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# Luck v. Justice: Consent Intervenes, but for Whom?

Jennifer W. Reynolds\*

## I. INTRODUCTION

Does consent in alternative dispute resolution (ADR) provide a rebuttable presumption of justice?<sup>1</sup> To the extent that justice is not arbitrary or random or subject to the vagaries of chance—put another way, to the extent that justice is immune to luck—the answer would seem to be yes.<sup>2</sup> Consent freely given implies that the proposed arrangement is fair, based on the parties' own valuations of costs and benefits and regardless of what happened (intentionally or not) to arrive at the arrangement.<sup>3</sup> This understanding of consent legitimates the inclusion of alternative processes

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1. Here, “consent” means freely agreeing both to process and to outcome, *see infra* Part IIIA and IIIB, and I am using “justice” in the broadest and most ordinary way. *See, e.g.*, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 5 (Erin Kelly ed., 2001) (stating the “fundamental idea of society as a fair system of cooperation”); Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 213 (2005) (noting that “each of us can readily describe situations that instantly appall us for reasons that we intuitively identify as constituting acts or occasions of injustice”). This stance is complicated, of course, by differences in subjective understandings of justice. *See, e.g.*, Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL. 247 (2005) (arguing that theories of justice are informed by personal experiences).

2. As described in Part II, moral luck philosophers “challenged the alleged immunity of morality to luck” and thus raised questions of “responsibility, justification, blame, and so forth” that implicate justice. *See* Daniel Statman, *Introduction*, in MORAL LUCK 2 (Daniel Statman ed., 1993).

3. *See, e.g.*, Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 158 (2002) (“Unlike a judge, jury or arbitrator, a mediator does not have the responsibility to determine an appropriate remedy or a just distribution. That is for the parties themselves to do.”).

such as mediation in the legal system.<sup>4</sup> In fact, one might go further and argue that because of consent, processes such as mediation outperform the traditional legal system in terms of delivering justice free from luck distortions. Consent ensures that the parties themselves are the final determinants of what is fair<sup>5</sup>—not the luck of the draw with which judge hears the case, or who among the parties happens to have more money, or how arbitrary legislative line-drawing allows for this but not that, or any other external variabilities that might affect the outcome but have really nothing to do with the parties or the dispute.

Thinking about consent this way is appealing but wrong. The thinking is wrong for many reasons, among them that this formulation of consent fails to appreciate how consent and luck actually interact in ADR settings and what the dangerous justice implications of that interaction might be.

This Article argues that consent in ADR works to make luck invisible without necessarily making luck go away. Invisible luck in consent-based processes, especially at the low end of the civil justice market, threatens access to justice not only by exposing participants to unjust or indefensible outcomes but also by holding them responsible for those very outcomes.<sup>6</sup> This double whammy undermines both the historical inclusiveness of American civil procedure<sup>7</sup> as well as the foundational ADR precepts of self-

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4. See, e.g., Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 22 (2004) [hereinafter Multidisciplinary Context] (noting the parties' own consented-to agreements have "greater legitimacy and longevity" than they would if "commanded from on high"); see also James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLIN J. PUB. L. & POL'Y 235, 329 (2004) (describing some panelists as "caustic in their characterization of justice delivered by the traditional legal system"); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOTIATION L. REV. 137, 190-92 (2000) (suggesting that mediation promotes greater process clarity that in turn makes it easier to "rationaliz[e] settlements to clients").

5. See, e.g., Hyman & Love, *supra* note 3; see also Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389 (2004-2005) (arguing that ADR should be informed by theories of deliberative democracy and especially the "normative concept of 'authentic participation'").

6. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 66 (1996) [hereinafter Search for Justice] (describing the "hit or miss type of justice" that occurs in small claims mediation contexts); see also Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 50 (2004) [hereinafter Just Resolutions] (warning dispute resolution proponents that "there can be no real or lasting resolution unless sufficient attention is paid to justice").

7. See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) ("[T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.") (citations omitted). Professor Miller compellingly demonstrates how recent Supreme Court

determination and autonomy,<sup>8</sup> and thus threatens to deteriorate public confidence and reduce social welfare in both arenas.<sup>9</sup> Such deterioration becomes even more problematic as we continue scaling dispute resolution and complex decision-making to broader public contexts in which we strive for consensus and then expect post-decision compliance.<sup>10</sup> Accordingly, we must become more sophisticated in how we understand and communicate what consent means to those who participate in consent-based processes. If we do not, then alternative dispute resolution proponents have no hope of supporting a meaningfully engaged democratic community.

Note that there are many potential entry points to a discussion of fictional consents in alternative contexts. Consent-based civil processes are everywhere. The broad thesis of this Article is that all forms of civil consent are susceptible to luck distortions. That said, the integrity of these consents certainly varies across contexts. On one end of the spectrum is the adhesive contract, certainly the most notorious example of consent fictions in ADR.<sup>11</sup>

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jurisprudence, such as the latest cases on personal jurisdiction and pleading, has raised the bar to unmanageable heights for many plaintiffs, thus curtailing public access to justice. *See id.* at 358. These developments on traditional civil litigation put more pressure on alternative dispute resolution mechanisms, such as mediation, and may actually make these mechanisms less effective. *See* Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means To Overcome Iqbal's Negative Effects upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN. ST. L. REV. 1149, 1156 (2010) (arguing that the Supreme Court's recent pleading opinions discourage would-be defendants from engaging with "marginalized claimants").

8. *See infra* discussion in Part IIIA.

9. "[C]onsent has the effect of confining responsibility for ill fortune under the contract to the unlucky party alone." Aditi Bagchi, *Managing Moral Risk: The Case of Contract*, 111 COLUM. L. REV. 1878, 1913 (2011).

10. For example, in international mediation, process leaders attempt to bring parties together to make agreements that require not only in-the-moment consent but a real commitment to post-agreement implementation. As Melanie Greenberg points out, because these agreements take place in "the shadow of weak international law," the expressed consent of the parties is not meaningful unless there is intention behind it. Melanie Greenberg, *Consent in International Mediation*, 14 No. 2 DISP. RESOL. MAG. 20 (2008).

11. Adhesion terms may specify, for example, that a consumer or employee has "consented" to waiving dispute resolution choices in favor of an often limited form of arbitration (for example, arbitration with no class form available). There is a significant literature on consent fictions in the context of arbitration and compulsory mediation. Arbitration "is a matter of consent, not coercion." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989), yet the quality of that consent has come under attack, particularly in recent years given mandatory arbitration developments in consumer and employment contexts. *See, e.g.*, Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STANFORD L. REV. 1631, 1645-46 (2005) ("[W]hile there are some exceptions, for the most part courts have held that even illiterate or blind consumers or employees can be bound by unsigned small print arbitration notices"); *see also* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009)

On the other end of the spectrum is the negotiation at arms' length, as between corporations, which at least appears to involve the greatest exercise of true agency and therefore the least fictional consents. This Article focuses on the unrepresented alternative processes, such as small claims mediation, that fall in between these two poles. How we think about "minor" court-connected processes may have considerable impact larger civic concerns (such as individual legal consciousness or the quality of participation in democratic society) as well as informing policy- and system-based decisions around whether and how alternative consent-based processes can be successfully deployed, as a matter of justice, in other contexts.<sup>12</sup>

This Article proceeds from here in four Parts. Part Two starts with a familiar puzzle in ADR scholarship: can a consented-to agreement be unjust? This is not a new question, and as such there are many possible avenues for analysis.<sup>13</sup> This Part contributes to the conversation by introducing the moral and jurisprudential conceptions of "luck" to alternative theory and practice. Scholars have examined moral and legal luck in criminal law, torts, and contracts, but not in ADR.<sup>14</sup> Thinking about luck in ADR is analytically useful in two ways: one, by showing how consent becomes less meaningful as the wide variance of external and internal inputs in alternative processes becomes evident; and two, by making clear that ADR processes are designed to leverage luck itself—serendipity

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(arguing that mandatory arbitration is not as fair as litigation); Christopher J. Kippely & Richard A. Bales, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L.J. 10 (2007) (offering ideas to make consent to arbitration more informed). Compulsory mediation has also garnered criticism. See, e.g., Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution*, 75 FORDHAM L. REV. 2685 (2007); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) (arguing that compulsory ADR may further disenfranchise structurally weak parties).

12. My thanks to Arthur Miller for his helpful comments on this point.

13. Some scholars approach this problem from the standpoint of mediation and justice. See, e.g., Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281 (2012); Stulberg, *supra* note 1; Paul Clark, *Restorative Justice and ADR: Opportunities and Challenges*, 44 NOV. ADVOCATE 13 (2001) (arguing that justice in the restorative justice context comes from conflict resolution that is relationship-centered, not punishment-centered); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787 (2001) (suggesting reform is needed to ensure procedural justice from the parties' perspectives). Others examine the coercion that mediators can exert on participants. See sources cited *infra* note 22.

14. See, e.g., Bagchi, *supra* note 9 (contracts); Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 THEORETICAL INQUIRIES L. 309 (2008) (property); Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1996) (torts); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995) (criminal law).

and synergy, for example, are unpredictable dynamics that alternative process designers attempt to harness in support of creative and arguably more just resolution of disputes. Adjustments to mediation and other ADR processes, accordingly, should avoid ruling out the possibility of flexible process, expansive problem definitions, and innovative solutions.

Part Three examines whether consent can effectively mitigate bad luck effects in ADR. Given the relative lack of procedural safeguards and professional accountability of process guides (such as mediators), many alternative designs rely on party consent as the arbiter of whether a particular process or outcome is fair. This Part tests the soundness of that design assumption and concludes that overreliance on “consent” in modern alternative processes is problematic as a matter of justice, even as it appears to offer the greatest expression of unfettered agency.

Part Four is prescriptive and accordingly seeks forward-looking actions that can strengthen consent in civil regimes without debilitating the transformative potential of alternative processes. In the past, scholars have suggested ideas that fall into two broad categories: one, improving mediator quality (and thus diminishing luck effects associated with getting a “bad” mediator) and two, improving the mediation context (and thus diminishing luck effects associated with existing legal doctrine, lack of information, confusing background rules, and time pressures). This Article reviews these suggestions and then adds another category: improving participant quality, in advance of private dispute resolution or large-scale public decision-making and beyond just better “inputs” through mediator and context improvements. Improving participant quality sounds straightforward but involves considerable disruption to established norms around the responsibilities of professional gatekeepers and the role of law schools more generally. Law schools have trained mediators, process leaders, and system designers for decades. Now, as traditional processes continue to give way to ADR and as large-scale deliberation of complex public problems becomes more pressing, perhaps law schools should take up the challenge to teach community members how to participate in consent-based deliberative processes.

## II. THE LUCK PROBLEM IN CIVIL SETTLEMENTS

Ms. P, a retired woman living alone, hires Mr. Q to install a new garage door at her home. Q installs a dented, obviously used door for P that scrapes the garage ceiling every time it goes up or down. He slathers grease along the chain and some ends up on the garage ceiling. P is unhappy with both

the door and the installation and refuses to pay. Q files a civil complaint. P is nervous about her first time before a judge—and as a defendant!—and so upon arriving at the courthouse alone on the day of the hearing, decides to ask the clerk about mediation. The clerk calls Q to the desk. Q agrees to mediate. So M, a mediator affiliated with the “Justice Center” (the organization providing small claims mediation services to the court), brings P and Q into a small conference room. After going through the typical mediation preamble, M moves P and Q into separate rooms for caucus. During his caucus with P, M says: “Q has a good case. He’s been here before. Think hard about settling.” M then disappears. Later, when M brings the parties back together, Q states that P should pay for the garage door plus interest. P agrees. Then P adds, suddenly: “And I want you to come pick up your door and take it away, for free.” Q agrees. M draws up the agreement. A week later, when Q comes to pick up the garage door, he makes a point of gleefully telling P that door is worth \$500. Q then loads the door into his truck and drives away, honking twice and waving out the window. P, who has already paid to have Q’s door removed from the garage and a new door installed, watches him go.

Maybe not a perfect small claims mediation, but hardly terrible. Two parties dispute over a low-dollar matter, head toward small claims court, divert themselves into mediation, and settle the case quickly. Ms. P did not have to face the judge as a defendant and did not have to dispose of the used garage door herself. Mr. Q received his payment plus interest plus the original door. Mediator M provided the parties with information about mediation at the outset and then gave each of them time in caucus and in joint session. Both parties were satisfied with the result. From the perspective of court resources, the process was efficient; from the perspective of the parties, the process was voluntary and the agreement consensual.<sup>15</sup>

Or—maybe a terrible small claims mediation. Perhaps the fact that P was an older woman unfamiliar with small claims court and mediation and Q sounds like a rascal and a repeat player suggests that disparities in gender, age, and process familiarity may have affected the outcome.<sup>16</sup> Or perhaps

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15. See Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 556 (2008) (explaining that court-connected ADR has dual purposes of efficiency and self-determination); Carrie Menkel-Meadow, *Introduction: What Will We Do when Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1616 (1997) [hereinafter *Intellectual History*] (noting ADR’s potential both for efficiency and for “tailor-made solutions” supporting justice).

16. Many critics have argued that the apparent informality of alternative processes can actually replicate existing power disparities and even extend state oversight into previously private affairs.



the apparent facilitative-to-evaluative shift by M in caucus speaks to inappropriate pressure to settle and potential coercion.<sup>17</sup> Or maybe the agreement—which essentially allows Q to recover twice for the door, less loading and transport, and never addresses the inconvenience or costs associated with the original faulty installation—is so lopsided as to be unfair. Would things have gone differently if Ms. P had not been alone on the day of the hearing?<sup>18</sup> If more materials about mediation had been available? If a judge had decided the outcome? If M had been facilitative throughout, or even a different M altogether? If Q had offered (or M or P had thought to ask about) the value of the door and the cost of loading and transporting it before the parties signed the agreement?

Here we have a puzzle. On the one hand, this story is a familiar dispute resolution narrative of consent, choice, and self-determination. On the other hand, this story is about luck—of this M instead of that M, of this court's particular approach to making mediation available, of Ms. P's failure to think of the right questions at the right time, of the variability and chance that shape human interactions even in the most institutionalized and

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*See, e.g.,* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Richard Delgado et al., *supra* note 10; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Even those who are not part of vulnerable or marginalized populations may experience “social anxiety” in mediated settings that is detrimental to self-determination and participation. Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 74-75 (2002).

17. *See* John W. Cooley & Lela P. Love, *Midstream Mediator Evaluations and Informed Consent*, 14 NO. 2 DISP. RESOL. MAG. 11 (2008) (advising mediators against shifting from facilitative to evaluative without informed and preferably written consent from the parties); James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALT. DISP. RESOL. EMP'T 4, 4 (2000) [hereinafter *Dirty Little Secret*] (stating that “mediation's dirty little secret is the degree to which mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements”).

