REQUIEM OR RESURGENCE?

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I. INTRODUCTION

In the mid-1980's, I asked Bob Coulson, then president of the American Arbitration Association ("AAA"), to envision the future of alternative dispute resolution ("ADR"). Without hesitation, he replied, "These delicate flowers are bound to wither in our careless hands." The flowers of which he spoke were varieties and hybrids of negotiation, mediation, and arbitration. Not known for pessimism and hyperbole, much less hackneyed poeticism, Coulson's response surprised me.

It wasn't long before I began to appreciate Coulson's prophetic metaphor, but it seemed unduly pessimistic at the time. After all, these were the early and heady halcyon days of the ADR movement, and the AAA had hired me, an "ADR Romantic,"[1] to help till this garden by mediating, training neutrals, and proselytizing across the country and abroad. Lots of ADR Romantics, some lawyers and lots of non-lawyers, were already working the fields. President Carter's DOJ had funded the pilot neighborhood justice centers, where I received my mediator training, and courts were experimenting with pilot ADR programs. Most notably, foundations, particularly Hewlett, were funding many of these efforts both on the practice and theory-building sides of the equation. Supported by this funding, the Association for Conflict Resolution (formerly the Society for Professionals in Dispute Resolution) and other organizations devoted to the growth and understanding of ADR thrived. Annual conferences proliferated, such as the first National Conference on Peacemaking and Conflict Resolution, which I attended in 1983. Law and business schools were starting to make conflict resolution an integral and valued part of their curricula. A new field was forming with its own set of practitioners and scholars.

ADR Romantics were riding the crest of this wave, a wave that we thought would change the legal system, transform the culture, and save the world (seriously). I would go on to join a law faculty, teach, write, and help establish and run one of the Hewlett-funded conflict resolution theory-building centers. In 2021, I retired after 40 years devoted to ADR. Reading *Discussions in Dispute Resolution* ("DDR") was a sobering reassessment of a lifetime spent gardening ADR. We were idealistic and naive, and Coulson was

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[1] John Lande, *For Pragmatic Romanticism in Law and Dispute Resolution: Reflections on Galanter's Remarkably Realistic Analysis of Why the Have-Nots Come Out Behind*, *in* DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 303, 303 (Art Hinshaw, Andrea Kupfer Schneider & Sarah Rudolph Cole eds., 2021) [hereinafter DDR] (describing a term borrowed from Lande's contribution to this book).

prescient.

II. PURPOSE, CONTENT, AND STRUCTURE

I doubt the editors intended to leave me in a state of severe melancholy. A more joyful purpose inspired DDR—to "honor both the field and its intellectual leaders by revisiting scholarly works that provided a theoretical bases for the revolution . . . [and document] the academic underpinnings of the modern dispute resolution movement . . . ."[2] The concept is simple—identify the foundational works in the field and invite current legal scholars to discuss why the work is foundational. Arguably, popular books like *Getting to Yes*[3] (GTY) have had more of an impact on practice, but law review articles are the most valuable coin in the realm of legal theory, and after polling the relatively small and tight-knit community of ADR legal scholars, the editors settled on sixteen articles and solicited commentaries from this same community.

The editors' predetermined structure for the book limited the number and choice of articles. DDR has four parts. The first three correspond to the standard organization of the primary ADR processes: "Negotiation," "Mediation," and "Arbitration," respectively. Each part contains four part-specific foundational articles (FAs) in chronological order. Each FA is followed by four commentaries, the last of which is reserved for reflection by the original author of the FA if that person is still alive and willing to participate. The fourth part serves as a catchall, titled "Dispute Resolution Public Policy," and contains four additional FAs and respective commentaries that apply to ADR generally. All sixteen FAs somewhat arbitrarily predate 2000 and, in one case, date back to 1926, but most were published in what I'll refer to as the "Foundation Times"—the 1980s and early to mid-1990s. Thus, as a field of legal practice and scholarship, ADR is relatively young, and not surprisingly, many of the FA authors are still alive and contributed to the 2021 commentaries on their own works.

III. COHERENCE AND CONSTRAINTS

An overarching question is whether DDR is a coherent whole or a reference collection. The book jacket, a reproduction of the once-popular

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[2] *See* PAUL H. ROBINSON ET AL., CRIMINAL LAW CONVERSATIONS xix (2009). The inspiration for DDR came from this similar Oxford Press book.

[3] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1st ed. 1981).

"Doors of Dublin" poster, depicts forty-eight very different doors .[4] The editors intended it to symbolize Frank Sander's concept of a multi-door courthouse,[5] but in my more cynical interpretation, it unintentionally evokes "let's get forty-eight of our colleagues together to write a book." Ultimately, sixty-four ADR legal scholars contributed comments. Although the four-part, four-article, four-commentator structure described in the previous section imposed a certain degree of coherence on the project, the editors had to make other hard choices. One could quibble with each.

The first hard choice was to limit the subject matter. As a field of practice and theory, dispute resolution rests on the broader foundation of the field of conflict resolution, which has many strands.[6] ADR is only one of these strands. A byproduct of the informal justice movement that started in the 1960s[7] and the complimentary access to justice movement,[8] ADR practice and theory is concerned largely with the integration of alternatives to civil litigation into the American legal system. It is hard to appreciate the full impact of DDR without understanding ADR's roots within a broader, idealistic movement for social change through informal justice, and limiting the FAs to traditional law review articles about ADR risked overlooking some foundational non-legal scholarship from within the informal justice movement.[9] Some commentators in DDR helpfully cited some of the

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[4] *Doors of Dublin Poster*, CAROLL'S IRISH GIFTS, https://www.carrollsirishgifts.com/usa/doors-of-dublin-poster/74127.html (last visited Feb. 9, 2022).

