

ESSAY

ADR: WHERE HAVE THE CRITICS GONE?

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I. INTRODUCTION

The Alternative Dispute Resolution (ADR) juggernaut continues apace. Congress, the federal judiciary, administrative agencies and citizens groups have all boarded the ADR train. The Civil Justice Reform Act of 1990 emphasized ADR as one of its six cornerstones.¹ The Judicial Arbitration Act continues to authorize court-annexed arbitration programs,² and eighteen federal districts are implementing them. Many federal district courts' local rules encourage judicial use of ADR,³ and numerous district courts regularly employ various ADR devices ranging from early neutral evaluation to mini jury trials.⁴ Federal Rule of Civil Procedure 16 also empowers magistrate judges to aggressively promote alternatives to trial.⁵ Federal agencies such as the Equal Employment Op-

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1. 28 U.S.C. § 473(a)(6) (Supp. V 1993). See also Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1306, 1330-34 (1994) (noting that mandatory arbitration, mandatory mediation, voluntary mediation, and early neutral evaluation programs are included).

2. Pub. L. No. 103-420, § 3, 108 Stat. 4343, 4345 (1994). See also Margaret L. Sanner & Carl Tobias, *The Judicial Amendments Act of 1994*, 159 F.R.D. 649, 650 & nn.8-10 (1995).

3. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 230-31 (1995).

4. Dunworth & Kakalik, *supra* note 1, at 1330-34; Resnik, *supra* note 3, at 218-20, 231-33, 234 n.87.

5. FED. R. CIV. P. 16(c)(9).

portunity Commission are debating mandatory ADR.⁶ Recently, the Republican controlled Congress seriously considered a one-way fee shifting bill that would impose an attorneys' fees sanction on unsuccessful plaintiffs who declined defendants' request for ADR. State courts also have embraced ADR. Mandatory court-annexed arbitration is commonplace.⁷ Certain family law disputes are subject to mediation. Appellate court ADR has become institutionalized.⁸

My perception is that the continuing federal and state movement, or wave, toward ADR is paralleled by a recent decline in the volume, depth, and prominence of legal scholarship critical of key aspects of ADR. My perception is a first take critical legal-sociological view of one dimension of ADR and civil procedure.⁹ If there has been this decline in critical scholarship, why has this been so? Is it because studies reveal across the board salutary effects of ADR? Is it linked to a "failing faith" in adjudication and our collective pressing need to embrace an encompassing "alternative?" Is it because, as one commentator put it, policymakers seem to care little for chasing after facts about ADR because "that train has already left the station?"¹⁰ Or is it something else?

I see the emphasis on ADR as part of a larger mosaic of efficiency reform measures implemented to constrict court ac-

6. The Federal Equal Employment Opportunity Commission recently considered and decided against mandatory ADR. *Justice Hires; the EEOC Embraces ADR*, NAT'L L.J., May 15, 1995, at A12.

7. See, e.g., Hawaii Arbitration Rules, HAW. R. CIR. CT. 34 (all tort claims under \$150,000 must be processed through the court-annexed arbitration program).

8. See Hawaii Appellate Conference Program Rules 1995 (adopted pursuant to the Hawaii Rules of Appellate Procedure, to provide an alternative means for resolving civil appeals).

9. See David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, LAW & CONTEMP. PROBS., Autumn 1988, at 111 (describing a "critical sociology of civil procedure" that examines linkages between language, knowledge, and power and the social effects of dispute resolution process and procedure). I characterize my perceptions as a "first take" because they are impressionistic and are not rooted in rigorous social science. In this essay, I seek to raise issues and suggest a framework for further socio-legal scientific and theoretical inquiry.

10. Professor Judith Resnik made this comment to Judge Sonia Sotomayor, Professor Kent Syverud and myself at a meeting of panelists preparing presentations on the topic of "Wither the Courts" at the American Association of Law Schools Civil Procedure Conference in Washington D.C., June, 1995.

cess and expedite case dispositions.¹¹ Those other reform measures, designed in the face of heavy court caseloads and criticism about waste and delay, include "Rocket Dockets,"¹² Rule 11 sanctions,¹³ lower summary judgment thresholds,¹⁴ reduced discovery,¹⁵ and heightened fact pleading,¹⁶ among others things. ADR, I believe, needs to be evaluated in the context of this larger trend.

