PUTTING THE "ALTERNATIVE" BACK INTO ADR

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ABSTRACT

Alternative Dispute Resolution (ADR) plays a dominant role in the resolution of most legal disputes whether by choice, contractual duty, or mandate of court. This Article argues that because of its growth and prominence, alternative dispute resolution is no longer "alternative." The Author claims that ADR's status as a default process in modern litigation contradicts its foundational principles of voluntariness and the strengthening of legal rights. The appeal of ADR for lawyers and judges is efficiency: saving time and controlling litigation costs. The Author argues there are more ways to promote those goals without defaulting to ADR. The Article advocates for restoring ADR's "alternative" status in order to preserve access to the law and to empower litigants to engage with conflict on their own terms.

INTRODUCTION

Most legal disputes are resolved through the processes known as "alternative dispute resolution," or ADR.[1] This is because many legal disputes are contractually required to be resolved through arbitration,[2] many

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1. *See, e.g.*, Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 727 (2005).

2. *See* Kristen M. Blankley, *The Ethics and Practice of Drafting Pre-Dispute Resolution Clauses*, 49 CREIGHTON L. REV. 743, 770–773 (2016). Many mandatory arbitration clauses also permit

are required by the courts to be addressed through mediation or non-binding arbitration before litigation,[3] and many are voluntarily resolved by the parties to avoid the uncertain outcomes of litigation.[4] After a half-century of rapid growth and institutionalization, ADR processes are ubiquitous while trials remain rare. There is nothing "alternative" about ADR anymore.[5]

There is nothing "alternative" about ADR—and that is a problem. Many scholars have questioned whether ADR's position as the default (and, when contractually required, the only[6]) method of resolving legal disputes is consistent with the rule of law as a general matter.[7] This essay's argument is different: that ADR's institutionalization has transformed a once-ambitious theoretical program of reimagining conflict and the purpose of the courts into a melioristic effort that takes existing systems as a given.[8] This is not an argument against the use of existing ADR practices; the established methods of ADR, which have been refined over decades, remain valuable for lawyers and judges for saving time and money in resolving cases.[9] But engaging with disputes outside of the courts can reveal facets of justice that are not cognizable within the litigation-oriented perspective of institutionalized ADR. It is with the goal of revitalizing dispute resolution

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negotiated or mediated settlement.

3. For more on mandatory mediation programs, see Dorcas Quek, *Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479 (2010); on arbitration programs, see Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399 (1990).

4. Moffitt, *supra* note 1, at 727.

5. Naming conventions reflect this shift. For example, the Oregon School of Law houses the Appropriate Dispute Resolution Center, and Loyola University Chicago's Dispute Resolution Program describes the processes it teaches as "Alternative/Appropriate Dispute Resolution (ADR)." And basic concepts from ADR will soon be among the "foundational skills" tested on the bar exam; see nextgenbarexam.ncbex.org.

6. There are very limited ways to challenge the enforceability of an arbitration clause under current interpretations of the Federal Arbitration Act. *See, e.g.*, David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219–1220 (2013).

7. *See, e.g.*, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 194–197 (2003); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2810–2811 (2015).

8. *See, e.g.*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4–5 (2001).

9. For example, the New York State Unified Court System advertises the use of ADR to save time and money. *See* What is ADR?, New York State Unified Court System, available at https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml.

as a general matter that this essay is concerned. The sophistication of ADR has been matched by the narrowing of its theoretical ambitions, and making ADR genuinely *alternative* can save it from the costs of its success.

Returning ADR to its "alternative" status in both senses—as a genuine alternative to litigation and as a way of imagining the courts' other—is necessary. Making ADR once again a genuine alternative to litigation is necessary to preserve access to the law, to generate better outcomes, and to empower disputants, as many other scholars have eloquently argued.[10] It is not the principal concern of this essay. Making ADR once again a space to rethink the role of courts in resolving civil disputes is necessary to maintain ADR's relevance for a changing society.[11] That is the problem with which this essay is concerned. Indeed, the toolkit of ADR could have much to offer American law in this moment of crisis[12]—if we can escape the straitjacket of prioritizing efficiency above all else. It is time to reclaim ADR as a way to think differently about disputes.