18. Unrepresented disputants are, empirically speaking, at a disadvantage in court-connected mediation settings. *See, e.g.,* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001). Also problematic is the situation in which one party has a lawyer and the other does not. *See, e.g.,* Orley Ashenfelter & David Bloom, *Lawyers as Agents of the Devil in a Prisoner's Dilemma Game* 16-21 (Nat'l Bureau of Econ. Research, Working Paper No. 4447, 1993) (demonstrating that the side with the lawyer will get better results than the side without a lawyer). *But see* Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419 (2010) (suggesting that empirical research shows that unrepresented parties do not see the mediation process as less fair, the mediator as less impartial, the pressure to settle as greater, or the settlement as less fair than do represented parties).



intentional contexts. What's puzzling is that we normally do not think of consent and luck as compatible. In fact, the law generally and procedural dispute resolution specifically work to eliminate unpredictability and arbitrariness;<sup>19</sup> this is perhaps especially true for non-binding consent-based processes, such as the small claims mediation described above, which allow parties to walk away from unacceptable process developments or unjust proposals. Further complicating matters is the fact that ADR embraces customization and differences within dispute resolution—not randomness, but multiple approaches and outcomes based on the interests, values, and resources of the actual disputants involved.<sup>20</sup> This means that similar disputes may have dissimilar resolutions, as a matter of ADR philosophy and practice. But how to distinguish these arguably welcome variations from those based on bad luck?

The problem exists beyond the garage door hypothetical. Consent litigation (the result of one party refusing to comply with the terms of a mediated agreement, even though that same party consented to those terms in mediation) is on the rise.<sup>21</sup> Consent litigation cases suggest that consent in the moment may not be a reliable indicator of autonomy, agency, and self-determination—all foundational to mediation as a legitimate process alternative to traditional forms of adjudication. Indeed, along with the increasing institutionalization of alternative processes, scholars and practitioners have become increasingly concerned about the cracks forming between alternative theory and practice. For example, scholars have argued that mediator coercion and mandatory mediation/arbitration schemes have eroded the capacity of ADR processes to support true consent and self-determination.<sup>22</sup> As a matter of legal consciousness and social justice, it is

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19. See, e.g., JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 2 (10th ed. 2009) (stating that dispute resolution “proceeds not arbitrarily but according to some standards of general procedure”).

20. See, e.g., Michael Moffitt, *Contingent Agreements: Agreeing To Disagree About the Future*, 87 MARQ. L. REV. 691 (2004) (explaining how different forecasts can provide value-creating opportunities in deals); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2d ed. 2000) (describing basic integrative theory and the potential for party differences to be sources of value).

21. See Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247 (2009) (arguing that the blending of consensual and nonconsensual features in mediation has led to an increase in consent litigation cases).

22. See, e.g., Margaret B. Drew, *Collaboration and Coercion*, 24 HASTINGS WOMEN'S L.J. 79 (2013) (arguing that collaborative practitioners must consider their role in exacerbating clients' trauma when dealing with abusive relationships); Jim Coben & Lela Love, *Trick or Treat? The Ethics of Mediator Manipulation*, 17 NO. 1 DISP. RESOL. MAG. 17 (2010); Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273 (2005) (making recommendations to minimize coercion in court-connected mediation); Daniel D. Barnhizer, *Inequality of Bargaining*

wrong to promulgate alternative processes if those processes disempower disputants and provide them with objectively worse results than they likely would have gotten had they gone the non-alternative route.<sup>23</sup>

This is bad enough, but it gets worse as we scale upward into multiparty contexts such as collaborative public-private decision-making.<sup>24</sup> Large-scale cases introduce problems not just with individual consent, as those in the consent litigation cases, but also with an individual's consent in her capacity as a member of the public.<sup>25</sup> In his analysis of collaborative management of the Glen Canyon Dam, for example, Joseph Feller argues that focusing on stakeholder interests does not promote wise decision-making around public lands because stakeholder interests do not usually contemplate the broader "public interest."<sup>26</sup> For stakeholders in such cases, it is not necessarily easy to appreciate the impact that one's consent will have on public life. Without this appreciation, a consent-based stakeholder-focused process may look satisfactory (e.g., everyone agrees) but is nonetheless inadequate given the ripple effects of decision-making in such contexts.

The garage door mediation, then, is an easy entry point into these difficult policy and design considerations. At all levels of alternative processes, the emphasis on party consent must be reevaluated in light of the

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*Power*, 76 U. COLO. L. REV. 140 (2005) (arguing that current standards regarding the legal consequences to attach to bargaining power are insufficient to deal with disparities); James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001) (arguing that the general policy, in court-connected mediation, of favoring settlement, raises troubling issues of settlement coercions, and departs from mediation's core principles and values); Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493 (1995) (illuminating the complexities involved in "trades" that occur in divorce settlement negotiations; focusing specifically on the coercion and exploitation that "lurks" behind these trades).

23. Larry Susskind has famously argued that mediation success is not solely a function of sound process and party satisfaction but also of the objective fairness of the outcome. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14 (1981).

24. And perhaps even worse when we consider the growing phenomenon of state and corporate exportation and encouragement of ADR practices overseas. See, e.g., Eduardo R.C. Capulong, *Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines*, 27 OHIO ST. J. ON DISP. RESOL. 641, 643 (2012) (arguing for "counter-hegemonic community mediation practice in the neocolonial setting" that is responsive to local values and norms).

25. See Susskind, *supra* note 23, at 8 (describing the problem of justice vis-à-vis unrepresented third parties, such as future generations, in mediation).

26. Joseph M. Feller, *Collaborative Management of Glen Canyon Dam: The Elevation of Social Engineering over Law*, 8 NEV. L.J. 896, 898 (2008) (criticizing collaborative management for elevating consensus among stakeholders over legal rules and policy objectives); see also Susskind, *supra* note 23.

variability, chance, and contingency that attend human affairs. Managing contingencies in various ADR settings, from private mediation to large-scale complex public deliberations, requires first an analytical framework for understanding how luck operates in these settings. The garage door mediation is a good test subject for developing this framework.

To that end, what follows is a general definition of luck followed by discussions of moral luck, legal luck, and the special case of “ADR luck.”

A. *What Is Luck?*

Agents make choices. What happens as a result of those choices – indeed, what led the agent to make those choices in the first place – are not wholly within the control of the agent herself. External to the agent’s conscious decision-making are “unchosen inputs” that may be truly random (being struck by lightning) or may be due to the “unconsented-to” choices and actions of others.<sup>27</sup> These unchosen inputs may manifest as bad luck (being born into poverty) or good luck (winning the lottery), and often comprise an overdetermined mix of stochastic and other-driven events that cannot be easily disaggregated from each other or from the agent’s own intentional choices.<sup>28</sup>

Just to complicate matters a little further, classifying an event as “bad luck” or “good luck” is often a matter of interpretation, specific to circumstances and personalities of those involved.<sup>29</sup> Many lottery players, for example, believe *ex ante* that winning the lottery is enormous good luck—yet, *ex post*, many lottery winners report the same or even lower happiness levels after the big win.<sup>30</sup> Such results suggest that whether a lucky event seems good or bad depends in part on when the evaluation happens. Similarly, whether a person describes being born into poverty as good or bad luck is, arguably, itself a choice in building one’s self-narrative

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27. See Lee Anne Fennell, *Odds and Ends: An Epstein-Inspired Look at Luck*, 44 TULSA L. REV. 779, 781-82 (2009). Fennell refers to Ronald Dworkin’s well-known distinction between “brute luck” (arising from factors wholly outside of one’s control) and “option luck” (arising from choices that bear risks). *Id.* at 782 (citing Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFAIRS 283, 293 (1981)).

28. Fennell, *supra* note 27, at 790 (explaining why disaggregation of luck from choice is often too costly to pursue in legal rules and policy).

29. See THOMAS NAGEL, MORTAL QUESTIONS 28, 33-34 (1979) (describing constitutive luck, which defines who a person is, and circumstantial luck, which defines what kinds of events a person must deal with).

30. See Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553, 555 (2010); Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S166 (2008). Studies also show that assistant professors denied tenure have the same level of happiness, a few years later, as those not denied tenure. *Id.*

that may serve as an explanation or support for other choices, positive or negative. (And of course, how one chooses to build one's self-narrative could in turn be a product of unchosen inputs, such as the role models one happened to have.)<sup>31</sup> What's more, the difference between events that are truly out of one's control versus those that are the attenuated consequences of some earlier choice is not self-evident.<sup>32</sup> Sorting through the unasked-for and the chosen becomes, following this train, an endless task that implicates, among other concerns, the well-known intractable tension between free will and determinism.

These are the beginnings of murky waters, so here we adopt Lee Anne Fennell's excellent definition: "luck is not a label that permanently adheres to particular events, but rather a measure of the extent to which a given event was out of the control of the person under consideration."<sup>33</sup> This definition aptly captures the variability of subjective interpretations (luck or choice? good luck or bad luck?) while emphasizing the agency and control issues that are foundational to luck-based analyses.

### 1. Moral Luck

Yet to appreciate the problem that luck poses for legal thinkers, a quick dip into the murky waters is in order. Luck's relationship to morality presents a classic Western moral philosophical conundrum.<sup>34</sup>

Whether a reckless driver who accidentally kills a pedestrian is morally worse than an equally reckless driver who happens not to kill anyone implicates, within the moral philosophical tradition, searching questions as to the exercise of moral judgment on the part of agentic beings.

On one side, we have Kant, who would adjudge these people the same. The Kantian view that morality is separate from and indeed immune to luck and therefore unaffected by results has been widely influential in Western

31. This would be an example of circumstantial luck. NAGEL, *supra* note 29, at 28.

32. In an open and ongoing system, contingencies make impossible the exercise of choice unaffected in some way and at some point by unchosen events. On this view, Dworkin's option luck seems inevitably to yield to brute luck. As Nagel writes, "The area of genuine agency, and therefore of legitimate moral judgment, seems to shrink under this scrutiny to an extensionless point." *Id.* at 35.

33. Fennell, *supra* note 27, at 782 (quotation marks omitted). *See also* Menachem Mautner, *Luck in the Courts*, 9 THEORETICAL INQUIRIES L. 217, 217 (2008) (defining lucky situations as those featuring both lack of control and multiple possible outcomes).

34. *See* Statman, *supra* note 2.

thought and jurisprudence; it accords with the appealing liberal idea that everyone – despite accidents of birth or circumstances – has the capacity to behave in a perfectly moral fashion. The categorical imperative (“I ought never to act in such a way *that I could not also will that my maxim should become a universal law*”<sup>35</sup>) assumes that moral truths are absolute, unchanging, and universal. Contingencies and context are not part of Kant’s moral calculus, and so luck simply does not figure into Kant’s moral philosophy. An individual’s morality on this view exists and endures separately from inputs and outcomes:

Even if it were to happen that, because of some particularly unfortunate fate or the miserly bequest of a stepmotherly nature, this will were completely powerless to carry out its aims; if with even its utmost effort it still accomplished nothing, so that only good will itself remained (not, of course, as a mere wish, but as the summoning of every means in our power), even then it would still, like a jewel, glisten in its own right, as something that has its full worth in itself. Its utility or ineffectuality can neither add to nor subtract from this worth.<sup>36</sup>

For Kant, therefore, the fact that the first driver killed someone does not make him morally worse than the other driver; likewise, that the second driver did not kill anyone does not make him morally better than the first.

On the other side, we have the moral luck philosophers, starting with Bernard Williams and Thomas Nagel. In 1979, Williams argued that outcomes affect a person’s own accurate self-assessment of his moral worth and thus moral theory is personal, not universal.<sup>37</sup> On this view, the reckless driver who kills the pedestrian is morally worse than the one who does not kill anyone, even if both drivers were equally reckless (in fact, even if the second driver was considerably more reckless). Observing that we would all expect that the first driver will feel terrible about what happened (what Williams called “agent-regret”<sup>38</sup>), Williams suggested that morality is not an absolute universal construct but a local one, a function of one’s own “rational justification of his own actions to himself”<sup>39</sup> and situated as an after-the-fact judgment.<sup>40</sup>

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35. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 203 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., Oxford Univ. Press 2002) (1785).

36. *Id.* at 196.

37. See Bernard Williams, *Moral Luck*, in MORAL LUCK 36 (Daniel Statman ed., 1993) (distinguishing his more subjective, retrospective approach from Kant’s universal, unconditioned idea of moral value).

38. *Id.* at 42.

39. Bagchi, *supra* note 9, at 1885.

40. Williams uses the example of an artist who chooses to abandon his family and pursue his art in Tahiti. Whether this decision is morally defensible will depend, Williams argues, on whether the artist actually fulfills his potential, which he cannot know in advance. Because morality on this

Although Thomas Nagel did not go as far as Williams in rejecting Kantian morality outright, he too pointed out that morally significant qualitative differences can arise from events outside the agent's control: "We judge people for what they actually do or fail to do, not just for what they would have done if circumstances had been different."<sup>41</sup> Not to take luck effects into account, he argues, turns a blind eye to the multiple forces and factors that ultimately constitute what we like to think of as agency:

I believe in a sense that the problem has no solution, because something in the idea of agency is incompatible with actions being events, or people being things. But as the external determinants of what someone has done are gradually exposed, in their effect on consequences, character, and choice itself, it becomes gradually clear that actions are events and people things. Eventually nothing remains which can be ascribed to the responsible self, and we are left with nothing but a portion of the larger sequence of events, which can be deplored or celebrated, but not blamed or praised.<sup>42</sup>

These discussions can get pretty heady pretty fast. Was Rousseau morally justified in sending his children off to the orphanage so that he could concentrate on his philosophy? What is the moral difference between an actual Nazi and a German who moved to a farm in Argentina in the 1930s and lived a quiet life but who would have, had he stayed in Germany, become a Nazi too?<sup>43</sup> To be sure, workaday lawyers and law professors rarely indulge these kinds of provocative thought experiments, instead focusing on engineering solutions to client- and policy-driven problems. Yet the moral luck dynamic persists in our sociopolitical discourse, not often explicitly but as a felt complication in modern debates around religious fundamentalism, nature versus nurture, moral relativism, and personal responsibility.

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view depends on outcomes, and because outcomes are affected by circumstances and actors outside one's control, luck ends up figuring prominently in whether the decision is moral or not. Williams, *supra* note 37, at 37-41. The reader might object that outcomes might not affect the objective (outside) moral evaluation of a given decision and that the artist was morally wrong to leave his family regardless of success. Here is a different example that might demonstrate Williams's point more clearly: the moral assessment of a decision to leave a baby in a bathtub momentarily with the water running, for example, will change depending on the outcome. NAGEL, *supra* note 29, at 30-31. Insisting that the moral value of leaving the baby in the bathtub is the same regardless of outcome is, on this view, not only unconvincing but unhelpfully reductive when thinking through human moral complexities.

