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## Foreword: Achieving Access to Justice Through ADR: Fact or Fiction?

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## SYMPOSIUM

### ACHIEVING ACCESS TO JUSTICE THROUGH ADR: FACT OR FICTION?

#### FOREWORD

*Jacqueline Nolan-Haley\**

This Foreword offers an overview of *Achieving Access to Justice Through ADR: Fact or Fiction?*, a symposium hosted by the *Fordham Law Review* and cosponsored by the National Center for Access to Justice and Fordham Law School's Conflict Resolution and ADR Program. Access to justice is a foundational value in our system of law and alternative dispute resolution (ADR) is enthusiastically promoted as a vehicle for providing that access.<sup>1</sup> This is as true in developing countries as it is in the United States. For parties, ADR promises autonomy, self-determination, and empowerment. For courts, there is the attraction of procedural and administrative reforms and greater efficiencies. An important question raised in this Symposium is whether ADR has delivered on its promises. Does it in fact provide access to justice or does it facilitate access to *injustice* for certain segments of society?<sup>2</sup>

Reflecting on these questions, this Symposium will offer a critical analysis of ADR's access to justice claims and consider the extent to which they should be more modest. An outstanding group of scholars have addressed this question in a variety of contexts, including procedural and substantive justice; restorative justice; arbitration; mediation; online dispute resolution (ODR); and international, comparative, and cross-cultural perspectives. This Issue of the *Fordham Law Review* includes thoughtful, provocative, and inspiring papers from thirteen of the Symposium participants.

Several papers focused on the access to justice challenges presented by current practices in arbitration. In "Arbitration Archetypes for Enhancing Access to Justice," Professor Jill I. Gross questions whether arbitration

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1. Jacqueline Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here*, 87 FORDHAM L. REV. ONLINE 78, 78 (2019).

2. See generally Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449 (2020).

enhances access to justice relative to litigation, given the increased use of arbitration by commercial entities with strong bargaining power.<sup>3</sup> She describes several critiques of mandatory arbitration based on adhesive predispute arbitration clauses in consumer and employment contracts.<sup>4</sup> In addition to the consent critiques, Professor Gross examines the claim that the process resulting from an adhesive agreement to arbitrate is unfair.<sup>5</sup> Noting that the arbitration process differs depending on the forum, the industry, and the parties' agreement to arbitrate, she claims that it is not possible to generalize in this area given the number of different arbitration subtypes.<sup>6</sup> Rather, she proposes a framework of "arbitration archetypes" that can be used as models for reform—to assess whether a particular form of arbitration enhances access to justice relative to litigation.<sup>7</sup>

In "Arbitrarily Selecting Black Arbitrators," Professor Michael Z. Green addresses the problem of the lack of diversity in the arbitral selection process, which is manifested specifically in racial bias and the lack of black arbitrators.<sup>8</sup> He describes the basic problem as the fact that, despite efforts to increase the pools of diverse arbitrators, it is the parties who will select the arbitrator, and parties are not incentivized to select an arbitrator based on a diversity profile.<sup>9</sup> Parties want to win—so they will choose the arbitrators they know and their risk aversion prevents their "representatives from using highly skilled mediators of color."<sup>10</sup> To remedy the problem, Professor Green proposes that arbitration service providers be given a more substantial role in the final selection of arbitrators.<sup>11</sup> He recommends an approach that mimics the selection of federal judges—a pool of diverse arbitrators with outstanding qualifications would be provided.<sup>12</sup> Instead of allowing parties to choose from the pool, the arbitrator assigned to the parties would be chosen for them by the neutral service provider in the same random and arbitrary manner as a judge is chosen for parties who file a claim in federal court.<sup>13</sup>

With a different take on the issue of diversity in arbitration, Professor Benjamin G. Davis writes from a historical perspective.<sup>14</sup> In "American Diversity in International Arbitration: A New Arbitration Story or Evidence of Things Not Seen," he focuses on the presence of black persons in international trade, what he labels the "longer view of diversity," and

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3. See generally Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319 (2020).

4. *Id.* at 2320.

5. *Id.* at 2323.

6. *Id.* at 2334–36.

7. *Id.*

8. See generally Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 FORDHAM L. REV. 2255 (2020).

9. *Id.* at 2273.

10. *Id.* at 2271.

11. *Id.* at 2278–85.

12. *Id.* at 2281.

