Fordham Law Review

Volume 88 | Issue 6 Article 10

2020

Does ADR Feel like Justice?

Jennifer W. Reynolds
University of Oregon School of Law

DOES ADR FEEL LIKE JUSTICE?

*Jennifer W. Reynolds**

INTRODUCTION

Thanks to media and social media, many disputes today have a public dimension. Spectators to these disputes—people with varying levels of involvement or interest in the subject of the disputes at hand—get pulled into what is happening by way of the internet and through a kaleidoscope of news stories, comments, tweets, posts, Snapchats, and other rapidly changing media. What these spectators experience is simultaneously real and imaginary. Their experiences are real insofar as they are grounded in actual events, embody institutional commitments and personal values, and lead to some measure of investment in one or more positions in the dispute. Their experiences are imaginary in that they exist largely within the mind—they take place primarily inside the space between person and screen and, to the extent that perceptions and opinions around these public disputes are shared, they are frequently shared in virtual contexts with unseen and often unknowable others, some of whom may not be real people and others of whom may seek only to exacerbate divisiveness and tensions.[1]

Elsewhere, I have defined these kinds of real/imaginary disputing experiences as characteristic of "snap disputes."[2] Snap (standing for "social networks amplifying polarization") disputes are highly charged public controversies that have a substantial online dimension.[3] Because "being online" is at once an individual and collective experience, snap disputes are intensely personal while also constantly subject to escalation and manipulation by outside actors.[4] Typical snap disputes involve extremely

* Associate Professor, University of Oregon School of Law; J.D., Harvard Law School; M.A., University of Texas at Austin; A.B., University of Chicago. This Article was prepared for the Symposium entitled *Achieving Access to Justice Through ADR: Fact or Fiction?*, hosted by the *Fordham Law Review*, Fordham Law School's Conflict Resolution and ADR Program, and the National Center for Access to Justice on November 1, 2019, at Fordham University School of Law. Many thanks to the wonderful editors of the *Fordham Law Review* and the inspiring participants in the Symposium. And as always, I am grateful for the support of the University of Oregon School of Law.

1. *See, e.g.*, Annalee Newitz, Opinion, *'Star Wars' Fans Are Angry and Polarized. Like All Americans*, N.Y. TIMES (Dec. 24, 2019), https://www.nytimes.com/2019/12/24/opinion/star-wars-rise-of-skywalker.html [https://perma.cc/U45Y-2KRZ].

2. Jennifer W. Reynolds, *Snap Disputes*, 25 HARV. NEGOT. L. REV. 37, 45 (2019).

3. *Id*. at 43–44.

4. *See, e.g.*, Emily Stewart, *Why Everybody Is Freaking Out About Political Ads on Facebook and Google*, VOX (Nov. 27, 2019, 8:00 AM), https://www.vox.com/

strong emotions, perceived threats to identities and values, and hotly contested claims to truth.[5] They are characterized by anger and fear, often manifesting as exceedingly simplified us-versus-them stances and all-or-nothing rhetoric.[6] Snap disputes are implicated in modern sociopolitical trends that are sometimes described as the "scissor algorithm,"[7] the "culture of outrage,"[8] the "culture of cruelty,"[9] the "vampire castle,"[10] the "purity spiral,"[11] "cancel culture,"[12] "bubbles"[13] of divergent media sources, and the widespread disinformation and discord created by trolls and meddlers.[14]

---

recode/2019/11/27/20977988/google-facebook-political-ads-targeting-twitter-disinformation [https://perma.cc/424X-CDKL].

5. *See* Reynolds, *supra* note 2. Snap disputes might be thought of as extreme versions of difficult conversations. *See id.* at 40; *see also* DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 21–128 (2010).

6. *See* Adam Rothman, *'Tribalism' Doesn't Explain Our Political Conflicts*, WASH. POST (Nov. 14, 2018, 12:53 PM), https://www.washingtonpost.com/outlook/2018/11/14/tribalism-doesnt-explain-our-political-conflicts/ [https://perma.cc/PR9Z-KQRJ].

7. *See* Ross Douthat, Opinion, *The Covington Scissor*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/opinion/covington-catholic-march-for-life.html [https://perma.cc/U87Y-WP9X] (discussing the short story "Sort by Controversial").

8. *See, e.g.*, Nancy Rommelmann, Opinion, *Op-ed: Outrage Culture Is out of Control*, L.A. TIMES (Feb. 22, 2019, 3:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-rommelmann-me-too-portland-20190222-story.html [https://perma.cc/3JKH-H3AN].

9. *See, e.g.*, Chesley B. Sullenberger III, Opinion, *Capt. 'Sully' Sullenberger: Like Joe Biden, I Once Stuttered, Too. I Dare You to Mock Me*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/opinion/sully-biden-stutter-lara-trump.html [https://perma.cc/QMH9-9HMM].

10. *See* Mark Fisher, *Exiting the Vampire Castle*, OPENDEMOCRACY (Nov. 24, 2013), https://www.opendemocracy.net/en/opendemocracyuk/exiting-vampire-castle/ [https://perma.cc/PLX5-GYT9].

11. *See, e.g.*, Gavin Haynes, Opinion, *How Knitters Got Knotted in a Purity Spiral*, UNHERD (Jan. 30, 2020), https://unherd.com/2020/01/cast-out-how-knitting-fell-into-a-purity-spiral/ [https://perma.cc/M5VU-U26T].

12. *See* NicholsSA, *Cancel Culture*, URB. DICTIONARY (Aug. 29, 2019), https://www.urbandictionary.com/define.php?term=Cancel%20Culture [https://perma.cc/45DW-93K8]; *see also* Osita Nwanevu, *The "Cancel Culture" Con*, NEW REPUBLIC (Sept. 23, 2019), https://newrepublic.com/article/155141/cancel-culture-con-dave-chappelle-shane-gillis [https://perma.cc/8LXR-FTWQ]; Emily S. Rueb & Derrick Bryson Taylor, *Obama on Call-Out Culture: 'That's Not Activism,'* N.Y. TIMES (Oct. 31, 2019), https://www.nytimes.com/2019/10/31/us/politics/obama-woke-cancel-culture.html [https://perma.cc/ZR3Z-2FMF].

13. *See, e.g.*, Wendy Rose Gould, *Are You in a Social Media Bubble?: Here's How to Tell*, NBC NEWS (Oct. 21, 2019, 1:06 PM), https://www.nbcnews.com/better/lifestyle/problem-social-media-reinforcement-bubbles-what-you-can-do-about-ncna1063896 [https://perma.cc/7RTV-NENH].

14. *See* LEO G. STEWART ET AL., EXAMINING TROLLS AND POLARIZATION WITH A RETWEET NETWORK 1 (2018) ("This analysis shows that these conversations were divided along political lines, and that the examined trolling accounts systematically took advantage of these divisions."). *See generally* WHITNEY PHILLIPS, THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE (2015); Conor Friedersdorf, *Trump and Russia Both Seek to Exacerbate the Same Political Divisions*, ATLANTIC (Jan. 23, 2018), https://www.theatlantic.com/politics/archive/2018/01/trump-russia-twitter/551093/ [https://perma.cc/MAH4-HXG8]; Joel Stein, *How Trolls Are Ruining the Internet*, TIME (Aug. 18, 2016), http://time.com/4457110/Internet-trolls/ [https://perma.cc/F8PE-DKEA].

Snap disputes play out through the media and, as such, they create and are created by what we might call "spectacles of conflict." Conflict spectacles are high-profile stories about people in disputes—people who may or may not be famous having disagreements that may or may not be important. Watching these conflict spectacles unfold provides more than just news or entertainment. When people watch conflict spectacles, they inevitably learn things about the nature of conflict and conflict resolution. They see how certain behaviors play to different audiences. They observe what happens to disputants who take one approach or another. They watch the (online or in-person) reactions of people they admire and people they do not admire, which may induce them to adjust their own thinking about the conflict so that they are more closely aligned with particular people or groups.[15] They draw conclusions around what kinds of conflict-related behaviors are normal, what tactics seem to work, what actions are ineffective, and what successful resolution looks like.

With this in mind, it is worth considering what people may be learning from conflict spectacles in the age of snap disputes, especially in the context of justice systems and access concerns. Beliefs around conflict—causes, effects, winning strategies, losing behaviors, successful resolutions—cannot help but affect how people think about the necessity of war, the possibility of peace, the humanity of the Other, the responsibility to self and to community, the status of one's own beliefs about how the world works, and the meaning of justice.[16] On this last point, what people believe about justice will affect whether they think that existing structures and institutions can provide justice. Questions about access to justice, therefore, must take into consideration not only what actual processes and support are available but also what people feel will provide justice, based on what they have gleaned from the various conflict spectacles they watch every day.

