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adequately address them. In fashioning new modes of awarding fees, however, policymakers must recognize the complexities of the legal market and the difficulty of properly calibrating a fee to meet the diverse interests of all the parties involved, be they plaintiffs, defendants, attorneys, or judges. At present, the sale of legal claims could best accommodate these interests. By coordinating attorneys' private incentives with the socially optimal level of investment in class action litigation, the claim auction holds the promise of deriving the maximum public benefit from private enforcement of the law.

VI. ADR, THE JUDICIARY, AND JUSTICE: COMING TO TERMS WITH THE ALTERNATIVES

Any discussion of recent developments in civil litigation must address the virtual revolution that has taken place regarding alternative dispute resolution (ADR). Attorneys have witnessed a steady growth in their clients' recourse to ADR in place of lawsuits, and ADR is increasingly incorporated into the litigation process itself — in the form of court-annexed arbitration, mediation, summary jury trials, early neutral evaluation, and judicial settlement conferences. "Alternative" models of dispute resolution have inarguably penetrated the mainstream;¹ the relevant question now is how they will change it.

The judicial embrace of ADR presents opportunities and concerns that distinguish court-annexed programs from the broader trend of contractual ADR. Its versatile mechanisms have much to offer overloaded courts, but as ADR gains ground in the judiciary, it becomes urgent to isolate better the values of each from the other. Policymakers must carefully design judicial ADR programs to preserve the access to public adjudication that has rendered the judiciary so invaluable an institution, and they must incorporate into judicial ADR the procedural norms necessary to satisfy fundamental fairness without sacrificing the flexibility that gives ADR its force.²

This Part explores developments in ADR generally, with prescriptive attention to the unfolding progress of the judicial use of ADR. Section A reviews the history of the modern ADR movement, section B surveys significant developments in statutory and case law, and section C outlines the need for further procedural elaboration in court-annexed ADR.

¹ Although still nominally "alternative," the negotiation-based tools of ADR represent the norm of legal practice. See, e.g., Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26–36 (1983).

² See generally Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999).

A. *The ADR Revolution: Origins, Champions, and Critics*

The oft-cited statistic that fewer than ten percent of all cases filed result in a judicially adjudicated decision³ reflects the salience of settlement negotiation as the primary vehicle of private dispute resolution.⁴ More formal mechanisms of private dispute resolution are also longstanding; arbitration⁵ in commercial settings and mediation by community leaders have provided effective means of conflict management for centuries.⁶ During the first half of the twentieth century, large-scale collective bargaining disputes encouraged the development of professional mediation, and some courts began experimenting with mediation in the 1950s to resolve minor criminal and family disputes.⁷ In the 1960s, local communities established neighborhood justice centers to provide facilitative dispute resolution services for neighbors, families, tenants, and consumers.⁸

1. *The Birth of the Modern ADR Movement.* — In the 1970s, jurists began to voice concerns about the rising costs and increasing delays associated with litigation, and some envisioned cheaper, faster, less formal, and more effective dispute resolution in such alternatives as

³ See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994).

⁴ "Positional" negotiation, a fundamental aspect of litigation practice throughout history, involves bargaining between high and low aspiration points until the difference is split to both parties' satisfaction. See, e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3-4 (2d ed. 1991). The ADR movement has fostered the development of more sophisticated techniques of "principled" negotiation, see generally *id.*, and "problem-solving" negotiation, see generally ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (forthcoming 2000) (manuscript on file with the Harvard Law School Library), which seek to generate fair, optimal alternatives.

⁵ In arbitration, a "third-party neutral" adjudicates a case based on an abbreviated factfinding process with relaxed evidentiary rules. Disputants choose arbitration because decisions may be kept private, closure is emphasized, disputes proceed more rapidly toward resolution than in litigation, and at least in contractual contexts, parties may exert some control over the choice of arbitrator. See STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 234 (3d ed. 1999).

⁶ See *id.* at 6-7.

⁷ See *id.* at 7. Mediation involves a third-party neutral to facilitate problem-solving communication and option-generation. Strategies employed by mediators range from interest-based facilitative mediation, in which the mediator approaches the process from a non-judgmental stance, to rights-based or evaluative mediation, in which the mediator expresses opinions regarding the strengths and weaknesses of each position based on legally cognizable rights. See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) (analyzing different styles of mediation).

⁸ See Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments*, in ROMAN TOMASIC & MALCOLM FEELEY, *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 60, 64 (1982); see also Jill Richey Rayburn, *Neighborhood Justice Centers: Community Use of ADR — Does It Really Work?*, 26 U. MEM. L. REV. 1197, 1222-28 (1996) (noting that neighborhood justice centers create community cohesion but may vary in quality).

arbitration and mediation.⁹ As the use of ADR mechanisms grew, proponents viewed them as promising vehicles for an array of agendas. Jurists hoped ADR would relieve docket congestion, while litigators — especially repeat players in the insurance and securities industries — were attracted to its promise of cheaper, faster resolution of claims that raised no new issues of law.¹⁰ Community development advocates hoped ADR would provide broader access to dispute resolution for those unable to afford traditional litigation.¹¹ In the 1980s, social scientists, game theorists, and other scholars showed how ADR mechanisms could facilitate settlement by dealing proactively with heuristic biases through the strategic imposition of a neutral third party.¹² Meanwhile, process-oriented ADR advocates emphasized that problem-solving approaches would yield remedies better tailored to parties' unique needs and that the more direct involvement of disputants would encourage greater compliance with outcomes and help rebuild ruptured relationships.¹³ Some supporters lauded ADR for its potential to restore a culture of civility to the legal system.¹⁴

⁹ Professor Frank Sander first articulated ADR as a field of legal inquiry in 1976 at the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, at which he proposed his vision of a "multidoor courthouse" offering a variety of dispute processing vehicles. See Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (A. Leo Levin & Russell R. Wheeler eds., 1979).

¹⁰ See GOLDBERG, SANDER & ROGERS, *supra* note 5, at 8.

¹¹ See, e.g., William H. Simon, *Legal Informality and Redistributive Politics*, 19 *CLEARINGHOUSE REV.* 384, 384–87 (1985). On the far left, support for ADR emerged on the theory that it represented indigenous recapture of power over people's disputes from courts and lawyers. See *id.* For a critique of this theory, see Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 *OHIO ST. J. ON DISP. RESOL.* 1, 3 (1993), who argues that "harmony ideology" was a response to the law reform discourse of the 1960s and that ADR placates its participants without vindicating their legal rights.

¹² Disputants' perceptions of incoming settlement offers are often distorted because they engage in "reactive devaluation," discounting accurate information offered directly by the other party and making irrational decisions regarding risk. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 26, 38–42 (Kenneth Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky & Robert Wilson eds., 1999) (proposing that ADR-conversant lawyers can offset these distortions).

¹³ See generally, Frank E.A. Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOTIATION J.* 49 (1994). Advocates found that ADR's means for identifying Pareto-optimal alternatives improved outcomes for all by directing the resolution process away from the zero-sum model. See, e.g., FISHER, URY & PATTON, *supra* note 4, at 56–80 (encouraging exploitation of differences in time horizons or risk preferences).

¹⁴ See, e.g., Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 *OHIO ST. J. ON DISP. RESOL.* 831, 833–39 (1998) (arguing that increased use of mediation may elevate legal practice); see also Frances McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, *DISP. RESOL. MAG.*, Summer 1997, at 12, 13; cf. GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 1–10 (1965) (arguing that cultural factors shape political institutions).

As ADR gained prominence in judicial, academic, and private circles, it also attracted the attention of critics. In the first serious attack on ADR, Professor Owen Fiss exhorted the legal community not to subordinate what he considered the primary function of the judiciary — the articulation of public values through the application of legal principles — to its ancillary role of resolving private disputes.¹⁵ Subsequent critical scholarship has continued to press the concern that ADR falls too far on the private law side of the public/private quandary, threatening rights-based jurisprudence and the rule of law,¹⁶ public accountability,¹⁷ and even the judiciary itself.¹⁸ Some proceduralist critics fear that ADR's negotiation-based approach may disempower vulnerable parties with limited bargaining strength, particularly civil rights and family law disputants.¹⁹

Furthermore, critics argue that ADR fails to address real problems of the legal system. Skeptics challenge the notion that ADR is more efficient than litigation, questioning whether it really saves time or money²⁰ and disputing the asserted judicial overload itself.²¹ Others worry that ADR creates ethical problems for practitioners.²² At least one scholar suggests that many benefits of ADR have already been

¹⁵ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984).

¹⁶ See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986) (“[W]e must determine whether ADR will result in an abandonment of our constitutional system in which the ‘rule of law’ is created and principally enforced by legitimate branches of government.”).

¹⁷ See, e.g., Jonathan D. Mester, *The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?*, 13 OHIO ST. J. ON DISP. RESOL. 167, 185–96 (1997) (arguing that the exemption of federal arbitration from the Freedom of Information Act undermines public accountability).