I. THE PROMISE OF VOLUNTARY ALTERNATIVES TO LITIGATION

In the current moment—when people unknowingly sign away their access to the courts and to class procedures through arbitration clauses,[13] and when mediation often seems more coercive than voluntary[14]—it is important to recall that ADR was intended to be part of a strategy of humanizing the law. The "ADR movement" of the 1970s and '80s was

10. *See, e.g.*, Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The Problem in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 868–869 (2008).

11. On the concern about the future of ADR amidst a sense of stagnation, see John Lande, *Introduction* to THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT (John Lande ed. 2020) 1, 8, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533324.

12. As signs of crisis, I include, as a non-exclusive list: the insurrection of January 6, 2021, and the denial of President Biden's election; stark political polarization; high levels of income inequality; the many after-effects of the Covid-19 pandemic; and declining trust in public institutions, including the judiciary.

13. Resnik, *supra* note 7, at 2870–2874.

14. Jacqueline Nolan-Haley, *Does ADR's Access to Justice Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. ON DISP. RESOL. 373, 377 (2018); Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 S.M.U. L. REV. 721, 729–733 (2017).

concerned with improving the resolution of disputes, not with excluding plaintiffs from court.

For ADR's early proponents circa 1980, litigation flattened the subtleties of complex human behavior into simplified legal tests with binary win/loss outcomes.[15] The rigors and expense of litigation could be so financially and psychologically perilous as to dissuade meritorious claims.[16] Alternative forms of dispute resolution permitted greater procedural flexibility and the possibility of generating creative solutions to complex problems.[17] Hence, arbitration: the parties could substitute a trusted subject-matter expert for a generalist judge and apply relaxed procedures instead of applying the full rules of civil procedure.[18] Or mediation: the parties could use a trusted third-party to facilitate a discussion for the parties to talk through their dispute in ways that were meaningful to them, rather than fitting the facts into a frame imposed by legal doctrine.[19] In some situations, they might reach a genuine reconciliation or find a mutually agreeable solution that was better for each than their expected value from litigation. And, if not, recourse to the legal system would remain available to enforce one's rights.[20]

From the vantage point of the 1970s, the use of such "alternative" processes could generate solutions that would be unavailable otherwise. In the context of labor disputes, for example, the law explicitly created space for private forms of dispute resolution through negotiations, mediations, and arbitrations so that the parties could self-govern their relationship and address specific disputes, without running aground on major political questions concerning the relationship between labor and capital.[21] In the international context, direct negotiations could resolve live disputes and respect state sovereignty better than international legal institutions could, by separating manageable disputes from larger, intractable geopolitical

15. *See* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2672–2674 (1995).

16. *Id.* at 2691.

17. *See* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 21–23 (1996).

18. Arbitration, Black's Law Dictionary (11th ed., 2019).

19. Mediation, Black's Law Dictionary (11th ed., 2019).

20. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–969 (1979) (explaining that the law establishes default endowments for each party and that the only acceptable bargains are those that improve upon them).

21. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580–581 (1960).

conflicts.[22] The key insight of ADR has long been that there are often opportunities to address concrete problems and achieve meaningful progress without being paralyzed by macro-level structural conflicts.

