

Justice Trumps Peace: the Enduring Relevance of Owen Fiss's *Against Settlement*

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Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one affects all indirectly.

Dr. Martin Luther King, Jr.
Letter from Birmingham Jail

I. Owen Fiss's *Against Settlement*: Raining on the ADR Parade

When it appeared in 1984, Owen Fiss's essay *Against Settlement* delivered a jarring critique of the budding alternative dispute resolution movement, particularly ADR's focus on settlement. Raining on a parade of academic, judicial, and political enthusiasm for ADR, Fiss's trenchant analysis prompted some of the paraders to stop and reassess the tune they were marching to. As David Luban points out, "Fiss was the first and boldest to argue that settlements are no cause for celebration—that, at best, they are "a capitulation to the conditions of mass society and should be neither encouraged nor praised."¹ Fiss's polemic defended an increasingly beleaguered and besieged judicial process at a time when an unlikely alliance of influentials—Supreme Court justices, reform-minded legal scholars, and business elites—decried an alarming "Litigation Crisis," as they castigated adjudication's endless delays, assembly-line pleas and hallway deal-making for exacerbating popular distrust of the entire legal system.

Fiss, instead, contended that settlement was not a panacea but a diversion, a "truce more than a true reconciliation."² Striking at the heart of consent-themed depictions of settlements, he observed that they bore greater comparison to plea bargaining, in that "Consent is often coerced; the bargain may be struck by someone without authority, the absence of a trial and judgment renders subsequent judicial involvement troublesome, and although dockets may be trimmed, justice may not be done."³ Fiss argued that these four factors—imbalances of power,

¹ David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (quoting Fiss).

² Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

³ *Id.*

the absence of authoritative consent, the lack of foundation for continuing judicial involvement, and “justice rather than peace”—exposed settlement’s shortcomings as a viable corrective to adjudication.

First, Fiss claimed that “ADR implicitly asks us to assume a rough equality between the contending parties,” but notes that in truth settlement “is also a function of the resources available to each party to finance the litigation and those resources are frequently distributed unequally.”⁴ Fiss argued that financial imbalances “will invariably affect the bargaining process,” and that any resultant settlement would often be “at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.”⁵ Fiss noted that wealth disparities skewed settlements in three ways. First, “the poorer party may be less able to amass and analyze the information needed to predict the outcome.”⁶ Second, disadvantaged bargainers in dire need of immediate compensation will be “induced to settle as a way of accelerating payment,” which would frequently allow “an indigent plaintiff (to be) exploited by a rich defendant.”⁷ Finally, the financially-strapped party may not have either the time nor resources to contest wealthier opponents, who may try to snowball expenses through extensive procedural motions.

In contrast, Fiss contended that adjudication, unlike the settlement process, “knowingly struggles” against these obvious resource inequalities, because judgment “aspires to an autonomy from distributional inequalities, and ...gathers much of its appeal from this inspiration.”⁸ Fiss also noted that settlement schemes lacked effective strictures for ensuring parties’ participation, despite the increasing popularity of mandatory, court-ordered mediation. While many courts eventually compelled parties to submit to ADR, the resultant programs frequently lacked the

⁴ *Id.* at 1076.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1077.

higher level of supervision of adjudicatory courts, who recognized that “judgment is not the end of a lawsuit, but only the beginning.”⁹ Fiss asserted that the “dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes the judgment to be the end of the process.”¹⁰ Finally, Fiss noted that unqualified reliance on settlement thwarted resolution of serious underlying problems, because “when the parties settle, society gets less than what appears, and for a price it does not know it is paying.”¹¹ Circumventing the courts through settlement essentially denies them the opportunity “to render an interpretation” on a matter that may be of pressing social concern.¹² Fiss countered relentlessly negative depictions of adjudication, asserting that “Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.”¹³ “To settle for something,” Fiss concluded, “means to accept less than some ideal.”¹⁴

II. ADR “Ideology” and the Promotion of Settlement

The goal of dispute resolution is to set things back to normal.¹⁵

Fiss’s incisive critique failed to retard the increasing popularity and implementation of settlement-promoting dispute resolution plans. “Most cases settle” has become a commonplace in discussions of civil justice,” and settlement continues to surf a wave of faux-populist and corporate-financed denigrations of the established judicial system. “Private settlements are the norm, not the exception” in contemporary American legal culture, and popular support for this trend is presumed.¹⁵ But settlement skeptics charge that no one is asking “whether settlement is the ‘right’ outcome just because most parties agree to it,” and note

⁹ *Id.* at 1082.

¹⁰ *Id.*

¹¹ *Id.* at 1085.

¹² *Id.*

¹³ *Id.* at 1089.

¹⁴ *Id.* at 1086.

¹⁵ OWEN FISS, *THE LAW AS IT COULD BE* 53 (2001).

¹⁵ DEBORAH L. RHODE, *ACCESS TO JUSTICE* 42 (2004).

that the “existence of a general preference for settlement” doesn’t equate with “informed and uncoerced expression of such a preference” in every instance.¹⁶ “On closer look,” another legal scholar argues, the widely-touted wisdom that most claimants prefer ADR programs to adjudication appears “to be based on questionable assumptions and debatable extrapolations from other social science contexts.”¹⁷ “Much too much ADR scholarship,” another critic commented, “has the tone of cultist conversion, religious fervor, or infatuation with all that is not litigation.”¹⁸ A RAND Corporation study reported that perceptions of “judicial fairness” were highest for trials and lowest for highly-touted judicial settlement conferences, buttressing the argument that “process matters to people, and it is the perceived fairness of processes that matters most.”¹⁹ The RAND study reflects other research illustrating that “participant perceptions of procedural fairness are crucial to the participant’s acceptance of the decisional outcome as substantially fair.”²⁰

First-time participants in the legal system remain especially suspicious and resentful of compelled behavior, yet contemporary settlement procedures reflect a “rush to embrace compulsion both in the private contract setting and with respect to court-mandated ADR programs.”²¹ An analysis of this growing tendency toward compulsion noted that:

(J)udges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change.²²

¹⁶ Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1352 (1994).

¹⁷ Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 (2002).

¹⁸ Jeffrey Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 309 (2002).

¹⁹ Hensler, *supra* note 17 at 90, 92.

²⁰ Richard C. Reuben, *Democracy and Dispute Resolution: the Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 294 (2004).

²¹ Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005).

