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Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR

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44 UCLA L. Rev. 1613

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INTRODUCTION: WHAT WILL WE DO WHEN
ADJUDICATION ENDS?
A BRIEF INTELLECTUAL HISTORY OF ADR

Carrie Menkel-Meadow*

I begin by thanking the UCLA Law Review, and particularly Darrin Mollet and Bryce Johnson, for seeing the timeliness of the topic of alternative dispute resolution and organizing this Symposium—collecting some of the best thinkers, writers, and practitioners in the field to discuss, among other things, the economics of ADR, the role of lawyers, courts, and judges in ADR, and the application of ADR to a variety of substantive legal and regulatory problems. In this Introduction, I would like to introduce the topics and the authors, and put them in the larger context of the movement that is now called “ADR,” and the fear it engenders that it might indeed “end adjudication” as we know it.¹ I will develop here an extremely short and understated intellectual history of the field and describe, briefly, what the field has already taught us—What are the “propositions” of learning that come from ADR? I will try, as well, to describe some of the current difficult and controversial issues and topics that confront the field and that many of our authors will address in these pages.

A Brief Intellectual History of the Field

In the late 1970s and early 1980s, when I first began writing about negotiation and dispute settlement, there was virtually no field in which to situate this work. Socio-legal scholars were engaged in both more abstract

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* Professor of Law, UCLA Law School; Co-Director, Center for Inter-Racial/Inter-Ethnic Conflict Resolution, UCLA; Professor of Law, Georgetown University Law Center. This Introduction is a revised and edited version of the opening remarks given at the Symposium, What Will We Do When Adjudication Ends?, held at UCLA on March 8, 1997. I want to thank my research assistant Edward Kim for excellent work and service beyond the call of duty on this Introduction and on the Article that appears in this Symposium.

¹. For an insightful argument that civil litigation and law making has already been transformed by forces, in addition to ADR, and has been changed to “devolve” more control to trial judges, lawyers, and parties, rather than appellate judges, see Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. REV. 631. For an argument that too much settlement activity has not only decreased the amount of litigation, but actually threatens the quality of our trial advocates, see Kevin C. McMunigal, The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. REV. 833 (1990).
and more empirically based studies of disputing across cultures, and legal clinicians were trying to teach law students how to negotiate, while the profession held a conference, *The Causes of Popular Dissatisfaction with the Administration of Justice*, exploring, among other things, new ways to process cases. Some of my colleagues urged me not to write about the "shadow" activities of lawyers as settlers of cases—"it was not the main event;" "it was not about law;" "it had little or no doctrine;" and "there was no theory there." This seemed strange to me because I was interested in interdisciplinary work and I knew that scholars in many other disciplines had explored the theory and practice of negotiation processes—in international relations, in anthropology, in economics, in social and cognitive psychology, in decision sciences, in game theory, in business, and in family relations, to name a few. And, the popular press was buzzing with self-help books telling people they could "negotiate anything."

For me, this subject was intensely practical as well as rich in academic and theoretical interest. When I was a legal services lawyer in the early 1970s, I noticed that as successful as we were in "winning" lawsuits, often at the summary judgment stage, in challenges to welfare regulations, prison rules, employment practices, and other institutional "wrongs," it did not take long for the institutions committing these wrongs to adapt and change their rules, without really changing their practices. Although we were


6. To protect the guilty, I have not attributed these direct quotes to particular individuals.

7. For a review of some of this work in other fields, as well as the early work in law, see Carrie Menkel-Meadow, Legal Negotiation: A Study of Strategies in Search of a Theory, 1983 Am. B. Found. Res. J. 905.

8. See, e.g., HERB COHEN, YOU CAN NEGOTIATE ANYTHING (1980).
often evaluated by how much “impact” litigation we brought, I realized
that some of the lawyers in my office who were successful at negotiating with
government officials, caseworkers, supervisors, employers, and some law
enforcement officials, actually accomplished more—at least for their individ-
ual clients. And so, I became interested in solving problems rather
than winning cases. As I explored the literature to help me learn how to
become a better negotiator, I learned that the legal academy had done little
to formally study and educate about this essential legal function. So, I
started to teach and write about negotiation and the resolution of cases
before trial, and I found that the work in disciplines outside of law had
more to say about negotiation and conflict-resolution processes than did
legal doctrine.

