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The Unintended Consequence of Settlement Fever and the Rule of Law

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One of the great mistakes is to judge policies and programs by their intentions rather than their results.

—Milton Freedman[1]

Introduction

Welcome to the final column of a three-part series about how settlement fever has influenced our justice system as it evolves into settlement-centric culture.[2] This column will focus on how the rule of law, once touted as the primary benchmark of justice, has now taken a secondary role to private ordering when shaping some negotiated and mediated settlements.

This settlement-centric justice focus has not occurred in a justice vacuum. Rather, three factors have influenced this change. First, courts have been increasingly overwhelmed with swelling case dockets and shrinking court budgets, making them more receptive to processes that efficiently resolve cases and spare judicial resources. Second, litigants themselves have been demanding efficient and affordable paths to achieving justice. Third, our broader society in which our legal system is embedded reflects a culture where efficiency has become a priority. *How have these changes affected the role of the rule of law in our settlement-centric justice system?*

Since our country's birth, the rule of law has been extolled as the jewel of our democracy and the foundational pillar of our legal system. As an iconic warranty of our justice system's integrity, the rule of law promises *predictable, objective, and stable* enforcement of our laws, free from the whims of any one despot. The rule of law has withstood the tests of time as our courts, serving as a benchmark, reinforce our Constitution's promises and re-interpret those promises to meet the legal challenges of our changing times. Enshrined in a network of procedural protections and case law precedent, the rule of law is the basis of all adjudicated decisions.

Today, however, only 2% of all cases filed in court are adjudicated to decision. Paradoxically, the very procedural protections that have safeguarded the rule of law have over time multiplied and make litigation a costly, time-consuming and inaccessible process for growing numbers of litigants who sought to enforce their justice rights in court. Furthermore, the permissible legal remedies provided by adjudicated decisions are purely binary, frustrating the justice desires of those litigants who prefer a more nuanced resolution that incorporates expanded remedies not available in court.

This column questions whether this settlement-focus shift diminishes the importance of the rule of law and jeopardizes the stability of our justice system. Though conspiracy theorists might allege that this erosion of the rule of law is part of a broader Machiavellian plan to undermine our country, this author disagrees. Rather, this author posits, this diminution of the rule of law is an unintended consequence of the inclusion of more efficient and more responsive justice resolutions to promote settlement.[3]

Looking Back

When the ADR movement first introduced the value of using party-directed processes such as negotiation and mediation into our justice system approximately 50 years ago, our justice community was divided on whether increased reliance on such party-directed processes was an advancement or a threat to our justice system. ADR supporters of these party-directed resolutions extolled their many benefits: personalized justice, expedient resolutions, and affordable access to justice as the top priorities. In their acclaimed article, "Bargaining in the Shadow of the Law: the Case of Divorce," respected dispute resolution scholars Robert Mnookin and Lewis Kornhauser previewed how private ordering could expand negotiating options and yield more responsive settlements by highlighting how divorcing couples might rely on the rule of law or opt for their own private ordering when settling their divorce issues.[4] ADR supporters of party-directed processes buttressed their argument that privatized agreements were a more appealing option than relying on stale law when in 2004, when Marc Galanter reported on the steady decline of trials in "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts."[5]

Yet, naysayers warned that increased use of such party-directed ADR processes was actually a foreboding that the sky was falling and the power of the rule of law eroding. For example, Own Fiss cautioned against romanticizing ADR's settlement benefits and not heeding concerns about ADR in his seminal piece "Against Settlement."[6] Ironically, he goes on to romanticize the court process by extolling how the court process can help equalize power imbalances and disparate resources that may coerce the disputing parties to settle.[7] According to Fiss, ADR proponents discount the value that adjudication brings "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[8] Other scholars such as Richard Delgado[9] and Tina Grillo[10] raised concerns

about how informal processes such as mediation could actually reinforce racial, ethnic and domestic violence biases without the protections provided by the rule of law. What happened to these voiced concerns?

Where We Are Today

Fast forward 50 years, and our justice system has become a settlement-centric culture. ADR, especially party-directed processes such as negotiation and mediation, has become institutionalized in our justice system. And, private ordering, rather than reliance on the rule of law, has become a valued and frequently used justice measure. In 2021, Bob Mnookin, reflecting back on his "Shadow of the Law," noted how there is now widespread reliance on social norms as a preferred measure of justice in negotiated agreements across the board including commercial, plea bargains and family disputes.[11]

Moreover, many lawyers and mediators, the primary facilitators of negotiated agreements, are given discretion to use the rule of law as a measure of fairness. Given this choice, many opt to use social norms as a justice measure in their agreements. For example, he ABA Model Rule of Professional Responsibility 2.1 Advisor explicitly allows lawyers to consider other factors beyond the rule of law when rendering advice:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[12]

Moreover, those mediators, who adopt a broad approach to mediation might discuss a private ordering approach as compared to those mediators who adopt a narrow approach to mediation that focuses primarily on the law.[13]

Professors of dispute resolution like this author also educate their students about the different role the rule of law plays in party-directed processes such as negations and mediation. We teach our students how the strength of their legal arguments in a negotiation or mediation might provide leverage in shaping the settlement, but it is not a benchmark of justice.[14] Rather, negotiations and mediations are emotional and economic decisions that rely on the parties' personal values.