ADR's institutionalization began in the 1970s amidst a broader crisis in American liberalism.[23] It was built upon three distinct visions of informal dispute resolution: a "multidoor courthouse" could expand *access* to justice without significantly expanding the work of the courts; bargaining could generate *more efficient* solutions through market mechanisms than formal legal remedies allowed; and neighborhood justice centers could *empower* individuals and communities rather than centralizing authority.[24]

But how would informal dispute resolution fit within the legal system? The structure of private interactions was built upon a substrate of public authority—that was what private law was all about.[25] There were no *purely* private disputes, nor could there be *purely* private mechanisms for resolving disputes; one of the aspirations of law was to resolve disputes through consistent sets of procedures, reaching substantively consistent outcomes.[26] Left unchecked, private processes could be abused and could yield results inconsistent with legal principles of fairness and equality. The legal system had to remain available as a backstop to prevent such processes from being coercive.[27] Private dispute resolution would remain subordinate to the public concerns of the justice system. It would occur within the "shadow of the law."[28]

For ADR's proponents, this subordination to the law created opportunities for ADR processes to benefit the parties. Provided parties retained, as a default, access to the courts to vindicate their rights through procedures established by the state, then the logic of private ordering suggested that disputants should be free to utilize other processes that were cheaper, that framed disputes better or yielded better outcomes, or that

22. *See generally* Roger Fisher, *Fractionating Conflict*, 93 DAEDALUS 920 (1964) (explaining that "big issues" can be broken into "little issues" that may be resolved more easily).

23. *See* Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399 (2019).

24. *Id.*

25. *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

26. *Id.* at 1089.

27. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1402–1404.

28. Mnookin & Kornhauser, *supra* note 20.

empowered them and their communities.[29] Litigation, as a default, was a procedural floor rather than a ceiling.[30] ADR would offer consensual alternatives grounded in the parties' recognition of their interdependence, a nonviolent alternative to the violence of the law.[31]

II. THE COSTS OF SUCCESS

If the law and the rules of civil procedure were meant to provide a procedural floor to prevent exploitation,[32] that floor has now fallen away. Litigation has become unavailable as a practical matter for many disputes, as "alternative" forms of dispute resolution have effectively foreclosed meaningful access to the courts without necessarily providing anything better in return.[33] The enforcement of mandatory referrals to ADR processes means that the law of ADR fully participates in the law's violence.

Of the three values animating the 1970s ADR movement, the focus on efficiency and low-cost access won out over party empowerment.[34] Processes that sought to advance the empowerment of the parties now instead underscore the *lack* of agency of those whose empowerment was at issue. Consumers and employees regularly sign away their access to the courts and to class actions in favor of individual arbitration processes that are unilaterally specified by repeat players.[35] Even if these processes are not

29. *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 479–485 (2007) (arguing that customization can improve procedural justice and increase efficiency.

30. For parties negotiating the use of an alternative dispute resolution process, litigation might serve as their *BATNA*, or their Best Alternative To A Negotiated Agreement concerning the use of arbitration or mediation. The *BATNA* is what a party should do if it cannot reach a better negotiated outcome.

31. On the law's violence, see Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). On ADR as offering the possibility of a nonviolent alternative, see Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 UNBOUND 79 (2012).

32. Delgado et al., *supra* note 27, at 1368.

33. *See* Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 253 (2013) (Kagan, J., dissenting).

34. For access, efficiency, and empowerment as three values animating ADR, see *supra* notes 23–24 and accompanying text.

35. *See* Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECONOMIC POLICY INSTITUTE (Sep. 27, 2017), available at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/. *See also* Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CALIF. L. REV. 1203 (2002).

biased in favor of the repeat players,[36] this kind of unilateral determination of dispute resolution procedures does nothing to advance the self-determination of marginalized parties. Even worse, the fiction of contractual assent makes those compelled into arbitration complicit in their own subordination.[37] And even if parties can terminate court-mandated mediation or set aside non-binding arbitration awards, parties are first compelled to use those processes in the name of advancing their own self-determination.[38]

But processes that sought to advance *access* to justice and the protection of legal rights may instead have had the effect of suppressing claims.[39] Even when arbitration and mediation provide lower-cost methods for resolving disputes, they do so because litigation is simply not a feasible alternative.[40] Expanding access to justice by expanding alternatives to a broken court system ignores the obvious remedy of expanding real access to the courts (and some scholars have noted that the expansion of ADR to handle disputes occurred just as the courts were formally made available to the poor and to racial minorities[41]). Informality has costs; for example, the expansion of mandatory arbitration effectively allows for a procedural end-run around substantive law, with no accountability.[42]

