

2013

Judicial Review: What Judges Write When They Write About Mediation

Jennifer W. Reynolds

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Jennifer W. Reynolds, *Judicial Review: What Judges Write When They Write About Mediation*, 5 *Y.B. Arb. & Mediation* 111 (2013).

This Symposium is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

JUDICIAL REVIEWS: WHAT JUDGES WRITE WHEN THEY WRITE ABOUT MEDIATION

Jennifer W. Reynolds*

Judges are uniquely positioned to comment on the phenomenon of court-connected mediation. Judges design and implement court systems with mediation components; they refer or order litigants into mediation; and they often serve as mediators themselves, either as part of their judicial duties or after retiring from the bench. Yet, ironically, there are few formal judicial opinions commenting on the procedural, ethical, and substantive issues around court-connected mediation today. When researching mediation, therefore, legal scholars who limit themselves to traditional legal sources will not have much to work with.

This Article identifies a new source of “judicial review” of mediation: judge-written scholarship. At least since the beginning of the modern alternative dispute resolution (ADR) era in 1976, judges have been writing about mediation in the courts. These articles run the gamut of narrative, audience, scope, and focus. They are neither accountable to nor constrained by the conventions and standards of academic scholarship or judicial opinions. Like wild horses, judge-written articles on mediation are intelligent and independent, socially aware yet also self-interested. Treating these articles as part of a distinct dataset—a dataset that, to my knowledge, has not previously been recognized before—uncovers a new, possibly treacherous quarry for research about front-line experiences with court-connected mediation.

The Article makes the following two contributions to mediation scholarship. One, the Article maps out a (starter) dataset of judge-written scholarship on mediation intended to support research efforts around mediation, court-connected and otherwise. Two, from this mapping exercise, the Article suggests that when it comes to mediation-as-process, judges prioritize efficiency; but, when it comes to mediation and professional identities, judges prioritize other values. For reformers, this preliminary finding helps clarify what court-connected mediation looks like today and suggests new discursive spaces and strategies for positive change.

I. INTRODUCTION

Judicial review of arbitration today is absolutely terrifying.¹ Thanks to the United States Supreme Court, arbitration opinions are coming fast and furious, straining to bursting notions of consent, arm’s length processes, power disparities, public-private

* Assistant Professor, University of Oregon School of Law. J.D., Harvard Law School; M.A., University of Texas at Austin; A.B., University of Chicago. Warm thanks to the wonderful student editors of the *Yearbook on Arbitration and Mediation* and to the participants of the *Yearbook’s* 2013 symposium on the “The Role of the Courts: Judicial Review of Arbitral Awards and Mediated Settlement Agreements.” I am indebted to Scott Rogers for his terrific research assistance. And special thanks to Stuart Chinn, Ellen Deason, Susan Gary, Michelle McKinley, Michael Moffitt, Forrest Reynolds, Suzanne Rowe, Liz Tippet, and Nancy Welsh for comments on earlier drafts.

¹ Or thrilling, depending on your point of view.

allocations of power, and federalism.² Scholars struggle to keep up with the speed and volume of cases, rightly recognizing that the immediate developing case law around arbitration disrupts and reconstitutes legal norms and structures.³

Judicial review of mediation, on the other hand, is a much more modest affair. No high-stakes doctrinal controversies, no pressing federalism concerns, no fierce high-court debates are presently sowing confusion for mediation scholars and practitioners.⁴ In fact, there has never been a famous U.S. Supreme Court case focusing on mediation practice or theory.⁵ The lower federal courts and the state systems have indeed reviewed mediated settlements but largely have not produced much interesting or contentious doctrine around mediation or mediated agreements. On the contrary, courts generally defer to mediated agreements; respect the broad confidentiality privileges around mediation communications; and decline invitations to find mediator misconduct.⁶ Additionally, many cases involving mediation and mediated agreements are unpublished and, therefore, lack precedential value.⁷ An analysis of judicial review of mediated agreements, therefore, provides some insight into, but little drama around, how judges influence and institutionalize mediation through the application of legal rules to disputes arising from mediation.⁸

But there is more to tell about judges and mediation than the state of judicial review of mediated agreements suggests. To paraphrase Bobbi McAdoo, there is nothing alternative about mediation in the courts anymore.⁹ Judges routinely oversee or design

² Here I am conflating judicial review of arbitration generally with judicial review of arbitral awards (the topic of the symposium) specifically.

³ See, e.g., Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 PENN ST. Y.B. ARB. & MEDIATION 1 (2013); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); Nancy A. Welsh, *Mandatory Pre-dispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. U. L. REV. 187 (2012); Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. U. L. REV. 131 (2012) (describing the “enormous” and problematic implications of recent Supreme Court jurisprudence for federalism); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385 (2007).

⁴ This doesn’t mean that there are no debates, of course.

⁵ Arbitration practice involves more Supreme Court-worthy issues because arbitration involves waivers of rights and procedures. See, e.g., Welsh, *supra* note 3, at 190-93 (discussing CompuCredit and the “right to sue” as understood by the Supreme Court). Compare BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS (defining mediation as a non-binding process, even if mandatory, that does not involve waivers of rights such that high court review is warranted).

⁶ See, e.g., Julia Rabich et al., *Judicial Review of Arbitration Awards and Mediation Agreements: Tips for Sustaining Deference*, 67-APR. DISP. RESOL. J. 48 (2012) (noting that “[c]ourts generally extend deference to arbitration awards and mediated settlement agreements”); Michael L. Moffitt, *Ten Ways To Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003) (noting historical rarity of lawsuits against mediators).

⁷ See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 75 (2006) (“Looking only at the 861 opinions by appellate courts in our database, over half (52%) of the opinions were unpublished. Much of the jurisprudence relating to the mediation process remains ad hoc and private.”).

⁸ But see James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 PENN ST. Y.B. ARB. & MEDIATION 162 (2013) (providing examples judges apparently exaggerating the impeccable credentials and integrity of class action mediators who testify as to the non-collusive nature of the settlements they have overseen).

court systems that include mediation as part of the pre-trial process. Judges often decide whether and how to refer parties to mediation. And judges sometimes act as mediators, either while working at the court or after retiring from the bench. These judicial interactions with mediation are more than just value-free procedural streamlining. Rather, these interactions force decisions and order priorities in ways that implicate efficiency and justice concerns. As such, judges often grapple with the complexities of these hybrid evolving systems in writing—not in opinions, limited as those are to individual disputes, but in law reviews and professional journals.

With this in mind, this Article explores another kind of “judicial review,” namely judicial scholarship about mediation. Academic commentators have written about the phenomenon of judicial scholarship in the context of traditional legal topics, but not with respect to alternative dispute resolution (ADR) generally or mediation specifically.¹⁰ Reading judicial scholarship about mediation gives us more direct evidence of what the ADR revolution has meant to those responsible for implementing the system of justice. In these articles, we can see judges attempting to integrate process and policy with their own legal training and professional norms while working in real time with real-life litigants whose rights and dignity are unavoidably affected by choices judges make. Watching judges sort through these system components and rationales is fascinating, not only as an example of judicial decision-making, but also as an indicator of what mediation has become in the courts, which in turn helps illuminate how non-lawyers might understand mediation practice and theory. For those who are interested in access to justice, particularly with respect to improving public understanding of dispute resolution and decision-making processes, knowing more about what does and does not make sense about mediation to those who work with mediation is an important foundational piece for any large-scale reform or educational efforts.

Following the Introduction in Part One, this Article proceeds in four more Parts. Part Two describes the general characteristics of the collected articles, such as how many were written by sitting or retired judges and whether the articles focused on a particular area of the law. Part Three provides an overview of the interpretive framework and maps the four recurrent themes in the dataset: how-to; professional identities; memoirs; and debate club. Mapping is an important foundational exercise in establishing a potential new source of data; the discussion illuminates some of the advantages and disadvantages of a thematic approach to the materials. Part Four explores these themes in more detail,

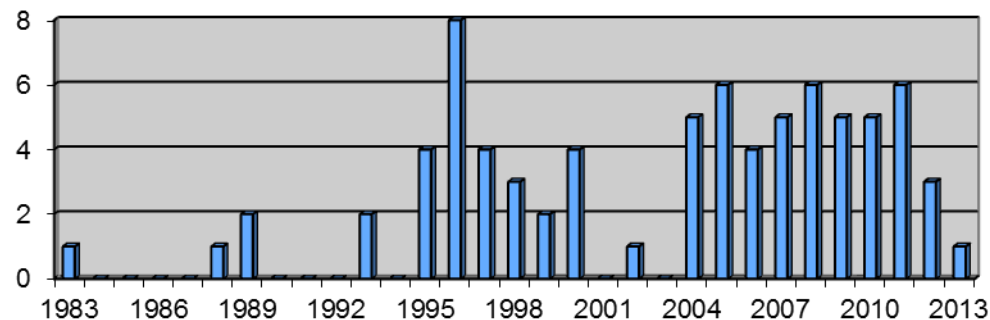
⁹ Bobbi McAdoo, *All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 387 (2007) (“There is nothing ‘alternative’ about ADR in Minnesota; it is a routinely expected step for most civil litigation.”). One of my goals for the present project is to create a dataset that complements both Professor McAdoo’s survey-based analysis of judges and court-connected mediation and Professors Coben and Thompson’s database of litigated cases about mediation. See Hamline University School of Law, *Mediation Case Law Project*, <http://law.hamline.edu/dri/mclp/index.html> (last visited Mar. 10, 2013).

¹⁰ See, e.g., Susan Bartie & John Gava, *Some Problems with Extrajudicial Writing*, 34 SYDNEY L. REV. 637, 637-38 (2012) (arguing that “the practice of sitting judges discussing live legal issues in legal literature raises serious problems,” namely bias, prejudging, and signaling effects); Leslie B. Dubeck, *Understanding “Judicial Lockjaw”: The Debate over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 573 (2007) (suggesting that extrajudicial scholarship is “a practice that frequently provides real benefits to democratic deliberation”); see also Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064 (2011) (discussing the related phenomenon of advisory opinions and their possible undesirable impacts on other judicial opinions, legislation, and policy).

paying special attention to how judges normatively assess mediation using efficiency and other values. The tentative claim from the analysis in Part Four is that judges focus mostly on efficiency when they are writing about the mediation process but focus mostly on other values when they are writing about professional identities. And where process and identities overlap (as they do in, say, memoirs) judges often default to efficiency as the primary rationale. In conclusion, Part Five considers additional ideas for future research.

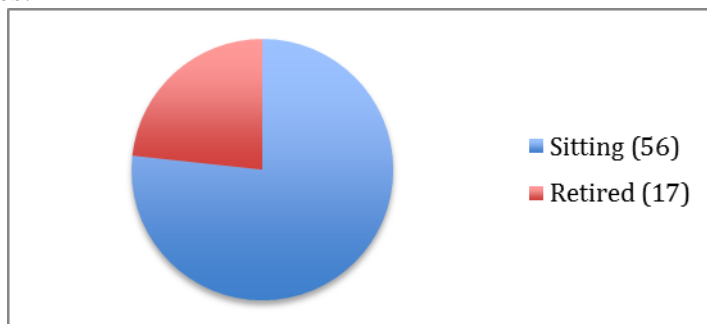
II. GENERAL CHARACTERISTICS OF THE COLLECTION

At the time of writing, the collection contains seventy-three articles written or co-written by judges from 1983 to 2013. From 1990-1999, there were 2.3 articles per year with a high of eight in 1996. From 2000-2009, there were 3.4 articles per year with a high of six in 2006 and 2009. Since 2010, there have been fifteen articles written by judges on mediation. Graphically speaking, these articles spike in the mid-nineties and then increase again starting in 2004:



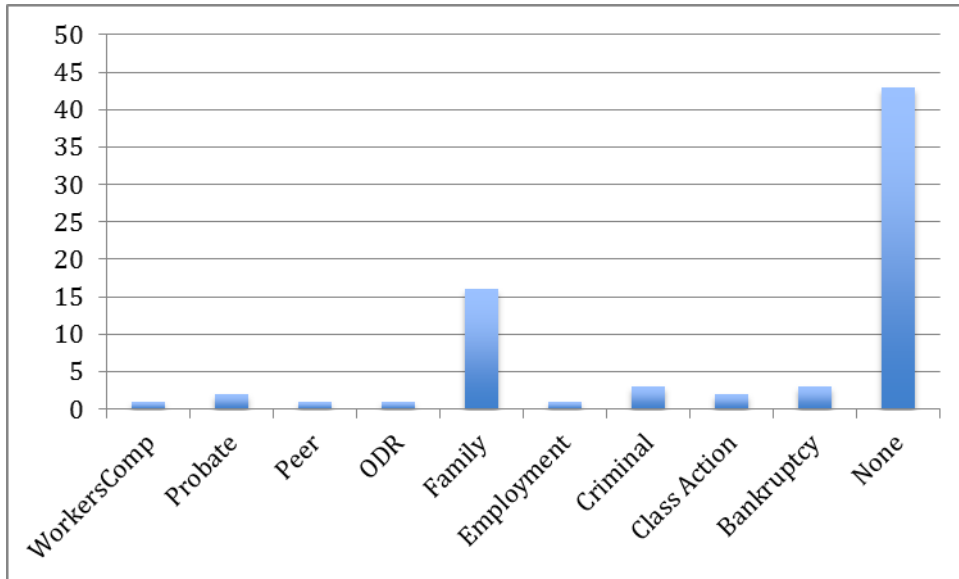
Number of articles written by judges on mediation by year.