Although ADR literature is replete with paeans to participant autonomy, it “has grown to prominence by compelling the vast majority who use it...to participate in processes that they have not voluntarily chosen and, in many cases, actively oppose.”²³ Another recent analysis of compulsory ADR posits that “The legal authority of the courts may be the single most important cause of the growth of mediation across the country.”²⁴ This “Robust and rapid embrace of mediation” has transpired “without sufficient attention to and clarity about the goals and quality of the mediation process adopted.”²⁵ In fact, courts’ enthusiasm for mediation has been “primarily based on the promise of increased efficiency,” and “this assumption that mediation is simply a settlement conference” contradicts the hopes of many mediation advocates.²⁶

“What, then, makes settlement ‘better’ than adjudication?” ADR critics ask, and proponents usually respond with variations of four contentions: party preference, cost reduction, superior outcomes, and more beneficial general (societal) effects.²⁷ Settlement advocates also emphasize that “the current legal process is heavily weighted in favor of a single adversarial structure, which does not always serve either participants’ or societal interests.”²⁸ In addition, they point to studies illustrating that “two-third of surveyed Americans agree that it is ‘not affordable to bring a case to court.’”²⁹ Settlement-enhancing ADR programs that “fit the forum to the fuss” provide the best opportunity, these advocates believe, of remedying the ironic deficiency of America possessing “the world’s highest concentration of lawyers, but one of the least accessible systems of legal services.”³⁰ Proponents contrast informal, low-key, communication-fostering ADR settlement

²² Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 195 (2003).

²³ Landsman, *supra* note 21 at 1600.

²⁴ Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 333 (2003).

²⁵ *Id.*

²⁶ *Id.* at 335-36.

²⁷ Galanter & Cahill, *supra* note 16 at 1339, 1350-51.

²⁸ RHODE, ACCESS TO JUSTICE, *supra* note 15 at 43.

²⁹ *Id.* at 80.

programs with “expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming” litigation, conjuring images of relaxed, neighborly chats versus tense, hostile courtroom encounters with aggressive litigators.³¹ Given their propensity to employ exaggerated portrayals of contemporary adjudication, it is no wonder that one critic suggested that “There are those in the ADR movement who think the adversary system of dispute resolution is little more than a pagan rite that ought to be excised root and branch.”³² Continuing criticisms of the pace, expense, and tenor of adjudication illustrate that “the doors to ADR are opened because the door to superior court is perceived either to be functionally closed or slightly ajar.”³³

Although ADR advocates eschew political partisanship and frustrate efforts at ready ideological characterization, at least one settlement critic has observed that “dispute resolution is a political resource.”³⁴ The generic image of ADR “is perceived to be friendly, flexible, and nicer than the uncivil exchanges that characterize litigation,” and the processes are viewed as “offering the opportunity for accommodation, and with it an escape from the win/loss hierarchy.”³⁵ ADR is pictured as “communicative and congenial,” in contrast to the “formality of adjudication,” which is “perceived as undermining open communication.”³⁶ Advocates posit three arguments for ADR’s efficiency; settlements are voluntary; the parties have better information than adjudicators; and parties have the “control to achieve outcomes that are better than those imposed by adjudicators.”³⁷ “Consensus outcomes,” a mediation proponent contends, “are

³⁰ *Id.* at 43, 185.

³¹ Luban, *supra* note 1 at 2621.

³² Steven H. Goldberg, “*Wait a Minute, This Is Where I Came In*”: a Trial Lawyer’s Search for Alternative Dispute Resolution, 1997 B.Y.U. L. REV. 653, 662 (1997).

³³ Judith Resnik, *Many Doors, Closing Doors?: Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 246 (1995).

³⁴ CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY & INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 4 (1985).

³⁵ *Id.* at 246, 249.

³⁶ *Id.* at 249.

³⁷ Resnik, *Many Doors*, *supra* note 33 at 250.

more likely to focus on the future, as well as the past. They are supposed to be based on underlying interests and needs, rather than arguments and positions.”³⁸

ADR critics acknowledge the potent presumption that potential litigants might prefer ADR schemes to courtroom encounters, but note that this belief “is so ingrained in contemporary legal culture that it is rarely questioned.”³⁹ Instead, they counter that studies, such as RAND’s, illustrating litigants’ preferences for litigation are “consistent with a long line of social psychological research on individuals’ evaluations of different dispute resolution procedures.”⁴⁰ Given that research has shown that legal claimants “valued public vindication of their rights or positions,” the entrenched “assumption of a general preference for mediation over adjudication may prove wrong.”⁴¹ Critics charge that the “idea that Americans should prefer mediation to litigation and adjudication may have received a boost from the decades long tort campaign by the business community, which sometimes is framed as a critique of litigiousness and other times as a critique of lawyers.”⁴² Professor Marc Galanter holds that this “jaundiced view”:

(D)epicts American civil justice as a pathological system, presided over by arrogant activist judges and driven by greedy trial lawyers, biased juries, and claimants imbued with victim ideology who bring frivolous lawsuits with devastating effects on the nation’s...economic well being.⁴³

This cynical portrayal, Galanter concludes, “reinforces strategies of settlement to avoid trial.”⁴⁴

Another ADR critic asserts that the very “process of ‘selling’ mediation may influence” subsequent client surveys.⁴⁵

³⁸ Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U.J.L. & POL’Y 37, 43 (2002).

³⁹ Hensler, *Suppose It’s Not True*, *supra* note 17 at 83.

⁴⁰ *Id.* at 81.

⁴¹ Hensler, *Our Courts*, *supra* note 21 at 172, 189.

⁴² *Id.* at 81.

⁴³ Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years’ War*, 57 STAN. L. REV. 1255, 1269-70 (2005).

⁴⁴ *Id.* at 1267.

⁴⁵ HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 143.

Beginning with Professor Frank Sander's "multi-door courthouse" proposal at the influential 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, ADR proponents effectively sold the concept to an eventual majority of judges, legal scholars, and politicians. Critical to the movement's success was its pointed eschewal of political partisanship, and the wide coalition of organizations that sponsored it, from business associations to advocates for the indigent to workplace reform advocates. In contrast to later revisionist portrayals of ADR's origins, it initially garnered critical support from the 1960s' community justice movement, whose "animating notion" was that "formal legal institutions, including the courts, are mechanisms for maintaining the power of elite groups," and that these institutions "impose dispute resolution norms that may be alien—or even harmful—to other members of the community."⁴⁶

In contrast to these reform-tinged recollections of ADR's emergence, Fiss asserted that there was a demonstrable "connection between the new popularity of the dispute resolution model and the growing disdain for governmental power in all its forms."⁴⁷ He claimed that "The dispute resolution model also suggests an institutionalized isolation for the judiciary."⁴⁸ Another critic concurs, charging that "ADR has become linked with the general hostility to government decision making, and adjudication has been linked with the disdained regime of government as regulator."⁴⁹ Fiss further implied that ADR's meteoric ascent was tainted, arguing that the "resurgence of the dispute resolution model was not an isolated phenomenon but occurred within a larger political context characterized by a renewed interest in market economics and theories of laissez faire."⁵⁰ Critics observed that "conservative

⁴⁶ Hensler, *Our Courts*, *supra* note 22 at 170.

⁴⁷ FISS, THE LAW AS IT COULD BE, *supra* note 15 at 48.

⁴⁸ Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 124 (1982).

⁴⁹ Resnik, *Many Doors*, *supra* note 33 at 257.

