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Discussions in Dispute Resolution: The Foundational Articles

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Book Review

Art Hinshaw, Andrea Kupfer Schneider, and Sarah Rudolph Cole, eds. *Discussions in Dispute Resolution: The Foundational Articles*. Oxford University Press, 2021. 440 pages. \$99.95 (hardcover), ISBN: 9780197513248.

Reviewed by Jacqueline Nolan-Haley

Introduction¹

I locate this review within the historical framework of the “modern” Progressive era of the late seventies, eighties, and nineties of the twentieth century. Similar to the Progressive era of the late nineteenth and early twentieth centuries, the modern Progressive era witnessed a great awakening in justice with the emergence of multiple reform movements advocating significant legal, political, social, and structural changes—law and economics, critical legal studies, feminism, law and society, clinical legal education, access to justice, and alternative dispute resolution (ADR), which is the broad topic of this review.

In the early days of the modern Progressive era, energized by the 1976 Pound Conference, the acronym ADR generally referred to alternatives to the court adjudication of disputes. More recently, it has been understood as “appropriate” or “amicable” dispute resolution. ADR is rooted in the access to justice movement, a reform initiative that Mauro Cappelletti, the Italian jurist, and Bryant Garth described in their 1978–1979 international and interdisciplinary study of access to justice. Cappelletti identified three waves of law reform that propelled the access to justice movement: (1) legal aid, (2) procedural devices for class actions, and (3) promoting systemic reform of the legal system through alternative dispute resolution (ADR). *Discussions in Dispute Resolution: The Foundational Articles* provides an account of how the third wave’s law reform initiative evolved into its own field of study (see Garth and Cappelletti 1978). It is a timely and important book, arriving at a time when some scholars argue that ADR should be rehabilitated so that it does in fact provide access to justice.

One of the book’s co-editors, Art Hinshaw, observes that the early ADR movement was an “insurgent populist movement” that rejected the

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legal system and turned to informalism as a way of addressing parties' needs (108). The idealism of the early movement attracted multiple stakeholders with its glittering promises of efficiency, reduced cost, greater satisfaction, and creative solutions to conflicts that did not depend upon law but acknowledged the importance of emotions and human connectivity. During the modern Progressive era, some authors of the foundational articles questioned the validity of these promises. Had they been co-opted by the dominance of the adversarial system? Did ADR really offer a new and superior mode of addressing disputes or did it privilege the "haves" at the expense of the "have nots"? Did the Supreme Court's expansive arbitration jurisprudence upholding the enforceability of pre-dispute arbitration clauses violate the intent of the Federal Arbitration Act (FAA), an access to justice initiative that emerged from the original Progressive era? In this carefully edited collection of discussions, leading ADR scholars engage with these important questions.

The book also arrives at a time when ADR struggles for legitimacy in the academy, where it suffers from a branding problem. Is it dispute resolution? Conflict resolution? Restorative justice? Moreover, it is frequently dismissed by being labeled with the taint of a "skills" subject. This view is misguided and the result, as noted by Jennifer Reynolds, is that "ADR scholars do not have the same credibility, rightly or wrongly, as non-ADR scholars" (410).

The editors have assembled classic pieces that arguably are the foundational basis for ADR as a field of study. These include articles from the ADR romantics, as well as the realists, feminists, and other critics from the modern Progressive era who claimed not only that ADR failed to provide access to justice, but that it hampered the delivery of substantive justice. The articles featured in this book discuss a range of topics from the impact of mediation neutrality to the consequences of moving commercial arbitration into the consumer and employment arena. Many of the featured articles are standard fare in contemporary law school ADR texts.

Structure

The book's title draws its inspiration from *Criminal Law Conversations* (Robinson, Garvey, and Ferzan 2009), an earlier publication that gives an overview of contemporary issues in criminal law followed by commentary from leading criminal law scholars. *Discussions in Dispute Resolution* features sixteen articles all published before the year 2000, including some by first-generation ADR scholars such as Soia Menschikoff and Lon Fuller. The collection is divided into four parts that correspond to the four topics that typically comprise the study of ADR: negotiation, mediation, arbitration, and public policy. Each featured article is

followed by brief commentaries from leading scholars who discuss the significance of the article as a foundational work in the dispute resolution field. A majority of the authors have the last word with their responses to the commentators. The book draws heavily from the legal academy and would benefit from a somewhat broader scope in coverage to include articles and discussions from the many fields that comprise dispute resolution. Nevertheless, dispute resolution academics and practitioners from diverse disciplines should find much of the commentary enlightening.