In terms of the judges who wrote the articles in the collection, most (76.7%) were sitting judges at the time of writing. Of these sitting judges, at least eleven also served as mediators in the court (19.6%). There may be more, but these eleven are confirmed from the articles themselves. Of the retired judges, at least twelve self-identified as practicing neutrals (70.6%). Sixty-four articles were written by trial judges, nine by appellate; forty-four by state judges, twenty-nine by federal. Again, these numbers are approximate and come from the biographical footnote and information in the article, not from separate research on the judges.



Number of articles written by sitting v. retired judges.

An interesting feature of the collection is that most of the articles are not primarily about mediation in a particular area of the law but about mediation practice and court systems more generally. When a judge-written mediation article does focus on an area of law, however, that area is almost always family law (including juvenile law, elder law, and collaborative practice).



Breakdown of articles by area of law, if area of law is a major focus.

Finally, the articles suggest a few textual observations. As a stylistic matter, the articles sound like what one might expect from a judge. Many are written in the first person (36 of 73, or 49.3%), which both circumscribes the author’s conclusions within her own experience while simultaneously bolstering the argument as one that comes from a distinctly authoritative (i.e., a judge) source.¹¹ The tone of these writings varies along a range, from academic to formal, to pragmatic to jokey, with most articles falling into a descriptive category that might be labeled “stern conversational.”¹²

¹¹ My original study attempted to capture the footnoted-ness of the articles, to see whether the judge conformed her scholarship to the footnote-intensiveness of the legal academy. In terms of footnotes, the articles appearing in bar journals and magazines have few if any footnotes, which is consistent with the format of those periodicals. The law review articles have more footnotes, though it is not clear whether this is because the judge approaches the law review article differently or if the student editors are adding footnotes into the text.

¹² See, e.g., Kirk H. Nakamura, *Better Late than Never! The New Court Approved Mediation Program Relaunches*, 51-FEB ORANGE COUNTY LAW. 34 (2009), providing a typical example of stern conversational, which is usually wry and not overly humorous: “When Orange County Bar Association rolled out its mediation program via its ADR Committee in 1997 with attorneys Linda Marks and Kirk Nakamura as co-chairs, Sheila Fell was a Superior Court Commissioner with a family law assignment. The film *Titanic* won the Oscar for best picture. Unfortunately, the OCBA mediation program, like the ship, met a rather quick demise.” *Id.* at 37.

III. INTERPRETING THE DATA

It may be meaningless to state that this project is interpretive rather than empirical (since everything is interpretive), but because we are dealing with “data” and a “dataset” and graphs and charts, it may be helpful to explain the study’s analytical framework and approach.¹³ First, the project assumes that judicial writings are primary texts that, like all primary texts, are subject to interrogation and analysis. Second, the study uses themes as a strategy for organizing the material. There are limits to this strategy, as discussed below, so it is important to remember that these themes are deployed consciously and strategically. They are not an intrinsic aspect of the texts themselves.

A. *Judicial Writings as Primary Texts*

First, the chief methodological assumption of this Article is that judicial writings are themselves primary texts and, therefore, appropriate subjects for research. This assumption is particularly valuable when the judicial writings are about alternative dispute resolution, because when it comes to using traditional legal scholarship methods in ADR, very few primary sources exist. Describing the difficulties of writing scholarship in an unfamiliar area, proceduralist Stephen Subrin remarked on the special challenges of attempting to research and write about ADR and mediation:

[T]here is a paucity of normal trail markings as there are few statutes or rules and little case law to guide our musings. There are no obvious original documents to draw upon. The growth of mediation has been largely helter-skelter... The politics, as I will discuss later, are hazy, with a baffling array of proponents. ...When one writes about mediation, therefore, she lacks the normal scaffolding of more traditional legal scholarship.¹⁴

Beyond just improving the available resources for ADR scholars, the philosophical justification for treating judicial scholarship about mediation and ADR as primary sources is that in these articles (in stark contrast to judicial opinions) judges comment on their front-line experiences with mediation processes, practices, and values. Since court-connected mediation is a creature primarily of the legislature and secondarily of court systems design, detailed information about the court-connected mediation phenomenon generally will not come from trial or appellate opinions. Instead, ADR scholars must look to other sources to understand court-connected mediation today, such

¹³ Note that this study makes an effort to be reasonably transparent and disciplined about the process and the materials but does not position itself as separate from that process and those materials. Instead, this project is an interpretive exercise that seeks to make broad claims and conclusions about a complex, shifting, and incomplete dataset. This interpretive aspect of the project is not a limitation but a feature of scholarly work. Indeed, the meta-goals of this project would be furthered by ongoing additions to and alternative explanations of the data.

¹⁴ Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here To Stay and Much Better than I Thought*, 3 NEV. L.J. 196, 199 (2003).

as field studies, surveys, interviews, and expert accounts. Judicial writings are an important new research quarry because they provide first-hand information about mediation in accounts that can be parsed and analyzed through various historical, literary, legal, and political lenses.

At this point, one could perhaps object that judge-written scholarship is not stable or coherent enough to qualify as a new data source.¹⁵ Judges are not a homogenous group and judicial scholarship varies dramatically in form and content, so it would be a mistake to overstate the potential insights from this study that may relate to judicial decision-making. This caution is even more important to keep in mind considering the variety of reasons judges may have for writing these articles. Probably not many of these judges wrote these articles solely because they had a burning desire to write about mediation. Likely, many of these articles were written at the behest and urging of a symposium, law school, local bar organization, or legal magazine. Or perhaps they were written to serve as a credential in a larger professional development strategy intended to improve prospects at the courthouse or in private practice. Either way, why and from where the request came could have an impact on what judges write, or at least how judges frame their writings.

Authorial intention and attitudes, however, are not my concern. Studying why judges themselves write what they write sounds like an interesting project but it is not this project. “[L]aw can be best understood as a set of literary practices,”¹⁶ as James Boyd White argues, and although the judge is “always a *person*”¹⁷ it does not follow that the judge’s intention is the most interesting or important part of the writing or that finding that intention, be it self-apparent or self-deceptive, is the only available interpretive approach to these texts. As Ronald Dworkin put it:

Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance. ... There is a better alternative: propositions of law are not merely descriptive of legal history, in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different than both.¹⁸

Admittedly, White and Dworkin were writing about the judicial opinion and other formal legal texts. There is no reason, however, that their interpretive rubrics would foreclose interpretation of legal scholarship, which like other legal texts, “is produced by actual speakers in actual social contexts, addressing audiences whom they wish to persuade [and i]n so doing the speakers constitute, or reconstitute through their

¹⁵ There is scholarship on the phenomenon of judges writing scholarship, though this phenomenon generally is more concerned with the potential improprieties and ethics problems associated with judges taking positions on legal issues in scholarship. See sources cited *supra* note 10.

¹⁶ James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1669 (1984).

¹⁷ *Id.* at 1686.

¹⁸ RONALD DWORIN, A MATTER OF PRINCIPLE 146-66 (1985).

performance a social universe.”¹⁹ Reading the work of judges, whose opinions are at once precedent and at the same time unsettled law capable of distinctions, makes the reader more aware of issues of authority and interpretation in judges’ scholarly writings. With regard to the texts, my scholarly posture is that all of these articles have historical relevance and, therefore, explanatory power vis-à-vis cultural and legal developments.

Accordingly, this project is intentionally limited to the writings themselves. This means that I am not contacting judges to find out what they intended when they wrote their articles, or why they wrote them in the first place, or any other authorial commentary. I am also not seeking secondary sources about these judge authors, though I do use scholarly literature to focus some of the questions that come up in the judicial writings. Future iterations of this project could include interviewing judges about their scholarship, but for now the study focuses primarily on the texts alone.

B. Themes as a Strategy for Organization

There are many different possible ways to process such a rich collection. One could take a historical perspective on the writings and attempt to connect the topics addressed and attitudes taken by the judge authors to developments in legal history, with special emphasis on the introduction and incorporation of alternative methods in the courts.²⁰ This would support a much-needed intellectual history of alternative dispute resolution. Or one could drill down into a set of articles that focus on a particular area of the law, to provide additional research data points for understanding whether and how different areas of practice have adopted mediation. Another possibility, for those studying regional trends in the law, is using the collection to provide a starting point for speculating as to how easily courts in different parts of the country incorporated mediation.²¹ Yet another possibility, for those interested in how judicial decision-making interacts with mediation values and processes, might be a close reading of the work of judges who have written multiple scholarly articles on mediation and alternative practice.²² For now, the project identifies major themes within the collection and classifies the texts along thematic lines.

Themes have their pluses and minuses. On the plus side, a thematic approach is a good way to make sense of a large amount of textual material. Themes orient the reader to the collected materials by providing an accessible way to think about that material. In addition, since part of the project is treating judicial writing as primary texts, taking a thematic approach helps accustom the reader to seeing these materials not only as informational repositories but also as artifacts for study and research. Furthermore, recognizing thematic similarities between articles can be the starting point for further inquiries into trends, situational or historical analyses, new pedagogies, or even different

¹⁹ White, *supra* note 16, at 1693.

²⁰ This is an analysis I intend to undertake in future stages of this project.

²¹ For example, to the extent that region is a proxy for caseload and congestion, it would be interesting to see whether judges with lighter caseloads describe the benefits and costs of court-connected mediation differently than would those judges with heavier caseloads.

²² Former Chief Justice Warren Burger, Judge Wayne Brazil, and Judge Leonard Edwards all stand out in this collection as having authored multiple works. The collection also includes Judge Jack Weinstein, a prolific writer who wrote about ADR as part of a larger body of scholarly work on the law.

thematic classifications. On the minus side, themes invariably involve drawing lines and as such can create categories that are unhelpfully overbroad or reductive. Within this collection, for example, many articles could be sensibly sorted into a variety of overlapping themes, which means that the thematic organization is going to feel arbitrary or tedious in some cases.

All that said, assuming that the organizational and research benefits of themes are worth preserving, please think of these themes as “themes,” in pencil not pen, separated by permeable membranes and amenable to redefinition.

This study identifies four major recurrent themes in the collection: how-to; memoirs; professional identities; and debate club. All of the articles in the collection align with at least one of these four themes, though most of them contain multiple themes that complicate the judges’ arguments in interesting ways. “How-to” articles explain, in an informational or instructional way, strategies for managing the substantive structural challenges and benefits of court-connected mediation. “Memoirs” provide more personalized accounts of a judge’s experience with court-connected mediation; success stories and conversion narratives are subthemes within this group. “Professional identities,” as a theme, includes articles in which judges examine what it means to be a judge and a mediator, either successively (as when judges retire and become mediators) or simultaneously. Finally, “debate club” contains articles that examine and/or take strong positions on some of the values conflicts that emerge from perceived and real tensions between mediation and litigation, alternative and traditional, peace/resolution and justice/rights.

IV. THE THEMES

The next Part will explore each of the themes in more detail, focusing on the articles in ways that illuminate and complicate the themes. Examples that illustrate or work against the thematic structure will be considered. Finally, the Part makes some tentative observations about possible normative claims around efficiency and other rationales suggested by the themes. One tentative conclusion of this Article is that in judicial writing, efficiency is a primary rationale when the subject is process but is less important when the subject implicates more personal values and professional identities.

A. *How-To*

The most common theme running through the collection is “how-to.” Many articles in the collection, regardless of dominant narrative structure and theme, contain practical how-to elements. How-to articles are easy to spot from their titles: for example, *Screening Family Mediation for Domestic Violence*²³; or *Getting to “Settled”: Ten Suggestions for a Successful Mediation*²⁴; or *What Mediators Need To Know About Class*

²³ See Chester B. Chance, *Screening Family Mediation for Domestic Violence*, 70-APR FLA. B. J. 54 (1996).

²⁴ See Jacob P. Hart, *Getting to “Settled”: Ten Suggestions for a Successful Mediation*, 1 SEDONA CONF. J. 71 (2000).

*Actions: A Basic Primer*²⁵; or *Eldercare and Adult Guardianship Mediation*.²⁶ Descriptive titles such as these support the how-to objective by signaling potential readers as to whether the information therein will be relevant and useful.

Because of the volume of how-to articles, it may be helpful to sort the how-to articles into subthemes: instructions, information, and advice. Many articles combine all three, and how-to strains often emerge in other types of narratives. Sorting into subthemes, therefore, provides one way (not the only way) to inspect the materials more closely. The following lays out these three subthemes then considers what we can take away from the prevalence and content of these articles.

1. *Instructional Articles: What You Should Do*

Instructional pieces explain how to operate mediation programs in a court system, either prospectively (in the wake of new legislation, for example)²⁷ or based on previous experience. In 2010, for example, Judge Howard Cummins framed an instructional piece on mediation programs in workers' compensation cases in the following way:

To understand the role of mediation in workers' compensation systems, the "how" of mediation, and the components for a mediation program to be effective, this paper will look to three of the most recently revitalized and effective systems in the country: Oregon, Maryland, and Virginia. It will provide a general overview of these systems and discuss specific aspects of how the systems work and the advantages they offer. To add a practical aspect to the discussion, and to aid those who might be considering establishing a mediation system, the last section of this paper will provide a template for adding a mediation component to the system
...²⁸

This no-nonsense and straightforward structure is typical of instructional pieces. Similarly, organized instructional pieces in the collection offer step-by-step advice on various topics including juvenile and family law,²⁹ online dispute resolution,³⁰ and employment disputes.³¹

²⁵ Myron S. Greenberg & Megan A. Blazina, *What Mediators Need To Know About Class Actions: A Basic Primer*, 27 *HAMLIN L. REV.* 191 (2004).

²⁶ Susan L. Fowler & Neal Rodar, *Eldercare and Adult Guardianship Mediation*, 36-FALL *VT. B. J.* 53 (2010).