⁵⁰ FISS, THE LAW AS IT COULD BE, *supra* note 15 at 57.

support of ADR occurred just at the time when legal services offices, civil rights lawyers, and the Warren Court's decisions had begun to successfully confront social injustice."⁵¹ Fiss argued that "At the heart of each phenomenon was a renewed belief in the private character of all ends."⁵² "ADR," another critic concluded, "provided the ammunition to kill a welfare state orientation."⁵³

Other, ideologically-focused critics of settlement and ADR stressed that the sales campaign for these programs contained "little talk of rights, remedies, injustice, prevention, or unequal power."⁵⁴ They alleged that "ADR rhetoric" reinforced a conservative challenge to "the law and reform discourse of the 1960s, a discourse concerned with justice and root causes, and with debates over right and wrong."⁵⁵ "The rights theme, consistent throughout earlier debates over legal resources," was conspicuous by its absence in "the policy discussion on alternative dispute resolution."⁵⁶ "In the alternatives movement," Christine Harrington charged, "*legal resources are not rights, they are institutions to facilitate negotiation and mediation.* The principle concern is now to facilitate settlement "rather than protect rights."⁵⁷ Laura Nader echoed Harrington, noting that ADR's "process of communication" ethos took necessary rough, ideological edges off claims, and fostered what she called "coercive harmony."⁵⁸ Nader argued that ADR was permeated with "conformist ideology," which was employed to "suppress the realities of class, gender, and racial antagonism" endemic to American society, and as such, it comprised an "unreal law movement."⁵⁹

Nader contended that ADR's emphasis on conciliation meant that critical considerations

⁵¹ Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 216 (2002).

⁵² FISS, *THE LAW AS IT COULD BE*, *supra* note 15 at 57.

⁵³ Bryant G. Garthy, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. U.L. REV. 927, 948 (2002).

⁵⁴ 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, 6 (1993).

⁵⁵ *Id.* at 3.

⁵⁶ HARRINGTON, *SHADOW JUSTICE*, *supra* note 34 at 73.

⁵⁷ *Id.* at 73 (emphasis in original).

⁵⁸ Nader, *supra* note 54 at 8-9.

⁵⁹ *Id.* at 5, 9.

of “blame or rights” were “avoided and replaced by the rhetoric of compromise and relationship.”⁶⁰ She concluded that “cultural notions of justice are factored out.”⁶¹

This tendency to screen-out unpleasant, divisive, but nonetheless vital social concerns supports Fiss’s characterization of ADR as a “sociologically impoverished universe,” in which critical issues of class, race and gender are subsumed to construct “a world composed exclusively of individuals.”⁶² Deborah Rhode seconds Fiss, in noting that “All too often, discussions of ADR invoke overly simplified or idealized models.”⁶³ One such “unspoken assumption” regarding ADR is that participants “have equally legitimate positions in the dispute”; “have equivalent levels of risk tolerance”; “proceed in good faith”; and “genuinely wish to resolve the dispute through an ADR procedure.”⁶⁴ The problem with such “Pollyannaish” models is that “All of these implicit assumptions are false.”⁶⁵ Professor Rhode points out that “many ADR processes are no less costly or contentious than traditional adjudication,” that legal gamesmanship is inevitable in any arrangement, and that disparities in wealth and power “may skew outcomes under any dispute resolution system, including ones that rely on non-adversarial approaches.”⁶⁶ Finally, as mandatory consumer arbitration illustrates, past ADR efforts to champion consent have been superseded by coercive regimens and expediency-driven rationales which “tend to discuss ADR as though it matters not at all who operates the ADR mechanism and how participants come to participate in the ADR process.”⁶⁷ “If we assume that the civil justice system reflects state and national policies on fair and appropriate access to justice,” a critic observes, “we may wish

⁶⁰ *Id.* at 13.

⁶¹ *Id.*

⁶² FISS, THE LAW AS IT COULD BE, *supra* note 15 at 51.

⁶³ Deborah L. Rhode, *Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1009 (1998).

⁶⁴ Stempel, *Forgetfulness*, *supra* note 18 at 313.

⁶⁵ *Id.* at 309, 313.

⁶⁶ RHODE, ACCESS TO JUSTICE, *supra* note 15 at 42.

⁶⁷ Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 10 OHIO ST. J. ON DISP. RESOL. 297 (1996).

to find ways to curb one-party control over dispute-system design in private justice systems.”⁶⁸

III. Settlements and the Frustration of Justice

When settlements are the predominant means of addressing legal claims, the system becomes one of secret law.⁶⁹

Legal critics of ADR’s settlement-focus highlight three negative developments in its rapid ascendancy which present potentially damaging “general effects” for the greater society; these are countenancing the powerful sway of organizational “repeat players,” who betray an intention to “privatize” justice; obscuring or distorting legal norms, either through private settlements and/or agreements without determining fault; and the potential for the increasing reliance on settlements to “delegitimize” the existing judicial system, and render traditional challenges to unjust practices and laws less attractive.

The “repeat player” concept, espoused by Professor Galanter in his seminal 1974 essay *Why the “Haves” Come Out Ahead*, has increasing relevance to the settlement context. He contends that “settlements more typically reflect the parties’ relative stamina and vulnerability to the pressures of a prolonged dispute.”⁷⁰ In ADR, Galanter notes, repeat players “will have a richer and more nuanced grasp of relevant precedents than occasional or ‘one shot’ participants,” especially given that the largely “unpublished” nature of many settlements means that existing “information disparities are accentuated.”⁷¹ This critical “non-publication” element of private settlement means that “repeat” corporate attorneys “will be in a position to amass a considerable library of settlement information and will enjoy corresponding strategic advantage in subsequent cases” in which they confront “one-shot” claimants.⁷²

⁶⁸ Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 239 (2004).

⁶⁹ Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U.L. REV. 1 (2004).

⁷⁰ Galanter & Cahill, *supra* note 16 at 1353.

⁷¹ *Id.* at 1385-86.

⁷² *Id.* at 1386.

Following Galanter, other critics assert that corporate entities have “captured” many ADR schemes to the extent that they now “*hold court*,” supplanting the public legal system’s oversight of their policies and practices.⁷³ Recent critics claim that “systematic private dispute processing appears to be gaining prominence as a way for organizational repeat players to structure their future transactions.”⁷⁴ This “structuring” relies upon the five demonstrable advantages that repeat players enjoy; advance intelligence and the ability to preplan; access to specialists; informal, often collegial or professional links with ADR functionaries; long-term interests that trump usual claimant concerns with immediate relief; and the acumen to recognize which rule changes might enter the mainstream legal system.⁷⁵ Critics contend that while “an organization might once have simply referred problem cases to public legal institutions for resolution, ADR procedures instead allow it to resolve many matters in situ, in private forums that are, themselves, organizational subunits.”⁷⁶ They conclude that

When organizations act as entire private legal systems, rather than simply as repeat players in the traditional public system, they gain increased control over the construction, implementation, and impact of law... throughout their organizational fields.⁷⁷

Professor Carrie Menkel-Meadow seconds this assertion, noting that “Haves” opted to avoid the risks inherent in public litigation by “choosing more streamlined and controlled forms of private justice,” not just for disagreements with each other but “now when they impose mandatory private dispute resolution schemes on their employees, clients, customers, patients, franchisees, and licensees.”⁷⁸ She notes that “the very individuation of claims in ADR processing

⁷³ Lauren Edelman & Mark Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. & SOC’Y REV. 941, 943 (1999) (emphasis in original).