For those working in alternative dispute resolution (ADR), the notion that people are learning about conflict from modern conflict spectacles is rather horrifying.[17] Conflict resolution professionals have worked for decades to contribute meaningfully to justice and access to justice, and the prospect of losing ground in these important arenas because of recent and unprecedented

15. *See, e.g.*, Cameron Brick & Sander van der Linden, *How Identity, Not Issues, Explains the Partisan Divide: New Research Has Disturbing Implications*, SCI. AM. (June 19, 2018), https://www.scientificamerican.com/article/how-identity-not-issues-explains-the-partisan-divide/ [https://perma.cc/Y72A-PJW8].

16. In other words, spectacles of conflict create a cultural narrative or dominant discourse that tends to limit and define what people believe is possible in conflict. *See, e.g.*, SARA COBB, SPEAKING OF VIOLENCE: THE POLITICS AND POETICS OF NARRATIVE IN CONFLICT RESOLUTION 52 (2013) ("[Conflict] narratives seal themselves off from transformation . . . because the narrative itself advances a plot that locates responsibility for action in conditions that are beyond the purview of human beings.").

17. For example, the *Negotiation Journal* recently published a special issue devoted to negotiation and conflict resolution in the age of President Trump. *See generally* Joel Cutcher-Gershenfeld et al., *Editor's Note*, 35 NEGOT. J. 5 (2019) (explaining that "Trump's approach challenges many of the core precepts that have emerged in the fields of negotiation and conflict resolution over the last fifty years").

rises in regressive approaches to conflict is deeply troubling. This Article contends that modern conflict spectacles, fueled by snap disputing dynamics and foisted upon the polity through media and social media, are so far afield from traditional ADR principles and practices that they may keep ADR from "feeling" like justice to many people. How people feel about alternative practices and processes will have an impact on whether they avail themselves of those methods in their own disputes. In other words, even if we had widely available, high-quality, and free ADR services available to everyone, we might still have an access to justice problem because those services would not be seen as providing justice.

I. ILLUSTRATION OF THE PROBLEM

Public Figure A and Public Figure B are accused of sexual misconduct. The accusations are unrelated, although for both men the alleged misconduct happened years earlier and has generated a great deal of publicity and criticism. Moreover, in both cases, there is some evidence but no way of definitively ascertaining the "full truth" of what happened. Certainly each man will have his own private reactions and concerns around how to handle the situation. Further, given that they are public figures, both men must make public responses to the allegations. What should these responses be?

Obviously, this is a fraught question. It has always been difficult to navigate public conflicts related to sexual misconduct, and it is especially hard in the #MeToo era.[18] Alleged wrongdoers not only must manage their own reactions—they may believe they did nothing wrong, may know they are responsible, or may not remember one way or another—but also must often respond to multiple audiences whose interest and involvement in the conflict vary greatly.[19] This is especially true for public figures, who know or should know that the spectacle of their conflicts, as communicated through media and social media, will affect public norms around what acceptable conflict responses look like.[20] In other words, what Public Figures A and B choose to say publicly will have an impact not only on themselves, the people involved in the situations, and their own constituents but also on the broader community. How they respond in public affects the seriousness with which we as a society handle claims of sexual abuse, the assumptions we make about who is telling the truth, and the general landscape of conflict patterns and expectations related to dispute processing.

In this particular example, Public Figure A takes what might be considered a relatively enlightened approach in his public response, doing the sorts of things that dispute resolution experts typically would recommend: he

18. *See, e.g.*, Joan C. Williams, *Five Rules for the Office in the #MeToo Era*, FIN. TIMES (Oct. 17, 2018), https://www.ft.com/content/216537ca-d1f7-11e8-a9f2-7574db66bcd5 [https://perma.cc/97MW-FJXX].

19. *Id.*

20. *See, e.g.*, Kenneth T. Walsh, *The Missing Role Models*, U.S. NEWS & WORLD REP. (Dec. 1, 2017, 6:00 AM), https://www.usnews.com/news/the-report/articles/2017-12-01/there-are-no-role-models-left-in-politics [https://perma.cc/GHS9-92Z2].

acknowledges the seriousness of the allegations; apologizes; demonstrates his interest in seeking opportunities to listen and engage in dialogue; provides information about his perspective, experiences, and contributions; and expresses empathy and remorse.[21] "I'm a warm person; I hug people," he tweets. "I've learned from recent stories that in some of those encounters, I crossed a line for some women—and I know that any number is too many."[22]

Public Figure B goes in a different direction. He responds to the accusations against him with outrage, categorically denying any wrongdoing.[23] In a hearing before the Senate, he appears angry and aggrieved.[24] He speaks loudly and emotionally, sometimes shouting, and refuses to entertain the possibility that he may not remember all the details surrounding the decades-old events giving rise to the accusations.[25] Instead, he insists that he is the real victim here, the target of nefarious operatives engineering the accusations as part of a political smear campaign.[26] "My family and my name have been totally and permanently destroyed by vicious and false additional accusations," he testifies.[27]

Which of these approaches is better? From the perspective of the conflict specialist, Public Figure A handled the public dimension of the conflict more successfully than Public Figure B. It is important to pause here and emphasize that this is true *regardless of the actual culpability of either man*. It is often the case that disputants have very different stories about the same event.[28] This does not mean that someone is lying, although someone might be; it just means that there is nothing unusual about situations in which people strongly disagree about what happened. In such situations, conflict experts recommend taking an empathetic approach, seeking to learn how the other person sees the world.[29] Notably, this does not mean agreeing with the other person but rather attempting to figure out what data, assumptions, and beliefs are informing his or her conclusions around what happened. When people have different memories or beliefs about the truth, the first challenge for the skilled conflict manager is to listen in an attempt to understand.[30] The second

21. *See* Joanna Robinson, *Senator Al Franken Admits He "Crossed a Line" in Light of New Allegations*, VANITY FAIR (Nov. 24, 2017), https://www.vanityfair.com/style/2017/11/al-franken-responds-scandal-crossed-line [https://perma.cc/W7AZ-97X4].

22. *Id.*

23. *See* Sabrina Siddiqui, *Kavanaugh's Angry Testimony Raises Doubts Over Future Impartiality*, GUARDIAN (Oct. 3, 2018, 1:00 PM), https://www.theguardian.com/us-news/2018/oct/02/kavanaugh-impartial-justice-testimony [https://perma.cc/RAC6-9HPP].

24. *Id.*

25. *Id.*

26. *Id.*

27. *See* Jacqueline Tempera, *My Family Is 'Totally and Permanently Destroyed'; Brett Kavanaugh Says He Is 'Innocent' in Fiery Opening Statement*, MASS LIVE (Jan. 29, 2019), https://www.masslive.com/politics/2018/09/kavanaugh_family_permanently_destroyed.html [https://perma.cc/H7MY-ZR3N].

28. *See* STONE ET AL., *supra* note 5, at 30–37.

29. *Id.* at 37–39.

30. *See, e.g.*, Jonathan R. Cohen, *Open-Minded Listening*, 5 CHARLOTTE L. REV. 139, 145–47 (2014) (explaining how empathetic listening benefits the speaker and listener alike).

challenge is to explain one's own perspective.[31] It may be that the two sides can never agree on what happened, but both can move toward resolution by affording each other respectful attention and a willingness to listen. Emotions such as anger are important and natural parts of these exchanges, of course, but emotion cannot be the only register in which the conflict proceeds.[32] Strong emotions work against empathetic listening and constructive dialogue, both of which are necessary to handle conflict in a sensible, compassionate manner.[33]

The conflict specialist therefore would counsel against public displays of unyielding or hysterical anger on the theory that such displays escalate disputing dynamics and stymie efforts toward resolution. Furthermore, in these particular cases, reacting publicly with extreme anger alone may make it harder for people to bring forward concerns about sexual violence or to have those concerns taken seriously.[34] But how about the conflict spectator? From the lay perspective, which of these public figures handled the conflict more successfully? Conflict spectacles are essentially stories of conflict and, as such, one especially relevant data point for conflict spectators may be how the stories ended. And here, the short-term visible outcomes are instructive. Public Figure A, Senator Al Franken, resigned from his position in the Senate before further investigation took place.[35] He now hosts a radio show on SiriusXM.[36] Public Figure B, then Judge Brett Kavanaugh, stayed furious throughout the hearings and, in a subsequent interview, continued to "emphatically den[y]" the charges against him.[37] He was confirmed to the U.S. Supreme Court.[38]

Note that the fact that Franken ended up as a radio host and Kavanaugh as a Supreme Court justice does not mean that the conflict experts were wrong

---

31. *See, e.g.*, ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 44–68 (2000) (describing the tension between empathy and assertiveness).