²⁷ See, e.g., Kirk H. Nakamura, *Better Late than Never! The New Court Approved Mediation Program Relaunches*, 51-FEB. *ORANGE COUNTY LAW.* 34 (2009); Michael J. Wilkins & Karin S. Hobbs, *Utah's Appellate Mediation Office Opens January 1998: A New Option for Case Resolution at the Utah Court of Appeals*, 10-DEC. *UTAH B. J.* 25 (1997); see also Josefina Muniz Rendon, *Partners in Peer Mediation*, 34-APR. *HOUS. LAW.* 38 (1997) (seeking attorneys to participate in youth-oriented peer mediation programs).

²⁸ Howard W. Cummins, *From Conflict to Conflict Resolution: Establishing ALJ Driven Mediation Programs in Workers' Compensation Cases*, 30 *J. NAT'L ASS'N. ADMIN. L. JUDICIARY* 391, 392 (2010).

²⁹ See e.g., Leonard Edwards, *Moving Cases from Juvenile to Family Court: How Mediation Can Help*, 16 *U.C. DAVIS J. JUV. L. & POL'Y* 535 (2012); Don R. Ash, *For the Children's Sake: How the New Parenting Plan Will Work*, 36-SEPT *TENN. B. J.* 12 (2000).

Instructional pieces are not just user manuals, however. They provide a glimpse of what judges found important enough, at the time and for whatever reason, to write down. In this way, instructional pieces viewed in hindsight can serve as signposts for the historical development of the alternative movement in the courts. As an example, Judge Evans' 1996 article on employment disputes³² merits further discussion not only as a thoughtful how-to for employers seeking to create internal processes for dispute resolution but also as an extraordinary example of trend-spotting. The article provides an early articulation of what is now called "dispute systems design" (DSD) in employment contexts, though the article neither uses that term nor references two of the most currently well-known texts (which were roughly contemporaneous with the article) on DSD.³³ The content of the article is remarkably fresh, presenting the reader with a plethora of short cases studies and setting forth the same basic structure for workplace DSD that law schools teach today.³⁴

2. *Informational Articles: What You Should Know*

Instructional pieces such as the ones described above often overlap with informational how-to articles that set forth mediation-related legal requirements and questions. Informational pieces include works on specific legal areas on the one hand and on mediation practice more generally on the other. For example, an informational piece might explain developments in restorative justice and mediation;³⁵ or mediator credentialing requirements;³⁶ or class action basics for mediators;³⁷ or mediation confidentiality rules.³⁸ Most of these articles review existing regimes and processes, though some report on newer or more cutting-edge trends.

³⁰ See generally Frank G. Evans et al., *Enhancing Worldwide Understanding Through ODR: Designing Effective Protocols for Online Communications*, 38 U. TOL. L. REV. 423 (2006).

³¹ Frank Evans & Shadow Sloan, *Resolving Employment Disputes Through ADR Processes*, 37 S. TEX. L. REV. 745 (1996).

³² Evans & Sloan, *supra* note 31. Apparently Judge Evans is known as the "father of alternative dispute resolution in Texas," *id.* at 778.

³³ See CATHY A. CONSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996); WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988); Evans & Sloan, *supra* note 31, at 776 n.114 (citing Jeanne M. Brett et al., *Designing Systems for Resolving Disputes in Organization*, 45 AM. PSYCHOL. 162, 166 (Feb. 1990)).

³⁴ In fact, the first-ever DSD casebook is coming out later this year. NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (forthcoming 2013).

³⁵ T. Bennett Burkemper, Jr., et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128 (2007); Lorenn Walker & Leslie A. Hayashi, *Pono Kaulike: A Pilot Restorative Justice Program*, 8-MAY HAW. B. J. 4 (2004); see also Anthony W. Frohlich, *Criminal Mediation*, 15 No. 1 DISP. RESOL. MAG. 11 (Fall 2008).

³⁶ See generally John Coselli, *Mediator Credentialing*, 40 THE ADVOC. (TEXAS) 17 (2007).

³⁷ See Greenberg & Blazina, *supra* note 25 at 222-23; Robert W. Thompson & William F. McDonald, *Attention to Detail Crucial in Mediating Class Action Disputes*, 46-MAY ORANGE COUNTY LAW. 22 (2004).

³⁸ See generally Michael D. Marcus, *What Happens in Mediation ... Courts Have Carved Out Only Very Rare Exceptions to Mediation Confidentiality*, 34-DEC L.A. LAW. 17 (2011); James DeAnda & S. Shawn Stephens, *Texas Examines the Need for More Extensive Confidentiality Rules in Mediation*, 37-APR HOUS. LAW. 38 (2000); Sarah S. Vance, *Confidentiality of Mediation Proceedings*, 47 LA. B.J. 99 (1999).

A typical example of an informational article comes from Judge Sarah Vance on mediation confidentiality:

Few would gainsay that a freedom to speak frankly is the bedrock of mediation. The parties' expectation of confidentiality helps maintain trust and candor, and it enhances the mediator's credibility among the disputants. ... Mediators and disputants should be aware, however, that, even when a mediation privilege is recognized, it is not absolute. In courts and legislatures around the country, the benefits of applying such a privilege compete with the general rule that the public is entitled to every person's evidence. Almost every state has enacted some form of mediation privilege that attempts to balance these interests. However, these laws frequently contain exceptions that make it difficult to predict the scope of protection.³⁹

Although there is clearly overlap between instructional and informational (that is, Judge Cummins' instructional article has information and Judge Vance's informational article has instructions) the two forms frame their content differently and so for the purpose of thematic arrangement they end up in different categories. Whether this will be a meaningful mapping difference to preserve over time remains to be seen.

Another overlap between the instructional and informational articles is the emphasis of both types on efficiency. In general, these articles explain mediation processes in terms of clearing dockets, reducing costs, and mitigating delays. Other mediation values, such as self-determination or relationship management, are not as prevalent in these works.

An exception that proves the rule appears in the two articles on collaborative law in the collection. In these pieces, two judges explain the developments not only in terms of efficiency benefits but also in light of other mediation values.

Collaborative law is a relatively new practice in the family law arena that co-exists in some tension with mediation.⁴⁰ Efficiency is one of the benefits promised by collaborative law proponents. Collaborative lawyers believe that the practice promises significant efficiency benefits in terms of court dockets, considering that collaborative lawyers disqualify themselves by contract from taking the case to court if they (and the clients) cannot reach an acceptable agreement, which at least in theory might make court a non-starter for people who have undertaken a collaborative process.⁴¹ Because the field

³⁹ Vance, *supra* note 38, at 99.

⁴⁰ Tommy Bryan, *Saying "No" to Court? An Introduction to the Collaborative Law Process*, 70 ALA. LAW. 434 (2009); P. Oswin Chrisman et al., *Collaborative Practice Mediation: Are We Ready To Serve this Emerging Market?*, 6 PEPP. DISP. RESOL. L. J. 451 (2006) (describing collaborative law as a "non-adversarial dispute resolution process in which parties commit themselves to collaborate in order to reach a mutually acceptable agreement without court intervention"); *see also* JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 75 (2005), available at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf (noting that the classic collaborative law model envisions lawyers and clients negotiating without mediators present. She describes the tension between the fields as a kind of "sibling rivalry" and applauds "efforts to build better communication and relationships" between the fields).

⁴¹ Bryan, *supra* note 40, at 435 ("One experienced collaborative-law attorney has stated that, in his experience, collaborative-law cases proceed much quicker than litigated cases.").

is growing so quickly,⁴² Judge Chrisman predicts that mediators with “specialized collaborative skills” will be well suited to facilitate collaborative processes.⁴³ As he puts it: “[p]ositioning oneself to serve this new market makes good business sense.”⁴⁴

Coupled with the efficiency justifications and market predictions, however, are ringing assertions of the positive benefits associated with the non-adversarial process of collaborative law, in particular the preservation of the relationship between the parties. Not to mention, as Judge Bryan points out, happier lawyers:

The clearest evidence of [collaborative law’s] success relates to the satisfaction—joy even—of family lawyers who have embraced collaborative law as an alternative to litigation. The study [on collaborative law] found that the primary motivator for lawyers embracing [collaborative law] was personal value realignment—in other words, finding a way to practice law that fit better with their beliefs and values than the traditional litigation model did.⁴⁵

Whether collaborative law will effect a sea change in litigation outside the family context remains to be seen; for their part, however, the judges speculate that the practice is sound and demand for mediations in this area is growing, both as a matter of efficiency benefits and substantive improvements on adversarial litigation.

The reason that these two judge-written how-to articles on collaborative law are the exception that proves the rule is that although the articles appear descriptive (and thus “how-to”) they are actually normative. Collaborative law basically writes judges out of the picture, so the fact that judges are writing positively about this trend is intriguing.⁴⁶ What’s more, Judge Chrisman refers to “humiliating litigation war”⁴⁷ to describe what parties are avoiding when they choose collaborative law, suggesting some deep-seated critiques of the civil justice system necessitating alternatives completely outside the courthouse. Neither of the authors appears (at the time of writing, at least) to be a professional neutral, though it is difficult to tell from the biographical footnotes. Nevertheless, the fact that these judges are writing so positively about an outside-the-courthouse phenomenon suggests that the articles may actually be professional identities articles in how-to clothing; and as we will see, professional identities articles often draw on values separate from efficiency concerns.

In any event, the salient feature of the two collaborative law articles is that they, unlike most of the other how-to articles in the collection, use mediation values other than efficiency to justify the development.⁴⁸ The other instructional and informational articles in the collection focus in large part on efficiency metrics and advantages.

⁴² See *id.* at 434.

⁴³ Chrisman et al., *supra* note 40, at 464 (“Mediators with specialized collaborative skills will fill a niche that will be desired by collaborative professionals.”).

⁴⁴ *Id.*

⁴⁵ Bryan, *supra* note 40, at 437 (quoting MACFARLANE, *supra* note 40, at 1).

⁴⁶ The judge may be involved after the parties settle, to approve the settlement agreement as a final judgment.

⁴⁷ Chrisman et al., *supra* note 40, at 457.

⁴⁸ Actually, the two restorative justice how-to pieces also draw on substantive mediation values outside of efficiency. See T. Bennett Burkemper, Jr., et al., *supra* note 35; see also Walker & Hayashi, *supra* note

3. Advice for Lawyers

A variation on the instructional/informational themes is advice for court officers (judges, lawyers) who are working with mediation and mediators. The advice pieces break out mostly chronologically into advice for judges⁴⁹ (earlier pieces) and advice for advocates (more recent pieces).⁵⁰ Because the advice for judges tends to implicate questions around professional identity, we will examine those articles in the Professional Identities subpart. For now, let us consider the advice for lawyers.

As noted, most of the articles giving advice for lawyers in mediation are fairly recent. An exception is Judge Rebecca Westerfield's article, written in the mid-nineties, in which she gives guidelines to lawyers who represent clients in mediation. Although the content of her article is largely the same as judge-written articles giving advice on that same topic today, the nature and expression of that advice arguably has changed over time in ways that perhaps illuminate what court-connected mediation has become.

In 1995, Judge Westerfield advised lawyers to "be aware of the differences and discuss [with clients] the specifics of the [ADR] process to be used."⁵¹ Her article provides the basics of mediation for attorneys, including a brief discussion of definitions before launching into process guidance around timing, ground rules, participants, and emotions.⁵² Judge Westerfield maintains a steady, positive tone throughout the article, using phrases like "sounding board" and "facilitate communication" and "honest discussions" and "new energy" and "fresh outlook," phrases familiar to proponents of classical mediation.⁵³ With respect to the lawyer's role in the mediation, Judge Westerfield counsels moderation:

It is fruitless to try to persuade the mediator because the mediator has no authority to decide the case. If the [mediation] brief has any persuasive value, it is with the other side. A concise brief written in a direct non-nonsense manner, focusing on key issues and sharing relevant evidence can influence an opponent to appreciate the strengths of the other side's case and the vulnerabilities of his own.⁵⁴

On this view, the mediation context requires lawyers to transmute zealous advocacy into something more reflective and reserved.

35. Like collaborative law, restorative justice is well outside the normal purview of the judge. And both collaborative law and restorative justice are related to but still distinct from mediation.

⁴⁹ See, e.g., Hart, *supra* note 24; J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1007 (1996); E. Joseph Bleich, *Meandering on Mediation*, 43 LA. B.J. 149 (1995); D. Milton Moore III, *ADR: The Future Is Now*, 43 LA. B.J. 148 (1995).

⁵⁰ See also Randall J. Newsome, *Mediating Disputes Arising out of Troubled Companies—Do It Sooner Rather than Later*, 42 GOLDEN GATE U. L. REV. 661 (2012); Robert L. Harris, Sr., *Attorneys as Advocates in Mediation*, SP006 ALI-ABA 213 (2009); Beth Deere, *Federal Court Mediation*, 43-FALL ARK. LAW. 22 (2008); Erwin I. Katz, *Representing Clients in Mediation: The "Missed" Opportunity*, 21-MAR AM. BANKR. INST. J. 30 (2002); Rebecca Westerfield, *Effective Use of Mediation: A Judge's Viewpoint*, 4 No. 4 LEGAL MALPRACTICE REP. 13 (1995).

⁵¹ Westerfield, *supra* note 50, at 13.

⁵² *Id.*

⁵³ *Id.* at 16-17.

⁵⁴ See *id.* at 16.