⁷⁴ *Id.* at 949.

⁷⁵ *Id.* at 941-42 (summarizing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

⁷⁶ *Id.* at 964.

⁷⁷ *Id.* at 976.

⁷⁸ Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 25-26 (1999).

potentially eliminates all of the reforms suggested by Galanter to counter the advantages of repeat players against the ‘Have-not’ one-shotter.”⁷⁹ These reforms are also thwarted by ADR-supportive judges who “treat the settlement process as though it were the sacrosanct private business of the settling parties, in which outsiders simply should not meddle.”⁸⁰ Instead of spawning community-enhancing, additional “doors” to the courthouse, ADR instead has “created a segmented and hierarchical system skewed dramatically toward business litigants and a few other players.”⁸¹ This reflects not a “simplistic bias of decision-making structured for the employers or companies to win,” but a milieu in which “only a few constituencies are comfortable making their arguments and confident that their concerns will be understood.”⁸² Another settlement critic observes that “private judging” essentially “enables wealthy parties to hire their own personally-selected adjudicator, and then conduct their trial out of public view without setting any precedent, unless appealed.”⁸³ Characterizing repeat player-dominated ADR plans as “private processes law,” critics contend that “non-judicial decision-makers are applying a spectrum of legal norms, ranging from near law (or shadow law) to private law (as in arbitration) to non-law (such as reaching a resolution contrary to existing legal rules).”⁸⁴ They add that “parties in arbitration may screen out potential arbitrators on any grounds, including factors that would be inappropriate in public adjudication, such as race or gender.”⁸⁵ Critics stress that analysis of an ADR program should “concentrate on who is structuring it, how they structure it, why this is so, and how these choices affect dispute outcomes.”⁸⁶

Galanter and Mia Cahill seize upon how damaging “general effects”—sending flawed,

⁷⁹ *Id.* at 37.

⁸⁰ Luban, *supra* note 1 at 2620.

⁸¹ Garthy, *supra* note 53 at 950-51.

⁸² *Id.* at 933.

⁸³ Perschbacher & Bassett, *supra* note 69 at 31.

⁸⁴ *Id.* at 31-32.

⁸⁵ Reuben, *supra* note 20 at 299-300.

⁸⁶ Bingham, *supra* note 68 at 221.

contradictory “legal” signals from settlement into the jurisprudential mainstream—far outweigh the “special effects” (such as party avoidance of expense or publicity) that accompany settlements.⁸⁷ General effects, they argue, are necessary for policymakers and decision makers to address similar situations in the future. As Rhode observes, “Processes designed to satisfy private parties lack public accountability and may undervalue public interests.”⁸⁸ Abuse of a compulsory consumer arbitration scheme, for example, “allows one party to nullify public policy as embodied in law.”⁸⁹ This reinforces Fiss’s contention that “dispute resolution privatizes values,” creating an environment in which “there are no public values or goals, only the private desires of individuals.”⁹⁰ Fiss contends that “if we accept the privatization of all ends or deny the government the power to realize the values that may fairly be deemed public, we will impoverish our social existence and undermine important institutional arrangements.”⁹¹ ADR-facilitated “privatization” affords “an easy haven for all those who would deny or minimize the role of public values in our social life and the need for governmental power to realize those values.”⁹²

Critics insist that privatization’s course can be reversed via the widespread publication of legal norms, as the “production of general effects depends on the flow of information. Where information about the existence or terms of a settlement is withheld from public view, as by typical agreements stipulating that the terms of settlement remain confidential, the general effects are presumably weakened.”⁹³ Valuable general effects include knowledge of “the hazard-causing behavior by remote actors or communication of a sense of entitlement to previously

⁸⁷ Galanter & Cahill, *supra* note 16 at 1379-80.

⁸⁸ RHODE, ACCESS TO JUSTICE, *supra* note 15 at 42.

⁸⁹ Bingham, *supra* note 68 at 251.

⁹⁰ FISS, THE LAW AS IT COULD BE, *supra* note 15 at 52.

⁹¹ *Id.* at 58.

⁹² *Id.*

⁹³ Galanter & Cahill, *supra* note 16 at 1382.

ignorant rights bearers.”⁹⁴ “Production of these public goods is a valuable component of adjudication,” especially since “Litigation against one actor may lead others to reassess the risks and advantages of similar activity.”⁹⁵ ADR critics ask “What reason is there to think that settlement negotiation would produce more knowledge of the facts than adjudication?”⁹⁶

The potential to thwart necessary publicity and skew legal norms justify fears that ADR schemes “will become institutionalized screening mechanisms for moving cases out of the court system instead of attempts to deliver justice with better results and greater access by the public.”⁹⁷ A critic alleges that ADR’s “principal concern is with preserving the institutional capacity of courts and disputants to reach settlements rather than protect rights.”⁹⁸ Other skeptical legal scholars assert that “Settlement and other recent procedural changes aimed at streamlining and expediting litigation have had the concomitant contrary effect of hiding legal processes from public view.”⁹⁹ In addition to helping “create inconsistency in the applicable (legal) norms,” this trend contributes to “both the obscuring and distorting of law.”¹⁰⁰ This illustrates how “Private, secret laws or legal proceedings can neither provide information that will shape the behavior of others nor provide a public forum.”¹⁰¹ “Private resolution,” critics allege, “whether by traditional negotiated settlement or the use of alternative dispute resolution methods, eliminates the public nature of legal proceedings by trading a public forum for a private one that sets no precedents and might not follow traditional evidentiary and other procedural rules.”¹⁰²

These evasions of judicial limitations support claims that ADR settlement schemes “place

⁹⁴ *Id.* at 1380.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1372.

⁹⁷ Quoted in HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 74.

⁹⁸ HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 74.

⁹⁹ Perschbacher & Bassett, *supra* note 69 at 21.

¹⁰⁰ *Id.* at 32.

¹⁰¹ *Id.* at 15.

¹⁰² *Id.* at 59-60.

