

Symposium on Environmental Alternative Dispute Resolution

Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America

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Articles & Speeches

SOME (MOSTLY) THEORETICAL AND (VERY BRIEF) PRAGMATIC OBSERVATIONS ON ENVIRONMENTAL ALTERNATIVE DISPUTE RESOLUTION IN AMERICA

Robert F. Blomquist*

*Blessed are the peacemakers, for they shall be called the children of God.*¹

Societies differ in their patterns of social stratification, morphology, and so forth, and this produces differences in their legal systems. Within particular societies, individuals and situations also differ from one another in regard to these factors - some people may be wealthier or more respected than others, for example, some relationships more intimate, and some conflicts more readily handled by non-legal means of social control. These differences affect legal outcomes on a case by case basis, predicting such things as who calls the police or files lawsuits, who wins legal cases, and who is subjected to what sorts of sanctions.²

“All societies and groups have systems which operate to influence conflict and to exert social control. What these systems are and whether or not they are ‘legal’ or ‘law’ is a question of investigation.”³

I. INTRODUCTION

For a variety of interesting reasons,⁴ American disputants and their advocates have, during the last quarter of the Twentieth Century,

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¹ *Matthew* 5:9.

² M. P. Baumgartner, *The Sociology of Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 406, 406 (Dennis Patterson ed., 1996).

³ Rebecca Redwood French, *Law and Anthropology, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 397, 398 (Dennis Patterson ed., 1996).

pursued a “panoply” of alternatives to conventional, and strictly formalistic, trial processes for resolving civil disputes.⁵ Indeed, since the

⁴ For a discussion of reasons for pursuing alternatives to traditional litigation in the environmental context, see generally ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 963-64 (2d ed. 1998). By way of a partial illustrative explanation of the recent popularity of expanded environmental use of ADR techniques, the authors of the above casebook observe:

ADR sometimes presents clear advantages. It can, for example, promote effective joint factfinding techniques producing facts faster and with greater accuracy than traditional discovery. If parties can develop a mutually-acceptable factfinding agenda and methodology, then the traditional “battle of the experts” can be averted and questions shifted from a “position-based” to a broader “interest-based” resolution process on the merits

Id. at 964 (citing LAWRENCE SUSSKIND & JEFFREY L. CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987) and ROGER FISHER & WILLIAM URY, GETTING TO YES (1981)).

⁵ See generally EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE 1-3 (1997) (describing a “panoply” of ADR procedures presently available to disputants). According to the National Institute for Dispute Resolution:

Dispute Resolution techniques can be arrayed along a continuum ranging from the most rulebound and coercive to the most informal. Specific techniques differ in many significant ways, including:

- whether participation is voluntary;
- whether parties represent themselves or are represented by counsel;
- whether decisions are made by the disputants or by a third party;
- whether the procedure employed is formal or informal;
- whether the basis for the decisions is law or some other criteria;
- whether the settlement is legally enforceable.

At one end of the continuum is adjudication (including both judicial and administrative hearings); parties can be compelled to participate; they are usually represented by counsel; the matter follows specified procedure; the case is decided by a judge in accordance with previously established rules; and the decisions are enforceable by law

At the other end of the continuum are negotiations in which disputants represent and arrange settlements for themselves; participation is voluntary, and the disputants determine the process to be employed and criteria for making the decision. Somewhere in the middle of the continuum is mediation, in which an impartial party facilitates an exchange among disputants, suggests possible solutions, and otherwise assists the parties in reaching a voluntary agreement

National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 5-47 (1983, 1987), reprinted in ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 966 (2d ed. 1998).

late 1970s, "alternative dispute resolution mechanisms like mediation, arbitration, non-litigative negotiation, minitrials, and other procedures"⁶

⁶ PLATER ET AL., *supra* note 4, at 963. According to the National Institute for Dispute Resolution, the following definitions of key ADR variations exist:

Arbitration . . . involves the submission of the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form, binding arbitration, the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute. [In a somewhat surprising 1990 case, representatives of a Phillips 66 petrochemical plant and citizens of a Texas Gulf Coast community agreed to arbitration to resolve a dispute over the company's discharge of polluted wastewater into Linnville Bayou. Under the terms of the agreement assenting to arbitration, a panel of three scientists were given binding authority to determine the extent of pollution in the bayou and to set out the best clean-up method. The decision of the arbitration panel could be appealed only to a retired judge, and appeal was limited to the narrow issue of whether the decision was arbitrary]. In last-offer arbitration, the arbitrator is required to choose between the final positions of the two parties

Court-annexed arbitration, a newer development, Judges refer civil suits to arbitrators who render prompt, non-binding decisions. If a party does not accept an arbitrated award, some systems require they better their position at trial by some fixed percentage, or court costs are assessed against them. Even when these decisions are not accepted, they sometimes lead to further negotiations and pretrial settlement.

Conciliation, an informal process in which the third party tries to bring the parties to agreement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or, in a subsequent step, through formal mediation. Conciliation is frequently used in volatile conflicts and in disputes where the parties are unable, unwilling or unprepared to come to the table to negotiate their differences.

Facilitation, a collaborative process used to help a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of the participants. The facilitator functions as a neutral process expert and avoids making substantive contributions, [helping] bring the parties to consensus

Fact finding, a process used from time to time primarily in public sector collective bargaining. The fact finder, drawing on information provided by the parties and additional research, recommends a resolution of each outstanding issue. It is typically non-binding and paves the way for further negotiations and mediation.

Med-Arb, an innovation in dispute resolution under which the mediator is authorized by the parties to serve first as a mediator and, secondly, as an arbitrator empowered to decide any issues not resolved through mediation.

Mediation, a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach a settlement but is not empowered to render a decision. [Mediation has been a particularly successful method for reaching settlement and allocating responsibility among potentially responsible parties in dozens of EPA Superfund toxic waste clean-up cases].

The Mini-trial, a privately developed method of helping to bring about a negotiated settlement in lieu of corporate litigation. A typical mini-trial might entail a period of limited discovery after which attorneys present their best case before managers with authority to settle and, most often, a neutral advisor who may be a retired judge or other lawyer. The managers then enter settlement negotiations. They may call on the neutral advisor if they wish to obtain an opinion on how a court might decide the matter. [Since the mid-1980s, the Army Corps of Engineers has used the mini-trial technique in resolving a number of regulatory environmental disputes].

The Multi-door center (or Multi-door courthouse), a proposal . . . to offer a variety of dispute resolution services in one place with a single intake desk which would screen clients. Under one model, a screening clerk would refer cases for mediation, arbitration, fact-finding, ombudsman, or adjudication

[**Negotiation** is the generic process that recurs in many of these ADR forms. In its simplest incarnation, however, negotiation constitutes discussions between the parties, with no formalized format, groundrules, or third party participation.]

Neighborhood Justice Centers (NJC)s, the title given to . . . about 180 local centers operating through the country under the sponsorship of local or state governments, bar associations, and foundations They are also known as Community Mediation Centers, Citizen Dispute Centers, etc.