Compare this advice with a more recent example. In 2008, Judge Beth Deere also wrote an article on how lawyers should represent clients in mediation.⁵⁵ Like Judge Westerfield, Judge Deere lays out timing, preparation, and process considerations for lawyers who are representing parties in mediation in federal court. Her advice pretty much tracks Judge Westerfield's advice.⁵⁶ At one point, Judge Deere also identifies advocacy level as one of the key difficulties lawyers face when they represent clients in mediation. How Judge Deere describes the appropriate level of zealous advocacy in the mediation context, however, is different than Judge Westerfield's description:

Once designated as the mediator, the Magistrate Judge is barred from presiding over your case and, consequently, has no power to decide it. That said, don't waste time making jury arguments in mediation. Instead, identify specific facts and exhibits that support your claim or defense, as well as those that expose your opponent's Achilles heel.⁵⁷

Content-wise, these two judges are giving the same advice in different styles. An Achilles heel is synonymous with vulnerability, after all. But the rhetorical thrust of the two excerpts is not the same. Judge Westerfield's third-person advice arguably distances her audience (attorneys in mediation) from the adversarial mindset through aphorisms ("It is fruitless to..."), downplayed tactical devices ("If the brief has *any* persuasive value ...", emphasis added), and passive constructions ("written in," "an opponent," "other side's case"). An attorney reading this article would not necessarily know whom to identify with—is she "an opponent" or the "other side"?—which likely is the judge's point. The rhetorical effect of this passage is to drape mediation theory and philosophy over mediation practice and to create an aspirational vision of lawyers in mediation as thoughtful, even-handed participants in a solution-oriented process.

Judge Deere, on the other hand, provides advice in the second person ("you") that not only recognizes but apparently endorses adversarialism, so long as such adversarialism does not derail the process with excessive grandstanding. Her advice to an attorney is clear: in mediation, you make a strong case and point out the holes in your opponent's case. There is nothing normative or romantic about the mediation setting itself. Even Judge Deere's admonition against "jury arguments" follows directly from the mediator's inability to decide the case, not against an ideal of balanced participation or relationship management. Again, this may be splitting semantic hairs, but it is at least possible that the interpretive differences between the two judges' advice reflects the evolution of court-connected mediation after more than a decade of institutional learning and experience. On this view, the adversarial dynamics decried by early proponents of mediation and understated by Judge Westerfield are, by the time Judge Deere is writing, just part of modern mediation.

In addition, it is instructive to note that in the article Judge Deere does not recommend that lawyers focus on, say, generating creative solutions before and during the mediation process. Rather, her instructions make it clear that mediation is a no-nonsense pre-trial opportunity for the parties to come to a resolution on the legal issues

⁵⁵ Deere, *supra* note 50.

⁵⁶ *See id.*

⁵⁷ *Id.* at 22.

quickly and cleanly.⁵⁸ As noted before, this emphasis on mediation's efficiency benefits (as opposed to its other possible benefits, such as improving the relationship between the parties or expanding the problem statement beyond its legal contours or promoting creative solutions) is typical of the how-to articles.

4. *Trend: Efficiency as Process Rationale*

What do these efficiency-centric how-to articles tell us about court-connected mediation today? Certainly these articles provide best practices and process guidance on system design in the courts. For judges or lawyers or others concerned with optimizing mediation components in the litigation process, these articles serve as useful reference. With this in mind, perhaps the efficiency-centric nature of the articles is to be expected, since how-to articles lend themselves naturally to discussions around more concrete and measurable system concerns such as efficiency.

In privileging efficiency over other justice and other substantive values, these how-to articles are consistent with the work of ADR scholars such as Nancy Welsh who described a "thinning vision of self-determination" and a tendency for modern institutionalized mediation schemes to winnow disputes down to their legally relevant attributes.⁵⁹ Put another way, because efficiency can be more easily measured than other mediation principles, efficiency concerns crowd out other important concerns. In these articles, judges do not, by and large, appear distressed by privileging efficiency, whereas many ADR scholars find such privileging problematic not only as a theoretical matter but also with respect to ADR's potential to disrupt and reconstitute ideological assumptions around dispute resolution. As Carrie Menkel-Meadow and Amy Cohen and others have pointed out, if mediation and other alternative practices are co-opted into traditional practice and/or overemphasize efficiency benefits at the expense of other values, we risk further promulgation of neoliberal market-driven policies that make progressive social change in the legal system more difficult.⁶⁰

B. *Memoirs*

Often in conjunction with the how-to is the professional memoir, defined broadly here as an account of events from one's worklife. Because these articles are about mediation, these memoirs recount professional experiences around implementing or

⁵⁸ *Id.*

⁵⁹ See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001); see also Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5 (2011); Rosanna Langer, *The Juridification and Technicisation of Alternative Dispute Resolution Practices*, 13 CAN. J.L. & SOC'Y 169, 170 (1998) ("The legal system is thus colonising potentially liberatory social practices and transforming them into a 'technique' where practices are formalised and strategies are imposed on conflict to produce determinable outcomes.").

⁶⁰ See, e.g., Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 1-3 (1991) (explaining how efficiency rationales for ADR can crowd out other values).

working in mediation settings. They are different from how-to stories not only because they are more personal but also because they tend to fall into one of three groups: personal accounts; success stories; and conversion narratives.

1. *Personal Accounts*

My original themes did not include “personal accounts” but instead lumped those articles into how-to/informational. On reflection, however, it seemed like these accounts were different enough from informational articles that they warranted a separate category. Basically, the “personal account” memoir is a more personalized version of the informational how-to article. In personal accounts, judges describe how their own courts have incorporated mediation as part of the pre-trial process. Judges recount these experiences in relatively neutral, formal language. Sometimes they include first-person anecdotes or observations, but not always.⁶¹

Personal accounts almost always focus on the judge’s own court. One of the most impressive examples in the collection is Judge Howard Dana’s article, *Court-Connected Alternative Dispute Resolution in Maine*.⁶² In this piece, Judge Dana lays out the history of ADR in Maine courts in the context of the larger conversation around ADR’s benefits and drawbacks.⁶³ After providing statistics around resolution and settlement rates and other relevant data points, Judge Dana concludes his study with recommendations, notably arguing in favor of continuing mandatory mediation and against adding a good faith requirement to Rule 16(b).⁶⁴ Similarly, in his *Report on Mediation Pilot Project of the Montgomery County Family Court*, the Honorable Richard H. Dorrrough provides brief background on the mediation pilot project of the Alabama Supreme Court Commission on Dispute Resolution and then lays out statistics on the project from November 1997 through April 1998.⁶⁵ Other than remarking that mediation in visitation access cases “appears to be beneficial to clients who are generally *pro se*,” Judge Dorrrough reports on the pilot project without editorial comment.⁶⁶

A more recent example comes from the Honorable Susan K. Gauvey, whose article “capture[s] the statistical picture of mediation, trials, and verdicts in the United States District Court for the District of Maryland in the recent past: October 1, 1999 – September 30, 2008.”⁶⁷ Judge Gauvey’s study, which contains fascinating data around post-failed-mediation verdict trends, is not only a personal account but a debate position,

⁶¹ See e.g., Sandra S. Beckwith, *District Court Mediation Programs: A View from the Bench*, 26 OHIO ST. J. ON DISP. RESOL. 357 (2011); Robert W. Fairchild, *Will the Legal Profession Ever Be the Same? Disappearing Trials and ADR in Kansas*, 76-MAY J. KAN. B.A. 18 (2007); John F. Varin et al., *Mediation Between Parents and Children: Part of the Twin Falls County Status Offender Program*, 41-NOV. ADVOC. (IDAHO) 10 (1998).

⁶² See generally Howard H. Dana, Jr., *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349 (2005).

⁶³ *Id.* at 351-60.

⁶⁴ *Id.* at 416.

⁶⁵ Richard H. Dorrrough, *Report on Mediation Pilot Project of the Montgomery County Family Court*, 59 ALA. LAW. 250 (1998).

⁶⁶ *Id.*

⁶⁷ Susan K. Gauvey & Heather R. Pruger, *Trials, Verdicts and Mediation in Maryland’s U.S. District Court*, 43-AUG MD. B.J. 52, 52 (2010).

as discussed below. Although Judge Gauvey uses formal, non-evaluative language as do Judges Dana and Dorrough, she frames her article pointedly in the larger debate about whether ADR has detrimentally affected the civil justice system by diverting so many cases from trial. Actually, finding a pure personal account in recent judicial scholarship is not easy, maybe because over the years judges have had opportunities to experiment with the mediation components in their courthouses and, therefore, have more opinionated observations to offer.

Like informational how-to articles, personal accounts provide guidance on best practices through documented examples of mediation in court systems. And like informational how-to articles, these accounts help institutionalize mediation by creating blueprints for what works and what does not. As the three examples above indicate, these blueprints are driven in large part by statistics, which confirm the intuition that data collection is an important part of developing best practices and also suggest that personal accounts of court-connected mediation programs require statistical validation. Additionally, because personal accounts are more personal and experience-driven than informational articles, data collection perhaps is an important aspect not only of defining but also defending one's professional experience and history.

2. *Success Stories*

In reviewing child protection mediation (CPM) in the United States, the Honorable Leonard Edwards recalls his own experience with CPM projects:

She was the angriest woman I had ever seen in my courtroom. She walked into the court aggressively, looking around at everyone angrily with disgust. ... When I tried to explain the nature of the court proceedings, her hostility flared up as she stated, "This is all a farce. I don't want anything to do with any of you." I quickly concluded that this was a situation that I could not manage in the formal courtroom setting so I said to the assembled parties, "This case is referred to mediation."⁶⁸

A week later, the woman returned to the court "a different person," and thanked the judge for referring her to mediation. She told him that mediation had been a "positive experience" that allowed her to help create a cooperative agreement with the social worker. The judge was not surprised but was gratified by the woman's change of heart. After telling this story, the judge concluded: "My belief that mediation was an indispensable part of the child protection process was reaffirmed."

⁶⁸ Leonard Edwards, *Child Protection Mediation: A 25-Year Perspective*, 47 FAM. CT. REV. 69, 69 (2009). See also Patricia M. Martin, *Child Protection Mediation: The Cook County Illinois Experience—A Judge's Perspective*, 47 FAM. CT. REV. 81, 81 (2009):

Almost immediately after I was assigned to a courtroom in the Cook County Juvenile Court in 1997, it became clear to me that families involved in child protection proceedings could benefit from mediation. ... Contested matters were routinely continued, because large blocks of time were not available on our overcrowded dockets. Worse yet, the families' needs and interests seemed to be lost in an adversarial morass. It was evident that an alternative to antagonistic litigation could significantly improve the way the court served and related to families and children.

The success story is a variant on the personal account because it contains more evaluative language around the positive effects that the judge perceives mediation had in the court system. The motivations for telling success stories are not always obvious, though it seems safe to say that in many cases, as in the article quoted above, judges tell success stories not (only) to pat themselves on the back but to encourage reform.

Yet encouraging reform through success stories, as it turns out, often means defending choices and explaining results in terms of statistics and other metrics. Although Judge Edwards's success story above framed the account using an individual's experience in the courtroom, many success stories, much like the how-to articles and personal accounts, are often framed in terms of efficiency gains.

As an example, consider the following success story from Judge H. Jeffrey Coker of Arizona:

In 1993 the Coconino County legal system was in crisis due to rapidly rising criminal and civil caseloads and static resources to deal with these demands. Because there was no great likelihood of more resources, we were faced with a sink-or-swim situation. We chose to swim. ... While some feel that alternatives to judicial resolution should not be employed, we in Coconino County find them not only critical to the expeditious resolution of cases, but in most instances preferred by the disputants themselves. There is not space here for a discussion of the pros and cons of ADR. Suffice it to say that it works incredibly well for us and is, with few exceptions, supported by the bench and bar.⁶⁹

Judge Coker's lean prose describes how Coconino County started its ADR program, how it works, what the drawbacks are, and future directions for court-connected mediation. In doing so, he uses the language of costs and benefits. "ADR is not just a poor substitute that fills in for inadequate resources," he states. "It is an efficient, cost-effective and [] appropriate answer to a great need."⁷⁰ Does it work? Judge Coker gives a one word answer: "Absolutely."⁷¹

A similar success story comes from Judge Charles Clawson. Describing his experience starting in 1995, when mediation was "very new" and the legislature had only empowered courts to refer cases to mediation and other alternative processes in 1993, Judge Clawson points out that he and the other judges based the algorithm for referring cases on the "time required and the relief requested," as well as the "nature of the hearing."⁷² These early efforts increased the court's present-day ability to "clear the docket of those cases which should be settled and provide time to address those cases that wait on an otherwise crowded docket" and thereby improve the daily operations of the court.⁷³ Like Judge Coker, Judge Clawson distills success to a simple question and

⁶⁹ H. Jeffrey Coker, *ADR in Coconino County*, 33-NOV ARIZ. ATT'Y. 30, 30 (1996).

⁷⁰ *Id.* at 31.

⁷¹ *Id.* at 30.

⁷² Charles E. Clawson, *The Use of Mediation in the 20th District*, 40-SPG ARK. LAW. 27, 28 (2005).

⁷³ *Id.*

answer: “Is mediation working? Yes.”⁷⁴ Here, as in the how-to articles, “working” appears to mean functioning in an efficient way.

3. Conversion Narratives

Some memoirs describe a progression or evolution toward ADR acceptance that focuses on the substantive justice benefits afforded by adopting an alternative perspective or at least a broader, more tolerant judicial mindset. These pieces are reminiscent of “conversion narratives,” testimonials generally associated with the Puritans of early America or, even earlier, Saint Augustine.⁷⁵ The popular understanding of a conversion narrative is an intensely personal, publicly shared account of an individual’s journey of faith. Judges who write mediation-focused conversion narratives either describe their own internal shift of attitudes or recommend with feeling (“preach”) an external shift of attitudes within the legal system. These shifts are not nearly as dramatic as those in conventional conversion narratives, but, nevertheless, subtly resonate with conversion energy.

