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BUT IS IT GOOD: THE NEED TO MEASURE, ASSESS, AND REPORT ON COURT- CONNECTED ADR

Nancy A. Welsh*

ABSTRACT

We know that very few civil matters reach disposition through trial—but what do we really know about how civil cases do reach disposition? What number of civil cases reach disposition through settlement? What number of civil cases reach settlement through court-connected “alternative” dispute resolution (ADR)? Do we know enough about the results of court-connected ADR to be able to detect potential patterns of systemic discrimination? This Article examines what we know from federal and state court systems’ public reporting and finds: 1) only a minority of federal district courts and state court systems report regarding dispositions through settlement; 2) there is no consistent logic in how these settlements are categorized and reported; and 3) while a goodly number of court systems reference their use of ADR, only two states report essential “bare bones” data including the numbers of dispositions produced by ADR. The Article urges the need for such data collection and reporting—as well as collection and reporting regarding other data elements—to ensure that court-connected and court-reliant ADR are making a difference, a good difference.

In this Article, I will expand upon what has become a recent theme of mine—that there should be more regularized data collection, analysis, and reporting regarding the use and effects of court-connected “alternative” dispute resolution (ADR) processes and that there should be similar data collection and transparency required of any privately-conducted dispute resolution processes that rely on the courts for potential enforcement of their outcomes.¹

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¹ See Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88 *FORDHAM L. REV.* 2449 (2020) [hereinafter

The goals of such data collection and transparency would be twofold. First, “bare bones” data collection and reporting would provide for a degree of accountability that is largely non-existent at this point. Second—and going beyond just “bare bones”—data collection and reporting would provide legislators, judges, court administrators, researchers, and the public with the information needed to identify and correct any patterns of systemic injustice that may otherwise go undetected.

The New York State Unified Court System’s launch of its Presumptive ADR initiative—involving the referral of parties in all civil cases to mediation or another form of dispute resolution “as the first step in the case proceeding in court”²—makes this a particularly appropriate time to reflect upon the need and opportunity for greater transparency from our courts. New York’s initiative includes an ambitious program of data collection. However, it is less clear how much of this data collection will find its way into public reporting. My hope is that this Article will encourage both data analysis and a meaningful degree of transparency—what I have referenced elsewhere as “measured” transparency³—through regular public reporting.

Part I of this Article begins by reflecting upon the general value of collecting and disseminating data regarding court-connected dispute resolution. Part II identifies the “bare bones” data that should be collected and disseminated regarding the disposition of civil cases. This part also reports on the data that is now publicly reported by state courts in the U.S. regarding their civil caseloads and dispositions and examines whether such data provides information regarding settlement generally or court-connected dispute resolution in particular. Part III discusses briefly why various

Bringing Transparency]; Nancy A. Welsh, *Dispute Resolution Neutrals’ Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823 (2019) [hereinafter *Neutrals’ Ethical Obligation*]; Nancy A. Welsh, *We Need Good Data to Know Whether What We Are Doing—and Espousing—Is Good*, in THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 258–60 (John Lande ed., 2020).

² See Hon. Lawrence K. Marks, Court System to Implement Presumptive Early Alternative Dispute Resolution for Civil Cases (May 14, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf; see also Hon. Edwina G. Mendelson, Diana Colón, Esq., & Thomas V. O’Neill, Esq., *Reimagining ADR in New York Courts*, 22 CARDOZO J. CONFLICT RESOL. 521 (2021).

³ See, Welsh, *Neutrals’ Ethical Obligation*, *supra* note 1, at 869, n.161 (acknowledging that the original source of this term was the organization Dispute Resolution Data); see also *International Commercial Arbitration and Mediation: What Does the Data Show?*, DISP. RESOL. DATA, http://www.disputeresolutiondata.com/international_commercial_arbitration (last visited Apr. 19, 2021).

stakeholders may now be more likely to support reforms providing for at least “bare bones” quantitative reporting regarding court-connected dispute resolution and considers New York’s Presumptive ADR initiative in this context. Part IV, though, turns to the question of whether “bare bones” data collection and reporting actually will reveal whether court-connected dispute resolution is making a difference—a good difference—in enabling our justice system to achieve its key goals, its reasons for being. This part then identifies the additional data that should be collected and the aggregate results that should be reported in order to assist our justice system in achieving its key goals. This part also touches upon the data that should be collected periodically to be sure that we know whether dispute resolution processes’ implementation is consistent with the expectations of the legislators and judges responsible for institutionalizing such processes and the parties participating in them. Such implementation details can make all the difference in assessing court-connected dispute resolution’s quality and the role it is playing in the achievement of the goals of our justice system.

I. THE “BIG PICTURE” VALUE OF DATA COLLECTION AND REPORTING

In many ways, it should be entirely unremarkable to observe that: first, the collection and reporting of data on court-connected dispute resolution is valuable and, second, we need such collection and reporting to occur *now*. Civil litigation and our courts represent the iconic “dispute system”—in which one or more processes have been “adopted to prevent, manage or resolve a stream of disputes.”⁴ In the field of dispute system design,⁵ it is

⁴ Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009); see also LISA BLOMGREN AMSLER, JANET K. MARTINEZ & STEPHANIE E. SMITH, *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* 7 (2020); see generally NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013); CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); Daniel W. Bernal & Margaret D. Hagan, *Redesigning Justice Innovation: A Standardized Methodology*, 16 STAN. J. C.R. & C.L. 335 (2020). The field of “dispute system design” also builds on the earlier work of many others, including Mary Parker Follett, Mary Rowe, and Elinor Ostrom.

⁵ Human-centered civil justice design is very much a related concept. See Bernal, *supra* note 4; see generally Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN. ST. L. REV. 745 (2017); Victor D. Quintanilla & Haley Hinkle, *The Ethical Practice of Human-Centered*

axiomatic that the system designer should begin by determining the goals of the system and should establish evaluation criteria and mechanisms to assess whether these goals are being achieved.⁶ Such evaluation enables the designer to identify problems, pinpoint the source of the problems, make improvements, and, if it proves necessary, abandon processes or process elements that turn out to be ineffective.⁷

Once we acknowledge that civil litigation and the courts comprise a dispute system that should be evaluated for its effectiveness in achieving its goals, it becomes clear that there must be data gathering, assessment, and reporting regarding *all* of the court-connected processes that result in disposition. Of course, this includes jury trials and bench trials. But because so few civil cases actually go to either jury trial or bench trial,⁸ there also should be data gathering, assessment and reporting regarding the many other processes that facilitate the disposition of civil cases, including judicial settlement conferences, negotiations, dispositive motions, mediations, non-binding arbitrations, defaults, and more. There is also an important signaling effect when a court system's annual reports include data regarding processes previously known as "alternative"—processes like negotiation, mediation, and non-binding arbitration. Such inclusion acknowledges the reality that these processes are not "alternative" diversions or afterthoughts at all. They represent an essential, integral part of the dispute system.

Civil Justice Design, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 251 (2018); Victor D. Quintanilla & Michael A. Yontz, *Human-Centered Civil Justice Design: Procedural Justice and Process Value Pluralism*, 54 TULSA L. REV. 113 (2018).

⁶ See, e.g., AMSLER, MARTINEZ & SMITH, *supra* note 4, at 25; ROGERS ET AL., *supra* note 4, at 16.

⁷ See AMSLER, MARTINEZ & SMITH, *supra* note 4, at 80–81; ROGERS ET AL., *supra* note 4, at 16.

⁸ See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1954–55 (2009) (using Administrative Office data to calculate an approximate 67.7% settlement rate for federal civil cases terminated in 2005); see, e.g., Gillian K. Hadfield, *Judging Science: An Essay on the Unscentific Basis of Beliefs About the Impact of Legal Rules on Science and the Need for Better Data About Law*, 14 J.L. & POL'Y 137 (2006); Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12 (2006); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 730–33 (2004) (suggesting that with various coding and statistical corrections to the Federal Judicial Center's Integrated Data Base for 1970–2000, the rate of settlement was 68.7% in 2000 and 66.6% in 1970 for contested terminations); see generally John M. Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191 (2005).