Ombudsmen, a third-party [on the Scandinavian model] who receives and investigates complaints or grievances aimed at an institution by its constituents, clients or employees. The Ombudsman may take actions such as bringing an apparent injustice to the attention of high-level officials, advising the complainant of available options and recourses, proposing a settlement of the dispute or proposing systemic changes in the institution

Public policy dialogue and negotiation, aimed at bringing together affected representatives of business, public interest groups and government to explore regulatory matters. The dialogue is intended to identify areas of agreement, narrow the areas of disagreement, and identify general areas and specific topics for negotiation. A facilitator guides the process.

[**Reg-Neg** is the term given to a process of intensive multiparty negotiations leading to governmental issuance of regulatory rules.]

Rent-a-judge, the popular name given to a procedure, presently authorized by legislation in [several] states, in which the court, on stipulation of the parties, can refer a pending lawsuit to a private

have been increasingly apparent "in the environmental setting (where it is often referred to as EDR)."⁷ Yet, to paraphrase the famous English poet and literary critic, T. S. Eliot, as the idea of Environmental Alternative Dispute Resolution ("ADR") has become older, it has become stranger, its patterns more complex.⁸

There has certainly been an outpouring of scholarly attention to Environmental ADR. Using the arbitrary, but useful, measure of a decade,⁹ there have been no fewer than fifty-seven published articles,

neutral party for trial with the same effect as though the case were tried in the courtroom before a judge. The verdict can be appealed through the regular court appellate system.

National Institute for Dispute Resolution, *supra* note 5, at 5-47, reprinted in ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 967-68 (2d ed. 1998) (certain bracketed references in the above quotation were actually footnotes in the original source, but are placed in brackets to aid in the reader's understanding of the definitions).

For a sampling of additional general texts on various aspects of ADR, see generally STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1988); BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 122-29 (1994) (providing a general survey of ADR techniques, in addition to, a comparison between litigation and alternatives to litigation); JOHN S. MURRAY ET AL., ARBITRATION (1996); JOHN S. MURRAY ET AL., MEDIATION AND OTHER NON-BINDING ADR PROCESSES (1996); JOHN S. MURRAY ET AL., NEGOTIATION (1996); JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (2d ed. 1996); NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE (1989) (discussing various issues including mediation clauses in contracts, confidentiality, conflict of interest, significant mediation legislation by topic and jurisdiction); KATHERINE STONE, PRIVATE JUSTICE - ALTERNATIVE DISPUTE RESOLUTION AND THE LAW (1999).

⁷ PLATER ET AL., *supra* note 4, at 963 (internal quotation marks omitted). For a sampling of general texts on various aspects of Environmental ADR, or EDR, not previously discussed in this Article, see generally D. J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987); GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES (1986); BRUNET & CRAVER, *supra* note 5, at 301-13 (discussing environmental mediation); SCOTT MERNITZ, MEDIATION OF ENVIRONMENTAL DISPUTES (1978); PLATER ET AL., *supra* note 4, at 968-82 (quoting Allan Talloot, *The Hudson River Settlement*, in SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION (1983)); RESOLVE, CENTER FOR ENVIRONMENTAL CONFLICT RESOLUTION, ENVIRONMENTAL MEDIATION: AN EFFECTIVE ALTERNATIVE? (1978); RESOLVING ENVIRONMENTAL REGULATORY DISPUTES (Lawrence Susskind et al. eds., 1983); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. REG. 133, 140-41, 142-46 (1985).

⁸ The actual quotation from T. S. Eliot is as follows: "As we grow older, the world becomes stranger, its pattern more complicated." T. S. ELIOT, EAST COKER, Part V (1940), quoted in Robert F. Blomquist, *The Beauty of Complexity*, 39 HASTINGS L. J. 555, 566 (1988) (book review).

⁹ For a sampling of the "older," pre-1990, literature of Environmental ADR which has not previously been cited in this Article, see generally WILLIAM H. RODGERS, 1 ENVIRONMENTAL LAW: AIR & WATER §4.17 (1986) (water quality standards); Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP.

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book chapters, essays, bar association reports, and conference proceedings dealing with one or more features of Environmental ADR published during the 1990s.¹⁰ A search on Westlaw, using other search

10060 (1989); Edward Brunet, *The Costs of Environmental Alternative Dispute Resolution*, 18 ENVTL. L. REP. 10515 (1988); Kenneth P. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: The Role of Binding Arbitration*, 18 ENVTL. L. REP. 10158 (1988); Kevin Gaynor, *Stipulated Penalties and Dispute Resolution in CERCLA Consent Decrees: Practical Innovations Can Benefit Everyone*, 18 ENVTL. L. REP. 10155 (1988); Nancy Kubasek & Gary Silverman, *Environmental Mediation*, 26 AM. BUS. L.J. 533 (1988) (part of special issue on alternative dispute resolution); Richard H. Mays, *ADR and Environmental Enforcement: Myths, Misconceptions and Fallacies*, 19 ENVTL. L. REP. 10099 (1989); Richard H. Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?*, 18 ENVTL. L. REP. 10087 (1988); Charles Openchowski, *Changing the Nature of Federal Enforcement of Environmental Laws*, 17 ENVTL. L. REP. 10304 (1987); Sandra M. Rennie, *Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting, and Enforcement*, 19 ENVTL. L. REP. 10479 (1989).

¹⁰ See generally *Alternative Dispute Resolution: Environmental Law Section Initiates Community Service Project*, 59 ALA. LAW 259 (1998); *Alternative Methods of Resolving Environmental Disputes*, 2 VILL. ENVTL. L.J. 1 (1991) (panel discussion); Donald K. Anton et al., *Nationalizing Environmental Protection in Australia: The International Dimensions*, 23 ENVTL. L. 763 (1993); Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models From Other Laws Save our Public Lands?*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y. 193 (1996); Lawrence S. Bacow & Michael Wheeler, *Binding Parties to Agreements in Environmental Disputes*, 2 VILL. ENVTL. L.J. 99 (1991); Jonathan Brock, *Mandated Mediation: A Contradiction in Terms*, 2 VILL. ENVTL. L.J. 57 (1991); Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1 (1991); Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141 (1999); Leonard F. Charla & Gregory J. Parry, *Mediation Services: Successes and Failures of Site-Specific Alternative Dispute Resolution*, 2 VILL. ENVTL. L.J. 89 (1991); Jeff Civins, *Environmental Law Concerns in Real Estate Transactions*, 43 SW. L.J. 819 (1990); Stephen Crable, *ADR: A Solution for Environmental Disputes*, 48 ARB. J. 24 (1993); Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997); *Directory of Alternative Dispute Resolution Organizations*, 18 HAMLINE J. PUB. L. & POL'Y 281 (1997); Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305; Joel B. Eisen, *Brown Fields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883; Lori Kyle Endris & Wayne E. Penrod, *Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution*, 12 ST. JOHN'S J. LEGAL COMMENT. 125 (1996); Ms. Greco, *Alternative Dispute Resolution Working Group Reconvenes*, ARMY LAW., Sept. 1998, at 52; William N. Hederman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 ENVTL. L. REP. 10414 (1991); Joel S. Jacobs, *Compromising NEPA? The Interplay Between Settlement Agreements and the National Environmental Policy Act*, 19 HARV. ENVTL. L. REV. 113 (1995); Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 1 (1997); Barbara Hopkinson Kelly, *Alternative Dispute Resolution of Environmental Insurance Coverage Claims*, 691 PLI/COM. 511 (1994); Lynn A. Kerbeshian, *ADR: To be or . . . ?*, 70 N.D. L. REV. 381 (1994); Kelly A. Kinney & Andrea West Wortzel, *Environmental Law*, 32 U. RICH. L. REV. 1217 (1998); Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C.