13. *Id.*

14. See generally Benjamin G. Davis, *American Diversity in International Arbitration: A New Arbitration Story or Evidence of Things Not Seen*, 88 FORDHAM L. REV. 2143 (2020).

examines the evolution of international arbitration law in the United States.<sup>15</sup> He suggests that the invisible presence of blacks and other underrepresented groups in the shadows of international arbitration law developments helps us to understand that diversity has been a basic part of American international arbitration for hundreds of years, even though it has gone unrecognized as such.<sup>16</sup> In Professor Davis's view, it was wealth creation both by enslaved Africans and ostensibly free blacks that drove developments in American arbitration law.<sup>17</sup> He then traces American arbitration law developments from the 1920 New York Arbitration Law to the Federal Arbitration Act to the American accession to the New York Convention of 1958.<sup>18</sup> The lens through which he tells this story is against the background of the civil rights struggle of black Americans.<sup>19</sup> Taking the story of American international commercial arbitration out of what he calls its "restrictive traces," he brings to light the unseen presence of black persons and raises the important question of whether blacks have been "underrepresented" or just "unseen" in international commercial arbitration.<sup>20</sup>

Two papers focused on the emerging world of ODR and its relationship to access to justice. Professor Amy J. Schmitz observes that, in the quest for efficient and affordable justice, policymakers have been promoting ODR, which allows for claim diagnosis, negotiation, and mediation without the transaction costs associated with traditional court proceedings.<sup>21</sup> In "Measuring 'Access to Justice' in the Rush to Digitize," she calls for a cautionary approach to ODR.<sup>22</sup> She warns of the possibility that the rush to digitize will ignore due process and transparency values in the name of efficiency.<sup>23</sup> While including herself among those scholars who have promoted ODR as a means to expand access to justice, open new avenues to remedies, and ease the stress of going to court, she suggests two reasons to exercise caution in promoting ODR programs.<sup>24</sup> First, studies suggest that some users are not very enthusiastic about using ODR, particularly, the poor, the elderly, and the less educated.<sup>25</sup> Her second concern relates to human dynamics—online processes may diminish the empathy and satisfaction that comes from being heard in court.<sup>26</sup>

Professor Schmitz's response is to acknowledge the need for empirical research along with transparency to help inform best practices.<sup>27</sup> Toward

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15. *Id.*

16. *Id.* at 2144.

17. *Id.* at 2144–46.

18. *Id.* at 2145–49.

19. *Id.* at 2149.

20. *Id.* at 2150.

21. See generally Amy J. Schmitz, *Measuring "Access to Justice" in the Rush to Digitize*, 88 *FORDHAM L. REV.* 2381 (2020).

22. *Id.* at 2393–96.

23. *Id.*

24. *Id.* at 2384.

25. *Id.*

26. *Id.*

27. *Id.* at 2385.

that end, she proposes a framework for ODR research that is based on a “who, how, and what” analysis.<sup>28</sup> Who are the users of ADR systems? How do consumers access and engage with an ODR process versus a face-to-face process? What effect does ODR have on case outcomes? For her, the bottom line is that ODR needs to be “properly deployed, improved, and monitored.”<sup>29</sup>

Focusing on family law, Professor Kristen M. Blankley offers an optimistic view of using online services to enhance access to justice in family law cases.<sup>30</sup> In her article, “Online Resources and Family Cases: Access to Justice in Implementation of a Plan,” she notes that in most areas of the law, enforcement of a court order is “merely an afterthought.”<sup>31</sup> However, in family law cases, the situation is radically different.<sup>32</sup> With respect to orders that involve parenting plans, financial plans, or even the terms of a guardianship, access to justice requires implementation because these orders may extend up to eighteen years, twenty-one years in the case of minors, and longer in the case of protected adults.<sup>33</sup> While technology is being utilized in some areas, particularly with respect to financial obligations, there is a need for greater use of it.

Professor Blankley argues that there is a need for online resources to achieve authentic access to justice for families following the implementation of parenting and financial plans.<sup>34</sup> She discusses the benefits and disadvantages associated with different types of technologies, while admitting that these tools are not a magic wand.<sup>35</sup> In short, authentic access to justice in family cases exists when parents are able to honor the promises and obligations in their parenting and financial plans.<sup>36</sup> In Professor Blankley’s view, online resources may be of great assistance in this endeavor, to the extent that parents take advantage of them.<sup>37</sup>

In “Does ADR Feel like Justice?,” Professor Jennifer W. Reynolds introduces us to the notion of “snap disputes,” which stands for “social networks amplifying polarization,” and “conflict spectacles.”<sup>38</sup> Snap disputes are “highly charged public controversies” characterized by anger and fear “that have a substantial online dimension.”<sup>39</sup> They play out through the media, and, as such, they create and are created by “spectacles of

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28. *Id.*

29. *Id.* at 2406.