I was, of course, not the first to teach and write about negotiation. There had, in fact, been several negotiation courses offered before I began.
At the University of Michigan, James J. White, well known as a
commercial lawyer and scholar, taught a negotiation course modeled on a
duplicate bridge tournament. Students competed with each other and were
scored on how much “gain” they achieved for their clients, usually as mea-
sured on a zero-sum basis as what they “took” from the other side.
2 At
the University of Washington, Cornelius Peck and William Fletcher also
pioneered a negotiation course based on their recognition that in the fields

9. This seemed a silly way to evaluate whether poverty had been ameliorated or whether
our clients were leading better lives because of our intervention. This may have been the par-
ticular environment in which I practiced. With an eye on the bottom line, consumers of legal
services with economic interests may have other standards of evaluating whether they have
received adequate, just, or efficient legal services. Despite the claims of some people that ADR
was used to siphon off “minor cases” or “rights cases” away from the courts, see RICHARD ABEL,
THE POLITICS OF INFORMAL JUSTICE (1984), 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 (1993), some of the earliest and most enthusiastic users of ADR were major cor-
porations with big disputes who were trying to solve their legal problems more efficiently and at
lower cost.

10. I would like to acknowledge the work of my friend and sometime mentor in legal ser-
ices, Linda Bernstein, who was a successful and caring negotiator and is now an administrative
law judge in the social security system in Philadelphia.

11. All the while still teaching Trial Advocacy and other litigation-related courses as well.

12. See HARRY T. EDWARDS & JAMES J. WHITE, PROBLEMS, READINGS AND MATERIALS
of labor law and torts, settlement was more often the norm than full adjudication. And in one of those wonderful moments of intellectual convergence, while I was teaching negotiation and finishing a long article, Roger Fisher and William Ury at Harvard published a popular book on principled negotiation designed to emphasize joint gain in negotiations, and it became a run-away best seller. Thus, different pedagogies developed from different theories about whether the purpose of negotiation was to beat the other side or resolve the problem and achieve joint gain.

By the early 1980s we had a field, at least of teaching and with some scholarship developing. At the institutional and judicial level, Professor Frank Sander's speech at the 1976 Pound Conference on the causes of popular dissatisfaction with the administration of justice gave birth to the idea of the "multi-door courthouse," in which a screening clerk would help the parties choose from a variety of dispute processes that would meet the needs and requirements of their particular dispute: some disputes involving parties with long-term relationships (such as neighbors, employees, family members) might go to mediation, whereas others would seek arbitration and a faster and cheaper award. Still others might get directed to a governmental ombudsman, and some disputants would opt for a full trial. Thus, different kinds of disputes might require different treatments, and if we could triage legal cases the way that doctors and nurses triage medical cases, perhaps the caseload could be better and more efficiently handled. Skilled facilitators might improve communications between parties or help them discover their underlying needs and interests. Or, perhaps someone might give the parties a neutral evaluation of the facts in dispute or an analysis of the legal claims and rights they are demanding. From the beginning, the multi-door courthouse itself represented the duality of purposes associated with ADR—efficiency and docket-clearing potential, as well as a claim for a better quality of justice with designated processes providing more tailor-made solutions to legal problems.