Before I continue, let me sketch my ADR experience and the vantage point from which I write. I served as an arbitrator on many cases under Hawaii's court-annexed arbitration program. I also served on the Hawaii Supreme Court Task Force that just recommended mandatory settlement conferences on appeal and on the federal district court's Local Rules Committee that considers ADR issues. I participated in both state judiciary and Ninth Circuit studies of racial fairness in court processes. Prior to teaching, I litigated complex cases in federal and state courts. I continue to do public law litigation in a co-counsel capacity. In this capacity I have recently been involved in a lengthy mediation about preliminary remedies concerning competing state, private, and indigenous people's claims to a valuable water resource. I am thus actively involved in both ADR and litigation at multiple levels, and I am simultaneously a practitioner, supporter, and critic of ADR. I believe that ADR can be useful, efficient, and satisfying under carefully tailored circumstances.

11. Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

12. In *Martel v. County of Los Angeles*, 56 F.3d 993 (9th Cir. 1994), cert. denied, 116 S. Ct. 381 (1995), the Ninth Circuit, sitting en banc, rejected a panel's earlier new trial order. The panel had ordered a new trial after concluding that the district court judge overzealously employed "Rocket Docket" procedures to preclude additional plaintiff's depositions of county sheriff deputies in a police brutality civil case. The Ninth Circuit concluded that plaintiff's attorney failed to demonstrate on the record how additional discovery would have aided plaintiff's case. *Id.*

13. Yamamoto, *supra* note 11, at 361-71.

14. *Id.* at 373-76.

15. See Eric K. Yamamoto & Joseph L. Dwight, IV, *Procedural Politics and Federal Rule 26: Opting-Out of "Mandatory" Disclosure*, 16 U. HAW. L. REV. 167 (1994) (describing political dimensions to the discovery-to-disclosure procedural reform embodied in Federal Rule of Civil Procedure 26 and modified by various district court local rules).

16. The Supreme Court recently limited court-imposed heightened fact pleading requirements in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993).

So what about my comment about a perceived decline of in-depth mainstream legal scholarship critical of ADR? As broadly framed, I have somewhat overstated my point. There has been ongoing ADR study and critique. I intend by my comment to address one aspect of critical inquiry that used to be highly visible — an aspect that in the last three and a half years appears to have withered from mainstream, and particularly prominent, legal scholarship.

II. EARLY CRITICS

From 1984 through 1992, in law journals from Yale, Wisconsin, Harvard, Iowa, George Washington, Florida State and Law and Social Inquiry, among others, scholars seriously questioned both ADR's purported benefits and prevailing methods for evaluating ADR's risks.¹⁷ More particularly, certain critics expressed concern about the impacts of informalized and privatized dispute definition and resolution upon societal "outsiders" — racial minorities, women and the poor; those traditionally of lesser power in society.¹⁸ Those critics worried about situations where the participants were of unequal power, the issues were volatile or involved "public

17. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 45 (1988); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Michele G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1989-1990); David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985); 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 (1991); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

18. I will hereafter for shorthand use "race and gender critiques" to encompass the race, gender, class and political critiques just discussed. See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322 n.15 (1989) (using "outsider" to describe the constituencies historically excluded from jurisprudential discourse); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (suggesting that the actual experience of disadvantaged peoples is a rich, untapped source for legal scholarship).

rights," and the decisionmakers were unconstrained by public scrutiny or a formal record. The critics concluded that ADR was not appropriate for all types of cases and participants, emphasized the need for continued access to adjudication and called for inquiry into the political dimensions of ADR.

Since the race and gender critiques of ADR during this period were cogently stated in prominent law reviews, since some of them were hotly challenged at the time and thus put into play, and since they seem now to have largely disappeared from mainstream legal discourse, I will spend a brief moment outlining those critiques.

In 1984, Owen Fiss strongly cautioned against the wholesale institutionalization of ADR.¹⁹ Focusing on settlement, but writing with relevance to ADR generally, he perceived in ADR a significant failure to protect weaker parties from the inequalities of bargaining power. He also viewed ADR as "trivializ[ing] the remedial dimensions" and law-interpretive functions of adjudication.²⁰

In 1985 and 1988, Richard Delgado and other scholars examined ADR's informal structure and highlighted the risks of biased treatment for racial minorities, women, and the poor in certain situations.²¹ Drawing upon social-psychological theories and studies, they concluded that people are more apt to act on their prejudices in an informal ADR-type setting, that the formal structure of an adjudicatory-type setting tends to suppress biases.²² They observed that the risk of prejudice is greatest where there is direct confrontation between disputants of disparate power, there are few rules gov-