It also should be possible to go a bit further and require data collection and reporting by private dispute resolution neutrals and organizations—or by the parties using these neutrals and organizations—if they wish to retain the option of using the courts as a guarantor of binding disposition.⁹ Such private dispute resolution processes are not quite “court-connected,” but they certainly are “court-reliant.” Relatively frequently, for example, parties must resort to the courts for the recognition or enforcement of arbitral awards.¹⁰ Indeed, the statutes governing federal courts’ jurisdiction provide opportunities for arbitration to “jump the line” in order to gain access to federal courts for such recognition and enforcement.¹¹ Less frequently, but enough to merit both domestic notice¹² and the creation of a new international convention,¹³ parties also resort to the courts for the enforcement of mediated settlement agreements. Past analysis has indicated that courts in the U.S. treat such agreements as “super-contracts,” presumptively entitled to enforcement.¹⁴

⁹ For a similar proposal, see Stephen Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 143, 151, 153–57 (Joseph W. Doherty et al. eds., 2012).

¹⁰ See Cory M. Morano & Ipek Basaran, *The New York International Law Review’s 30th Anniversary Symposium: New York and International Law*, 31 N.Y. INT’L L. REV. 1, 4 (2018) (discussing New York’s “very strong policy in favor of enforcing arbitral awards”).

¹¹ See Louis Del Duca & Nancy A. Welsh, *Interpretation and Application of the New York Convention in the United States*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS—THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 995 (George A. Bermann ed. 2017) (noting that the FAA does not require removal from state court to federal court to meet the usual jurisdictional requirements of the “well-pleaded complaint rule” or comply with otherwise-applicable time limits).

¹² See, e.g., James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001); Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001).

¹³ See the United Nations Convention on International Settlement Agreements Resulting from Mediation (United Nations, 2018). The Singapore Convention, which is modeled upon the New York Convention, requires signatory nations’ courts to recognize and enforce mediated settlement agreements, with only narrow grounds for the denial of such enforcement. Article 1 of the Singapore Convention specifically excludes employment, family, and consumer matters from its scope (United Nations General Assembly, 2018). See also Abramson (2019), Strong (2016), Deason (2015); Natalie Y. Morris-Sharma, *The Singapore Convention is Live, and Multi-lateralism, Alive!*, 20 CARDOZO J. CONFLICT RESOL. 1009 (2019); Hal Abramson, Introduction, Singapore Mediation Convention Reference Book, 20 CARDOZO J. CONFLICT RESOL. 1001 (2019).

¹⁴ See LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 454 (6th ed. 2019); see also Welsh, *supra* note 12 (describing various contract defenses applicable to both mediation and judicial settlement conferences and urging the adoption of a mandatory cooling off period

The point is this: the courts need providers of dispute resolution processes to manage and resolve streams of disputes, *and* the process providers need the courts to ensure the finality of their process outcomes. Both mediation and arbitration would be quite different—and much less attractive¹⁵—if neither could rely on the courts to enable the production of binding, enforceable results.

As a final “big picture” point, it is important to recognize that we have evidence that it is indeed possible to collect, assess and report data on court-connected dispute resolution on a regular basis. Other nations manage to provide at least “bare bones” data in their annual reports.¹⁶ A few federal district courts similarly report “bare bones” data annually.¹⁷ Some states collect and report some data on a regular basis, though not all of the “bare bones” data described here.¹⁸ And there are private providers of dispute resolution that are collaborating in the collection and analysis of this and other data.¹⁹

before a mediated settlement agreement is enforceable); James Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 *CARDOZO J. CONFLICT RESOL.* 779 (2014).

¹⁵ Indeed, many urged that the Singapore Convention was necessary in order to provide for the expedited enforcement of mediated settlement agreements.

¹⁶ See, e.g., Nancy A. Welsh, *Data and Regulation*, CONFERENCE VOLUME: MEDIATION MOVES (Ulla Glaesser, et al. eds.) (forthcoming 2021) (describing Singapore’s reporting on court-connected mediation in the courts’ annual reports); MINISTERO DELLA GIUSTIZIA, CIVIL MEDIATION LEGISLATIVE DECREE 28/2010, STATISTICS FOR THE PERIOD JANUARY 1ST – DECEMBER 31ST 2019, [https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%20Year%202019%20\(ENG\).pdf](https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%20Year%202019%20(ENG).pdf).

¹⁷ See Welsh, *Bringing Transparency*, *supra* note 1, at 2470–73 (2020).

¹⁸ See *Id.* at 2473–75.

¹⁹ See Mark Baker & Ayaz Ibrahimov, *Data Insights: Q&A with Bill Slate, Chairman, CEO and Co-founder of Dispute Resolution Data*, INT’L ARB. REP. 2 (Oct. 2017), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925—international-arbitration-report—issue-9.pdf?la=EN-in&revision=>; see also Brian Canada et al., *A Data-Driven Exploration of Arbitration as a Settlement Tool: Does Reality Match Perception?*, KLUWER ARB. BLOG (June 11, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/06/11/data-driven-exploration-arbitration-settlement-tool-reality-match-perception/> [<https://perma.cc/29M8-JYHG>] (reporting, based on “approximately 216,000 data points, collected across 4,100 alternative dispute resolution cases,” that for three of the top four arbitral case types—commercial contracts, hospitality and travel, and wholesale and retail trade—the most frequent outcome was settlement or withdrawal, while awards were the outcome fifty percent of the time for the case type of financial services and banking; “both case type (including more specific subtypes) and case region (that is, where arbitration took place)” are noted as factors potentially affecting arbitration outcomes, in addition to “the time required to reach those outcomes, and the associated costs of achieving those outcomes”); *International Commercial Arbitration and Mediation: What Does the Data Show?*, DISP. RESOL. DATA, http://www.disputeresolutiondata.com/international_commercial_arbitration [<https://perma.cc/J9KJ-BGNL>] (last visited Apr. 12, 2021) (“Dispute Resolution Data (DRD) is receiving data from 17 international entities and then aggregating the data by case type (28 different) and seven geographic regions. In this process, each closed international

The picture may be a bit different—and less positive—if we go beyond “bare bones” data and search for a nation, federal district court, state court system, or collective of private providers that collects and reports *all* of the data needed to assure that court-connected (or court-reliant) dispute resolution is serving courts’ goals and reasons for being. This Article will turn to that more ambitious project for data collection and reporting in Part IV. For now, this Article will content itself with identifying the “bare bones” data regarding dispute resolution that should be collected and reported and examining whether that is indeed occurring in any state court systems.

II. “BARE BONES” DATA CURRENTLY BEING COLLECTED AND REPORTED

Previously, I have urged that the following represent “bare bones” data that should be collected and reported regarding court-connected dispute resolution:

- Number of cases eligible for dispute resolution processes
- Number of cases referred to each dispute resolution process
- Number of cases that proceed through each dispute resolution process
- Number/percentage of settlements in each process
- Perceptions of litigants regarding fairness of process, fairness of outcome, control of outcome (consensual processes), trust in/legitimacy of court²⁰

Research regarding the U.S. federal court system, individual federal district courts, and selected states thus far has revealed that only certain individual federal district courts—e.g., Northern and Central Districts of California—collect and report all of this “bare bones” data on an annual basis.²¹ Meanwhile, the Southern District of New York and the Florida state court system collect and report the first three data elements listed above.²² Looking at the U.S. federal court system as a whole, the Administrative Office of

commercial arbitration provides information for up to 100 data fields and each closed international mediation up to 45 data fields. Presently, over 1,000 cases have provided information, in excess of, 40,000 data fields.”).