inquiries such as "Environmental Mediation" or "Environmental Arbitration", yielded well over a hundred articles on the subject

ENVTL. AFF. L. REV. 239 (1991); Channing J. Martin, *Boards Will Draft ADR Regulations*, 2 VA. ENVTL. COMPL. UPDATE 6 (1998); Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57 (1995); NAAG to Host Training Seminar on Environmental Enforcement, NAAG Env'l Update, (1996); John Copeland Nagle, *The Missing Chinese Environmental Law Statutory Interpretation Cases*, 5 N.Y.U. ENVTL. L.J. 517 (1996); Mark J. Newman, *Alternative Dispute Resolution: The Literature in a Nutshell*, 4 LEGAL MALPRACTICE REP. 18 (1995); Mark J. Newman, *Alternative Dispute Resolution: The Literature in a Nutshell*, 3 LEGAL MALPRACTICE REP. 21 (1992); Mark J. Newman, *Alternative Dispute Resolution: The Literature in a Nutshell*, 4 LEGAL MALPRACTICE REP. 18 (1995); Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327 (1992); Elia V. Pirozzi, *Resolutions of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo*, 12 J. ENVTL. L. & LITIG. 371 (1996); Staci J. Pratt et al., *Alternative Dispute Resolution as a Means of Addressing Agricultural Pollution*, 20 HAMLIN L. REV. 395 (1996); Melanie J. Rowland, *Bargaining for Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVTL. L. 503 (1992); J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405 (1997); Jerome B. Simandle, *Resolving Multi-Party Hazardous Waste Litigation*, 2 VILL. ENVTL. L.J. 111 (1991); Ruby K. Sondock, *General Principles of ADR*, SA88 A.L.I.-A.B.A. 223 (1996); Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305 (1994); Dean B. Suagee & Patrick A. Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 AM. INDIAN L. REV. 297 (1997); William A. Tilleman, *Environmental Appeal Boards: A Comparative Look at the United States, Canada and England*, 21 COLUM. J. ENVTL. L. 1 (1996); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25 (1997); David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619 (1994); 1995-1996 Alphabetized Bibliography Entries, 12 OHIO ST. J. DISP. RESOL. 831 (1997) (1995-96 alphabetized bibliography entries); 11 OHIO ST. J. DISP. RESOL. 549 (1996) (alphabetized bibliography entries); David G. Carpenter, Note, *Superfund is Not Super Fun: Bringing Reg-Neg to Hanford*, 21 VT. L. REV. 677 (1996); Steven Felsental, Note, *Superfund Reauthorization: Program Funding, Dispute Resolution, Local Control and Tax Incentives*, 7 FORDHAM ENVTL. L.J. 515 (1996); Peter J. Johnson, Note, *Mr. Smith Goes to Washington: 1997 Superfund Amendments - Will it Solve the Liability Problems and How Will this Affect Massachusetts?*, 31 NEW ENG. L. REV. 1269 (1997); Graham C. Lilly, Commentary, *Skills, Values, and Education: The MacCrate Report Finds a Home in Wisconsin*, 80 MARQ. L. REV. 753 (1997); Elizabeth F. Mason, Comment, *Contribution, Contribution Protection and Nonsettler Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. ENVTL. AFF. L. REV. 73 (1991); Cynthia L. McNeill, Comment, *The States Square Off in Arkansas v. Oklahoma and the Winner is . . . The EPA*, 70 DENV. U. L. REV. 557 (1993); Nancy P. O'Brien, Note, *Arbitration Allocates Costs of Hazardous Waste Cleanup Claim Under Superfund*, 1991 J. DISP. RESOL. 347; Melissa Powell, Note, *A Case Study for Stakeholders: An Alternative to Traditional Hydroelectric Relicensing*, 18 ENERGY L.J. 405 (1997); Mark R. Privratsky, Comment, *A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska*, 75 NEB. L. REV. 91 (1996); Edward Brunet, *Blending State and Federal Administrative Law*, 75 CORNELL L. REV. 366 (1990) (book review); Diane R. Smith, *Easing the Pain for Disputants: Fundamentals of Environmental Mediation*, REMEDIATION, Autumn 1998, at 87.

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published during the 1990s. At the cusp of the new millennium, *la fin de deuxième millénaire*,¹¹ American law schools and law students are apparently obsessed with new ADR courses in the curriculum;¹² in

¹¹ For my initial, authoritatively confirmed mention of this French phrase, see Robert F. Blomquist, *Roots, Trunk, and Branches of Modern Environmental Law*, 5 BUFF. ENVTL. L.J. 503, 505 (1998) (book review) (defining *la fin de deuxième millénaire* as “the end of the millennium”).

¹² See, e.g., Carolyn Kleiner, *Wanted: Attorneys Who Know How to Make Peace, Not War*, in U.S. NEWS & WORLD REPORT BEST GRADUATE SCHOOLS 30-32 (2000) (1999). According to the author of this article:

The Perry Masons and Ally McBeals present a vastly distorted picture of how justice is meted out: just a fraction of legal matters are ultimately resolved in court – an estimated 4 percent of criminal cases and 5 to 10 percent of civil suits. For the rest, courts and clients alike are increasingly turning to “alternative dispute resolution,” or ADR. Virtually every state has experimented with some form of ADR, and the number of private arbitrations and mediations handled through the American Arbitration Association alone has nearly doubled in the past decade, to a projected 90,000 in 1998. As the use of less adversarial procedure spreads, lawyers in almost every type of practice – from environmental to family to international law – are being asked to adapt.

Until recently, any learning about these [ADR] procedures has occurred on the job But demand from both the marketplace and their students has prompted many law schools to add or beef up dispute-resolution curricula. In 1984, an American Bar Association survey found ADR coursework at 47 law schools; in 1997, the Organization’s [ADR Directory] listed more than 714 courses and clinics at 177 schools.

While Hollywood still prefers its lawyers locked in courtroom battle, it’s clear the real-world dilemmas will increasingly involve peacemakers. Jan Schlichtmann, the personal-injury lawyer whose toxic waste-dumping suit in Woburn, Massachusetts is chronicled in Jonathan Harr’s bestseller (now a movie), *A Civil Action*, was so disillusioned by his “nine years of war” that he fled the law for Hawaii. He’s now practicing again in Boston – and favors mediation.

