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## FOREWORD

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### COMPETING AND COMPLEMENTARY RULE SYSTEMS: CIVIL PROCEDURE AND ADR

*Jean R. Sternlight\* & Judith Resnik†*

Professors of alternative dispute resolution (ADR) and of civil procedure often move in different circles. Some professors teach about ADR in their basic procedure course, some ADR professors may touch on litigation, and some teach both procedure and ADR. But overlap is more the exception than the rule. Although the two fields have a common focus on issues of procedural justice, the two sets of professors work in professional arenas that have been separately delineated, each with its own set of conferences, newsletters, law journals, and affiliated practitioners. During the last decade, as the amount of non-litigation dispute resolution increased, the interconnections between civil procedure and ADR have become more obvious and important. Yet, while the phenomenon of the “vanishing trial” has received substantial attention,<sup>1</sup> the relationships among dispute resolution modes have not.

In an effort to enhance communication among all of these proceduralists, the ADR and Civil Procedure sections of the Associa-

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\* Saltman Professor of Law and Director, Saltman Center for Conflict Resolution, Boyd School of Law, University of Nevada, Las Vegas. In 2003, the ADR Section of the Association of American Law Schools was chaired by Professor Suzanne Schmitz, and the program chair for that year was Professor John Lande. Professor Sternlight extends her thanks to both for asking her to coordinate the joint program with the Civil Procedure section.

† Arthur Liman Professor Law, Yale Law School. In 2003, Professor Resnik chaired the Section on Civil Procedure of the Association of American Law Schools. Our thanks to the able and thoughtful editors of the *Notre Dame Law Review*.

1 For a wide-ranging and informative set of articles discussing the “vanishing trial” phenomenon see Volume 1, Issue 3 of the *Journal of Empirical Legal Studies*. Those articles grew out of a project sponsored by the Section of Litigation of the American Bar Association. For this project, Professor Marc Galanter gathered a substantial amount of data that prompted analysis from an array of commentators.

tion of American Law Schools (AALS) co-hosted a three-hour session at the January 2004 AALS Annual Meeting in Atlanta, Georgia. Entitled "Competing or Complementary Rule Systems? Adjudication, Arbitration and the Procedural World of the Future," the session brought together panelists whose expertises ranged across the academy. The legal academics were joined by the federal district judge now chairing the committee charged by the Judicial Conference of the United States to draft federal civil procedural rules.

The stimulating session reflected on the relationship between litigation and non-litigation approaches to dispute resolution. Participants explored common concerns about pedagogy and scholarship, the increasing relevance of transnational and global practices, and the economics, sociology, and political economy of dispute resolution systems. We are most fortunate that, with the support of Professor Jay Tidmarsh, the *Notre Dame Law Review* offered to publish written papers and that most of the speakers were able to contribute to the symposium. Below, we provide introductions of the themes of the articles included here, and we remind readers that two of the presenters, Bryant Garth and Deborah Hensler, relied on already-published work or have published related comments in other journals.<sup>2</sup> In addition, a recent volume of the *Journal of Legal Education* contains a symposium that, like the collection of articles in this volume, also aspires to generate interactive exchanges among those interested in dispute resolution.<sup>3</sup>

As will be plain from reading the articles that follow, the interrelationships among litigation, arbitration, mediation, and negotiation are many. First, every dispute resolution system has to resolve the same questions: Who can participate? May participants appeal in a group as well as individually? What information has to be provided from one disputant to another? What information is provided to third parties and what power of decision do third parties have? How final are those decisions? Who other than disputants may participate? Does the public have access to either the processes or the outcomes? Who pays for what aspects of the dispute resolution system?

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2 See, e.g., BRYANT GARTH & YVES DEZALAY, *DEALING IN VIRTUE* (1996) (exploring the development of the modern field of international arbitration from a sociological perspective); Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417 (2003) (summarizing an empirical study on participants' responses to and experiences with the specially-created process for compensation to direct victims of the 9/11 attack).

3 See Carrie Menkel-Meadow, *Introduction, Dispute Resolution: Raising the Bar and Enlarging the Canon*, 54 J. LEGAL EDUC. 4 (2004).

Second, these dispute resolution systems do not take place in isolation—as if other options did not exist. Thus, the “border issues” arising between these two fields are increasingly important. Legal rules—from statutes and the Constitution to case law and court-based rules—frame both government-based and private dispute resolution. Indeed, the market for ADR has flourished in the wake of United States Supreme Court decisions supporting the enforcement of dispute resolution clauses in a wide array of cases and as disputants and institutions explore the utility of mediation and of negotiated settlements.