Consider, for example, Judge Marietta Shipley’s account of hearing about mediation, a practice she came to champion in the Tennessee family courts, for the first time:

My first exposure to mediation came from my psychologist husband. From his experience he suggested that family mediation would be a useful tool for the courts and for the parties and their lawyers. I had only read about it in journals...⁷⁶

Here is a familiar conversion trope: trusted person introduces the relatively uninitiated person to a new idea that, upon learning more, the uninitiated person not only sees as positive but as potentially revolutionary and therefore worth disseminating widely.⁷⁷ And indeed, after taking her first training session in mediation, Judge Shipley was convinced. She recalls thinking that mediation, as a product of the “marriage of the legal and psychological communities,” held tremendous promise for family courts.⁷⁸ References to psychology and marriage underscore the therapeutic dimension of Judge Shipley’s perspective. Connecting legal process to therapy through mediation is reminiscent of Justice Warren Burger’s call for lawyers to become “healers,” a term suggesting enlightenment and inflected with spiritual significance.⁷⁹

⁷⁴ *Id.*

⁷⁵ See, e.g., EDMUND S. MORGAN, *VISIBLE SAINTS: THE HISTORY OF A PURITAN IDEA* (1963); see also SAINT AUGUSTINE, *THE CONFESSIONS*.

⁷⁶ Judge Marietta Shipley, *Family Mediation in Tennessee*, 26 U. MEM. L. REV. 1085, 1089-90 (1996).

⁷⁷ *Id.* at 1114-17 (recommending steps for Tennessee that include setting up and seeking funding sources for mediation as a “court attached program,” making “family mediation available to every party,” and considering mandatory mediation in divorce disputes).

⁷⁸ *Id.* at 1090.

⁷⁹ See Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice*, 38 HOFSTRA L. REV. 537, 567 (2009) (quoting Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (May 1984)).

That same year (1996) and in the same law review, Judge R. Allan Edgar also wrote a piece that qualifies as a conversion narrative not because it describes an evolution from one state to another but because of the gentle, aspirational, somewhat spiritual glow over the story. He writes that “ADR ... has as much to do with the quality of dispute resolution as it does with its efficiency” and that alternative practices “are relatively inexpensive ways to have a good shot at resolving a case in an amicable, as well as confidential manner.”⁸⁰ Judge Edgar’s choice of “amicable” is not accidental; he later adds that “[p]ersonally, I have a much better feeling as a judge when I have helped resolve a conflict as conciliator and peacemaker rather than as an all-knowing judgment renderer.”⁸¹ Notably Judge Edgar does not disavow traditional litigation values but instead frames his thoughts about mediation as an inquiry into legal structures and values (his opening line is “Why do we have courts?”) and claims that conciliation and other problem-solving techniques are “in the finest tradition of the legal profession.”⁸² Like Judge Shipley’s piece, this particular conversion narrative does not disavow the one approach for the other, but instead seeks an inclusive space for the best of both. As such, Judge Edgar ends with a quote from Isaiah that emphasizes not blind faith, but problem-solving, though still from within a shared understanding of sacred values: “[c]ome now, and let us reason together.”⁸³

Perhaps Judge Edgar’s piece is not so much a conversion narrative but a spin on the conversion narrative: the chronicle of the already converted. The already-converted do not describe an evolution from X to Y but instead point out that they are already happily at Y; thus, bolstering arguments that the move to Y is a good idea.⁸⁴

4. Trend: Efficiency as Professional Rationale?

Many articles in the collection initially present themselves as memoirs, because they are written in the first person and often rely on anecdotes from the judge’s own experience. This is not surprising, considering that memoirs are fun to read and may be easier to write than other, drier forms of scholarship. Moreover, our fascination with the judicial mind perhaps encourages those who are tasked with getting judicial scholarship to ask judges to write articles about their thoughts and experiences.⁸⁵ Memoirs are an

⁸⁰ R. Allan Edgar, *A Judge’s View – ADR and the Federal Courts – The Eastern District of Tennessee*, 26 U. MEM. L. REV. 995, 1000 (1996).

⁸¹ *Id.* at 996

⁸² *Id.* at 995-96.

⁸³ *Id.* at 1000.

⁸⁴ Another example of the chronicle of the already converted comes from Judge John Berman. In 1997, Judge Berman wrote that ADR-like processes existed in the state’s probate courts without statutory requirements to include them. John A. Berman, *Alternate Dispute Resolution in Connecticut Probate Courts*, 11 QUINNIPIAC PROB. L.J. 29 (1997). Such processes came about naturally, apparently in response to the needs of the system and the temperament of the participants and officers. “The spirit of mediation prevails in most probate hearings,” he noted, explaining that many of Connecticut’s probate proceedings are “inherent[ly] mediation-like” and help “foster a setting of compromise” which allows the court and parties to work out many disputes in flexible, informal ways, *id.* at 35.

⁸⁵ Finding judges fascinating is not a recent phenomenon. Recalling Cardozo’s delivery of the Storrs Lectures at Yale Law School, biographer Andrew Kaufman, a biographer of Joseph Cardozo, notes:

The usual process is for audiences to diminish over the course of a lengthy lecture series. Not so with Cardozo’s Storrs Lectures. Once word got around after the first lecture, the audience

easy way to write about one's own experience without getting too personal or venturing into questionable judicial conduct, like taking positions on legal issues.

Beyond these storytelling qualities, however, the fact that some judges talk about mediation as part of a personal account, success story, or conversion narrative may indicate an expansion of judicial identity—that is, what judges (and others) think it means to be a judge. These narratives speak not only to judges as presiders or deciders but also as facilitators and managers. Indeed, with the movement toward managerial judging, conventional trial-focused rubrics are no longer the only relevant markers of professional success for judges. Federal Rule of Civil Procedure 16 and state equivalents, for example, state that “facilitating settlement” is one of the judge’s responsibilities in managing the litigation process.⁸⁶ In memoirs about mediation, therefore, judges can explore how they themselves have fulfilled the dictates of the rules and other newer professional requirements around court-connected alternative practices.

Because so many of the memoirs appealed to statistics and other efficiency metrics, it would be useful to analyze the normative justifications about mediation included in this section. One suggestive trend in the memoirs as collected here is the apparent progression from conversion narratives (mid-1990s) to statistics-heavy personal accounts (more recent). This progression, if it exists, may provide further evidence that, as discussed in the how-to section, the efficiency priorities of mediation today far outweigh other mediation-related values. It may also suggest that, at one time, judges felt more comfortable with other substantive rationales for mediation, outside of efficiency. It may also suggest that in these memoirs judges are identifying themselves with their courthouses and, accordingly, assume the same efficiency-centric norms and values around mediation process that we saw in the informational articles above.

Of course, this progression may not be a progression at all, but instead may simply reflect the insufficiency of the data or the inadequacy of the interpretation. As such, and in keeping with the personal nature of memoirs, it may be helpful in the next phase of the project to follow up with the individual judges who wrote these memoirs. Interviews could shed light on why and how the judges wrote their articles, whether they believe there has been an intellectual progression from more substantive/emotional rationales for mediation to more efficiency-oriented arguments, and what kind of follow-up commentary, if any, they would add to their articles today.⁸⁷

C. *Professional Identities*⁸⁸

My transition from sitting judge to sitting, standing, walking mediator is still a work in progress. ADR looks a lot different from within the

increased dramatically, and the series had to moved from a room seating 250 to a hall seating 500. The latter room was completely filled for the remaining three lectures.

Andrew F. Kaufman, *Forward to the Nature of the Judicial Process*, 8 JUD. NOTICE 39, 43 (Spring 2010).

⁸⁶ FED. R. CIV. P. 16(a)(5) (identifying “facilitating settlement” as one of the primary purposes of the Rule).

⁸⁷ To be clear, interviews will not clarify the “truth” of what the judge “meant” in a determinate way, but will provide important additional layers to understanding what the judge “means” today.

⁸⁸ This theme’s label is inspired by John Lande, *Mediation Paradigms and Professional Identities: Can Mediators Activate a New Movement for Justice?*, 4 MEDIATION Q. 19 (June 1984).

profession than it did from my former perch. Mediation is not an adjunct to judging, no more than teaching is an adjunct to being a lawyer. These are equal but separate professions, each with their own unique set of skills.⁸⁹

At least twenty-three of the articles in the collection are written by retired judges who now serve as neutrals (12) and sitting judges who also mediate (11).⁹⁰ The phenomenon of the judge-mediator has taken on special significance as settlement conferences have become more and more common. Whether judges should serve as mediators and in what capacities are often subjects of judicial writings, as well as what the difference between a judge-mediator and a lay mediator are. These writings, in sharp contrast to the how-to narratives and the memoirs, often address the intrinsic values and priorities of the justice system, separate from efficiency concerns.

1. *Retired Judges Who Mediate*

Many of the articles in the collection are written by retired judges who now mediate professionally, but few of these refer explicitly to that professional transition. Judge Michael Orfield is an exception. Judge Orfield, the author of the excerpt above, wrote a short piece in a California bar journal describing his move from the “third branch” to the “business arrangement” of private mediation.⁹¹ The transition is dramatic but evidently not unpleasant. In fact, Judge Orfield appears to relish the engaged participation that his new role affords. For example, the formalities that previously attended his judicial office (e.g., attorneys prefacing disagreement with “with all due respect”) have been replaced by more direct feedback (e.g., attorneys prefacing disagreement with “that dog will not hunt” or “you’ve got to be kidding”).⁹² Judge Orfield sees judging and mediating as “separate and distinct” and that techniques he used as a judge, such as proposing settlements, are not appropriate now that he is a mediator—precisely *because* he used to be a judge. Here, Judge Orfield recognizes and advises against an attenuated version of what Ed Brunet calls “muscle mediation,” a type of forceful evaluative mediation Brunet associates with judges who mediate cases.⁹³

Again, Judge Orfield’s essay is noteworthy because most of the other articles in the collection written by retired judges turned mediators do not talk about the professional transition from judge to mediator but instead focus on substantive and

⁸⁹ Michael Orfield, “*Toto, We’re Not in Kansas Anymore*,” 52-JUL ORANGE COUNTY LAW. 18, 19 (2010).

⁹⁰ I say “at least” because whether a judge has these dual professional identities is not always obvious from the texts. Many judges become professional neutrals after they retire. For example, JAMS is one of the most well-known associations of high-end neutrals. As of March 8, 2013, there are 318 total neutrals listed on the JAMS website. Of those 196 are former judges (that is, have “(Ret.)” at the end of their names). See JAMS: The Resolution Experts, *Neutrals*, <http://www.jamsadr.com/neutrals-search/> (last visited Mar. 8, 2013).

⁹¹ Orfield, *supra* note 89, at 18.

⁹² *Id.*

⁹³ Ed Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 234 (2003).

procedural topics relevant to mediation.⁹⁴ One might speculate (and indeed, several people have suggested to me) that one reason retired judges turned mediators write these articles may simply be to market and promote themselves for lucrative second careers as neutrals.⁹⁵ Judges who position themselves as experts (how-to) or successful designers/managers (memoirs) could be padding their resumes to make themselves more attractive for high-end mediation gigs in the near future.

Yet, padding and marketing, if those are indeed the motives, are not reasons to discount this scholarship.⁹⁶ In fact, the opposite is true. If judges do pad resumes and market themselves through scholarship, analyzing that literature as a whole could generate fascinating insights into what aspects of mediation knowledge and experience are perceived as more or less marketable than others. This kind of “market research” could greatly enhance efforts to reform and/or promulgate mediation practices.

2. *Sitting Judges Who Mediate*

Judges make public decisions that are binding on litigants. Mediators facilitate private discussions between parties, sometimes weighing in with evaluative opinions, but in no event can bind the participants to an outcome they refuse to sign onto. These are strikingly different professional roles that, in the age of alternative practice and mediation, together now constitute what it means, for many judges, to be a judge.

Judge Judith Dein, a magistrate in the District of Massachusetts, recently wrote that “wearing two hats” as a judge and a mediator bifurcates her job in complex and rewarding ways:⁹⁷

There is a real distinction between my role in cases in which I am serving as the mediator, and cases in which I am serving as the presiding judge. As a mediator, I view my role as helping the parties reach a resolution that meets their needs as best as possible. It is my responsibility to help the parties identify the real (sometimes as opposed to the “legal”) issues in dispute ...⁹⁸

⁹⁴ See e.g., Westerfield, *supra* note 50 (notably, the article did not mention her post-judicial career as a practicing neutral other than listing it in the biographical footnote).

⁹⁵ See Bryant G. Garthy, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 942 (2002) (“For those on the bench attracted by the potential rewards of private judging or other forms of ADR, it is vital they gain access to courts and forums where they can campaign for this kind of reputation. The incentives encourage them to dump cases that have low stakes (except for the litigants) or are argued by lawyers whose opinions do not count in assessments of who is worthy of selection for private ADR. That is not to say that judges everywhere are consciously conducting campaigns; however, judges who want to excel will follow the patterns of behavior of those who are recognized and rewarded.”).

⁹⁶ One could argue, in fact, that whenever anyone writes with a professional goal or audience in mind, those factors could sharpen the analysis, which means that the quality of such scholarship arguably improves. Therefore, these articles could actually be more informative and helpful than non-padding articles.

⁹⁷ Judith Gail Dein, *Wearing Two Hats: Being a Mediator and a Trial Judge*, 57-WTR B. B.J. 7, 7 (2013) (calling the dual role the “best of all worlds”).