Id. at 30-32.

For accounts of Jan Schlichtmann’s “war and peace” experiences during the aforementioned Woburn toxic waste litigation, see Robert F. Blomquist, *Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perceptions of the Law*, 81 CORNELL L. REV. 953 (1996) (book review); Jan Richard Schlichtmann, *To Tell the Truth*, A.B.A. J., Mar. 1999, at 100 (“The Woburn . . . litigation over industrial pollution taught me that the best way to achieve some measure of justice for victims is by sharing, not fighting.”).

For further recent books, reports and accounts about the popularity of ADR, in general, and Environmental ADR, in particular, see STEWART LEVINE, *GETTING TO RESOLUTION: TURNING CONFLICT INTO COLLABORATION* (1998) (discussing such collaborative principles of “conflict resolution” as being creative, being open to vulnerability, forming long-term collaborations, and fully disclosing information); Shell J. Bleiweiss & Kirk Emerson,

addition, environmental disputes and problems are growing more varied and involved year-by-year (with interest by disputants in pursuing non-litigation strategies). Accordingly, it certainly does not take a philosophically credentialed ontologist to conclude that the first word of our conference, entitled *Is Environmental Alternative Dispute Resolution Working in America?*, has a flourishing present state of Being.¹³

Coordinating Group on Alternative Dispute Resolution, 15 NAT. RES. ENERGY & ENVTL. L. 370, 370-71 (1998) (discussing the enactment into federal law in October, 1998, of the Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2293 (1998) and the Environmental Policy and Conflict Resolution Act, Pub. L. No. 105-156, 112 Stat. 9 (1998) which establishes the U.S. Institute for Environmental Conflict Resolution, to be operated within the Morris K. Udall Foundation in Tucson, Arizona); Hope Viner Samborn, *The Mediation is the Message: Lawyers Give Onscreen Meetings a Thumbs-Up for Settling Disputes*, A.B.A. J., May 1999, at 70 (discussing "'cybermediation,' using the Internet to conduct a settlement"); Robert A. Stein, *Better Ways to Bury the Hatchet*, A.B.A. J., Mar. 1999, at 90 (discussing that the ABA Section of Dispute Resolution offers support to the alternative dispute resolution community through its programs, conferences and publications) ("The [environmental] client wants to be involved in the process, and with ADR they are intimately involved.").

¹³ For diverse and varied examples of the present flourishing of Environmental ADR in America, see generally LAWRENCE SUSSKIND ET AL., *NEGOTIATING ENVIRONMENTAL AGREEMENTS* (1999) (discussing the "mutual gains approach," which the authors contend is a proven method of producing fairer, more efficient, more stable, and wiser results in the business environmental regulatory negotiation arena); Christopher H. Marraro, *Previewing 1999 Annual Conference on Environmental Law at Keystone*, 30 A.B.A. SEC. NAT. RES. ENERGY & ENV'T 3 (Jan./Feb. 1999) ("The increasing docket of environmental cases in the courts and in mediation requires [legal] practitioners to continually hone their advocacy skills and to be prepared for new types of environmental disputes."); *Industrial Ecology IV: The Profit in Sustainability - The Sustainability of Profit* (Conference Brochure, Global Futures Foundation), Apr. 29 - May 2, 1999 (discussing "collaborative" environmental industrial activity) (on file with author); The Third Annual J.B. and Maurice C. Shapiro Environmental Law Conference, *Is There a Need for a Body to Resolve International Environmental Disputes? Why, What, and How?* (Conference Brochure, The George Washington University School of Law), April 15-17, 1999 (on file with author); Vermont Law School, Environmental Law Center and the Dispute Resolution Project, at 3, Summer Session 1999 (on file with author).

The ability to address and manage disputes effectively and efficiently are essential skills for lawyers, nonlawyer advocates and managers in the public and private sectors. Increasingly, courts, legislators, public administrators and private parties have recognized that many disputes cannot be addressed adequately in litigation and may be better resolved through ADR processes that are less adversarial and more cooperative and flexible than litigation. Examples are environmental disputes involving multiple parties and sensitive public policy issues, civil disputes where practical or business considerations are a better basis for resolution than legal rules and disputes involving technical matters that can best be resolved with the assistance of neutrals with relevant expertise. As a result, ADR is becoming institutionalized, as evidenced by federal legislation authorizing and encouraging

So, of course, it is really no surprise to discern that the key word in our conference title is the adjective "working." Stated differently, despite the *quantity* and varied nature of Environmental ADR in America, what has been, is, and is likely to be in the future the *quality, efficacy, and efficiency* of these litigation alternatives in resolving our environmental disputes?

Part II of this Article conceptualizes some of the key theoretical issues that attend a comprehensive treatment of the overarching functional question posed above, dealing with the quality, efficacy, and efficiency of environmental ADR.¹⁴ Next, Part III will discuss various pragmatic questions which attend our exploration of whether or not Environmental ADR has been working, is working and will be likely to work in America.¹⁵ Finally, Part IV will offer some concluding thoughts on the future prospects of American Environmental ADR.¹⁶

II. THEORETICAL MATTERS

Despite its apparent popularity, the enterprise that we call Environmental ADR has developed without careful attention to theoretical foundations and presuppositions. In certain respects, this paucity of theoretical thinking is endemic in the general field of Alternative Dispute Resolution, of which Environmental ADR is only a part.

The Twenty-first Century proponents and practitioners of Environmental ADR need to provide a more robust account of five theoretical matters if Environmental ADR is going to live up to its full potential: (a) ethical soundness; (b) economic justification; (c) political legitimacy; (d) jurisprudential sustainability; and (e) systemic coherence.

A. Ethical Soundness

It is surprising that ADR, in general, has developed in diverse areas of the law (e.g., Family Law, Labor Law, Construction Contracts,

administrative agencies (like the EPA) to use ADR, Presidential Executive Orders directing administrative agencies and lawyers representing the government to be knowledgeable in the use of ADR and use it in appropriate cases, programs in state and federal courts integrating ADR into case management procedures and a pledge by 1,500 law firms to counsel their clients about ADR options.

Id.

¹⁴ See *infra* notes 17-46 and accompanying text.

¹⁵ See *infra* notes 47-65 and accompanying text.

¹⁶ See *infra* notes 66-67 and accompanying text.