Third, the various systems sometimes guard their distinctive features and sometimes attempt to export them. One can often find advocates of one form of resolution leery about the incorporation of features that mark another. ADR proponents worry about undue “legalization” of ADR, increasingly organized through professional communities and regulated by rules of practice. Adjudication’s proponents worry about undue informalization of court-based processes. The judicial world is now filled with judges trying to be mediators as well as with specially-chartered auxiliary personnel, whose names range from “neutral evaluators” to “special masters” to “parajudicial officers” to “arbitrators” or “judges pro tem” and whose jobs are to promote settlement or otherwise resolve cases without trials.

Fourth, developments in both adjudication and in ADR are themselves artifacts of larger social changes. The discussions about the utility and propriety of these processes need to be grounded in debates about the relative roles of public and private sectors in governance.

Fifth, everyone worries about how to seek justice. Whether styled adjudication, dispute resolution, or alternative dispute resolution, those who structure processes and those who participate make claims about doing justice, while critics argue about whether the particular processes and outcomes deserve to be called “just.” Thus, these articles are rich with philosophical commitments and clashes, with data and doctrine, and with commentary and conflict, as they debate fundamental questions about the purposes and functioning of justice systems.

Here, we offer brief summaries of the articles presented. We begin with two articles that analyze the development of ADR in the United States, then move offshore to consider global trends, and finally consider how these changes affect the work of judges and of law teachers in the United States.

Professor Keith Hylton, who specializes in the application of economic analysis to legal problems, offers an argument for the utility of

arbitration. Hylton's article, *Arbitration: Governance Benefits and Enforcement Costs*,<sup>4</sup> focuses on two aspects of rules governing private behavior including both litigation and arbitration. He terms these two aspects "governance benefits" and "enforcement costs." Hylton suggests that well-informed parties do and should choose between arbitration and litigation with respect to which process offers greater governance benefit at lower cost. Reviewing an empirical literature that he recognizes to be scant, Hylton finds reason to believe that arbitration can, on this metric, be a "better" dispute resolution technique than litigation. At the same time, Professor Hylton urges that more empirical work be done to explore these questions.

We then turn to Professor Katherine V.W. Stone, a scholar of the laws and practices of both workplaces and of alternative dispute resolution. Her article, *Procedural Justice in the Boundaryless Workplace: The Tension Between Due Process and Public Policy*,<sup>5</sup> begins by noting that more workers are now covered by non-union ADR provisions than are governed by union contracts. To explain the phenomenon, Stone points to the shift from long-term employer/employee relations to briefer interactions in a world full of contingent jobs. Drawing on literature from the fields of human relations and organizational behavior, Professor Stone suggests that companies rely on ADR programs in an effort to bolster employees' commitment to companies that are not offering prospects of permanent employment. Stone also considers the relationship of ADR programs to the changing shape of discrimination claims. In her view, such claims have become more difficult to win in court, in part because of changes in doctrine and in part because discrimination has become more subtle and structural in nature. Stone argues that workplace ADR can—if properly designed—offer employees processes and forms of remedies not otherwise available. Specifically, Stone urges that companies employ a form of binding arbitration that would allow decision makers to consider a broader range of evidence than currently looked to by courts. Stone also suggests that governmental regulation is needed to ensure that workplace ADR is not unfair to employees and addresses due process concerns.

From these articles, focused primarily on United States experiences, we turn to the article by Professor Christopher Drahozal, discussing parties who seek to avoid national legal regimes. Drahozal,

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4 Keith N. Hylton, *Arbitration: Governance Benefits and Enforcement Costs*, 80 NOTRE DAME L. REV. 489 (2005).

5 Katherine V.W. Stone, *Procedural Justice in the Boundaryless Workplace: The Tension Between Due Process and Public Policy*, 80 NOTRE DAME L. REV. 501 (2005).

who is the author of a leading arbitration text and of multiple articles examining U.S. arbitration law, takes on one aspect of this phenomenon in *Contracting Out of National Law: An Empirical Look at the New Law Merchant*.<sup>6</sup> Emphasizing that arbitration rather than litigation “is the dispute resolution mechanism of choice in international commerce,”<sup>7</sup> Drahozal examines the question of what substantive law parties choose to have arbitrators apply. He finds that although there has been a substantial academic debate over the propriety of choosing transnational common law (“lex mercatoria” or “new law merchant”) rather than the law of any particular country, “[o]nly a small percentage of parties provide for application of transnational commercial law in their arbitration clauses.”<sup>8</sup> Further, “[e]ven when parties do rely on transnational law, they often do so to supplement rather than displace national law.”<sup>9</sup> Drahozal analogizes to the domestic setting, where little information is available about the law arbitrators apply. As he explains, although the Supreme Court has repeatedly emphasized that the decision to resolve a dispute in arbitration rather than in litigation should only accomplish a change in forum and not a change in substantive law,<sup>10</sup> we do not as an empirical matter know enough about the bases for arbitrators’ judgments and hence whether this important assertion is accurate.