19. Fiss, *supra* note 17, at 1075.

20. *Id.* at 1082-87. In this essay, I include Fiss' often-cited article interrogating settlement because early on it raised significant issues of power imbalance in dispute resolution and the adjudicatory function of public law articulation. I agree that the development of a "jurisprudence of settlement" is needed. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement*, 83 GEO. L.J. 2663 (1995). However, I consider settlement an internal part of the adjudicatory dispute resolution process and, therefore, do not consider it ADR. The remainder of my comments for this essay thus exclude settlement from the realm of ADR. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

21. Delgado et al., *supra* note 17, at 1375-87 (the socio-psychological studies Delgado relied upon did not specifically address ADR).

22. *Id.* at 1388-99.

erning the interaction, the setting is closed, and the issue is highly personal.²³

While Delgado focused on potential bias and power misuse within ADR processes primarily involving racial minorities, Marjorie Silver targeted ADR's larger social impacts in civil rights cases.²⁴ In 1987, Silver found a lack of empirical evidence to support the different alternative dispute resolution mechanisms employed by federal civil rights enforcement agencies. In particular, she observed that mediation appeared to serve poorly the larger goals of civil rights programs by focusing narrowly on the resolution of individual disputes. This led enforcement agencies to overlook patterns and systems of discrimination. Silver questioned the prevailing methodology for evaluating ADR which focused on quantity — time and cost — and not on quality in terms of justice, law compliance and relief for civil rights complainants as a group.²⁵

In 1991, Trina Grillo examined ADR and child custody disputes.²⁶ She found that mediation failed to fulfill its promise of being more just and humane.²⁷ She concluded that mediation was not necessarily, as touted, the "feminist alternative."²⁸ Grillo observed that mediation failed in its promise to consider context over law, in fostering compromise rather than recognizing rights and rectifying serious injustice within families, in insisting on a future-looking perspective instead of addressing past harmful behavior, and in superficially assuming equality between disputants despite severe power imbalances.²⁹ Mediation, without the process protections of adjudication, often left women unprotected from more powerful spouses. Grillo also pointed to the lack of controls

23. *Id.* at 1402-03. But see Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution, A Myth: Bridge Makers Who Face the Great Mystery*, 25 U. TOL. L. REV. 253, 260-61 n.17 (1994) (asserting that Delgado's view perpetuates bias and citing MICHELE G. HERMANN ET AL., UNIVERSITY OF NEW MEXICO CENTER FOR THE STUDY OF RESOLUTION AND DISPUTES, THE METROCOURT PROJECT FINAL REPORT (1993)). See also Trubek, *supra* note 9, at 131 (discussing how ADR shifts focus from vindication of rights to satisfaction of needs and tends to reinforce existing power imbalances).

24. Silver, *supra* note 17.

25. *Id.* at 540-46.

26. Grillo, *supra* note 17.

27. *Id.* at 1549.

28. *Id.* at 1550.

29. *Id.* at 1563-69.

over mediator bias or power abuse and mediators' preference for compromise and thus joint custody.³⁰ Grillo therefore concluded that, as then constituted, mediation for women involved in child custody disputes was fundamentally flawed — more harmful and disempowering than adjudication, forcing the less powerful "to acquiesce in their own oppression."³¹

Building upon particularized critiques of ADR, around this time John Esser perceived a general lack of empirical study of and theoretical inquiry into the political dimensions of ADR.³² In Esser's view, quantitative efficiency evaluation of ADR had "blinded" the dispute processing field to the political underpinnings of ADR.³³

Similarly, in separate 1991 articles, Carrie Menkel-Meadow and Kim Dayton questioned the politics of ADR. Menkel-Meadow expressed concern that ADR was being "co-opted" by the adversarial system, rapidly becoming an institutionalized part of the system it was supposed to transform.³⁴ Moreover, she cautioned that meaningful evaluation of this trend was impossible until basic jurisprudential and policy questions about ADR were addressed. Those questions included:

- (1) What are the values of settlement and of adjudication?
- (2) What values should court-institutionalized ADR serve?
- (3) What are the politics of ADR?
- (4) When is adversariness appropriate?
- (5) How should we measure the "quality" of justice?³⁵

Dayton's assessment went even further. Calling ADR's efficacy a "myth," Dayton argued that "the statistics simply do not support" the claim that ADR is cost and time efficient.³⁶ Dayton called for "more exacting scrutiny . . . to de-

30. *Id.* at 1585-96.