Environmental Law, and International Law) without careful differentiation between disputes involving what have traditionally been viewed as questions of *Private Law* (e.g., Construction Contracts and Family Law), disputes involving what traditionally have been viewed as questions of *Public Law* (e.g., International Law) and hybrid disputes that mix certain ingredients of Private and Public Law (e.g., Labor Law). Because disputes are viewed differently, this oversight has created and exacerbated confusion and sometimes engendered acrimonious debate about the ethical soundness of Environmental ADR. If environmental disputes are viewed chiefly as disagreements between private actors (for example, which business firms among hundreds of potentially responsible parties should be liable for cleaning up abandoned hazardous waste sites), then the ethical claim of *teleologists*, who argue that "goodness dominates justice" and "the just act is that which is required to increase the Good,"¹⁷ would have presumptive priority over

¹⁷ KUKLIN & STEMPEL, *supra* note 6, at 6. The "best known form" of teleology is utilitarianism. As explained by the authors:

The utilitarian, like other teleologists, considers that which is of intrinsic value, the Good, to relate to a state of being. While utilitarianism has roots among the ancient Greeks, Jeremy Bentham, and eighteenth century Englishmen, is the modern father. He declared that the Good is happiness. This theory of the Good is categorized as hedonistic utilitarianism since happiness is a sensuous satisfaction. Other hedonistic utilitarian conceptions of the Good have been expressed in terms of pleasure or the avoidance of pain. Ideal utilitarians espouse non-hedonistic qualities such as those which have intrinsic worth, such as virtue, friendship, love, solidarity, knowledge, or aesthetic contemplation. Hedonistic utilitarians tend to adopt monistic theories of the Good (*i.e.*, that there is one basic quality with intrinsic value), while ideal utilitarians are often pluralistic (*i.e.*, that there is more than one). *The most common conception of the Good among current utilitarians is preference satisfaction.* It is good when an individual's own preference is satisfied. This version diverges from hedonistic ones because preference satisfaction may not be hedonistic, as when one prefers something that gives pleasure to no one.

Utilitarianism generally is aggregative and consequentialist (*i.e.*, acts are judged by their effects). In seeking the state of affairs in which goodness is maximized, **universal utilitarianism** typically aims for the greatest good for the greatest number. A state of affairs is better, under this version, when aggregated goodness (often expressed in terms of utility) is increased, even when some individuals suffer losses in order to facilitate greater gains by others. Under **egoistic utilitarianism**, on the other hand, a person strives to increase her own good, irrespective of effects on others Under both versions of utilitarianism in determining the proper action under the circumstances, the actor looks to the probable consequences of the options, doing a cost-benefit analysis of sorts to choose the option

the competing ethical claim of the *deontologists*,¹⁸ the other major modern school of moral theory. If, as an alternative, environmental disputes are viewed as primarily public questions of right and wrong (for example, whether a new, large chemical plant should be built that will provide hundreds of new opportunities for local residents, but that is projected to spew thousands of pounds of toxic chemicals into a nearby residential African-American neighborhood), then the ethical claim of *deontologists*, who assert that “justice dominates goodness” and that “the just act, one’s duty, is to be done even if it decreases the Good,”¹⁹ would have presumptive priority over the competing claim of *teleologists*. If, however, environmental disputes are properly viewed in context, with sensitivity to the unique facts and circumstances of each case, then there will be some situations where the Public Law Model predominates, some

which maximizes utility. In some sense, the ends justify the means. A just act increases utility.

Id. at 6-7 (emphasis added).

Philosophers have, as one might expect, leveled several criticisms against utilitarianism, while pointing out various complications that utilitarians must confront. See *id.* at 7-9.

¹⁸ See *infra* note 19 and accompanying text.

¹⁹ KUKLIN & STEMPEL, *supra* note 6, at 6. The “best known form” of deontology is Kantianism:

Immanuel Kant, an eighteenth century Prussian, is the leading figure among deontologists. He declared that the only thing that is of intrinsic value without qualification is a “good will,” or, basically, a worthy character. An individual’s character is good when she is conscientious, willing to do her duty for the sake of duty alone and not for other reasons such as generosity, sympathy or benevolence. While a good will is fundamental to Kant, his writings emphasize duty. In explicating duty, Kant espoused a universalizability principle, the first form of his famous **categorical imperative**: one should act pursuant to a maxim that could be willed or chosen as a universal law. A categorical imperative is a moral rule or law that is to be observed in all events, whereas a **hypothetical imperative** is a non-moral normative judgment, a rule or “counsel” of prudence that is to be observed only as a means to further a purpose of the actor, such as the rule that in order to write better, she should keep a dictionary by her side. While right action could be determined case by case . . . and some deontologists have adopted this approach of “situation ethics,” Kant argued that in doing one’s duty by acting according to universal rules without special exceptions, the actor existentially embodies or exhibits her essence, her humanness, her authenticity.

Id. at 9.

“The second form of Kant’s categorical imperative is that all persons, as rational beings with autonomy of the will, are to be treated as ends in themselves, and not as a means only to another’s ends. All humans, as ethical beings, are to be respected.” *Id.* at 10.

controversies where the Private Law Model holds sway, and some cases where there is a draw.²⁰

A checklist of further ethical issues in the realm of the future workability of Environmental ADR might include the following: (1) the relative merits and application of competing principles of *corrective justice*, on the one hand, and *distributive justice*, on the other;²¹ (2) the "is-ought or fact-value" chasm²² whereby, much as we would like to believe the contrary, mere assertion of facts "cannot alone justify normative propositions" because what ought to be done in a given dispute "can be

²⁰ In such "draw" situations, one could choose teleological moral approaches or deontological moral approaches, or, perhaps, "hybrid theories." See KUKLIN & STEMPEL, *supra* note 6, at 12. "Examples of the weaknesses [in these two competing approaches] reveal why neither one is generally accepted [by philosophers] in unalloyed form." *Id.* Therefore, several hybrid theories have been devised:

The first [is] . . . rule utilitarianism. General rules are adopted which usually promote the Good [A second hybrid theory] is to embrace one of the two basic theories except in cases where this would lead to moral catastrophe, as in the utilitarian hypothetical of contended slavery A third approach is to consider both utilitarian and Kantian mandates for particular acts and, when they conflict, to incorporate their relative thrust in the final determination of what to do.

Id.

²¹ *Id.* at 14.

Corrective justice, in Aristotle's translated words, "supplies a corrective principle in private transactions," both voluntary (e.g., contract) and involuntary (e.g., negligence). Sometimes called or associated with rectificatory, commutative or compensatory justice, among other labels, it generally declares that when one person injures or harms another through blameworthy conduct, the first should compensate the second. According to Aristotle, corrective justice requires one not only to make reparations for injuries from, say, negligence, but also to avoid harming another, for example, by knowingly inducing her to enter an ill-advised contract, though she has no legal remedy. Distributive justice "is exercised in the distribution of [public valuables such as] honor, wealth, and other divisible assets of the community." Each is to obtain in proportion to her merit. Today, distributive justice is thought to reach questions regarding the effects of legal rules and statutes regardless of whether they turn on merit, as well as criminal matters For example, if a court adopts the rule all smoke pollution is enjoined as a nuisance, the distributive consequences that wealth is effectively transferred from factory owners to neighboring homeowners, as easily seen in the scenario in which the factory must pay to install smoke stack scrubbers and the neighboring property values increase.

Id.