⁹⁸ *Id.*

Judge Dein observes that each role helps her become more effective in the other. Acting as a mediator, she can bring useful evaluative perspectives and advice to the parties.⁹⁹ Acting as a judge, she has a heightened awareness of the “people behind the disputes” and a renewed commitment to justice for the litigants.¹⁰⁰

Judge Dein’s modern perspective on the dual role of judge-as-mediator is the latest in a trajectory of articles by judges exploring how to integrate mediation roles and responsibilities into traditional judicial identities.¹⁰¹ Understandably, for many judges, expanding their professional roles to include not only new practices but also new theories of dispute resolution required some internal ordering of priorities and approaches in order to make the transition. Two relatively early reflections on the judge’s role-as-mediator in court-connected mediation demonstrate the commitment of judges to retaining judicial personality and norms:

Active trial judges make fine mediators. The lawyer and the judge that may already be involved in the case know the judge/mediator and how he or she thinks. The judge/mediator generally is well versed in liability and quantum issues. The judge/mediator possesses a wealth of experience and skills useful to successful mediation. Judge/mediators are successful, in part, because their opinions carry weight. If the judge proposes a particular compromise, the parties take notice, even if the suggestion is known to be non-binding.¹⁰² (Judge Bleich, 1995)

Mediators tend to fall into one of two camps. They are often referred to as “facilitative” and “evaluative.” That’s mediator-speak for neutrals who don’t express their views on the merits, likely outcomes or worth of a case, and neutrals who do. I am emphatically one of the latter. I firmly believe that the parties, to say nothing of the lawyers, expect guidance in the process from the mediator, even to the point – where appropriate – of suggesting a settlement figure. It may look good in a textbook to describe how settlements magically emerge from “feel good” seances overseen by a third party, but this third party has yet to see one of those miracles occur.¹⁰³ (Judge Hart, 2000)

As Brunet points out, judges who mediate generally follow standard mediation procedures but “[n]onetheless judicial mediation is unlike other forms of mediation in one very important respect: the mediator is a judge.”¹⁰⁴ Parties are arguably more likely to hear the judge-mediator’s evaluative assessments more loudly and authoritatively than the evaluative assessments of the non-judge mediator, which could overweight the

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 8.

¹⁰¹ *See, e.g.,* Breen, *supra* note 49.

¹⁰² Bleich, *supra* note 49, at 152 (footnote omitted).

¹⁰³ Hart, *supra* note 24, at 73.

¹⁰⁴ Brunet, *supra* note 93, at 233-34.

mediator's role and thus lead to self-determination and consent problems.¹⁰⁵ Yet, as the writings of Judges Dein, Bleich, and Hart suggest, it is precisely these evaluative assessments that make mediation valuable for the parties, and not just as an efficiency matter. Part of the assessment, after all, is involving the parties in explaining and understanding the issues, something at which many judges excel. As Judge Hart states: "Once you have the clients in the room, don't make them potted plants. ... [L]et the plaintiff have the floor. ... [I]t can be a wake-up call for the defense to see just how invested the plaintiff is in the case."¹⁰⁶ Perhaps the flip side of the judge-mediator overpowering the parties' capability for self-determination is the judge-mediator empowering weaker parties to participate, by virtue of the apparently "official" recognition and acknowledgement that the parties experience in the actual judicial presence.

Another worry scholars have about judges who mediate is that the role confusion of judge/mediator is potentially quite problematic in cases involving judges who first mediate and then preside over the same case.¹⁰⁷ How can the judge put aside what she has learned in the mediation (or in the settlement conference, for that matter) and impartially oversee the litigation? And how can the parties ignore what they may perceive as signaling from the judge during the mediation?

The articles in the collection suggest that judges are aware of this potential problem and address it in various ways. For many judges, court practices preclude them from mixing roles. Judge Dein, for example, remarks that magistrates in the District of Massachusetts only preside over cases they mediate in "extraordinary cases."¹⁰⁸ Likewise, Judge Celeste Bremer states that in the Southern District of Iowa, "[w]hen one of us is assigned as the trial judge on consent of the parties, another magistrate will serve as the settlement judge," a role similar to a mediator.¹⁰⁹ According to Judge Bremer, having the same trial judge as mediator discourages parties from "participat[ing] fully or candidly in the mediation process," which in turn prevents them from "learn[ing] through mediation what their best settlement option really is," which precludes mediation's efficiency benefits and substantive values, such as self-determination.¹¹⁰

These comments from Judge Bremer come from an interview conducted by retired judge-turned-professor Wayne Brazil. In that same interview, Brazil talks with Judge Karen Klein of the District of North Dakota, making this particular work the "triple threat," the most judicially authored of all the articles. Judge Klein, who herself has written one of the more scholarly articles in the collection (discussed in the Debate Club), has a different view on the propriety and value of judges serving both as mediator and trial judge on the same case:

¹⁰⁵ Prominent ADR scholars have noted the tension between evaluative mediators and party self-determination. See, e.g., Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937 (1997).

¹⁰⁶ Hart, *supra* note 24, at 72.

¹⁰⁷ See, e.g., Brunet, *supra* note 93, at 256-257 (summarizing arguments).

¹⁰⁸ Dein, *supra* note 97, at 8.

¹⁰⁹ Judge Bremer and Judge Karen Klein's observations here come from an interview conducted by retired judge-turned-professor Wayne Brazil, *Judicial Mediation of Cases Assigned to the Judge for Trial*, 17 No. 3 DISP. RESOL. MAG. 24 (2011) [hereinafter Interview].

¹¹⁰ See *id.* at 26, 27.

Mediation is a process that empowers the parties to reach their own decisions, and that should include the power to choose the trial judge as their mediator, as long as they are well-informed about their options and really can choose among those options freely. ... I have never sensed during mediation of a case assigned to me for trial that the lawyers or parties felt any obligation to settle, or any duty to please me or to relieve my docket.¹¹¹

Parties may want the same judge for both processes because of informational streamlining¹¹² or because they believe that the mediation has “added value” as a kind of “day in court” if the trial judge participates.¹¹³ Of course, these benefits are only available with parties who have informedly and unreservedly consented. Part of Judge Klein’s strategy for making sure that the parties freely choose their process is telling settlement participants that “the court has no stake in the outcome and is pleased to have a trial if they don’t reach a settlement.”¹¹⁴ Wayne Brazil gracefully wraps up the interview by finding common ground.

3. *The Judge-Mediator-Professor*

The mention of Wayne Brazil suggests an additional professional identities category and possible area for further research: the judge-mediator-professor. Brazil has had an extraordinary career as an innovator and leader on some of the most ambitious court-connected ADR reform efforts in the country.¹¹⁵ As a magistrate judge, Brazil authored several well-received articles on mediation topics as diverse as early neutral evaluation, confidentiality, and the “spiritual fatigue” mediators often experience.¹¹⁶ More recently, and since joining the faculty at Berkeley Law, Brazil wrote an article exploring the rights-resolution tension in modern dispute resolution. This tension is at the heart of the professional identities articles in the collection:

[I]f our ADR processes are occupying, or about to occupy, most of the field of civil justice, is it wise for us to try to promote resolution by

¹¹¹ *Id.* at 27.

¹¹² *See* Brunet, *supra* note 93, at 257.

¹¹³ *See* Interview, *supra* note 109, at 27.

¹¹⁴ *Id.*

¹¹⁵ *See* Press Release, Am. Bar Ass’n, California Magistrate Judge Wayne Brazil to be honored by the American Bar Association Section of Dispute Resolution (Jan. 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/pdf/D_Raven_AwardPressRelease_09.authcheckdam.pdf (discussing the D’Alemberte-Raven Award. In 2009, for example, the American Bar Association Section of Dispute Resolution honored Wayne Brazil with the D’Alemberte-Raven Award. This award “recognizes leaders in the dispute resolution community who have contributed significantly to the field by developing new or innovative programs, improvements in service and efficiency, research and writings in the area of dispute resolution or continuing education programs.”).

¹¹⁶ Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 DISP. RESOL. MAG. 10 (2007); Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); *see e.g.* Wayne D. Brazil, *Thoughts About Spiritual Fatigue: Sustaining Our Energy by Staying Centered*, 2008 MO. J. DISP. RESOL. 411 (2008).

sending messages to parties that challenge their belief in the reality of rights, that undermine their confidence in the rule of law? When we emphasize such messages (e.g., to encourage “flexibility” in the parties’ settlement positions), we may be, in effect, promoting resolution in individual cases at the cost of intensifying parties’ alienation from the system of civil justice. In so doing, we risk elevating resolution over rights.¹¹⁷

Note the first-person plural (we, us, our) here. First-person plural is characteristic of Brazil’s work. He often frames social and legal challenges as “our” responsibility that “we” must develop possible solutions to address. This could be simply a stylistic choice or it could indicate that Brazil conceives of his audience broadly, including judges, mediators, professors, and everyone else with a stake in dispute resolution (so, basically everyone). As an interpretive matter, however, the choice of first-person plural in this article complicates Brazil’s text in interesting ways. For example, consider the following sentence:

If we want to protect that balance [between resolution and rights], we had better be prepared to counter accusations, sometimes by judges, that mediators care more about protecting themselves and their precious (literally) process than they do about whether parties comply with substantive societal norms.¹¹⁸

Who is the “we” here? Brazil could have written something like “ourselves as judges” instead of “judges,” or “we mediators” instead of “mediators,” but instead he moves those people into the third person, arguably repositioning the tension between rights and resolution as a professional and structural tension between those two roles, syntactically separate from himself and the reader, the “we” who want to protect the balance.¹¹⁹ But if “we” does not include them then who are “we”? Following this train of thought, earlier in the piece Brazil mentions “our field,”¹²⁰ which initially sounded like “we mediators” but in light of the third-person shift above now seems amenable to different interpretations. Could “we” refer to law professors, for example, and could “our field” refer to legal academia? If so, how does this rhetorical shift from addressing mediators and judges to addressing law professors implicate professors in front-line efforts to ensure that the practice of mediation supports rights and justice? With this in mind, consider this possible reworking of two sentences from Brazil’s article:

To maximize our movement’s capacity to move the real world, we must reassure the skeptics, the thoughtful as well as the cynical, that it is the real world in which our methods and theses are rooted. We must be

¹¹⁷ Wayne D. Brazil, *Rights and Resolution in Mediation: Our Responsibility To Debate the Reach of Our Responsibility*, 16 No. 4 DISP. RESOL. MAG. 9, 12 (2010).

¹¹⁸ *Id.*

¹¹⁹ I don’t think he is trying to avoid criticism as a mediator, however.

¹²⁰ Brazil, *supra* note 117, at 9.

understood as appreciating fully the importance of having visible and real sources of discipline in our human affairs.

To maximize the legal academy's capacity to move the real world, law professors must reassure the skeptics, the thoughtful as well as the cynical, that it is the real world in which the academy's methods and theses are rooted. The legal academy must be understood as appreciating fully the importance of having visible and real sources of discipline in academic (or maybe intellectual) affairs.¹²¹

Reimagining Brazil's article in this way connects his thinking about rights and resolution to larger "ivory tower" debates that seek to define and redefine the academy's relationship and responsibility to society at large. These debates are especially salient for law schools and for ADR faculty in law schools, because we prepare students to engage directly with systems of power and change: namely, law and politics. Reading Brazil's article as not just an address to mediators or judge-mediators but also – in keeping with his tripartite professional identity as judge, mediator, and professor – as a direct challenge to ADR professors opens new mental space for rethinking how we teach ADR not as alternative to but in the context of rights and law.

Adding "professor" into the professional identities of judge-mediators who write scholarship, therefore, suggests possible new interpretive layers and connections between practice and theory. The foregoing analysis is just one example of how rereading the works of someone with multiple professional hats can complicate and deepen understanding of the material. It may be, with additional examples of and research into judge-mediator-professor writings, that along with these practice-theory insights, conceptual tensions and value rifts will emerge. The judge-professor, for example, is an intriguing and somewhat paradoxical creature, as is the judge-mediator (though in different ways). As Stephen Burbank points out in an article on Judge Jack Weinstein (who also appears in this collection, see below), the law professor enjoys an intellectual freedom and independence that are not always consonant with the responsibilities and professional parameters of judging:

Academic freedom and judicial independence are alike in some respects, including the fact that they exist to protect institutions. They also differ in critical respects. Whereas intellectual autonomy is central to the integrity of the academic enterprise, it can be inimical to the perceived legitimacy of the judiciary in a democracy.¹²²

Burbank argues that "an important part of Weinstein the judge is Weinstein the law professor"¹²³ and as such traces Weinstein's academic tendencies and intellectual independence not only through Weinstein's published opinions but also, importantly,

¹²¹ *Id.* at 10.

¹²² Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1974 (1997).

¹²³ *Id.* at 1973.

through his judicial activities separate from those opinions.¹²⁴ He admires Weinstein but also believes that the independence of professor is not compatible in all ways with the responsibilities of the judiciary, and that Weinstein was a flawed judge in this respect.¹²⁵

In terms of trajectory, Brazil is not precisely in the same situation as Judge Weinstein. However, tracking Brazil's scholarship may reveal important discontinuities between real-world problems and ADR research and pedagogy, which can in turn suggest new potential synergies for practitioners and professors.

4. *Trend: Efficiency is Not Enough*

Whatever the merits of the judge-mediator role debates, one interesting thing about these divergent views is that here we see the reemergence of mediation values other than efficiency. Self-determination, consent, and substantive justice are again at the forefront, not just measurements of efficiency. In fact, efficiency would likely militate against having different trial judges from mediators/settlement conference judges, because the timing would likely be smoother if the settlement conference or mediation could run right into the litigation instead of needing to be reallocated to someone else. Perhaps these non-efficiency arguments come up here because judges in these positions have their skin in the game, such as it is, and are holding themselves accountable for the process in a more personal, value-bound way. Here values of mediation and values around judging converge: issues of fairness, impartiality, procedural stability, rule of law not of man, and so on.

For judge-mediator-professors (as for judge-professors), this normative layer is even more apparent, perhaps, because of the decidedly non-efficient norms of legal academia. Tenured professors want their work to have an impact, of course, but that impact is generally not measured in terms of market penetration or other external metrics (and even if it were measured in this way and the professor came up lacking, the professor's job would be safe). As such, academic work can afford to examine priorities other than efficiency.