Asking scholars to take a second look and re-engage with foundational pieces in any field can produce much fruit, and ADR is no exception. The commentators featured in this book write with the benefit of hindsight. They are able to discern who was prescient and who was not, to speculate about what the authors of the foundational articles would say today, and to offer their own insights about how to resolve the problems being addressed.

This review identifies the articles in each of the book's four sections and presents a brief highlight of the commentators' views on why the article should be considered foundational. It is not possible within the confines of a book review to give full attention to the depth and quality of the discussions, some of which, standing alone, make a valuable contribution to the literature.

Part 1. Negotiation

Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979)

The book's lead article offers what Rebecca Hollander-Blumoff describes as a "core fundamental insight": legal endowments matter to parties even outside of court. Rishi Batra both praises and critiques the article, offering what he perceives as some of its deficiencies: the failure to give more attention to irrational behavior and emotions, and its silence on the issue of gender imbalance. Elizabeth Tippet commends the authors for legitimizing the study of negotiation within the legal academy by "tethering bargaining to jurisprudence" (9). Moving into the realm of psychological norms and drawing on her empirical research, Hollander-Blumoff discusses how bargaining in the shadow of the law framework leads her to focus on procedural justice norms. Parties bargain not merely in the shadow of their substantive legal entitlements, she argues, but "in the shadow of due process as well" (14).

Using his response as an opportunity to broaden the article's relevance beyond the divorce context, Mnookin identifies four insights from divorce bargaining that have more general relevance. First, the majority

of legal conflicts are resolved through negotiation, not by judges in the adjudication process. Second, in these negotiations, the law is relevant but not determinative of the outcome. Third, five factors influence bargaining behavior and outcomes: party preferences, bargaining endowments created by substantive and procedural rules, degree of uncertainty if parties go to court, transaction costs, and strategic behavior. Fourth, viewing law and the legal system from a bargaining perspective can offer insights into the effect of substantive law and procedural requirements.

James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980)

White's article on distributive bargaining ethics was written in the shadow of debates over drafting the Model Rules and in particular, concern with a rule on truthfulness in negotiations. Michel Moffitt reminds us that it was a time when the legitimacy of negotiation as an area of study and the legitimacy of ADR was still in question. White favored adoption of ABA Model Rule 4.1 governing candor in negotiations but warned that it may not be effective in practice because of the inherent nature of negotiation and because of lawyers' behavior. In the article, which Lauren Newell calls prescient in part, White predicted that application of Rule 4.1 would be inconsistent and that lawyers might preference zealous client representation over ethical compliance, and thus undermine the rule. After comparing White's prediction with the empirical evidence gathered thirty years afterward, Newell is left puzzled, "wondering which is better: lawyers who know the rules but ignore them to gain a negotiating advantage or lawyers who do not understand the rules and gain a negotiating advantage through their ignorance" (43).

Moffitt commends the article for its candor and quotability, writing that "...White employs turns of phrase ... that make it all but impossible for those of us teaching negotiation to avoid quoting him" (33). But Moffitt is critical of the article's negative effects on ethical practice—for producing a system of "ethical ratcheting" under which ethical rules can only loosen as the ethical ratchet exerts force in the direction of fewer ethics. Reflecting on the Model Rules and White's acceptance of puffery by lawyers in negotiation, he wonders: If puffery is permitted, what is next? Peter Reilly reflects Moffitt's concerns, acknowledging that in his sixteen years of teaching negotiation in law school, he has seen decreasing student support for negotiation ethics rules.

What is White's rebuttal? He claims that negotiation is a welcoming environment for liars and ABA Rules do little to deter this. So the question for him is: What should we teach our students? He answers

his question with four suggestions for teaching students protective practices. The first three are: gather information on your opponent, be skeptical about assertions of value, and protect your reputation. The fourth suggestion is: “[A] good negotiator should be slightly paranoid; that is, she should look backward, however uncomfortable that might be, to see if she achieved a good settlement in cases that never went to trial and in commercial deals that were made” (46).

Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving” (1984)

“The Structure of Problem Solving” makes the claim that problem solving can achieve better negotiation outcomes than adversarial bargaining. It wins high praise from Andrea Kupfer Schneider, who commends Menkel-Meadow for using interdisciplinary literature to theorize problem-solving negotiation, as well as for providing a skills-based road map for lawyers to use in achieving this goal. In a similar congratulatory vein, Russell Korobkin notes that problem solving has become the “uncontested dominant paradigm” (57). If this is so, why is it then, asks Erin Archerd, that lawyers are reluctant to engage with the problem-solving model and they consider interest-based approaches “as the exception rather than the rule” (60). The problem, she says, is the client, who still clings to the image of a lawyer as a hired gun, and so it is not the lawyers but the public whom we need to convince of the value of problem solving.