²² *Id.* at 17.

neither proved nor disproved [but]... only maintained;"²³ and (3) divergent views of feminist moral theory centering around Carol Gilligan's claim²⁴ and those that vigorously dispute her claim with "victimology" scenarios²⁵ that women "are more likely to speak in a different voice that emphasizes the importance of relations and interdependence among persons, and the need to communicate," thus "[t]rying to avoid moral conflict, or resolving it by compromise," including "mediation of the conflict by means of communication and interpersonal connection, rather than impersonal law and logic."²⁶

B. Economic Justification

It is often asserted by supporters of ADR, in general, and Environmental ADR, in particular, that alternative dispute resolution techniques are desirable, in large measure, because of the considerable savings that accrue from diverting cases from litigation to non-litigation modes of resolution. Yet, this is another theoretical area where serious theory is lacking due, in considerable part, to deficient empirical data.

Do we have a reasonably good idea, for example, whether or not Environmental ADR meets the Efficiency Criterion: the epicenter of economic theory? "Efficiency questions turn on the costs and benefits of the particular assignment of resources. A more efficient allocation is one that increases their net value."²⁷ Indeed, "[i]f one individual values a resource more than does another person, then overall personal satisfaction is increased when the first person obtains it."²⁸ Little attention has been paid to this vital concern and so we have, at best, a primitive understanding of whether or not Environmental ADR is efficient, whether particular kinds of Environmental ADR are efficient, or whether the resolution of using specific disputes Environmental ADR techniques are efficient.

²³ *Id.* at 18.

²⁴ See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

²⁵ KUKLIN & STEMPER, *supra* note 6, at 21. Some feminists question Gilligan's theory that women "speak in a different voice" and seek to avoid conflict, as part of their nature as women. *Id.* In this regard, Gilligan's critics "question whether this different voice is not simply that of an oppressed person. If women were not subordinated in a social and legal hierarchy established and maintained by men, they ask, what would be the true, undominated voice of women?" *Id.*

²⁶ *Id.*

²⁷ *Id.* at 29.

²⁸ *Id.* at 29-30.

Related, of course, to the Efficiency Criterion in economic theory is the matter of transaction costs which includes the costs of organizing to resolve a dispute, paying both neutrals and advocates for the parties to resolve it, the opportunity costs of being prevented from doing something else while one is involved in the dispute, and various other costs.²⁹ Yet, at this juncture, the extant literature on Environmental ADR is crude in delineating comparative transaction costs between litigation, on the one hand, and ADR, on the other. More serious work needs to be done.

C. Political Legitimacy

Although there has been much heat in theoretical musings about the political legitimacy of Environmental ADR, and ADR in general, there has, unfortunately, been little light placed on the subject. Adjudicative-oriented opponents of ADR are quick to assert that ADR, as opposed to governmentally-supervised courtroom procedures, tends to favor the party or parties with the greatest resources, whereas traditional litigation is more evenhanded.³⁰ In this regard, "[s]everal legal scholars have suggested that ADR offers either lower quality justice or differs sufficiently from litigation to affect case outcomes."³¹ Attempting to answer these critics, "[d]efenders of ADR counter that [their opponents] have . . . failed to prove that ADR results in different outcomes" (in

²⁹ See *id.* at 37. Transaction costs consist of several potential discrete costs including information costs, opportunity costs and administrative costs. *Id.* at 42.

³⁰ See, e.g., Delgado, *supra* note 10.

³¹ KUKLIN & STEMPEL, *supra* note 6, at 127.

For example, federal judges have life tenure and are screened by the Justice Department and the U.S. Senate. Courts operate with defined procedural rules as well. In addition, appellate review also acts as a quality control device. Critics of ADR see it as less likely to produce neutral or wise outcomes because it lacks these [political] attributes. Consequently, they fear that winners and losers will be determined as much by forum selection as by the merits of the dispute, particularly if arbitrators or mediators tend to favor certain classes of litigants. To the extent that certain litigants can steer disputes to more favorable forums, they find this [politically] troubling. If, for example, large retailers or stock brokers can require consumers to sign arbitration clauses in order to do business and arbitration routinely favors the brokers and retailers, ADR has then become a means of redistributing wealth in society. Thus, these critics of (or skeptics regarding) ADR may argue that judicial scrutiny of ADR agreements and outcomes should be increased and that the current norm of judicial deference is unwise.

Id.

effect, asserting that those who favor the *status quo* of adjudication have the burden of proof) and, "have mistakenly assumed that the judicial result is preferable, making any distinction tautologically defined as 'bad' or 'inferior'."³²

Part of the theoretical problem is that those who debate the relative political merits or demerits of ADR do not expressly acknowledge how one's subjective political stance, whether libertarian,³³ conservative,³⁴ liberal,³⁵ communitarian,³⁶ or combinations thereof, color one's view of

³² *Id.*

Supporters of ADR often question whether court outcomes are correct. Many argue, for example, that arbitration generally brings better substantive results, particularly when the matter arbitrated involves technical disputes The arbitrators often have expertise judges lack. ADR proponents deny that arbitrators or mediators are more likely than judges to be biased. Other proponents of ADR acknowledge that devices such as arbitration have fewer procedural safeguards and may miss some information when compared to full-dress litigation but view this [through a hybrid of economic and political lenses] as a respectable tradeoff in light of the claimed lower costs and faster processing time of arbitration and other ADR hybrids.

Id.

³³ *Id.* at 64.

As implied by the label, libertarians stress the claims to personal freedom or liberty. They sometimes call themselves the "true liberals." They usually agree with Locke that individuals in the state of nature . . . are totally free and equal. Each has the natural right to life, liberty and property. Libertarians usually also are Kantians and urge respect for another individual's autonomy. Treat all persons as ends in themselves, and not as means only to another's end. The Kantian vein leads libertarians to abhor the utilitarian claim that individuals may be used for the greater good of society.

Id.

³⁴ *Id.* at 65.

There are substantial differences among those who hold themselves out as conservatives. Some common threads can be identified. Conservatives tend to be liberty-oriented, and hence anti-egalitarian, and advance an ordered hierarchical view of society strongly supportive of private property rights. Though most generally favor a limited government, some conservatives would allow the government an expansive role.

Id.

Variations of conservatives include Lockean conservatives, Smithian conservatives, and Burkean conservatives – named, respectively, after the varying conservative views of John Locke, Adam Smith, and Edmund Burke. *Id.* at 65-69.

³⁵ *Id.* at 69.