14. See Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In (2d ed. 1991). This book has sold over two million copies and has been published in 18 languages.
17. See Carrie Menkel-Meadow, Dispute Resolution: The Periphery Becomes the Core, 69 JUDICATURE 300 (1986) (reviewing Stephen B. Goldberg et al., Dispute Resolution (1992)).
Trying to decide what kind of case belongs in which forum remains one of the most interesting and understudied questions. While many courts now exempt particular classes of cases from some kinds of treatments (constitutional and civil rights cases are commonly exempted from court-annexed arbitration or mediation programs\textsuperscript{18}), some have argued for dividing various forms of ADR along the lines of cases seeking decision (arbitration, adjudication, or some kind of neutral evaluation), and those seeking settlement (mediation, discovery planning, or conciliation).\textsuperscript{19} Others suggest we can sort cases by whether the parties provide for some form of ADR ex ante (before the dispute ripens, as in a contract), or wait until the dispute has already occurred and is formally a case.\textsuperscript{20} By analyzing factors such as what is at stake (what is the “res” of the dispute), who are the participants, how voluntary and long-standing is their relationship, do the parties need a precedential ruling or an efficient end to their dispute, and are there issues of privacy or broadly known norms,\textsuperscript{21} the parties can choose from a variety of formats to resolve their dispute—some in the public sector and others to be used in private.

As we have learned from court programs, some of these issues and distinctions have begun to blur—another factor that makes study of our field so interesting—so that we have med-arb, or evaluative rather than facilitative\textsuperscript{22} mediation, when people would like a consensual joint decision-making process but want to build in a third-party decision if their own efforts fail. And, we have “presumptively mandatory” referrals to ADR (from which parties may opt out with a showing of good cause) in order to ensure some efforts at “voluntary” participation.\textsuperscript{23} It is becoming harder and harder to keep definitional integrity between processes as the parties' needs and court requirements have altered our original understandings. I have come to the view that almost any dispute would benefit from some form of ADR exposure, and thus, I have moved from a position

\textsuperscript{18} See Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in the Federal District Courts (1996).
\textsuperscript{19} See, e.g., Jeffrey W. Stempel, Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty, 11 OHIO St. J. ON DISP. RESOL. 297 (1996).
\textsuperscript{23} Stephanie Smith, Remarks at the UCLA Symposium on Alternative Dispute Resolution (Mar. 8, 1997). Stephanie Smith is the former director of the Northern District of California Multi-Option Program on ADR.
of advocating only voluntary ADR to supporting presumptively mandatory ADR—with party choice about which process should be used. In my experience, it is just as often the personalities of the lawyers or the parties, as it is some structural aspect of their dispute, that will determine which process is best for a particular case.

With a more sophisticated focus on the different kinds of cases that exist and some concern about the etiology of a dispute, law schools have begun to study how disputes occur, and how we go from perceiving an injurious experience to deciding whether to convert that into a legal case (by "naming, blaming and claiming" as one set of scholars has called it). Thus, in order to fully apprehend how we process information and whether we attribute blame to ourselves or someone else, we need to understand both the psychology and sociology of disputing. I teach my students to ask of every dispute-resolution problem the journalists' questions—what are the who, what, where, when, how, and why of the dispute? What is at stake, who is involved, what is needed to be done, and how can it be accomplished? In a broader sense, negotiation is also essential to the making of transactions and the building of legal, social, and economic institutions, which has also eluded much formal legal study until relatively recently.

And so the field was created, though perhaps mushy around its boundaries, to try to understand how we dispute with each other and in larger groups of people, organizations, entities, and legal families, such as corporations and class actions. However, as the field of ADR has developed, and more and more people have gained interest in the idea of "solving human problems," the field has also begun to develop its critics. There are those who think that settlement is not always the most appropriate way to deal with important disputes; or that whole classes of people may be disadvantaged by particular processes; or that alternative forms of dispute

25. See William L.F. Felstiner, Influences of Social Organization on Dispute Processing, 9 L. & Soc'y Rev. 63 (1974) (exploring how one of the most common forms of dispute processing is lumping it or doing nothing).
resolution have already been co-opted or tainted by traditional processes, or that we may not generate enough clear rules and norms to be able to govern human behavior.

Of Theory, Practice, Evaluation, and Policy

What have we learned from the field of ADR so far that might inform how we conduct adjudication and dispute settlement and norm articulation in general? What propositions of knowledge have the fields of ADR and conflict resolution contributed to what we know?

First, we have learned that one size does not fit all—that is sociology's contribution to law. Conditions, disputes, people, and rules are variable and different configurations of disputants, issues, and stakes in disputes may militate in favor of different forms of disputing (adversarial or competitive forms for scarce-resource, single-issue, two-party disputes, or collaborative, more integrative processes for disputes in which we want to create value before we have to claim it, if at all).