41. NAGEL, *supra* note 29, at 34.

42. *Id.* at 39.

43. *Id.* at 26, 34.

### 3. Legal Luck

Related to moral luck is legal luck, which explores the impact of fortuity on legal rules and outcomes. Like moral luck, legal luck presents situations in which outcomes play a large role in determining how legally wrong an action is. If A shoots at B with the intent to kill, and indeed does kill B, then A is guilty of murder. If X shoots at Y with the intent to kill, but a bird flies in between them and takes the bullet and Y lives, then X is guilty of attempted murder—a crime that carries different penalties than murder, even though the intentions and actions in both cases were the same.<sup>44</sup> As Jeremy Waldron notes, luck effects are “ineliminable” in the positive law, because positive law is characterized by line drawing, definitionally and temporally.<sup>45</sup> Similar luck disparities result when legislatures pass new laws; what might have been legal yesterday is illegal today, and it is only the present offender’s bad luck that he did not offend one day sooner.<sup>46</sup>

Additionally, luck emerges in legal settings because people (judges and juries)—not written laws—decide cases. Neither Dworkin’s conception of judicial integrity nor a return to “natural law” would ameliorate luck effects. As Waldron points out, both judges acting with integrity and natural law introduce chance into the proceedings, because there is no way to come to consensus about what integrity or natural law requires.<sup>47</sup> Both are necessarily subjective in practice, given that no external measure or (divine) intervention is available. Such adjudication would be subject to differing interpretations by different people or even by the same person over time. These differences would introduce luck into legal proceedings, likely much more luck and uncertainty than exist in the positive law.<sup>48</sup> As appealing as judicial integrity or natural law might seem in curing luck effects in law, therefore, even a fully realized implementation of such regimes would not rid the law of luck.

Because a luck-free legal system is not an option, legal luck analyses often concern themselves with the appropriate allocation of responsibilities in the aftermath of lucky events. If a cosmic ray hits a bank computer and

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44. Nagel uses the example of the bird flying in front of the bullet. NAGEL, *supra* note 29, at 31.

45. Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185, 187, 193 (2008).

46. *Id.* at 193.

47. *Id.* at 197, 209-14.

48. *Id.* at 201 (“We want to be ruled by settled rules, not by natural law reasoning about particular cases, because we figure the element of luck and arbitrariness and unpredictability involved in the latter far exceeds the element of luck and arbitrariness and unpredictability involved in the former. That is Locke’s argument, and it seems to me quite persuasive.”).



scrambles some of the accounts, for example, should we pay whatever it takes to fix it (and thus support expectations around property) or should we insist that the affected account holders seek help from decentralized sources, such as private charities or family?<sup>49</sup> Certainly private insurance can help manage certain luck effects ahead of time, but not for every contingency (such as the cosmic ray) or for every potentially affected person. For those studying legal luck, these fortuitous situations present as system-level glitches that require an assessment of whether institutional “buffers” (legal rules allocating responsibility, insurance regimes, etc.) are possible and, if so, affordable as a matter of policy and costs. If such buffers are not available for whatever reason, then the discussion turns to what the impacts of unbuffered luck on ordered society might be.

None of this comes as a surprise to those who study the law, especially those who study civil procedure. As proceduralists and practitioners know, lawyers become experts at scoping out judges, analyzing jury pools, shopping for forums, and thinking through novel theories and extensions of existing that just might work in this particular fact pattern.<sup>50</sup> Within the legal academy, the realist, critical, and post-critical movements have identified myriad external influences on legal rules and outcomes, such ideological politics, judicial personalities, power structures, coalitions and alliances, and agency capture.<sup>51</sup> Learning to think like a lawyer means, for many people, becoming less idealistic about the capability of human-made systems to deliver justice.

Yet the widespread recognition of luck effects in the law does not equate to widespread acceptance of those effects, which is why scholars see luck as problematic, as a matter of both theory and practice. This is because the core values of the legal system still resonate—with legal actors, surely, but perhaps especially with non-lawyers. These values, which include predictability, non-arbitrariness, and fairness, reinforce the prevailing belief that “law should not be random in its application to its subjects, and that those who contend with it should not have to hope for luck, or fear bad luck,

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49. Professor Fennell cites this example from Epstein’s 1988 essay on luck. Fennell, *supra* note 27, at 779 (citing Richard A. Epstein, *Luck*, 6 SOC. PHIL. & POLICY 17, 30 (1988)).

50. See, e.g., Markus Petsche, *What’s Wrong with Forum Shopping? An Attempt To Identify and Assess the Real Issues of a Controversial Practice*, 45 INT’L LAW. 1005 (2011).

51. See, e.g., Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191 (2012); Kimberle Williams, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253 (2011); Steve Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*, 34 N.Y.U. REV. L. & SOC. CHANGE 499 (2010).

in the law that is applied to their case.”<sup>52</sup> Predictability assures members of society that they can go ahead and make plans and investments in the context of established rules and reliable regulation. Non-arbitrariness prevents parties from suffering undeserved “financial loss, incarceration, stigmatization, and non-vindication in a dispute”<sup>53</sup> at the hands of the public justice system. Fairness means, in the most basic sense, that like cases will be treated alike.<sup>54</sup> Although these three values can never be fully realized in a contingent, plural, political environment, they retain strong cultural resonance and are certainly worthy aspirations for those engaged in the various enterprises of the law.

Legal luck, then, is one entry point for considering how our legal institutions exist within a particular historical/ideological set of contexts which both determine and misdirect institutional strategies for delivering justice. Legal luck reminds us that human-made systems have shifting and unavoidable gaps and uneven places that trip up the unlucky.<sup>55</sup> With that frame, legal scholars and policymakers are able to think through the policy implications, the resource expense, and the system design difficulties associated with attempting to calibrate that system a little more perfectly.<sup>56</sup>

### 3. “ADR Luck”

Legal luck philosophers have focused most of their scholarly energies on good and bad luck in tort and criminal law.<sup>57</sup> Aditi Bagchi recently expanded the conversation to contract law, considering the impacts that background institutions, contract rules, and private negotiation have on “manag[ing] moral risk” in contract.<sup>58</sup> Aside from Bagchi’s excellent analysis, which includes discussion of consent in non-dispute settings (such

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52. Waldron, *supra* note 45, at 192.

53. Waldron, *supra* note 45, at 191; *see also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (describing the power of civil legal regimes and judges to harm one’s person and property).

54. *See* Waldron, *supra* note 45, at 191-92.

55. Marc Galanter provides a memorable image of litigation as a billiards table with many games happening at once. “What would an observer perched above the table see? Balls colliding, deflected; energies dissipated and transmitted. The course of the balls is not random. ... Yet the overall pattern is not traceable to or deducible from the goals or strategies of any of the players. For each is surrounded by unknowable contingencies, including in part the cumulative effects of the actions of the others.” Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC’Y REV. 371, 395 (1990).

56. Fennell, *supra* note 27, at 789-96 (analyzing the economic impact of over-responsible and under-responsible luck-managing mechanisms in the law).

57. *See* sources cited *supra* note 14.

58. Bagchi, *supra* note 9.

as private negotiation), the relationship between legal luck and ADR processes—namely, mediation, arbitration, and negotiation—has not received any attention in luck or ADR scholarship.<sup>59</sup>

This section examines whether “ADR luck” is a meaningful subset of legal luck and, if so, what its attributes and operational characteristics might be. Because ADR is such a vast area of theory and practice, we will limit the present discussion to court-connected ADR processes, and accordingly some brief context is in order.

It is no longer possible to talk about procedural law without considering the impact of ADR on pre-trial and other court-connected processes. At least since Frank Sander presented his vision of the multi-door courthouse in 1976, state and federal courts have developed an array of non-litigation avenues for those seeking redress in the public courts.<sup>60</sup> Court-connected ADR processes, such as mandatory mediation or non-binding arbitration, are supposed to help with docket management and provide quicker resolutions to participants.<sup>61</sup> Litigants in small claims court, for example, often find themselves (intentionally or otherwise) in pre-hearing mediations, so that the parties have a chance to air their grievances and work out their usually straightforward concerns, neither of which necessarily require judicial expertise or involvement.<sup>62</sup>

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59. Bagchi's position accords with my own. She disagrees with the prevailing view that “there can be nothing morally wrong with the terms on which one contracts because those terms are consented to by the other party” and argues instead “that it is possible (though rare) to wrong another individual through a voluntary transaction.” *Id.* at 1895. Her essay then examines the implications of this argument for notions of legal and moral responsibility.

60. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell Wheeler eds., 1979); see also Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); 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).

61. But as Professor Shestowsky points out, the efficiency benefits of court-connected processes are often overstated. “Courts often subordinate disputants’ needs to the desires of the bench (as well as the bar) to clear dockets and reduce the institutional costs of disputes even though empirical studies of court-connected programs suggest that they often fail to meet these institutional goals.” Shestowsky, *supra* note 15, at 551. My own analysis of judicial writings about mediation suggest that judges indeed support and believe in the efficiency benefits of court-connected mediation. See Jennifer W. Reynolds, *What Judges Write when They Write About Mediation*, 5 PENN ST. Y.B. ON ARB. & MED. 111 (2013).

62. See Nolan-Haley, *supra* note 21, at 1253-54 (describing the seeming contradiction between a “central ideology” of voluntary participation and the willingness of legislatures to mandate mediation in certain cases).

Efficiency is not the only reason that alternative processes have emerged in legal settings, however. Early community mediation proponents and access to justice activists stressed the potential justice benefits that less adversarial, less institutional, more informal, more local interventions may provide.<sup>63</sup> The development of “interest-based” ADR techniques promised to help disputants resolve not only the legal aspects of their dispute but also other extra-legal concerns, such as ongoing relationship and communication challenges.<sup>64</sup> Many working in the area of family law, for example, have long championed the benefits of non-litigation ADR processes in cases of divorce, custody, and other family-related disputes in which providing for the well-being of the individuals involved as well as for the strength of the family ties is as important as resolving the legal matters at stake.<sup>65</sup> Simply put, empowering disputants to craft their own solutions – making possible “tailor-made justice”<sup>66</sup> – has been and is still a central tenet of ADR philosophy and practice, along with and often in tension with ADR’s promises of efficiency.<sup>67</sup>

In this way, as I have argued similarly elsewhere, ADR may be thought of as an Epsteinian decentralized institutional response to luck effects in the law.<sup>68</sup> Early ADR proponents saw alternative practice as a way to eliminate the arbitrariness of law in dispute resolution.<sup>69</sup> Part of the popular

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63. See, e.g., Karen G. Duffy & James Thomson, *Community Mediation Centers: Humanistic Alternatives to the Court System, A Pilot Study*, 32 No. 2 J. OF HUMANISTIC PSYCHOL. 101 (1992) (evaluating mediation as a “humanistic dispute resolution process” that better addresses disputants’ Maslowian needs than do adversarial systems); see also Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, 1091-92 (2011) (describing the early ADR movement as driven in part by a desire to “transform ordinary people from passive subjects into empowered ones” who did not need help from legal institutions).

64. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3-14 (1981) (stressing the importance of identifying and addressing the interests underlying positions).

65. See generally CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 274 (2005) (identifying family disputes as one of the mediation’s “major growth areas” due to the harmful impacts from adversarial process on ongoing family relationships); but see John Zeleznikow & Andrew Vincent, *Providing Decision Support for Negotiation: The Need for Adding Notions of Fairness to Those of Interests*, 38 U. TOL. L. REV. 1199, 1233 (2007) (“Family law is one domain where interest-based notions of mediation conflict with notions of justice”).

66. See Intellectual History, *supra* note 15.

67. See Shestowsky, *supra* note 15; see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994) (asserting that narrow focus on settlement does not promote larger justice and relationship concerns that mediation has potential to address).

68. See Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 480-81 (2012) (arguing that the “utopian promise” of ADR responds to perceived dystopian features of traditional law, such as arbitrary or coercive process).

69. Eliminating arbitrariness was not, in the those days, merely a matter of creating better process. In an early examination of the community mediation movement, for example, Christine

dissatisfaction with the law that led to the modern ADR movement, after all, were system distortions (delay, overcrowding, contentiousness) that created too much variability and concomitant gamesmanship in what should be orderly legal proceedings.<sup>70</sup> In contrast, ADR promised a highly individuated alternative designed to promote civility, respect difference, and seek resolution (broadly defined as integrative agreements that encompass relational concerns) through dialogue.<sup>71</sup> These utopian goals were made possible through the valorization of self-determination and autonomy: choice, not chance, shapes the parties' process and outcomes.<sup>72</sup> As such, and using the theoretical constructs of legal luck, ADR arguably provided a less chancy proposition than the crowded, clunky legal system for parties attempting to resolve disputes.

Even so, because ADR is so closely linked to legal process and substantive law, ADR is arguably subject to the same luck effects as the law itself. As Mnookin and Kornhauser famously observed, the positive law creates a "shadow" on private negotiation and mediation, and as such parties engaged in those alternative processes have bargaining entitlements and concessions derived from perceived legal rights.<sup>73</sup> To the extent that the law

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Harrington and Sally Merry argued that by 1988, the original three goals of the movement—"delivery of dispute resolution services," "social transformation," and "personal growth and development"—were overwhelmed by an ideology of "consensus process" that "submerge[d] the ideology of community justice." Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 714-15, 729 (1988). Elevating process over participants' needs is one of the problems of institutionalized ADR and may alienate participants. See Just Resolutions, *supra* note 6 (noting that overemphasis on resolution may lead to ADR processes that do not promote disputants' self-determination or participation).

70. See, e.g., 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, 4 (1983) (emphasizing the need for lawyers "who understand that access to justice does not invariably mean access to courtrooms").

71. See, e.g., Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution*, 5 PSYCHOL. PUB. POL'Y & L. 1084 (1999) (situating ADR as a legal reform); see also Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide To Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

72. Emphasis on self-determination emerges in different ways in the three big areas of ADR (negotiation, mediation, and arbitration). Private interest-based negotiation, for example, emphasizes the creative possibilities inherent in sharing information and recognizing the importance of ongoing relationships. Mediation focuses on party choice and mediators will tell the parties, often more than once, that they can leave at any time. Arbitration, for its part, is cloaked in the mythology of equally powerful merchants who would prefer a subject-matter expert to resolve their dispute without a lot of process baggage—thus supporting their self-determination and autonomous ends.

73. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

does or does not offer a particular remedy or right, therefore, bargaining positions are adjusted accordingly. For example, if a would-be plaintiff cannot pursue her case in court because the relevant statute of limitations has passed, it is unlikely that she will be successful in private mediation. In this way, ADR is tethered to the contingencies of positive law and therefore is subject to the same legal luck.

So modern ADR is both a response to legal luck and subject to legal luck. Over the years, the primary focus of the alternative movement has settled on efficient disposition of disputes, upstream and down, and not as much on the movement's original commitments to social transformation and individual empowerment.<sup>74</sup> Accordingly, court-connected mediation often narrows the dispute along legal lines, dampening mediation's effectiveness as a legal luck buffer and making mediation more susceptible to luck effects associated with the positive law.<sup>75</sup>

Additionally, the fact that alternative processes are often flexible, confidential, and relatively unencumbered by professional norms on the part of institutional players (mediators, arbitrators, lawyers) may lead to significant luckiness and disparity in outcomes, even for cases that are themselves alike. Consider the example of lawyers appearing in mediation settings. Some lawyers may seek to promote integrative outcomes and information sharing, in accordance with mediation philosophy.<sup>76</sup> Others, in contrast, may assume an adversarial stance and use the mediation to intimidate the opponent or to avoid litigation costs (e.g., the problem of "free discovery" in mediation).<sup>77</sup> Because mediation in particular does not have

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74. See Harrington & Merry, *supra* note 69; see also Cohen & Alberstein, *supra* note 63.

75. See, e.g., Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 864 (2008) (arguing from empirical evidence that court-connected mediation tends to focus on narrow legal issues, not on broader extralegal concerns).

76. See, e.g., Michael T. Colatrella Jr., A "Lawyer for All Seasons": *The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93 (2012) (arguing that lawyers who adopt a broad conflict management approach will cut costs, save time, and better preserve relationships among disputants); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001) (raising questions about how to assure that lawyers will learn to become effective mediation advocates); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000) (describing new professional paradigm for lawyers emphasizing problem-solving over adversarialism); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997) (recommending that lawyers become familiar with the various styles of mediation practice so that they can competently advise clients about use of mediation, select mediators appropriate for particular cases, and constructively participate in mediation as appropriate).

77. See, e.g., Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 102 (reporting that survey



fixed process or procedural safeguards, other than confidentiality, lawyers may behave differently than they would in a more controlled, public litigation setting.<sup>78</sup> Certainly clients can choose their own lawyer intentionally, but whether the other lawyer will be cooperative or combative is, often, a matter of luck.<sup>79</sup> To the extent that alternative processes are concerned with non-litigation and extra-legal priorities—and to the extent that those processes do not include the same rules or restraints of traditional legal settings that impose formal controls over attorney behavior—the presence of lawyers exposes ADR participants to some measure of additional chance and uncertainty than might otherwise exist.<sup>80</sup>

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respondents feared that “revelations in mediation may ‘unfairly’ serve as a source of discovery”); *see also* Stephen D. Kelson, *Where Many Litigators Still Fear To Tread: Adapting to Mediation*, UTAH B.J. 14 (Nov./Dec. 2012) (arguing that attorneys often obstruct the mediation process by intentionally and unintentionally employing contentious tactics when they fail to prepare for mediation); Art Hinshaw, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 152-53 (2011) (discussing to what extent lawyers can (and believe they can) posture and exaggerate in caucused mediation), citing ABA Comm. On Ethics and Prof'l Responsibility, Formal Ops. 93-370 (1993), 06-439 (2006).

78. Ellen Deason points out that confidentiality in mediation may “hinder accurate decision making,” undermine democratic values of participation and accountability, and hide conduct or statements that should, as a normative matter, be disclosed. Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387, 1388 (2006); *see also* Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 572 (2004) (arguing that court-connected mediations are “draped with a cloak of secrecy” that allows for efficiency but may not comport with society’s expectation of justice). *But see* Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1420 (2006) (arguing that judges often fail “to discourage intentional violations of mediation confidentiality” suggesting that the protection is not as robust as it should be).

79. Unless, of course, the mediation arrangement is structured as an exercise in collaborative law. *See infra* text accompanying note 102; *see also* James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002) (arguing that, for ADR to be successful, it must be practiced by lawyers and clients who are convinced not just of the merits of their case but of the value of finding successful resolutions without formal litigation).

80. The extent to which lawyers “colonize” and deform alternative processes is an important inquiry in ADR. *See, e.g.*, Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 922 (2012) (noting that the presence of attorneys shifts mediation’s “client-centered” focus to an “attorney-driven process”); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 250 (2002) (arguing that lawyers and legal thinking should not dominate ADR processes). Getting rid of lawyers has its own downsides, of course, in that power may shift to the mediator, who may then start looking more like a judge than ever. *See, e.g.*, Ronit Zamir, *The Disempowering Relationship Between Mediator*



Mediators and arbitrators also introduce issues of luck. As Waldron notes, one may be “lucky or unlucky in one’s jury” or judge because judges and juries are people making decisions, and the human decision-making process is subject to differences in moral values, in individual temperaments, in external circumstances, and in a host of other influences that together make it impossible to predict with certainty what the outcome of a given case will be.<sup>81</sup> Of course, procedural and substantive law, not to mention legal training and the judicial code, create some permeable parameters for adjudication, which may buffer some luck effects.<sup>82</sup> Seeing as how mediators and arbitrators are not subject to the same (or any) professional standards or political accountability as are many judges, there is potentially even greater variation in these roles and therefore greater possibility of luck effects in those practices.<sup>83</sup> Although JAMS and other provider organizations provide luck buffers against mediator variability, such as research, monitoring, and reputational bonding<sup>84</sup> at the high-end of the ADR market (e.g., providing profiles of former judges who now specialize in high-dollar complex commercial mediation), there are generally no such quality control mechanisms at the low end of the ADR market—which includes, of course, small claims mediation.<sup>85</sup> As Bryant Garthy caustically observes:

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*Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L.J. 467 (2011).

81. See Waldron, *supra* note 45.

82. Mautner argues that judges in groups are more luck-resistant than judges alone, suggesting that their identities as part of a publicly accountable community hedges against arbitrary outcomes. See Mautner, *supra* note 33, at 222-23 (suggesting that one way to reduce luck in the law is to capitalize wherever possible on collective judicial training and knowledge, such as by convening large panels).

83. I do not want to overstate the wilderness. There are model standards for mediation, see Model Standards of Conduct for Mediators (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf), and many programs have standards and rules for their affiliated members. See *infra* text accompanying note 183. In addition, legal remedies are available for truly egregious mediator conduct—though it must be truly egregious. See, e.g., Michael Moffitt, *Ten Ways To Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

84. A professional’s interest in her own reputation should help align her incentives and actions with the interests of her clients and her firm. Her reputation serves as a “bond” with clients and colleagues, both because her good reputation precedes her and because she will want to continue having a good reputation. See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1714 (1998), citing Milton C. Regan, Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 565-66 (1998).

85. See JAMS: The Resolution Experts, *JAMS Career Center*, <http://www.jamsadr.com/careers/xpqGC.aspx?xpST=CareersOverview> (last visited Aug. 8, 2013) (“JAMS looks to attract, train, develop and retain the most competent, productive professionals in order to maintain our status as ‘The Resolution Experts.’”).

[Mandatory mediation allows courts to dump some cases that judges do not want, and it also makes a place for relatively marginal members of the legal profession to be deputized as mediators. These individuals succeed in [what amounts to the bare minimum in terms of qualifications:] going through a training session and getting on an appropriate list.<sup>86</sup>

Garthy notes that the “oversupply” of low-end mediators and the lack of “general accountability” by these mediators for their work make it difficult for lawyers, much less unrepresented parties, to know whether a mediator will be “good or bad,”<sup>87</sup> and consequently choosing one unknown mediator over another is basically a roll of the dice. This is not to say that all small claims mediations are bad or unlucky; it is only to point out that the variability of mediation quality, particularly in the lower segment of court-connected ADR processes, makes luck a larger factor in outcomes.

Finally, even the best-intentioned alternative process may exert significant pressure to settle, whether foisted onto the parties by the mediator, intentionally or otherwise, or more self-imposed, particularly for the unrepresented non-repeat-player, because of confusing background rules around legal and alternative processes.<sup>88</sup> As Deborah Hensler points out, parties in court-connected mediation may expect (mistakenly) that the process will be adjudicated by legal norms and therefore will not necessarily understand that they themselves are responsible for devising a solution to the problem.<sup>89</sup> In this situation, the more familiar background rules of the court (single adjudicator, binding result) are in conflict with the arguably less familiar norms of the court-connected alternative process.<sup>90</sup> One possible

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86. 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, 938 (2002).

87. *Id.*

88. See, e.g., Jacqueline Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004) (arguing that mediation’s connection to traditional adjudication threatens mediation’s ability to provide individualized justice).

89. See Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (2002); see also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 988 (2000) (noting that “voluntary usage” of ADR remains low despite institutional enthusiasm for the practice).

90. See, e.g., Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 234 (2007) (pointing out that court-connected make it more likely that parties will see mediators as “agent[s] and representative[s] of the court”). The situationist literature on cognitive preferences and schemas argues that we bring pre-existing knowledge structures to new situations that make it difficult to comprehend the new situation on its own terms. See Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge*

result of this confusion is that an unfamiliar party will look to the mediator as the adjudicator (despite the mediator's protestations to the contrary) and misread or overweight the mediator's statements. Another possible result is that the unfamiliar party will assume that settlement is not optional (despite the mediator's protestations to the contrary) and thus agree to a bad deal. Regardless of the source, pressure to settle is at odds with mediation's foundational precepts of value creation and autonomy.<sup>91</sup> This disconnect creates spaces for chance that can lead to unpredictable, arbitrary, unfair outcomes, just as with legal luck. Put another way, "ADR luck" presents predicaments like that of Ms. P: a consensual process, a consensual agreement, and an (arguably) unjust outcome.<sup>92</sup>

Yet legal luck and ADR luck are not entirely the same. As noted above, one prominent construction of applied justice is comparative justice ("like cases treated alike"). But integrative ADR recognizes a range of possible outcomes that would be better than the bottom-line reservation value, and this is true even in dispute resolution contexts.<sup>93</sup> Therefore it is not always possible to compare outcomes meaningfully, particularly if there is a working assumption that the dispute itself is private and context-specific to

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*Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1129 (2004) (defining the situational character and "critical realism" as a theoretical approach to legal studies); *see also* Zamir, *supra* note 80, at 468 (arguing that mediator neutrality is too closely linked to judicial impartiality and may not, therefore, "advance[] the empowering and effective participation from disadvantaged groups"). It gets even more confusing when judges sit as mediators in court-connected processes. *See, e.g.*, Ed Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 236 (2002) (describing the judicial mediator as someone who, unlike a more traditional private mediator, is highly directive and does most of the talking).

91. *See, e.g.*, Brazil, *supra* note 90, at 244-50 (explaining why settlement is not an appropriate goal for mediators); *but see* Stephen B. Goldberg & Margaret L. Shaw, *Is the Mediator's Primary Goal To Settle the Dispute?*, 15 NO. 2 DISP. RESOL. MAG. 16 (2009) (responding to Brazil's position and attempting to reconcile the mediator's settlement goals with mediation's core principles).

92. I say "arguably" because some ADR diehards and some classic law & econ types are going to claim that the outcome must be just because she agreed to it, and therefore it must have addressed core interests that may not even have been known to her. However, Professor Bagchi points out that modern economic theory supports a more moderated view of consent that takes into account "arbitrary elements." Bagchi, *supra* note 9, at 1897. Information costs, cognitive biases and limitations, and transaction costs (related to one's ability to manage contingencies in advance) all impinge upon the voluntariness of contract and consent. *Id.*

93. *See, e.g.*, Multidisciplinary Context, *supra* note 4, at 10 (pointing out that "particular processes do affect outcomes" and that "process pluralism" supports the careful tailoring of process to disputants); *see also* Danya Shocair Reda, *Critical Conflicts Between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193 (2011) (theorizing feminism's embrace of ADR as the result of similar affinities and attention to the special case of the individual); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 36 (2000) (emphasizing that alternative practice does not necessary promote compromise but instead can foster "creative solutions and integrative outcomes").

the individuals involved.<sup>94</sup> Accordingly, comparative justice has less relevance and meaning in such processes. In fact, some of the most trenchant critiques of court-connected mediation note that mediation has become, in the hands of repeat players such as professional mediators and lawyers, a pallid reflection of litigation practice and values.<sup>95</sup> The mediator who adopts a narrow problem definition that tracks legally relevant issues and does not consider the future relationship of the parties, for example, may have consistent results in roughly similar cases but is not making space for extralegal concerns that may be important to the parties in the room.<sup>96</sup> On this view, mediation is failing to live up to its promise not because it is too variable, but because it is not variable enough.

This is not to say, however, that comparative justice has no meaning in ADR. “Like cases should be treated alike” glosses the vast frontier of justice-as-fairness. Fairness is a bedrock value in ADR processes as well.<sup>97</sup> Although ADR processes may explicitly leave room for cases articulating themselves as more different than they might initially seem, based on circumstances and personalities and relevant interests involved, these are intentional variations from what might be thought of as a baseline minimum result. On this view, unintentional variations (luck) that lead to unpredictable, arbitrary, or unfair results are not defensible in ADR.

Other differences between legal luck and ADR luck are inherent to process differences between the two. At the micro level of process design, for example, ADR designers may seek to eliminate some kinds of luck effects (say, by promulgating mediator credentials in a particular jurisdiction for court-connected mediation) while intentionally making room for more beneficial luck effects, such as serendipity.<sup>98</sup> Creativity and flexibility are

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94. See, e.g., Kruse, *supra* note 5 (rejecting the “correct outcome” form of substantive justice in favor of a theory emphasizing just harmony, authentic participation, and appropriate fit).

95. See, e.g., Riskin & Welsh, *supra* note 75.

96. *Id.*; see also Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 19 (2009) (describing mediation as “an alternative to mainstream jurisprudential thinking” in that it makes space for, among other things, discourse and emotions).