32. *Id.* at 166–67.

33. *See, e.g.*, STONE ET AL., *supra* note 5, at 89–90.

34. *See, e.g.*, Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner [https://perma.cc/DF3A-FD8M] (identifying "shame" and "fear of consequences" as two reasons).

35. *See* Elana Schor & Seung Min Kim, *Franken Resigns*, POLITICO (Dec. 7, 2017), https://www.politico.com/story/2017/12/07/franken-resigns-285957 [https://perma.cc/WF34-KU97].

36. *See* Ben Sisario, *Al Franken Moves Back into the Public Eye with a SiriusXM Talk Show*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/business/media/al-franken-sirius-talk-show.html [https://perma.cc/9EML-8RXW].

37. Samuel Chamberlain, *Kavanaugh Denies Sexual Misconduct in Fox News Exclusive: 'I Know I'm Telling the Truth,'* FOX NEWS (Sept. 24, 2018), https://www.foxnews.com/politics/kavanaugh-denies-sexual-misconduct-in-fox-news-exclusive-i-know-im-telling-the-truth [https://perma.cc/3RQY-FYQD].

38. *See* Kevin Breuninger & Mike Calia, *Brett Kavanaugh Confirmed by Senate in 50-48 Vote, Ascends to Supreme Court*, CNBC (Oct. 6, 2018, 4:01 PM), https://www.cnbc.com/2018/10/06/brett-kavanaugh-confirmed-by-senate-in-50-48-vote.html [https://perma.cc/ZBU5-ZF87].

about how to handle the conflicts at the public or private levels. Moreover, it does not mean that Franken was guilty and Kavanaugh innocent of the allegations against them. Conflict resolution theory and practice take into account a wide range of factors when evaluating the success of conflict management strategies.[39] It is impossible to say how Kavanaugh's choices about how to handle the accusations might have affected him personally, and we can only speculate as to what all of this meant and will continue to mean to his family, his community and colleagues, and his work now and going forward on the Supreme Court. Certainly, he has not had a smooth start to his tenure.[40] Likewise, at this point, there is not enough information to evaluate whether Franken's approach was supportive of various private interests or will serve him in the future.

What we do know is that those watching these events unfold may conclude that the most effective way to respond publicly to accusations like these—and thus perhaps the best way to respond publicly or even privately to any conflict or dispute—is to show anger and deny everything and not to listen, engage in dialogue, or demonstrate empathy. This conclusion holds whether or not the spectator believes that Kavanaugh was telling the truth. Both those who believe Kavanaugh and those who do not can plainly see that his unwavering outrage made it possible for him to ascend to the Supreme Court. Anger plays well to many audiences because anger appears to be rooted in values (as opposed to strategy or self-interest) and grounded in moral conviction. One of the angriest people at Kavanaugh's hearings, Senator Lindsey Graham, justified his own anger in this way: "You can tell I'm still angry about Brett Kavanaugh," he said in October 2018.[41] "I've known Brett Kavanaugh for 20 years . . . . The bottom line is they tried to completely destroy this guy. And that's not acceptable in my book."[42] Here, Graham explicitly linked his angry outbursts to his moral commitments in an effort to cast his much-commented-upon angry outburst during the confirmation hearings[43] as righteous anger in the wake of unfair treatment of his friend.

---

39. *See generally* Bruce Patton, *Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 279 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (explaining how evaluating the success of negotiation requires looking at seven different criteria).

40. *See, e.g.*, Sandra E. Garcia, *Calls for Kavanaugh's Impeachment Come Amid New Misconduct Allegations*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/09/15/us/brett-kavanaugh-allegations-trump-impeach.html [https://perma.cc/A2LJ-XX6T]; Alexis Grenell, *A Year Later, the Wound That Brett Kavanaugh's Confirmation Opened Is Still Bleeding*, DAILY BEAST (Oct. 5, 2019, 5:11 AM), https://www.thedailybeast.com/a-year-later-the-wound-that-brett-kavanaughs-confirmation-opened-is-still-bleeding [https://perma.cc/747A-54AZ]; Clyde McGrady, *Brett Kavanaugh Brings Pizza to the Supreme Court and It Is Not Good*, ROLL CALL (Jan. 14, 2020, 8:18 AM), https://www.rollcall.com/news/hoh/pizza-justice-brett-kavanaugh-gets-his-way-at-the-court-cafeteria [https://perma.cc/5H96-CG5E].

41. Lindsey Graham (@LindseyGrahamSC), TWITTER (Oct. 26, 2018, 10:23 AM), https://twitter.com/lindseygrahamsc/status/1055827146462105600 [https://perma.cc/2NWE-UVVK].

42. *Id.*

43. *See, e.g.*, Adam Edelman, *Sen. Lindsey Graham Got Really, Really Mad at the Kavanaugh Hearing*, NBC NEWS (Sept. 27, 2018, 5:29 PM), https://www.nbcnews.com/politics/supreme-court/sen-lindsey-graham-got-really-really-mad-kavanaugh-hearing-n914456 [https://perma.cc/D3QM-6DFX].

Instead of apologizing for getting angry, he explains his anger as proof of Kavanaugh's good moral character and principled motivations.[44] Apologies, by contrast, as seen here and in the case of Franken, end up looking like weakness at best and admissions of wrongdoing at worst.

Along with anger, strong denials come off looking like effective conflict management mechanisms in situations such as those involving Kavanaugh and Franken, where the available evidence did not lead to an unavoidable conclusion. Denying that one has done anything wrong is not a new conflict response, of course, but the increasing use of no-holds-barred denial in high-profile conflicts (and not only conflicts that involve allegations of sexual misconduct) is cause for concern. President Trump, to give a prominent example of this conflict management trend, is well known for asserting what is demonstrably false (e.g., the size of the crowd at his inauguration)[45] and denying what is demonstrably true (e.g., the fact that his son met with a Russian lawyer to find "dirt" on Hillary Clinton).[46] On the one hand, it is understandable that one would deny doing something that one in fact did not do. On the other hand, it is problematic to deny reflexively and continuously, regardless of the available evidence. For the conflict spectator, watching people in conflict deny that they have done anything wrong, in spite of evidence that may suggest or even prove otherwise, and then seeing these people succeed or at least not be held accountable for these overstated and unsupportable denials may lead to the conclusion that blanket denials are effective conflict management mechanisms.

To be sure, many people decried the way Brett Kavanaugh behaved.[47] And many have questioned how the controversy around Al Franken was handled.[48] Conversations about these public conflicts, therefore, are still

---

44. Indeed, President Trump called Kavanaugh's angry testimony "honest and riveting." Sabrina Siddiqui et al., *Kavanaugh Hearing: Anger and Clashes Ahead of Senate Committee Vote*, GUARDIAN (Sept. 28, 2018, 5:26 PM), https://www.theguardian.com/us-news/2018/sep/27/kavanaugh-ford-testimony-latest-what-will-they-say-senate-hearing [https://perma.cc/3LD5-HPRM].

45. *See, e.g.*, Megan Garber, *The First Lie of the Trump Presidency*, ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/the-absurdity-of-donald-trumps-lies/579622/ [https://perma.cc/L2XW-SDLR].

46. *See* Shannon Pettypiece, *Deny, Divert, Discredit: Trump Turns to His Scandal Playbook Once Again*, NBC NEWS (Sept. 20, 2019), https://www.nbcnews.com/politics/donald-trump/deny-divert-discredit-trump-turns-his-scandal-playbook-once-again-n1057181 [https://perma.cc/VUU7-UZWK].

47. Admittedly, the criticism was primarily partisan. *See, e.g.*, David Crary, *Kavanaugh-Ford Hearing: A Dramatic Lesson on Gender Roles*, AP NEWS (Sept. 28, 2018), https://apnews.com/c3bd7b16ffdd4320a781d2edd5f52dea/Kavanaugh-Ford-hearing:-A-dramatic-lesson-on-gender-roles [https://perma.cc/XA3L-JQ5W]; Deanna Paul, *Kavanaugh's Evasive Testimony Probably Wouldn't Have Been Allowed in His Courtroom*, WASH. POST (Sept. 28, 2018, 2:32 PM), https://www.washingtonpost.com/politics/2018/09/28/kavanaughs-evasive-testimony-probably-wouldnt-have-been-allowed-his-own-courtroom/ [https://perma.cc/56LJ-RVKU]; *see also* Opinion, *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html [https://perma.cc/83D8-HSJG].