Thus, before we assume all legal disputes are about scarce resources that must be divided, we might ask instead how can we "expand the pie" and look for ways to increase the available resources. By broadening the issues, parties, and stakes in the dispute, we may actually increase the likelihood of settling it. Different processes have different logics. While it may be good to narrow issues for clarity at trial, it is better to expand issues (to be available for trade) when we are seeking to settle a case.

Next, we do not all approach disputes and conflicts in the same way. Where do our default positions of behavior come from—why are some people hopeful and optimistic and risk-seeking and others both risk and loss averse? This is social, developmental, and cognitive psychology's contribution to law. We learn some things from our families; others may be base human predispositions—with some individuals more malleable and susceptible...
tible to change (with negotiation or mediation training, for example) than others.

Related to our different predilections or preferences for dispute modes, we also have different values and preferences about the things that make up the dispute. This is a good thing, not a bad one. To the extent that our interests are different from one another, they may be complimentary and not competing with each other. Thus, we can trade, rather than fight or compete; we can engage in log-rolling, rather than battle over the scarce resource that is used to monetize or commodify all of our disputes in the legal system—money.

Thus, we can trade, rather than fight or compete; we can engage in log-rolling, rather than battle over the scarce resource that is used to monetize or commodify all of our disputes in the legal system—money.

We have also learned from the fine work of the interdisciplinary collaboration at the Stanford Center on Conflict Resolution and Negotiation that as humans we have heuristic biases in how we process information that may systematically distort what we can accomplish. So, we are more likely to act to avoid the loss of something we have than to risk a little to improve our chances of a gain. And, most importantly for dispute resolution, we systematically undervalue anything offered to us or told to us by the other side. Thus, reactive devaluation prevents us from accurately assessing information or offers provided by the other side and provides a useful rationale for why we need mediators—third-party neutrals can help us hear things better by presenting information and proposals in a more neutral setting.

In a related insight that sociologists call labeling theory, Professor Lee Ross demonstrated, in an experimental setting, that when faced with proposals from “out groups” (such as the Board of Trustees of Stanford University in the South African divestment controversy) that


36. See Steven J. Brams, Fair Division: From Cake Cutting to Dispute Resolution (1996); Menkel-Meadow, supra note 15, at 795–801. I return to my personal connections at UCLA to illustrate this point: Some years ago when I was explaining all this to a group of my colleagues at the faculty club, I noticed that we were wearing down the cocktail snacks by choice of one—pretzels, another wheatchex, another peanuts, and another goldfish. We could satisfy many different needs without competing with each other.


38. See Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution, in Barriers to Conflict Resolution, supra note 37, at 26.

are actually more favorable to one's desired position, people prefer the less advantageous proposals from their own "in groups" (the student proposal).  

In addition to these somewhat sobering teachings, we also have some good news. In a much touted study, Robert Axelrod, a political scientist at Michigan, ran a computer tournament for game theorists who had been working on iterations of the prisoner's dilemma game, and discovered that the most robust program was one (called tit-for-tat) that began by cooperating, defected when it was defected against, but was forgiving in that it defected for no more than one round. Thus, a cooperative rather than competitive defecting program was found to be not only successful, but robust as well—it could survive well among the more competitive programs. This study has implications for human behavior as well as legal behavior. When do we cooperate? In sharing and processing information in a negotiation? In discovery? Applying this work to the work of lawyers as agents, Robert Mnookin and Ronald Gilson have argued that lawyers have incentives to act cooperatively and to develop reputations as cooperative agents for their clients, countering many of the common assumptions that lawyers, who naturally compete, actually make disputes worse.