97. See, e.g., FISHER & URY, *supra* note 64, at 12 (“Insist on using objective criteria.”).

98. Serendipity is “the accidental discovery of something that, post hoc, turns out to be valuable.” Miguel Pina e Cunha et al., *On Serendipity and Organizing*, 28 EUR. MGMT. J. 319, 320 (2010). Scholars writing on serendipity often point out that processes can be calibrated to be more or less receptive to serendipitous insights. See generally ROBERT K. MERTON & ELINOR BARBER, *THE TRAVELS AND ADVENTURES OF SERENDIPITY: A STUDY IN SOCIOLOGICAL SEMANTICS AND THE SOCIOLOGY OF SCIENCE* 2004 (“The research director ... can create a suitable atmosphere for the

key process skills in ADR, skills that almost by definition will lead to highly individuated, differentiated outcomes. Overformal and too-scripted processes are unlikely to provide the right environment for thinking outside the box.<sup>99</sup> Furthermore, ADR contemplates the possibility that outcomes may even come about as the result of “random” decision-making, such as flipping a coin or relying on another fairness-based process norm, if indeed the parties involved agree that no other relevant objective criteria exist that could inform the decision-making process.<sup>100</sup>

Finally, at the macro level of process, legal luck and ADR luck resonate slightly differently. Many forms of ADR, particularly forms based on integrative bargaining and interest-based mediation, intentionally acknowledge and embrace variation and variability, as evidenced by the proliferation of alternative processes and the field’s commitment to pluralism and value neutrality.<sup>101</sup> Recognizing that existing procedures may not suit exactly the dispute or disputants involved, ADR process designers and scholars routinely leverage legal and ADR luck risks into an opportunity for reenvisioning and redesigning dispute resolution processes. In this way, bad luck becomes the rationale for process innovation—something that happens much more easily and readily than changes to traditional litigation.

Consider the example of collaborative law. Collaborative law practice, in which the parties’ lawyers contractually disqualify themselves from representing the parties in litigation and thus create an incentive to negotiate as cooperatively as possible, arose in part because Stuart Webb, a divorce

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making of accidental discoveries by giving his researchers, within broad limits, the autonomy to decide what is ‘interesting’ ... ); Michael H. Hoeflich, *Serendipity in the Stacks, Fortuity in the Archives*, 99 LAW LIBR. J. 813, 826 (2007) (arguing that overly-rational disposal policies will make it harder to make serendipitous discoveries).

99. *See id.*; *see also* Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697, 697 (2004) (“Negotiation experts seem to agree that creative solutions are often the key to reaching value-maximizing outcomes in integrative, interest-based bargaining.”); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 144 (2001) (answer: maybe).

100. *See, e.g.*, Ken Belson, *What? No Rock, Paper, Scissors?*, at <http://london2012.blogs.nytimes.com/2012/06/24/what-no-rock-paper-scissors/> (June 24, 2012) (describing new tie-breaking rule in Olympic qualifying event specifying either a runoff or a coin toss); Carol Vogel, *Rock, Paper, Payoff: Child’s Play Wins Auction House an Art Sale*, at [http://www.nytimes.com/2005/04/29/arts/design/29scis.html?\\_r=0](http://www.nytimes.com/2005/04/29/arts/design/29scis.html?_r=0) (Apr. 29, 2005) (describing rock-paper-scissors game played by Christie’s and Sotheby’s to determine which auction house would sell a Japanese company’s art collection).

101. *See, e.g.*, Multidisciplinary Context, *supra* note 4. Developments in transformative and narrative mediation—both of which emphasize the unique individuals and relationships in a particular dispute—serve as examples of ADR’s tendencies toward reforming process and notions of fairness and justice in outcomes. *See* JOHN WINSLADE & GERALD MONK, *PRACTICING NARRATIVE MEDIATION: LOOSENING THE GRIP OF CONFLICT* (2008) (describing narrative mediation objectives and approaches); BUSH & FOLGER, *supra* note 67 (describing same for transformative mediation).

lawyer, was disillusioned with what appeared to be the inescapable sharpness of attorneys even in non-litigation settings.<sup>102</sup> Adversarial systems are prone to luck problems because they overemphasize procedural rules, narrow problems along legal lines, and typically favor the better-heeled party. Webb believed that taking away the threat of going to court was the only way for lawyers to engage wholeheartedly in interest-based bargaining and dispute resolution processes.<sup>103</sup> Although collaborative law introduces its own set of problems, it provides a useful example of ADR's agility in the face of undesirable luck distortions.<sup>104</sup>

It is hard to be innovative, however, if nothing appears to be wrong. In consent-based systems, recognizing problems can be difficult given the priority that modern neoliberal society places on individual choice<sup>105</sup> and the belief that some measure of serendipitous luck is intrinsic to ADR. If the parties agree, then we assume nothing is broken. Theories of luck, however, create new space to reevaluate this assumption.

#### *B. The Garage Door Mediation: Luck at Work*

Consider again the garage door mediation. On the day of her hearing, P was alone in an unfamiliar environment, afraid to appear before the judge. Waiting at the court, she saw the sign for mediation and asked for a mediator. After participating in mediation, P agreed to all of Q's demands and more.

Here we see three significant lucky (unchosen) moments. First, P was alone and scared at the courthouse. As it turned out, P was alone only because her son, who intended to accompany her, was out of town on the

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102. See Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008) (describing collaborative law's origins, development, and ongoing challenges).

103. Of course, as people have pointed out, collaborative law practice does not necessarily accomplish this goal. If one side decides to abandon the mediation, for example, both sides must retain new counsel and this additional expense could greatly disadvantage the side with fewer resources. Additionally, the practice has raised ethical concerns about the lawyer's responsibility to the client. At present, only in family law—the most cutting edge arena of alternative law practices—is collaborative law even a possible option.

104. See, e.g., Ellen E. Deason, *State Court ADR: Probate, Family, Other Specialized Courts Are a Key Source of Innovation*, 6 NO. 1 DISP. RESOL. MAG. 6 (1999) (describing the “fertile ground” state courts provide for process innovations).

105. See Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 56-58 (2009) (explaining how neoliberal values around individual freedom and efficiency resonate with much ADR thinking).



date the hearing was scheduled. No other family members were around that summer and she was too embarrassed to ask a friend to come along. The absence of trusted family members and the fact of being in small claims court in the first place both qualify as “circumstantial luck,” defined generally as the “kinds of problems and situations one faces.”<sup>106</sup> Additionally, P’s shame with respect to facing the judge (surely not an idiosyncratic reaction but predictable as a matter of system design<sup>107</sup>) provides an example of what Nagel calls “constitutive luck”—the type of person P is, her capacities and temperament, that determine her responses to circumstances.<sup>108</sup> These observations about constitutive and circumstantial luck may seem unremarkable, considering that first-time disputants are probably often alone and feeling scared. Indeed, part of the rationale for alternative processes (and the reason P asked for mediation here) arguably is to offer a less frightening, more humane option, to offset the luck distortions that arise from anxiety in adjudicative settings.

Which brings us to the second lucky moment: P asks for mediation and receives M. This may seem like an exercise in agency, but at this particular court, parties are assigned mediators randomly (circumstantial luck) and so P and Q “chose” mediation and ended up with someone who turned out to be the sort of mediator who takes a strong hand in pushing the parties toward settlement but then leaves the actual details of the settlement to the parties (circumstantial luck combined with causal luck, Nagel’s term for how circumstances influence agency). The same exercise of agency could have resulted in a different mediator, which makes this moment particularly lucky. As noted earlier, mediators vary widely in terms of approach and training. Different mediators may have paced the process differently, emphasized settlement less (or more), or focused more time on relationship building and communication. Given the constitutive posture of P, these kinds of circumstantial differences (and note, these differences are an example of “ADR luck” insofar as processes and professional norms are unregulated in ADR) could have had a meaningful impact on the outcome of the mediation.

And finally, the third lucky moment took place when P did not ask for an offset for the door, because (as she reported later) she did not think to ask and the meeting felt like it was coming to a close (constitutive, circumstantial, causal). As an objective matter, the resultant agreement was not favorable to P and hence the “resultant luck” for P was poor.<sup>109</sup> This

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106. See NAGEL, *supra* note 29, at 28.

107. See Ackerman, *supra* note 16.

108. See NAGEL, *supra* note 29, at 28.

109. *Id.*



combination of chosen and unchosen (lucky) factors led to P and Q settling quickly, even if the settlement was questionable because it awarded the cost of the door and interest and the door itself to Q. The questionable settlement seemed even worse a week later, when Q picked up the door, gloated about his windfall, and then drove away before P could respond, a kind of replay of the mediation drive-by that had happened the week before.

From the standpoint of justice, separate from whether legal remedies are available or ADR process norms were adequately met, what happened in the garage door mediation is wholly deficient. Q, the putative bad actor, prevails; P, the more socially marginalized and disempowered party, pays more than she owes and then must endure Q's subsequent jibes; and M, the facilitator turned evaluator, fails to address adequately any of the relational concerns presented by the repeat-player-versus-first-timer dynamic while pushing for settlement, therefore perhaps undermining some of the core practices and beliefs of mediation itself. These injustices in process and outcome are arguably products of the various luck distortions running amok throughout the proceedings, as described above. It is easy to imagine that adjusting any of those three lucky moments in another direction could have led to a different outcome.

A luck-based analysis of the garage door mediation, therefore, suggests that the outcome was highly contingent and therefore not an exercise of justice, which in turn throws the legitimacy of small claims mediation into question. Yet how could this situation be unjust? P consented throughout—and not only that, she was often the first mover. She, not Q, asked for mediation. She, not Q, insisted that he take the door away. Perhaps the apparent lopsidedness of the settlement does not reflect the actual value she placed on avoiding the judge and on having the door taken away. Indeed, her consent suggests that she did receive equivalent value, because otherwise she would not have consented. Put another way, even assuming all the luck distortions listed above, the fact of P's multiple consents throughout the process resists the conclusion that the end result was lucky and unjust.

These dueling interpretations (luck or consent? determinism or free will?) suggest the next question: does consent actually fix luck problems in ADR? The next Part builds upon the foregoing discussion of luck by focusing on consent and on the relationship between luck and consent, specifically whether and how much consent buffers the process and substance of court-connected ADR from luck.

### III. DOES CONSENT FIX LUCK PROBLEMS IN ALTERNATIVE PROCESSES?

Broadly speaking, consent is a doctrinal device that operationalizes the notion of free will into an Anglo-American legal framework.<sup>110</sup> When we consent to something, we have made (or are assumed to have made) a decision based on the information we have, which means that we have also decided (or are assumed to have decided) that the information we have is sufficient for the choice at hand. Agency, actual or assumed, provides one of the most familiar narratives of legal consciousness in the West.

In consent-based dispute resolution processes, such as mediation, consent presumably eliminates luck by empowering the parties to decide, based on their own individual interests and values, how to structure proposals and whether proposals are acceptable. The unconsented-to bad luck that may have contributed to the original dispute—having a neighbor who won't prune his overgrown bushes, or losing a limb in a wrong-side amputation case, or not having enough money to pay employees when the economy goes bad—is not the focus here, other than to point out that our analysis of consent in procedural law often presumes some unconsented-to bad luck from the get-go, which could in turn impose limiting schemas on disputants and thus inhibit autonomous self-expression in the dispute resolution context.<sup>111</sup> That said, this Part focuses more on the interaction of consent and luck after the dispute starts.

This Part will first examine the centrality of consent to mediation theory and practice. Consent is important in many forms of ADR (such as negotiation and arbitration, for example) but is particularly salient in mediation because of mediation's emphasis on self-determination. After this preliminary discussion, the Part will move on to explore how consent works to buffer luck in mediation. The Part will then consider in more detail some of the fault lines in the consent buffer, starting with the unavoidable ambiguities of the concept of consent and then moving into the process challenges of collecting meaningful consent in court-connected mediation.

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110. See, e.g., Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1203 (1985) (describing legally effective consent as dependent on judicial presumption of free will).

111. See Chen & Hanson, *supra* note 90; see also Jon Hanson, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 23 (2004) (describing people as “cognitive misers” who have trouble seeing things as they are); see also DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 22 (3d ed., 2004) (linking conflict to the development of hostile attitudes that can lead to zero-sum thinking “which tends to make problem solving seem like an unworkable alternative”); Arthur Pearlstein, *Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR*, 12 PEPP. DISP. RESOL. L.J. 215, 232-33 (2012) (explaining how zero-sum mindsets arising from apparently adversarial situations contributes to unhappiness).

### A. *Example: Mediation and Consent*

Mediation is “the intervention of an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”<sup>112</sup> All forms of mediation, from community mediation to complex multiparty mediation, share basic ingredients: an impartial mediator with no legal authority to bind the parties; disputants who may choose to walk away from a proposed agreement or at any point in the process provided that, in certain circumstances, they have made a good-faith effort to mediate; and the possibility of creative agreements that may address more than just the legally relevant issues at stake. Within the American legal system, the incorporation of mediation and other alternative processes was a transformative shift in the resolution of disputes.<sup>113</sup> Mediation reprioritized the components of conventional dispute resolution by putting the participants and their interests, preferences, values, and relationship at the top; legal rules and institutions and service providers were thus relegated to more supporting positions.<sup>114</sup>

#### 1. Consent as Philosophical Linchpin of Mediation

Consent freely given is foundational to mediation. The Model Standards of Conduct for Mediators identifies nine standards of mediation, with three among them of primary importance: self-determination, informed consent, and impartiality.<sup>115</sup> These three principles did not originate with the Model Standards but rather have been cornerstones of mediation theory and practice for decades.<sup>116</sup> These three principles overlap and each relies upon a robust notion of consent in order to function properly.

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112. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 6 (1986).

113. *See, e.g.*, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003).

114. *See* sources cited *supra* note 62.

115. Model Standards of Conduct for Mediators (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf). Michael Moffitt and Andrea Schneider pull out these three standards (plus confidentiality) as the most important. *See* EXAMPLES & EXPLANATIONS: DISPUTE RESOLUTION 92-95 (Michael L. Moffitt & Andrea Kupfer Schneider eds., 2011).

116. Self-determination is “the fundamental principle of mediation.” Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of* 275

The first principle, self-determination, refers to the right to make autonomous choices about one's own life. Building upon Bush and Folger's definition, Nancy Welsh describes the development of the modern concept of self-determination in mediation like so:

[M]any mediation advocates envisioned party self-determination as involving more than just the disputants' passive ability to respond to the particular settlement proposal put before them. Rather, self-determination in mediation involved party empowerment that 'restor[ed] to individuals . . . a sense of their own value and strength and own capacity to handle life's problems.' It promised disputants the opportunity to participate actively and directly in the process of resolving their dispute, control the substantive norms guiding their discussion and decision-making, create the options for settlement, and control the final outcome of the dispute resolution process.<sup>117</sup>

Consent, particularly informed consent, is essential in self-determination. Without informed consent, which entails

appropriate levels of information or sufficient competency to make choices, an individual cannot exercise true self-determination, because she may not understand how the process works, what the issues are, or whether the proposed outcome actually meets her interests.<sup>118</sup>

The second principle, impartiality, also implicates consent. Impartiality means that the mediator must not have a stake in the dispute or its outcome.<sup>119</sup> Without impartiality, a mediator could, intentionally or not, push the parties to solutions that they otherwise would not choose. Such mediator interference could have an adverse impact on the voluntariness of the parties' consent and thus threaten the parties' overall self-determination. As Joseph Stulberg writes, mediators who wish to intervene in the parties' decisions around process and outcomes are violating the core principle of impartiality (he calls it neutrality):

If the parties wanted a decision-maker, they could create a process to deliver it. But what is central to mediation—I believe its driving value—is that it systematically supports individuals or groups to exercise their freedom and to take responsibility for making decisions regarding how they choose to move forward. It requires engaged participation

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*Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3 (2001) [hereinafter Thinning Vision], quoting Model Standards of Conduct for Mediators, *supra* note 115, at §1 (Joint Committee of Delegates from American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution 1994).