48. *See, e.g.*, Seung Min Kim, *Some Democrats Now Regret Calling on Franken to Resign Amid Sexual Misconduct Allegations*, WASH. POST (July 23, 2019, 9:02 PM),

amenable to nuance and critique. But the spectacle of these conflicts is nonetheless worrying. Watching these conflicts play out in the media and then seeing how these particular situations ended, in terms of consequences and outcomes, rewards and punishments, suggest that the window of what acceptable or desirable conflict management looks like is moving toward more positional, partisan, and polarized approaches that do not take into account or value different viewpoints or beliefs. As such, the conventional wisdom around managing public disputes—namely, that listening, explaining, and apologizing are constructive responses in conflict situations—does not seem to apply. Instead, like Kavanaugh and Trump, people involved in these kinds of public disputes increasingly display extreme and aggressive reactions, doubling down on hard-line positions that refuse to admit any complexity or contribution.

II. IMPLICATIONS OF THE PROBLEM

The Kavanaugh and Franken situations are not the only two examples of conflict spectacles in our media and social media, of course. We are bombarded by images and stories of people who are furiously disputing about subjects that implicate fundamental values. Just think of the social media posts that have gone viral recently. A left-wing comedian posted a picture of herself holding up what looked like the severed head of the president.[49] A Major League Baseball umpire announced that he would buy an assault rifle and join a civil war if President Trump were impeached.[50] A shopper angrily confronted a woman who was criticizing two women speaking Spanish in a grocery store.[51] Ayatollah Khamenei and President Trump got into a blistering Twitter feud over whether the United States is helping or hurting the Iranian people.[52] Two Democratic candidates for president, whose platforms were virtually indistinguishable, accused one another of being

---

https://www.washingtonpost.com/politics/durbin-regrets-calling-on-franken-to-resign-amid-sexual-misconduct-allegations/2019/07/23/7591e190-ad6b-11e9-bc5c-e73b603e7f38_story.html [https://perma.cc/4C9C-KCAH]; Emily Yoffe, *Democrats Need to Learn from Their Al Franken Mistake*, ATLANTIC (Mar. 26, 2019), https://www.theatlantic.com/ideas/archive/2019/03/democrats-shouldnt-have-pressured-al-franken-resign/585739/ [https://perma.cc/5TTU-TGL3].

49. *See* Jay Kernis, *Death Threats, Cancellations, Investigations: Kathy Griffin Says She Would Do It All Again*, CBS NEWS (Mar. 24, 2019, 9:58 AM), https://www.cbsnews.com/news/kathy-griffin-on-death-threats-cancellations-investigations-over-trump-severed-head-photo/ [https://perma.cc/5F6P-ZTWN].

50. *See* Jamie Ross, *MLB Umpire Apologizes for Tweets Calling for Civil War if Trump's Impeached*, DAILY BEAST (Oct. 25, 2019, 5:12 AM), https://www.thedailybeast.com/rob-drake-mlb-umpire-apologizes-for-tweets-calling-for-civil-war-if-trumps-impeached [https://perma.cc/Z99A-A9XM].

51. *See Watch Woman Defend Spanish Speakers at Store*, CNN, https://www.cnn.com/videos/us/2018/10/05/colorado-woman-defends-spanish-speaking-friends-abc-orig-vstop.cnn [https://perma.cc/HHU7-3VVM] (last visited Apr. 12, 2020).

52. *See* Keith Griffith, *'Abandon Terror and Make Iran Great Again!' Donald Trump Trades Barbs with Ayatollah Khamenei After Iran's Supreme Leader Accused Him of Plotting to 'Stab the Iranian People in the Heart with Venomous Daggers*,*'* DAILY MAIL (Jan. 17, 2020), https://www.dailymail.co.uk/news/article-7901197/Donald-Trump-trades-barbs-Ayatollah-Khamenei-Twitter.html [https://perma.cc/NTA7-3TPP].

liars.[53] These examples highlight the increasingly common practice of taking exaggerated and extreme public positions on charged issues, leading to angry and dramatic confrontations that do not allow for the exchange of information, empathy, or transformative interventions.

What's interesting about this turn to traditional and arguably hypermasculine shows of strength (which, paradoxically, are also often claims of victimhood or unfair treatment) is that these behaviors resemble conflict management approaches found in stories from our popular culture. We need look no further than popular television shows and movies to see that talking through disputes is not the way to go. For example, one of television's longest-running reality shows, *Survivor*, explicitly links survival and winning to antisocial behaviors such as scheming, lying, and manipulating the emotions and loyalties of others.[54] And certainly there are scores of cinematic depictions of disputes being resolved through violence (especially with guns) and by extraordinary individuals (of late, especially superheroes). More than one hundred million people saw the latest *Avengers* movie, which was a spectacle of good, evil, strength, weakness, victory, defeat, power, and, ultimately, justice.[55] Even the name "Avengers" as applied to the good guys provides insight into the political, social, and moral order of these films. When something bad happens, good people do not seek peace but instead seek vengeance, with all the implicit violence and tribalism and history of blood feuds caught up in that word.[56]

Of course, popular culture is not a monolith, and there are notable examples of films and television programs that take a much less one-dimensional view of the nature of conflict and justice.[57] Nevertheless, recent

53. *See* Emily Larsen, *'How Could the American People Want Someone Who Lies?': Warren Turns Up Heat on Sanders*, WASH. EXAMINER (Jan. 19, 2020, 5:03 PM), https://www.washingtonexaminer.com/news/how-could-the-american-people-want-someone-who-lies-warren-turns-up-heat-on-sanders [https://perma.cc/H4ZC-9F22].

54. *See, e.g.*, *The 18 All-Time Greatest Moments from the Best Seasons*, CBS, https://www.cbs.com/shows/recommended/photos/1003895/the-18-all-time-greatest-survivor-moments-from-the-best-seasons/ [https://perma.cc/BFA9-8AQK] (last visited Apr. 12, 2020) (detailing that eight of the eighteen greatest moments involved lies, fake idols, and hard bargaining).

55. *See* Bob Mondello, *'Avengers: Endgame' Turns Previous Box Office Record to Dust*, NPR (Apr. 29, 2019, 5:32 PM), https://www.npr.org/2019/04/29/718394120/avengers-endgame-turns-previous-box-office-record-to-dust [https://perma.cc/A7S2-QMA3].

56. *See, e.g.*, Tamar Frankel, *Lessons from the Past: Revenge Yesterday and Today*, 76 B.U. L. REV. 89, 90 n.5 (1996).

57. Recent documentaries and films, such as *Making a Murderer* (Netflix, Dec. 18, 2015) and JUST MERCY (Warner Bros. 2019), provide more nuanced and critical views of how the legal system operates and what it means to be "good" or "evil." Along these lines, many have written about the importance of *Orange Is the New Black* in shaping popular attitudes. *See, e.g.*, Orli Matlow, *7 Ways 'Orange Is the New Black' Has Changed Society Since the Season 1 Premiere*, BUSTLE (June 11, 2015), https://www.bustle.com/articles/89491-7-ways-orange-is-the-new-black-has-changed-society-since-the-season-1-premiere [https://perma.cc/MD6U-VEN6]. Even nonlegal popular comedies like *Schitt's Creek* are promoting prosocial approaches to interpersonal conflict and wealth/class inequality. *See, e.g.*, Richard Lawson, *Yes, "Schitt's Creek" Really Is That Good*, VANITY FAIR (Jan. 16, 2019), https://www.vanityfair.com/hollywood/2019/01/yes-schitts-creek-really-is-that-good [https://perma.cc/Q8DK-WBDF].

wildly successful television shows (*Game of Thrones*, *Love Island*) and blockbuster films (*The Avengers*, *John Wick*, and *Star Wars* movies) skew sharply toward vilifying the Other, simplifying the stories of those involved in the conflict, and justifying or even glorifying violent responses.[58] With this in mind, and given that many political conflicts play out on the internet, perhaps one reason why public figures like Trump and Kavanaugh adopt such angry, bombastic personas is that they are aware of the spectacles they are creating and they seek to make the spectacles work within familiar frameworks from popular culture. In this way, they can conduct themselves in ways that serve their interests while simultaneously evoking well-known narrative dynamics that situate them in the role of the victim or the hero, whichever suits their purposes better.[59]

One might argue that these approaches to conflict are not new or different because people (especially politicians) have always sought to take extreme positions that verge on caricatures in order to demonstrate their commitment to particular values and constituencies.[60] Such approaches are simply "hard bargaining tactics" with a long history in human affairs. This argument does not, however, account for the unusual nature of the current political climate, which features an attention-seeking executive who has made numerous racist[61] and sexist[62] comments, who has emboldened hate groups through his own inflammatory rhetoric,[63] and who has told an enormous number of lies.[64] In addition, the argument that people have always been angry and

58. And although these tendencies have been part of our popular culture for decades, they are only becoming more and more pronounced.