40. See Ross, supra note 38, at 30–33.
42. See WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992).
43. This program was submitted by the game theorist Anatol Rapaport of the University of Toronto. In subsequent iterations, tit-for-tat did not always beat all the other programs, but it was remarkably robust overall. See Douglas R. Hofstadter, Metamagical Themas: Computer Turnaments of the Prisoner's Dilemma Suggest How Cooperation Evolves, Sci. Am., May 1983, at 16.
In work that has informed and is being affected by dispute resolution theory and practice, analysts of the litigation process have sought to explain, both theoretically and empirically, the choices that lawyers and parties make about whether to litigate or to settle—known in the literature as "the selection hypothesis."\textsuperscript{47}

Several researchers have begun to explore the theoretical claims that some classes of people are particularly disadvantaged in their use of some kinds of dispute processes. For example, Ian Ayres has documented that there are race and gender disparities and discrimination in negotiations for the sale of cars.\textsuperscript{48} There are also a number of studies designed to test the claims made by Trina Grillo, Richard Delgado, Laura Nader, and others, that there are systemic race, gender, ethnic, and class biases in particular forms of dispute processing. One study, the Metro Court Project, completed by a group of researchers at the University of New Mexico,\textsuperscript{49} has already produced some interesting and complex findings. For example, although white women may fare better in mediation, they claim to like it less than adjudication (in small-claims settings), and minorities, who may not fare as well in mediation, prefer it over adjudication. In addition, minorities achieve more favorable results when their third-party neutrals are also minorities, providing some support for the idea of "matching" in choices about third-party neutrals or facilitators.\textsuperscript{50} In some sense, this study confirms what one set of psychologists documented some years ago, that in evaluating satisfaction with dispute processes, it is not only outcome, but process values that matter—and parties may value different things.\textsuperscript{51} Thus, due process matters, but what process is due may vary by person, matter, and context.

\textsuperscript{47} See, e.g., George L. Priest, Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes, 14 J. LEGAL STUD. 215 (1985); Linda R. Stanley & Don L. Coursey, Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle, 19 J. LEGAL STUD. 145 (1990); Robert E. Thomas, The Trial Selection Hypothesis Without the 50 Percent Rule, 24 J. LEGAL STUD. 209 (1995); see also Jeffrey Miller, Some Agency Problems in Settlement, 16 J. LEGAL STUD. 189 (1987) (suggesting that attorney-client conflicts of interest in contingent fee structures affect litigation and settlement decisions).


\textsuperscript{49} See Gary LaFree & Christine Rack, The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 L. & SOC'Y REV. 767 (1996).

\textsuperscript{50} See Isabelle R. Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. DISP. RESOL. 55.

Finally, as these and other propositions of our field are developed, we have begun to see some increase in the empirical work on dispute resolution processes to evaluate these theoretical claims, as well as those of more common program evaluations—does the program of dispute resolution do what it promises? In addition to the RAND Reports,\(^5\) we have increasing numbers of studies attempting to understand the disputing behavior of parties before they file litigation and after, whether they file in state or federal court, and whether they litigate or settle.\(^5\)

**What Will We Do When Adjudication Ends?**

Our Symposium is entitled *What Will We Do When Adjudication Ends?*, and so it is important to remember that when we talk about allocating disputes to particular processes, we are always comparing processes, as well as disputes, to something else. Despite my great support of ADR (and my practice of it too, as an arbitrator and mediator), I am not in favor of ending adjudication. Adjudication is necessary to generate rules and norms, and to exist as a final resort when the parties cannot resolve things themselves and require a particular kind of decisionmaker—whether judge or jury—each with its own logic, rationales, and functions within our judicial system. The interesting question for me, then, is not what will we do when adjudication ends, but when and how should we use adjudication and when should we use something else? And, must adjudication be structured the way it is? Is it possible that we will learn something about alternative processes that might transform adjudication itself to provide other ways of presenting issues and arguing about governing principles?\(^5\)

We have gathered here some of the most distinguished and newer theorists of ADR to address these and other issues. We examine the econo-