31. *Id.* at 1610. See also Bryan, *supra* note 17 (describing rhetoric of divorce mediation and reinforcement of gendered power relations); Singer, *supra* note 17, at 1540-49 (describing the potential negative impacts of privatization of family law disputes in light of gender power imbalances). But see Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991) (criticizing Grillo's premises and conclusions).

32. Silver, *supra* note 17, at 534-43.

33. *Id.* at 543.

34. Menkel-Meadow, *supra* note 17, at 1-3.

35. *Id.* at 4-5.

36. Dayton, *supra* note 17, at 957.

termine whether ADR is the salvation of federal civil litigation — or if the emperor has no clothes.”³⁷

III. WHERE HAVE THE CRITICS GONE?

This short summary paints an incomplete but nevertheless useful picture of race and gender jurisprudential critiques of ADR existing at the beginning of the nineties. Scholars, in prominent law reviews, raised serious questions about ADR's actual benefits and hidden disadvantages for the already disadvantaged, about the surprising lack of empirical data to support the hastening rush toward ADR, and therefore about ADR's possible ideological dimensions. Some of these views were strongly challenged at the time,³⁸ raising the spectre of productive future inquiry and the development of prominent theoretical ADR legal scholarship encouraged by empirical study.

Interestingly, however, there appears to be comparatively little attention paid now to the race and gender critiques of ADR in prominent legal scholarship. Two indicia are treatment by prominent law reviews and civil procedure casebooks. Law reviews are principal currency for the exchange of ideas among civil proceduralists, particularly non-specialists in ADR with some interest in the subject.³⁹ They are also an important means for communicating theory and policy about and critique of ADR to law-concerned audiences. Casebooks are also a significant source of “ADR learning” both for law professors and students.

A. Law Reviews

A review of 400 law review articles that touched on ADR between early 1992 and late 1995 reveals no development of and scant attention to race and gender critiques. During this

37. *Id.*

38. See, e.g., Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987) (critiquing Fiss' arguments against ADR and settlement); Rosenberg, *supra* note 31; Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. L. REV. 437 (1989) (assessing the debates over ADR as a clash between traditional legal views and proponents of new forms of dispute processing).

39. The term “prominent” is admittedly ambiguous. Nevertheless, there is a general understanding that certain law reviews have higher “standing,” and thus are more widely read and cited by legal scholars.

period, articles in prominent law reviews assessed various ADR devices and evaluated costs and time reduction effects.⁴⁰ Efficiency concerns received considerable attention. General user satisfaction also received notable treatment.⁴¹ The race and gender critiques, by comparison, were either cited in passing or ignored. The Stanford Law Review, for example, recently devoted an extensive symposium issue to Civil Justice Reform, including ADR. Other than one article's brief reference to racial minorities — women and the poor as reported in two ADR studies⁴² — the symposium did not seriously engage the practical, theoretical, or political outsider ADR issues raised earlier by the critics. The reference in the Stanford Law Review article and one section of a 1993 Pennsylvania Law Review article on the impact of federal court-annexed arbitration on "poorer litigants" appear to exhaust the field in prominent law reviews.⁴³ Legal scholars and policymakers now need to look elsewhere for theory development and related empirical work.⁴⁴

40. See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994); Dunworth & Kakalik, *supra* note 1; Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994); Lee E. Teitelbaum, *Divorce, Custody, Gender and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808 (1994); Mark William Bakker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479 (1994).

41. See sources cited *supra* note 40.

42. Galanter & Cahill, *supra* note 40, at 1357-58 (citing MICHAEL FIX & PHILIP J. HARTER, URBAN INSTITUTE, *HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA 70-84* (1992) and MICHELE G. HERMANN ET AL., UNIVERSITY OF NEW MEXICO CENTER FOR THE STUDY AND RESOLUTION OF DISPUTES, *THE METROCOURT PROJECT FINAL REPORT* (1993)). A 1994 Arizona law review article also makes summary reference to the outside critiques. See Diane E. Hoffman, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821 (1994).