Even the idea that alternative processes could yield *more efficient* outcomes for individual disputants by better satisfying their interests—perhaps the most influential theoretical basis for ADR[43]—has proven to be a double-edged sword, with value for the parties created asymmetrically. Grounding dispute resolution in the transactional logic of the market makes

36. There are arguments for and against the proposition that arbitrations are biased in favor of repeat players. *Compare* Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000) *with* Mark Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers*, STANFORD GRADUATE SCHOOL OF BUSINESS WORKING PAPER NO. 3768 (Oct. 2018).

37. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 (2005).

38. *See supra* note 14.

39. *See* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012).

40. *See, e.g.*, Robert H. Frank, *How Rising Income Inequality Threatens Access to the Legal System*, 148 DAEDALUS 10, 10–11 (2019).

41. *See* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3 (1983).

42. *See* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3076–3083 (2015).

43. Mamo, *supra* note 23, at 1440.

the price of settlement simply a cost of doing business. Under this logic, purchasing the silence of victims of harassment becomes an "efficient" outcome that spares the parties the cost and indignity of trial.[44] In the absence of a genuine ability to appeal to rights, the ideal of an interest-based bargaining process can devolve into a raw exercise of power.

Processes meant to *empower* parties, improve *access* to justice, and generate *more efficient* outcomes have had far more ambiguous consequences. The successful expansion of ADR has undermined its own aspirations.[45] While there is important work to be done in making ADR processes more consensual, an even more fundamental intervention is necessary: re-establishing foundational principles for ADR. The broader legal community is engaged with alternative ways of thinking about disputes that can do more to enhance party agency and capabilities for engaging in conflict, while enabling a deeper reckoning with the meaning of justice. The ADR community needs to join these conversations to re-establish its foundations.

III. ENGAGING WITH DISPUTES AS ENGAGING WITH DIFFERENCE

The search for genuine alternatives for how we engage with conflict manifests on the law's periphery[46]—having new urgency amidst the growing sense that our neoliberal order is fracturing.[47] In the cracks that have formed in the edifice of neoliberalism, new possibilities have space to take root. I focus on three that have drawn attention from ADR practitioners: restorative justice; engagement with social movements; and political dialogue. Each of these efforts addresses conflict from a concern with

44. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 234 (2018). For an argument that NDAs may benefit victims, see Gloria Allred, *Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. Times (Sept. 24, 2019), https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits.

45. *See* Welsh, *supra* note 14, at 761.

46. On ADR's relationship to the core and periphery of the law, see Carrie Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, 69 JUDICATURE 300, 303–304 (1986).

47. *See, e.g.*, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022) (arguing that the neoliberal order of the past half century is in collapse). This fracturing of the neoliberal order matters for dispute resolution because it calls into question the reliance on individual actions to address systemic problems, and the centrality of market logics instead of relationships of care and vulnerability.

relationships, with identifying new modes of achieving solidarity, and with learning not to *resolve* our differences but to *live with and through* our differences. Because their relational logics differ from the concerns with efficiency and cost-savings that have driven the institutionalization of ADR since the 1970s, they offer the possibility of expanding the horizon of how to engage with conflict, once again making ADR a project of imagining the courts' other.

A. Restorative Justice

Restorative justice seeks to repair harm while recognizing the participants as being in relationship with each other.[48] In the criminal context, it offers an alternative to the punitive logics of criminal sentencing by focusing on repairing the harm experienced by victims.[49] These practices can be generalized beyond the criminal context to explore other experiences of harm from a focus on repairing ruptures within the community, with the potential to achieve something approaching understanding or even reconciliation.[50] Its relational focus calls for a distinct approach to the professional role of the facilitator, who also stands in some relationship with the other participants.[51] As a way of thinking about harm relationally, it has drawn attention from ADR practitioners,[52] but its subsumption within institutionalized forms of ADR may come at a cost: an outcome-oriented approach to restorative justice risks giving inadequate attention to the practice's concerns with agency[53]—as has arguably occurred with arbitration and mediation.[54]

48. *See, e.g.*, Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147.

49. Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 640–642 (2021).

50. *Id.* at 644–648.

51. Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 59.

52. *See, e.g.*, James Coben & Penelope Harley, *Intentional Conversations about Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 306–313 (2004).

53. Lanni, *supra* note 49, at 660–662.

54. *See supra* notes 34–38 and accompanying text.

B. Social Movements

The persistence of inequality—economic, racial, gender-based, and otherwise—spurs mass movements for recognition and for reparation as well as reactionary movements.[55] The ADR community has embraced community dialogues, truth and reconciliation commissions, and other processes that center victims and avoid the formality of traditional legal process.[56] These engagements have been effective to the extent they operate within the frame of existing ADR processes.[57] But it is not clear that the ADR community's awakening to systemic inequality has resulted in a reckoning with the deeper lessons learned through generations of struggle.[58] And, given the perverse consequences the expansion of arbitration and mediation has had for access to justice,[59] it is not obvious that the ADR community is the ally that movements for social justice need.[60]

The ADR community stands to learn from the literature on law and social movements, which grapples with the role of law as supporting broader movement strategies.[61] Lawyering for social movements appreciates the strategic uses of the courts—understanding how regulations and constitutional law shape the possibilities of movements, but without

55. *See generally* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021).

56. For example, programs on dispute resolution at the law schools of The Ohio State University, Harvard, and Stanford recently hosted events on dispute systems design and racial justice. See https://moritzlaw.osu.edu/abstracts-rethinking-systems-design-racial-justice-equity.

57. The "Can't Buy My Silence" campaign, for example, challenges the use of nondisclosure agreements to shield sexual harassment. See cantbuymysilence.com. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022, the first significant amendment of the Federal Arbitration Act in its century of existence, narrows the scope of the FAA, though its effects may be limited; see David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. FORUM (June 23, 2022).

58. Andrew B. Mamo, *Against Resolution: Dialogue, Demonstration, and Dispute Resolution*, 36 OHIO ST. J. ON DISP. RESOL. 251, 257–258 (2020).

59. *See supra* notes 39–42 and accompanying text.

60. *But see* Jennifer W. Reynolds, *The Activist Plus: Dispute Systems Design and Social Activism*, 13 U. ST. THOMAS L.J. 334, 337 (2017) (explaining that ADR scholars and practitioners should study activists' work and its effects to better determine the ways in which they can productively engage in conversations surrounding activism).

61. Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 201 (2022) ("at the same moment that ADR is losing its status as an intellectually vibrant field within law, experiments in what is often called *transformative justice* or *community accountability processes* are proliferating in left-wing American social movement consciousness").

accepting the lawyers' conceit that the real action is what happens in the courts.[62] From the study of law and movements comes an energy that embraces more adversarial approaches, tempered by ADR's fundamental recognition that at the end of the day we all must live together and that stories of conflict are always more complicated than they first appear.[63] The traditional cooperative posture of ADR can add something salutary to the element of confrontation in social movements, even as movements' recognition of the inevitability of struggle can bring ADR a needed acceptance of the *limitations* of resolution.

C. Political Dialogue

Perhaps the most pressing challenge for dispute resolution today involves defusing the political polarization, appeals to violence, and threats to democratic institutions that define American politics in 2022. Dispute resolution scholars and practitioners have issued calls for civility and for mutual understanding, for respectfully listening with curiosity to those with opposing views, and for politicians to engage in legislative dealmaking rather than ideological posturing[64]—an agenda that is inadequate. What these appeals to impartiality[65] miss is the foundational concern for *agency* that drives not only the militarization and extremism of the right, but also the growth of the left and the hollowing out of the center.[66] When the stakes of social conflicts are so heightened as to be seen as existential,[67] when the falseness of the maxim that "no one is above the law" is so apparent,[68] when

62. Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 445.