Finally, as mentioned above, further research into Brazil's works, especially research that contextualizes his writing in the larger historical development of alternative movements and court-connected practices would be valuable. Additionally, like the memoirs, our understanding of the works in this subtheme could benefit from follow-up interviews with judges. Again, this is not because the judges will explain what the texts mean, but because they can complicate and augment the issues explicit and implicit in their works.

¹²⁴ Burbank, *supra* note 122, at 1972 n.5 (citing JEROME FRANK, *COURTS ON TRIAL* 165-85 (1949) and Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1955-56 (1989) (noting that “[m]ost of Judge Weinstein’s judicial behavior is not captured in opinions. . . . Moreover, because of both the rhetorical function of opinions and publication practices that are neither comprehensive nor scientific, published opinions may give a distorted picture of the legal landscape.”)).

¹²⁵ It would be interesting to study not just the problems and benefits of extrajudicial scholarship but also the merits, as explored in this study, of treating extrajudicial scholarship as primary texts in legal analysis. Burbank’s article on Weinstein is an important humanities and legal project because it helps elucidate the complicated subjectivities that judges come from when they engage in the enterprise of judging, separate from (oversimplified) political labels or (overpromising) neuroscientific advances.

D. Debate Club

In a 1983 dedication address of the Notre Dame London Law Centre, Justice Warren Burger commented:

If Sir Thomas More's utopia were achieved, we would not need lawyers; and without lawyers perhaps we could survive without judges, or at least with fewer judges. In that ideal setting we would need even fewer physicians, I suspect, for the stresses that produce illness would be far less. In that happy state of Thomas More, the population would be made up of producers, consumers and teachers—teachers in the broadest sense of that term. There would be no lawyers, no judges, and no soldiers. But until that society of the Golden Rule and the Golden Day is achieved, lawyers and judges will be necessary wherever men and women are gathered in villages, towns, and cities, and rub shoulders, share boundaries, and deal with each other daily.¹²⁶

Here Justice Burger draws upon a metaphor that I have commented on in earlier work: associating law and lawyers with the non-utopian state.¹²⁷ In that work, I argue that much of the appeal of alternative processes lies not just in its positive assertion of an idealized vision of harmonious dispute resolution (utopia) but also in its express rejection of broken, dehumanizing adversarial processes (dystopia).¹²⁸ Later in the same address, Justice Burger presses again on the disconnect between ideals of justice and our flawed legal system, comparing the adversarial judicial process to the behavior of dumb beasts:

Both truth and justice are essential to a system of law based on reason. We desperately need a generation of lawyers—and law teachers—who understand that access to justice does not invariably mean access to courtrooms. Primitive people who relied on clubs and stones and brute strength to settle differences can be forgiven because they were unable to grasp the idea of any other method of dispute resolution. But modern lawyers, educated in great universities and trained in the law, have no excuse for treating the judicial process as the primary mode of resolving conflicts.¹²⁹

¹²⁶ Warren E. Burger, *Remarks of Warren E. Burger, Chief Justice of the United States at the Dedication of Notre Dame London Law Centre: The Role of the Lawyer Today*, 59 NOTRE DAME L. REV. 1, 2 (1983).

¹²⁷ See generally Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477 (2012).

¹²⁸ See *id.* at 480-81; see also Amy J. Cohen, *The Family, The Market, and ADR*, 2011 J. DISP. RESOL. 91, 93 (2011) (“ADR, in other words, envisions communities of people who resolve conflict, correct criminal behavior, make deals, and manage organizations, because they are bound together—like the family—by affective, interpersonal, intimate, localized, and ethical relationships as much as by the mutual self-interest of the market or the collective political belonging of the nation-state. This vision, I suggest, presents an increasingly popular (yet normatively quite complex) construction of the kinds of societal self-regulation that are today deemed possible and desirable from within the ‘private sphere.’”).

¹²⁹ Burger, *supra* note 126, at 4.

And so we have the framework for one of the great debates in law: the struggle between alternative/private/new dispute resolution and traditional/public/old legal system. Many of the judges who wrote articles in the collection engage this debate on various points and at various levels. Some wrestle with the data, considering whether and how alternatives processes improve efficiency in American courts. Others wrestle with the philosophy, attempting to articulate and better understand the value-based tensions arising from introduction of mediation and other alternative practices into the civil justice system. Being judges, the authors of these pieces are ready to take a position on the debate; being judges, they often take this position after setting up the strongest case they can for the opposing side.

The Debate Club theme attempts to capture the strands of argument, opinion, examination, intense conversation, and disagreement in the collection. Listing out the apparent positions of each judge on various issues will not do justice to the vigor and intellectual energy in these articles. Accordingly, this Part envisions some of these judges as actual participants in a debate club, formed into teams that argue the pros and cons of contentious, complex issues. First, however, we must determine the question that the teams will debate.

1. *The Question for Debate*

Fortunately, Judge Larry Boyle from the District Court of Idaho provides the perfect debate question in his 2012 article, *Mediate, Arbitrate or Litigate: What Would Lincoln Do?*:

“What would Lincoln do – mediate, arbitrate or take it to a jury?”¹³⁰

For many if not most Americans, Abraham Lincoln represents the very best of what lawyers can be.¹³¹ As Judge Boyle points out, “the overwhelming consensus [of Lincoln biographers] is that Lincoln was a premier attorney, and one of the most creative, intelligent and exceptional advocates ever to address a court or jury”¹³² and furthermore that Lincoln’s “ability to ride into town, make friends, win a client, analyze facts, cross-examine and win a jury over were the skills that saved the Union!”¹³³ Judge Boyle is quick to point out that Lincoln was a man, not a myth, but that even so demonstrated an extraordinary breadth of legal talents and leadership qualities.¹³⁴ For the purpose of debate, however, Lincoln as legal legend will serve nicely. Such a person, after all, would certainly know whether and how alternative processes should displace traditional ones.

The question for debate, then, requires the teams to think through quintessential American values and norms around justice, freedom of choice, equal treatment, peace,

¹³⁰ Larry M. Boyle, *Mediate, Arbitrate or Litigate: What Would Lincoln Do?*, 55-MAY ADVOC. 38, 38 (2012) (emphasis omitted).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 42 (citation omitted) (quoting David H. Leroy, former Idaho Attorney General and Lieutenant Governor).

¹³⁴ *Id.* at 38.

neighborliness, and no-frills common sense. Note that in answering “what would Lincoln do” the positions below are stated as pro-mediation and pro-litigation. Sorting the articles into these two positions is not meant to flatten the arguments into absolutist caricature on either side. To be sure, the articles largely recognize the benefits of both approaches, though they do end up valorizing one more than the other.

With these disclaimers in mind, let us hear first from the proponents of court-connected mediation as selected from the collection: Judge Lisa Fenning, Senior Judge D. Duff McKee, Judge Robert P. Murrian, Judge Lisa Sullivan, and Judge Karen Klein.

2. *Lincoln Would Mediate*

The pro-mediation position (which, to reiterate, is not an anti-litigation position) in the collection emphasizes three interrelated points. One, the traditional legal system is broken and requires an overhaul. Two, mediation adds value, both efficiency- and justice-wise, to court processes and dispute resolution. And three, the practices and philosophical underpinnings of mediation disrupt the conventional patriarchal discourse of the traditional legal system, a discourse that enshrines and perpetuates historical inequities of power. In so doing, mediation can provide space for different voices, experiences, and priorities.

First, and in agreement with Justice Burger, the pro-mediation side argues that the legal system does not work well enough for the complex needs of modern society. Judge Fenning provides an example from the context of bankruptcy practice circa 1996:

Chapter 11 [as a litigation process] isn't working right. Even its fans acknowledge the increasingly obvious symptoms of dysfunction. The criticisms are not just coming from ivory-tower academics or special interest groups. Leading judges and practitioners are saying it, too.¹³⁵

Judge Fenning argues that Chapter 11 proceedings are a poor fit in traditional binary litigation and are more correctly thought of as “mediation, not litigation.”¹³⁶ Additionally, she observes, “[c]hanneling access to the judge through adversarial pleadings encourages litigiousness as the only way to be heard.”¹³⁷ In other words, the single-track approach of reducing everything to a civil case not only is a poor fit for certain matters, such as Chapter 11, but also limits lawyers and judges to a single tool—adversarial practice—no matter what the nature of the problem or situation might be. Adding mediation to the quiver of problem-solving tools, according to Judge Fenning, is eminently sensible both as a matter of law and policy.

Senior Judge McKee agrees with Judge Fenning's assertion that adversarial practice is often insufficient or destructive. He identifies lawyers as a big part of the problem. “Given this growing legal climate [of settlement], and given the apparent simplicity of the money-damage-only case, ... [w]hy not just turn the lawyers loose with instructions to negotiate and get out of the way?” he asks, and then answers his own

¹³⁵ Lisa Hill Fenning, *Mediation, Not Litigation* (pt. 1), 15-AUG AM. BANKR. INST. J. 35, 35 (1996).

¹³⁶ *Id.* at 36.

¹³⁷ *Id.*

question: “[It is because] trial lawyers generally make lousy negotiators.” Lawyers are “advocates” not “collaborators” and as such cannot be expected to handle the collaborative work of settlement. Therefore:

Enter the mediator. A mediator brings to the settlement venue a bag full of devices to facilitate a settlement. The devices are effective even when both sides appear to be fully prepared and motivated to settle.

On this view, mediators help fix legal culture by providing the collaborative piece missing in the lawyerly personality and in the civil system more generally. Judge Murriam supports this point, noting that “[t]rial by jury is just one option—and many times it will not be the best one.” He argues that judges and trial lawyers should learn about the different ADR processes so that they can advise parties and clients accordingly.

The above argument that litigation alone cannot successfully serve the needs of modern disputants leads into the pro-mediation team’s second point, namely that mediation is added value in the court system. For example, Judge Sullivan identifies five benefits of ADR in family law cases: quicker resolution, party self-determination, “venting opportunities,” “intangibles” such as dialogue between the parties, and positive modeling for future interactions between the parties.¹³⁸ These value-adds are unavailable in the traditional legal framework because of docket congestion, and because of the highly structured process of litigation that precludes self-determination, discourages venting, forbids dialogue between the parties (when in session), and provides no space or guidance for forward-looking relational or communication modeling that may be useful to the parties. Put another way, not only is mediation responsive to the inadequacies of the legal system by giving judges and lawyers different tools for managing cases, mediation also provides new educative and even therapeutic functionality in the courts.

Finally, the pro-mediation position closes with an article by Judge Klein on mediation and gender.¹³⁹ Judge Klein applies Carol Gilligan’s formulation of “ethic of rights” (associated with men) and “ethic of care” (associated with women) to notions and practices around litigation and mediation today.¹⁴⁰ On this view, litigation is loosely associated with men/“rights” orientation and (facilitative) mediation with women/“care” orientation. Judge Klein then speculates that the growing number of women in the law may account for the “growing preference for resolving legal disputes through mediation.”¹⁴¹ As she puts it:

Mediation has not grown in popularity solely because of the increasing presence of women and the awakening ethic of care in male lawyers; economic factors such as litigation cost and delay engendered by crowded

¹³⁸ Lisa Sullivan, *ADR Offers What the Bench Cannot*, 85 MICH. B. J. 16, 16-18 (2006).

¹³⁹ Karen K. Klein, *A Judicial Mediator’s Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice*, 81 N.D. L. REV. 771, 771-72 (2005). It is important to note that Judge Klein recognizes that gender is not a fixed construction, either in Carol Gilligan’s work or in her own. She acknowledges associations and tendencies with gender categories so long as these associations and tendencies do not overgeneralize or “exaggerate[] the role of gender,” *id.* at 776.

¹⁴⁰ *Id.* at 777 (“Women lawyers, like women generally, presumably exhibit a care-oriented morality more often than their male counterparts.”).

¹⁴¹ *Id.* at 772.

dockets have likely provided a significant impetus for the mediation explosion. Yet, the contribution of care-based practice should not be discounted. Growing acceptance of the different approach women bring to the profession and the subtle (or, maybe not so subtle) push of care-minded lawyers has caused a shift from the win-lose dichotomy of litigation toward the client-driven, relational approach of mediation.¹⁴²

According to Judge Klein, court-connected mediation does more than just provide process diversity and added value. Court-connected mediation makes room for more women (and men) lawyers, judges, and mediators; this in turn makes room for alternative values and priorities and voices, which then makes possible different and legitimate ideas about what constitutes a “fair” outcome to a dispute. If we are satisfied that traditional conventional legal values and labels are sufficient, then surely we do not need these different voices; but, as Judge Klein points out, if we were indeed satisfied, then likely the different voices would not be raising their concerns and ideas about other ways our society might function.

And so the pro-mediation contingent returns to the earlier excerpted comments of Justice Burger and his call for disaggregating access to justice from courts and litigation. To recap, the pro-mediation team argued that mediation is an effective, valuable remedy to the procedural and value-based system failures of modern litigation. And these comments are not coming from the ivory tower or wild-eyed community activists, but from judges who are intimately familiar with the strengths and weaknesses of the traditional system.

With that, let us turn to the pro-litigation team selected from the collection: Judge James Gritzner, Judge Robert Martin, and—the heavy hitter—Judge Jack Weinstein.

3. *Lincoln Would Litigate*

The pro-litigation position (which, to reiterate, is not an anti-mediation position) in the collection focuses primarily on the core values of the civil justice system and assumes that the problems facing legal culture today (delay, congestion, bureaucracy) do not come from those core values but instead threaten them. On this view, mediation and alternative practices are an attractive but dangerous fix for these problems (delay, congestion, bureaucracy) because if overused, alternative methods may themselves erode the core values beyond repair.