43. Bernstein, *supra* note 40, at 2228-39.

44. As discussed later in this section, scholars continue to raise outsider concerns, but not in prominent law reviews. See, e.g., Bruce E. Barnes, *Conflict Resolution Across Cultures: A Hawaii Perspective and a Pacific Mediation Model*, 12 MEDIATION Q. 117 (1994); Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38 (1994); Isabelle R. Gunning, *Diversity Issues in*

B. *Civil Procedure Casebooks*

A survey of eight recent civil procedure casebooks provides further insight into ADR and mainstream legal discourse.⁴⁵ All but one of the casebooks have a section on ADR. None of the sections are extensive. The casebooks tend to treat ADR in similar fashion, providing a brief overview of the ADR movement, and the various methods of ADR, with specific attention to arbitration and mediation. The casebooks differ in minor ways concerning the incorporation of settlement and case management materials. The casebooks are similar in their treatment of the ADR race, gender and political critiques. With limited exceptions, the casebooks do not engage the critiques.⁴⁶

I wonder if this comparative silence in prominent law reviews and civil procedure casebooks parallels the tenor of the current publicized congressional debates about ADR: the time and cost-savings of ADR are evaluated and highlighted while the underlying political impacts and value choices are downplayed.⁴⁷ If this is so, I also wonder if prominent legal scholarship and political civil justice reform rhetoric are coa-

Mediation: Controlling Negative Cultural Myths, 1995 J. DISP. RESOL. 55; Mori Irvine, *Mediation: Is It Appropriate in Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993); Stephen Meili & Tamara Packard, *Alternative Dispute Resolution in a New Health Care System: Will It Work for Everyone?*, 10 OHIO ST. J. ON DISP. RESOL. 23, 30-35 (1994); Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269 (1994); see *infra* note 51 concerning family law mediation.

45. ROBERT C. CASAD ET AL., CIVIL PROCEDURE, CASES AND MATERIALS (2d ed. 1989); JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS (6th ed. 1993); RICHARD H. FIELD, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (David L. Shapiro et al. eds., 6th ed. 1990); GEOFFREY C. HAZARD, JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE STATE AND FEDERAL (7th ed. 1994); A. LEO LEVIN ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE (David L. Shapiro et al. eds., successor ed. 1992); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE A MODERN APPROACH (2d ed. 1995); MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE (5th ed. 1990); STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE (Richard A. Epstein et al. eds., 3d ed. 1992).

46. Only the Field casebook presents in any length the criticism's of ADR's potential to adversely impact the disadvantaged, specifically noting the poor, racial minorities, and women. FIELD, *supra* note 45, at 342-47, 615-16. Two of the casebooks give passing reference in notes to these issues. MARCUS ET AL., *supra* note 45, at 110-13; COUND ET AL., *supra* note 45, at 1318-19. Hazard cites Delgado's 1985 article without any accompanying text. HAZARD ET AL., *supra* note 45, at 1361.

47. Deborah R. Hensler, *Does ADR Really Save Money? The Jury's Still Out*, NAT'L L.J., Apr. 11, 1994, at C12.

lescings to construct a mainstream legal discourse on ADR that marginalizes outsider critiques.

The one outsider area where substantial theory and empirical work continues is the impact of mediation on women and family disputes, particularly child custody, divorce, and domestic abuse.⁴⁸ This work, however, tends to receive only "niche" — i.e. limited — attention. With the exception of two articles in the Minnesota and Florida State Law Reviews,⁴⁹ recent writings have been published primarily in practice guides, state bar journals, specialty law journals and lesser read law reviews.⁵⁰ They miss casebook and prominent law

48. For example, Penelope Bryan found that women were disadvantaged in negotiating divorce settlements under mandatory mediation. See Bryan, *supra* note 17. Disparities in negotiating power were seen as the consequence of women's lower status in our society resulting from disparities in the resources of men as compared to women, and the continuing pervasive influence of traditional sex ideology which legitimizes male dominance and further imbalances the power relations between the parties. Karla Fischer, Neil Vidmar and Rene Ellis argued that the disadvantages of mediation for women generally put women in domestic violence cases at even greater risk and required their exemption from mandatory mediation. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2118 (1993).

49. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43 (1995); Craig A. McEwen et al., *Bring In The Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

50. See, e.g., Carol Bohmer & Marilyn Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223 (1994); Carol Bohmer & Marilyn L. Ray, *Regression to the Mean: What Happens When Lawyers Are Divorce Mediators*, 11 MEDIATION Q. 109 (1993); Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994); Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95 (1993); Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer-Mediators*, 10 GA. ST. U. L. REV. 487 (1994); Desmond Ellis & Noreen Stuckless, *Preseparation Abuse, Marital Conflict Mediation, and Postseparation Abuse*, 9 MEDIATION Q. 205 (1992); Fischer et al., *supra* note 48; Dane A. Gaschen, *Mandatory Custody Mediation: The Debate Over Its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995); Louise Everett Graham, *Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience*, 81 KY. L.J. 1107 (1992-1993); Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995); Douglas D. Knowlton & Tara L. Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?*, 70 N.D. L. REV. 255 (1994); Kevin M. Mazza, *Divorce Mediation: Perhaps Not the Remedy It Was Once Considered*, FAM. ADVOC., Spring 1992, at 40; Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, FAM. ADVOC., Winter 1995, at 34; Elizabeth M. Schneider, *Gendering and Engender-*

review attention. From the vantage point of procedure generalists, the ADR critiques concerning gender and family law now appear largely on the margins of mainstream legal discourse.⁵¹

IV. WAKE UP CALL

I thus return to, and expand upon, the questions posed at the outset: If there has been a decline in the amount, depth, and prominence of scholarship critical of ADR, in the ways I have discussed, why is this so? Is it because studies reveal the across-the-board salutary effects of ADR? Or are studies still in progress? Or is a decline linked to a "failing faith" in adjudication and our collective pressing need to embrace an encompassing alternative? Or is there scholarly, or prominent law review, disinterest in the issues? Or is it because ADR issues of race, gender and class arise only in the limited context of family disputes and civil rights claims, and ADR is now most prevalent in contract and tort disputes?⁵² Or something else?

My perceptions are preliminary, and I have no definitive answers to the questions posed. I do suggest, however, that the questions are significant. They raise afresh for Congress, courts, lawyers, scholars, and teachers of civil procedure concerns about a side to the prevailing legal rhetoric of ADR that still appears to be cast in darkness. We need to ask if amid mainstream ADR proselytizing by Congress, courts, scholars and practitioners a master narrative has emerged that the ADR "train has already left the station"⁵³ and that all who do not scramble aboard will be left behind. If this is so, we need to ask if this narrative has undermined legal discourse generally critical of ADR.

ing Process, 61 U. CINN. L. REV. 1223 (1993); Maggie Vincent, *Mandatory Mediation of Custody Disputes: Criticism, Legislation and Support*, 20 VT. L. REV. 255 (1995).

51. If this is so there may be many intertwined explanations. Unraveling those explanations is beyond the scope of this essay. Who writes, who gives and who receives grants, and who makes publication decisions are questions that combine with the difficulties of inquiry into the substantive issues to complicate any assessment of the reasons for across-the-board scholarly production (or nonproduction) in a given area.

52. *But see* Meili & Packard, *supra* note 44, at 30-35 (citing problems particular to women, minorities, and the poor in health care ADR).

53. *See supra* note 10 and accompanying text.

Even for those criticizing overwhelmingly salutary ADR rhetoric and scrutinizing ADR's claims of cost and time efficiency, questions emerge. Did an observer get it right recently when he wrote that beyond the family dispute mediation setting, ADR issues of race, gender, and class still remain largely unaddressed.⁵⁴ If this is so, we need to ask why these issues have not only seemingly disappeared from mainstream legal discourse but also apparently have been marginalized by prominent scholarship otherwise carefully critical of ADR.

I close by referring to a recent observation by Professor Judith Resnik. In examining the climate of dissatisfaction with adjudication that accompanied the rising acceptance of ADR, she observed that neither ADR nor adjudication are being clearly viewed or evaluated on their own merits. It is in this muddled setting, she concluded, that ADR is poised to supplant adjudication. She sounds a ringing wake up call.⁵⁵

54. Rosenberg & Folberg, *supra* note 40, at 1488. *See also* Clement & Schwebel, *supra* note 50, at 106 ("[T]he literature suggests that little attention has been given to a systematic investigation of cultural and ethnic issues in the use of divorce mediation.").

55. Resnik writes:

[T]hose who think adjudication has something to offer had better start explaining why one would aspire to a preserve for adjudication If there is an important and affirmative . . . story to be told for the preservation of adjudicatory forms, with judges in distinctive roles, and why a culture would value, cherish, fund, encourage, and sometimes insist on adjudication, then those who believe so had better speak up soon, for it is becoming increasingly hard to hear those claims.

Resnik, *supra* note 3, at 263.