63. Mamo, *supra* note 58, at 303–305.

64. For recent symposia on the topic, see Nancy A. Welsh, *Introduction to Symposium on "ADR's Place in Navigating a Polarized Era,"* 35 OHIO ST. J. ON DISP. RESOL. 581 (2020); Rafael Gely, *Introduction to "Dispute Resolution and Polarization,"* 2018 J. DISP. RESOL. 1.

65. And, implicitly, to equating political centrism with impartiality.

66. For an argument that feelings of powerlessness and fear are drivers of political polarization, see MARTHA C. NUSSBAUM, THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS (2018).

67. *See, e.g.*, Richard Pildes, *When Politics Becomes Existential*, ELECTION LAW BLOG (Feb. 26, 2017), available at https://electionlawblog.org/?p=91331.

68. This includes anger regarding, among other things, the qualified immunity of police officers accused of violence, particularly against people of color, and regarding the failure to hold executives accountable for financial crises. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519–1524 (2016) and Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J.F. 33, 44–45 (2016).

control of the judiciary has become a driver of electoral politics and party discipline,[69] and when the most significant decisions that bear on public life are made outside of democratically accountable channels,[70] can we be surprised by appeals to strongman leaders who promise to break through gridlock unconstrained by legal niceties? Can we then be surprised by the stockpiling of military-grade weapons in anticipation of state failure, by conspiratorial thinking, or by the dehumanization of one's political opponents? These are reactions to the loss of a sense of belonging and agency among the disaffected, wounds deeper than what listening alone can heal.

Instead of focusing on understanding (which presumes a shared commitment to tolerance and pluralism), ADR practitioners can instead practice dispute resolution as a form of civic education. Dispute resolution practices that strengthen the capabilities of individuals and communities to handle disputes and to recognize their own complicity in disputes have the potential to create a citizenry fit for democratic self-governance.[71] Such practices would extend the Tocquevillian argument that juries provide a form of civic education by recognizing the even greater possibilities of civic education through consensual and participatory dispute resolution.[72] Dispute resolution as a form of civic education would require empowering disputants to make voluntary and informed decisions about the use of mediation and arbitration,[73] and rethinking practices of mediation and arbitration to emphasize the interdependencies among disputants and third parties alike.[74] Such redesigned practices provide much-needed experiences of agency in fundamentally nonviolent forms.

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69. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 330–344.

70. For a view from the right on how major decisions are made by elites, see generally JAMES R. COPLAND, THE UNELECTED: HOW AN UNACCOUNTABLE ELITE IS GOVERNING AMERICA (2020); for a view from the left on the same theme, see generally ASTRA TAYLOR, DEMOCRACY MAY NOT EXIST, BUT WE'LL MISS IT WHEN IT'S GONE (2019).

71. *See* Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, 12 DISP. RESOL. MAG. 18, 19–20 (2006).

72. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274–275 (trans. George Lawrence, 2006). Of course, the increased use of ADR rather than jury trials necessarily limits the educative effects of civil jury service by reducing the need for juries.

73. As mentioned in the introduction, making ADR processes voluntary and informed has been a major theme of scholarship in this field. *See, e.g.*, Nolan-Haley, *supra* note 14.