[5] *See* Frank E.A. Sander, *Varieties of Dispute Processing, in* DDR, *supra* note 1, at 321, 321 (providing the source of the concept, but the term emerged later).

[6] *See* Louis Kriesberg, *The Conflict Resolution Field, in* PEACEMAKING IN INT'L CONFLICT: METHODS & TECHNIQUES. (I. William Zartman ed., 1997).

[7] *See generally* RICHARD L. ABEL, THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (1982). For a good review of that foundational literature, see Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement Symposium on Informal Dispute Resolution*, 13 LAW & SOC. INQUIRY 145 (1988). *See also* Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197 (2022) [hereinafter Cohen, *Rise and Fall*] (summing up the informal justice movement). *See* Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 17 OHIO ST. J. DISP. RESOL. 669 (2003) for a more legal-centric history of the ADR movement.

[8] *See generally* Bryant Garth & Mauro Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO L. REV. 181 (1978).

[9] *See, e.g.*, MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973).

foundational sociolegal literature that didn't make the cut[10] and would clarify some of the underling aspirations, assumptions, context, and argot of the field. Yet, even in this thin strand, there are a couple of pieces that might have enhanced the work.[11] One might quibble with the choice of FAs, but in retrospect, these choices would have changed the tenor of the whole. Indeed, the emergence and impact of this eventually siloed, legalistic and ADR-centric subfield of conflict resolution is the point of the book. Limiting the number of FAs to sixteen may have been hard, but limiting the scope of the field eased the task considerably.

Another hard choice was redacting the FAs. How would a first-time reader appreciate the full import of an FA once redacted? Fortunately, the unredacted texts are reasonably accessible elsewhere, so the difficult editorial task was (1) to retain enough to give the reader an understanding of the salient points and (2) to highlight those points that are integral to the commentaries. The editors mostly succeeded on (1) but occasionally fell short on (2). The unredacted article informed the commentators who occasionally referred to ghosted portions. This may leave the uninitiated reader who depended entirely upon the redacted version slightly lost; however, most commentators included helpful signposts in the form of cites to the FA within the texts of their commentary and some, albeit purposefully limited, endnotes.

Another hard choice was to limit additional background and explanatory material beyond a very short concise introduction. Much like the redactions, this risked leaving the less initiated reader in the dark while sixty-four law professors steeped in the history and nuances of their limited specialty have "discussions in dispute resolution" with one another and leave the rest of us quizzically eavesdropping. Although the editors, for practical reasons, imposed draconian page and citation limits, at least one and often all four commentators for a FA provided helpful context, situating the FA in the zeitgeist of its Foundational Time. Nevertheless, there remain nuances that only a few law professors and some well-read and engaged students and practitioners will understand, and as I alluded to above, the reader would benefit from a better understanding of the deeper roots and aspirations of the social movement from which ADR emerged.

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[10] *See, e.g.*, William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y REV. 631 (1981).

[11] In Part 1, I might have favored the inclusion of the Fisher/White debate. *See* James J. White & Roger Fisher, *Essay Review: The Pros and Cons of "Getting to YES"*, 34 J. OF LEGAL ED. 115 (1984). In Part 4, I might have favored Lon L. Fuller. *See* Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

Without these hard choices, however, DDR would have become a huge or multi-volume reference rather than a book to be read as a whole. Fortunately, and to their great credit, the editors, intentionally or not, achieved a gestalt that should resonate with a larger audience. As a genre, this is not a mere festschrift filled with argot nor an insular navel gazing. It is a well-curated collection of short stories with connecting themes, although the better analogies might be a tragedy in four acts or even a requiem in four movements. By the end of the first movement, I had set aside any misgivings.

IV. PART 1: FORESHADOWING

Part 1 is about the first flower, negotiation, but not just any form of negotiation. In the Foundational Times, ADR Romantics extolled the virtues of an alternative to hard-nosed positional negotiation. Generically referred to as win-win or mutual gains negotiation,[12] it is a form of interest-based negotiation favored in GTY or needs-based negotiation.[13] What the Romantics didn't appreciate is the mutative context of legal negotiations, aptly described in Mnookin and Kornhauser's 1979 FA, "Bargaining in the Shadow of the Law."[14] Lawyers negotiate clients' disputes in a legal shadow that bestows various bargaining endowments and constraints created by legal norms and the legal system. While the commentators credit this FA with legitimizing negotiation specifically and ADR generally as a topic of legal study,[15] it (ahem) foreshadowed the tragedy to come because within that same shadow lurked the adversarial culture of the American legal system.

Mnookin and Kornhauser didn't endorse a particular mode of negotiation or strategy and tactics, but in James White's 1980 FA,

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[12] *See* Amy J. Cohen, *A Labor Theory of Negotiation: From Integration to Value Creation*, 1 J.L. & POL. ECON. 147 (2020) for a useful explanation of how this ideal developed.

[13] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984), *reprinted in* DDR, *supra* note 1, at 49, 49 (explaining how needs-based negotiation differs from interest-based negotiation as popularized in GTY).

[14] Robert H. Mnookin & Louis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979), *reprinted in* DDR, *supra* note 1, at 3, 3.

[15] For background on the emergence of negotiation in legal education, see Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 8 AM. BAR FOUND. RES. SCH. J. 905 (1983).

"Machiavelli and the Bar,"[16] he observed that lying is a powerful negotiation tactic, so, lawyers will lie, and it is difficult if not impossible to create an effective ethical restraint. Moreover, in his 1996 FA,[17] Wetlaufer persuasively argued that interest-based negotiation, as espoused by Lax and Sebenius in 1989,[18] just isn't that useful in most legal disputes, which are contextually distributive and therefore more suited to positional bargaining. Lax and Sebenius's concept of the Negotiator's Dilemma implicitly takes center stage—interest and needs-based negotiation rely on information sharing, but sharing information is a disadvantage in positional bargaining.[19] Back in the Foundational Times, White and Wetlaufer tried to warn us that this is not fertile ground for the ideal.[20] The context of most legal negotiations will favor defaulting to positional bargaining and consequently deception.