59. *See, e.g.*, Michelle Mark, *Trump Posted a Photo of Himself Photoshopped to Look like Rocky Balboa, and Hoo Boy*, BUS. INSIDER (Nov. 27, 2019), https://www.businessinsider.sg/trump-tweets-photo-himself-rocky-balboa-photoshop-2019-11/ [https://perma.cc/A9DK-9M5X].

60. Moreover, popular culture has glorified violent dehumanizing conflict spectacles throughout the history of cinema, from THE BIRTH OF A NATION (David W. Griffith Corp. 1915) to TOUCH OF EVIL (Universal Pictures 1958) to DIRTY HARRY (Malpaso Productions 1971), to name a few.

61. *See, e.g.*, Brian Naylor, *READ: Here's the Resolution Condemning Trump's Racist Comments About Congresswomen*, NPR (July 16, 2019, 10:00 AM), https://www.npr.org/2019/07/16/742156445/read-heres-the-resolution-condemning-trump-s-racist-comments-about-congresswomen [https://perma.cc/J2XG-2B3V].

62. *See, e.g.*, Ritu Prasad, *How Trump Talks About Women—and Does It Matter?*, BBC NEWS (Nov. 29, 2019), https://www.bbc.com/news/world-us-canada-50563106 [https://perma.cc/SJ78-VTHB].

63. *See, e.g.*, Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS INST. (Aug. 14, 2019), https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/ [https://perma.cc/MSA9-HB3C].

64. *See, e.g.*, Glenn Kessler et al., *President Trump Has Made 15,413 False or Misleading Claims over 1,055 Days*, WASH. POST (Dec. 16, 2019, 6:52 AM), https://www.washingtonpost.com/politics/2019/12/16/president-trump-has-made-false-or-misleading-claims-over-days/ [https://perma.cc/Y5SD-UVBY]. Note that this is not necessarily a partisan take—even pro-Trump people recognize these flaws. The difference is that they draw different conclusions. *See, e.g.*, Martin Pengelly, *Rick Perry Tells Donald Trump: 'You Really Are the Chosen One*,*'* GUARDIAN (Nov. 25, 2019, 9:20 AM), https://www.theguardian.com/us-news/2019/nov/25/rick-perry-donald-trump-chosen-one [https://perma.cc/U9PU-CVBD].

defiant in disputes does not consider the impact of the internet in transmitting an unending stream of conflict spectacles to people who are not otherwise involved. It stands to reason that being exposed on a regular basis to extreme hard bargaining tactics in conflict, for example, will normalize those tactics more quickly and dramatically than witnessing those tactics more infrequently. And normalizing hard bargaining tactics may have significant deleterious effects. As an example, the generation of students now entering law school (Generation Z) has had social media, smartphones, and access to the internet for almost their entire lives.[65] The high suicide and depression rates of Generation Z youth have been attributed in part to their constant exposure to stories about climate change, immigration, and mass shootings[66]—subjects that have been at the heart of many snap disputes and conflict spectacles in recent memory.

Moreover, the argument that this is the way things have always been does not consider the wider historical context of the current moment. Political theorist William Davies argues that modern Western democracies, particularly the United States and the United Kingdom, are experiencing what he calls a "decline of reason" and a "rise of feeling."[67] Davies argues that a new "crowd dynamics"[68] has emerged, made possible by the internet, shaped by the constant influx of data from media and social media, and often influenced by corporate and state actors whose agendas are served by people "living in a state of constant and heightened alertness, relying increasingly on feeling rather than fact."[69] This alertness often gives way to a free-floating anxiety that something bad is about to happen. Davies opens his book with an example from 2017, when scores of Londoners believed that a terrorist incident was unfolding near Oxford Circus.[70] Davies describes how the flow of information, unvetted and chaotic, affected those in the area and beyond:

> Amidst the panic, it was unclear where exactly the threat was emanating from . . . . Inside the [nearby Selfridges] store at the time was the pop star Olly Murs, who tweeted to his 8 million followers "Fuck everyone get out of Selfridge right now gun shots!!" As shoppers in the store made for the exits, others were rushing in at the same time, producing a stampede.

65. Julian Vigo, *Generation Z and New Technology's Effect on Culture*, FORBES (Aug. 31, 2019, 2:00 PM), https://www.forbes.com/sites/julianvigo/2019/08/31/generation-z-and-new-technologys-effect-on-culture/ [https://perma.cc/MHF7-LBDH].

66. *See* Emily Seymour, *Gen Z About to Change the Face of the US*, VOA (Aug. 25, 2019, 2:37 AM), https://www.voanews.com/student-union/gen-z-about-change-face-us [https://perma.cc/QUY9-A66Z].

67. Davies has divided his book into two parts, one designated "The Decline of Reason" and the other "The Rise of Feeling." *See generally* WILLIAM DAVIES, NERVOUS STATES: DEMOCRACY AND THE DECLINE OF REASON (2018).

68. *Id.* at 3–17.

69. *Id.* at xii. Davies further argues that many of the messages we receive tend to be negative, which can create or perpetuate antisocial and undesirable social dynamics. "The anger, intimidation, and lies that have crept into the media and civil society, destabilizing institutions without constructing alternatives, can generate a downward spiral of fear and mutual suspicion." *Id*. at 22.

70. *Id.* at ix.

> Smartphones and social media meant that this whole event was recorded, shared, and discussed in real time. The police attempted to quell the panic using their own Twitter feed, but this was more than offset by the sense of alarm that was engulfing other observers.[71]

Although the police ultimately found no evidence of terrorists or of gunshots fired, nine people went to the hospital with injuries sustained in the panic.[72]

Davies uses this story to introduce some of the central theses of his book, arguing that one consequence of our internet-enabled world is that people are so overwhelmed by information that they prefer to rely on feeling rather than fact and to trust their own intuition and emotional response over the advice of experts.[73] To the extent that people are unable to agree on basic truths, and considering that they are often suffering from considerable or even chronic physical and psychological pain, they begin to respond viscerally and fearfully to the world around them.[74] This is particularly true given the tenor of much political and corporate messaging today, messaging that is often framed in militaristic and frightening terms (e.g., "end of the world" or "culture wars"), which increases people's fearfulness.[75] Under these conditions, people naturally flock to autocratic "strongman" leaders who promise them easy solutions and cast blame on outside groups, such as immigrants.[76]

Davies believes that this increase in feeling is intertwined with increasing distrust of expertise, resulting in a "decline of reason." He draws a contrast between the present and the period around and after the Enlightenment, when professional standards and field-specific expertise began to emerge.[77] Today, expertise is often tied explicitly to agendas and context, which can compromise or make irrelevant the value of expert advice.[78] Put another way, when people are in pain or feel like their lives are in danger, they may not be persuaded by technocratic solutions or evidence-based appeals to rational approaches. Telling people to trust experts and "the elite" will not work if elite experts produce reports and give advice that do not seem applicable to people's lived experiences.[79]

---

71. *Id.*

72. *Id.* at x.

73. For example, Davies argues that when expert reports related to immigration do not resonate with people's lived experiences or social mythology, they do not believe those reports. "By confronting the nationalist myth with cold statistical facts, evidence for the macroeconomic benefits of immigration presents a threat to an important source of meaning for many people, and is often ignored or actively resisted." *Id.* at 87.

74. *Id.* at 99–102.

75. *Id.* at 198–201.

76. *Id.* at 16–17, 117–19.

77. *Id.* at 29–61.