¹⁸ See, e.g., Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262–63 (1995) (suggesting that ADR is weakening the judiciary); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. DISP. RESOL. 241, 261–62 (1996) (warning of judicial “white flight,” whereby the rich opt for private ADR and leave an underfunded judiciary for the poor).

¹⁹ See, e.g., Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400–04 (addressing class bias in the administration of ADR); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–50 (1991) (examining results of ADR in child custody disputes); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 61 (1984) (articulating a feminist critique of domestic violence mediation).

²⁰ See, e.g., Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 915 (1991); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1001 (2000) (discussing the RAND Institute for Civil Justice's findings that many judicial settlement efforts are “resource-consuming”).

²¹ See, e.g., Weinstein, *supra* note 18, at 265–67.

²² See, e.g., Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 421 (1997) (discussing the failure of legal ethics to address the complex relationships managed in ADR).

diminished over the course of its institutionalization, which has gradually rendered ADR more like the system it sought to transform.²³

2. *ADR at the Turn of the Century.* — Even as jurists debated the merits of the budding ADR movement, contractual arbitration and, later, mediation developed as preferred methods of dispute resolution in major areas of law practice, especially commercial²⁴ and employment law,²⁵ in as well as the administration of mass insurance claims²⁶ and class action torts.²⁷ ADR mechanisms nurtured in the neighborhood justice centers of the 1960s emerged by the late 1990s as the darlings of the business world for their cost efficiency and facilitation of continuing business relationships. In a 1997 Price Waterhouse survey of the “Fortune 1000” companies, nearly all of the 530 respondents had used some form of ADR, and ninety percent classified ADR as a “critical cost control technique.”²⁸ Private ADR vendors and law firms’ ADR practice groups began to market their services more widely.²⁹

Today, contractual ADR use continues to expand in the construc-

²³ See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 3 (1991). But see Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1292 (1998) (arguing in favor of ADR’s incorporation of many legal evidentiary and procedural norms).

²⁴ See, e.g., GABRIEL M. WILNER, 1 DOMKE ON COMMERCIAL ARBITRATION § 3 (1999).

²⁵ See Christine Lepera & Jeannie Costello, *New Areas in ADR*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT THE BUSINESS LAWYER NEEDS TO KNOW 593, 610 (PLI Litig. & Admin. Practice Course Handbook Series No. H-605, 1999). Employers are attracted to ADR for its facilitation of preventive management. See, e.g., John E. Sands & Sam Margulies, *ADR in Employment Law: The Concept of Zero Litigation*, N.J. LAW., Aug.-Sept. 1993, at 23, 23-24 (discussing the fit between “new” management structures and ADR in addressing employment-related conflicts).

²⁶ For example, the American Arbitration Association (AAA) administered a claims resolution program at the request of the Florida Department of Insurance following the devastation of southern Florida by Hurricane Andrew in 1992. See Cindy Fazzi, *Disaster: When It Strikes, ADR Can Come to the Rescue in Resolving Mass-Tort Claims*, DISP. RESOL. J., Feb. 1998, at 16, 16-17.

²⁷ See Kenneth R. Feinberg, *Resolving Mass-Tort Claims: The Perspective of a Special Master*, DISP. RESOL. J., Feb. 1998, at 10, 10-12 (describing the role of ADR in the Agent Orange, DES, and Dalkon Shield class actions). But cf. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (rejecting a mass tort settlement plan for its failure to account for the interests of future claimants).

²⁸ Sabatino, *supra* note 23, at 1301. For a detailed report on corporate use of ADR, see David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, DISP. RESOL. J., Feb. 1999, at 66, 66-71. Approximately 4000 companies have subscribed to the Center for Public Resources (CPR) Institute for Dispute Resolution’s *Corporate Policy Statement on Alternatives to Litigation*, which obligates them to explore the use of ADR in disputes with other signatories. See CPR Institute for Dispute Resolution, *CPR Corporate Policy Statement on Alternatives to Litigation* (visited Apr. 2, 2000) <<http://www.cpradr.org/corppol.htm>>.

²⁹ The top three private providers of ADR are the American Arbitration Association (AAA), J*A*M*S*, and the CPR Institute for Dispute Resolution. See Sabatino, *supra* note 23, at 1301.

tion,³⁰ health care,³¹ entertainment,³² telecommunications,³³ intellectual property,³⁴ and technology industries.³⁵ ADR is proving significant in the resolution of environmental and other public policy disputes,³⁶ and mediation techniques are increasingly used in community fora addressing juvenile justice and violence in schools.³⁷ ADR is also apt for disputes involving online commerce between geographically disparate parties,³⁸ and a rapidly developing area of ADR is on the Internet itself, where an array of dispute resolution services are available online.³⁹ Finally, increased international exchange has led to the

³⁰ See, e.g., Richard H. Steen & Robert J. MacPherson, *The Construction Industry: Forging a Path for ADR*, N.J. LAW., Aug.-Sept. 1993, at 19, 19-20.

³¹ In 1997, the American Bar Association, the American Medical Association, and the AAA formulated due process standards and procedures for health care disputes. See Roderick B. Matthews, *Rx for Managed Care*, DISP. RESOL. MAG., Spring 1999, at 14, 14. In 1998, the resulting Commission on Health Care Dispute Resolution recommended the use of ADR to resolve conflicts involving patients, doctors, health care providers, and managed care programs. See William K. Slate, *ADR and the Health Care Challenge*, DISP. RESOL. J., Aug. 1999, at 1, 1.

³² The Practising Law Institute highlighted entertainment law as one of the fastest-growing areas of ADR practice, reporting that the AAA experienced a 25% growth in entertainment cases in 1997 alone. See Lepera & Costello, *supra* note 25, at 607.

³³ See, e.g., Lori Tripoli, *Telecommunications Act Offers Opportunity for ADR Advocates*, INSIDE LITIG., Mar. 1997, at 3, 3 (reporting that the CPR Institute's Telecommunications Group is recommending ADR to state agencies that must implement the Telecommunications Act of 1996).

³⁴ The American Intellectual Property Law Association and the World Intellectual Property Organization both endorse ADR. See Nancy Neal Yeend & Cathy E. Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601, 602 (1996).

³⁵ See, e.g., William F. Baron, *High-Tech/High Resolution: ADR in Technology Disputes*, DISP. RESOL. J., Apr. 1996, at 88, 90 (noting characteristics of ADR amenable to technology disputes).

³⁶ See, e.g., THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind, Sarah McKearnan, Jennifer Thomas-Larmer, The Consensus Building Institute eds., 1999) (discussing public policy disputes); Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305, 1309-25 (1994) (surveying the history of ADR in modern environmental disputes).

³⁷ See, e.g., T. Nikki Eckland, *The Safe Schools Act: Legal and ADR Responses to Violence in Schools*, 31 URB. LAW. 309, 321-22 (1999).

³⁸ See, e.g., E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 216-22 (1996). The availability of reliable dispute resolution can help Internet commerce reach its full market potential. For example, Square Trade's *Transecure* service uses online ADR to resolve disputes involving long-distance electronic commerce. See Square Trade, *About Us* (visited Apr. 2, 2000) <http://transecure.com/aboutus/aboutus_alloff.cfm>.

³⁹ See, e.g., Martin C. Karamon, *ADR on the Internet*, 11 OHIO ST. J. ON DISP. RESOL. 537, 537 (1996). For example, the Internet Corporation for Assigned Names and Numbers (ICANN) has accredited ADR providers to arbitrate disputes online about Internet domain names. See Ethan Katsh, *The New Frontier: Online ADR Becoming a Global Priority*, DISP. RESOL. MAG., Winter 2000, at 6, 8. Online ADR providers also handle general disputes. For example, CyberSettle offers a simple technological means of defeating the "reactive devaluation" barrier to settlement, see *supra* note 12, by asking both parties to submit the zone of settlement values to which they would be willing to agree and then informing parties whether they have a shared Zone of Possible Agreement. See CyberSettle, *CyberSettle.com* (visited Apr. 2, 2000) <<http://www.cybersettle.com/flash.htm>>; see also Katsh, *supra* note 38, at 7.

widespread adoption of ADR in international arenas⁴⁰ that lack a uniform set of legal and cultural expectations regarding the management of disputes.⁴¹ Meanwhile, ADR mechanisms continue to evolve.⁴²

3. *ADR and the Courts.* — The practice of ADR has coalesced into two realms: the private (or “contractual”) sphere, in which parties agree to submit disputes to nonjudicial fora of resolution, and the judicial (or “court-annexed”) sphere, in which litigants engage in ADR through the court system, sometimes at their option and sometimes as mandated by statute or local rule.⁴³ Private ADR receives only limited judicial review, as courts presume that participation in arbitration is consensual and as mediated settlements are consensual by definition. In contrast, the results of court-annexed arbitration are rarely binding,⁴⁴ and though good-faith participation in court-annexed mediation may be compelled, parties are not required to reach agreement.⁴⁵

(a) *Mediation.* — According to a 1996 study of the federal courts by the Federal Judicial Center and the Center for Public Resources, mediation is the most prevalent form of court-annexed ADR.⁴⁶ In 1996, over half of all federal district courts provided mediation services, generally in-house or in cooperation with an external ADR provider.⁴⁷ Although outcomes in court-annexed mediation remain consensual, courts often compel participation by certain claimants.⁴⁸ Court-annexed mediation is common in family law cases,⁴⁹ and many

⁴⁰ See, e.g., *First Global Research Facility Dedicated to ADR Launched*, DISP. RESOL. J., Aug. 1999, at 4, 4; Betty Southard Murphy, *ADR's Impact on International Commerce*, DISP. RESOL. J., Dec. 1993, at 68, 69. Because some foreign courts refuse to hear technology and Internet cases, ADR is the only recourse in these situations. See Lepera & Costello, *supra* note 25, at 600.