The term "liberal," because of its linkage to the idea of liberty which is of prime concern to libertarians and Lockean conservatives, has been

ADR. As a rough rule of thumb, “[a]s one moves from Libertarian to Communitarian, one generally finds more tolerance of increased governmental functions,”³⁷ and, therefore, presumably more tolerance for traditional, governmentally-supervised litigation and presumably less tolerance for innovative, novel, and privately-ordered alternative dispute resolution techniques. But, as one team of commentators has written, “this rule of thumb must be applied cautiously Politics leads to curious alliances.”³⁸

D. Jurisprudential Sustainability

ADR, in general, and Environmental ADR, in particular, pose unresolved theoretical problems of what I call jurisprudential sustainability. In other words, the widespread use of ADR in American society has developed and evolved over the last few decades in an almost willy-nilly fashion. Little, if any, serious thought has yet to be given to three critical areas *vis-à-vis* ADR: (1) a theory of the nature of the interrelationship between legal concerns and moral concerns and what justice may require at the intersection of these concerns; (2) a theory of interpretation, with particular attention to questions of interpretative authority and techniques, including problems of the conventions of interpretation and the meaning of words, in addition to the discretion or constraint to be exercised by interpreters (who may on the one hand be ADR neutrals, either trained in law or not, or on the other hand, judges – trained in the law – reviewing the ADR neutral’s

used to describe a broad range of political philosophies. To distinguish the right wing meanings from the left wing ones, the current use of “liberal” in America is often clarified by the label “welfare state liberal.” This title cuts to the heart of the main unifying feature of this liberalism: it advocates a meaningful amount of welfare for those in need, significantly above the safety net of conservatism.

Id.

³⁶ KUKLIN & STEMPEL, *supra* note 6, at 70.

Communitarians challenge the view that the state is to remain neutral with respect to the Good. First, neutrality is itself a value and thus implicates a value choice at square one. Second, communitarians take a step beyond the liberal critique of the notions of individual responsibility and merit. They see the individual as even further from totally autonomous, instead, as embedded in, and defined by, the community. A person is a product of her molding environment. Consequently, the justification of political organizations must acknowledge common aims the Good.

Id.

³⁷ *Id.* at 64.

³⁸ *Id.*

interpretation); and, (3) a theory of the subsuming role of adjudication in affecting the behavior of a cast of ADR legal actors, from disputants to advocates, from mediators to arbitrators, from trial court judges to appellate court judges.³⁹

Moreover, the long-term jurisprudential sustainability of Environmental ADR in America is further at risk because of the relative impoverished state of knowledge at present about how various disciplines outside the law influence, or can conceivably influence, the resolution of disputes. For instance, what can religion teach us about how to appropriately resolve disputes regarding God's Creation?⁴⁰ What can literature teach us about how to channel conflicts over nature and reconcile opposing parties, or how to interpret pertinent environmental texts, like statutes and regulations?⁴¹ Furthermore, this jurisprudential sustainability of Environmental ADR is problematic now because of confusion over the role of precedent⁴² in various ADR contexts, such as arbitration and mediation, and uncertainty about the role of indeterminacy in reaching a particular result (i.e., whether the law, indeed, constrains ADR decision-making or review or whether all ADR cases are hard cases and open to wide variations in results).⁴³

E. Systemic Coherence

As explained by one legal thinker, "[a]n idea or theory is coherent if it hangs or fits together, if its parts are mutually supportive, if it is

³⁹ For an excellent discussion of the elements of jurisprudence, see *id.* at 139-40.

⁴⁰ See *id.* at 172.

⁴¹ See KUKLIN & STEMPER, *supra* note 6, at 173. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) (discussing, among other things, how the evolution of legal rules is akin to the writing of a "chain novel"); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980) (discussing how "interpretative communities" debate and discuss texts in various situations); RICHARD A. POSNER, *LAW AND LITERATURE* (1988).

⁴² See generally Larry Alexander, *Precedent*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 503 (Dennis Patterson ed., 1996).

⁴³ See generally Lawrence B. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 488 (Dennis Patterson ed., 1996):

[The indeterminacy claim] has been associated with two schools of legal theory, the critical legal studies movement and legal realism, although many scholars associated with the contemporary legal studies movement do not believe that a radical critique of law should involve claims about legal indeterminacy. The strongest version of the claim is the notion that any result in any legal dispute can be justified as the legally correct outcome, but the thesis can be modified or weakened in various ways.

Id.

intelligible, if it flows from or expresses a single, unified viewpoint."⁴⁴ In contradistinction, "[a]n idea or theory is incoherent if it is unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another."⁴⁵

I fear, in closing my sketch of five theoretical problems confronting modern Environmental ADR, that the entire enterprise suffers from a decided tilt toward incoherence. While this problem is serious in its own right, it also has second-order consequences; to wit, the probable impact of an incoherent Environmental ADR "system" of processes of dispute resolution on the pre-existing incoherent and fragmented substance of Environmental Law in America.⁴⁶

III. PRAGMATIC CONSIDERATIONS

Having conceptualized, at some length, five theoretical issues that go to the heart of whether Environmental Alternative Dispute Resolution is working in America,⁴⁷ I turn now to what I term five pragmatic considerations about the prospects of Environmental ADR. I will very briefly sketch the following five pragmatic issues of our conference topic: (a) Environmental ADR in Cyberspace and beyond as a metaphor for the future of ADR; (b) training of neutrals and participants; (c) process choices and assumptions; (d) green "psychotherapy", healing and psychobabble; and, (e) bargains, breaches, and enforcement issues.⁴⁸

A. *Environmental ADR in Cyberspace and Beyond*

As pointed out by Professor Joel B. Eisen in a recent law review article, "[t]he idea of mediating [or conducting other forms of ADR to resolve] disputes online has captured the imagination of the dispute resolution profession."⁴⁹ According to these fervent technical optimists:

⁴⁴ Ken Kress, *Coherence*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 533 (Dennis Patterson ed., 1996).

⁴⁵ *Id.*

⁴⁶ See J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 16-19 (1998) (discussing the fragmentation, overlaps and inconsistencies of American environmental law).

⁴⁷ See *supra* notes 17-46 and accompanying text.

⁴⁸ I am particularly indebted to the recent law review article by Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, for spurring my own thinking on these pragmatic issues.

⁴⁹ *Id.* at 1305.

Mediators propose creating “spaces” in cyberspace, where disputes would be resolved electronically. Online mediation is not the stuff of mere conjecture. Experiments are already underway on a small scale, and it is likely that more online mediation will take place. Cyberspace seems especially well-suited to a process that allows parties to resolve disputes without resorting to formal law. Because the Internet makes direct links of communication available to anyone, it empowers its users to bypass existing legal institutions.⁵⁰

From a pragmatic perspective, one might label this issue as the problem of *Techniospeak*. Rooted in America’s seemingly continuing fascination with new gadgets, new technologies, and new machines, the *Techniospeak* of ADR proponents is pragmatically flawed in several respects. First, “[e]lectronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation. Given the profession’s current orientation to listening and processing oral information, mediators would find it largely impossible to translate their skills to the online setting.”⁵¹ Second, “[t]he predominantly written character of the online mediation proceeding would create communication breakdowns; this is ironic, as mediators claim disputants’ inability to communicate is precisely why mediation is necessary in the first instance.”⁵² Third, “using computers for decision-making raises fundamental concerns about societal ordering in the technological age. Online mediation could cede substantial authority for

⁵⁰ *Id.* at 1305-07. As observed by Professor Eisen:

Among dispute resolution professionals, there is an almost limitless optimism about online mediation’s potential. One article confidently asserts that, “In a relatively short amount of time, we will have ‘virtual’ ongoing mediation and other confidential decision making forums on the Internet” Another proponent claims mediators could create “a virtual [dispute resolution] architecture that reflects our profession’s highest aspirations.” Mediators assert online dispute resolution can be done with today’s technology. They believe it will save the parties’ money (particularly travel costs), foster enhanced communication among participants, and reduce the emotional temperature of disputes.