The commentators give some respectful push back. Moffitt critiques White's assumptions,[21] and Newell suggests that, according to subsequent research,[22] lawyers are prone to lie more out of confusion about the ethical rule on truthfulness to others[23] than some conscious instrumentalism.[24] White doesn't buy it and suggests that the only solution is to play defensively.[25] While recognizing the possible harm, Reynolds gently defends the possible "overselling" of "integrative negotiation [if it] can transform adversarial culture."[26] Bordone questions Wetlaufer's underlying assumption about the

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[16] James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 8 AM. BAR FOUND. RES. SCH. J. 926 (1980), *reprinted in* DDR, *supra* note 1, at 27, 27.

[17] Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEORGETOWN L. J. 369 (1996), *reprinted in* DDR, *supra* note 1, at 73, 73.

[18] DAVID LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986). Ironically, Lax and Sebenius thought GTY was simplistic and naive and that they were offering a better model.

[19] *Id.* at 158.

[20] Jennifer Reynolds, *Oversimplifying, Overselling, Overreaching*, *in* DDR, *supra* note 1, at 79, 79. In her comments, Reynolds neatly sums this up as "warning signs about the legitimacy and status of the emerging legal field of [ADR]." *Id.*

[21] Michael Moffitt, Machiavelli and the Bar *and Ethical Racheting*, *in* DDR, *supra* note 1, at 31, 33.

[22] Lauren A. Newell, Machiavelli and the Bar: *Prescient in Part*, *in* DDR, *supra* note 1, at 40, 42 (citing Art Hinshaw, et al., *Attorneys and Negotiation Ethics: A Material Misunderstanding?*, 29 NEGOT. J. 265, 265–85 (2013)).

[23] *Id.* (citing MODEL RULES OF PRO. CONDUCT, r. 4.1. (AM. BAR ASS'N 2020)).

[24] *Id.* at 43.

[25] James J. White, *Confronting Lying in* Negotiation, *in* DDR, *supra* note 1, at 45, 46.

[26] Jennifer Reynolds, *Oversimplifying, Overselling, Overreaching*, *in* DDR, *supra* note 1, at 79, 81.

goals of integrative negotiation and counters with a hypothetical that reveals the hidden opportunities in distributive contexts for value creation.[27] Wetlaufer absorbs Bordone's first point into his original argument but doubles down against the hypothetical.[28]

I delve into these details to demonstrate that DDR is, true to its title, a set of discussions touching upon much of the current intellectual tension in ADR while also suggesting future directions, e.g., Ebner's call for devising a new unified theory of negotiation.[29] Despite the depth and subtleties of these exchanges over negotiation theory and practice, I can't help but wonder if the discussion is hampered by imprecise terminology. A lot of terms are being thrown about in Part 1. Is negotiation different from bargaining? Are integrative, interest-based, needs-based, and mutual-gains negotiation or distributive and positional negotiation/bargaining the same or different? What do we mean by self-interest? Do these things exist on a spectrum? Doubtless, the sixteen commentators in Part 1 know what they mean when they use these terms and might define them for the reader, but the precise meanings are not necessarily shared—a consequence of the still nascent character of the field. Perhaps this can be rectified in some future unified theory of negotiation, but as this part of DDR highlights, we have yet to clarify the vocabulary of the field much less answer the question of how lawyers should negotiate.[30]

None of this detracts from the foreshadowing of Part 1. Reynolds nails it: "Ironically, ADR's struggle for legitimacy in the legal academy may mean turning away from those things that made ADR so popular in the first place."[31] There was an opportunity in Part 1 to argue for the continued relevance of the ideal. For example, GTY's concept of "principled negotiation" is not limited to integrative situations and interest-based bargaining. If done well, lawyers can use it effectively in distributive situations to positionally bargain and neither deceive nor spill the beans. Therefore, I might have inserted the White-

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[27] Robert C. Bordone, *Strengthening Integrative Bargaining: How* The Limits of Integrative Bargaining *Sharpened the Work of Negotiation Scholars*, *in* DDR, *supra* note 1, at 89, 91–92.

[28] Gerald B. Westlaufer, *Reflections on* The Limits of Integrative Bargaining, *in* DDR, *supra* note 1, at 94, 95–96.

[29] Noam Ebner, *Integrative Negotiation: Paying the Price of Popularity*, *in* DDR, *supra* note 1, at 84, 88.

[30] For an attempt to do so, see DICTIONARY OF CONFLICT RESOL. (Douglas H. Yarn ed., 1999).

[31] Jennifer Reynolds, *Oversimplifying, Overselling, Overreaching*, *in* DDR, *supra* note 1, at 79, 83.

Fisher debate in Part 1.[32] Call me naïve—White would—but the upshot of Part I is that the adversarial system corrupted the ideal, or alternatively framed, this flower was never going to thrive under the shadow of the law, at least not in its original form.

V. PART 2: BE CAREFUL WHAT YOU WISH FOR

The second flower, mediation, seemed the most promising. On one level, it facilitated negotiation by offering a way around the negotiator's dilemma and an offramp from positional bargaining. At another level, it was an instrument for social change. In the Foundational Times, true believers in informal justice promoted mediation as a more humane and just alternative to a divisive, adversarial legal system. It would empower parties, mend relations, produce better solutions based on privately created norms, and generally enhance social and community cohesion.[33] Many also touted it as a fungible or all-purpose process. Whether in the context of workplace, family, congregation, neighborhood, courthouse, environment, public policy, civil unrest, or international relations, mediation was the solution. Today, the widespread adoption of mediation by the courts for almost any civil legal dispute is the most notable achievement of the ADR movement. But Part 2 of DDR tells us that this context matters.