30. See generally Kristen M. Blankley, *Online Resources and Family Cases: Access to Justice in Implementation of a Plan*, 88 FORDHAM L. REV. 2121 (2020).

31. *Id.* at 2122.

32. *Id.*

33. *Id.*

34. *Id.* at 2123–26.

35. *Id.* at 2142.

36. *Id.*

37. *Id.*

38. Jennifer W. Reynolds, *Does ADR Feel like Justice?*, 88 FORDHAM L. REV. 2357, 2357–59 (2020).

39. *Id.* at 2357.

conflict.”<sup>40</sup> Within this framework, Professor Reynolds considers “what people may be learning from conflict spectacles in the age of snap disputes, especially in the context of justice systems and access concerns.”<sup>41</sup> She argues that “what people believe about justice will affect whether they think that existing structures and institutions can provide justice.”<sup>42</sup> The “questions about access to justice, therefore, must take into consideration not only what actual processes and support are available but also what people feel will provide justice—based on what they have gleaned from the various conflicts spectacles they watch” on a daily basis.<sup>43</sup>

Professor Sukhsimranjit Singh addresses some cultural aspects of access to justice, noting that the notion of access to justice is unique among cultures and can be interpreted in multiple ways by members of different groups.<sup>44</sup> In his article, “Access to Justice and Dispute Resolution Across Cultures,” he examines several cultural communities that experience diminished access to justice.<sup>45</sup> Focusing on the specific needs of these diversified communities, he examines access to justice theory through their culturally structured identities and concludes that the circumstances of each group must be considered throughout ADR practices such as mediation.<sup>46</sup>

Professor Singh notes that the issue of access to justice primarily impacts impoverished and disadvantaged groups who lack the ability to obtain assistance on legal matters.<sup>47</sup> Reviewing alternative understandings of access to justice, he argues that defining justice involves questions of enforceability and legitimacy.<sup>48</sup> Those who cling to a rigid definition assert that justice means access to an established legal system and may go as far as to say that ADR-based approaches are insufficient because they do not improve the pathways to existing court systems.<sup>49</sup> He also explores the barriers to accessing justice, including the lack of “an information infrastructure to educate those who are unaware that they can pursue a legal remedy.”<sup>50</sup> With respect to the central question of the Symposium—does ADR provide access to justice?—Professor Singh argues that, without an established structure as well as precedent in place, “ADR may serve only to provoke low-quality justice for the impoverished.”<sup>51</sup>

In “Restorative Justice from Prosecutors’ Perspective,” Professors Bruce A. Green and Lara Bazelon engage the access to justice conversation through

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40. *Id.* at 2359.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See generally* Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures*, 88 *FORDHAM L. REV.* 2407 (2020).

45. *Id.* at 2407–09.

46. *Id.*

47. *Id.* at 2421–24.

48. *Id.*

49. *Id.* at 2422.

50. *Id.*

51. *Id.* at 2423.

a criminal law lens with a focus on restorative justice.<sup>52</sup> The basic goal of a restorative justice process is to encourage a mediated discussion between an offender and victim, to give the victim an opportunity to explain the impact of the offense, and to give the offender a chance to offer an apology and seek to understand the causes of the offending behavior.<sup>53</sup> Both the victim and offender then make a plan to repair the damage and make amends.<sup>54</sup>

Outside the United States, restorative justice has been used as an alternative to criminal prosecution where the victim and offender both agree to use it.<sup>55</sup> However, the situation is different in the United States.<sup>56</sup> Except for a small group of progressive prosecutors, conventional U.S. prosecutors have an unfavorable view of restorative justice.<sup>57</sup> Professors Green and Bazelon identify and comment on some of the reasons why traditional prosecutors might be skeptical or even hostile toward restorative justice processes.<sup>58</sup> They then offer arguments to demonstrate that this skepticism is unwarranted.<sup>59</sup> Restorative justice should not be viewed as a “rejection of the traditional adjudicatory process,” they argue, but as “an alternative that runs parallel to traditional adjudication.”<sup>60</sup> This alternative, they argue, will better serve the public interest in reducing recidivism and better serve the interests of the crime victim.<sup>61</sup>