Professor Ellen Deason takes us to another aspect of rulemaking on ADR in a transnational context. Deason, who has previously examined the issue of confidentiality in mediation, here writes about *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*.<sup>11</sup> Deason examines two statutes, the Uniform Mediation Act, a domestic law, and the Model Law of International Commercial Conciliation, created by the United Nations Commission on International Trade, both of which address the issue of the confidentiality of mediation. Deason asks whether structures should be established to permit mediated agreements to be enforced in a summary fashion that is analogous to the expedited enforcement provided to arbitration awards by the Federal Arbitration Act and the New York Conven-

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6 Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005).

7 *Id.*

8 *Id.* at 526.

9 *Id.*

10 See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

11 Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553 (2005).

tion. Because Deason views mediation as focused on “self-determination, voluntariness, and mediator neutrality,”<sup>12</sup> and litigation as focused on “[a]ccessible justice, open court proceedings, effective enunciation of rights, consistent outcomes, and the fundamental rule of law,”<sup>13</sup> Deason questions whether a summary enforcement process for mediated agreements can be used without undermining important values underlying mediation or litigation.

We next move from these discussions of ADR to court-based processes. In her article, *Procedure as Contract*,<sup>14</sup> Professor Judith Resnik argues that during much of the twentieth century, civil processes in the United States relied on a conceptual framework anchored in the constitutional and common law of due process. More recently, the case law looks to doctrines of contract and agency law to enforce contracts to preclude litigation and to encourage the entry of contracts to conclude litigation. As she puts it, while once “bargaining in the shadow of the law” was the phrase invoked, today bargaining is a requirement of the law of conflict resolution, both civil and criminal. Resnik argues that proceduralists need to debate what the law of “Contract Procedure” ought to provide. She considers the extent to which parties ought to be able to contract for jurisdiction, for choice of law, and for privacy, and how much law ought to regulate judges, as they shape settlements, enter settlements, and enforce settlements. Her claim is that even as “Contract Procedure” supplements and sometimes supplants “Due Process Procedure,” judges must function within a due process framework to legitimate their own decisionmaking.

Judge Lee Rosenthal, current chair of the Advisory Committee on Civil Rules of the Judicial Conference of the United States and a federal district judge for the Southern District of Texas, offers her views in the article *One Judge’s Perspective on Procedure as Contract*.<sup>15</sup> She examines the law on the obligation to arbitrate. Judge Rosenthal parses the doctrine to identify what issues are to be decided, at least at the first instance, by arbitrators. She also explores how Supreme Court doctrines unrelated to arbitration—such as rulings on punitive damages—make more or less appealing alternatives to courts. Further, she considers the role that judges play as gatekeepers by deciding

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12 *Id.* at 555.

13 *Id.*

14 Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

15 Lee H. Rosenthal, *One Judge’s Perspective on Procedure as Contract*, 80 NOTRE DAME L. REV. 669 (2005).

when contractual arbitration agreements have been entered and when parties can extract themselves from such provisions.

The symposium concludes with an article by Professor Jean Sternlight, who helps to guide teachers of procedure and of ADR to an integrated approach to the two areas. A teacher and scholar in both fields, Sternlight addresses the fact that while these two procedural disciplines are increasingly united and intertwined in the real world they remain segregated in legal academia. Her article, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*,<sup>16</sup> explains that civil procedure courses usually spend little time on ADR and that ADR courses similarly typically spend little time on intersectional subjects such as the enforcement of mediation agreements or offers of judgment. Sternlight argues that we need to do a better job of blending these fields in both our teaching and our writing, and that the payoff will be great in terms not only of the education of our students but also the way that we think about the meaning of procedure and justice. In her view, recognizing the linkages between all of the various approaches to dispute resolution “allows us to explore more fully the nature of procedural justice.”<sup>17</sup> As well, recognizing the common themes that underlie these fields will help us to consider whether multiple approaches to dispute resolution may be desirable in a given society to meet our various justice-related goals.

As you shall see, this set of articles contributes to a growing literature and invites yet more exchange about the interaction between the worlds of civil procedure and ADR. We hope that these ongoing discussions will support our aspirations for processes that provide and express commitments to justice.

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16 Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005).

17 *Id.* at 717.