²⁰ See Welsh, *Bringing Transparency*, *supra* note 1, at 2499.

²¹ See *id.* at 2470–73.

²² See *id.* at 2473–75.

the United States Courts reports only an aggregate number of cases affected by dispute resolution each year, and that number is actually quite ambiguous. It does not reflect information from all of the district courts and, indeed, is based on an unspecified source.²³ Past research also indicates that the state court systems of Maryland, Texas, California, and New York do not report any of the data described as “bare bones.”²⁴

It is important to note, however, that New York’s presumptive ADR initiative portends change on this front.

This Article goes beyond what has already been reported regarding state and federal courts’ data collection and reporting. This Article casts a wider net, reporting on the quantitative data made publicly available by *all* state court systems regarding their civil caseloads, to determine whether they collect and report the “bare bones” data described earlier.

It turns out that state court systems do not report all of this data, and they vary widely in the data they report. The categories of data most likely to be reported by state court systems are the total numbers of filings and dispositions at the trial court level and, to a much lesser degree, the number of the dispositions that are the result of settlement and the number that are the result of court-connected dispute resolution processes.

Remarkably, two states—Georgia²⁵ and Idaho²⁶—do not provide *any* quantitative public information at all regarding their courts’ civil operations. They do not even report annual numbers showing their courts’ civil filings or dispositions. Several states report quantitative information *only* regarding their court systems’ annual filings. They do not report at all on numbers of dispositions.²⁷

²³ See *id.* at 2467–68.

²⁴ See *id.* at 2475–82.

²⁵ JUD. COUNCIL ADMIN. OFF. CTS., ANNUAL REPORT FY 2019 (2019), <https://georgiacourts.gov/wp-content/uploads/2020/04/FY2019-AR.pdf>.

²⁶ IDAHO JUD. COUNCIL, REPORT TO THE LEGISLATURE, GOVERNOR, AND SUPREME COURT (2019), https://judicialcouncil.idaho.gov/pdf/reports/2019_Annual_Report.pdf.

²⁷ See ST. ME. JUD. BRANCH, MAINE JUDICIAL BRANCH 2019 ANNUAL REPORT (2019), <https://www.courts.maine.gov/about/reports/ar2019.pdf>; ME. ADMIN. OFF. CTS., MAINE STATE COURT CASELOAD 5 YEAR TREND (July 17, 2020), <https://www.courts.maine.gov/about/stats/statewide.pdf>; MINN. JUD. BRANCH, ANNUAL REPORT 2019 11 (Oct. 2020), <https://mncourts.gov/mncourtsgov/media/PublicationReports/MJB-Annual-report-2019.pdf>; OFF. CT. ADMIN., MONTANA DISTRICT COURT 2019 NEW CASE FILINGS AND REOPENED CASES, <https://courts.mt.gov/portals/189/dcourt/stats/2019stat.pdf>; NEB. ADMIN. OFF. CTS. & PROBATION, ANNUAL REPORT 24–29, https://supremecourt.nebraska.gov/sites/default/files/annual_report_2019.pdf; NEB. JUD. BRANCH ANN. CASELOAD REP., DISTRICT COURTS, (July 19, 2019), <https://supremecourt.ne>

Approximately one-third of the statewide court systems report annually regarding their total numbers for both filings²⁸ and dispositions, and some states in this group additionally report regarding total numbers of pending cases. However, they provide no further breakdowns regarding types of disposition or processes used to reach disposition. For example, the following states report only their annual aggregate numbers for filings and dispositions: Arizona,²⁹ Arkansas,³⁰ Colorado,³¹ Iowa,³² Kentucky,³³ Maryland,³⁴

braska.gov/sites/default/files/District_Caseload_Report_FY_2019.pdf; N.H. JUD. BRANCH, CIRCUIT COURT NEW FILINGS 2011–2019, <https://www.courts.state.nh.us/cio/2011-2019-Circuit-Court-Filings-by-Division.pdf>; N.H. JUD. BRANCH, SUPERIOR COURT FILINGS 2016–2019, <https://www.courts.state.nh.us/cio/2016-2019-Superior-Court-Filings-compared.pdf>; SUP. CT. OHIO, 2019 OHIO COURTS STATISTICAL SUMMARY, (July 2020), <http://www.supremecourt.ohio.gov/Publications/annrep/19OCSR/2019OCS.pdf>; SUP. CT. OHIO, 2019 ANNUAL REPORT (July 2020), http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2019.pdf; S.C. JUD. BRANCH, 2018 ANNUAL REPORT, <https://www.sccourts.org/whatsnew/SOJ2019/2019SCJBAAnnualReport.pdf>; S.C. CTS., CIVIL NATURE OF ACTION FILINGS (Oct. 28, 2019), https://www.sccourts.org/annualReports/2018-2019/CPNOA_F.pdf; S.C. JUD. DEP'T, FAMILY COURT NATURE OF ACTION FILINGS (Oct. 28, 2019), https://www.sccourts.org/annualReports/2018-2019/FCNOA_F.pdf; S.D. UNIFIED JUD. SYS., SOUTH DAKOTA COURTS 6, 14–16 (Oct. 2019), <https://uj.s.d.gov/uploads/annual/fy2019/FY2019AnnualReportEntireReport.pdf>; W. VA. CTS., THE 2019 ANNUAL STATISTICS REPORT ON CIRCUIT, FAMILY, AND MAGISTRATE COURTS, <http://www.courts.wv.gov/public-resources/press/Publications/2019AnnualReportStats.pdf>; WYO. CTS., WYOMING DISTRICT COURT STATISTICS, <https://www.courts.state.wy.us/wp-content/uploads/2019/09/District-Court-Statistics-FY2019.pdf>; WYO. CTS., WYOMING CIRCUIT COURT STATISTIC FY19, <https://www.courts.state.wy.us/wp-content/uploads/2020/08/Circuit-Court-Statistics-FY19-Website.pdf>.

²⁸ And sometimes “reopened” cases.

²⁹ ARIZ. CTS., ARIZONA JUDICIARY ANNUAL REPORT FISCAL YEAR 2019, <https://www.azcourts.gov/Portals/38/AnnualReportFY19.pdf>.

³⁰ ARK. CTS., 2019 ANNUAL REPORT TO THE COMMUNITY, <https://www.arcourts.gov/sites/default/files/calendar-year-2019-annual-report.pdf>; ARK. JUDICIARY, ARKANSAS JUDICIARY ANNUAL SUMMARY (June 1, 2020), https://public.tableau.com/profile/orjs.arcourts#!/vizhome/AR_Annual_Summary_Public_0/Dashboard1.

³¹ COLO. CTS., COLORADO JUDICIAL BRANCH ANNUAL SUMMARY, https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2019/FY2019AnnualReportFINAL.pdf (Colorado reports how many jury trials were held but does not indicate whether such jury trials resulted in disposition.).

³² IOWA CTS., 2019 ANNUAL REPORT, https://www.iowacourts.gov/static/media/cms/2019_Annual_Report_Web_FINAL_C2D47D7139FD5.pdf (note that Iowa reports the number of “new or reopened” case filings along with the total number of dispositions).

³³ KY. CTS., ALL CASES FILED, https://analytics.kycourts.net/views/HistoricalYearlyCaseloadbyCategory/CrossTabulation?%3AshowAppBanner=false&%3Adisplay_count=N&%3AshowVizHome=&%3Aorigin=viz_share_link&%3AisGuestRedirectFromVizportal=&%3Aembed=Y.

³⁴ MD. CTS., MARYLAND JUDICIARY STATISTICAL ABSTRACT (2018), <https://mdcourts.gov/sites/default/files/import/publications/annualreport/reports/2018/fy2018statisticalabstract.pdf>.