78. *Id.*

79. Anti-vaxxers, conspiracy theorists, flat-earthers, and critics of the "deep state" are examples of those who no longer trust the "elite" and others in power. *See, e.g.*, Naomi Thompson, *Anti-vaxxers and the Decline of Trust in Intellect and Expertise*, EAVI (Nov. 22, 2018), https://eavi.eu/anti-vaxxers-and-the-decline-of-trust-in-intellect-and-expertise/ [https://perma.cc/Z2NY-SZKW]; *see also* Geoff Nunberg, Opinion, *Why the Term 'Deep State' Speaks to Conspiracy Theorists*, NPR (Aug. 9, 2018, 10:14 AM), https://www.npr.org/

Davies does not address justice directly in his book, but his argument about the effects of technology on civic engagement tracks the emergence of snap disputing and provides insight into the problem of conflict spectacles. We have already established that conflict spectacles tend to teach people that exaggerated emotional responses in conflict are effective ways to get favorable results.[80] To this, Davies might add that people in today's technological and sociopolitical climate are already inclined to respond more emotionally than ever before and in fact would rather "go with their gut" than with expertise, reasoned argument, and rational appeals to personal and collective well-being. What does this mean for justice and access to justice within the traditional legal system and through alternative processes? When people think about justice, are they actually thinking or are they feeling?

The implications here are potentially profound. If more and more people feel deep down that successful management of conflict involves strident rhetoric and fighting—and does not involve listening, engaging in respectful conversation, recognizing multiple perspectives, or seeking collaborative or dialogue-based resolutions—then they arguably will be less amenable to alternative forms of dispute and conflict resolution, such as interest-based negotiation or transformative mediation. Put another way, if people do not think alternative interventions deliver anything close to what feels like justice because these interventions do not feel immediately identifiable as approaches that appear to work in conflict spectacles, then presumably people will not avail themselves of those alternatives. And if people stop availing themselves of alternative interventions in conflict situations, then surely we will see an upsurge in time-consuming and expensive adversarial processes, not to mention more contentious interactions in workplaces, families, communities, and the political sphere. In such a climate, ADR practices such as negotiation and mediation may become less about transformative interventions, less about integrative "win-win" possibilities, and more about party leverage and the exercise of coercive power in the interest of quick settlement.

2018/08/09/633019635/opinion-why-the-term-deep-state-speaks-to-conspiracy-theorists [https://perma.cc/7C69-GCBS]; Natalie Wolchover, *Are Flat-Earthers Being Serious?*, LIVE SCI. (May 30, 2017), https://www.livescience.com/24310-flat-earth-belief.html [https://perma.cc/UK9N-ASJ6]. And distrust is not just an alt-right phenomenon. Similar dynamics affect those on the left who believe that government is irredeemably captured, that civil processes work to the benefit of bad actors, that people should "cancel" those with whom they disagree, and that corporations are corrupt and self-dealing. *See, e.g.*, ZZ Packer, *When Is 'Civility' a Duty, and When Is It a Trap?*, N.Y. TIMES MAG. (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/magazine/when-is-civility-a-duty-and-when-is-it-a-trap.html [https://perma.cc/N6P8-76WR]; Eduardo Porter, *The Spreading Scourge of Corporate Corruption*, N.Y. TIMES (July 10, 2012), https://www.nytimes.com/2012/07/11/business/economy/the-spreading-scourge-of-corporate-corruption.html [https://perma.cc/6SU5-R5NR]; Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, VOX (Dec. 30, 2019, 12:40 PM), https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate [https://perma.cc/J5X7-TU4Z].

80. *See supra* Part I.

III. SITUATING THESE DEVELOPMENTS IN THE CONTEXT OF ACCESS TO JUSTICE AND ADR

Conflict spectacles, both real and fictional, thus have considerable impact in the present moment on justice and access to justice insofar as they affect people's feelings about whether and how certain processes can provide justice. This impact is of particular concern to dispute resolution theorists and practitioners, who historically have had an uphill battle when it comes to explaining how "alternative" methods deliver justice.[81] To the extent that conflict norms are moving away from alternative methods (like listening, empathy, and dialogue) and alternative processes (like mediation and negotiation), promoting ADR's justice-related capabilities will become that much harder.

Understanding how conflict spectacles and snap disputes affect access to justice in alternative contexts requires some preliminary definitions. As an initial matter, and putting aside the long history of philosophical and practical work directed toward understanding what justice means, we can say generally that justice encompasses substantive and process concerns, in that justice pertains both to rights and responsibilities (negative and positive) and also to how those rights and responsibilities are delineated and enforced. For the present analysis, we can think of justice as roughly equivalent to fairness, to correct outcomes, and to people getting what they deserve based on how they behave. When something is wrong in our world, we seek justice that will put things right as a matter of compensation, restoration, punishment, and vindication.

We can narrow the frame by thinking about justice in terms of "access to justice," a phrase that tends to focus on the functional aspects of seeking justice through institutions and processes. How to file a lawsuit, how to seek mediation, what barriers might be encountered, what kinds of disputes qualify, how to ensure that the process is comprehensible to the layperson—these are the kinds of operational matters that are relevant in discussions about access to justice. Recently, Andrea Schneider wrote that access to justice in ADR contexts encompasses three things: access to process, access to lawyers plus, and access to fairer outcomes.[82] A person with access to process is able to take advantage of a suitable and affordable process that is a good fit for the kind of dispute they are having.[83] A person with access to lawyers is able to secure meaningful assistance to navigate the process that they are using.[84] A person with access to outcomes is able to participate in a process that leads to substantively just outcomes, in the sense that they are objectively fair and approximate what would be awarded in court.[85]

---

81. *See infra* notes 93–107 and accompanying text.

82. Andrea Schneider, *Access to Justice & ADR—What Does This Even Mean?*, INDISPUTABLY (June 22, 2019), http://indisputably.org/2019/06/access-to-justice-adr-what-does-this-even-mean/ [https://perma.cc/7MG3-UWMT].

83. *Id.*

84. *See id.*

85. *See id.*

Professor Schneider's breakdown of access to justice in ADR seems straightforward, but it is built upon a long history of rich philosophical and practical debates within the ADR community about justice concerns.[86] For years, ADR has grappled with how to provide meaningful access to justice. Early proponents of alternative practices took a relatively expansive view, seeing "access to justice" not only as access to the courts but access to a fair process that would take into account the entire conflict, not just the legally cognizable aspects of the dispute.[87] Part of what would make the process fair is that it would be local, free from the professionalism and institutionalization that make the legal system so homogenous, impersonal, and ill-suited to needs of individual disputants and the nuances and complexities of the disputes themselves.[88] On this view, people from the community who were familiar with the kinds of pressures and conditions that the disputants were facing would be able to help disputants work through their issues.[89] In this way, alternative methods, and particularly mediation, were part of an innovative justice system that not only dealt with the specifics of a particular conflict but also tended to empower people and transform relationships and communities.[90]

To make this vision of empowered, transformed community members possible, early ADR practitioners focused on impartiality, in the sense that third-party neutrals helping to guide the process would not be biased toward one party; consent, in the sense that everyone involved would be participating by choice and would not be subject to an outcome that they did not want; and self-determination, meaning that the parties would be able to draw on norms and generate outcomes that suited their sense of what would be fair in the particular situation.[91] Although process guides like mediators would be able to help the parties engage with one another in ways that are thought to be constructive, generally they were supposed to refrain from imposing their own views about the appropriate norms or potentially fair outcomes in a particular case.[92]

The difficulties of this theoretical and somewhat idealized approach to resolving disputes soon became apparent. It is impossible to be completely impartial and questions about the role and limitations of the mediator

86. *See infra* notes 93–107 and accompanying text.

87. *See generally* Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709 (1988).

88. *See* Jennifer W. Reynolds, *The A Is for Activism*, *in* THE NEGOTIATOR'S DESK REFERENCE 743, 746–48 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017). *See generally* Harrington & Merry, *supra* note 87.

89. *See* Reynolds, *supra* note 88.

90. *Id.*

91. *See generally* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARBITRATION ASS'N ET AL. 2005).