In Menkel-Meadow’s response, we learn that she was motivated to theorize problem solving based on her work as a clinical legal educator and a poverty law litigator. In addition to responding to the individual commentators, she turns to the “telling critiques” from other sources, in particular Herbert Kritzer, who predicted that the creative and non-monetary solutions she advances in her article cannot work due to the fee structures in law firms and corporations. His critique is “correct and prescient,” she says, and now we should be studying the context in which lawyers’ work is conducted and ask: What are the incentives for advancing or restricting problem solving?

Gerald B. Wetlaufer, “The Limits of Integrative Bargaining” (1996)

Written in the euphoric shadow of *Getting to Yes* and Menkel-Meadow’s “The Structure of Problem Solving,” Wetlaufer critiques the claims associated with integrative bargaining, the dominant bargaining theory of his time. For Noam Ebner, Wetlaufer should be credited with setting the tone for the critique, which is respectful and appreciative rather than polemic. Jennifer Reynolds views the most interesting aspect of the article as the “warning signs about the legitimacy and status of integrative

bargaining as a practice and as the foundation of the emerging legal field of ADR” (79). Wetlaufer warns us, Reynolds says, of the harms that result from oversimplifying, overselling, and overreaching. For example, when concepts such as value, self-interest, cooperation, and honesty are oversimplified, we are unable to engage deeply with the ethical dimensions of negotiation practice. Pivoting in a different analytic direction, Robert Bordone suggests that rather than viewing this article as an assault on integrative negotiation generally, it may be seen more like a “re-balancing” of the negotiation field at a moment when the mutual gains approach was the Holy Grail of negotiation. He views the dissenting voice of Wetlaufer, which challenges orthodoxy, as strengthening ADR as a distinct field of academic inquiry rather than simply a movement of reformers.

As do many of the foundational authors, Wetlaufer responds by explaining why he wrote the article. He intended to bring a measure of clarity and discipline to the then prevailing discussion of integrative bargaining, which had become the dominant paradigm of negotiation. Wetlaufer claims that we have overstated the case against distributive bargaining by understating its pervasiveness and importance and by describing it in the least charitable way. To remedy the situation, he offers five suggestions for what is needed now, including a mandate to “begin to do full justice to distributive bargaining, acknowledging its pervasiveness, its interpersonal and ethical complexities, and the fact that it may but need not be ‘nasty’ and unpleasant” (97).

Part 2. Mediation

Lon L. Fuller, “Mediation—Its Forms and Functions” (1971)

One of the recurring themes of several commentators in this volume is ADR’s struggle to achieve credibility as a field of study. Hinshaw argues that the inclusion of Fuller, one of the preeminent legal theorists of the twentieth century, assists in that struggle by lending credibility to the legitimacy of ADR as a field of academic inquiry. Fuller’s article, he suggests, foreshadows three major developments in dispute resolution: the Negotiator’s Dilemma—which Lax and Sebenius would write about years later, the use of mediation in child custody disputes, and the erosion of the opening joint session in mediation. Echoing Hinshaw’s legitimacy theme, Nancy Welsh claims that Fuller’s article contributes to the legitimacy of mediation with its identification of mediation as one of six processes for social ordering. Welsh reminds us that Fuller continually emphasized the relational nature of mediation and then asks: What would Fuller say today to mandated court-connected mediation? To contractual imposition of pre-dispute mediation on consumers

and employers and to defendants' failure to attend personal injury and professional malpractice mediation? James Alfini focuses on how Fuller's article informs later conceptualizations of mediator orientations, i.e., facilitative, evaluative, Riskin's grid, and Bush and Folger's transformative mediation theory. Speculating on what might be Fuller's preferences in the existing dispute resolution landscape, Alfini decides that Fuller would be opposed to evaluative mediation "because mixed processes did not fit well into his social ordering construct" (118). Instead, he would favor the mediator who adopts Bush and Folger's transformative approach. Becky Jacobs ends by commending Fuller for going beyond theorizing and offering detailed descriptions of essential mediation skills that still have currency today as they are incorporated into law school mediation clinics and class simulations.

Joseph B. Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind" (1981)

"The Theory and Practice of Mediation" introduces the famous Stulberg/Susskind neutrality/impartiality debate and raises basic questions that are still with us today. What is the goal of mediation? What is the role of the mediator? For Stulberg, impartiality is a critical feature of mediation, requiring the mediator to be impartial toward the outcome. This definition of impartiality is insufficient, claims Brian Pappas, because "it does not go far enough to maintain the correct scope" (139).