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mics of ADR, the ways in which individuals process information, the role of particular psychological states, such as hope, in successfully negotiating, as well as what the barriers or impediments to settlement are, and how the structure of process affects what we can accomplish. We also look at some of the deep jurisprudential issues implicated in the choices between alternative processes and adjudication. What does justice mean in process? Who ought to be resolving disputes—judges, juries, and the courts or private providers? What kind of accountability should there be for dispute settlement? What will be the roles of lawyers and judges in a more variegated dispute resolution landscape? We also explore the public policy implications when ADR processes are used in new substantive contexts. Clark Freshman explores both the promise and difficulties of using mediation in single-sex relationships—relationships in which private and informal processes may offer the greatest potential for self-regulation and larger commitments. Both Eric Green and Francis McGovern, who have served as Special Masters in many of the nation's complex mass tort cases, explore the use of new forms of case processing in the increasingly complicated national classes that comprise our response to the injuries of modern mass consumer life.

58. For a spirited and still timely debate on the accountability of third-party neutrals for the resolutions over which they preside, see Lawrence Susskind, Environmental Mediation and the Accountability Problem, 6 VT. L. REV. 1 (1981), and Joseph B. Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 VT. L. REV. 85 (1981).
61. Eric helped pioneer the field of ADR and founded JAMS/Endispute, one of the first private providers of dispute resolution services, including designing processes for complex litigation and offering mediation and arbitration services. He was also one of the principal innovators of the first private "mini-trial"—a process that combines negotiation, advocacy, and case presentation, with settlement talks, case evaluation, and some mediation, putting a variety of primary forms of ADR together to construct a hybrid, designed to maximize party attention to the dispute at hand. See ERIC GREEN, THE CPR LEGAL PROGRAM MINI-TRIAL HANDBOOK (1982); Eric Green et al., Settling Large Case Litigation: An Alternative Approach, 11 LOY. L.A. L. REV. 493 (1978).
Another issue this Symposium addresses is how we are to evaluate the results of ADR programs. Pursuant to the requirements of the Civil Justice Reform Act (CJRA), Congress has ordered an empirical evaluation of the federal courts' efforts to reduce the cost and delay of litigation through case management techniques, as well as ADR. That study was conducted principally by the Institute of Civil Justice at the RAND corporation. As the Judicial Conference studies this report and a smaller one conducted by the Federal Judicial Center, it will make recommendations to Congress about both the reauthorization and reappropriation of funds for activities provided for in the CJRA. These reports and the debates that have already ensued will make clear the dimensions of our policy concerns about the proper role of courts in an age in which increasingly few cases make it to the adjudication stage at all. The respective roles of the public and private sectors in dispute settlement and norm generation will continue to be debated in this context, as well as others.

The Personal Side: The People of ADR

Finally, because the field of ADR is concerned about the people in disputes and the effects of process on people, it is important to take note of the personal losses we have recently suffered in the field. In the past year and a half, we have lost a number of individuals who have greatly contributed to the field in very different ways, illustrating one of my themes that the study and practice of "appropriate dispute resolution" processes engages us simultaneously on many different levels, including high theory, applied theory, applications that vary by context, empirical study and evaluation, skills learning, and teaching—all as we attempt to figure out the most just, fair, and efficient ways to solve human problems and resolve disputes.

63. See RAND ADR REPORT, supra note 52.
At Stanford, which has had the good fortune to develop a critical mass of conflict resolution theorists from a number of related fields, Amos Tversky68 is sorely missed as a cognitive psychologist who, though having no formal relation to law or ADR, has contributed an enormous amount to what we know about how people process information and think about things—with clear applications to conflict resolution and dispute processing.69

Trina Grillo,70 who worked in the Bay Area as a law professor, mediator, and teacher of academic support, is known to many as having written the now canonical text of feminist criticism of the mediation process.71 Trina's work in mediation and civil rights has greatly affected many of us, and I hope that we will continue to heed her words of caution.72

Jeffrey Z. Rubin,73 one of the key theorists and founders of the modern conflict resolution field, was lost to us in a mountain climbing accident, engaged as he always was in scaling new heights. There is virtually no issue in conflict resolution that Jeff did not touch, including the social psychology of bargaining;74 cultural variations in negotiation;75 the