⁴¹ Researchers report widespread dissatisfaction among Mexican and Canadian disputants, with more than 50 sets of laws that must be managed in U.S. litigation, and indicate that the availability of ADR has significantly improved the international free trade climate. Mediation is also more compatible with cultural biases in Canada and Mexico against litigation. See L. Richard Freese, Jr. & Robert Sagnola, *New Challenges in International Commercial Disputes: ADR Under NAFTA*, COLO. LAW., Sept. 1997, at 61, 62.

⁴² See GOLDBERG, SANDER & ROGERS, *supra* note 5, at 275–77.

⁴³ See, e.g., GOLDBERG, SANDER & ROGERS, *supra* note 5, at 372. These realms differ only loosely because court-annexed ADR is provided as often by private practitioners on a courthouse roster as it is by court personnel or volunteers. See ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS* 9–10 (1996).

⁴⁴ The Seventh Amendment renders all arbitration nonbinding in federal court; most states provide a similar constitutional guarantee for jury trials in civil disputes. See generally Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 493–95 (1989) (outlining the constitutional constraints on ADR).

⁴⁵ See GOLDBERG, SANDER & ROGERS, *supra* note 5, at 372.

⁴⁶ See PLAPINGER & STIENSTRA, *supra* note 43, at 4–5.

⁴⁷ See *id.* at 4.

⁴⁸ See GOLDBERG, SANDER & ROGERS, *supra* note 5, at 372.

⁴⁹ See, e.g., Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Same Coin?*, 1993 J. DISP. RESOL. 1, 11 & n.68.

Farm Belt states mandate mediation of agricultural debt foreclosures.⁵⁰ Other programs address disputes ranging from the siting of radioactive waste to the interpretation of Do-Not-Resuscitate orders.⁵¹

(b) *Arbitration.* — As of 1999, statute or local rule provided for court-annexed arbitration in thirty-three states and twenty-two federal district courts.⁵² Federal courts generally do not compel participation in court-annexed arbitration,⁵³ but the same is not true of state courts.⁵⁴ Although judicial arbitration is rarely binding, courts may impose disincentives for rejecting the arbitrator's decision — for example, requiring that respondents who achieve results in subsequent trials as or less favorable to the arbitration award pay fines or fees.⁵⁵

(c) *Other forms of ADR.* — Mediation and arbitration remain the most widespread forms of ADR, but practitioners continue to develop additional problem-solving means of resolving disputes. Summary jury trial, a mock trial settlement device, involves the truncated presentation of evidence and argument before a judge and a jury, which renders a nonbinding decision; afterward, the parties engage in better-informed settlement negotiations.⁵⁶ Similarly, in early neutral evaluation, a knowledgeable third-party neutral meets with the parties before litigation begins and evaluates their positions on the merits, facilitating more realistic settlement negotiation. Courts are also experimenting with the use of minitrials⁵⁷ and special settlement masters.⁵⁸ Finally,

⁵⁰ Examples include Montana, Nebraska, and Utah; participation is generally at the option of the debtor farmer. See generally Leonard L. Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21 (1993).

⁵¹ See Sabatino, *supra* note 23, at 1300-01 & nn.37-57.

⁵² See GOLDBERG, SANDER & ROGERS, *supra* note 5, at 373.

⁵³ The Alternative Dispute Resolution Act of 1998 requires that court-annexed arbitration be voluntary, with the exception of 10 districts authorized by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 901(a), 101 Stat. 4642, 4662 (1988), to establish experimental compulsory arbitration programs. See 28 U.S.C. § 654 (Supp. IV 1998).

⁵⁴ Various states have enacted compulsory nonbinding arbitration for specific types of disputes. For a sampling, see Sabatino, *supra* note 23, at 1300 & nn.37-57.

⁵⁵ See Nancy F. Reynolds, *Why We Should Abolish Penalty Provisions for Compulsory Nonbinding Alternative Dispute Resolution*, 7 OHIO ST. J. ON DISP. RESOL. 173, 182 (1991). However, the legal authority for these penalties has been questioned. See *id.* (arguing that courts lack constitutional authority to apply such penalties); *Tiedel v. Northwestern Mich. College*, 865 F.2d 88, 93-94 (6th Cir. 1988) (overturning penalty provisions on statutory but not constitutional grounds).

⁵⁶ In theory, summary trial jurors should not know that their verdict is not binding, a characteristic that has elicited criticism. Chief Judge Posner fears it compromises the seriousness with which jurors take cases, as the presence of summary jury trials means they never know whether a given trial is "real." See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 336, 386-87 (1986).

⁵⁷ In the minitrial, attorneys for the parties give abbreviated presentations to an adjudicative panel consisting of a neutral authority and a representative with settlement authority for each party. See Robert G. Fryling & Edward J. Hoffman, *Step by Step: How the U.S. Government Adopted the ADR Idea*, DISP. RESOL. J., May 1998, at 80, 80. Based on the presentations, the

judicially mandated settlement conferences, in which judges attempt to mediate settlement negotiations during the pre-trial phase, are now routine in many courts.⁵⁹

B. *Developments in Statutory and Case Law*

Over the past few decades, ADR has emerged from a shadowy “alternative” status into common legal parlance. The legislative and executive branches both require federal agencies to look first to ADR in seeking resolutions of disputes,⁶⁰ and Congress has declared that all federal district courts must enact ADR programs to help streamline their dockets.⁶¹ The judiciary has been slower in its embrace,⁶² but even the Supreme Court has wielded an activist gavel in favor of expanding ADR use.⁶³ Nonetheless, the case law reveals doctrinal and ethical issues that have yet to be resolved in the new marriage between private and public forms of dispute resolution.

1. *Statutory Developments.* — Overturning the traditional common law doctrine declining enforcement of arbitration agreements,⁶⁴ Congress first declared a national policy favoring arbitration in 1925 with

party representatives attempt to negotiate a settlement, but if they fail, the neutral adjudicator provides a nonbinding assessment of the merits in the case, predicting the outcome at trial. *See id.*

⁵⁸ In particularly complex cases, courts appoint special masters, chosen for their expertise in the relevant subject matter, to hear the parties' arguments and prepare recommendations to the court. *See* Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881, 884 (1996) (describing the use of special masters in asbestos, defective heart valve, and Dalkon Shield class action suits). Used in the past on a more limited basis, special masters increasingly assist courts by conducting direct settlement negotiations. *See id.*

⁵⁹ Judicially mandated settlement conferences require parties to balance their management of settlement concerns against their management of relations with a judge who may ultimately wield total power over the disposition of their case. For this reason, some commentators argue that judges should not mediate cases assigned to them for trial. *See, e.g.,* James Alfini, *Risk of Coercion Too Great*, DISP. RESOL. MAG., Fall 1999, at 11, 11. Taking Alfini's argument one step further, Frank Sander argues that judging and mediation should remain mutually exclusive. *See* Frank E.A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG., Fall 1999, at 11, 11.

⁶⁰ The Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736, required each federal agency to adopt a policy for using ADR. *See id.* § 3. The White House pressed has the issue further: expanding on a Bush Administration executive order requiring government attorneys to seek settlement to manage caseloads more efficiently, *see* Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991), President Clinton mandated consideration of ADR as a means of reaching efficient resolution of all civil claims in which the government is a party, *see* Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996).

⁶¹ *See* 28 U.S.C. § 651(b) (Supp. IV 1998).

⁶² *See infra* p. 1862.

⁶³ *See* cases cited *infra* notes 90–92, 94, 96.