117. Thinning Vision, *supra* note 116, at 17-18 (quoting partially Robert A. Baruch Bush & Joseph P. Folger, Promise of mediation 1(1994))

118. "Without [informed consent], mediation's promises of autonomy and self-determination are empty." Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 840 (1999) [hereinafter Informed Consent].

119. See Moffitt & Schneider, *supra* note 115, at 92-93.

that leads to outcomes for which each negotiator is accountable. To promote those central elements, the mediator must remain neutral.<sup>120</sup>

The third principle, informed consent, refers to the conditions, both internal and external, that make self-determination possible. This principle recognizes that consent is meaningless without a basic understanding of context, priorities, and options. Informed consent, therefore, is a concept about what it means to make meaningful choices in pursuit of self-determination.<sup>121</sup> In her seminal article on knowledgeable decision-making in mediation, Jacqueline Nolan-Haley defines informed consent like so:

Informed consent is an ethical, moral, and legal concept that is deeply ingrained in American culture. In those transactions where informed consent is required, the legal doctrine requires that individuals who give consent be competent, informed about the particular intervention, and consent voluntarily. Informed consent is the foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity.<sup>122</sup>

As Nolan-Haley points out, informed consent typically assumes a professional-client relationship and has two parts: disclosure and voluntary consent. Disclosure is the responsibility of the professional, such as the physician or lawyer, who must provide particular sorts of information to the client; voluntary consent is the province of the client, assumed to be a stable and rational individual, who receives, understands, and appreciates the information before choosing to agree to the proposed treatment or approach.<sup>123</sup>

Consent is therefore the philosophical linchpin of mediation. Without a genuine commitment to autonomous non-coerced self-determination in mediation—that is, without prioritizing party control and decision-making over process and outcomes—mediation is no better than an adversarial process with a third-party decision-maker. In fact, if there were no self-determination, mediations would be much worse because mediation proceedings are private and do not have the same formal safeguards for participants that litigation has, such as the rules of evidence or the option to

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120. Joseph B. Stulberg, *Must a Mediator Be Neutral? You Better Believe It!*, 95 MARQ. L. REV. 829, 857 (2012). Stulberg draws a distinction between “neutrality” and “impartiality” by noting that a mediator might pressure parties equally (and thus be “impartial”) but still interfere with the parties’ decision-making (and thus not “neutral”). *Id.* at 835. This Article uses the two terms interchangeably, both meaning “neutrality” in the Stulberg sense.

121. See Moffitt & Schneider, *supra* note 115, at 94-95.

122. Informed Consent, *supra* note 118, at 781.

123. See *id.* at 799-800.

appeal. Whether the parties have exercised autonomy and self-determination in mediation is not outwardly visible other than by their consent. As such, consent is not just a theoretical or psychological construct but an external choice, an action in the world, connecting *who* someone is with *what* he does.<sup>124</sup>

And if the reverse is true—that is, if what someone does constitutes and reconstitutes who he is—then the importance of freely-given and fully-informed consent is even greater, assuming Western humanistic, neoliberal values. On this view, anything that cheapens or devalues individual consent, either as a substantive matter or as part of a procedural mechanism, not only worsens our individual lives but also eviscerates democratic participation and the collective experience. The adhesion consumer contract, for example, may be a wonderfully efficient tool but is an absolute travesty when it comes to consent. Adhesion contracts hold consumers to agreements they had no idea they were making and, prospectively, lead consumers to believe that they are powerless to negotiate or protest within the marketplace. Mediation and other alternative dispute resolution processes have historically striven to hold the line against such harmful efficiencies, rightly recognizing that the value of alternative processes is in their actual, not pro forma or boilerplate, commitment to consent, impartiality, and self-determination.<sup>125</sup>

## 2. Consent as Process Enabler in Mediation

The importance of consent in mediation is evident from the amount of consenting that a mediator asks mediation participants to do. Disputants who go through civil mediation typically give their consent not just once but rather at various points in the dispute resolution process. Nolan-Haley has laid out these consent points in terms of mediator disclosures. On this view, party consent is a function of the mediator expressly or impliedly providing

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124. This touches back upon the moral luck literature. Martha Nussbaum notes that the Aristotelian concepts of the good life (*arête*) and happiness (*eudaimonia*) are not solely intrinsic qualities but require actions that lead to outcomes that are then evaluated as good or bad, and so both concepts are vulnerable to contingencies in a way that Kantians would find intolerable. Martha C. Nussbaum, *Luck and Ethics*, in *MORAL LUCK* 77-78 (Daniel Statman ed., 1993). On this view, the person of good character who falls into a coma and sleeps for his entire adult life, for example, has not lived virtuously. “[Aristotle’s] point is that the endowment and condition [of good character] are not sufficient for praise: the person has to *do* something, show how he or she can be active. ... Character alone is not sufficient.” *Id.* at 83.

125. See, e.g., Harrington & Merry, *supra* note 69.

information that permits parties to decide whether to go forward with mediation.<sup>126</sup>

**a. Early.** Consent to start mediation happens early in the process, sometimes before a dispute occurs. Pre-dispute mediation provisions in contracts allow parties to specify mediation as the method of dispute resolution before anything has gone wrong between them. Even without these pre-dispute agreements to mediate, once a dispute occurs, one party might ask the other about trying mediation before filing a lawsuit. Additionally, parties who have filed a lawsuit and are still in pre-trial litigation may decide to mediate, or the court may order mediation, in which the party trades its short-term consent for the ability to return to court if the mediation does not produce an acceptable outcome. If the court orders mediation then consent did not enable that part of the process; in non-mandatory settings, however, party consent may be thought of as kicking off the mediation process.

**b. During.** Once disputants have decided to mediate, but before they have come to a proposed agreement, there are ongoing opportunities for consent throughout. This post-entry, pre-agreement “participation consent”<sup>127</sup> is the parties’ agreement to continue participating in the mediation.

As a matter of practice, many mediators periodically check in with the parties and make sure that they are still on board with the process, particularly when moving from one stage of the mediation to the next (e.g.: “Now that we have heard from both of you about X, let’s talk a minute about Y, *if that works for you*”). One example of participation consent arises when mediators present to the parties a problem-solving question that synthesizes the dispute into a more workable formulation for problem solving and negotiation.<sup>128</sup> Mediators who follow this practice often seek express agreement around the problem-solving question before moving forward.<sup>129</sup>

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126. Professor Nolan-Haley separates consent into those arising at “participation disclosures” (both before the mediation and during the mediation) and those arising at “outcome disclosures” (after an agreement is proposed but before agreeing). *Informed Consent*, *supra* note 118, at 817-18.

127. *Id.* at 820.

128. This is how some mediation trainings, such as the one hosted semiannually at the University of Oregon, trains people. See UNIVERSITY OF OREGON SCHOOL OF LAW, BASIC MEDIATION TRAINING MANUAL 41 (2010) (on file with author). The “problem-solving question” may be an example of impartiality but not neutrality in the Stulberg sense because it crystallizes the parties’ dispute into a single core question that necessarily deemphasizes the other features of the dispute.

129. *Id.*



Moreover, a mediator may need to seek more explicit consent if she significantly changes the course of the mediation or adopts a new style, such as when parties ask facilitative mediators to provide a midstream evaluation of the case.<sup>130</sup> Lela Love and John Cooley note that the dangers of such a shift may give rise to a legal duty to warn and the mediator should therefore seek informed consent from participants before agreeing to provide an evaluation.<sup>131</sup>

*c. At the end.* The third type of consent in mediation, what Nolan-Haley calls “outcome consent,” is the choice to accept the proposed agreement, perhaps after going through multiple rounds of amendment and analysis against one’s interests.<sup>132</sup> Outcome consent means not only that the parties understand and appreciate the consequences of the agreement, but that they willingly bind themselves to the provisions therein. The parties must also understand that they do not have to agree during mediation, but can opt for traditional litigation instead. Given all this, once parties give outcome consent and come away with an agreement, it is very difficult for them to undo that agreement if they have memorialized it in a settlement contract, as is often the case in small claims settings.<sup>133</sup>

The accumulation of repeated consents over the course of the process and the apparent strong freedom of contract attitude permeating legal relationships at the present moment<sup>134</sup> act together to cement the

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130. See, e.g., Cooley & Love, *supra* note 17, at 13 (scripting out a possible response for a facilitative mediator who is asked mid-mediation to provide evaluation); see also Frank E. A. Sander, *Achieving Meaningful Threshold Consent to Mediator Style(s)*, 14 NO. 2 DISP. RESOL. MAG. 8, 10 (2008) (arguing that more training is needed to help mediators learn how to secure effective consent vis-à-vis mediation style).

131. This consent should be “carefully crafted to describe the precise scope of the consent to an evaluative process . . . The scope of a party’s consent should encompass a freely made, voluntary decision: (1) to participate in a specific type of evaluative process based on a clear understanding of the benefits, limitations, and risks associated with the process; (2) to be satisfied with the specifically described role of the neutral and the neutral’s related ethical responsibilities in the evaluative process; and (3) to be satisfied with the nature and amount of any additional fees and costs charged by the neutral in conducting the evaluative process.” Cooley & Love, *supra* note 17, at 13.

132. Professor Nolan-Haley separates consent to reach an agreement (a type of participation consent) from consent to the agreement (outcome consent). See *Informed Consent*, *supra* note 118, at 819-20.

133. Mediated settlements are not easy to contest afterward. See, e.g., James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 74 (2006) (demonstrating that most contested mediation agreements ultimately are enforced by courts).

134. The Supreme Court’s recent arbitration jurisprudence provides a useful example. The Court has made a strong effort to ensure that arbitration clauses in contracts are enforced, despite state rules or policies seeking to regulate these contracts and the relationships that they determine. See Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 133 (2012) (arguing that the

enforceability of the agreement. As Michael Moffitt has pointed out, this is true regardless of how egregiously inadequate the mediator or the process may have been.<sup>135</sup>

*B. Consent in Mediation Should Buffer Luck*

If the purpose of consent in mediation is to facilitate self-determination and autonomy; and if luck is the extent to which unchosen inputs affect an individual's situation, then consent in mediation is necessarily in tension with luck. This is true even for good luck. Unchosen inputs that turn out to be good luck and would have been consented to if given the choice are not expressions of individual self-determination or autonomy.

In the legal arena, luck buffers include devices like ex-ante private insurance intended to protect people from unforeseen bad events. Ex-post luck buffers might include government action, such as the bank bailout, FEMA responses to hurricane disasters, and the work of decentralized nonlegal entities (like charities, churches, families). The rhetoric of American self-reliance exists alongside strong bankruptcy protections, so as to encourage productive behavior while predefining what happens if luck turns bad.<sup>136</sup> Drilling down to civil procedure, the adversarial process is governed by rules designed to level the playing field and make sure that the competition—not chance—determines the results.<sup>137</sup> Likewise, judges are careful to support their decisions with reasons and precedent, thus deflecting charges of arbitrary or idiosyncratic decision-making.<sup>138</sup>

In mediation, one of the primary luck buffers is consent. Consent acts as a backstop against chance dictating arbitrary outcomes. Some unlucky

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Supreme Court's strong protection of contract terms around arbitration undermines state oversight of consumer and employee regimes and thus upsets the balance of federalism).

135. See Moffitt, *supra* note 83, at 82 (noting the "historical rarity of suits against mediators").

136. See, e.g., John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 306 (2003) (noting that American bankruptcy law "renarrated commercial failures in ways that emphasized not self-reliance and fault, but interdependence and inevitability").

137. See, e.g., Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1294-95 (2012) (explaining how competitive adversarial process is supposed to support truth-seeking in litigation).

138. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 228-32 (1986) (describing the judicial process as a "chain novel" in which judges provide new chapters constrained in part by what has happened in the story already). *But see* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1158 (2005) (suggesting that the accumulation of precedents appears to have made it easier for judges to decide along ideological, rather than precedential, lines).

events might happen during the mediation, but because being at the mediation, staying at the mediation, and coming to agreement are all ultimately matters of choice, then the presumption is that the outcome was consensual. More specifically, consent buffers luck in three different ways: by mitigating legal luck, by deemphasizing the power of the mediator, and by making possible a customizable process tailored to the specific needs of the parties.

First, consent-based processes, such as mediation, buffer legal luck by providing a decentralized option to luck-riddled traditional legal processes. The mediation option avoids the legal presets by promoting individual priorities and encouraging a broader array of possible resolutions. Parties in mediation do not have to take the chance at an unfavorable outcome in court. Mediation offers, as an institutional matter, the opportunity for parties to engage in a process that can support both parties' self-determination. To keep people interested in the mediation option, mediation has its own organizational incentives to make sure that luck does not dictate outcomes.

Second, within the mediation process itself, consent buffers luck by deemphasizing the power of the mediator. Because the parties can walk away from mediation at any time, the parties should know that the mediator has no formal authority to resolve the dispute. Additionally, because parties have consent power throughout the mediation, they have—or should have—the ability to make process choices: like determining whether the mediator should be more facilitative, more evaluative, or spend more time on communication, and so on.<sup>139</sup> Although the mediator is likely more than a potted plant in the room, the mediator is never empowered as a decision-maker or judge in the dispute as a matter of law or mediation theory.<sup>140</sup>

Finally, consent buffers luck by providing the opportunity for a tailor-made process that is not arbitrary or limiting, but rather suits the needs of the participants while defining the problem broadly. Unlike the legal system, mediation can address non-legal issues that may be important to the parties, such as communication patterns going forward or expressions of empathy.<sup>141</sup> Affording this level of process control to the parties obviates

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139. See Shestowsky, *supra* note 15, at 553-54.

140. See, e.g., John Lande, *Stop Bickering! A Call for Collaboration*, 16 ALTERNATIVES TO HIGH COST LITIG. 1 (1998) (recounting unflattering characterizations of facilitative mediation, “potted plant” being among them).