‘have nots’ at a disadvantage by depoliticizing and delegating conflict, divorcing grievances from principles of law.”¹⁰³ One critic argues that we have “created a low-end justice for the rank and file,” as courts “push ordinary litigants into settlement-oriented ADR processes” in which “the repeat players clearly dominate and create the market for the leading neutrals and provider organizations.”¹⁰⁴ “Those who have market value for the providers,” he adds, “tend to be those who are broadly acceptable to the repeat players.”¹⁰⁵ This reflects current ADR realities in which the “low end” does not possess “the resources in people or funding” to incorporate the idealized theoretical models of ADR.¹⁰⁶

Finally, critics maintain that ADR’s emergence “promotes informal dispute resolution based on privately negotiated norms and procedures at the same time that it curtails the formal enunciation, vindication, and enforcement of publicly mandated legal rights.”¹⁰⁷ Settlement schemes, in their estimation, are the means by which those at the commanding heights of power in American society “explicitly remove certain matters from the purview of the public courts.”¹⁰⁸ “The notion that courts might order parties—as a condition for seeking access to the courtroom—to use a private process, run by public providers, in circumstances that impede public scrutiny is new” asserts another settlement critic.¹⁰⁹ Pulling a curtain across conflicts obscures the “public spectacle” of law, which can otherwise “demonstrate that the law’s authority can be mobilized by the least powerful as well as the most powerful in society.”¹¹⁰ “Public adjudication constrains the arbitrary exercise of power by elites,” and this “promotes a sense of fairness and equality.”¹¹¹ ADR critics assert that privatization of procedures dims the

¹⁰³ Edelman & Suchman, *supra* note 73 at 967.

¹⁰⁴ Garthy, *supra* note 53 at 932.

¹⁰⁵ *Id.* at 939.

¹⁰⁶ *Id.* at 950.

¹⁰⁷ Edelman & Suchman, *supra* note 73 at 953.

¹⁰⁸ *Id.* at 963.

¹⁰⁹ Hensler, *Our Courts*, *supra* note 22 at 187.

¹¹⁰ *Id.* at 196.

“visible presence of institutionalized and legitimized conflict,” which “teaches citizens that it is not always better to compromise and accept the status quo because, sometimes, great gains are to be had by peaceful contest.”¹¹²

Despite their initial salutary focus on redressing “caseloads, delay, and inefficiency,” settlement-fixated reforms have instead “created an entirely new problem—a form of legal erosion.”¹¹³ ADR schemes have “consistently disserved law,” in essentially “removing the decision-making process from public view, (and) removing the decision itself from scrutiny.”¹¹⁴ Arbitration is a special target of these criticisms, as it “resolves disputes without contributing to the body of law and without providing information to the public. The increase in arbitration clauses and proceedings means that more and more potential law is being lost.”¹¹⁵ Class-action proponents note that “lawyer or other litigant-based interest groups have been instrumental in creating law,” and that “these complaints can develop facts and legal theories that can be used in subsequent cases.”¹¹⁶ They contend that “by precluding class actions, companies are engaging in ‘do-it-yourself tort reform’, freeing themselves from liability without having to convince legislatures to change the substantive law.”¹¹⁷ Additionally, the civic “information pool may be further depleted by the presence of a confidentiality agreement attached to the settlement,” as non-disclosure pacts serve to “limit the general effects of the dispute since the parties are blocked from transferring information to other potential disputants and decisionmakers.”¹¹⁸

These broader societal effects of private settlements trigger concerns because they “can

¹¹¹ Reuben, *supra* note 20 at 295.

¹¹² Hensler, *supra* note 22 at 196-97.

¹¹³ Perschbacher & Bassett, *supra* note 69 at 60.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 30.

¹¹⁶ Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733 (2004).

¹¹⁷ Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 98 (2004).

¹¹⁸ Galanter & Cahill, *supra* note 16 at 1385.

easily produce inconsistent results when contrasted with similar cases, simply because settlement terms are often confidential and unavailable to other potential litigants. This potential for inconsistent treatment violates the most fundamental notion of fairness—that those similarly situated are treated the same.”¹¹⁹ Critics present two major concerns resulting from the “widespread endorsement of settlements”; first, with fewer “decided” cases, settled claims are removed from judicial and social purview; second, usually-confidential settlements obfuscate the law, because they do not embody precedent in any useful or meaningful form.¹²⁰ Instead, settlement may allow parties to “end-run” legal norms and precedent, as when the two parties “find a way to shift the burden to a third party who is not present at the bargaining table”—often the public interest.¹²¹ A secret settlement, David Luban charges, also “carves out an unacceptable area of exceptions to democratic publicity,” especially when it may “play a major role in concealing important health and safety information from the public.”¹²² Suppression of important discoverable knowledge “can be of great public importance, both because it might save lives and because it informs.”¹²³ A trial lawyer critical of private settlement noted that a “decision about fault and liability is often critical to future community peace, psychologically important to individuals, therapeutic for society at large, and a useful way to establish societal norms.”¹²⁴ Instead, settlements “are often accompanied by exculpatory statements to the effect that no wrongdoing or liability is admitted.”¹²⁵ In contrast, adjudication “may encourage claimants and lawyers to pursue claims of a certain type, (and) provide symbols for rallying a group, broadcasting awareness of grievance, and dramatizing challenges to the status quo.”¹²⁶

¹¹⁹ Perschbacher & Bassett, *supra* note 69 at 26.

¹²⁰ *Id.* at 27.

¹²¹ Luban, *supra* note 1 at 2626.

¹²² *Id.* at 2649-50.

¹²³ *Id.* at 2653.

¹²⁴ Goldberg, *supra* note 32 at 673.

¹²⁵ Galanter & Cahill, *supra* note 16 at 1383.

¹²⁶ *Id.*

Democracies cannot flourish without the broad dissemination of knowledge.

“Privatizing” justice disserves the citizenry, and breeds cynicism and suspicion regarding the essential institutions of self-governance. Luban suggests that the “sticking point with settlements is not truth but openness,” and notes that “the goods that they create are privatized and not public.”¹²⁷ Luban believes that the

(O)paCity of settlements is particularly troubling when their terms are secret. Kant once wrote “All actions relating to the rights of other human beings are wrong if their maxim is incompatible with publicity.” This publicity principle lies at the core of democratic political morality.¹²⁸

Cases that “settle,” Luban notes, do so on terms agreeable to their parties, but “those terms are not necessarily illuminating to the law of to the public.”¹²⁹ “Instead of reasoned consideration of the law,” he observes, “we often find little more than a bare announcement of how much money changed hands (often accompanied by a disclaimer of actual liability)—unless the settlement is sealed, in which case we don’t even find that out.”¹³⁰ “It is impossible to improve,” an ADR critic observed, “what you can’t measure.”¹³¹ In contrast, Fiss avers, “Adjudication is the social process that enables judges to give meaning to public values.”¹³²

Undermining a sense of “public” values seems to be at the heart of corporate and other elites’ embrace of ADR programs. “Corporate America,” a critic contends, “has moved ever more of its disputes into systems that it can control and away from ones where third parties have substantial influence over the outcome.”¹³³ In turn, ADR providers’ acquiescence in this disquieting anti-democratic drift tends to “bespeak an industry that has drifted away from a

¹²⁷ Luban, *supra* note 1 at 2648.

¹²⁸ *id.*

¹²⁹ *Id.* at 2639.

¹³⁰ *Id.*

¹³¹ Gregory Todd Jones, *Fighting Capitulation: a Research Agenda for the Future of Dispute Resolution*, 108 PENN. ST. L. REV. 277, 302 (2003).