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68. Professor of Psychology, Stanford University.
69. See, e.g., Daniel Kahneman & Amos Tversky, Conflict Resolution, in BARRIERS TO CONFLICT RESOLUTION, supra note 37; Daniel Kahneman & Amos Tversky, Judgment Under Uncertainty, 185 SCIENCE 1124 (1974); Amos Tversky & Daniel Kahneman, Rational Choice and the Framing of Decisions, 59 J. BUS. S251 (1986). I remember arguing with Professor Tversky at a conference at Stanford about whether it was deviation from rational thought processes that needed study and explanation (his life's work), or whether it was conformity to rational thinking processes that needed study and explanation as being the more deviant of behaviors. How you respond to this argument may depend a great deal on what you consider to be rational thinking processes.
70. Professor of Law, University of San Francisco.
71. See Grillo, supra note 29.
72. For my own tribute to her teachings, see Carrie Menkel-Meadow, What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life, 81 MINN. L. REV. 1413 (1997).
73. Professor of Psychology, Tufts University; former Director of the Harvard Negotiation Project; and Editor of the Negotiation Journal.
use of agents in conflict resolution; and scores of other issues that inspired a conference in his name and will soon culminate in a festschrift honoring his work, published by the Harvard Negotiation Project.

Closer to our own home in law, we also recently lost Professor Maurice Rosenberg, a proceduralist of the first rank who, unlike many other modern proceduralists, was not afraid of ADR—indeed, he embraced it, wrote about it, and, in recent years, taught it at Columbia Law School. Maury was truly remarkable in that he exemplified work in this field at all levels. He completed one of the most significant empirical studies of the pretrial conference, whose results were recently confirmed, in part, by the RAND Report on the Civil Justice Reform Act, and which I discuss more fully in my own contribution to this Symposium. Maury did important doctrinal work in civil procedure, as well as empirical work on civil justice, and he acknowledged the usefulness of some forms of ADR as supplements to the civil adjudication system. Maury actually coined the phrase: "fitting the forum to the fuss"—a phrase that many ADR enthusiasts have embraced as a way of analyzing which process is appropriate for what kind of dispute. Like many of us who work in ADR and teach civil

77. See CONFLICT, COOPERATION AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH (Barbara Benedict Bunker et al. eds., 1995).
79. Professor of Law, Columbia University.
80. See Maurice Rosenberg, Can Court-Related Alternatives Improve Our Dispute Resolution System?, 69 JUDICATURE 254 (1986).
82. See RAND CASE MANAGEMENT REPORT, supra note 52.
83. See Menkel-Meadow, supra note 59.
87. See Goldberg & Sander, supra note 21.
procedure, Maury Rosenberg tried to understand how ADR and adjudication fit together—not seeing one as ending the other, but rather viewing each as supplementing or correcting the other—each being used in its proper domain.88

Finally, I include someone not known at all as an ADR scholar, but one who was sometimes an ADR practitioner, my colleague Julian Eule,89 who just recently succumbed to cancer.90 When Howard Gadlin91 and I, as Co-directors of UCLA’s Center for Inter-Racial/Inter-Ethnic Conflict Resolution, designed a nonadversarial process to explore the contentious issue of affirmative action on UCLA’s campus last year, we sought participants who were willing to engage in dialogue and conversation, instead of debate. Julian was one of the participants who agreed to put himself forward on this contentious issue, as a proponent of affirmative action, for deeply personal, as well as institutional, reasons. Julian experimented with ways of discussing issues and positions without debating and without being positional, though he was an expert debater and appellate advocate. He agreed to talk about his views, his own demographic position, and to be questioned about his own doubts—“grey areas of thinking.” Julian voluntarily did this in front of a large forum of people, all in service to the idea of dialogues and alternative ways of having conflictual conversations.92 We explored the issues with a greater variety of views and examined different positions on different aspects of controversial issues, demonstrating the value of some forms of ADR that allow us to deal with the modern-day

88. It is useful here to remember that Lon Fuller, who many of us regard as the jurisprude of ADR, articulated that each process has its own logic, justification, and morality. See, e.g., LON L. FULLER, THE MORALITY OF LAW (1969); Lon L. Fuller, Collective Bargaining and the Arbitrator, 1963 WIS. L. REV. 3; Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353 (1978); Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971). I have argued that, in one sense, the study of ADR is a continuation of the Legal Process analysis of institutional competence and institutional settlement principles. See Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution, 38 S. TEX. L. REV. 401 (1997); see also HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW (William N. Eskridge & Philip P. Frickey eds., 1994).