141. As many scholars have pointed out, plaintiffs often want an apology. Mediation provides more opportunities for apologies than litigation. See, e.g., Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, 17 BARRY L. REV. 89 (2011); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology To Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 342 (1999) (“In a mediation, the client, in an opening statement or in the course of subsequent discussion, can

the luck effects that might accrue from less-relevant process rules as applied to the parties.

Although the mediation process may be customizable, it is not random. Law schools and other institutional training venues have developed approaches for mediation that generally promulgate the key values (self-determination, autonomy, and so on) and lay out key process pieces (uninterrupted time, interest gathering, and so on) for those interested in mediation.<sup>142</sup> Although mediators do not need licenses, most court mediation programs in the United States do have standards and rules for their affiliated mediators.<sup>143</sup>

In these ways, consent in mediation works to buffer luck and thereby promote autonomy. The practice has some institutional incentives to keep luck out. In the law, luck is unavoidable as a matter both of line drawing and of differences between those empowered to make legal evaluations and judgments. These line drawings should not be as salient in mediation, though of course will have an impact on at least some portion of the issues; moreover, the differences between third-party decision-makers should be much less relevant, because the parties are the ones in control of the process and outcome. The law can bear a certain amount of bad luck (though not too much), because it has an institutional credibility that may offset or explain away chance as part of the bureaucracy of government. Mediation is less able to bear bad luck, because it does not have a position equivalent to the law in the public's narrative of legal institutions, and more importantly, actively publicizes the primacy of self-determinacy and autonomy. As such, mediation relies on consent as a protection against luck distortions in process and outcomes.

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make it clear that she also cares about nonmonetary relief such as an apology, reinstatement, or establishing a new business relationship”).

142. See, e.g., Susan Raines, Timothy Hedeem & Ansley Boyd Barton, *Best Practices for Mediation Training and Regulation: Preliminary Findings*, 48 FAM. CT. REV. 541, 551 (2010) (noting that “[m]any mediation programs in North America are now more than thirty years old” and thus have developed programmatic identities and approaches that should be evaluated in light of today's client goals).

143. See, e.g., Nancy A. Welsh, *Institutionalization and Professionalization*, in THE HANDBOOK OF DISPUTE RESOLUTION 487-98 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing the various institution-driven requirements imposed on mediators in various contexts).

C. *But Consent Often Makes Luck Invisible*

The foregoing analysis suggests that consent fixes luck problems by positioning the parties as decision-makers at various points in the process. Bad mediator? Parties can find someone else or quit the mediation altogether. Unfavorable proposal? Parties can refuse to sign. If lucky (unchosen) events affect the process and outcome, but the parties sign off anyway, one interpretation of the parties' consent is that they intentionally merged these luck effects into the agreement because the effects were either beneficial or at least not on balance detrimental to the overall benefits.

Another interpretation, of course, is that the consent itself may have been relatively meaningless in a process that mechanically gathers consents without regard to the luck distortions (constitutive, circumstantial, or otherwise) affecting the quality of those consents. Social psychology and neuroscience, for example, recently have overwhelmed us with new models of human decision-making informed by cognitive biases, heuristics, schemas, reptilian brain functions, and a host of other non-conscious factors that throw into doubt any traditional understanding of agency and consent.<sup>144</sup> One need not fully embrace these findings to agree that the quality of consent is not constant but can shift and vary, depending on the people and circumstances involved.

Either way, consent makes luck invisible by merging it into the agreement or by hiding it behind an ideological commitment to individual choice. As a system matter, sublimating luck is unwise because it may make problem diagnosis and resolution more difficult in the aftermath of settlements. Perhaps, this invisible luck is responsible in some part for the rise in broken agreements, for example.<sup>145</sup> Or more broadly, perhaps

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144. Jennifer Robbennolt and Jean Sternlight's new book on legally relevant information from psychology brings together many of these literatures. JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISIONMAKING* (2012). These materials overlap with Jon Hanson and the other critical realists; see, e.g., Jon Hanson, *Introduction*, in *IDEOLOGY, PSYCHOLOGY, AND LAW 4-7* (Jon Hanson ed., 2012) (examining ideology as a cognitive constraint). The neuroscience angle is a more recent variation on the same theme of biased-and-unreliable-awareness-masquerading-as-agency. The fact that forced altruism has the same measurable effect on the brain as real altruism, for example, suggests that we may overvalue pure agency in settlement contexts. See, e.g., Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 522-23 (2010) (noting also that "people's sense of what will make them feel good is not accurate" and therefore mediators should consider "pushing to the edge of ethics" in mediation).

145. "Frequently, the fatal flaw in agreements that ultimately unravel is the absence of authentic consent" even though "[t]he majority of parties who challenge the enforceability of mediated agreements are not successful." Jacqueline Nolan-Haley, *Consent in Mediation*, 14 DISP. RESOL. MAG. 4, 4-5 (2007-2008).

invisible luck exacerbates many of the concerns about the legitimacy of institutionalized ADR, such as the potential for parties with unequal power to make decisions that could have an impact on non-present third parties, such as the public, in private settings bound by strong confidentiality and led by virtually unaccountable mediators.<sup>146</sup>

Part of the trouble may come from the notion of consent itself. The following section continues with the example of small claims mediation and argues that misunderstandings and multiple interpretations of “consent” may be primary sources of luckiness in ADR systems. In mediation, these misunderstandings emerge as definitional and process ambiguities that together create a large luck gap—which, in turn, is shrouded by a strong simplistic view of consent.

### 1. Definitional Ambiguities

Like many legally meaningful terms, the word “consent” is not easy to define. Before examining how consent mechanisms work in small claims dispute resolution settings, let us briefly examine what consent and informed consent mean.

*a. Consent.* There are several ordinary yet different senses of “consent” that both reinforce and complicate one another. Consider this standard definition of consent: “to permit, approve, or agree; to comply or yield.”<sup>147</sup> “Permit” suggests that a consenting party may allow something to happen, even if she does not intend to do the something herself. For example, at a neighborhood homeowners association meeting, a board member may consent to a proposed block party without necessarily committing to bringing a dish or even attending. “Permit” captures this passive, yielding aspect of consent; it is a choice, but the choice is basically not to resist the proposed activity.

Consent also means “to agree.” Continuing with the block party example, by affirmatively saying yes to the block party, the consenting board member both approves the block party idea and perhaps implies that she plans on taking a more active role in the party. Although it is true that she might use the words “I agree” without intending to participate, the word

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146. Here the classic critiques of the field still resonate. See sources cited *supra* note 16; see also Susskind, *supra* note 23, at 8 (insisting on the public interest as a necessary though often ignored part of environmental mediation).

147. Dictionary.com, Consent, <http://dictionary.reference.com/browse/consent?s=t> 9 (last visited Aug. 11, 2013) (“to permit, approve, or agree; to comply or yield”).

“agree” is certainly stronger than “permit” and expresses more of the agentic, active dimensions of consent.

Finally, consent also captures the sense of “comply.” Depending on the wording of the resolution before the board, consenting may mean assuming responsibility for certain chores under the direction of the block party committee chair or other decision-maker. Choosing to comply, on this view, relinquishes some portion of autonomy within some parameters for some period of time (e.g., “What am I going to do on the night of the block party?”) to someone else.

The purpose of this brief lexicographical exercise is not to nail down a single definition of consent, but simply to point out that the word “consent” is semantically unstable and context dependent. All of these popular synonyms for consent sound correct, yet none fit together easily. Each resonates differently as to the levels of agency in decision-making, the overall commitment to agreement, the nature and quality of participation in implementation activities, and the assertion of personal autonomy. To understand what the board member’s consent to the block party entailed, we would need more context, such as how the resolution was framed, what was said during the meeting, what the group’s default norms are, and what the board member’s own intentions were with respect to her consent in this instance. For the present discussion, noting this possible confusion and context dependency may help explain why consent can be such a slippery legal and moral concept, particularly for non-lawyers and one-shot players in dispute resolution settings.

**b. Informed consent.** Likewise, the separate but related doctrine of “informed consent” presents significant definitional challenges. As described above, informed consent consists of information disclosure and, after the competent recipient of such disclosure such disclosure is understood and appreciated it, voluntary consent.

This definition seems straightforward enough; but for scholars and practitioners (and, especially, for people who are themselves about to make an important choice), informed consent is an elusive doctrine that continually challenges our understanding of what it means to sufficiently prepare someone to make decisions. What to disclose, how to disclose it, how much understanding is required, whether understanding has occurred, and how capably certain parties can exercise autonomy within particular contexts are not settled questions.<sup>148</sup> People facing difficult time-sensitive

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148. See, e.g., Informed Consent, *supra* note 118, at 781-87 (defining informed consent in professional contexts and noting the problems associated with determining the proper disclosures in these contexts); see also Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving*



decisions about their health or their legal situation may have trouble understanding their options when evaluating unfamiliar choices in settings apart from their everyday reality.<sup>149</sup> What's more, in these atypical settings, people may not be able to appreciate the possible or likely consequences of their choices, particularly when confronted with the presence and advice of those recognized as professionals.<sup>150</sup>

Accordingly, scholars and practitioners working on informed consent issues are concerned not only about the wording of disclaimers or the right methods for assessing competency but also about theories of the self, socially constructed roles and ideologies, and strategies of power and resistance. The more destabilized and contingent the individual's identity is, the more problematic the idea of "freely made choices" becomes; and this is true for everyone, not just for those in historically marginalized or exploited groups. As biomedical ethicist Carolyn Ells writes, "informed choice must be understood in explicitly relationship terms that includes social relationships. It is a decision or authorization situated in a set of practices,"<sup>151</sup> not simply the delivery of a premeasured dose of information to an individual who then rationally processes the data and decides.

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*Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 911-12 (2002) (defining autonomy in terms of the exercise of informed consent).

149. In bioethics, for example, the "therapeutic misconception" refers to the mistake patients make when they believe that participating in a research study will provide them with therapeutic benefits, even when they are told beforehand that no such therapeutic benefits will occur. Charles Lidz notes that a "strong model" of informed consent in these situations is not empirically defensible because it does not take into account the tendency for patients to confuse research and treatment frames. Charles W. Lidz, *The Therapeutic Misconception and Our Models of Competency and Informed Consent*, 24 BEHAV. SCI. & L. 535, 538 (2006). Together with Hensler's observations about court-connected mediation, *supra* note 89, Lidz's analysis suggests some provocative analogs with unrepresented parties in small claims mediation. Those who come into the courthouse may believe that their dispute will be adjudicated by someone in authority according to legal norms, despite what they are told about alternative processes, roles, and responsibilities.

150. See, e.g., Carolyn Ells, *Foucault, Feminism, and Informed Choice*, 24 J. OF MED. HUMAN. 213, 214-16 (2003) (mapping Foucauldian power structures in terms of institutions and bodies). Contracts scholars have produced an important and voluminous literature on the inadequacy of consent and informed consent devices in adhesion contracts such as consumer agreements. See, e.g., Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 879-87 (2010) (providing data showing that consumers do not read contract terms); Debra Pogrud Stark & Jessica M. Choplin, *A License To Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 617 (2009) (arguing that consumers tend to trust salespeople and real estate brokers and other professionals involved in the transaction, even if the statements of those people are absent from or even contradictory to provisions in the sales agreement).

151. Ells, *supra* note 151, at 224.

In this way, informed consent is another turn on the “permit, agree, comply” construct. Informed consent in its strongest form sounds most like agree, in that the strong form presumes a high level of agency and endorsement based on full information about the proposed course forward as well as an understanding of one’s own interests, preferences, resources, and so on. A weaker form of informed consent might emerge when a person bases her decision more on the person making the proposal than on the merits of the proposal itself: permit, suggests non-resistance to what someone else wants to do, and although this does not sound ideal such “permission” is nonetheless a common manifestation of informed consent, perhaps particularly in the health arena. Faced with a time sensitive health decision, for example, a person’s informed consent may not be with full understanding and appreciation but instead just reflect the delegation of decision making to the perceived expert. “Comply” is even weaker, in that comply, suggests that the person will follow the instructions of another. We know that this weak form of informed consent still counts as consent: “I was following orders” does not translate, as a legal matter, to “I did not consent.”<sup>152</sup>

Consent and informed consent, therefore, are fraught terms that continually deconstruct themselves, in that they presuppose both an ideal of rational presence and an actual human decision that is necessarily contingent on numerous factors beyond the control or knowledge of the decision-maker. The ideal/reality clash in consent appears in multiple scholarly literatures, and is an intractable problem.<sup>153</sup> For scholars studying consensual procedural law, both of these dimensions of consent—on the one hand the ideals of autonomy and self-determination, on the other the recognition that individuals are more complicated than the rational choice model<sup>154</sup> might

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152. Indeed, this submissive aspect of consent creates problems for those who seek to valorize the individual and neoliberal policies here and abroad. See, e.g., Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 426 (1985) (observing that consent “may spring from fear, hysteria, feelings of inadequacy, or masochistic compulsion” and therefore does not necessarily express autonomy or maximize utility).

153. *Id.*

154. *Id.*; see also Ran Kuttner, *The Wave/Particle Tension in Negotiation*, 16 HARV. NEGOT. L. REV. 331, 332 (2011) (arguing that the negotiation process is better understood as an “emergent system” that extends beyond static, discrete interests and individual personalities); Kenneth H. Fox, *Negotiation as a Postmodern Process*, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 20-23 (Christopher Honeyman et al. eds., 2009) (contrasting the “individualist and rational” model of negotiation with an “emergent and dynamic” enterprise in which parties “‘co-create’ meaning”). But see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 523 (2008) (arguing that most modern negotiation scholars still “believe in the possibility, along with the value, of making individuals into

suggest and so procuring their informed consent may not be as easy as it looks—present intriguing practical challenges for determining how to preserve and express consent in mediation.

## 2. Process Ambiguities

Compounding these definitional ambiguities are process ambiguities with respect to mediation. Small claims mediation again provides a useful example. In general, first timers will not know how mediation works, either as a standalone process or as a court-connected option. This process ignorance could create excessive luck effects, because the party is unable to engage as autonomously as she would otherwise be able to. The cure for this ignorance is consent, which happens at numerous points throughout the mediation process. Consent, on this view, provides participants an opportunity to learn what is happening and contribute to the process and outcome. In this way, consent resists luck.

Yet that view presupposes that participants are equipped with consent in a way that empowers them to engage the process. Given that small claims mediation may be an unfamiliar process, sound mediation practice prescribes numerous consent points throughout the process, to provide participants with opportunities to learn and shape the resolution of their own dispute. These same consent points, however, are also fault lines in that they create ambiguities around what is happening.

To illustrate, recall the description above of the three major consent points in the mediation process: early, during, and at the end.