¹³² FISS, THE LAW AS IT COULD BE, *supra* note 15 at 3.

¹³³ Landsman, *supra* note 21 at 1623-24.

commitment to fairness and neutrality and toward the protection of lucrative and cozy arrangements.”¹³⁴ Elite entities are seeking to elude “structural litigation,” which is “premised on skepticism about the existing distribution of power and privilege in American society.”¹³⁵ In so doing, they embody the third major criticism of settlement skeptics: that the “dispute resolution model is at odds with the social and political reality of modern society.”¹³⁶ The ultimate goal of adjudication’s critics, Fiss alleges, is to “isolate” the judiciary so that, ultimately, the “courts are not depicted as an integral part of government.”¹³⁷ Private settlements have bolstered corporate-driven campaigns to “delegitimize” the judiciary, and the “loss of substantive law from the public realm distorts the legal landscape, limits public testing and debate of legal norms, and devalues or destroys institutional competencies.”¹³⁸ As a result, “the traditionally understood processes are fading from—or perhaps more accurately, are being hidden from—view, with negative consequences for both law itself and for society as a whole.”¹³⁹ Secrecy foments cynicism, and conspiratorial notions of the “true” nature of law are spawned when, given that “the vast majority of lawsuits do not proceed to trial,” the public accepts corporate-proffered depictions of lawyers’ amorality and plaintiffs’ greed.¹⁴⁰

“The animus against trials is not just an objection to generous or individuated remedies,” Galanter observes, “it also involves an aversion to the determination of corporate accountability in public forums.”¹⁴¹ Malefactors’ fears of damaging publicity stem from their recognition that “The trial is a site of ‘deep accountability’ where facts are exposed and responsibility assessed.”¹⁴² This reinforces the contention that powerful repeat players utilize ADR to “avoid

¹³⁴ *Id.* at 1618.

¹³⁵ FISS, THE LAW AS IT COULD BE, *supra* note 15 at 53.

¹³⁶ *Id.* at 54.

¹³⁷ *Id.* at 55.

¹³⁸ Perschbacher & Bassett, *supra* note 69 at 2.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 61.

¹⁴¹ Galanter, *The Hundred-Year Decline*, *supra* note 43 at 1273.

the sense of community conscience that juries bring to the resolution of disputes, especially in the form of punitive damages.”¹⁴³ ADR increasingly relegates one-shot claimants to being “shepherded outside the courthouse to confidential conferences presided over by private neutrals in private venues.”¹⁴⁴ “With little experience of public adjudication and little information available about the processes or outcomes of dispute resolution,” “one-shot” claimants’ “abilities to use the justice system effectively to achieve social change will diminish markedly.”¹⁴⁵ Finally, when the media select, from the small number of public trials, those most likely to either titillate or outrage, they “reinforce a public perception that the law is frivolous, foolish, and absurd.”¹⁴⁶

In contrast, “Adjudication provides occasions for law, and therefore the politics it codifies, to assume tangible form.”¹⁴⁷ Further, it is adjudication, not harmony-themed ADR, which “may often prove superior...for securing peace because the former, unlike the latter, creates rules and precedents.”¹⁴⁸ Disputing parties who proceed with adjudication “enhance the courts’ claim as an authoritative resolver of controversies, and every “litigant who proceeds to judgment and acquiesces in it thereby subsidizes a judicial authority that is available for future litigants.”¹⁴⁹ “Part of the mission of federal courts is to be repositories of expertise,” another ADR critic notes, “But expertise is something like Scrooge’s vault: it does little good if hoarded.”¹⁵⁰ Further, “Less federal court consideration of legal matters touching on federal policy frustrates development and refinement of a coherent body of federal law.”¹⁵¹ In contrast, “Where parties

¹⁴² *Id.* at 1273-74.

¹⁴³ Reuben, *supra* note 20 at 299.

¹⁴⁴ Hensler, *Our Courts, Ourselves*, *supra* note 22 at 196.

¹⁴⁵ *Id.*

¹⁴⁶ Perschbacher & Bassett, *supra* note 69 at 61.

¹⁴⁷ Luban, *supra* note 1 at 2637.

¹⁴⁸ *Id.* at 2623.

¹⁴⁹ *Id.* at 2625.

¹⁵⁰ Jeffrey Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 998 (1998).

and lawyers receive benefits in exchange for the suppression of information about settlement, we have what amounts to the appropriation for private benefit of the public goods produced by the dispute process.”¹⁵² Adjudication “may make such agreements impossible because the terms are no longer in the parties’ hands, or because the public character of a trial makes it impossible for the parties to pass along their losses without scandal and protest.”¹⁵³ Privatization rooted in the suppression of facts must be halted “lest courts lose too much of their historical capacity to articulate social values and make political decisions neglected or mishandled by other branches of government.”¹⁵⁴ When ADR programs are imposed, with lax judicial oversight, “society is unwisely deprived of the continuing flow of judicial reflection necessary to improve the law and keep it current.”¹⁵⁵ The “task for policy,” then, “is not promoting settlements or discouraging them, but regulating them,” as “society must take care that the river of judicial settlement does not slow to an inadequate trickle.”¹⁵⁶

Settlement’s critics ask “Will we really have achieved our goal when the courthouses are empty, so long as disputing parties have a private alternative?”¹⁵⁷ As Judith Resnik observes, “Whatever the number of doors, the call was for access to and preservation of the courthouse.”¹⁵⁸ “If we are to find a better way to resolve disputes in our society,” another ADR critic commented, “the first thing we must do is to fix the one door that every courthouse must have—the door to the courtroom—rather than spend our time worrying over the design for a multi-door courthouse. Nothing else will matter if we cannot fix the trial door.”¹⁵⁹

¹⁵¹ *Id.* at 1000.

¹⁵² Galanter & Cahill, *supra* note 16 at 1386.

¹⁵³ Luban, *supra* note 1 at 2626.

¹⁵⁴ Stempel, *Forgetfulness*, *supra* note 18 at 350.

¹⁵⁵ Stempel, *Contracting Access*, *supra* note 150 at 1000.

¹⁵⁶ Galanter & Cahill, *supra* note 16 at 1388; Stempel, *Contracting Access*, *supra* note 142 at 1000.

¹⁵⁷ Perschbacher & Bassett, *supra* note 69 at 62.

¹⁵⁸ Resnik, *Many Doors*, *supra* note 33 at 217.

¹⁵⁹ Goldberg, *supra* note 32 at 674.

IV. The Multi-Doors of Perception: Transformative Mediation and Settlements

Mediators intervene to take the legal dispute and help translate it back to a human problem because there are more possible solutions to human problems than legal disputes.