In the first FA, Lon Fuller described the ideal context for mediation.[34] Influenced by his extensive experience in labor mediation, he argued that mediation is appropriate when the dispute is between two parties of roughly equal bargaining power in an interdependent ongoing relationship. Mediation works because of "its capacity to reorient the parties toward each other," and the mediator's role is to help the parties "free themselves from the encumbrance of rules and...[accept]...a relationship of mutual respect, trust, and understanding."[35] This allows the parties to construct a unique social order with relevant norms to govern their ongoing relationship rather than conform

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[32] White & Fisher, *supra* note 11.

[33] Lande, *For Pragmatic Romanticism in Law and Dispute Resolution: Reflections on Galanter's Remarkably Realistic Analysis of Why the Have-Nots Come Out Behind*, *in* DDR, *supra* note 1, at 303, 305; Cohen, *Rise and Fall*, *supra* note 7.

[34] Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971), *reprinted in* DDR, *supra* note 1, at 101, 101.

[35] *Id.* at 104. Fuller sees this as particularly important in light of the parties need to adapt to future circumstances. *See also* Fuller & Winston, *supra* note 11, for an explanation why adjudication is ill-suited to manage such relationships.

to judicially-imposed generalized legal norms.[36] In this context, justice and fairness is based on the parties private order. It is what they think it is.

What if mediation is used in a different context? In his commentary, Hinshaw picks up on the disconnect, noting that "[t]oday, civil matters are mediated regardless of relational concerns."[37] Welsh observes that Fuller's concept of mediation and the mediator's role may be untenable where the disputants either lack a relationship or are terminating one and are forced to rely on other social and legal norms.[38] Taking Welsh's observation a bit further, without the scaffolding of an on-going relationship, the parties can't build a private social order based on private norms that will allow them to assess whether a particular outcome is fair and just. As a result, in most court-connected mediation, the law becomes the default for assessing the fairness of settlements—shades of the shadow of the law.

Should the mediator help parties conform to applicable legal norms if she can't help the parties create private norms? In 1981, Lawrence Susskind persuasively argued that environmental mediators could not be neutral as to applicable norms, justice, and the fairness of outcomes.[39] In response, Joseph Stulberg asserted that such a mediator was no longer mediating because neutrality was crucial to their primary objective of facilitating a settlement desired by the parties.[40] In his FA, Stulberg shifted the focus from mending relationships (a la Fuller) and defined mediation and the mediator's role in a way that transcends context. The process and outcome belong to the parties, and the mediator's role is to help them settle while not imposing her normative preferences. Stulberg's concept of mediation is closest to what we now refer to as facilitative or problem-solving mediation with its emphasis on self-determination and neutrality. In theory, it made mediation more fungible.

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[36] Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971), *reprinted in* DDR, *supra* note 1, at 101, 102 ("[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.").

[37] Art Hinshaw, *Lon L. Fuller: Private Ordering and Mediation*, *in* DDR, *supra* note 1, at 107, 109.

[38] Nancy A. Welsh, *The Untethering of Mediation from Relationships*, *in* DDR, *supra* note 1, at 112, 112.

[39] Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); Lela Porter Love, *A Star to Steer Her By*, *in* DDR, *supra* note 1, at 131, 132. Love summarizes Susskind's criteria as pressing for outcomes that are efficient, minimally harmful to the environment, and just for both the disputants and affected third parties.

[40] Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981), *reprinted in* DDR, *supra* note 1, at 125, 125.

As an aside, one of the more engaging discussions in the book is between 2021 Stulberg and the commentators on his FA. Stulberg responds constructively to each while slightly revising and ably defending his original thesis.[41] Like in Part 1, language is important, as Stulberg helpfully explains how he defines and distinguishes neutrality and impartiality.[42] While Pappas questions both the centrality of neutrality and the goal of settlement,[43] Press and McAdoo ask whether Stulberg's concept of mediation still holds up considering the nature of mediation practice twenty years later.[44]

In practice, it was being transmogrified, as described in Tina Grillo's searing indictment of California's mandatory custody mediation program.[45] Her 1991 FA, *The Mediation Alternative: Process Dangers for Women*, paints a picture of mediators disempowering and traumatizing already vulnerable women with their implicit biases and by imposing procedural and substantive norms mimicking legal process in an effort to meet the courts' objective of settling these cases.[46] Instead of changing the system, it was imitating it in a way that mocks neutrality and, according to Pauli, makes self-determination meaningless.[47] Frenkel and Olson note that some of the problems Grillo identified were structural and alleviated subsequently by improvements in system design and mediator training (perhaps spurred in part by Grillo's criticism?). With the passage of time, Frenkel observes that Grillo's concerns seem less salient,[48] while Olson identifies continuing concerns.[49] It's a shame that Grillo, now deceased, can't respond to the commentators. She might agree that some procedural reforms have reduced the dangers of court-ordered custody mediation to women but that her broader warning about the tension between the ideal of mediation and the reality of mediation practice in the shadow of the law was justified then and is now reflected in current mediation

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[41] *Id.*

[42] Joseph B. Stulberg, *Revisiting Mediator Neutrality*, *in* DDR, *supra* note 1, at 145, 146.

[43] Brian A. Pappas, *Just Settlement? Rethinking the Mediator's Goals*, *in* DDR, *supra* note 1, at 136, 136–37.

[44] Sharon Press & Bobbi McAdoo, *Neutrality in 2020: A Reply to 1981 Stulberg*, *in* DDR, *supra* note 1, at 141, 143.