Chief among these core values is the conception of the judicial role as an “umpire,” impartial and passive, overseeing the contest between players with a stake in the outcome:

We would all be astounded if, at a softball game, the umpire stepped out from behind the plate and instructed the outfielders to come in because the next batter was a weak hitter or shift toward right field for a left-handed batter. Even more outrage would be expressed if our fictional umpire were to tell a shortstop to get back on the right side of second base

¹⁴² *Id.* at 792.

because the “Boudreau Shift” is not permitted on her diamond. Yet, otherwise sensible bankruptcy lawyers and judges are suggesting that bankruptcy judges should abandon their role of deciding between positions advanced by advocates in favor of assuming the garb of a grand inquisitor to assess the bona fides of a debtor ...¹⁴³

These words come from Judge Martin, who like Judge Fenning is writing about Chapter 11. In this passage, Judge Martin invokes the popular image of judge-as-umpire and reminds the reader that the Anglo-American system does not brook inquisitors, as does the so-called Continental system of centralized inquisitorial practice. Regarding the specific issues with Chapter 11, Judge Martin offers some suggestions for reform.¹⁴⁴ He does not, however, extend these reforms to reinvention of the judge’s traditional role. On the contrary, he frames his reform proposals as intended to fix the problems while “retain[ing] the judge’s traditional role as arbiter of controversies.”¹⁴⁵

Judge Martin focuses on the importance of preserving the traditional judicial role. Judge Gritzner, for his part, turns the reader’s attention to the importance of preserving the civil trial itself.¹⁴⁶ After describing the “all too infrequent[]”¹⁴⁷ experience of watching the jury return to the jury box and deliver the verdict—the “purest form of democracy”¹⁴⁸—Judge Gritzner describes what happens with mediation:

Compare that [jury] experience with disputing parties gathered in a conference room or dueling conference rooms with the assistance of a mediator who postures, insists, and negotiates in an effort to get the most bang for the parties’ buck, to resolve the dispute in the least expensive way, to get the parties back to their normal business as quickly and cheaply as possible, and perhaps to obtain a result of strategic importance to their enterprise. At that moment, we experience the purest form of capitalism.¹⁴⁹

Judge Gritzner states that the civil trial, though not extinct, is “on fairly equal footing with the American bison.”¹⁵⁰ Factors tending to wipe out the civil trial include cost, delay, “user-unfriendly court rules and policies,” judicial hostility to trials, and the “increas[ing] importance of dispositive motions” that prevent cases from reaching the jury.¹⁵¹ Judge Gritzner’s fear is that ADR, as the primary corrective measure adopted by litigants and courts, will “grasp[] an ever-increasing share of our means to resolve our

¹⁴³ Robert Martin, *Mediation-Shmediation—Let’s Play Ball*, 16 AM. BANKR. INST. J. 34, 34 (1997) (No relation to Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005)).

¹⁴⁴ Martin, *supra* note 143, at 34.

¹⁴⁵ *Id.*

¹⁴⁶ James E. Gritzner, *In Defense of the Jury Trial: ADR Has Its Place, But It Is Not the Only Place*, 60 DRAKE L. REV. 349, 349 (2012).

¹⁴⁷ *Id.* at 350.

¹⁴⁸ *Id.* at 351.

¹⁴⁹ *Id.* (citation omitted) (“They erect shrines to democracy. When reference is made to a shrine of capitalism, it is made ironically.”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 355-58.

disputes . . . The siren needs to sound or the ADR glacier will flatten the landscape.”¹⁵² He concludes his article with an appeal to justice:

Lastly, mediation lacks an important element. Unless the parties walk away from mediation, the claimant always wins something and the defendant always gives up something—no one wins everything. Sometimes—indeed often—when one party wins everything, that is justice.¹⁵³

There is a distinctively American flair to Judge Gritzner’s prose (bison, glacier, winning) that underscores his substantive argument that, insofar as mediation and ADR replace the civil trial, they are undemocratic and un-American.

Now for Judge Weinstein. “Before permitting traditional court functions to be supplanted by private dispute resolution approaches,” he states, “it is useful to reflect on the central role of the courts in society’s dispute resolution system of the past and the reasons for preserving that centrality in the future.”¹⁵⁴ Like his teammates, Judge Weinstein is concerned about the public dimension of the law in the United States, not only as a matter of history but as an ongoing vibrant concern and essential resource of society:

Procedures, jurisdictional rules, and other seemingly neutral devices that affect people’s ability to use the courts are part of a complex set of social relations. Any device—whether ADR or changes in formal litigating procedure—that makes it more difficult to get into court, has a substantive effect on how people see their rights in the real world. . . . Are we in danger of shutting the courthouse door to the have-nots with the excuse of procedural and substantive reform? Any change which increases the difficulty of bringing suit will have a disproportionate effect on the poor and relatively powerless.¹⁵⁵

Judge Weinstein does not disapprove of mediation and ADR in all instances. He believes that courts will serve people more effectively “both by improving court procedures, and by *some* privatization of dispute resolution.”¹⁵⁶ Ultimately, however, the dominant mechanism for dispute resolution must be the public court system:

We cannot forget, however, that in a democracy such as ours, the obligation for making law and for changing substantive balances among members of our society lies ultimately with members of our elected and appointed governmental legal institutions. The power to control the law

¹⁵² Gritzner, *supra* note 146, at 353, 360.

¹⁵³ *Id.* at 364.

¹⁵⁴ Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 248 (1996).

¹⁵⁵ *Id.* at 258.

¹⁵⁶ *Id.* at 294 (emphasis added).

and justice cannot be permitted to seep out of the hands of the people through privatization.¹⁵⁷

With that, the pro-litigation team concludes. To recap, the pro-litigation side conceded that the civil justice system is indeed afflicted with problems such as cost and delay but disagreed that alternative processes should be the only or primary response to these problems. On the contrary, too much ADR ventures on the undemocratic because alternative processes (such as mediation) have the potential of transforming judges into inquisitors; foreclosing trials and enervating the institution of the jury; valorizing business arrangements at the expense of rights; exposing weaker parties; making private what should be public; and eating away at the historical foundation of law and legal institutions in the United States.

4. *Who Wins, and Why Does It Matter?*

This imaginary debate is just that: imaginary. The judges quoted above were not writing in response to the stated question or to one another. They were not even writing in the same time periods. But because Judge Boyle actually does answer the question “what would Lincoln do?” in his article, we can extend this thought experiment a little farther and declare a winner.

Or can we? In his article, Judge Boyle traces Lincoln’s professional evolution through law and then politics, a trajectory that found Lincoln both addressing juries in the courtroom and overseeing conciliations in his law offices.¹⁵⁸ Based on this historical and biographical portrait of Lincoln, Judge Boyle concludes that this extraordinary person would not have conceived of dispute resolution process categories as abstract forms but instead would have fit his responses to the situation:

[I]f he were practicing law with us today, at the beginning stages of a dispute I am confident Lincoln would be a peacemaker and negotiate with the other lawyer to reach real common ground. I am confident he would practice law in much the same manner as fine lawyers practice today. . . . Regardless of whether Lincoln would choose to mediate, arbitrate or litigate, depending on the circumstances I believe he would do what was right, honest and best for his client.¹⁵⁹

Well, this answer is pretty unsatisfying. We all know that Lincoln the legal legend would have done what was right, honest, and best. What we do not know is whether he would have thought mediation, arbitration, or litigation most closely fit, as a general rule, what is right, honest, and best. Answering “all three” refuses to prioritize these process choices, other than to give a slight preference to conciliatory processes at an early stage (a preference that is not antithetical to traditional litigation).

¹⁵⁷ *Id.* at 294-95.

¹⁵⁸ Boyle, *supra* note 130, at 39-42.

¹⁵⁹ *Id.* at 42.

On further reflection, however, Judge Boyle's answer appears quite profound. First, by broadening the popular understanding of Lincoln's professional capabilities and career to include not just trial work but also conciliation, the judge redefines what it means to be a great lawyer and statesperson. In turn, he recasts the debate above as not being so much about process choices leading values but about values, community and judicial, defining process choices. His answer therefore is both pro-mediation and pro-litigation, forward-looking and traditional, all at once.

Additionally, by refusing to answer the question Judge Boyle sensibly leaves the debate open; thus, reflecting the current status of this debate today. For those of us engaged in the project of developing broader public understanding of process choices within the framework of civic rights and responsibilities, identifying the rhetorical appeal of the different arguments in this debate is an important first step in developing a substantive message about how people can participate meaningfully in self-determination processes not only in litigation contexts but also in multiparty decision-making or deliberative democratic processes. Reading through these Debate Club articles, at a minimum, resensitizes the reader to the kinds of arguments that resonate with people: Dignified treatment. Efficient processes. Competent, responsible state actors. Democratic participation. Civic rights and duties, regarding self and other. Protecting the disenfranchised. Respecting where we have come from. None of these arguments are proprietary to process choices, as Judge Boyle points out, but should instead inform both the rationale for making the choice and—importantly—the support provided (education, information, etc.) to those involved in and/or affected by the choice.

V. CONCLUSION

It would be a mistake to limit the possible interpretive projects of the dataset to efficiency tracking. Although the articles provide a wealth of information about how judges prioritize (or say they prioritize) efficiency when thinking about mediation, this is not the only benefit of collecting these works.

For example, within the how-to subset many potential interesting and unexplored comparison points exist. A future study could do a closer reading of the how-to articles to determine whether and how mediator style (facilitative, evaluative, transformative) surfaces in these pieces. To the extent mediator style is part of the judge's analysis, it would be useful to examine how the judge characterizes the styles and what advice the judge gives for choosing between the styles. To the extent that mediator style does not appear in the judge's analysis, it would be helpful to suss out any assumptions made around what professional approaches mediators should take. This kind of analysis would provide additional insight into the actual working definitions of mediation today.

Additionally, further analysis could consider when and how judges cite to academics. Although I did not make a disciplined study of this question, I did notice positive mentions of famous names like Carrie Menkel-Meadow, John Lande, and Marc Galanter now and then. Although it is always a tricky business to try to figure out the relationship between judges and scholars, citations could provide another data point for mapping this relationship. Such a project arguably sheds light on convergences between scholarly interests and judicial realities, which could provide more insight into how to direct research (or how to reform court systems).

It would also be helpful to see whether trends in judicial writing are consistent over subject areas, in terms of frequency over time.

For me, this dataset supports a larger research agenda to identify normative and rhetorical devices that are, for lack of a better way to put it, appealing to normal people—not to lawyers, not even necessarily to judges, but to people who are relatively untrained in dispute resolution processes. Our democracy is confronting some of the largest, most complex public decision-making issues we have ever faced: among them, the environment; the prison system; the economy. It is not enough to teach lawyers and neutrals to be effective in multiparty dispute resolution and decision-making contexts. Those who participate must also have a working knowledge of process, norms, and expectations. Developing that knowledge will require, as one piece, an understanding of what makes sense to non-ADR experts about alternative processes. Is ADR the new Civics? And if so, how can ADR scholars help develop the necessary curriculum and outreach to support this social and cultural transformation?

Judges may be a better source of data on these matters than lawyers and scholars, because judges interact with the public on a much more regular basis than those other two groups do. By collecting information about how mediation works and is perceived by judges, we have a more informed position from which to serve and educate the public.

VI. APPENDIX – METHODOLOGY

The goal for the starter dataset was to collect articles, in law reviews and other magazines and journals, written by judges on the topic of mediation.¹⁶⁰ For the current phase of this project, my research assistant and I took a brute force search approach. We scoured Westlaw for authors who appear to be judges (for example, searching for “Hon.” or “Honorable” or “Judge” in the author caption or star footnote) writing articles that appear to focus in some way on mediation.

When we discover an article, we add an entry to a spreadsheet that contains the following information: Title; Author (single or co-author); Sitting/Retired; Citation; Journal; Year; Number of Pages; Area of Law; Person; and Judge/Mediator. Most of these column titles are self-explanatory but a few may need additional definition. “Area of Law,” for example, allows us to track whether the judge’s article is focusing on mediation in a particular legal context, such as bankruptcy or family law. “Person” refers to whether the judge is writing in first, second, or third person. “Judge/Mediator” attempts to capture whether the judge also serves as a mediator, either while sitting or after retired. At present, the Judge/Mediator category does not specify whether the judge serves as a mediator on the same case.¹⁶¹

As with any search, there are limits to this approach. First, with respect to the data gathering piece, the dataset will always be incomplete. At present we are only looking at two legal databases. Additionally, although we have tried to optimize our search strings, they are not guaranteed to reveal every judge-written article on mediation.

¹⁶⁰ The collection excludes books, perhaps arbitrarily so.

¹⁶¹ It will be important to figure this out at some point, as this is an area of debate. *See supra* notes 24, 49, 93 and accompanying text. In the near term we will supplement the writings with additional research that will make this much more accurate.

And even if we could reliably find every judge-written article on mediation in the database, our results still depend on choices made by the editors of Westlaw. Their decisions, which undoubtedly change over time for reasons that may be impossible to find out, lead to the inclusion of certain publications in their online collection that in turn shapes what my dataset looks like. So there is a certain arbitrariness to the original pull that may be impossible to cure.

Moreover, depending on the article, not all of the columns on the spreadsheet are easy to fill in. Figuring out whether a judge also acts as a mediator, for example, requires that the judge mention this fact in her article or biographical footnote. For articles without such indicators, we just left the relevant field blank, which creates reporting errors if indeed the judge is also a mediator.

Now that we have established the initial collection, the plan is to continue adding to the collection through ongoing searches of these (and possibly other) legal databases along with individual updates that may be forwarded.¹⁶² Additionally, it would be useful to have more detailed coding on each article so that users can search the dataset more easily.

¹⁶² We will be putting the list of articles on the internet this summer.