Mississippi,³⁵ Nevada,³⁶ New Jersey,³⁷ New York,³⁸ Rhode Island,³⁹ Utah,⁴⁰ and Virginia.⁴¹ These additional state court systems report their total filings and dispositions and then supplement such numbers with their total pending cases: Hawaii,⁴² Illinois,⁴³ Missouri,⁴⁴ North Dakota,⁴⁵ and Oklahoma.⁴⁶ Essentially, these states report cases in and cases out, nothing more.

Another third of the states go further than just detailing the total numbers for filings and dispositions and provide more finely grained detail regarding dispositions. Despite such additional detail, it is noteworthy that several of these nineteen states fail to reference settlement—or voluntary dismissal which presumably involves settlement much of the time—as a type of disposition.⁴⁷

³⁵ MS CTS., SUPREME COURT OF MISSISSIPPI 2019 ANNUAL REPORT (2019), <https://courts.ms.gov/research/reports/SCTAnnRep2019.pdf>.

³⁶ NEV. CTS., ANNUAL REPORT OF THE NEVADA JUDICIARY (2019), https://nvcourts.gov/Supreme/Reports/Annual_Reports/2019_Annual_Report/. Note that Nevada separately reports the number of “reopened” cases.

³⁷ N.J. CTS., ANNUAL REPORT OF THE NEW JERSEY COURTS (2019), https://www.njcourts.gov/public/assets/annualreports/AnnualReportCY19_web.pdf?c=2ZW.

³⁸ N.Y. CTS., NEW YORK STATE UNIFIED COURT SYSTEM 2019 ANNUAL REPORT (2019), https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

³⁹ R.I. CTS., ANNUAL REPORT OF RHODE ISLAND JUDICIARY (2019), <https://www.courts.ri.gov/PublicResources/annualreports/PDF/2019.pdf>.

⁴⁰ UTAH CTS., 2019 ANNUAL REPORT TO THE COMMUNITY (2019), <https://www.utcourts.gov/annualreport/2019-CourtsAnnual.pdf>.

⁴¹ VA. CTS., CASELOAD STATISTICS OF THE GENERAL DISTRICT COURTS (2019), http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/district/cms/2019/gcms1001_dec.pdf.

⁴² HAW. CTS., HAWAII STATE JUDICIARY ANNUAL REPORT (2019), https://www.courts.state.hi.us/wp-content/uploads/2021/02/2019_Hawaii_State_Judiciary_Annual_Report_online_ADA.pdf.

⁴³ ILL. CTS., ILLINOIS COURTS ANNUAL REPORT (2019), https://www.illinoiscourts.gov/Resources/56f72c92-8f53-4324-af66-f0510b39352b/2019_Annual_Report.pdf; ILL. CTS., ILLINOIS COURTS STATISTICAL SUMMARY (2019), https://www.illinoiscourts.gov/Resources/9ce30c6e-f2c8-4990-b5b4-a1eae2db5739/2019_Statistical_Summary.pdf (Illinois also reports on numbers of reinstated cases).

⁴⁴ MO. CTS., CIRCUIT COURTS FYR 2019 CIVIL, JUVENILE & PROBATE CASES FILED, DISPOSED AND PENDING (2019), <https://www.courts.mo.gov/file.jsp?id=155753>.

⁴⁵ N.D. CTS., NORTH DAKOTA COURT SYSTEM ANNUAL REPORT (2019), <https://www.ndcourts.gov/Media/Default/Court%20Administration/Annual-Report/North%20Dakota%20Courts%20Annual%20Report%202019.pdf> (also reporting on reopened or reinstated cases).

⁴⁶ SUP. CT. OKLA., SUPREME COURT OF OKLAHOMA ANNUAL REPORT (2019), <https://www.oscn.net/static/annual-report-2019.pdf>.

⁴⁷ ALA. CT., ALABAMA UNIFIED JUDICIAL SYSTEM: FISCAL YEAR 2019 ANNUAL REPORT AND STATISTICS 155 (2019), <https://www.alacourt.gov/Annual%20Reports/2019AOCAnnualReport.pdf> (besides providing the total number of dispositions, Alabama identifies only those produced by jury trial); CA. CTS., 2019 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 96 (2019), <https://www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf> (California subdivides its total dispositions into before trial (lack of prosecution, other) and after trial (jury,

That leaves thirteen states that *do* reference settlement or voluntary dismissal as types of disposition. They subdivide their total dispositions into the following categories (with emphasis supplied here for the categories involving settlement or voluntary dismissal):

- Alaska—*dismissal/settlement*, default, summary judgment, bench trial, and jury trial.⁴⁸
- Delaware—*voluntary dismissal*, default judgment, trial, and other.⁴⁹
- Florida—dismissed before hearing (*settlement, mediated settlement, other*), dismissed after hearing (*settlement, mediated settlement, other*), disposed by default, disposed by judge (no trial), disposed by non-jury, disposed by jury, disposed by other.⁵⁰
- Kansas—dismissed, uncontested, contested/*settled*/no trial, summary judgment, trial to court, trial by jury, and other.⁵¹
- Michigan—jury verdict, bench verdict, uncontested/default/*settled*, transferred, *dismissed by party*, dismissed by court, inactive status, other disposition, case type change.⁵²
- New Mexico—jury trial, non-jury trial, petition denied, petition granted, *settlement*, dismissal, default, stipulation arbitration, post judgment active., and other.⁵³

court, de novo)); *Indiana Trial Court Statistics by County*, PUB.CTS.IN.GOV (2019), <https://publicaccess.courts.in.gov/ICOR/> (Indiana divides its total dispositions into jury trial, bench trial, bench disposition, dismissed, default, closed and other); OR. CTS., CASES TRIED ANALYSIS – MANNER OF DISPOSITION 2019 1 (2019), <https://www.courts.oregon.gov/about/Documents/2019CasesTriedAnalysis-MannerofDisposition.pdf> (Oregon divides its total dispositions into bench trial, jury trial, and other); CT. CTS., SUPERIOR COURT- CIVIL MATTERS: CIVIL CASE MOVEMENT FY19 (2019), https://jud.ct.gov/statistics/civil/CaseDoc_1819.pdf (Connecticut divides its total dispositions into with trial, other, and transferred out).

⁴⁸ See PUBLIC CTS. ALASKA, ALASKA COURT SYSTEM ANNUAL REPORT FY 2019 115 (2019), <https://public.courts.alaska.gov/web/admin/docs/fy19.pdf>.

⁴⁹ DEL. CTS., THE DELAWARE JUDICIARY ANNUAL REPORT: BUILDING FOR THE NEXT DECADE 32 (2019), <https://courts.delaware.gov/aoc/AnnualReports/FY19/doc/AnnualReport2019.pdf>; see also DEL. CTS., 2019 ANNUAL REPORT STATISTICAL INFORMATION FOR THE DELAWARE JUDICIARY (2019), <https://courts.delaware.gov/aoc/AnnualReports/FY19/doc/2019AOCStatisticalInformationReportEdited.pdf>.

⁵⁰ FLA. CTS., FY 2019—20 STATISTICAL REFERENCE GUIDE 4–20 (2019), <https://www.flcourts.org/content/download/720938/file/srg-ch-4-circuit-civil-2019-20.pdf>.

⁵¹ KAN. CTS., ANALYSIS OF CIVIL CASELOAD ACTIVITY: YEAR ENDING JUNE 30, 2019, BY COUNTY, BY DISTRICT (2019), <https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Civil-Terms.pdf>.

⁵² MICH. CTS., 2019 COURT CASELOAD REPORT 1 (2019), <https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf>.