Relying on Marc Galanter’s understanding of justice<sup>62</sup>—that justice is achieved by pushing back against injustice which is forever changing—Professor Lydia Nussbaum explores how ADR processes fit within a dynamic system of justice.<sup>63</sup> In her article, “ADR, Dynamic (In)Justice, and Achieving Access: A Foreclosure Crisis Case Study,” she “argues for a dynamic, rather than fixed, conception of access to justice.”<sup>64</sup> She then locates ADR processes within that dynamic framework as vehicles that enhance injustice and sometimes exacerbate preexisting injustice.<sup>65</sup>

Using, as a case study, the foreclosure crisis that developed out of the Great Recession, she describes the dynamic system of justice and ADR’s evolving role within that system.<sup>66</sup> State legislatures and courts throughout the country created foreclosure ADR programs to respond to the crisis and help

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52. See generally Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287 (2020).

53. *Id.* at 2289–90.

54. *Id.* at 2290.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2296–310.

59. *Id.* at 2310–16.

60. *Id.* at 2317.

61. *Id.*

62. See generally Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115 (2010).

63. See generally Lydia Nussbaum, *ADR, Dynamic (In)Justice, and Achieving Access: A Foreclosure Crisis Case Study*, 88 FORDHAM L. REV. 2337 (2020).

64. *Id.* at 2338.

65. *Id.*

66. *Id.* at 2345–54.

parties avoid unnecessary foreclosures.<sup>67</sup> Yet, while ADR processes provided remedies for some of the injustices created by the financial crisis, they also introduced new injustices.<sup>68</sup> This is because they were introduced into systems “with systemic communication problems, lack of transparency, and preexisting power differentials between homeowners and loan services.”<sup>69</sup> A series of procedural correctives in foreclosure ADR helped to remedy some of the new injustices they introduced.<sup>70</sup> ADR, Professor Nussbaum rightfully points out, “can be only as ‘just’ as the system in which it operates.”<sup>71</sup>

Two papers considered the potential roles of technology and data in the quest for access to justice. Professor Ellen Waldman’s essay, “How Mediation Contributes to the ‘Justice Gap’ and Possible Technological Fixes,” focuses on the growing number of self-represented parties who find themselves participating in mediation.<sup>72</sup> She argues that, for these parties, mediation in its current form in the lower courts “risks significant deprivations of justice.”<sup>73</sup> This is due in large measure to ethics rules that prevent disputants from receiving the information they need to make informed judgments in mediation.<sup>74</sup> For Professor Waldman, simply providing a forum where disputes can be discussed is insufficient.<sup>75</sup> She argues that, if the goal is to enhance self-represented parties’ access to justice, then we need to be concerned with substantive as well as procedural justice. She claims (and I agree) that parties should be provided with the information they need to make informed decisions.<sup>76</sup> To achieve this end, she recommends embracing technologies of both the low-tech and high-tech varieties, including algorithms which would give self-represented litigants the data that predictive legal forecasting is able to provide.<sup>77</sup> Noting that artificial intelligence in the legal arena has benefited wealthy corporations, she argues that it is time to harness this asset for unrepresented parties who mediate in court-connected processes.<sup>78</sup>

For Professor Nancy A. Welsh, it is difficult to respond to the question of whether ADR provides access to justice because of the lack of data.<sup>79</sup> In her article, “Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution,” she calls for regular data collection regarding the use and effects of all court-connected dispute

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67. *Id.*

68. *Id.*

69. *Id.* at 2352.

70. *Id.* at 2338.

71. *Id.*

72. See generally Ellen Waldman, *How Mediation Contributes to the “Justice Gap” and Possible Technological Fixes*, 88 *FORDHAM L. REV.* 2425 (2020).

73. *Id.* at 2428.

74. *Id.*

75. *Id.* at 2428–29.

76. *Id.* at 2432–33.

77. *Id.* at 2435.

78. *Id.* at 2448.