Robert Creo¹⁶⁰

Transformative Mediation emerged nearly a decade after Fiss's *Against Settlement*. Robert Baruch Bush & Joseph Folger's 1994 book *The Promise of Mediation* rejected more-schematic, settlement-fixated visions of ADR in favor of a holistic process designed to bring "empowerment and recognition" to disputants.¹⁶¹ The Bush-Folger approach focused on influencing deeper cultural and societal changes, in contrast with the value-free pragmatism of most settlement schemes. Their analysis acknowledged nascent flaws in ADR's rapid institutionalization, but also reflected disaffection with the increasingly conservative tack of federal courts. Fiss's hopes had waned, due to "adjudication's failure to make good on its own promises," as "the contemporary refusal to intervene" reflected conservative judges' "narrowed vision of the constitutional obligation to create equality."¹⁶² Strict Constructionist judges were "advocates for less judging and less rightsholding," and not coincidentally, had "become a major part of the ADR lobby."¹⁶³ Those "who have styled judging as a heroic activity failed to focus on the discontent of some of the would-be heroes, who have rejected the job in whole or part."¹⁶⁴ Some settlement opponents came to the reluctant conclusion that "litigation, although it has its uses, may not be optimal for all forms of legal change."¹⁶⁵

¹⁶⁰ Robert A. Creo, *Mediation 2005: the Art & the Artist*; accessed 9/30/05 @ www.rcreo.com.

¹⁶¹ Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 38 OHIO ST. J. ON DISP. RESOL. 573, 586 (2004).

¹⁶² Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. MIAMI L. REV. 173, 185, 179 (2003).

¹⁶³ *Id.* at 192-93.

¹⁶⁴ *Id.* at 193. See also HERMAN SCHWARTZ, RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS (2004).

¹⁶⁵ Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U.J.L. & POL'Y 37, 45 (2002).

Transformative mediation proponents believed that “As mediation has become more institutionalized and settlement-oriented, its humanizing and emotionally satisfying characteristics are diminished.”¹⁶⁶ Recognizing that “law is a social force having consequences for the mental health and functioning of all those it touches,” transformative advocates asked, “Can the law be used for emotional healing and development, rather than merely as a tool of social control?”¹⁶⁷ Transformative mediation’s tenets “are considerably different than those of settlement-based mediation,” de-emphasizing “winning” in favor of “how the story is told and how the harm is named.”¹⁶⁸ The critical distinction between transformative mediation and other mediation and ADR variants rested “in the degree to which needs and desires of the parties are fully explored and validated, instead of minimized, for a settlement agreement.”¹⁶⁹ Arguing that “conflict is an instrument for moral growth,” transformative mediators drew upon theoretical developments indebted to postmodernism and growing interest in non-western philosophical constructs.

“Unlike litigation,” the transformative mediation emphasis on “story” does not assume “a binary moral universe that divides the good from the bad, but rather, a universe that values collaborative striving to achieve common ground and resolution.”¹⁷⁰ With talk of “embracing the notion that perceptions of the world (including perceptions of the actions of others) are unstable,” elements of transformative mediation practice are heavily indebted to Eastern religious and philosophical thought, particularly Buddhism.¹⁷¹ Like the community justice activists

¹⁶⁶ Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence: Transformative Mediation and Narrative Mediation: a Natural Connection*, 3 FL. COASTAL L.J. 167 (2002).

¹⁶⁷ *Id.* at 169.

¹⁶⁸ *Id.* at 180, 171.

¹⁶⁹ *Id.* at 180.

¹⁷⁰ Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 857 (2004).

¹⁷¹ *Id.* at 857-58. See also Barry Nobel, *Meditation and Mediation*, 43 FAM. CT. REV. 295 (2005) & Don Ellinghausen Jr., *Venting or Vipassana?: Mindfulness Meditation’s Potential for Reducing Anger’s Role in Mediation* (forthcoming, CARDOZO JOURNAL OF DISPUTE RESOLUTION (2007)).

who influenced ADR's ascent, transformative mediators seek to imbue participants with an "organic worldview," in which the restoration of harmony between the parties trumps win-lose settlements.¹⁷² It is then hoped that participants—and the greater culture—"will respond in a less aggressive and adversarial manner to conflict, adopting a more relational worldview."¹⁷³ Another ADR scholar maintains that there is "no reason why an emphasis on protection of rights has to be exclusive on improving relations among members of society."¹⁷⁴ She then asks, "Why should we not take into account psychological and emotional factors, as well as other social policies, when we set up our legal system?"¹⁷⁵ "If our field's purpose is to provide fair, just, and more harmonious solutions to human problems," Menkel-Meadow observes, "then we will not easily be cabined to teachings from law and legal theory alone."¹⁷⁶ "If the goal is to maximize joint gain, or at least improve the social conditions of those worst off," she adds, "then we will need all the tools and all the strategies that are likely to help."¹⁷⁷

Skeptics depict transformative mediation's focus on self-empowerment, versus group or cause advancement, as a surrender in the struggle to redress social injustice. They find the transformative vision laudable, but point out that "the goals, approaches, skills, and behaviors that now characterize mediation have developed largely in response to the needs and expectations of the professionals who dominate these environments."¹⁷⁸ In other words, lawyers' increasing introduction of litigation-rooted tactics into mediation sessions is silencing the "stories" of the participants. A recent study found that "Few attorneys...chose mediation because they perceive

¹⁷² Paquin & Harvey, *supra* note 166 at 181.

¹⁷³ *Id.* at 184.

¹⁷⁴ Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 302 (2003).

¹⁷⁵ *Id.* at 300.

¹⁷⁶ Carrie Menkel-Meadow, *Mothers and Fathers of Invention: the Intellectual Fathers of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 3 (2000). See also DENNIS P. STOLLE, DAVID B. WEXLER, & BRUCE WINICK, EDS., *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (2000).

¹⁷⁷ Menkel-Meadow, *When Litigation Is Not the Only Way*, *supra* note 165 at 50.

¹⁷⁸ Welsh, *supra* note 161 at 577.

that their clients might like it or experience greater satisfaction or control.”¹⁷⁹ “To the extent that the views of more powerful and sophisticated users of mediation...dominate the design and evaluation of institutionalized mediation programs,” a recent analysis observed, repeat-players’ premium on efficiency will thwart one-shotters’ hopes of having their stories heard.¹⁸⁰ This reflects contemporary ADR reality, in which the altruistic aspirations of transformative mediation enthusiasts are subsumed in compulsory programs characterized by “a production focus at the expense of a focus on the consumer.”¹⁸¹

Finally, the utopian vision of transformative mediation infusing society with collaborative idealism fails to provide the most disadvantaged with the dramatic, public vindication of their rights offered by litigation. “A trial in open court,” unlike privatized ADR, “is a forum for citizens to find out about illegal actions, to discover how to protect themselves, and to disgrace wrongdoers.”¹⁸² Citizens ensnared by drafter-friendly arbitration clauses need legal relief, whether they are burdened with exploitive payday loans, harassment at work, or other fundamental challenges to their livelihoods. Many Americans live with a daily sense of crisis, and require maximal, not incremental relief from their predicaments. Academics postulating postmodern tinkering with dispute resolution fail to take into account that for many Americans, the wolf is past the door, in the kitchen rummaging the refrigerator. To add insult to injury, many working and underclass Americans now find their vital concerns relegated to the smaller-gauge track of quick-and-dirty court-mandated ADR programs. ADR can not, and will not, transform American society and culture until it examines its complicity with compulsion, hierarchy, and the escalating, ominous suppression of information vital to a truly free citizenry. As a recent critic notes, “ADR needs

¹⁷⁹ *Id.* at 590-91.