[45] Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. REV. 1545 (1991), *reprinted in* DDR, *supra* note 1, at 151, 151.

[46] *Id.*

[47] Carol Pauli, *Trina Grillo: Productive Rage*, *in* DDR, *supra* note 1, at 157, 159.

[48] Douglas N. Frenkel, *The Grillo Effect at Thirty*, *in* DDR, *supra* note 1, at 165, 165–68.

[49] Kelly Browe Olson, *Post-Grillo: New Family Mediation Protections and Revised Dangers*, *in* DDR, *supra* note 1, at 169, 172.

practice.

Within the legal academic community, this tension came to a head when Len Riskin gave ADR theorists a conceptual tool with which to center the debate over what constituted mediation and acceptable mediator behavior. First introduced in his 1996 FA, Riskin's Grid described the spectrum of mediator behavior or orientation along two axes: (1) mediator role from facilitative to evaluative and (2) problem definition from broad to narrow.[50] Debate ensued particularly over whether mediators who engage in evaluative behavior, i.e., opining on the legal strengths and weaknesses of claims and predicting a litigated outcome, are actually mediating a la Stulberg's model.[51] Although the debate continues, it is muted. In her commentary, Erez-Navot opines that the field "has . . . begun to come to terms with the contradictory practices."[52] Kovach, one of the most ardent defenders of that model,[53] admits in her commentary that, despite the warnings, mediation was "transformed to fit within the legal paradigm."[54] She asks "[u]pon reflection, if the legalization of mediation was necessary for its acceptance, was it worth it?"[55] We got what we wished for, and the flower withered.

VI. PART 3: WHY WE CAN'T HAVE NICE THINGS

Part 3 contains the climax of the book, and describes how the third flower, commercial arbitration, was transformed from a progressive ideal into a corporate cudgel. Arbitration is a broad term encompassing many forms of adjudication outside the legal system. Traditionally, commercial arbitration was a creature of contract among merchants to submit mercantile disputes to an expert for determination. For some ADR Romantics, arbitration never fit

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[50] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996), *reprinted in* DDR, *supra* note 1, at 175, 175.

[51] Ironically, Fuller's model is arguably "off the grid" so to speak. Alfini persuasively demonstrates how Fuller's notion of the mediator's role most closely aligns with transformative mediation. James J. Alfini, *Lon Fuller's Influence on the Debate Over Mediator Orientations*, *in* DDR, *supra* note 1, at 116, 116.

[52] Donna Erez-Navot, *The Riskin Grid: A Mixed Legacy*, *in* DDR, *supra* note 1, at 192, 192.

[53] *See, e.g.*, Kimberlee K. Kovach & Lela P. Love, *"Evaluative Mediation" is an Oxymoron*, 14 ALT. TO HIGH COST LIT. 31 (1996).

[54] Kimberlee Kovach, *Growth from the Grid?*, *in* DDR, *supra* note 1, at 197, 198 (citing Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997)).

[55] *Id.*

comfortably in the ADR movement.[56] It was adjudicative instead of conciliatory and well-established prior to the movement's birth, as Conklin concisely explains in her commentary.[57] It already had its own cultures, sets of proponents, and legal scholars. But as an alternative to litigation and an embodiment of party autonomy, commercial arbitration was the grandaddy of ADR. For merchants, courts were too slow, too expensive, too adversarial, and too inexperienced in both the subject matter and the applicable mercantile norms. Disputants could shape arbitration to their specific needs, control the procedures, select a knowledgeable decision maker, designate the norms, manage risk in the award, and preserve the relationship by avoiding the alienating effects of the adversarial legal system.

This was the promise of the arbitration described in Cohen and Dayton's 1926 FA, *The New Federal Arbitration Law*.[58] While displaying an impressive knowledge of origins of the Federal Arbitration Act, Szalai's commentary puts this FA in its historical context as an attempt at judicial reform. Much like the ADR Romantics 50 years later, progressive reformers of the age favored expertise in decision making and wanted to make dispute resolution more efficient and satisfying for the disputants.[59] The Act empowered federal courts with a uniform process to enforce arbitral agreements and awards, thereby bolstering mercantile confidence in and use of arbitration. Cohen and Dayton sought to mollify opponents of the legislation who were concerned about possible abuses and to address the misgivings of the legal community.[60]

Cohen and Dayton knew that planting this flower in the soil of the courts was a risky proposition. Conklin explains the historical tension between essentially two competing systems,[61] and Schmitz highlights the authors' concern that courts would intrude upon and "judicialize the process" and undermine its efficiency.[62] Blankley's commentary shows how their attempt

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[56] Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (2000).

[57] Carli N. Conklin, *A Robust History of Arbitration in Early America: Commentary on The New Federal Arbitration Law*, *in* DDR, *supra* note 1, at 207, 207.

[58] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VIR. L. REV. 265 (1926), *reprinted in* DDR, *supra* note 1, at 203, 203.

[59] Imre S. Szalai, *The Federal Arbitration Act in Its Infancy: Cohen and Dayton's The New Federal Arbitration Law*, *in* DDR, *supra* note 1, at 212, 212.

[60] *Id.* at 214–15.

[61] Carli N. Conklin, *A Robust History of Arbitration in Early America: Commentary on The New Federal Arbitration Law*, *in* DDR, *supra* note 1, at 207, 207.