Sharon Press and Bobbi McAdoo agree with Stulberg on the importance of outcome neutrality but urge mediator impartiality and neutrality throughout the process. This leads them to wonder whether the directive role of the mediator favored by Stulberg risks "subverting the mediation process and the accepted role of the mediator" (144). This is particularly true with the contemporary mediation landscape and the growth of court-connected and mandatory mediation.

Lela Porter Love's discussion begins with an excerpt from John Masefield's poem, "Sea-Fever"—"*And all I ask is a tall ship and a star to steer her by.*" In her view, Stulberg's article is foundational because it gives us "a star to steer by" in understanding the mediation process. Stulberg proposed a simple idea that mediation is about party choice. This gives mediators and society a star to steer by in developing a field, training programs, qualifications for practice, and ethical codes.

With characteristic humility, Stulberg states in his response that his article merited inclusion in this volume not because of his analysis but because of the nature of the topic—neutrality. He reminds us that participating in mediation is a justice event and that there is something majestic and noble about the mediation process. Stulberg identifies the

“single and theoretical challenge for mediators: What is or should be the relationship between a mediator’s promoting party autonomy and a mediator’s obligation as a member of the political community to securing fidelity to norms of fairness and justice?” (148). He leaves this question, among others, to the rising generation of scholars.

Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991)

Grillo’s feminist critique of mediation generated both praise and critical commentary. Reflecting on the article’s impact, Karen Tokarz poignantly describes how it informed her teaching, scholarship, and practice, giving her a more mindful and feminist path to mediation practice. Grillo pushes us, Tokarz argues, to be “more intentional and rigorous” in examining issues related to mandatory mediation, self-determination, bias, justice, and the norms of the mediation process. Carol Pauli explains the sources of Grillo’s anger toward mediation and why Grillo felt betrayed by a process that seemed to promise so much for women. Grillo used her anger effectively, says Pauli, because when she saw problems, she “said clearly what she saw happening” (160).

Kelly Browe Olson focuses on design and contextual dimensions. She asserts that context matters, and that in the family law arena, courts and dispute resolution programs should follow Grillo by focusing on individualized solutions that address the conflict rather than assuming that one model is appropriate in all situations. This requires that programs prioritize universal screening, mediator training, neutrality, confidentiality, and party self-determination.

Douglas Frenkel offers a mixed critique. He identifies three reasons why Grillo’s article is noteworthy. The first is good timing, coming out “at the crest of the first wave of the feminist movement and as alternative dispute resolution courses gained curricular traction” (165). Second, the article has good examples—Grillo’s claims are illustrated with stories based on actual California custody mediations. Third, the article’s vivid description of what can go wrong in a family mediation must have inspired some neutrals to reconsider their approaches. But Frenkel criticizes Grillo for her rhetoric, claiming that “[s]he oversimplified and overgeneralized, speaking of women and men in sweeping and stereotypic terms.” In his view, it is possible that the “fervor of Grillo’s advocacy undercut its message and even invited pushback” (167).

Leonard L. Riskin, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996)

Riskin’s article categorizes mediators’ work, offering a conceptual model that helps us to understand what mediators do and how they do it. According to Michael Colatrella, despite criticism that the Grid is too

simple, it is the Grid's simplicity that helps explain the mediation process so clearly. Moreover, the article rightly is described as "a classic piece of scholarship because it explains the Grid model in a way accessible to those new to mediation" (186).

For Alyson Carrel, Riskin's article is foundational because almost twenty-five years after its publication, and despite the fact that numerous critics have challenged it, the evaluative/facilitative terminology that Riskin invites us to use has come to dominate the field. Carrel is optimistic, however, that the phrase "evaluative mediator" might become an anachronism with new developments in technology such as predictive analytics.

But it may be that the debate is over, suggests Donna Erez-Navot, and that with advances in technology, practitioners have accepted the Grid. She points to the growth of court-mandated mediation where "evaluative mediators sit on court panels side by side with facilitative ones" (196).

This article is significant for Kimberlee Kovach because it offered, for the first time in the modern mediation movement, "a foundation upon which to center process debates" (197), and it generated countless articles dealing with mediator behaviors. She suggests three issues related to the article that could be engaged for further conversations: (1) the disconnect between the teaching and practice of mediation; (2) the influence of the legal system in shaping mediation practice today; and (3) issues related to the problem definition continuum.

Part 3. Arbitration

Julius Henry Cohen and Kenneth Dayton, "The New Federal Arbitration Law" (1926)

Cohen was the principal drafter of the Federal Arbitration Act (FAA). Conklin reminds us that this article, co-authored with Dayton, was intended chiefly as an apologetic for the FAA, responding to what the authors anticipated as pushback to the seemingly radical nature of this progressive legislation. She explores six of Cohen and Dayton's claims related to the early history of arbitration, noting that the arguments they offer in support of the FAA were not new, but were a continuation of long-standing support for arbitration throughout American history.