⁵³ N.M. JUDICIARY, STATISTICAL ADDENDUM TO THE 2019 ANNUAL REPORT, <https://realfile3016b036-bbd3-4ec4-ba17-7539841f4d19.s3.amazonaws.com/79968cf9-5462-40fd-a32b-d338f4419f36?AWSAccessKeyId=AKIAIMZX6TNBAOLKC6MQ&Expires=1624387809&Signature>

- North Carolina—jury trial, judge trial, magistrate trial, final judgment without trial, clerk, dismissal on order of court, discontinued, *voluntary dismissal* and other.⁵⁴
- Pennsylvania—*settlements*, default judgments, dismissed/discontinued, administrative purge, other, dispositive motions, decided by arb. board, transferred/withdrawn, moved to inactive status, non-jury trial, jury trial.⁵⁵
- Tennessee—*compromise/settlement*-no hearing, court approved settlement, dismissal, other, transferred, trial-jury, trial-non-jury, uncontested/default, withdrawn.⁵⁶
- Vermont—jury trial, court trial, summary judgment, default judgment, *consent judgment*, dismissed by court, withdrawn, change of venue, other.⁵⁷
- Texas—*dismissed by plaintiff*, agreed judgment, default judgment, dismissed for want of prosecution, bench trial, all other dispositions, summary judgment, and jury-directed verdict.⁵⁸
- Washington—resolutions not involving trial (uncontested/resolved when filed, dismissed by clerk, change of venue, decision on appeal/review, dismissed, *settled/agreed judgment*, *settled by arbitration*, default/summary judgment, closed by court after hearing), resolutions after trial commencement (*dismissed/settled*, court decision, jury verdict).⁵⁹

=WhVGOLcsapLj%2BHvX8C7lg9xPnWE%3D&response-content-disposition=inline%3B%20filename%3D%222019%20Statistical_Addendum.pdf%22&response-content-type=application%2Fpdf.

⁵⁴ N.C. CTS., 2018–19 ANNUAL REPORT OF THE N.C. JUDICIAL BRANCH, <https://www.nccourts.gov/assets/documents/publications/2018-19-North-Carolina-Judicial-Branch-Annual-Report.pdf?8Xkl8oI6angZpJHnxhSeenXp3sI2QJSB>.

⁵⁵ PA. CTS., 2019 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 24 (Oct. 2, 2020), <https://www.pacourts.us/Storage/media/pdfs/20210205/174304-caseloadstatisticsreport2019.pdf>.

⁵⁶ TENN. JUDICIARY, ANNUAL REPORT OF THE TENNESSEE JUDICIARY, FISCAL YEAR 2018—2019 19 (2019), https://www.tncourts.gov/sites/default/files/docs/annual_report_fy2019_0.pdf.

⁵⁷ VT. JUDICIARY, VERMONT JUDICIARY ANNUAL STATISTICAL REPORT FOR FY19 51 (2019), <https://www.vermontjudiciary.org/sites/default/files/documents/FY19%20Statistics%20Report%20-%20FINAL.pdf>; *see also* VT. JUDICIARY, VERMONT JUDICIARY ANNUAL STATISTICAL REPORT FOR FY19, <https://www.vermontjudiciary.org/sites/default/files/documents/Appendix%20L.pdf>.

⁵⁸ TEX. CTS., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2019, <https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf>.

⁵⁹ WASH. CTS., SUPERIOR COURT 2019 ANNUAL REPORT: ANNUAL CASELOAD REPORT 91–95 (2019), <https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2019.pdf>.

- Wisconsin—jury trial, court trial, *settlement*, default/uncontested judgment, dismissed before trial, and other.⁶⁰

It is a pleasant surprise that some state court systems' reports actually acknowledge the role of settlement in the disposition of civil lawsuits. At the same time, however, it is disheartening that only thirteen states report anything regarding their total numbers of settlements or voluntary dismissals. In addition, because there is no readily discernible pattern among these states in how they differentiate among the processes that result in disposition or how they define the categories that include settlement, the numbers cannot tell us much. Because there is no dominant approach to identifying the number of cases resolved through settlement, there is no regularized means of recognizing or interrogating the role of settlement in the disposition of courts' cases. This Article will return to this point later.

Some states reporting their overall numbers of filings and dispositions (including those that also report on pending cases) also include specific information regarding their use of dispute resolution processes (often described in the reports as "ADR"). Most noteworthy for purposes of this Article are Florida and Illinois. As noted above, the Florida Courts' FY 2019–20 Statistical Reference Guide specifically reported regarding the number of dispositions achieved before and after hearings through mediated settlement agreements.⁶¹ Florida also reports, on a quarterly basis, the number of cases ordered into ADR by its courts.⁶² Meanwhile, the Illinois Courts Statistical Summary for 2019 reported substantial data regarding the state's mandatory arbitration program. (The courts' thorough reporting was facilitated by the assignment of an arbitration case number to every arbitration-eligible case at the time of filing).⁶³ In particular, Illinois regularly reports on the number of cases filed and pending in arbitration, the number of cases disposed prior to an arbitration hearing, the number of cases that had an

⁶⁰ WIS. CTS., CIVIL DISPOSITION SUMMARY BY DISPOSING COURT OFFICIAL STATEWIDE REPORT 1 (2019), <https://www.wicourts.gov/publications/statistics/circuit/docs/civildispostate19.pdf>; WIS. CTS., DISPOSITION SUMMARY BY DISPOSING COURT OFFICIAL STATEWIDE REPORT 1 (2019), <https://www.wicourts.gov/publications/statistics/circuit/docs/disposumstate19.pdf>.

⁶¹ FLA. CTS., FLORIDA OFFICE OF THE STATE COURTS ADMINISTRATOR, FY 2019–20 STATISTICAL REFERENCE GUIDE, <https://www.flcourts.org/content/download/720938/file/srg-ch-4-circuit-civil-2019-20.pdf>.

⁶² *Uniform Data Reporting*, FLA. CTS., <https://www.flcourts.org/Publications-Statistics/Statistics/Uniform-Data-Reporting> (last visited Mar. 25, 2021).

⁶³ ILL. CTS., ILLINOIS COURTS STATISTICAL SUMMARY 14 (2019), https://www.illinois-courts.gov/Resources/9ce30c6e-f2c8-4990-b5b4-a1eae2db5739/2019_Statistical_Summary.pdf.

arbitration hearing, the number of arbitration awards accepted by a party, the number of cases disposed after an arbitration hearing, the number of arbitration awards rejected by a party, the number of cases disposed after a party's rejection of an award, and the number of cases that went to trial after an award was rejected.⁶⁴ These numbers revealed in 2019 that 58% of the arbitration dispositions occurred before the arbitration hearing, another 6% occurred post-hearing, 25% occurred after rejection of the arbitral award, and only 9% were the result of parties' acceptance of the arbitration award.⁶⁵ These arbitration-related dispositions also presumably became part of the overall number of dispositions for the Illinois courts.

The other state court systems that reference their use of dispute resolution are much less consistent or thorough. Some include some numbers. As part of its 2018-2019 annual report's discussion of the judicial system's programs to assure access to justice, for example, North Carolina referenced family financial settlement, court-ordered arbitration, mediated settlement conferences and the clerk's mediation program as examples of ADR services⁶⁶ and reported that 5,551 district court cases had been settled in mediation, and 10,025 child custody cases had been mediated.⁶⁷ These statistics were not reported in the North Carolina courts' 2017–2018 annual report.⁶⁸ New Mexico's 2020 annual report provided the number of referrals to ADR, mediation, foreclosure settlement facilitation, and ODR.⁶⁹ It also described the role and accomplishments of the state's Alternative Dispute Resolution Commission,⁷⁰ Children's Court Mediation Program,⁷¹ and Magistrate Court Mediation Program—but did not report on dispositions achieved.⁷² Colorado's 2019 annual report provided information

⁶⁴ *Id.* at 116–17.

⁶⁵ *Id.* at 117.

⁶⁶ N.C. CTS., 2018–19 ANNUAL REPORT OF THE N.C. JUDICIAL BRANCH 21 (2019), <https://www.nccourts.gov/assets/documents/publications/2018-19-North-Carolina-Judicial-Branch-Annual-Report.pdf?8Xkl8oI6angZpJHnxhSeenXp3sI2QJSB>.