¹⁸⁰ *Id.* at 664.

¹⁸¹ Jones, *supra* note 131 at 288.

¹⁸² Subrin, *supra* note 51 at 217.

to learn greater humility and respect for the rule of law or risk discrediting and politicizing itself.”¹⁸³

V. Conclusion: No Peace Without Justice

The more we settle, the less we try.¹⁸⁴

Lost in the strains of skepticism regarding settlement is the fact that most of these critics do not desire scuttling existing ADR programs. Instead, they want to establish a greater understanding that “Settlement is not intrinsically good or bad, any more than adjudication is good or bad. Settlements do not share any generic traits that commend us to avoid them per se or to promote them.”¹⁸⁵ However, there are three seminal considerations that critics identify in analyses of settlement and ADR.

First, they reproach settlement proponents’ tendency to minimize the general effects of legal encounters; “Law is more than the mere resolution of disputes,” and “the tendency to equate ‘law’ with ‘dispute resolution’ is unduly narrow and misleading.”¹⁸⁶ They claim that “By taking this narrow ‘dispute resolution’ approach, other considerations within the wider realm of ‘law’... are disregarded and discarded without apparent thought.”¹⁸⁷ Settlement’s primacy reduces law’s “normative content and force, and diminishes law’s significance in ordering society.”¹⁸⁸ When a defense of settlement argues that the parties “own” their particular dispute, it takes a progress-impeding micro view of what might a macro concern; would Rosa Parks have claimed she “owned” her struggle? If another, less inspiring individual had accepted a particularized remedy from the bus company, would segregation have been confronted and toppled?¹⁸⁹

¹⁸³ Landsman, *supra* note 21 at 1594.

¹⁸⁴ Goldner, *supra* note 32 at 674.

¹⁸⁵ Galanter & Cahill, *supra* note 16 at 1388.

¹⁸⁶ Perschbacher & Bassett, *supra* note 69 at 13-14.

¹⁸⁷ *Id.* at 14.

¹⁸⁸ *Id.*

¹⁸⁹ Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: a Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2696 (1995).

Settlement's critics also disparage harmony ideology, and how "substantive demands for social justice have been overshadowed by experimentation with techniques of alternative dispute resolution."¹⁹⁰ Laura Nader claims that ADR adherents would rather seek "harmony in the guise of compromise or agreement," which they regard as "ipso facto better than an adversary posture."¹⁹¹ In many ADR programs, "Discussion of blame or rights is avoided and replaced by the rhetoric of compromise and relationship; cultural notions of justice are factored out."¹⁹² Additionally, the "focus on dispute techniques has separated the problem solving from the politics of taking rights seriously."¹⁹³ "Surrounded by a culture that celebrates social harmony and self-realization and disparages social conflict," a settlement critic contends, "citizens' tendencies to turn to the court as a vehicle for social transformation will diminish."¹⁹⁴ Increasing emphasis on technique, coupled with the "growing professionalization of dispute resolution staff," have contributed to the "loss of a social justice component" in ADR."¹⁹⁵ Dashing the hopes of transformative mediation advocates, "the future appears to be a trend toward the further formalization of ADR."¹⁹⁶ This tendency confirms critics' fears that in "turning to diversion or an alternative justice system, we move away from rights as a political resource to the politics of consensus building outside or in the shadow of legal institutions."¹⁹⁷ Since "settlement information offers no reasons or reasoning, nothing to feed or provoke further argument," it follows that "a world without adjudication would be a world without public conversation about the strains of commitment that the law imposes."¹⁹⁸

¹⁹⁰ HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 173.

¹⁹¹ Nader, *supra* note 54 at 3.

¹⁹² *Id.* at 13.

¹⁹³ HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 173.

¹⁹⁴ Hensler, *Our Courts*, *supra* note 22 at 196.

¹⁹⁵ HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 172.

¹⁹⁶ Garthy, *supra* note 53 at 928.

¹⁹⁷ HARRINGTON, SHADOW JUSTICE, *supra* note 34 at 173.

¹⁹⁸ Luban, *supra* note 1 at 2639.

Finally, settlement critics note that consent, once “so central to the notion that the parties and society will profit from solutions by agreement, has been replaced by mandatory participation,” as with compelled consumer arbitration.¹⁹⁹ This has led to the defection of some longtime ADR supporters in academia, in particular, for whom “volition is so central to ADR that ADR is at risk if it becomes a mandatory part of the state’s apparatus.”²⁰⁰ As a recent chronicler of dispute resolution’s history observed, the “most important word in ‘ADR movement’ was ‘alternative.’ It was the soul of the idea, its substance. Today, the form is succeeding, but the substance is dying.”²⁰¹ For reformers who envisioned ADR as transformative in a rights-enhancing sense, there is a sense of betrayal in this “policing out of the public legal system and into private organizations.”²⁰² The overreaction to corporate depictions of overburdened, gridlocked courthouses has resulted in the neglect of basic legal needs; “What should be of greatest concern are not excessive lawsuits but inaccessible rights and remedies.”²⁰³ For the “more our justice system develops a settlement mentality, the less vigor it will have for trying those cases that ought to be tried. Putting ADR doors on the courthouse only further increases the likelihood of settlement by exhaustion, while it reduces the number of disputes passing through the trial door.”²⁰⁴ Thirty years after Frank Sander proposed opening more doors, the potential exists that in “the long run, all of the doors of the multi-door courthouse may swing outward.”²⁰⁵ Who can say what the greater societal impact of these “lost” cases might be; as legal scholars have noted, *Against Settlement’s* argument was inevitably influenced by Fiss’s support of the civil rights movement, leaving the “unspoken question: *Where would we be if Brown v. Board of Education had settled*

¹⁹⁹ Goldberg, *supra* note 32 at 669.

²⁰⁰ Resnik, *Many Doors*, *supra* note 33 at 251.

²⁰¹ Goldberg, *supra* note 32 at 655.

²⁰² Edelman & Suchman, *supra* note 73 at 983.

²⁰³ RHODE, ACCESS TO JUSTICE, *supra* note 15 at 5.

²⁰⁴ Goldberg, *supra* note 32 at 674.

²⁰⁵ Hensler, *Our Courts*, *supra* note 22 at 196.

quietly out of court?”²⁰⁶ Adjudication ultimately trumps settlement and dispute resolution, because as Fiss observes, “Justices seek justice, not peace.”²⁰⁷

²⁰⁶ Luban, *supra* note 1 at 2629.

²⁰⁷ FISS, THE LAW AS IT COULD BE, *supra* note 15 at xi.