Imre Szalai offers a historical framework for the article, locating it in the closing years of the Progressive era. He notes that the push for the FAA was part of a broader movement for procedural reform during which progressive reformers deployed aggressive lobbying efforts to educate people about the benefits of arbitration. Responding to contemporary negative publicity about arbitration, Szalai reflects on the continuing need for greater educational efforts to promote arbitration's benefits, at the same time reminding us that the FAA is in need of reform.

Kristin Blankley observes that in addition to its discussion of the purpose and benefits of arbitration, Cohen and Dayton's article predicted the problem of lawyers' self-interest and the negative effect it would have on arbitration, as seen today with lawyers incorporating litigation tactics into arbitration practice. He notes that rather than lawyers adapting to arbitration and its promise of satisfying client interests, "arbitration adapted to lawyers' basest instincts" (219).

Amy Schmitz writes that Cohen and Dayton used their article to promote arbitration and its value as a foundation for promoting efficiency in the resolution of fact-based disputes. Using the efficiency theme as a launching pad, Schmitz discusses how arbitration has evolved into the new world of online dispute resolution (ODR) and argues that just as the FAA signaled a push for universal enforcement of arbitration agreements and awards, ODR proponents are now crafting legal infrastructures for online mediation and arbitration. Like the promotion of arbitration as a reform measure in the 1920s, ODR presents a more efficient means for resolving fact-based disputes and for Schmitz, it is the only reasonable way to seek redress in cross-border contexts.

Soia Mentschikoff, "Commercial Arbitration" (1961)

Mentschikoff's seminal article, written sixty years ago, compares arbitration practice among trade associations with commercial arbitrations conducted by the American Arbitration Association (AAA). For Stephen Ware, this article continues to inform our understanding of commercial arbitration. He singles out Mentschikoff's study of trade associations as perhaps her most important contribution for what it teaches about commercial arbitration, commercial law, and commerce. With respect to Mentschikoff's finding that most arbitrators feel free to ignore substantive rules of law, Ware notes that it highlights the degree to which arbitration can privatize law.

David Horton discusses how Mentschikoff's article inspired his current project studying consumer, employment, and medical malpractice arbitration. In his view, Mentschikoff's essential contribution to the field is her description of how arbitration operates from the inside—the story of what happens behind closed doors. He also reminds us that Mentschikoff established arbitration as a malleable and context-dependent process, rather than a monolithic one, and this insight has proved to be prescient.

Echoing Horton's prescience theme, Mark Weidemater observes that Mentschikoff was "remarkably prescient" in raising questions that are still with us. What is the role of precedent in arbitration? To what extent do court procedures influence practice norms in arbitration? What role

can arbitrators play in interpreting form contracts? For Mentschikoff, context matters, and that is what will determine the appropriate structures and processes for commercial arbitration.

Sarah Cole finds Mentschikoff's most significant contribution in her analysis of the differences among types of arbitration. Cole notes that Mentschikoff makes two observations about the ways in which arbitral subtypes vary. The first variation is in the extent to which lawyers are involved. Second, "Mentschikoff confirmed that different types of disputes may be better suited to one form of arbitration than another" (231). With respect to both of these observations and in the current landscape of a rush to one-size-fits-all arbitration, Cole believes that Mentschikoff was ahead of her time. She suggests that just as Mentschikoff once created a taxonomy of arbitration processes for commercial disputes, the same can be done for modern arbitration. Depending upon the identity of the parties and the nature of the disputed issues, there could be different arbitral procedures, what Cole refers to as a "model menu of arbitral forms."

Jean R. Sternlight, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996)

Jill Gross identifies two reasons for the continued significance of "Panacea or Corporate Tool." From a doctrinal perspective, Sternlight was the first scholar to construct a road map for arguments against mandatory arbitration, thereby inspiring the forced arbitration movement. Second, she draws on critical legal theory to push back on the law and economics foundation of the Supreme Court's FAA jurisprudence of the 1980s and 1990s. Despite Sternlight's desire to debunk the courts' continued reliance on law and economics perspectives, Gross notes that "she was remarkably prescient about the unlikelihood of doing so" (258). For Gross, Sternlight cares about the little guy as she brings concepts of fairness and justice to the debate about mandatory arbitration, concepts that are ignored by a law and economics analysis.

Hiro Aragaki continues and expands on the critical legal studies (CLS) theme. For him, this article clearly puts Sternlight in the CLS camp with its central themes of legal indeterminacy, power, ideology, and transformation. According to Aragaki, Sternlight took the "bold CLS inspired position that arbitration law was politics" and sought to expose how the court was largely responsible for both oppressing consumers and for legitimizing that oppression behind the shield of "law."