⁶⁷ *Id.*

⁶⁸ N.C. CTS., 2017–18 ANNUAL REPORT OF THE N.C. JUDICIAL BRANCH https://www.nccourts.gov/assets/documents/publications/2017-18_North_Carolina_Judicial_Branch_Annual_Report.pdf?U0aCTgXQqfE.02brZOE9cCwdnNYi1Kvw.

⁶⁹ ADMIN. OFF. CT., NEW MEXICO JUDICIARY ANNUAL REPORT 2020 13-15, 21, 24, 30 (2020), <https://www.nmcourts.gov/wp-content/uploads/2021/01/AOC-2020-annual-report-for-web-final.pdf>.

⁷⁰ *Id.* at 29.

⁷¹ *Id.* at 31–32.

⁷² *Id.* at 39.

on the number of cases referred to mediation by the various courts and identified the numbers of cases that were: completely or partially resolved; not resolved; parties left with a proposed agreement but it was unknown whether the case resolved; inappropriate for ADR; ongoing; and referred to ADR but a session was not held.⁷³ South Carolina's Judicial Department produced a report in 2019 listing the number of arbitration and mediation cases that were pending, and for what length of time, in each circuit—but did not report on dispositions achieved through arbitration or mediation.⁷⁴

Some states confine their reports on mediation to its use in particular courts. North Dakota's 2019 annual report provided data regarding the number of family mediations that occurred and their settlement rate.⁷⁵ West Virginia's Business Court similarly reported on the number of mediations it had conducted and the percentage that resulted in an agreed order of dismissal.⁷⁶ Rhode Island's 2019 annual report included information on its Supreme, Superior and Workers Compensation courts' use of mediation, arbitration, and settlement weeks and included some numbers.⁷⁷

Other states provide descriptions of dispute resolution processes or programs, but no numbers at all. For example, Utah's 2019 annual report discussed the value of online dispute resolution as a means to provide greater access to justice, but did not provide any numbers regarding use of this dispute resolution process.⁷⁸ Hawaii's 2019 annual report similarly discussed the value of mediation and other dispute resolution processes such as talking circles, but did not provide numbers regarding the use of these processes in the state's trial courts.⁷⁹ Ohio's Commission on Dispute Resolution produces an annual report, but its 2019 report did not include

⁷³ COLO. CTS., COLORADO JUDICIAL BRANCH ANNUAL STATISTICAL REPORT FISCAL YEAR 2019 103 (2019), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2019/FY2019AnnualReportFINAL.pdf.

⁷⁴ S.C. JUD. DEP'T, SUMMARY OF PENDING ARBITRATION/MEDIATION CASES 1 (2019), https://www.sccourts.org/annualreports/2018-2019/cc20am_ann.pdf.

⁷⁵ N.D. CT. SYS., NORTH DAKOTA COURT SYSTEM ANNUAL REPORT 49 (2019), <https://www.ndcourts.gov/Media/Default/Court%20Administration/Annual-Report/North%20Dakota%20Courts%20Annual%20Report%202019.pdf>.

⁷⁶ W. VA. CTS., 2019 ANNUAL REPORT 14 (2019), <http://www.courts.wv.gov/lower-courts/business-court-division/pdf/2019AnnualReport.pdf>.

⁷⁷ See R.I. CTS., ANNUAL REPORT 11–12 (2019), <https://www.courts.ri.gov/PublicResources/annualreports/PDF/2019.pdf>.

⁷⁸ UTAH CTS., 2019 ANNUAL REPORT TO THE COMMUNITY: BRINGING THE COURTS TO THE PEOPLE 5 (2019), <https://www.utcourts.gov/annualreport/2019-CourtsAnnual.pdf>.

⁷⁹ HAW. CTS., ANNUAL REPORT 2019 53–56 (2019), https://www.courts.state.hi.us/wp-content/uploads/2021/02/2019_Hawaii_State_Judiciary_Annual_Report_online_ADA.pdf.

information regarding the number of cases being referred to or resolved by dispute resolution.⁸⁰ Oklahoma's annual report described the state's Dispute Resolution Advisory Board and its Early Settlement Centers, but without any numbers.⁸¹

Florida's and Illinois's reports on court-connected dispute resolution are particularly noteworthy because they make it possible to integrate their ADR-specific numbers with the overall numbers reported for civil case filings, dispositions, or pending civil cases. This is not the case for any of the other states' ADR reporting described here.

As an initial point, this summary of states' current reporting regarding their courts' operations strongly suggests that many states view their courts' primary role or goal as receiving and disposing of cases. Period. *How* the courts reach disposition is not reported by most states. The *effects* of the different processes used to achieve disposition are not regularly reported by *any* states.

This summary further indicates that the role of settlement in the dispositions achieved by our courts remains largely unrecognized. Most states do not even *acknowledge* the disposition of civil cases through settlement in their overall reporting regarding court operations. Indeed, only thirteen states report the sorts of numbers that begin to demonstrate the role of settlement in civil litigation. Why do these numbers only "begin" to demonstrate the role of settlement? The states are inconsistent in how they categorize different forms of disposition, and some of the categories are quite ambiguous. For example, Delaware and North Carolina have a category for voluntary dismissals which *probably* are the result of settlement, but not necessarily so. Michigan bundles uncontested cases, defaults, and settlements into one category, so it is not clear how many cases actually are settled. Vermont and Texas report on the numbers of consent judgments and agreed judgments, but these are likely to be just a subset of total settlements. Best among the thirteen settlement-reporting states are Florida, New Mexico, Pennsylvania, Tennessee, Washington, and Wisconsin.

Finally, although the numbers that are available in some states' annual reports begin to demonstrate the role of settlement in civil litigation, very few even come close to offering the "bare bones" data that would help us see what role is being played by

⁸⁰ See Memorandum from Richard Altman to Sup. Ct. Ohio (Jan. 21, 2020), <http://www.supremecourt.ohio.gov/Boards/disputeResolution/reports/2019.pdf>.

⁸¹ OKLA. SUP. CT., ANNUAL REPORT FISCAL YEAR 2019 19 (2019), <https://www.oscn.net/static/annual-report-2019.pdf>.

court-connected dispute resolution processes in achieving these settlements. And turning to the states that produce separate reports regarding their “alternative” dispute resolution processes, only Florida and Illinois regularly produce numbers regarding mediation and arbitration, respectively, that permit integration with the judicial systems’ general numbers reporting on filings and dispositions.

Based on the general inadequacy of data being reported regarding the use and effects of court-connected dispute resolution processes, it would be easy to become discouraged regarding the potential for greater transparency in this area. However, it remains important to celebrate the states that are now reporting on settlement, thus demonstrating that such data collection and reporting can be done. Further, it is noteworthy that a surprisingly large number of states are reporting, at least to some degree, on their use of dispute resolution. Beyond this, the world is changing—with increased expectations regarding data collection and transparency.

III. WHY STAKEHOLDERS MAY NOW SUPPORT INCREASED DATA COLLECTION AND REPORTING

Increasingly, members of the public, governmental leaders, NGOs, and others are turning to court data to identify societal developments, to investigate the appropriateness of current policies, and to develop responsive future policies.⁸² Investors and international organizations are similarly demanding metrics to assess the quality of different nations’ governance, including their judiciaries and dispute resolution processes, and to inform investment and other funding decisions.⁸³

Also increasingly, organizations that support state courts are urging greater data collection in order to respond to these sorts of demands—both in general and specifically regarding courts’ use of dispute resolution processes. The Conference of State Court Administrators and the National Center for State Courts (“NCSC”)

⁸² See, e.g., Erika Rickard, *How Debt Collectors Are Transforming the Business of State Courts*, PEW (May 6, 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts> (observing that “without better data [from courts] than are currently available . . . states and researchers cannot effectively evaluate whether debt claims are increasing, what might be driving that growth, and what the implications are for consumers”).