⁶⁴ Under the English common law “ouster doctrine,” courts voided arbitration agreements because such agreements ousted courts of their jurisdiction to hear cases arising under the laws of the sovereign. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 977 (2000).

passage of the Federal Arbitration Act (FAA),⁶⁵ which rendered contracts to arbitrate binding and provided federal recognition of arbitration awards.⁶⁶ In 1990, Congress passed the Administrative Dispute Resolution Act,⁶⁷ which authorized federal agencies to use a full range of ADR mechanisms and required them to explore how use of ADR could advance their missions.⁶⁸ In 1996, Congress significantly extended the scope of the Act⁶⁹ by authorizing true binding arbitration for federal agencies,⁷⁰ simplifying the procedural requirements for negotiated rulemaking,⁷¹ and enhancing confidentiality protections.⁷²

At the same time, the judiciary fostered the paradigm shift toward pre-trial settlement through Rule 16 of the Federal Rules of Civil Procedure, which facilitated settlements by granting trial courts discretion to convene pre-trial settlement conferences.⁷³ Amendments to Rule 16 in 1983 required judges to address the possibility of using extrajudicial procedures to resolve disputes,⁷⁴ and further amendments in 1993 specified these procedures as ADR.⁷⁵ The promotion of settlement by the evolving Federal Rules has, as powerfully as any legislative action, laid the foundation for our modern culture of settlement.⁷⁶

⁶⁵ United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1994)). *But see* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996) (refuting the claim that the FAA actually established such a "policy" favoring arbitration).

⁶⁶ *See* 9 U.S.C. §§ 2, 9-11 (1994).

⁶⁷ Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified at 5 U.S.C. §§ 571-584 (1994 & Supp. III 1997)).

⁶⁸ *See* 5 U.S.C. § 572 (1994).

⁶⁹ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870.

⁷⁰ *See* 5 U.S.C. § 575(c) (1994 & Supp. III 1997). The 1990 Act gave agencies authority to employ private arbitrators, *see id.* § 573(a), but constitutional concerns raised by the Justice Department led to a provision enabling agency directors to vacate an award within 30 days for any reason, *see id.* § 580(b)-(c); Charles Pou, Jr., *Reauthorized Laws Show Government's ADR Comfort Level Is Increasing*, reprinted in WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR app. at 635 (PLI Litig. & Admin. Practice Course Handbook Series No. H-578, 1998). Under the 1996 Act, agencies are bound on equivalent terms as private parties, but to assuage remaining concerns about possible abuse of public funds, the Act requires federal agencies entering into arbitration to specify a maximum arbitral award. *See* 5 U.S.C. § 575(a)(2) (1994 & Supp. III 1997).

⁷¹ *See* 5 U.S.C. § 569 (1994 & Supp. III 1997).

⁷² *See* 5 U.S.C. § 574 (1994 & Supp. III 1997). Of all statutory issues affecting agency ADR use under the 1990 Act, the troubling disconnect between its confidentiality provisions and the Freedom of Information Act caused the most concern. *See* Pou, *supra* note 70, app. at 635; Jeffrey M. Senger, *Turning the Ship of State*, J. DISP. RESOL. (forthcoming 2000) (manuscript at 23-24, on file with the Harvard Law School Library) (addressing confidentiality concerns). The 1996 Act prevents disclosure of most documents in a neutral's possession and communications between a party and the neutral. *See* 5 U.S.C. § 574(j) (1994 & Supp. III 1997).

⁷³ *See* FED. R. CIV. P. 16.

⁷⁴ FED. R. CIV. P. 16 advisory committee's note (1983).

⁷⁵ *See* FED. R. CIV. P. 16(c)(9) advisory committee's note (1993). Professor Resnik identifies this as the moment when "ADR . . . moved inside the courts." Resnik, *supra* note 18, at 230.

⁷⁶ *See* Galanter & Cahill, *supra* note 3, at 1339.

The 1990 passage of the Civil Justice Reform Act (CJRA),⁷⁷ which authorized the federal judiciary to implement pilot court-annexed ADR programs, closed the divide between legislative and judicial postures toward ADR. In 1993 and 1994, based on the success of such programs, legislators proposed mandating the provision of court-annexed arbitration in federal district courts, but the judiciary insisted that such provision be optional.⁷⁸ The compromise plan continued authorization of the twenty districts with existing ADR programs — ten of which could provide only voluntary, nonbinding arbitration and ten of which could, at their option, require participation in arbitration programs.⁷⁹

The most important statutory development to date, the Alternative Dispute Resolution Act (ADRA) of 1998,⁸⁰ mandates that every federal district court implement an ADR program because ADR “has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.”⁸¹ The Act requires federal civil litigants to consider ADR at appropriate stages in litigation and instructs each district court to offer at least one ADR alternative.⁸² Significantly, the Act authorizes courts to compel participation in mediation or early neutral evaluation processes but requires consent for court-annexed arbitration.⁸³ Although the judicialization of ADR may itself raise threshold questions, the most troubling aspect of the statute is the lack of procedural guidelines provided for courts required to implement ADR programs. The ADRA directs each court to establish its own rules concerning confidentiality and disqualification of neutrals.⁸⁴ The discretion afforded individual courts to determine the nature and extent of annexed ADR programs may encourage helpful evolution of ADR, but it may also lead to undesirable variety in procedure and

⁷⁷ Pub. L. No. 101-650, 104 Stat. 5089 (codified in scattered sections of 28 U.S.C.).

⁷⁸ See Resnik, *supra* note 18, at 237-38.

⁷⁹ See *id.* A report by the RAND Institute for Civil Justice evaluated six programs and concluded that, although participants were generally supportive, the programs did not significantly relieve docket congestion. See JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL McCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE, & MARY E. VAIANA, RAND INST. FOR CIV. JUST., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 48-53 (1996). However, the report's methodology has been rigorously challenged. See, e.g., William H. Erickson, *The RAND Report: Concerns and Future Choices*, COLO. LAW., Oct. 1997, at 7.

⁸⁰ Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-658 (Supp. IV 1998)).

⁸¹ *Id.* § 2.

⁸² See 28 U.S.C. § 652(a) (Supp. IV 1998).

⁸³ See *id.* The Act directs each court to examine any existing ADR programs for compliance with the law, but the 10 district courts that established mandatory arbitration programs under the CJRA are exempted from compliance with the consent-rule for new arbitration programs. See *id.* § 654(d); Eileen Barkas Hoffman, *The Impact of the ADR Act of 1998*, TRIAL, June 1999, at 30, 31.

⁸⁴ See 28 U.S.C. §§ 652(d), 653(b) (Supp. IV 1998).

practice. Furthermore, the Act appropriates no funding to implement programs, rendering impotent hopes of significant innovations in courts already struggling to cover basic expenses.⁸⁵ More congressional support is needed before courts can properly implement and evaluate the ADRA.

2. *Case Law Developments: Arbitration.* — Although case law poorly tracks the progress of ADR, it does reveal the evolution of positive judicial regard for arbitration, as well as the increasing levels of power that the judiciary is willing to cede to private dispute resolution.

In 1953, the Supreme Court expressed its hostility toward ADR — despite Congress's passage of the FAA — in *Wilko v. Swan*,⁸⁶ upholding a client's right to litigate a securities claim against his brokerage firm even though he had contracted with the firm to arbitrate all such disputes.⁸⁷ Fearing that arbitration would prove less loyal to the law and less protective of vulnerable parties than courtroom adjudication, the Court held that parties were unable to consent to waive litigation of their federal rights.⁸⁸ The *Wilko* regime persisted until 1983, when the Court held that the FAA established that doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.⁸⁹ The Court overruled *Wilko* in a progression of cases between 1985 and 1991,⁹⁰ culminating with *Gilmer v. Interstate/Johnson Lane Corp.*,⁹¹ in which the Court explicitly dismissed its previous concern in *Wilko* regarding unequal bargaining power between parties contracting to waive rights to litigate federal statutory claims.⁹²

By welcoming arbitration of even federal statutory claims, the Supreme Court formalized a shift away from its role in the articulation of public legal standards. With courts regarded less as vehicles for "regulation and rights pronouncement"⁹³ and more as fora for the disposition of individual conflicts, the arbitration tribunal seemed ever more like a court — and less subject to concerns of lawlessness.

⁸⁵ Lack of funding renders impossible even the most basic statutory obligation to provide "adequate training" for staff. See John Bickerman, *Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Move on ADR*, DISP. RESOL. MAG., Fall 1999, at 3, 4.

⁸⁶ 346 U.S. 427 (1953).

⁸⁷ See *id.* at 428–30, 438.

⁸⁸ See *id.* at 434–38.

⁸⁹ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁹⁰ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989) (overruling *Wilko* and enforcing an ex ante arbitration agreement under the Securities Act of 1933); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (finding that courts' duty under FAA to enforce arbitration contracts is not diminished when claims raise statutory rights); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (allowing arbitration of antitrust claims arising out of domestic or international agreements).

⁹¹ 500 U.S. 20 (1991).

⁹² See *id.* at 33.

⁹³ Resnik, *supra* note 18, at 226.