[62] Amy J. Schmitz, *Emphasizing Efficiency in the Digital Age*, *in* DDR, *supra* note 1, at 221, 221.

to mollify lawyers by appealing to their self-interest that they "are needed in arbitration"[63] belied their underlying fear that lawyer self-interest would lead to "incorporating litigation techniques into arbitration,"[64] thereby robbing it of the characteristics that made it so desirable.[65]

Thirty-five years later, Soia Mentschikoff documented how Cohen and Dayton's fears were being realized. Her 1961 FA, *Commercial Arbitration*,[66] compared trade association arbitration with AAA-administered arbitration. She found that different institutional contexts shape the arbitral process differently. Trade association arbitration adhered closer to the ideal, run efficiently by members applying industry norms. There were no lawyers, and awards were enforced by internal self-policing. In contrast, AAA awards relied on courts for enforcement thereby increasing the need for legal norms and the use of lawyers. As a result, "in the great majority of cases . . . lawyer participation not only failed to facilitate decision but was so inadequate as to materially lengthen and complicate the presentation of the cases."[67] As Cole wryly notes, "Mentschikoff did not view the introduction of lawyers as a salutary event."[68]

Lawyers may have been changing the character of the arbitral process in one context, but the courts were engineering a more radical transformation by expanding the applicability of the FAA into another context, from business-to-business disputes to disputes between businesses, consumers, and employees, "a development that would have surprised and alarmed Mentschikoff."[69] It certainly alarmed Jean Sternlight. Sternlight's 1996 FA,

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[63] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VIR. L. REV. 265 (1926), *reprinted in* DDR, *supra* note 1, at 203, 206.

[64] Kristen Blankley, *The New Federal Arbitration Law: A Call to Ethical Practice Not Yet Realized*, *in* DDR, *supra* note 1, at 216, 216.

[65] This had already happened to arbitration in the English legal system during the 18th and 19th centuries. *See* Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN. ST. L. REV. 929 (2004).

[66] Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961), *reprinted in* DDR, *supra* note 1, at 227, 227.

[67] *Id.* at 246.

[68] Cole also explains how the state of affairs has so deteriorated by 2021 that businesses are favoring mediation over arbitration. Sarah R. Cole, *Everything Old is New Again*, *in* DDR, *supra* note 1, at 231, 232.

[69] W. Mark C. Weidmaier, *The Legacy of Soia Metschikoff's* Commercial Arbitration, *in* DDR, *supra* note 1, at 235, 235–36. Weidemaier opines that the pressing interest in how commercial arbitration has been enlarged to include consumer and employment disputes explains how ADR scholarship "demonstrates little interest in context . . . rarely focus[ing] on how arbitration regimes are shaped by structural considerations." *Id.*

Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, traced this expansion and argued that the supposed promises of arbitration in this context "are outweighed by the distributional inequities and injustices . . . incurred."[70] The corporate "big guys," as repeat players with greater resources, had made arbitration a tool to disadvantage the "little guys," one-shot players with fewer resources. The following year, Lisa Amsler (previously Lisa Bingham) empirically confirmed the repeat-player effect in her FA, *Employment Arbitration: The Repeat Player Effect*.[71]

Sternlight and Amsler lobbed opening salvos in a scholarly war on what is now called mandatory arbitration, a war that was already well underway in the trenches of appellate courts nationwide, and most arbitration law scholarship remains locked in this combat. According to the commentators, Sternlight's critique introduced a Critical Legal Studies (CLS) frame into ADR scholarship[72] while Amsler's empiricism encouraged others to bring new data into the fray.[73] Although the little guys may have the support of most scholars, 2021 Sternlight feels that "the war has been lost" in the trenches.[74] In the climax to DDR, 2021 Amsler agrees while placing the battle in a broader context.

It is impossible to do justice to 2021 Amsler's insightful reflection on her FA. After tracing the arc of her personal story in the field, she situates the mandatory arbitration debate within America's defining social and political struggle during the same period. Wealthy and powerful conservative forces have harnessed the legal system to undo the New Deal and favor free markets and individual self-interest over the common good. As CLS theorists might agree, these forces succeeded in making law a tool for facilitating the flow of wealth upwards and increasing social inequity. In the struggle between the

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[70] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 679 (1996), *reprinted in* DDR, *supra* note 1, at 249, 249.

[71] Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997), *reprinted in* DDR, *supra* note 1, at 273, 273.

[72] Jill I. Gross, *Rethinking the Debunking: On Arbitration Myths, Preferences, and Legal Theory*, *in* DDR, *supra* note 1, at 255, 257; Hiro N. Aragaki, *The Critical Theory Legacy of Jean Sternlight's Panacea or Corporate Tool?*, *in* DDR, *supra* note 1, at 260, 260–61.

[73] Alexander J.S. Colvin, *The River's Source: Empirical Research and Lisa Blomgren Amsler's Employment Arbitration: The Repeat Player Effect*, *in* DDR, *supra* note 1, at 279, 279–80; Martin H. Malin, *Arbitration's Catalyst for Empirical Studies*, DDR, *supra* note 1, at 283, 283–84.

[74] Jean R. Sternlight, *Panacea or Corporate Tool?: The Sequel*, *in* DDR, *supra* note 1, at 268, 271.

"Haves" and the "Have Nots," the Haves are winning, and as ADR was co-opted and transformed by the legal system, it became their tool. Amsler was an ADR Romantic, and her heart is broken.

VII. PART 4: IF WE HAD ONLY LISTENED

The flowers have withered, and Part 4 reminds us that we had fair warning all along. Marc Galanter warned us that the soil was already tainted. His 1974 FA, *Why the "Haves" Come Out Ahead*,[75] questioned the contemporary enthusiasm for litigation as a tool for social progress.[76] He demonstrated how repeat players, the Haves, acquire a distinct advantage over one-shot players, the Have Nots. Moreover, the Haves gain additional advantages in their ability to retain lawyers (professional repeat players). A system that already favored the Haves is "unlikely to shape decisively the distribution of power in society."[77] His FA was not about ADR because it preceded ADR's institutionalization, but Golann shows how Galanter's analysis of litigation applies to ADR and how the Haves are advantaged in and take advantage of these alternative processes.[78] 2021 Galanter makes some interesting conjectures about the symbiotic relationship of litigation and settlement processes over time.[79]

Frank Sander warned us to be sensitive to context and to match the appropriate ADR process to the specific type of case, something later phrased as "matching the forum to the fuss."[80] Sander's 1976 FA was a paper he delivered at the Pound Conference on the Sources of Dissatisfaction with the Courts.[81] As Eisenberg explains, Sander was concerned with the capacity of

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[75] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974), *reprinted in* DDR, *supra* note 1, at 297, 297–80.