⁸³ See Welsh, *Bringing Transparency*, *supra* note 1, at 2491 (specifically referencing the World Justice Project’s Rule of Law Index and the World Bank’s Doing Business project).

have recently developed and released court data standards to “support the creation, sharing, and integration of court data.”⁸⁴ The stated purposes of the National Open Court Data Standards (“NODS”) are entirely consistent with the general theme of this Article: “[m]aking case-level data available to researchers, policy-makers, legislators, the media, and the public from state and local courts”; “[p]roviding transparency in court operations to improve public confidence,” and “[m]aking data available for public and court system use in a consistent manner that can improve public policy and reduce the possibility of error and misinterpretation.”⁸⁵ Interestingly, a final purpose is “[r]educing the burden on court system staff in responding to data requests.”⁸⁶

For purposes of this Article, it is significant that the NODS specifically include settlement as a case disposition category, occurring during a trial or pretrial.⁸⁷ The NODS also provide for data elements to track the use and disposition effects of court-connected dispute resolution, recommending that courts track, among other things: the type of ADR or ODR (online dispute resolution), the date it occurred, whether it was court-ordered, whether parties were ordered to participate, the date when it was completed, and the result of ADR or ODR.⁸⁸

The National Center for State Courts has also partnered with the Pew Charitable Trusts to evaluate the use and effects of one of the newest dispute resolution offerings—online dispute resolution or ODR—and is recommending that courts continue such evaluation after the pilot phase ends.⁸⁹ Finally, among the organizations that support state court operations, the private vendors that pro-

⁸⁴ NAT’L CTR. ST. CTS., NATIONAL OPEN COURT DATA STANDARDS (Apr. 2020), https://www.ncsc.org/_data/assets/pdf_file/0014/34025/NODS-User-Guide.pdf.

⁸⁵ *Id.* at 3.

⁸⁶ *Id.*

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* at 21.

⁸⁹ Beth Graham, *Pew Charitable Trusts Calls for Standardization of US Court ODR Programs*, MEDIATE.COM (Mar. 2019), <https://www.mediate.com/articles/graham-pew-charitable-trusts.cfm>; Erika Rickard & Amber Ivey, *Can Technology Help Modernize the Nation’s Civil Courts?*, PEW (Mar. 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/03/04/can-technology-help-modernize-the-nations-civil-courts>; *How to Evaluate the Litigant Experience as Courts Turn to Online Dispute Resolution*, PEW (Jan. 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/01/25/how-to-evaluate-the-litigant-experience-as-courts-turn-to-online-dispute-resolution>; Erika Rickard & Qudsiya Naqui, *Texas Judicial Council Adopts Statewide Framework for Online Dispute Resolution*, PEW (Jan. 22, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/01/22/texas-judicial-council-adopts-statewide-framework-for-online-dispute-resolution>; TEX. JUD. COUNCIL, CIVIL JUSTICE COMMITTEE REPORT AND RECOMMENDATIONS SEPTEMBER 2020 at 8-9 (recommending integra-

vide the bulk of these courts' case management software have expressed great willingness to collect data regarding dispute resolution processes and their effects.⁹⁰

All of these developments provide reason to hope that stakeholders will now support—and even advocate for—increased data collection and reporting regarding court-connected dispute resolution. Indeed, it is noteworthy that New York's Unified Court System has indicated that it will follow the recommendations of its ADR Advisory Committee to collect and assess data regarding referrals to mediation, opt-outs, matters actually mediated, settlements in mediation (or soon thereafter), other mediation-related outcomes, and litigant satisfaction with the process and to evaluate, monitor and ensure the quality of mediation services.⁹¹ Current reports indicate that as New York's Presumptive ADR initiative rolls out, there have been decisions to collect several data elements, including the following:

- Court and case type
- File date
- Date of referral to ADR
- Type of ADR process
- Neutral/provider type
- Number of ADR sessions
- Date of final ADR session
- ADR outcome type (e.g., full agreement, partial agreement, case withdrawn/dismissed, no show, settled on own)
- Court disposition if not fully resolved by ADR
- Litigant perceptions (fairness, listening, understanding, own solutions)⁹²

tion of ongoing monitoring and evaluation into ODR platforms) (2020), https://www.txcourts.gov/media/1449780/civil-justice-committee-2020_0923_final.pdf.

⁹⁰ The ABA Section of Dispute Resolution's Advisory Committee on Dispute Resolution Research has also developed recommendations regarding data elements to be collected by courts. See Welsh, *Bringing Transparency*, *supra* note 1, at 2484–85.

⁹¹ See Welsh, *Bringing Transparency*, *supra* note 1, at 2477 (citing Press Release, N.Y. State Unified Court Sys., Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases 2 (May 14, 2019), https://www.pbwt.com/content/uploads/2019/05/PR19_09.pdf).

⁹² See E-mail from Donna Erez-Navot, Visiting Clinical Assistant Professor, Cardozo Sch. of L., to Nancy Welsh, Professor of L., Tex. A&M Univ. Sch. of L. (June 22, 2020) (on file with author); see also *Post-Mediation Survey*, STATEWIDE ADR OFF. N.Y. STATE UNIFIED CT. SYS., <https://mediationsurvey.questionpro.com> (last visited June 23, 2021).

This list is remarkably similar to the “bare bones” data list that appeared earlier in this Article. The only missing item is data regarding the number of cases eligible for dispute resolution. If all of this data is collected, assessed, *and reported in some form*, we will know much more regarding the frequency of court-connected dispute resolution processes’ use, their role in settling cases, and their effects on disputants’ perceptions of fair treatment, fair outcomes and self-determination. In other words, we will know much more about settlement’s and dispute resolution’s role in disposition, rather than relying on anecdotal evidence, speculation, or wishful thinking.

What we will not know, though, is whether these processes are helping courts achieve the goal of enabling disputants within our society to come to resolutions that are sufficiently fair or consistent with the rule of law. If that approach to the question of substantive fairness is too ambitious, perhaps we can ask instead whether the collection and reporting of such data will enable us to determine whether court-connected dispute resolution processes are systematically forcing disputants to agree to resolutions that are *not* sufficiently fair or that are even *inconsistent* with the rule of law.

IV. WHAT DATA COLLECTION AND REPORTING ARE NEEDED TO MAKE A DIFFERENCE—A GOOD DIFFERENCE?

Surely, our courts want to be understood as accessible, respectful of parties, trustworthy, effective, and good stewards of public funds. Surely, our courts want to be viewed as neutral forums providing both fair processes and fair results that are consistent with the rule of law. Even if a primary role of our courts is to achieve the disposition of disputes, such dispositions will not be sufficiently respected as legitimate—and thus will be less likely to be perceived as normatively binding—if they regularly fall too short of being fair. Certainly, our courts do not want to produce dispositions regularly understood as unjust, unfair, or unconscionable.

Similarly, dispute resolution advocates do not want their processes to be perceived as producing unjust, unfair, or unconscionable results. Increasingly, though, friends of dispute resolution worry about just that. Jacqueline Nolan-Haley has long urged that parties in mediation are not sufficiently informed about their

rights.⁹³ Jennifer Reynolds has pointed out that plain old bad luck can play an outsized role in the results produced by court-connected mediation.⁹⁴ Carrie Menkel-Meadow has worried about “the relationship of mediation to the rule of law and larger societal justice” and “the relation of individualized, *ad hoc*, if consensual, decision-making to the justice of a fair and equitable society.”⁹⁵ Ellen Waldman has warned that “[w]hen we assume that merely providing access to dispute resolution solves the ‘access to justice’ problem, we do harm.”⁹⁶ And dispute resolution skeptics are, of course, eager to raise objections.