92. Of course, different styles of mediation feature varying levels of involvement on the part of the mediator. *See, e.g.*, MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, DISPUTE RESOLUTION: EXAMPLES & EXPLANATIONS 84–90 (2011) (describing facilitative, evaluative, and transformative mediation styles).

emerged.[93] Likewise, consent is problematic given, for example, the difficulties that self-represented people may have with assessing good deals in a nonstructured environment with repeat players.[94] In addition, since mediation is sometimes mandated and arbitration often is, the notion of consent has become less meaningful in the context of alternative processes.[95] Finally, self-determination appears to rely on the idea of a rational self with known, stable preferences, which has been shown not to track with our variable, shifting human nature and the practical limitations of alternative processes.[96] Indeed, many mediators have noted that parties often prefer an evaluative approach to a facilitative one, suggesting that people might not know what would make sense in terms of determining their own ends. And many mediators may prefer to take evaluative stances given the importance of settlement to establishing a successful mediation practice.[97]

Of course, no theoretical model is ever perfect in practice, so the fact that ADR's idealized principles are not capable of real-life manifestation is not an indictment of alternative processes. Justice itself is an ideal, and no one would seriously argue that the conventional legal system delivers full justice. But the problematic relationship between ADR and justice extends beyond the unavoidable shortcomings of any human-built system. Over the years, many commentators have pointed out that alternative methods often work to preserve existing power relations and actually may subvert the ends of justice. For example, settling cases privately can divest the court system of its power to oversee and correct illegal or unethical conduct, can starve the common law of cases, can recast public norms around morality and legality into transactional ones, and can pit parties with unequal bargaining power against one another in a venue that does not have the procedural safeguards of more traditional procedures.[98] Furthermore, the application of state-sponsored alternative processes to more private disputes, such as family matters, frequently extends the reach of the state into the lives of individuals in often unacceptable and intrusive ways.[99] And to the extent that ADR focuses on settling legal disputes or being part of mainstream legal practice and processes, much of the transformative and empowering aspects of

93. *See generally* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

94. *See* Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 269 (2014).

95. *See generally* Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247 (2017).

96. *See generally* Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQ. L. REV. 817 (2004).

97. *See generally* James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769 (1997).

98. For the classic articulation of these objections, see generally Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984).

99. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

alternative interventions that initially were so inspiring in the early days of the ADR movement may be lost.[100]

Modern ADR scholars and practitioners are well aware of the tensions in this history and are still striving toward the ideals of the field while trying to compensate for the ways in which these ideals tend to serve powerful or corrupt interests.[101] For example, ADR scholars have begun turning their attention to subjects that are at the heart of ADR's challenges regarding access to justice, including figuring out how to ensure procedural fairness;[102] expanding the slate of dispute resolution options and pushing for appropriate options based on the circumstances of the dispute;[103] identifying and building out upstream possibilities for avoiding unnecessary conflict or litigation;[104] thinking more broadly about applying integrative approaches in criminal contexts;[105] proposing ways to hold professional ADR actors accountable;[106] and making clear that sometimes litigation is the most appropriate response even when alternative approaches are available.[107]

In other words, the ADR community—whose efforts may have had unintended antijustice effects—continues to double down on its commitment to access to justice. Scholarship and conferences, classes and trainings, legal reforms, and process proliferation (accompanied by training and outreach) are evidence of this enduring commitment.[108] Most ADR theorists and practitioners take seriously their role in the delivery of justice while continuing to stand by the organizing tenets of the field, prioritizing customizable party-driven processes over one-size-fits-all approaches.[109]

---

100. *See generally* Reynolds, *supra* note 88.

101. For example, those working in the emergent ADR specialty of dispute systems design may find themselves or their work being used for purposes that they did not anticipate or desire. *See* Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design?: And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 204–05 (2009).

102. *See, e.g.*, Rebecca Hollander-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081 (2017).

103. *See, e.g.*, Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

104. *See, e.g.*, LAINEY FEINGOLD, STRUCTURED NEGOTIATION: A WINNING ALTERNATIVE TO LAWSUITS (2016).

105. *See generally* CYNTHIA ALKON & ANDREA SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT (2019).

106. *See, e.g.*, Michael Moffitt, *Settlement Malpractice*, 86 U. CHI. L. REV. 1825 (2019).

107. *See, e.g.*, Carrie Menkel-Meadow, *Too Much Litigation?: Quantification, Qualification and Differentiation: What Is an Appropriate Measure of Litigation?*, 10 OÑATI SOCIO-LEGAL SERIES (forthcoming 2020) (on file with author).

108. *See supra* notes 102–07 and accompanying text.

109. Ultimately, the field tends to focus more on process than substance, which makes sense considering the pragmatism of alternative methods and the unattainability of actual justice in most cases. From the perspective of ADR professionals, if disputants can reach a mutually agreeable result through a fair process that takes into account their values, norms, and ideas, then even if they did not receive objectively pure justice, they at least ended up with something valuable.

IV. RESTATING THE PROBLEM: DOES ADR FEEL LIKE JUSTICE?

As described above, those working in ADR strive to create more and better processes for people seeking just resolutions to their disputes. But are ADR's efforts toward improving access to justice working? If we think about the question in terms of making high-quality processes available for addressing conflict, which includes training the professional class of people who work within these processes, then the answer is yes. Over the past fifty years ADR proponents have developed tremendous scholarly and pedagogical resources for managing conflict wisely and well.[110] Additionally, ADR proponents are going in the right direction insofar as they recognize the shortcomings of formal legal processes and then propose and implement programs and reforms that attempt to address these shortcomings while avoiding the risks and downsides of alternative interventions. Community mediation centers, negotiation and conflict management training, court-connected alternative processes, ombudsman's offices, restorative justice diversion programs—all of these are efforts to promote access to justice by empowering individuals to work through conflict situations constructively and without recourse to coercive state power.

But when thinking about the question in terms of user expectations and experiences, the answer is less certain. When someone is embroiled in a conflict, particularly one that involves snap disputing dynamics, do they believe that a conversation mediated by a neutral third party will provide justice? Do public disagreements and conflict spectacles often feature empathetic responses and sincere acknowledgements that the other side has valid points that deserve serious consideration in order to satisfy the demands of justice? Or do people see alternative methods as providing something other than justice in cases where justice itself is unavailable or unaffordable? After all, we describe negotiated agreements as "settlements," suggesting that through the process of give-and-take, the parties eventually agreed to something less than receiving actual justice. And "mediation" sounds a lot like "equivocation" or "making compromises," neither of which sounds much like justice, especially in values-intensive disputes.

Davies's analysis is instructive here.[111] People who are in conflict (or are witnessing conflict) may not be able to perceive how alternative interventions might bring justice, especially if they are experiencing the conflict in primarily emotional ways. Their desire for justice comes from feeling, not from thinking, and for many people (especially for those who are disenfranchised or disillusioned), these feelings are fed by a confluence of anger, fear, resentment, and sometimes physical pain. Moreover, when people in conflict see anger and fear played out in conflict spectacles, these responses are reinforced as appropriate and desirable.

Recognizing that justice is often about feelings is a crucial insight because, in the ADR world, justice and access to justice are often framed in rational

110. *See supra* notes 102–07 and accompanying text.
111. *See supra* notes 67–79 and accompanying text.

terms. For example, whether to accept a settlement is a function of carefully thinking through one's own interests with respect to objective criteria and possible alternatives. Similarly, designing a dispute processing system requires thorough planning and project management. Although it is true that alternative approaches definitely take feelings into account—in fact, this has long been considered one of the chief advantages of alternative practice to traditional litigation in many disputing contexts—they take feelings into account in a fairly structured fashion. Many alternative approaches situate feelings within a relational framework that acknowledges the importance of emotions, recognizes that all parties in conflict may have strong feelings, and attempts to build processes that provide a humane environment for working through the feelings and reducing the tensions surrounding the issue.[112]

Ironically, the practice of acknowledging feelings may be in part why ADR does not feel like justice today. If someone experiences conflict primarily through negative emotions like fear and anger, they tend to see people on the other side of the issue as the enemy.[113] Enemies by definition pose a threat and, as such, giving them any leeway could be harmful. One can imagine this dynamic in any number of disputing contexts today, ranging from reproductive rights to gun control to climate change. When people hold conflicting views in these highly charged contexts, how receptive will they be to an alternative process that appears to legitimize the enemy's views by allowing the enemy to speak? Will participating in a learning conversation have emotional resonance as a matter of justice? Is it acceptable to think that a fair outcome might not involve someone losing?

Put another way, if people are experiencing their world through emotion and if reason is considered suspect, then they are going to be led more by emotion than they might otherwise be. Hence, they may not find alternative processes—which are built on a reasoned approach to conflict, no matter how much they embrace and attempt to validate emotions—particularly compelling as a matter of justice. And it does not help that the media embodies their worst fears in terms of conflict and the worst possible actions in terms of conflict resolution. Again, when people see conflict spectacles resolved through fighting, bombastic rhetoric, and further polarization on the basis of power, they draw conclusions about what works and what does not work when it comes to conflict resolution.

These conclusions may be reflected in parts of public life and popular culture, but they are decidedly not the vision of justice set forth in ADR principles and practices. ADR does not feel like justice to people who desperately want something certain, something punitive, something simple, and someone to blame.

---

112. *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994) (foregrounding the importance of emotion and relationship in the mediation process).

113. *See* COBB, *supra* note 16, at 44–75 (describing how narrative tropes such as hero-villain characterizations affect people's perceptions of conflict). *See generally* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (2000).