89. Professor of Law and former Associate Dean, UCLA School of Law.

90. In what is a particularly sad and poignant connection to me, when Trina Grillo was originally diagnosed with Hodgkin’s disease, I put her in touch with Julian, who was a wonderful counselor to cancer patients. At the time, we all thought that Julian was “cured”—he had been cancer-free for over 10 years. Trina and Julian died within months of each other, at the same age and working in the same profession on many of the same issues in their very different ways.

91. UCLA Ombudsperson.

92. For a slightly fuller description of this event, see Menkel-Meadow, supra note 54, at 34–37.
complexity and nonbinary nature of issues to be resolved. Thus, Julian contributed to our field by agreeing to experiment in practice with new forms of dealing with, and teaching about, conflict.

These are big losses for us, particularly as some suggest that we are a weakly connected field, drawing insights where we can from a variety of sources and disciplines, both inside and outside of law and the academy and practice—so every theorist and every practitioner we lose is a loss to us all as we struggle to conceptualize the field and work with its promises and dilemmas.

Concluding Remarks

This brief and partial review of what we already know, and what we will learn from this Symposium, should reveal that we need to think about questions of process from several different levels simultaneously. We need high theory (and we get that here from Ian Ayres, Barry Nalebuff, Jennifer Gerarda Brown, Clark Freshman, and Bruce Hay); descriptions of and prescriptions for practice (from Francis McGovern and Eric Green); and evaluation and empirical analysis (from Kent Syverud, Francis McGovern, Eric Green, and to a lesser extent, from my own evaluative work), in both quantitative and qualitative terms that can then enrich the policy discussion with which this Symposium is engaged.

What will we do when adjudication ends? As you have heard me say before, I don't think it will, but it will certainly be changed by the greater varieties of case processing and conflict resolution that are now available for use and study. In my own view, ADR (in all its own variable forms) and adjudication, have come to affect, supplement, and challenge each other.

93. Of course, in California, this issue was dealt with in a binary way—it began with an election that was then challenged by the legal process. The legality of the California Civil Rights Initiative (CCRI) now wends its way through the courts. For an example of the legal arguments that are currently being litigated, see Vikram D. Amar & Evan H. Caminker, Equal Protection, Unequal Political Burdens, and the CCRI, 23 Hastings Const. L.Q. 1019 (1996). For an eloquent statement of the legal, economic, historical, emotional, and spiritual aspects of this issue, see CHARLES LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK (1997); see also Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953 (1996).

94. This is only a partial review of what we could say we know from the field; for my earlier efforts to review the literature on negotiation, see Menkel-Meadow, supra note 7, and for literature on mediation, see Carrie Menkel-Meadow, The Many Ways of Mediation: The Transformation of Traditions, Paradigms, Ideologies, and Practices, 11 Negotiation J. 217 (1995). For my views on the competing values that inform the field (quantitative-efficiency reasons versus qualitative, quality-seeking solutions), see Menkel-Meadow, supra note 59.
Thus, as we encounter many dialectical relations in law (rule and discretion, common law and statute, public and private, federal and state systems), we can now add a dialogue and dynamic tension between and among dispute processes and systems. So I invite you to engage with the questions we have posed, the answers or propositions we have already supplied upon which we can reasonably rely, and the policy issues that we discuss in the pages that follow.

95. See George L. Priest, Private Litigants and the Court Congestion Problem, 69 B.U. L. REV. 527 (1989) (arguing that as ADR decreases the queue to trial, courts will become more available and case backlogs will increase once again). In other words, at some point, ADR and the public court system may arrive at some equilibrium point of access to justice, as each corrects for and responds to the demands for the other.