For Michael Green, the seminal impact of the article is its focus on debunking the myth that arbitration should be enforced as a preference where weaker parties—or, in Starlight's words, "little guys"—are

involved. Green observes that the concerns Sternlight wrote about in 1996 are still with us today—the big guys are still imposing arbitration on the little guys in consumer, employment, and franchise disputes. Finally, Green offers multiple examples of how this article inspired his work as a new scholar.

Sternlight's response acknowledges that yes, mandatory arbitration turned out to be the "corporate tool" that she feared. She notes with sadness that her predictions came to fruition—powerful economic and psychological interests have prevented the free market from ensuring fair and efficient results. In addition to reminding readers that she successfully predicted the harms resulting from mandatory arbitration, Starlight also recounts what she failed to predict, namely that the Supreme Court would hold that contractual challenges must often be made to the arbitrators themselves rather than courts. The organized resistance to mandatory arbitration is in her view a "war" that continues outside of the court and in state legislatures, and she urges readers to persevere in fighting "hard" against the "scourge" of compulsory arbitration.

Lisa B. Bingham and Lisa Blomgren Amsler, "Employment Arbitration: The Repeat Player Effect" (1997)

In "Employment Arbitration," Amsler was the first scholar to identify repeat player effects in employment arbitration and demonstrate how they advantage employers in mandatory arbitration. Labeling the article a "groundbreaking piece of work," Alexander Colvin introduces his own research that developed from the article. In his view, the policy debates over mandatory arbitration have at times focused too much on the repeat player problem.

Martin Malin and Richard Bales both note that the article discusses the first systematic empirical examination of repeat players in employment arbitration and it inspired other scholars to expand on Amsler's work. According to Bales, Amsler's legacy is demonstrating how employment arbitration works in practice, as opposed to theory. He offers three examples of how Amsler's work influenced the field: arbitration scholars conducted more empirical studies; her empirical work had a strong influence on normative scholarship and caused people to rethink their enthusiasm for arbitration; and her work encouraged scholars to be more nuanced and specific in all areas of arbitration scholarship. For Bales, Amsler's influence over the direction of future scholarship is the realization of "every scholars' dream" (289).

Amsler's response begins with an account of what brought her to the table as a former management labor lawyer and new arbitrator and how she initially identified the problem of repeat player effects

in the context of dispute system design. Despite the bleak picture of the Supreme Court's embrace of mandatory arbitration, which deprives workers of a voice in the justice system, Amsler is hopeful that justice still can be attained in arbitration. But justice will only prevail in compulsory arbitration, says Amsler, when ordinary people "cultivate virtue and reason together to shape it for the common good based on their lived reality." How might this occur? According to Amsler, by "[e]lecting the right people to Congress and the presidency" (292).

Part 4. Dispute Resolution Public Policy

Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974)

Dwight Golann observes that although Galanter's article is not about ADR or any of the values of the modern ADR movement, it offers prescient predictions about the weaknesses of ADR—how repeat players, the "haves," can influence the processes of dispute resolution to gain advantage over vulnerable members of society, just as they do in litigation. Golann notes that Galanter's analysis of how repeat players may "play" adjudicative processes is one of many ways in which Galanter advances ADR theory. For Golann, Galanter's article provides an insightful understanding of why ADR has failed to fulfill "some of the most important dreams of its pioneers" (311).

For John Lande, Galanter's article demonstrates a pragmatic romanticism in trying to help the "have nots" become more like the "haves." Just as Galanter cautioned against "litigation romanticism," Lande urges ADR romantics "to see our beloved ADR as it is" (302). Instead of making broad empirical or exaggerated claims that are not supported by the evidence, ADR romantics should work toward minimizing the effects of what he calls the creeping legalism on ADR processes. Rather than abandon idealism, Lande would have us "be very pragmatic about understanding the real world and potential strategies to make it better" (303).

Cynthia Alkon focuses on criminal defendants as "have-nots" and prosecutors and defense lawyers as repeat players. She identifies four basic strategies for reform offered by Galanter that still remain relevant in discussions of criminal legal reform to help "have-not" criminal defendants. Galanter's "caution about the limits of litigation and [legal] process to make meaningful change is an important contribution to contemporary discussions about criminal legal reform" (315).