V. ADDRESSING THE PROBLEM

Given what we know about conflict spectacles and snap disputes, and considering the ascendancy of feeling over thinking in the current sociopolitical moment, those working toward justice and access to justice in ADR must be strategic in how they spend their time and energy.

What will not be helpful is more projects that tend to concentrate knowledge and expertise in the hands of a small number of professional gatekeepers and guides. To the extent that the field focuses on the development and advancement of these kinds of players, the field is missing important opportunities to engage with the special challenges of the present moment. Lawyers, neutrals, consultants, trainers, and process designers are of course important to the promotion of access to justice but developing their expertise is not the only or even the most important consideration given the modern disputing landscape. Continuing to focus primarily on developing expertise ignores the fact that many people today do not trust experts and are learning about conflict resolution from their experiences with snap disputes and conflict spectacles. In this case, it is not true that if we build it, they will come.[114] They will only come if they are forced to come (which does happen, in cases of mandatory mediation and arbitration, but is nonetheless inconsistent with established ADR values) or if they want to come.[115]

With this in mind, the field would benefit from a broader view of access to justice, something that is less focused on experts and more intentional about meeting people where they are. In other words, access to justice requires an appreciation for the ways in which social context informs how people perceive and feel about justice in terms of what justice looks like and how justice is achieved. Such appreciation is really an awareness of and regard for feelings—not the same awareness and regard that conventional ADR processes have when it comes to airing and acknowledging emotions in a structured process, but instead deeper understanding around the economic, social, political, and technological conditions of modern life and how these conditions shape knowledge, assumptions, beliefs, feelings, and experiences about conflict. Note that these conditions are not uniformly experienced and so any "understanding" is necessarily provisional and must remain open to revision. Nevertheless, the effort to understand and to recognize that people's feelings are important contributors to justice and access to justice will move scholarly, pedagogical, and practical interventions in more productive directions.

What might these productive directions look like? First, ADR scholars should consider taking up the questions that Davies and others raise about populist impulses in Western democracies and the role of technology in

114. *See generally* FIELD OF DREAMS (Gordon Co. 1989).

115. *See, e.g.*, Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95; *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 988 (2000) (noting that "voluntary usage" of ADR remains low despite institutional enthusiasm for the practice).

conflict management, which would allow them to examine how people are changing when it comes to alternative interventions in civil and criminal contexts. This work has already started, with theorists like Noam Ebner writing about the impacts of technology on negotiation theory and practice;[116] Amy Cohen providing historical context for recent expressions of bipartisan support for restorative justice, along with a radical rethinking of well-established principles of alternative practice;[117] Michael Moffitt reorienting analyses of settlement practice in favor of the client, not the lawyer;[118] and Jennifer Gerarda Brown setting forth key considerations in working through campus-based values conflicts, which have become increasingly common and present thorny conflict management issues.[119] These ADR research projects are exemplary in how they engage with social context to provide insight and spark innovation.

Second, teaching and training in ADR must better reflect the realities of the current moment. Too often ADR classes set a vision of utopian alternative practices against a backdrop of dystopian litigation and adversarial process.[120] In setting forth this vision, they often leave out some of the more challenging dispute contexts (e.g., online flame wars, values-based disputes, cancel culture, hate speech) that often inform or are the subject of conflict spectacles today. Furthermore, to the extent that ADR teachers present ADR skills as uniformly good regardless of context and fail to interrogate the assumptions underlying these claims, they may downplay or even make invisible the pressing concerns that critics have raised about informal practices in conflict situations. Classes such as mediation and negotiation present opportunities to reconsider conventional alternative practices with respect to their relevance within the broader culture, as well as their relationship to justice and access to justice. Rethinking the ADR curriculum will require teachers to take social context more seriously, not just to improve negotiation and conflict resolution practice but also to encourage students to examine the systemic factors creating the conditions for conflict spectacles and snap disputes.

Third, in terms of practice opportunities, ADR professionals should take advantage of opportunities for direct impact. Many inside and outside ADR have begun engaging with some of the destructive communication trends associated with snap disputes and conflict spectacles, sometimes organizing and conducting discussions around charged issues and sometimes creating educational materials aimed at lay audiences. This is important work that

116. *See generally* Noam Ebner, *Negotiation Is Changing*, 2017 J. DISP. RESOL. 99.

117. *See generally* Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889 (2019).

118. Moffitt, *supra* note 106.

119. Jennifer Gerarda Brown, *Four Questions About Free Speech and Campus Conflict*, 2018 J. DISP. RESOL. 45, 46.

120. *See generally* Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477 (2012) (arguing that the idealized, utopian rhetoric often associated with ADR makes it difficult to understand how ADR methods may cause unfair processes and unjust outcomes).

attempts to meet people where they are. The Divided Community Project at The Ohio State University,[121] the *Thanks for Listening* podcast from the Harvard Negotiation and Mediation Clinical Program,[122] and Weave, the social fabric project from the Aspen Institute,[123] are all examples of work done inside and outside universities in an effort to support people who are attempting to make sense of the conflicts around them and want to work through divisive, polarized situations.

At stake in all these new directions is a shift in thinking about audience. Part of reorienting scholarship, teaching, and outreach in the wake of modern conflict spectacles and snap disputes is reconsidering assumptions about whom we should be seeking to engage with and support. Certainly students and professionals are a core "audience" for ADR theorists and practitioners, and many ADR professionals work with executives, politicians, state actors, and other influential people in an effort to promote alternative processes as wise and effective ways to manage and prevent conflict. But if one of the goals of ADR is to reach people who do not trust experts and do not feel like ADR provides justice, then we will need to continue to think broadly about what messages will resonate with them and how.[124]

CONCLUSION

Conflict is nothing new, but the spectacles of conflict that are endlessly streaming through our smart devices are not something we have seen before. Conflict spectacles affect what we believe about the nature of conflict and the possibility of resolution. They situate disputants (and often, by extension, the spectators themselves) in morality plays that tend to reduce people to caricatures, overemphasize the benefits of "strong" responses like anger, and devalue efforts to validate opposing perspectives, admit mistakes, apologize, and forgive. This is a problem, not least because what we see when we watch conflict spectacles is not neutral or unfiltered. Trolls, meddlers, marketing types, political actors, and other people all seek to make meaning out of conflict spectacles in ways that suit their own agendas. It would be a sad

121. The Divided Community Project has information for community leaders on how to navigate social media. *See Divided Communities and Social Media*, DIVIDED COMMUNITY PROJECT, https://moritzlaw.osu.edu/dividedcommunityproject/social-media/ [https://perma.cc/WG89-YK2Y] (last visited Apr. 12, 2020).

122. *Thanks for Listening*, created by the Harvard Negotiation and Mediation Clinical Program, strives to "spotlight efforts to bridge the political divide in the U.S. through dialogue and collaborative processes." *Thanks for Listening: Episode 1*, HARV. NEGOT. & MEDIATION CLINICAL PROGRAM (Dec. 12, 2018), http://hnmcp.law.harvard.edu/hnmcp/podcast/thanks-for-listening-episode-1/ [https://perma.cc/SZP3-KJ2H].

123. *See Weave: The Social Fabric Project*, ASPEN INST., https://www.aspeninstitute.org/programs/weave-the-social-fabric-initiative/ [https://perma.cc/ZM7N-9Y77] (last visited Apr. 12, 2020).

124. To this end, I encourage ADR theorists to consider engaging more directly with popular culture. Right now, ADR scholars and professors use popular culture in their articles and classrooms to demonstrate particular points. We can take this a step further by using popular culture as a springboard for talking about conflict. Given that popular culture already resonates with people, this could be a productive arena for analysis and possibly prescription.

outcome indeed if society were to suffer elevated levels of fear and hatred just to entertain trolls, sell more products, or consolidate political power.

For those working in ADR, the challenge is clear: we are living in an age where destructive disputing tendencies and regressive conflict management have become associated more than ever with power and success. The skills we teach, the principles we impart, the justice we define, and the access we create are all in jeopardy if the foundational norms of our field do not resonate with people seeking to manage conflict.[125]

125. ANDREW MARANTZ, ANTISOCIAL: ONLINE EXTREMISTS, TECHNO-UTOPIANS, AND THE HIJACKING OF THE AMERICAN CONVERSATION 4 (2019) ("We like to assume that the arc of history will bend inexorably toward justice, but this is wishful thinking. Nobody, not even Martin Luther King Jr., believed that social progress was automatic; if he did, he wouldn't have bothered marching across any bridges. The arc of history bends the way people bend it.").