79. See generally Welsh, *supra* note 2.

resolution processes and publication of aggregate results.<sup>80</sup> Noting that courts are now beginning to collect data with respect to their “traditional” operations, she argues that the time is right to also seek inclusion of data regarding ADR processes.<sup>81</sup> After describing the institutionalization of mediation and other ADR processes in the federal court system and in selected state courts, including California, Florida, Maryland, New York, and Texas), she focuses on the data that these courts collect and make publicly available.<sup>82</sup> Concluding that we still do not know very much, she recommends the collection and reporting of data on court-connected mediation, which would at least give answers to the following questions<sup>83</sup>: How many cases are referred to mediation? How many mediations are occurring? How many dispositions result from mediation? What outcomes are produced by court-connected mediation? How do lawyers and litigants perceive the process and its outcomes? Does mediation and other ADR processes provide access to justice or facilitate access to injustice for certain segments of society?<sup>84</sup>

Professor Howard M. Erichson focuses on mass disputes, including class actions and nonclass mass litigation, in which each claimant lacks meaningful control over the settlement negotiation process because it is controlled on the claimants’ side by a lead lawyer or group of lead lawyers.<sup>85</sup> In his article, “The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks,” he raises concerns that mediators’ mindsets and skill sets may work to the disadvantage of claimants in mass disputes.<sup>86</sup> While acknowledging the importance of mediation in the resolution of mass disputes, Professor Erichson warns that, unless mediators pay careful attention to agency risks, they “may inadvertently become part of the problem rather than part of the solution.”<sup>87</sup> This happens, he explains, when mediators search for “aligned interests among those at the bargaining table” and then empower the “lawyer-negotiators who speak on behalf of large groups of claimants.”<sup>88</sup> In doing so, “mediators may exacerbate agency risks and undermine claimants’ access to justice.”<sup>89</sup>

In Professor Erichson’s view, this situation presents both a threat and an opportunity.<sup>90</sup> The threat is that the mediator’s “striving for consensus” and “embracing creativity” may empower “negotiating counsel to the detriment

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80. *Id.*

81. *Id.* at 2452–66.

82. *Id.* at 2466–82.

83. *Id.* at 2482–99.

84. *Id.* at 2500.

85. See generally Howard M. Erichson, *The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks*, 88 FORDHAM L. REV. 2155 (2020).

86. *Id.* at 2155.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

of the great mass of claimants.”<sup>91</sup> However, a mediator may be in a good position to move settlement discussions away from the provisions that mutually benefit class counsel and defendants but not the claimants, and this should be viewed as an opportunity.<sup>92</sup> His hope is that “awareness of this risk will better position mediators to embrace the opportunity and suppress the threat.”<sup>93</sup>

In “Remedy Without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process,” Professor Marianna Hernandez-Crespo Gonstead goes beyond what she considers a narrow understanding of ADR as a vehicle for providing access to justice and argues that it is important to provide citizens with knowledge of conflict literacy—learning how to develop conflict resolution and participatory capacity at the individual and collective levels.<sup>94</sup> To achieve this end, she proposes a “Comprehensive Framework for Conflict Resolution” and suggests two analytical tools to implement this framework: “Dispute System Design” and “Shared Decisions System Design.”<sup>95</sup> Focusing on Latin America, and specifically Venezuela, Professor Gonstead discusses the harmful consequences of failing to develop conflict literacy—including millions of Venezuelans fleeing their country.<sup>96</sup> She emphasizes the critical importance of including the perspectives of all stakeholders to accurately diagnose the current crisis in order “to select or design the appropriate process for a sustainable resolution.”<sup>97</sup> Once a sustainable resolution has been reached, she “proposes the use of collaborative governance to supplement representative democracies and bring about” stability.<sup>98</sup> Governments, working alone, are unable to bring stability to the sociopolitical arena.<sup>99</sup> She argues powerfully that “only an organized civil society, equipped with conflict resolution and participatory capacity, can better stabilize and help unlock the power of the whole.”<sup>100</sup>

In addition to the authors whose papers are described above, we would also like to thank the other scholars who presented at the Symposium—the Honorable Wayne D. Brazil, Professors Ellen E. Deason and Julie Macfarlane, and the moderators who generated stimulating discussions—Professors David Udell, Lela Love, Paul Radvany, and Harold Abramson.

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91. *Id.* at 2163

92. *Id.* at 2171–72.

93. *Id.*

94. See generally Marianna Hernandez-Crespo Gonstead, *Remedy Without Diagnosis: How to Optimize Results by Leveraging the Appropriate Dispute Resolution and Shared Decision-Making Process*, 88 *FORDHAM L. REV.* 2165 (2020).

95. *Id.* at 2177.

96. *Id.* at 2171–72.

97. *Id.* at 2178.

98. *Id.* (footnote omitted).

99. *Id.* at 2253.

100. *Id.*