Galanter replies that the article was shaped by his experience as a Fulbright scholar in India studying the abolition of untouchability (the domination and oppression of the lowest castes). What he describes as his "India inspired intuitions" (317) were refined in the literature of

the law and society movement, which was critical of legal institutions. Galanter notes the significant changes to the legal landscape that have occurred since he wrote the article. When ADR arrived on the scene in the 1970s, the trial was already in decline. What replaced the trial was not ADR but rather an elaborated version of settlement negotiations, what he has famously called “litigotiation.” Galanter cannot predict what will happen to trial and settlement, observing that half a century ago, no one would have predicted where we are now—trials in administrative forums far outnumber trials in court, many claims are blockaded by being deployed to arbitration, managerial judging, and outsourcing of claims to ADR.

Frank E. A. Sander, “Varieties of Dispute Processing” (1976)

Sander’s seminal speech delivered at the Pound Conference in 1976 called for developing a range of options for litigants to manage disputes in the court system. Donna Shestowsky questions the usefulness of court ADR programs if litigants do not know about them. Her empirical research shows that litigants are often unaware of the ADR options in particular courts. Shestowsky claims that lawyers share a major responsibility for this state of affairs, and proposes a blueprint for litigant education that begins with legal education. In her view, ADR education should be mandatory in law schools, not relegated to small seminars.

Despite the fact that Sander’s remarks inspired legal curriculum reforms in both domestic and international settings, Yael Efron believes that more work is needed. Continuing with Shestowsky’s focus on legal education, he identifies five areas in need of curricular development: (1) the justice gap; (2) issues that arise in the aftermath of dispute resolution, agreement, and enforcement; (3) the positive and negative effects of technology on the legal profession; (4) an interdisciplinary approach to law; and (5) empirical studies to inform theory. Calling for more data to improve the administration of justice, he regrets that too few academics do this kind of research.

Lydia Nussbaum proposes an updated matrix for Sander’s original sorting mechanisms matching dispute types with methods of dispute resolution. In her view, the matrix would be improved by adding new categories for dispute and disputant characteristics such as parties’ unequal legal sophistication, financial vulnerability, and previous ADR experience. The notion that only courts can do the sorting is outdated, she claims, but which agency should do the sorting remains a puzzle to her. The bottom line? It falls to those who toil in the ADR policy field to continue educating policymakers about the uses and abuses, burdens and benefits of ADR.

Deborah Eisenberg notes that while Sander was not the first person to propose the use and study of ADR, his speech at the Pound Conference marked a “tipping point.” Years after the Pound Conference, the ADR field continues to grapple with the issues Sander raised, including: Who decides what cases are amenable to ADR? How do we ensure the quality of the process? What kinds of problems is ADR trying to solve? Sander did not offer all the solutions, but for Eisenberg, “[he] asked the right questions” (340).

Owen M. Fiss, “Against Settlement” (1984)

Brushing with broad strokes and referencing Fiss’s larger body of work, Amy Cohen surveys his related writings and interest in public law values such as human rights. She argues that the standard analysis of Fiss and ADR overlooks the larger political and social implications of his ideas. While Fiss divided dispute resolution into two fields, he was interested in moral deliberation and interest satisfaction, not adjudication and ADR.

Ellen Waldman maintains that Fiss was largely correct when he claimed that efficiency was the driving force behind ADR. Citing studies by the Global Pound Conference Series that were based on interviews in twenty-four countries, she demonstrates that it is efficiency, not the traditional values of transforming relationships or procedural justice, that people most value. Fiss was right again, she claims, to voice concern over power imbalance in informal settings. Pointing to the plight of unrepresented tenants and homeowners facing property foreclosure, Waldman argues that the reality today is worse than what Fiss imagined. The remedy? “Keeping in mind Fiss’s romantic vision of what justice requires can only improve our reform efforts as we strive toward the best balance of formal and informal dispute resolution processes” (358).

Adam Zimmerman’s discussion focuses on Fiss’s prediction of how courts would be transformed by new settlement procedures, “particularly in the area of mass adjudication” (361). In Zimmerman’s view, the challenge going forward is to “identify how hybrid systems of dispute resolution can provide relief without sacrificing the values of public adjudication that Fiss championed” (361).

In stark contrast to the other commentators, Marjorie Aaron offers a critical view of Fiss, identifying what she considers the dominant flaws in his article. According to Aaron, “[M]ost of Fiss’s insights reflected little awareness of the way that litigation, ADR and settlement work, naïve views on the relationship between courts, truth, and justice, and, in some instances, glib failure to address inconvenient counter-realities and arguments” (365). She argues that Fiss was

rejected by ADR scholars and ignored and dismissed by ADR leaders and providers. Despite believing that Fiss was generally wrong, she concedes three areas where his insights were correct: coercion within mediation; power imbalance; and the danger of private settlements and arbitration.

Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'" (1991)

The final article in this volume speaks of the adversarial system's co-optation of dispute resolution innovations. Comparing Menkel-Meadow to Cassandra "in predicting the destruction of Troy (and in particular the warning about the Greeks hiding inside the Trojan Horse)" (389), James Coben credits her prescience in foreseeing the negative effects of ADR institutionalization and legalization. Despite the bleak picture he paints of co-optation, based in part on his seminal study of mediation-related litigation, Coben urges us to be inspired by Menkel-Meadow's optimism and continue to believe in the transformative power of mediation.

Ellen Deason continues Coben's prescience theme, applauding Menkel-Meadow's ability to conceptualize issues and ask questions that still resonate today. In Deason's view, Menkel-Meadow's lasting contribution is the recognition that as ADR becomes institutionalized into the legal system, what is at stake is not just a clash of cultures but a clash of values. It is also noteworthy for Deason that Menkel-Meadow deals with questions of justice in her emphasis on parties achieving quality resolutions from ADR processes. But then—in 1991, when this article was written—as now, there is little agreement about what constitutes justice and fairness, and for Deason, this is just another example of Menkel-Meadow's prescience. When sorting out the meaning of quality justice in the newly developed relationship between litigation and settlement, Deason urges that we follow Menkel-Meadow and recognize the complexity of that project.

Writing from a feminist perspective, Elayne Greenberg reflects on why ADR's promise to humanize justice often becomes "coopted by an adversarial legal system that is undergirded by male values" (383). Continuing the prescience theme of previous commentaries, she observes that the culture clash and the acculturation of ADR innovations described by Menkel-Meadow are still with us today. Greenberg frames the ADR movement as an extension of the feminist movement and its promotion of "feminine values." These include human connectivity and emotions and may be more helpful to parties in conflict than the adjudication of their legal rights. In her view, ADR's struggle to gain

institutional legitimacy mirrors the ongoing feminist struggle to claim legitimacy.

In her response and with characteristic optimism, Menkel-Meadow reports not only on the problems that have worsened since she wrote this article but also on what has become better with institutionalization. What has become worse? According to Menkel-Meadow, it is the lack of informed consent when engaging in ADR processes. For example, with respect to the developing hybrid forms of dispute resolution such as med-arb and arb-med, the users of these hybrid systems may not always understand them. What has become better? ADR is ubiquitous; mediation is firmly established in many court systems; law schools and business schools teach ADR courses; there is a concern with ethical standards to govern ADR practice; and judges and dispute system designers now consider requiring ADR as a prerequisite to litigation.

Conclusion

Discussions in Dispute Resolution is ambitious and succeeds in its goal of documenting the academic underpinnings of the modern dispute resolution movement. More broadly, this collection of articles provides a documentary history of the field from the modern Progressives right up to the current challenges—a half-century of change, on the one hand, and on the other, enduring problems that need our attention now in order to remain faithful to ADR's roots in the access to justice movement.

The commentators' diverse perspectives are an important contribution to the literature on dispute resolution, strengthening and legitimizing ADR as a distinct academic field. The commentators suggest who was prescient and who was wrong. Grillo's "The Mediation Alternative" (1991), for example, warned about bias in mediation and Coben observes that we still do not know whether ADR facilitates prejudice and bias. The commentators also remind us how some of the featured articles have made a difference in the way that ADR is learned and practiced. In "Varieties of Dispute Processing" (1976), Sander urged law schools to teach ADR courses. Forty-five years later, every accredited U.S. law school teaches some form of ADR course, and ABA law school accreditation standards recognize negotiation and conflict resolution as basic learning competencies for lawyers. Grillo's article criticized the practice of family court mediators in California making recommendations on custody arrangements, and today, family court mediators in most California counties are no longer permitted to do so. Galanter's article focusing on the disparities between the "haves" and the "have-nots"—"Why the 'Haves' Come Out

Ahead” (1974)—propelled significant developments in the access to justice movement.

I envision several ways that academics in ADR and other fields might use this book, which offers students the opportunity to study ADR through the lens of the modern Progressive era. It could be assigned as a basic text for an ADR survey course or specific sections could be assigned for specialized courses in negotiation, mediation, arbitration, dispute system design, comparative dispute resolution, and public policy. The discussions not only help students to engage with the field’s foundations, but also to confront the ethical challenges and policy questions with which we continue to grapple. They help students appreciate that the concerns expressed by foundational authors such as Menkel-Meadow and Fiss are still with us today, and remind us of the role that justice must play in dealing with the realities of coercion, lack of informed consent, and weakening of core values, all of which diminish access to justice.

ENDNOTE

¹ I would like to thank Ellen Deason and Catherine McCauliff for their valuable comments.

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