Sharing this view, the current Court has departed notably from its recent trend of federalist reasoning to draw state jurisprudence in line with federal precedent, holding preempted by the FAA all state statutes denying recognition to arbitration agreements or otherwise thwarting federal policies favoring arbitration.⁹⁴ Still, the Supreme Court appears to have reserved certain issues to the judiciary, including the question of arbitrability itself.⁹⁵ On the whole, however, the Court has granted increasing levels of authority to ADR neutrals, including the power to award punitive damages.⁹⁶ Some courts have even allowed arbitrators to adjudicate class actions.⁹⁷

Nevertheless, tension between the desire for maximum efficiency and anxiety over issues of fairness continues to stymie courts in their efforts to interpret the Supreme Court's determination that parties who contract to arbitrate "will be held to their bargain."⁹⁸ *Gilmer* explicitly discounted power imbalance as a per se reason to invalidate arbitration clauses,⁹⁹ but lower courts continue to exhibit concern over inequalities in bargaining power between parties to adhesion contracts.¹⁰⁰ For example, endorsing consideration of actual assent in

⁹⁴ In *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 281 (1995), the Court rejected the Supreme Court of Alabama's ruling that the FAA applied only to contracts that contemplate a substantial "interstate commerce connection" and struck down a law denying enforcement to ex ante arbitration agreements. *Id.* at 281-82. For the Court's first holding that the FAA applies to state, as well as federal, courts, see *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

⁹⁵ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995) (holding that courts may review arbitrators' decisions on arbitrability de novo unless "clear and unmistakable" evidence shows that the parties agreed to arbitrate questions of arbitrability). *But see* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that federal courts are barred from hearing consent-based challenges to broad arbitration agreements if the challenge goes to the substance of the entire contract); 2 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 15.3 (1999) (discussing *Prima Paint*). In addition, the First, Second, Third, Fourth, Seventh, and Ninth Circuits have authorized courts to issue preliminary injunctions in disputes subject to mandatory arbitration. See Catherine Cronin-Harris, *A Primer on ADR Statutes and Cases*, in *WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR*, *supra* note 70, at 449, 469. Other issues preserved for the courts include questions of fraudulently induced or unconscionable contracts and determinations of statutes of limitations. See *id.*

⁹⁶ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-62, 64 (1995) (upholding the inclusion of punitive damages in an arbitration award).

⁹⁷ See, e.g., *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 794 (Ct. App. 1998) (allowing classwide arbitration when authorized by state law). *But see* *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) (holding that, unless an arbitration agreement specifically provides for class action treatment, a court cannot certify class arbitration).

⁹⁸ *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

⁹⁹ See *Gilmer*, 500 U.S. at 33.

¹⁰⁰ See, e.g., *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994) (invalidating an arbitration clause in light of congressional concerns regarding unequal bargaining power); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 158-59 (Ct. App. 1997) (finding an arbitration agree-

agreements to arbitrate,¹⁰¹ the California Supreme Court recently denied review of an appellate court's refusal to enforce a bank's unilateral imposition of a mandatory binding-arbitration clause on its checking and credit card account holders.¹⁰² The lower court had refused to enforce the arbitration clause because the bank had quietly grafted it onto an initial contract that had not considered dispute resolution at all.¹⁰³ The degree to which individuals can waive their rights to litigate federal claims also continues to attract scrutiny.¹⁰⁴

Moreover, although the judiciary has seen fit to cede disposition of claims to ADR fora, it has not done so without concern for the preservation of procedural due process for individual disputants. In *Cole v. Burns International Security Services*,¹⁰⁵ a landmark case straining the holding in *Gilmer*, the D.C. Circuit found that an employer who compels arbitration of claims as a condition of employment cannot burden an employee who brings a claim with the costs of arbitration.¹⁰⁶ In addition to requiring employers to bear these costs,¹⁰⁷ Chief Judge Edwards further advocated judicial imposition of minimum procedural standards when employers require arbitration of statutory

ment to be an unconscionable contract of adhesion because the defendant employer presented it as a standard employment contract after the commencement of employment).

¹⁰¹ See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir. 1998) (holding that employees cannot be compelled to waive the right to bring claims under Title VII as a condition of their employment); *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104, 1105-08 (9th Cir. 1997) (holding that an arbitration clause contained in the Uniform Application for Securities Industry Registration did not constitute a knowing waiver of Title VII and related state claims); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994); see also Richard Reuben, *The Pendulum Swings Again: Badie, Wright Decisions Underscore Importance of Actual Assent to Arbitration*, DISP. RESOL. MAG., Fall 1999, at 18, 18 (arguing that the "relinquishment of legal rights through mandatory arbitration contract provisions must be knowing and voluntary").

¹⁰² See *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 291 (Ct. App. 1998).

¹⁰³ See *id.* at 287-88. The court found the provision unconscionable but noted that an adhesion contract is not per se unconscionable if it prescribes fair procedures. See *id.* at 277 n.5.

¹⁰⁴ In *Wright v. Universal Maritime Services Corp.*, 525 U.S. 70 (1998), a unanimous Court agreed that a waiver of federal rights under the Americans with Disabilities Act implied by an arbitration provision in a collective bargaining agreement must be "clear and unmistakable." *Id.* at 80. The waiver analysis allowed the *Wright* Court to evade the pressing issue whether *Gilmer's* denial of de novo review of statutory claims had overturned the seminal holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), that union representatives may not waive workers' rights to litigate statutory claims as part of a collective bargaining agreement. See *id.* at 51. Indeed, this question has "badly fractured the lower court[s]," Reuben, *supra* note 101, at 22 n.2, especially with respect to the adjudication of civil rights claims. Compare *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1347 (6th Cir. 1992) (holding that section 1983 rights can be asserted regardless of contracts to arbitrate), with *Bender v. A.G. Edwards & Sons*, 971 F.2d 698, 700-01 (11th Cir. 1992) (holding that Title VII claims can be subject to compulsory arbitration).

¹⁰⁵ 105 F.3d 1465 (D.C. Cir. 1997).

¹⁰⁶ See *id.* at 1482.

¹⁰⁷ Payment of neutrals in court-annexed ADR remains a difficult question. Of the 41 courts offering mediation services in 1996, only nine provided the service without charge. See PLAPINGER & STIENSTRA, *supra* note 43, at 10-11.

claims as a condition of employment.¹⁰⁸ Specifically, he recommended a neutral arbitrator conversant with relevant law, fair access to information necessary for presenting a claim, the right to independent representation, remedies equal to those available in litigation, a written opinion explaining the decision, and sufficient judicial review to ensure compliance with governing statutory rights.¹⁰⁹

The *Cole* court sought to broaden the grounds for judicial review of arbitral awards under the “manifest disregard” doctrine, a standard raised in *Wilko v. Swan*¹¹⁰ and later reaffirmed by the Supreme Court,¹¹¹ which allows for judicial review of an arbitral decision made in “manifest disregard” of the law.¹¹² Insisting that courts ensure meaningful review of public law issues in private fora of dispute resolution, the *Cole* court urged that arbitral awards be set aside not only if they fail to adhere to the law,¹¹³ but also if they violate basic norms of procedural fairness.¹¹⁴ Following *Cole*’s lead, the Second Circuit set aside an arbitral award for its “manifest disregard of the evidence”¹¹⁵ — a dramatic departure from the dominant regime of arbitral review, exerted narrowly and only on questions of law.¹¹⁶

¹⁰⁸ See *Cole*, 105 F.3d at 1482.

¹⁰⁹ See *id.* Similarly concerned about the lack of procedural due process protection in arbitration, the ABA and several ADR organizations have promulgated a Due Process Protocol for mediation and arbitration of statutory disputes arising out of the employment relationship, proposing standards for choice of representation, fee payment, and access to information, as well as guidelines for neutral selection, training, conflicts of interest, and scope of authority. See Task Force on Alternative Dispute Resolution in Employment, *Document: A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, DISP. RESOL. J., Oct.–Dec. 1995, at 37, 37–39. The President’s Commission on the Future of Worker-Management Relations, chaired by Harvard economist and former Labor Secretary John T. Dunlop, has also called for “quality standards” in contractual non-union ADR that are the functional equivalent of due process standards. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 30, 25–33 (1994).

¹¹⁰ 346 U.S. 427, 436 (1953) (noting that parties are bound by arbitral decisions not in “manifest disregard” of the law).

¹¹¹ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko*).

¹¹² *Wilko*, 346 U.S. at 436; see also Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 739, 810–19 (1996) (describing the doctrine but noting the rarity with which courts use it to overturn arbitration awards).

¹¹³ See, e.g., *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (overturning an arbitration award which evidenced manifest disregard for the Fair Labor Standards Act and holding that arbitrators are bound to apply the law absent a valid agreement not to do so).

¹¹⁴ See *Cole*, 105 F.3d at 1482.

¹¹⁵ *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998). But see *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 820 (2d Cir. 1997) (affirming an arbitral award in the absence of “manifest disregard for [clear and applicable] law”).

¹¹⁶ See, e.g., *Halligan*, 148 F.3d at 204. However, courts have been receptive to a trend toward parties’ contracting for increased judicial review. See, e.g., *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 887–88 (9th Cir. 1997). But see *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

Also relying on *Cole*, the Eleventh Circuit recently upheld a trial court's refusal to enforce a contract to arbitrate in the absence of guarantees that the "high costs" of arbitration would not obstruct the plaintiff's ability to vindicate statutory rights.¹¹⁷ The Supreme Court has granted certiorari¹¹⁸ and may soon begin to clarify the scope of procedural rights implicated by arbitration.