Id. at 1307-08.

⁵¹ *Id.* at 1308.

⁵² *Id.*

decision-making to those who have familiarity with computers and their use."⁵³

From a more synoptic, pragmatic perspective, the purported panacea of Cyberspace ADR technologies and non-stop *Techniospeak* justifications for Cyberspace ADR are seriously fractured by a fundamental lack of foundational knowledge regarding the theory and praxis of ADR.⁵⁴ Moreover, in complex proceedings involving Environmental ADR, there is little valid data about how and why environmental disputes settle; in addition, no one has shown how Environmental ADR can be consistently successful in environmental cases, which often involve "numerous parties or factions"⁵⁵ or the existence of "ideologically based disputes."⁵⁶ Extrapolating into the future, therefore, should lead us to conclude that new technological developments alone, like the emergence of Artificial Intelligence machines, do not automatically mean that new technology can be usefully employed, in an Environmental ADR setting, to genuinely resolve the dispute.

B. Training of Neutrals and Participants

Is it likely that effective and efficient Environmental ADR proceedings will take place without proper training of both the neutrals (i.e., the mediators, arbitrators, conciliators, etc.) as well as the participants (i.e., the environmental group members, local, state and federal government disputants, corporations, etc.)? At least with regard to the neutrals, it would seem that the answer to the previous rhetorical question is "no"; in environmental disputes, some have pointed out that it is "critical" that ADR neutrals, like a mediator, "have both expertise in dispute resolution techniques and understanding of complex... environmental laws."⁵⁷

The empirical results of the impact of ADR training, the definition of proper ADR training, and the successful or unsuccessful outcomes of

⁵³ *Id.* at 1308-09.

⁵⁴ See *supra* notes 1-46 and accompanying text.

⁵⁵ Eisen, *supra* note 48, at 1319. See also Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Court?*, 10 COLUM. J. ENVTL. L. 1, 7 (1985) (citing ALLAN R. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* 91 (1983) (pointing out that only about ten percent of all environmental disputes are suitable for ADR)).

⁵⁶ Eisen, *supra* note 48, at 1319.

⁵⁷ *Id.* at 1332.

Environmental ADR disputes in light of the training are pragmatic questions that remain substantially unanswered.

C. Process Choices and Assumptions

What is or are the basic model or models for Environmental ADR? For Environmental Mediation? For Environmental Arbitration? The pragmatic reality is that Environmental ADR practitioners and participants cannot agree on a basic model of Environmental ADR or any of its more particular processes like Environmental Mediation or Environmental Arbitration.⁵⁸ Unfortunately, as one commentator has pointed out, "the choice of process does matter" since process decisions often influence the outcome of various ADR proceedings.⁵⁹ Moreover, ADR neutrals, like mediators, "are often unaware of the process assumptions they make and how they affect the disputants."⁶⁰

D. Of Green Therapy, Healing and Psychobabble

An article of faith among many ADR professionals, particularly those who focus on mediation, is that the processes pursued by ADR in face-to-face meetings with opposing parties are "therapeutic" and "cathartic."⁶¹ "Mediation participants often value the transformative and reconciliatory potential of ADR more than the adversary process of litigation."⁶² Moreover, proponents of mediation, for example, contend that "[m]ediation can be about healing, educating, informing, and persuading. It can open lines of heartfelt interpersonal communication where none have existed, allowing parties to transform and recharacterize the nature of their dispute."⁶³ At the same time, "[i]t can develop a base for the parties' future relationship and can help them create empathy for one another."⁶⁴ For some, the mediation process is said to be "therapeutic" whereby "mediation is about the 'venting' of

⁵⁸ *Id.* at 1312.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1312 n.38 (citation omitted).

⁶¹ Eisen, *supra* note 48, at 1322 (citing, *inter alia*, Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 41; Paul J. Zwier & Dr. Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383, 386 (1996) (discussing how mediation can best be understood as involving "a relational ethic which views the primary moral concern as one of creating and sustaining responsive connection to others")).

⁶² *Id.* at 1322.

⁶³ *Id.* at 1322-23.

⁶⁴ *Id.* (footnote omitted).

feelings and emotions that they would be unable to express in a formal setting such as a courtroom."⁶⁵

Applying the aforementioned set of beliefs to the environmental setting might lead us to assume that a form of "green healing" and "therapy" is a valuable offshoot of the Environmental ADR process – particularly Environmental Mediation. But where is the data? Where are the empirical studies as opposed to the touchy-feely psychobabble? Indeed, this issue of efficacy and efficiency of Environmental ADR in helping to achieve a more "healing," and implicitly more desirable, outcome than run-of-the-mill litigation is a pragmatic consideration that needs more attention in the next century.

E. Bargains, Breaches and Enforcement

A fifth, and final, pragmatic consideration regarding the state of Environmental ADR in America is the two-pronged question of first, whether and to what extent ADR bargains or resolutions are complied with by the parties and, second, what happens when there is a breach? Further research would seem to be advisable in comparing the need, efficiency and efficacy of follow-up enforcement of Environmental ADR bargains or outcomes, on the one hand, and similar parameters of follow-up enforcement of litigation-consummated requirements, on the other hand.

IV. CONCLUSION

Environmental ADR is no longer an infant industry phenomenon. Indeed, it is now entering middle age. As with our own analogous "midlife crises," Environmental ADR is entering a period of necessary introspection and re-examination of basic principles.

In my remarks, which open our conference on *Is Environmental Alternative Dispute Resolution Working in America?*, I have raised two parallel lines of interpretation and reexamination which, I contend, would help Environmental ADR emerge better and stronger from its "midlife crisis." Initially, I talked about five theoretical matters concerning Environmental ADR that need more attention and foundational refurbishing: (a) ethical soundness; (b) economic

⁶⁵ *Id.* at 1323 (footnote omitted).

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justification; (c) political legitimacy; (d) jurisprudential sustainability; and (e) systemic coherence.⁶⁶

Then I sketched five pragmatic considerations about Environmental ADR's functional and factual characteristics that currently lack good empirical data: (a) technology's impact on emerging forms of Environmental ADR like ADR in cyberspace; (b) the state and quality of training for Environmental ADR neutrals and participants; (c) process choices and assumptions; (d) therapeutic assumptions; and (e) enforcement needs regarding non-compliance with ADR "bargains" or "decisions."⁶⁷

Will Environmental ADR emerge stronger, more resilient, more attractive than traditional litigation, better at fairly resolving environmental disputes, more efficient and efficacious than courtroom battles? Only time will tell. But our remaining speakers on the program for today will give us some hints.

⁶⁶ See *supra* notes 17-46 and accompanying text.

⁶⁷ See *supra* notes 47-65 and accompanying text.