[76] Marc Galanter *Reflections on Why the "Haves" Come Out Ahead, in* DDR, *supra* note 1, at 317, 318 ("[The article] was a challenge to the judicial triumphalism that was the received wisdom of the progressive wing of the American legal academy.").

[77] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974), *reprinted in* DDR, *supra* note 1, at 297, 302.

[78] Dwight Golann, *A Prescient Warning of the Vulnerabilities in ADR, in* DDR, *supra* note 1, at 308, 308.

[79] *See* Marc Galanter *Reflections on Why the "Haves" Come Out Ahead, in* DDR, *supra* note 1, at 317, 317.

[80] Frank Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

[81] *See* Sander, *supra* note 5, at 321.

the courts to process "the myriad of social problems presented to them."[82] This was the tipping point for institutionalizing ADR into the legal system and legal education, but Sander didn't know, and we have yet to learn, how best to match the forum to the fuss.[83] In fact, most courts have ignored that step altogether by offering only mediation and by diverting entire caseloads with little regard to the suitability of individual cases or the preferences of the disputants. As Shestowsky points out, most disputants, particularly the one-shot players, are not given the information they need to make an informed choice anyway.[84]

In *Against Settlement*, Owen Fiss warned us that settlement through ADR would make the imposition of public values subservient to market forces, that socially significant disputes would be privatized to the detriment of important norms, and that ADR would exacerbate existing power imbalances.[85] As Waldman points out, Fiss was correct in believing that the efficiency needs of the courts were more responsible for the growth of ADR than the philosophical and interpersonal benefits touted by the ADR Romantics.[86] Cohen puts the FA in the context of Fiss's later scholarship and shows how a contemporary rereading of the article reveals "tensions *within* the discipline of ADR as it presently understands its own social and political commitments."[87] In a similar vein, Waldman concludes that "Fiss reminds us that as audience perhaps overly enamored with 'peacemaking' must understand that party consent does not assure a just outcome."[88]

Finally, Carrie Menkel-Meadow warned us that ADR could be co-opted by our adversarial legal system. In her 1991 FA, *Pursuing Settlement in an Adversary Culture,* Menkel-Meadow saw the writing on the wall. Integrating ADR into the legal system was a "clash of cultures," and the

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[82] Deborah Thompson Eisenberg, *Frank Sander: Father of Court-based Dispute Resolution*, *in* DDR, *supra* note 1, at 337, 339–40 (citing Sander & Goldberg, *supra* note 80).

[83] Yael Efron, *Varieties of Dispute Processing: The Implications on Legal Education*, *in* DDR, *supra* note 1, at 342, 342 (crediting Sander's FA with legal education reforms worldwide).

[84] *See* Donna Shestowsky, *How Useful Is Court ADR If Litigants (Still) Don't Know about It?*, *in* DDR, *supra* note 1, at 327, 327.

[85] Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984), *reprinted in* DDR, *supra* note 1, at 347, 347.

[86] Ellen Waldman, *What* Against Settlement *Got Right, in* DDR, *supra* note 1, at 355, 355–56.

[87] *Id.* at 354.

[88] *Id.* at 358.

question was how much each might change the other.[89] There were clear signs that "we may be pouring old wine...into new jugs."[90] In her 2021 reflection, she admits that most of her fears and worse had been realized as the adversarial culture (and Trumpian influence?) came to dominate ADR.[91] In her commentary, Deason explores Menkel-Meadow's question of how justice would fare against the pressures for efficiency, reminding us of the tension between the application of legal norms and the possible creation of individualized norms in ADR.[92] Coben documents how ADR itself has become a fertile ground for litigation and how Menkel-Meadow's "crash of cultures...has...played out with coercive impact—both undermining the hoped-for transformative power of mediation and compromising the quality of justice delivered by judges within the legal system."[93]

It is fitting that Carrie Menkel-Meadow's two FAs bookend DDR. Her 1986 FA in Part 1 contains the optimism and energy of the ADR Romantic that she was, while six years later her 1991 FA portrays a committed but clear-eyed pragmatic, attuned to the emerging consequences of our boosterism. As the final entry in DDR, Menkel-Meadow's 2021 commentary is both resigned and yet still striving to make good on the promise of ADR. Few have committed so much of their physical and intellectual energy to the field, and it's hard to overstate her influence on both the expression of the ideals and the recognition of the problems of integrating ADR into the legal system.

VIII. REQUIEM OR RESURGENCE

Is DDR a requiem? On the one hand, ADR is very much alive. Lawyers negotiate settlements daily and rarely see the inside of a courtroom. Court-connected mediation is one of the most significant civil justice reforms in the last 40 years, and entire categories of cases that were once litigated are now arbitrated. The Dispute Resolution Section of the American Bar Association is one of the largest and most active. On the other hand, many of

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[89] Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. L. REV. 1 (1991), *reprinted in* DDR, *supra* note 1, at 371, 371.

[90] *Id.* at 376.

[91] Carrie Menkel-Meadow, *Institutionalizing ADR: Clashing Values*, *in* DDR, *supra* note 1, at 391, 392 (citing Carrie Menkel-Meadow, *The Culture of Negotiation; Trumpian Imprints on the Future?*, 35 NEGOT. J. 221 (2019)).