3. *Case Law Developments: Mediation and Other Forms of ADR.* — Whereas arbitration cases test the limits of the judiciary's willingness to allow arbitrators to assume court-like powers, mediation cases test the parameters of judicial tolerance for dispute resolution methods that depart more dramatically from the adjudicatory model. Courts have struggled to determine the appropriate procedural treatment of evidence as it circulates through and between ADR and litigation processes, particularly in the context of court-annexed ADR, in which due process concerns are heightened. Some courts have accorded evidentiary privileges to mediators, while others have subordinated confidentiality concerns to the proverbial "search for truth." Conflict of interest questions also divide the courts. In resolving these questions, courts confront fundamental tensions between fairness and efficiency.

Although rules of evidence and procedure offer guidance regarding the confidentiality of settlement negotiations,¹¹⁹ mediation presents a situation unanticipated by rules established in contemplation of litigation and settlement negotiations: facilitation by a third-party neutral. Settled authority is lacking regarding the parameters of privilege in the neutral relationship and participants' reasonable expectations of confidentiality. Several states have created a mediation privilege¹²⁰ to protect disclosures made during mediation,¹²¹ but some courts, including the Fifth Circuit, have subordinated interests in mediation confidentiality to the power of courts to procure evidence in criminal proceed-

¹¹⁷ *Randolph v. Green Tree Fin. Corp.—Ala.*, 178 F.3d 1149, 1158 (11th Cir. 1999).

¹¹⁸ See *Green Tree Fin. Corp.—Ala. v. Randolph*, No. 99-1235, 2000 WL 122150 (U.S. Apr. 3, 2000).

¹¹⁹ Rule 68 of the Federal Rules of Civil Procedure and Rule 408 of the Federal Rules of Evidence (and corresponding state rules) generally protect evidence obtained during negotiations from admission in court, and some courts have also protected such evidence from discovery under Rule 26(b) of the Federal Rules of Civil Procedure.

¹²⁰ Related to the issue of mediation privilege is the granting of immunity to neutrals in non-binding ADR programs. See *Wagshal v. Foster*, 28 F.3d 1249, 1250 (D.C. Cir. 1994) (granting immunity to a court-appointed mediator sued for an alleged breach of his confidentiality obligation).

¹²¹ See, e.g., NEB. REV. STAT. § 25-2914 (1995); see also, e.g., *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998) (holding that communications made during the course of a formal mediation were protected by a federal mediation privilege pursuant to Rule 501 of the Federal Rules of Evidence).

ings.¹²² Other courts have disregarded statutory mediation privileges when they have conflicted with other legal rules.¹²³ Still others have simply flouted an established privilege when it has proved inconvenient.¹²⁴ Perhaps the only reliable rule in the realm of mediation confidentiality is that seemingly settled rules can prove unreliable.

Increasing judicial appreciation of the importance of mediation confidentiality has tracked the growing use of nonbinding ADR, but decisions remain inconsistent. The case law shows courts generally permitting discovery at the expense of confidentiality during the 1980s¹²⁵ and then increasingly barring discovery over the course of the 1990s.¹²⁶ Foreshadowing the later trend, the Sixth Circuit held in 1988 that the press did not have a First Amendment right of access to a summary jury trial about the construction of a nuclear reactor; the court reasoned that the event was more like a settlement conference than a trial and that press access would hamper the goal of promoting settlement.¹²⁷ Yet many courts continue to prioritize other concerns over confidentiality. For example, the Eighth Circuit recently allowed testimony despite mediation confidentiality to enforce a mediated settlement agreement reached three days *after* a summary judgment motion had been granted to the defendant, even though neither party was aware that the order had been granted.¹²⁸

¹²² See, e.g., *In re Grand Jury Subpoena*, 148 F.3d 487, 489 (5th Cir. 1998) (finding that a federal statutory requirement that agricultural mediation programs be confidential did not create a privilege protecting mediation records from a grand jury subpoena).

¹²³ See, e.g., *Rinaker v. Superior Court*, 74 Cal. Rptr. 2d 464, 466 (Ct. App. 1998) (holding that a juvenile's constitutional right to confrontation trumps a mediator's statutory right not to be called as a witness); *Vernon v. Acton*, 693 N.E. 2d 1345, 1349–50 (Ind. Ct. App. 1998) (holding that an agreement that a mediation would be confidential did not prevail over the rules of evidence).

¹²⁴ See, e.g., *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1131–33 (N.D. Cal. 1999) (holding that a mediator's right not to testify yields when the evidence is material and the disputants agree to waive the privilege); *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, No. B124482, 2000 WL 218353 (Cal. Ct. App. Feb. 25, 2000) (holding that, regarding sanctions, a court may consider parts of a mediator's report and communications made during the mediation).

¹²⁵ See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986) (permitting discovery of settlement documents despite their having been placed under seal); *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739, 749 (D.D.C. 1983) (holding that Rule 408 of the Federal Rules of Evidence places a limit only on admissibility, not on discovery). *But see* *NLRB v. Macaluso, Inc.*, 618 F.2d 51, 56 (9th Cir. 1980) (finding that the public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a mediator's testimony).

¹²⁶ See, e.g., *Cook v. Yellow Freight Sys.*, 132 F.R.D. 548, 552–55 (E.D. Cal. 1990) (applying the federal law of privilege and the underlying policy of Rule 408 of the Federal Rules of Evidence to protect from discovery documents related to settlement negotiations).

¹²⁷ See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904–05 (6th Cir. 1988).

¹²⁸ See *Sheng v. Starkey Lab., Inc.*, 117 F.3d 1081, 1082–83 (8th Cir. 1997). By holding that even mutual mistake is insufficient to rescind a mediated agreement, the court implied that its role in facilitating private resolution of disputes is paramount to its role in applying public law.

Poorly developed rules of mediation confidentiality also plague matters of conflict of interest and the scope of permissible representation in subsequent disputes. Because attorneys representing a party in a mediation are privy not only to their clients' confidential information, but also to "off the record" information of all the other parties, their ethical responsibilities in future representation are more complex than in the adversarial context envisioned by rules of professional conduct.¹²⁹ Attorneys acting as neutrals — a situation entirely unanticipated by the rules — face even more difficult ethical questions.¹³⁰

Courts increasingly err on the side of disqualification, if for no other reason than to satisfy public perception.¹³¹ However, a recent case in the Southern District of New York highlights the potential for abuse in the absence of clear confidentiality rules. In *Fields-D'Arpino v. Restaurant Associates*,¹³² the court disqualified a law firm as counsel for a defendant corporation in a discrimination suit to avoid "an appearance of impropriety" because one of its lawyers had previously attempted to mediate the case.¹³³ Appearances were not all that were at stake: not only had the firm failed to implement screening procedures to prevent the mediator from sharing confidential information, it had also used such confidential information to rebut the plaintiff's charge of discrimination during an administrative proceeding.¹³⁴

C. Judicial ADR, Fairness, and the Future

In 1996, a landmark study of federal judicial ADR and settlement practices demonstrated the explosion of judicial ADR even before passage of the ADRA.¹³⁵ The study called attention to the questions this trend raises for judges, lawyers, and policymakers:

Do judges have the resources to identify and refer cases to different types of ADR? Will a court's ADR or settlement approaches influence a litigant's choice of forum or affect other key litigation decisions? Should

¹²⁹ For example, may a lawyer who represents a plaintiff in a mediation subsequently represent a different plaintiff against the same defendant without breaching confidentiality? See *Barajas v. Oren Realty & Dev. Co.*, 67 Cal. Rptr. 2d 62, 63 (Ct. App. 1997) (holding in the affirmative).

¹³⁰ See, e.g., Menkel-Meadow, *supra* note 22, at 422-44. In response to this problem, the CPR Institute for Dispute Resolution and the Georgetown University Law Center have drafted the *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral*, which recommends guidelines regarding competence, confidentiality, impartiality, conflicts of interest, fees, and fairness. See Elizabeth Plapinger & Carrie Menkel-Meadow, *ADR Ethics: Model Rules Would Clarify Lawyer Conduct When Serving as a Neutral*, DISP. RESOL. MAG., Summer 1999, at 20, 20.

¹³¹ See, e.g., *Cho v. Superior Court*, 45 Cal. Rptr. 2d 863, 863-64 (Ct. App. 1995) (disqualifying a firm as trial counsel after a former judge who had presided over settlement conferences in the suit joined the firm, in order to preserve public confidence in the integrity of the legal process).

¹³² 39 F. Supp. 2d 412 (S.D.N.Y. 1999).

¹³³ *Id.* at 418.

¹³⁴ See *id.* at 417.