Taking the ADR pulse today regarding party-directed processes, we see that many of the process concerns about bias are being addressed. For example, the ADR profession is finally actively ensuring that mediators reflect the diverse public it serves. Furthermore, the profession has fortified its training and supervision requirements to ensure that there are qualified mediators. However, an unanswered question remains, and the focus of this column remains: *How might we also preserve the role of the rule of law in our settlement-centric justice system?*

Going Forward

This column began with the following quote from Milton Friedman:

> One of the great mistakes is to judge policies and programs by their intentions rather than their results.

I, along with other ADR supporters of party-directed processes, believed that the increased use of party-directed process such as negotiation and mediation would strengthen our justice system by expanding parties' access to justice and offering more personalized, efficient, and affordable justice options than adjudication, and it has. The *choice* of justice options to resolve a case—private ordering or the rule of law—was never intended to devalue the importance of the rule of law. It was always about providing parties to choose their preferred justice options. However, this may have had the unintended consequence of diminishing the importance of the rule of law in our justice system.

We must not forget that the strength of a settlement-focused justice system is supported, in large part, by strength of the rule of law. Our esteemed colleague Michael Moffitt reminds us that the rule of law provides parties some contours of their " legitimate expectations" and a vehicle to enforce their party-directed agreements.[15] Therefore, I have been horrified by the ongoing domestic attacks on and attempts to dismantle our rule of law and weaken our democracy. It has incentivized me to reflect on how our support of a settlement-centric justice system may unintentionally be ignoring the importance of the rule of law to the integrity of our justice system. *How do we continue to support parties' choice between privatized ordering and the rule of law as integral and compatible components of our justice system?* Now is the time for us to step back and re-examine how to also preserve the importance of the rule of law in the midst of our growing settlement-focused justice culture. I welcome your thoughts.

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Endnotes

1. From a December1975 interview with economist Milton Friedman on PBS's "The Open Mind," at https://www.wsj.com/articles/notable-quotable-milton-friedman-1444169267#:~:text=Friedman%3A%20One%20of%20the%20great,is%20paved%20with%20good%20intentions.
2. *See Ethical Compass: Three Different Judicial Treatments for Settlement Fever*, NYSBA New York Dispute Resolution Lawyer, 2021 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864284 (discussing how individual judges assess settlement means); and *Ethical Compass: Settlement Fever: Lawyers, Have Your Updated Your Philosophical Map*, NYSBA New York Dispute Resolution Lawyer, Vol.14, No.2, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3931520 (prescribing an expanded lawyer's philosophical map.
3. This author acknowledges that there are other reasons that there is a diminution of reliance on the rule of law that warrant exploration. However, that discussion is beyond the scope of this column.
4. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. (1979), at: https://digitalcommons.law.yale.edu/ylj/vol88/iss5/4.
5. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, Journal of Empirical Legal Studies 1.3 (2004): 459-570.
6. Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984), at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6871&context=ylj.
7. *Id.* at 1076.
8. *Id*. at 1085.
9. Richard Delgado, Chriss Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*,1985 Wis. L. Rev. 1359 (198%).
10. Tina Grillo, *The Mediation Alternative: Process : Dangers for Women*, Yale L. J. 100, 1545 (1990).
11. *See* Discussions in *Dispute Resolution: The Origin Stories* with Professor Bob Mnookin at https://www.youtube.com/watch?v=WfKyuVk6md4 at 28.19.
12. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/.
13. Riskin, Leonard, *Narrow vs. Broad Problem Definition*, Mediate.com, May 2010), at https://www.mediate.com/Mediation2020/article.cfm?zfn=riskindvd06.cfm.
14. Astute lawyers appreciate that a court determination as a BATNA is a pipe dream with little weight. *See* Elayne E. Greenberg, , *Ethical Compass: The Changed BATNA*, NY Dispute Resolution Lawyer (Spring 2019), at https://nysba.org/app/uploads/2020/03/DisputeResolutionLawyer-Spring2019.pdf.
15. Michael Moffitt, *Which Is Better, Food or Water? The Rule of Law or ADR?*, at 13, ABA Disp. Resol. Mag.Vol 16 No. 4 (Summer 2010).