[92] Ellen E. Deason, *Dimensions of Quality of Justice*, *in* DDR, *supra* note 1, at 377, 377.

[93] James Coben, *Foundational Because Prescient (and Unfortunately, Cassandra-like Prescience)*, *in* DDR, *supra* note 1, at 387, 389.

the people, activities, and institutions of the Foundational Times are now mostly irrelevant to ADR in the legal system.[94] Non-lawyers are increasingly rare in court programs, the few remaining neighborhood or community justice centers rely on the courts for cases, foundation money has dried up, the Association for Conflict Resolution is a mere shadow of its former self, and the once vibrant annual Conference on Peacemaking and Conflict Resolution is functionally moribund. Most importantly, as Lande's excellent commentary summarizes, the hopes and ideals of the ADR Romantics were dashed.[95] In this sense, DDR is a requiem for a particular dream of ADR. That ADR is dead. Long live ADR.

Then what are the implications for the scholarly field ADR represents? The integration of ADR into the legal system has been the primary impetus for legal scholarship and teaching in this area. This institutionalization gave us something to talk about—a topic for discussion. Now that ADR seems a settled part of the legal system, is there much more to discuss? Almost every commentator in DDR seems to think so and concludes with a hopeful note about the future of their academic enterprise.

Carrel and Schmitz hint at the possibilities of ADR in the digital age. Carrel suggests that artificial intelligence and case outcome databases could give the mediator an opportunity to offload evaluations onto a neutral technology and thereby remain facilitative.[96] Schmitz shows how the efficiency theme of arbitration has been transferred constructively into the current use of ODR.[97] Hollander-Blumoff demonstrates how a more robust model of human behavior would improve ADR practice.[98] Reilly and Colatrella demonstrate how to creatively translate theory into ADR skills pedagogy.[99] By applying CLS, Gross and Aragaki hint at how to address

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[94] This is not to say that the broader field of conflict resolution and the skills and processes associated with ADR are not thriving in other select contexts.

[95] John Lande, *For Pragmatic Romanticism in Law and Dispute Resolution: Reflections on Galanter's Remarkably Realistic Analysis of Why the Have-Nots Come Out Behind*, *in* DDR, *supra* note 1, at 303, 303.

[96] Alyson Carrel, *Dismantling the "Facilitative" "Evaluative" Dichotomy: Reflection on Riskin's Grid and Predicting the Future*, *in* DDR, *supra* note 1, at 188, 188.

[97] Amy J. Schmitz, *Emphasizing Efficiency in the Digital Age*, *in* DDR, *supra* note 1, at 221, 221.

[98] Rebecca Hollander-Blumoff, *Taking Human Behavior Seriously*, *in* DDR, *supra* note 1, at 13, 13.

[99] *See* Peter R. Reilly, Machiavelli and the Bar: *J.J. White as Negotiation Ethics Architect*, *in* DDR, *supra* note 1, at 36, 36; Michael T. Colatrella Jr., *"True Enough,"* *in* DDR, *supra* note 1, at 183, 183.

ADR's fraught relationship with justice.[100] Other commentators highlight ongoing empirical work and the opportunities for more. Eisenberg sees an opportunity to harness ADR to bridge our political divide.[101] Lande urges the ADR Romantics among us to continue to pursue our ideals but with the pragmatism acquired by our last four decades of experience.[102] It is encouraging that Menkel-Meadow embodies that pragmatic romantic by still believing enough in the possibilities of ADR that she continues to train and teach throughout the world where many societies are embracing ADR with the benefit of knowing the American experience. In this sense, DDR is an important recap and a call for a resurgence. There are more discussions to be had, and some of the promising younger scholars featured in DDR certainly bode well for the future.

I am less sanguine. DDR is an important and well-edited book, but there is a sense that the commentators are rehashing the same issues that we've been discussing for 40 years. As Cohen argues in an important new article, "ADR's march to instrumentalization...has left scholars constrained in the political, social, and economic questions that they can claim to explain why ADR should remain an important scholarly field in legal education."[103] There is palpable angst within the ADR professoriate. As Deborah Thompson Eisenberg observed recently: "[S]ome are concerned, if not downright panicked, that the future of ADR in the legal academy . . . looks bleak."[104] Despite how much there is still to learn and the importance of teaching dispute resolution theory and skills to law students, the legal academy itself is less interested. Whether because of resource pressures or otherwise, only a handful of law schools are deeply committed to ADR and that commitment may be eroding. ADR is no longer the bright shiny new thing it was, and despite its unquestioned importance, it never fit comfortably in the traditional realm of

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[100] *See* Jill I. Gross, *Rethinking the Debunking: On Arbitration Myths, Preferences, and Legal Theory*, *in in* DDR, *supra* note 1, at 255,; Hiro N. Aragaki, *The Critical Theory Legacy of Jean Sternlight's* Panacea or Corporate Tool?, *in* DDR, *supra* note 1, at 260, 260.

[101] Deborah Thompson Eisenberg, *Frank Sander: Father of Court-based Dispute Resolution*, *in* DDR, *supra* note 1, at 337, 337.

[102] John Lande, *For Pragmatic Romanticism in Law and Dispute Resolution: Reflections on Galanter's Remarkably Realistic Analysis of Why the Have-Nots Come Out Behind*, *in* DDR, *supra* note 1, at 303, 306.

[103] Cohen, *Rise and Fall*, *supra* note 7, at 201.

[104] Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as "Process Strategy"*, *in* THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 53 (John Lande ed., 2020).

legal scholarship and teaching. ADR may have been institutionalized in the legal system but perhaps less so in legal education. I hope I am wrong.