¹³⁵ See PLAPINGER & STIENSTRA, *supra* note 43.

lawyers learn negotiation as well as litigation skills? Is the development of rules for court ADR programs good or bad for a dispute resolution process that has relied in the past on flexibility and, in many instances, informality? Has ADR eclipsed the role of judges in settlement, or have trial courts become primarily settlement forums? Are national rules needed to bring uniformity and good standards of practice to the array of innovations now found in the district courts? Should there be ethical rules or guidelines for court-connected ADR neutrals?¹³⁶

The ADRA's mandate that all federal districts implement ADR programs demands more focused consideration of these issues.

Among the most important areas of development needed in judicial ADR is the designation of uniform standards of ethics and procedure to ensure fundamental fairness. Experience with private ADR demonstrates that fairness concerns are not unfounded; such problems as coercion have arisen in the contexts of both arbitration¹³⁷ and mediation.¹³⁸ As ADR becomes more compulsory and less "alternative," it is imperative that these problems not contaminate court-annexed ADR, lest they erode the public legitimacy on which judiciary depends.

1. *Judicial ADR and Due Process.* — Although the Constitution canonized societal concern for fairness in the language of due process, determining the specific guarantees of due process continues to preoccupy courts and commentators. The Supreme Court has articulated the essence of due process, perhaps circularly, as the fundamental fairness that society has come to expect in proceedings with the state.¹³⁹

The relevant controversy over ADR stems from the absence of consensus on which "due process" protections are appropriate in quasi-judicial proceedings. Most judicial ADR programs allow litigants to reject a neutral's recommendation and proceed to trial; therefore, these litigants are not denied their right to trial.¹⁴⁰ However, the embryonic state of ADR professional norms, local district rules, and statutory law regarding procedure translates into deep insecurity for litigants about how participation in ADR may affect their enjoyment of that right.¹⁴¹ Whether ADR in general calls for the due process required of state be-

¹³⁶ *Id.* at v.

¹³⁷ *See, e.g.,* *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 276–78 (Ct. App. 1998); *see also supra* p. 1864 (discussing *Badie*).

¹³⁸ *See, e.g.,* *Allen v. Leal*, 27 F. Supp. 2d 945, 947–48 (S.D. Tex. 1998) (finding coercion of parties by a mediator); *see also* *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989) (overturning a trial court for threatening contempt if the parties failed to settle in mediation).

¹³⁹ *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 267–70 (1970).

¹⁴⁰ *See, e.g.,* *Capitol Traction Co. v. Hof*, 174 U.S. 1, 45–46 (1899).

¹⁴¹ This insecurity stems from the fact that "forms of ADR designed to provide more efficient adjudication, such as arbitration, usually do so by omitting steps traditionally associated with adjudicatory procedure, while mediative processes reject basic assumptions of the adversarial model of adjudication." Golann, *supra* note 44, at 531.

havior animates debate,¹⁴² but it seems clear that court-annexed ADR should comply with at least rudimentary notions of due process.

Evidence suggests that a certain degree of "due process" is already present in ADR practice as a result of the saturation of professional conflict management culture with fairness norms consistent with due process.¹⁴³ Reviewing the constitutional issues raised by ADR, one scholar posits the fundamental concern as "whether ADR constitutes an unreasonable barrier to disputants' access to court, or unreasonably impairs the quality of later adjudicative hearings"¹⁴⁴ and concludes that neither is generally true.¹⁴⁵ However, in the most thorough treatment of the issue to date, Richard Reuben argues that the private-public nexus strand of the state action doctrine¹⁴⁶ subjects all court-related and most contractual ADR to constitutional scrutiny.¹⁴⁷

Considering which procedural standards are thus necessary, Reuben isolates the core aspects of due process required in ADR as the right to an impartial tribunal, the right to present and contest evidence, and the right to representation by counsel.¹⁴⁸ He then suggests that different ADR processes implicate these rights to various degrees: arbitration, as an adjudicatory process, requires respect for all three; consensual mediation, in which the presentation of evidence does not drive the formal process, does not necessitate evidence-related rights; and advisory processes like court-annexed early neutral evaluation,

¹⁴² Compare *id.* at 531-46 (presuming that it does not), with Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 579, 589-90 (1997) (insisting that it does).

¹⁴³ See, e.g., Sabatino, *supra* note 23, at 1324-37 (arguing that evidentiary norms of materiality, relevance, hearsay, and privilege are approximated in the bulk of ADR practice). Major ADR providers adhere to certain minimum due process constraints prescribed by three due process protocols, including the employment dispute resolution protocol, see *supra* note 109, the consumer protocol, see NATIONAL CONSUMER DISPUTES ADVISORY COMM., AMERICAN ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (1998), and the recent health care protocol, see Matthews, *supra* note 31, at 14. The protocols are promising endeavors but fail to assuage present doubts because they lack enforcement provisions.

¹⁴⁴ Golann, *supra* note 44, at 540.

¹⁴⁵ See *id.* at 566-68.

¹⁴⁶ Reuben relies on the nexus strand rather than the original "public function" strand of the state action doctrine. See Reuben, *supra* note 64, at 999. The public function argument has become more difficult to make since the Supreme Court narrowed the doctrine's scope to include only areas of "exclusive" state control, see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974), and subsequently held that the resolution of private disputes was never "exclusively" the domain of the state, see *Flagg Bros. v. Brooks*, 436 U.S. 149, 160-62 (1978). These cases may indicate that private ADR cannot be considered state action. Court-annexed ADR is arguably different, however, because the resolution of disputes that private individuals bring to court for judicial adjudication is, by definition, a traditional public function reserved exclusively to the state.

¹⁴⁷ See generally Reuben, *supra* note 64. Reuben expressly exempts contractual mediation, see *id.* at 1091, and advisory mechanisms from the scope of his argument, see *id.* at 1100.

¹⁴⁸ See *id.* at 1055.

which are neither adversarial nor reliant on a tribunal, implicate only the right to counsel.¹⁴⁹

Although Reuben makes the ambitious argument that most contractual ADR represents state behavior, judicial ADR as state action is comparatively easy to establish. Court-annexed ADR provided in-house is state action by definition, but even judicial ADR provided privately constitutes state action for doctrinal purposes.¹⁵⁰ Litigants participate in judicial ADR because the state has either commanded or encouraged them to do so, and the relationship between judicial ADR and the state is clearly symbiotic. Moreover, state entanglement in court-annexed ADR is sufficiently pervasive to satisfy the nexus doctrine through the joint participation alone, as the state empowers arbitrators to issue subpoenas, compel testimony, and grant awards.¹⁵¹

This degree of state involvement suggests that the safeguards of due process should, as a constitutional matter, apply to judicial ADR. Although requiring judicial ADR to follow the Federal Rules of Evidence and Civil Procedure in their entirety would defeat the value (and purpose) of ADR mechanisms, the basic norms of fairness inherent in these rules must nevertheless inform ADR procedures if they are to withstand constitutional scrutiny. Reuben's proposal is noteworthy for applying constitutional values to ADR in a rigorous manner that nonetheless leaves room for each mechanism to function effectively.

Some worry that the adaptation of legal norms by ADR endangers its essential substance. For example, Professor Menkel-Meadow contends that the flexibility inherent in ADR processes enables disputants to craft more satisfying remedies than the adversarial process allows.¹⁵² She sounds an alarm on behalf of early ADR enthusiasts that the increasing judicialization of ADR represents its co-optation.¹⁵³ However, in the context of judicially mandated ADR, the state's involvement argues strongly for — if not compels — prioritizing the protection of constitutional rights.

¹⁴⁹ See *id.* at 960. This tripartite distinction is useful, but in reality, the categories blur: early neutral evaluation and mediation range from the facilitative versions to evaluative forms that approach adjudication, see Riskin, *supra* note 7, at 17, and may require greater protection of rights.

¹⁵⁰ The public-private nexus (or "entanglement") strand of the doctrine finds state action if the government encourages constitutionally problematic private behavior or is sufficiently entangled therein. See, e.g., *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924–25 (1982) (finding state action when a private disputant obtained the cooperation of a court clerk and a sheriff in the execution of a prejudgment lien). More recently, the Supreme Court has articulated this strand as a theory of joint participation between private actors and the state machinery that enables the problematic behavior. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622–24 (1991) (finding state action when a private civil litigant used peremptory challenges to exclude jurors on racial grounds).

¹⁵¹ See Reuben, *supra* note 64, at 1005–06.

¹⁵² See Menkel-Meadow, *supra* note 22, at 416–17.

¹⁵³ See Menkel-Meadow, *supra* note 23, at 3.

2. *Recommendations.* — Even if judicial ADR is not state action, due process values provide a starting point for considering which fairness standards judicially sponsored programs should incorporate as a matter of public policy. Applying procedural constraints to ADR will require delicacy to ensure that its values are not lost. As a preliminary measure, its mechanisms must be considered separately. For example, rules of confidentiality are less troublesome in the adversarial (and accordingly tight-lipped) context of arbitration than in the facilitative context of mediation. In contrast, the requirement of a written rationale is critical when a decision is imposed in arbitration, but probably unnecessary in most mediation contexts, in which any agreement is consensual by definition. Alternatively, some constraints, such as certification and conflicts of interest rules, pertain to all ADR processes.

