work to do.