Unfortunately, the data collection and reporting described thus far in this Article—even the recommended “bare bones” data collection—do not allow dispute resolution advocates or skeptics to be reassured regarding dispute resolution’s performance in helping our courts achieve any of their important justice-related (as distinguished from disposition-related) goals. As a result, this Article now turns to the question of identifying the additional data collection and reporting necessary to avoid court-connected dispute resolution potentially producing systemic injustice.

In order to identify the data that could confirm expectations of fairness—or reveal systemic injustice—it is important to pinpoint what sorts of results would evidence fairness or injustice. This Article suggests that the most socially corrosive, systemic injustice occurs when courts—or the dispute resolution processes institutionalized and supported by courts—produce results that systemically disadvantage certain groups of people simply because of who they are, not because of what they have done or failed to do.⁹⁷ Of course, I am thinking here of systemically inferior results based on demographics—e.g., race, ethnicity, culture, gender, sexual orientation, religion, etc. This sort of systemic injustice—grounded in discrimination and prejudice—cannot be consistent with the rule of law or the even-handed application of neutral legal

⁹³ Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 799–823 (1999).

⁹⁴ Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 306–07 (2014).

⁹⁵ Carrie Menkel-Meadow, *When Should I Be in the Middle? I’ve Looked at Life from Both Sides Now*, in *EVOLUTION OF A FIELD: PERSONAL HISTORIES IN CONFLICT RESOLUTION* 421, 439–40 (Howard Gadlin & Nancy A. Welsh eds., 2020).

⁹⁶ Ellen Waldman, *Seeking Justice in the Shadow of the Law*, in *EVOLUTION OF A FIELD: PERSONAL HISTORIES IN CONFLICT RESOLUTION* 467, 484 (Gadlin & Welsh eds. 2020).

⁹⁷ I am tempted to include the socially and economically corrosive effects of corruption in judicial systems as well.

standards. Indeed, the procedural justice literature, which counsels that people are more likely to perceive a court's or other dispute resolution process' outcomes as fair if they perceive the process as fair, also finds that people are more likely to judge a process as fair if they perceive the forum itself is neutral and treats the parties even-handedly, based on the application of neutral principles.⁹⁸

In recent years, we have become painfully aware of systemic injustice in our criminal justice system. African Americans are more likely to become embroiled in the school-to-prison pipeline,⁹⁹ more likely to be identified as requiring special education,¹⁰⁰ more likely to be charged with crimes and imprisoned,¹⁰¹ and more likely to be the victims of police shooting.¹⁰² Cellphone videos certainly have played a role in bringing this state of affairs to our national consciousness, *but we have also become aware of these examples of systemic injustice due to the availability and analysis of aggregated data, including demographic correlations.*¹⁰³ This experience in the

⁹⁸ See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 7-40 (New York, 1988); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW*, eds. Joseph Sanders & V. Lee Hamilton, 65, 69-70 (New York, 2001); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L. Q. 787, 817-830 (2001); Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52-54 (2004); Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 733-35 (2017).

⁹⁹ See Laura R. McNeal, *Managing Our Blind Spot: The Role of Bias in the School-to-Prison Pipeline*, 48 ARIZ. ST. L.J. 285, 285-86 (2016); Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 315-18 (2016) [hereinafter *Dismantling the Pipeline*]; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1063-65 (2016) [hereinafter *Over-Disciplining Students*].

¹⁰⁰ See Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL'Y & L. 181 (2009).

¹⁰¹ See Leo E. Strine, Jr., *Criminal Justice and (a) Catholic Conscience*, 56 SANTA CLARA L. REV. 631, 662 (2016) (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7 (2010) (Blacks in some states are between twenty and fifty times more likely than Whites to be imprisoned for drug-related offenses); Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1628 (2012) (“[W]hites and blacks use illegal drugs at the same rates, yet African-Americans are many times more likely to be stopped, searched, arrested, charged, convicted, and sentenced to prison for drug crimes.”).

¹⁰² See Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31, 38 (2015) (citing *Race and Policing: We Don't Belong Here*, *ECONOMIST* (Nov. 29, 2014), <https://www.economist.com/united-states/2014/11/27/we-dont-belong-here>) (“[B]etween 2010-2012, young Black men were twenty-one times more likely to be fatally shot by police than young White men.”).

¹⁰³ See Waldman, *supra* note 96; see McNeal, *supra* note 99; see Nance, *Dismantling the Pipeline*, *supra* note 99; see Nance, *Over-Disciplining Students*, *supra* note 99; see Vallas, *supra* note

criminal justice arena is instructive as we consider the data needed regarding court-connected dispute resolution's use on the civil side.

In addition to the “bare bones” data identified earlier, courts and court-reliant private dispute resolution providers should collect data regarding the outcomes achieved (i.e., actual dollar amounts and specific, non-monetary terms) in dispute resolution processes and the demographics of the parties and the neutrals. The correlation of these data elements, along with the other “bare bones” data elements identified earlier, would permit assessment and reporting on an aggregated basis. Further, it would enable detection and correction of any systematically discriminatory patterns in court-connected and court-reliant dispute resolution.¹⁰⁴ In order to detect other problematic effects of court-connected and court-reliant dispute resolution, it would also be useful to have data regarding parties' return to the courts to deal with non-compliance issues.¹⁰⁵

Thus, the “new and improved bare bones” data needed regarding court-connected and court-reliant dispute resolution would consist of:

- Number of cases eligible for dispute resolution processes
- Number of cases referred to dispute resolution processes
- Number of cases that proceed through each dispute resolution process
- Number/percentage of settlements
- Perceptions of litigants regarding fairness of process, fairness of outcome, trust in/legitimacy of court, cost-benefit analysis
- Outcomes achieved (actual dollars and specific, non-monetary terms)
- Demographics of the parties and the neutrals
- Number of cases that return to court due to non-compliance with outcomes

100; see also Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019).

¹⁰⁴ See Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893 (2020) (recent research providing a model for the use of data to identify systemic group-based disparities (based on age, gender, and race) in the outcomes produced by in-person vs. online proceedings in civil infraction cases).

¹⁰⁵ This sort of data has been collected in the past as courts evaluated the effects of court-connected divorce and child custody mediation, particularly in dealing with post-divorce issues.

If systemic patterns of discrimination or non-compliance are detected, it will be necessary to determine why such patterns are emerging, at what point, and as the result of whose actions or inaction.

One last point is in order. Details can make all the difference in the effects of dispute resolution processes. It is possible that systemic patterns of discrimination could be the result of a disconnect between how legislators and judges understand dispute resolution processes will be implemented and what actually occurs after their implementation. Therefore, it would also be essential to have data collected periodically regarding various implementation details—e.g., the timing of the use of dispute resolution in the life of a case; whether parties are receiving some form of legal assistance or legal representation; whether the process is occurring in-person or online; etc. For certain processes, like mediation, we also would want to know more about the interventions used by the mediators—e.g., the extent of joint session versus caucus; the extent of opportunities for parties to speak and engage in dialogue; the occurrence and timing of reality-testing and recommendations from the mediator.

Finally, because our courts represent dispute *systems*, we would want the same data to be collected, assessed, and reported for “traditional” processes—e.g., judicial settlement sessions, dispositive motions, jury trials, bench trials, even lawyers’ negotiations with and without their clients present—as for “alternative” dispute resolution processes. This Article began by noting that we need data and reporting regarding all court-connected and court-reliant dispute resolutions, not just jury and bench trials. “Traditional” processes should not be the only processes deemed worthy of data collection and reporting. Neither should they be deemed exempt from the data collection and reporting we are demanding for “alternative” dispute resolution processes.

V. CONCLUSION

This Article is part of a symposium issue celebrating New York’s Presumptive ADR initiative. The state’s initiative represents another important step forward in the acceptance and institutionalization of dispute resolution in our courts. Institutionalization without accountability, however, is cause for concern. In contrast, institutionalization *with* accountability is

cause for celebration as our field demonstrates its growth into maturity and assumes responsibility for making a difference—a good difference.