(a) *Confidentiality.* — Procedural guidelines for facilitative programs must focus on establishing confidentiality rules that protect confidences revealed during good faith mediation and still peacefully coexist with other legal norms, especially a defendant's right of confrontation. Rulemakers must consider a host of thorny issues, including whether to attach the privilege to the mediator as well as the participant, how the privilege might be waived or qualified by judicial discretion, and how to apply it in the criminal context, in which its invocation against the admissibility of evidence carries its greatest costs to both individuals and society.¹⁵⁴ Such questions are already being considered at the state level by the drafters of the Uniform Mediation Act,¹⁵⁵ who are closely watching the experiences of individual states that have already codified mediation rules.¹⁵⁶

(b) *Evidence.* — Adjudicative and evaluative mechanisms may demand even more ambitious evidentiary guidelines.¹⁵⁷ Because these mechanisms involve fact-finding based on presentation of evidence, the fundamental norms of fairness associated with due process require protection through more specifically articulated standards. When the judiciary empowers private adjudicators to wield the binding force of

¹⁵⁴ If a mediation privilege is recognized, a litigant may suffer admission of ADR evidence without being afforded the right of cross-examination to expose weaknesses in the process that led to the disputable result. Alternatively, a defendant might unduly benefit by exercising the privilege against incriminating evidence.

¹⁵⁵ The drafting committees of the National Conference of Commissioners on Uniform State Laws recently met to review the March 2000 draft of the Uniform Mediation Act, which details procedures, limitations, rules of privilege and confidentiality, waiver and estoppel, and enforcement provisions. See UNIF. MEDIATION ACT §§ 1-13 (Draft Mar. 2000).

¹⁵⁶ For example, mediation confidentiality enjoys perhaps its greatest statutory protection under a recent California law, see CAL. EVID. CODE. § 1119 (West. Supp. 2000) (rendering inadmissible and protecting from discovery communications arising out of a mediation), and yet the privilege has been undermined in several cases, see *supra* pp. 1866-67.

¹⁵⁷ Participants in compulsory arbitration may be disadvantaged later if the neutral fails to create a record of the decision, foreclosing judicial review for manifest disregard of law.

a court judgment or a subpoena, it must be sure that they will exercise judgment consistent with due process and that sufficient recourse exists if they fail. Even if due process standards are not required constitutionally, they convey the legitimate and equitable values that ADR should manifest as a matter of public policy. The privately promulgated due process protocols¹⁵⁸ are positive contributions to this end (at least to the extent that they actually constrain behavior, which remains unclear in the absence of monitoring or enforcement measures).

(c) *Public Accountability.* — Judicial ADR must be structured to ensure public accountability and to preserve legitimacy in the eyes of participants. Especially in disputes involving unequal bargaining power, judicial ADR providers may never be regarded as truly neutral unless they are state-funded.¹⁵⁹ When private neutrals are paid directly by disputants, they may prove more beholden to the repeat players in commercial disputes than to their adversaries.¹⁶⁰ Meanwhile, policymakers must address more rigorously the problem of cases that are inappropriate for ADR: those characterized by gross power imbalances or violence between parties.¹⁶¹ Cases involving domestic violence and child abuse exemplify disputes for which negotiation-based resolution may be not only inappropriate, but also dangerous.¹⁶²

(d) *Ethical Issues.* — Rulemakers must also grapple with basic ethical issues raised by judicial ADR, particularly questions regarding conflicts of interest in subsequent negotiations. The ethical responsibilities of ADR providers who are not acting as attorneys remain inchoate.¹⁶³ Moreover, the bar has yet to address adequately the scope of an attorney's duty to inform clients of ADR options,¹⁶⁴ and ADR advocates have yet to perfect guidelines for practitioners that would prevent conflicts of interest in future representation while preserving the vitality of the profession.¹⁶⁵ Further ethical issues for considera-

¹⁵⁸ See *supra* notes 109, 143.

¹⁵⁹ Cf. Brazil, *supra* note 2, at 762 (suggesting that judicial ADR would be less subject to illegitimacy concerns on these grounds than private ADR).

¹⁶⁰ The problem of neutrality is thus especially pronounced where court-annexed ADR programs refer disputants to a roster of private providers who also handle contractual ADR.

¹⁶¹ See discussion *supra* p. 1854.

¹⁶² See *id.*

¹⁶³ Professor Menkel-Meadow offers an insightful critique of the application of litigation-oriented ethical rules to ADR procedures founded on different values and relationships, arguing that non-adversarial practice requires its own rules. See Menkel-Meadow, *supra* note 22, at 409.

¹⁶⁴ Some states already require such notice. See Carol VanAuken-Haight & Pamela Chapman Enslin, *Attorney Duty to Inform Clients of ADR?*, 72 MICH. B.J. 1038, 1038 (1993).

¹⁶⁵ The uncritical extension of rigorous representational conflict of interest rules to the non-representational relationships in ADR may starve the field of practitioners because an ADR neutral is exposed to privileged information from all parties involved and because the available pool of trained neutrals remains limited. See Menkel-Meadow, *supra* note 22, at 437.

tion include the fair arrangement of fees and the guaranteed impartiality, diligence, and competence of each provider.¹⁶⁶

(e) *Quality Control*. — Finally, when disputing parties surrender their conflict to ADR, they must be met by a neutral authority of appropriate expertise in a program monitored for quality. For example, mediators must receive training not only in negotiation, but also about due process norms to protect both the rights of the participants and the integrity of the process. Certain realms of dispute resolution may also require a neutral's expertise in a substantive field of law or industry. Recognizing that the quality of a program's neutrals is determinative of the program's success (and that the court must meet quality standards when it annexes such a program), the Society of Professionals in Dispute Resolution (SPIDR) has drafted guidelines for "court-connected" ADR programs to ensure their quality.¹⁶⁷ In addition to suggesting active monitoring of court-annexed neutrals, SPIDR recommends that courts establish minimum criteria for competency (which would not restrict the practice of ADR to lawyers), that neutrals and criteria be subject to periodic review, and that settlement rate not be the sole basis on which neutrals are retained.¹⁶⁸ Also of note, the Institute of Judicial Administration (IJA) has issued a set of recommendations for overall quality control of court-annexed mediation programs.¹⁶⁹

The current blossoming of private proposals represents the efforts of multiple stakeholders to impose order on the creative chaos that has nurtured the ADR movement but now threatens its ability to yield fair, predictable results. The judiciary must formulate policies regarding the qualifications of ADR providers and standards for overseeing their performance, and SPIDR and the IJA offer excellent templates. Additionally, the Center for Public Resources and Georgetown's Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral offers a helpful starting point for consideration of standards addressing other ethical uncertainties faced by lawyers practicing in non-representational contexts.¹⁷⁰ Together with the Uniform Arbitration Act¹⁷¹ and the forthcoming Uniform Mediation Act,¹⁷² federal

¹⁶⁶ David Hoffman makes an eloquent case for certification of ADR providers, proposing how to do so without stifling development of the profession or purging non-legal practitioners. See David Hoffman, *Certifying ADR Providers*, BOSTON B.J., Mar.-Apr. 1996, at 9, 22-25.

¹⁶⁷ SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING DISPUTE RESOLUTION PRACTITIONERS: GUIDELINES FOR COURT-CONNECTED PROGRAMS (1997).

¹⁶⁸ See *id.* at i-iii.

¹⁶⁹ See CENTER FOR DISPUTE SETTLEMENT, THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992).

¹⁷⁰ See Plapinger & Menkel-Meadow, *supra* note 130, at 21.

¹⁷¹ In 1955, the National Conference of Commissioners on Uniform State Laws issued the Uniform Arbitration Act, which codified general arbitration procedures. See UNIFORM ARBITRATION

courts establishing judicial ADR programs under the ADRA are not lacking for guidance. Nor are the members of the Judicial Conference or state and federal legislators. Policymakers are fortunate to have access to these resources, and the time for drawing upon them is nigh.

D. Conclusion

Reaping the best and avoiding the worst will be a matter of carefully channeling the entropic forces unleashed by ADR's flexibility. ADR's relative freedom from procedural constraints expands options for private parties, but its removal of disputes from the public sphere undermines the public process of interpreting laws. Choices made now about the best ways to focus ADR toward the conflicts it can best resolve — and away from the judicial foundations it could most damage — represent, perhaps, the most important legal responsibility of the new century.

ACT, §§ 1-25, 7 U.L.A. 1 (Supp. 1999). It has thus far been adopted in 29 states; 14 others have adopted similar laws. See GOLDBERG, SANDER & ROGERS, *supra* note 5, at 627.

¹⁷² See *supra* note 155.