74. Studies of implicit bias helpfully show how neutrals are never fully removed from the dispute. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. &

D. How ADR Might Evolve

The freshest thinking on conflict engagement is happening outside of the ADR community. To the extent that traditional ADR frameworks are being brought to bear on these new initiatives, their emphasis on efficient and low-cost resolution may coopt projects grounded in alternative logics. But ADR scholars have thought deeply about non-adjudicative forms of conflict engagement and have much to contribute to designing the emerging forms of conflict engagement. To do so, the field must reorient around the possibility of conflict engagement as exploring relationships of interdependence, as an exercise in knowing when and how to struggle, as a form of civic education on which to build a robust civil society.[75] A dispute resolution field so reconstituted would need to put the development of practices of *critical* engagement with conflict at its center.[76]

IV. THE STAKES OF HAVING GENUINE ALTERNATIVES

At the root of these new directions in dispute resolution is the awareness that responsibility for resolving disputes cannot and should not be wholly outsourced to legal professionals and the formal legal system, while also recognizing the essential role played by the courts in protecting fundamental rights. There must be opportunities for people to participate in addressing conflicts both large and small by making their voices heard—not only by working together collaboratively in a spirit of problem-solving, but also by engaging in full-throated struggle and contestation within relationships of interdependence.[77] Some of our deepest conflicts lay at the level of foundational values that cannot be managed away, an insight in some tension with ADR's key lesson that fractionating conflict is necessary as a way of coping with our differences. Struggle is essential in a world in which people pursue competing projects. The challenge for dispute resolution

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POL'Y 71, 121–22 (2010) (emphasizing the need for mediator neutrality and outlining strategies through which it can be accomplished). *See also* Andrew Mamo, *Unsettling the Self: Rethinking Self-Determination* (forthcoming).

75. Mamo, *supra* note 23, at 1451–1453.

76. One such effort is described in Mamo, *Unsettling the Self*, *supra* note 74.

77. *See generally* REBECCA SUBAR, WHEN TO TALK AND WHEN TO FIGHT: THE STRATEGIC CHOICE BETWEEN DIALOGUE AND RESISTANCE (2021) (arguing that both modalities are essential to achieve justice).

theory today is how to embrace the necessity of struggle within the promise of nonviolence.[78]

The new directions of conflict engagement live within this tension—acknowledging both that righteous anger can lead us to the abyss and that problem-solving can perpetuate injustice. They broaden the range of conflict engagement strategies by looking beyond dispute *resolution* to the larger question of how the law structures the experiences of disputing and the possibilities that can emerge from conflict.[79]

The scope of ADR, therefore, need not only be concerned with cooperative alternatives to combative litigation.[80] ADR also encompasses ways of engaging with conflict *without* reference to the formal apparatus of the court system at all, by looking instead to communities and movements and individual relationships.[81] In a time of robust political contestation, practices of conflict engagement must look beyond dispute resolution systems if they are to help us address our deepest conflicts.

The recognition of mutual interdependence is at the heart of these alternative practices of dispute resolution. They reject the dominant logic that insists that dispute resolution is necessarily about the efficient and low-cost closure of conflict. They instead appreciate that the transformative possibilities of conflict only emerge in their own time,[82] that recognizing our fundamental condition of interdependence is both truer and harder than insisting on our atomistic independence,[83] that the work of building and sustaining a democracy calls on everyone to take responsibility for their involvement in the conflicts that run throughout our society.[84] Properly resourced courts, as components of democratic states governed by law, must be available as a primary locus of dispute resolution (with voluntary opportunities for streamlined arbitration and efficient settlements), but with

78. Menkel-Meadow, *supra* note 31, at 106–107.

79. *See generally* BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION (2004) (arguing that conflict resolution involves a broader range of conflict interventions).

80. While it is important that these processes be genuinely consensual as alternatives to litigation, that is not the concern of this essay.

81. *See* Menkel-Meadow, *supra* note 31, at 102.

82. *See* BERNARD MAYER, STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES (2009).

83. *See* JUDITH BUTLER, THE FORCE OF NONVIOLENCE: AN ETHICO-POLITICAL BIND 21–23 (2020).

84. Jennifer J. Llewellyn & Brenda Morrison, *Deepening the Relational Ecology of Restorative Justice*, 1 INT'L J. RESTORATIVE JUST. 343, 347–348 (2018).

real alternatives available for those who choose to do the hard work of engaging deeply with the substance of disputes. This is the promise that ADR continues to hold out in this time of profound political upheaval.