Early pre-mediation consent points are important, because they are the first opportunities for the disputants to exercise self-determination in the process. As such, the kinds of information that disputants receive at these early choice points may influence not only whether they consent to participate in mediation, but also what they think consent means later. For example, consider the differences between these descriptions of mediation from different small claims courts' webpages:

1. When the defendant in a small claims case responds within 14 days after being served with the claim, the court will set a hearing date and notify the parties of that date by mail. On the scheduled court date the parties will be referred to a mediator to assist the parties to attempt to settle their case. If the parties reach an agreement, the agreement is

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[rationally acting] self-managers: purpose, self-reflexive, and able to think clearly and act creatively in conditions of uncertainty”).

presented to the judge for approval. If the parties are unable to reach an agreement, a judge hears the case after the mediation session.<sup>155</sup> (Oregon)

2. Mediation allows you to make choices about what you feel is in your best interest. It is a way of helping people reach settlement. You and the other party make the decisions in mediation. You are under no obligation to reach an agreement, and you do not give up your right to a court hearing.<sup>156</sup> (Maine)

3. Nebraska has six (6) court-approved mediation centers located throughout the state to assist individuals with settling disputes outside the court system. If you would like to try mediation in your small claims case, contact a center near you.<sup>157</sup> (Nebraska)

4. Contested small claims may be ordered to mediation. This is a process involving the plaintiff, defendant, and a trained mediator. During mediation, the mediator will attempt to resolve the dispute between the parties.<sup>158</sup> (Hawai'i)

5. Mediation is available in many courts on the date of trial. When the case is called, if mediation is available you will be asked if you would like to mediate your claim.<sup>159</sup> (Massachusetts)

For the person unfamiliar with mediation or small claims court, these five descriptions might leave fairly different impressions. The Maine excerpt expresses the most faithful recitation of traditional mediation principles, emphasizing the control of the parties and the need for consent throughout. The mediator does not show up in this description at all; Maine makes mediation sound like a comfortable room in which the parties can try to sort out their differences. The Hawai'i excerpt, in contrast, recasts mediation into litigation speak (e.g., starting with “contested small claims may be ordered”) and positions the mediator as decisionmaker in the dispute. The use of “attempts” in “attempts to resolve” perhaps blunts the mediator’s authority somewhat, though it is a fairly subtle hedge. The Oregon excerpt falls between these poles, closer to the Maine example, in that it stresses party control but is still somewhat similar to Hawai'i in that Oregon presents mediation as one step in a formal litigation process. This is not inaccurate, but it does paint mediation with the litigation brush, which

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155. Lane County Circuit Court, Mediation/Arbitration, available at <http://courts.oregon.gov/Lane/Mediation/MediationPage.page?#SmCIm> (last visited Aug. 11, 2013).

156. State of Maine Judicial Branch, Guide to Small Claims Proceedings in the District Court [http://www.courts.state.me.us/maine\\_courts/small\\_claims/smallclaimsguide/going\\_to\\_court.html](http://www.courts.state.me.us/maine_courts/small_claims/smallclaimsguide/going_to_court.html) (last visited Aug. 11, 2013).

157. State of Nebraska Judicial Branch, Filing a Small Claims Case in Nebraska, available at <http://www.supremecourt.ne.gov/self-help/7224/filing-small-claims-case-nebraska> (last visited Aug. 11, 2013).

158. The Judiciary State of Hawai'i District Court of the First Circuit, Your Guide to Small Claims Court, available at [http://www.courts.state.hi.us/docs/self\\_help\\_docs/small\\_claims\\_brochure.pdf](http://www.courts.state.hi.us/docs/self_help_docs/small_claims_brochure.pdf) (last visited Aug. 11, 2013).

159. The Massachusetts Court System, Small Claims Information, available at <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/smallclaims.html#16> (last visited Aug. 11, 2013).

could give the parties the impression that mediation only addresses those matters of interest to litigation, thus impinging upon their self-determination in the broader dispute context.

Finally, we have Nebraska and Boston, both of which take a terse, hands-off approach to informing disputants about mediation via the website. Nebraska and Boston might think disputants already know what mediation is; possibly they do not want to commit themselves to a particular definition of mediation. Whatever the reason, the impression left is that Nebraska appears not to have court-connected small claims mediation at all while Massachusetts does seem to have court-connected small claims mediation, but only in limited quantities. For disputants in these two regions, the message seems to be if you want mediation, you must proactively seek it out. On the one hand, that message does not answer the question of what mediation is and further might delegitimize mediation as a high quality alternative to litigation because, especially in the case of Nebraska, it sounds like mediation does not take place in what first timers might recognize as the legal system. On the other hand, pushing disputants to recognize mediation as a choice that they need to make could encourage less passive responses to mediation and promote autonomy and self-determination.

Of course, there are limitations to this kind of textual comparison and analysis, considering that the disputants arguably should research their options more thoroughly than glancing through a website before going to court. In addition, depending on how the small claims court structures its intake processes and information desk, disputants may receive more information and counseling in person when they arrive at the courthouse, and those services are not captured in this comparison.<sup>160</sup> Even so, the differences here demonstrate some of the potential variations that could have an impact on how a person enters mediation—whether confused, submissive, or empowered—and that entry stance may affect subsequent consents in mediation.

For example, once the mediation starts, participation consent may be the manifestation of active agreement, the byproduct of a misunderstanding of what the process is all about, process inertia, or deal fatigue. Participation consent in joint session is not the same as in caucus, because they involve

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160. *E.g.*, of the thirty-six county courts in Oregon, almost all have information about small claims mediation on their websites and more than half offer additional information through the mail and at the courthouse, including flyers, brochures, pre-mediation videos, and assigning someone to answer questions that small claims participants might have.

different inputs: a mediator may prefer caucuses, for example, because the parties are more agreeable (i.e., consenting).. Additionally, once a proposal is on the table, outcome consent could be the manifestation of active agreement, process inertia, or deal fatigue. It is hard to know whether people are actually satisfied with the result, because people tend to report how they think they are supposed to feel (especially considering that they themselves agreed—a sort of resistance to cognitive dissonance).

### 3. How These Definitional and Process Ambiguities Hide Luck

Ms. P is a competent and educated member of the middle class. She asked for mediation in a small claims case. She participated voluntarily in the entire mediation process; she did not ask to leave, and she willingly cooperated with each of M's process proposals throughout. Finally, Ms. P agreed to the settlement, even contributing an interest of her own. Ms. P's consent is clear from her behavior throughout the process, culminating with signing the final agreement and then complying with the terms. As mentioned before, focusing on these multiple consents throughout the mediation supports the conclusion that the mediation process and outcome were not lucky, but were instead expressions of tailor-made, individual-driven justice.

Another interpretation of these events, taking into account the definitional and process ambiguities around consent as described above, might go as follows: like many Americans, Ms. P has no formal training in or exposure to the legal system or institutionalized ADR. She therefore had no idea what to expect either from mediation or small claims court, other than the impressions she had cobbled together (non-informed consent). When she arrived at her hearing, she thought a mediator sounded better than a judge and that mediation sounded better than a hearing (non-informed consent). Once in mediation, she followed M's directions, which makes sense since as a first-timer she did not have any process alternatives to offer (consent as permission). When M said, "Q has a good case," which could have been a throwaway remark that M says to everyone to encourage settlement, Ms. P concluded that she should give Q what he was demanding (consent as compliance). Asking for Q to pick up the door was almost an afterthought, and happened so close to the end of the process that Ms. P did not have time to reconsider that request more carefully. This alternative reading of events, therefore, suggests that the quality of Ms. P's consent varied throughout the day, and furthermore, that this variable quality was linked to both constitutive and circumstantial luck (Ms. P's unfamiliarity with the process, Ms. P's aversion to court, and the assignment of M).

Actually, asking Q to pick up the door may have been one of Ms. P's purest moments of agency in the entire mediation. Although her request did not take into account the potential offset available for returning the door (an offset that a judge undoubtedly would have made), the quick identification of her interest (getting rid of the door), along with the awareness that the proposal was soon to be finalized, could suggest that an incipient consent consciousness may have been in the making.

This glimmer of agency is important, even if it comes by way of unfairly enriching Q, because it reminds us that consent can improve. The democratic promise of alternative practices is leveraging genuine self-determination in support of individual and community decisions. Weak or non-existent consent, therefore, will not work for ADR systems. Given the process pluralism and diversity of outcomes supported by alternative practice, ADR needs consent to be a fairly stable, relatively strong category. Only then will consent be able to mitigate luck distortions and other detriments more consistently and with greater faithfulness to the parties' self-determination. The next part explores the challenge of cultivating consent so that participants in mediation and other alternative processes are operating at a high level of engagement.

#### IV. HOW TO MAKE CONSENT-BASED PROCESSES LESS LUCKY

The garage door mediation highlights the shortcomings of consent in alternative settings. Consent is supposed to mitigate luck distortions that invariably arise in overdetermined human contexts. On this view, consent buffers luck and preserves the opportunity for justice. Yet, as argued above, consented-to outcomes can be unjust because consent is a fraught category that continually deconstructs itself, as a matter of definition and practice, and is thus susceptible to the luck distortions that pervade ADR processes. Because consent is the exercise of human agency in the world, it is necessarily subject to the vagaries of extrinsic (external conditions) and intrinsic (cognitive predilections) luck. A system that leans too heavily on consent, therefore, may undervalue these unconsented-to inputs and thereby develop serious justice concerns. Such is the case with unrepresented dispute resolution, such as small claims mediation (or adhesive arbitration or large-scale public sector decision-making and dispute resolution), in which



participants may consent to outcomes that do not meet the requisite standard for justice.<sup>161</sup>

Given that party consent is not enough to ensure just outcomes, is it possible to improve consent in ADR processes?<sup>162</sup> ADR scholars have addressed this issue by suggesting measures that fall into two broad overlapping categories. One set of ideas focuses on improving the mediator. Scholars in this school of thought recommend changes that would make mediation more professional and accountable while attempting to preserve the flexibility and innovation that have historically characterized the field. The second set of ideas seeks to improve the context in which mediation takes place. Scholars in this second school of thought suggest that court-connected processes in particular would benefit from certain design changes, such as better disclosures at different points in the mediation, more appropriate defaults in legal regimes, and cooling-off periods for mediated agreements. These design innovations are meant to make consent more meaningful by avoiding luck effects associated with the relevant legal framework, unfamiliarity with mediation and other alternative processes, or with time pressures.

This part reviews those ideas and suggests another category for innovation: improving the consent competency unrepresented disputants. It is not enough to have a beautifully tailored process hosted by an impeccably trained and licensed mediator. The people who come unrepresented into dispute resolution settings must have a certain level of proficiency with their consent. They have to know what it means to give consent and how an unfamiliar and stressful setting could jeopardize their full participation in the process. Without this consent competency, the potential of alternative processes cannot be achieved.

#### A. *Improving the Mediator*

From the perspective of system design, it is obvious that the mediator is a critical variable. This is true even though the parties are supposed to be

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161. See Susskind, *supra* note 23, at 14 (arguing that complex mediations must strive for not only sound process but objectively fair results).

162. Of course, taken to their philosophical limits, genuine free will and fully self-actualized consent are impossible to attain and therefore hopelessly unworkable as system variables. So it is tempting to throw in the towel and either live with the fictions of consent as presently configured in modern legal institutions or choose nihilism. With that in mind, this part strategically assumes that true consent is an achievable goal and that justice benefits may redound from attempting to reach that goal. This is a strategic assumption because it is not meant to satisfy the theoretical conundrum, but rather address the practical challenge of making access to justice more real for unrepresented disputants.

the primary movers in mediation, through the device of consent. Mediators are prominent sites of system diagnosis and suggested improvements for three reasons.

One, no one doubts that the mediator's special role as process guide (and sometimes evaluator) influences the parties to some degree.<sup>163</sup> Party perceptions of procedural justice, for example, will be affected by how the mediator speaks to the parties and structures a process that enables (or does not) respect and participation.<sup>164</sup> These perceptions in turn will inform whether the parties believe that the outcomes are fair, regardless of the actual quality of the outcomes themselves. Beyond procedural justice concerns, the mediator's choices around process will have an impact on who gets to say what, when, and in whose presence. Sequencing the dialogue and possibly sequestering the parties has an impact on how the parties ultimately decide to resolve their dispute.<sup>165</sup> In this way, process organization is not only relevant to decision-making, it is at the heart of decision-making.<sup>166</sup> As such, the process control of the mediator is an important system element.

Two, because of the flexibility and informality that is traditionally associated with mediation, process, and outcomes are not consistent or predictable. This is true insofar as both process and outcomes reflect the interests and resources of the individual disputants. As noted previously,

163. See *Dirty Little Secret*, *supra* note 17, at 5 (listing ways that mediators influence parties, from control over the seating arrangement to encouraging doubts); see also Hensler, *supra* note 89, at 96 (“Anecdotal evidence suggests that in order to persuade parties to accept a settlement many mediators paint trials in the most negative light possible.”); John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 106 (2002) (arguing that a good-faith requirement “gives mediators too much authority over participants to direct the outcome in mediation”).

164. See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1 (2011) (applying psychological insights from procedural justice studies to alternative processes); see also Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002) (arguing for explicit procedural justice in all consensual processes and especially in mediation).

165. See, e.g., Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259, 273 (2006) (arguing that keeping parties apart in mediation can be “kinder [and] more user-friendly” than having them together in joint session).

166. See, e.g., Frank E. A. Sander & Lukasz Rozdeiczer, *Selecting an Appropriate Dispute Resolution Procedure: Detailed Analysis and Simplified Solution*, in THE HANDBOOK OF DISPUTE RESOLUTION (Robert C. Bordone & Michael L. Moffitt eds., 2005) (explaining how process choices affect and are affected by party goals and features of the dispute).

one of the great advantages of less rigid processes like mediation is that they allow for creative, outside-the-box resolutions to disputes. The system designer must determine, hopefully along with input from participants, when these variances are welcome innovations.

Three, because of the strong legal protections afforded to mediation by way of confidentiality rules and freedom of contract, mediators are generally not legally accountable for their performance.<sup>167</sup> Most states have broad confidentiality rules around mediation that make it difficult for parties to talk about what happened in mediation.<sup>168</sup> Additionally, mediation historically has been an unregulated profession not requiring particular degrees, state licensure, or other professional credentials.<sup>169</sup> Such anti-credentialism is very much in keeping with the modern origins of mediation, which sited the process in community centers and characterized the process as informal and not beholden to institutional norms and requirements.<sup>170</sup> The combination of no legal accountability and no state regulation creates a “black box” around the mediator that, at least for system designers, is problematic given reasonable demands on the legal system to deliver just outcomes.

The problem with unaccountable mediators can reach scandalous proportions. Everyone has heard about the bad mediator who, by virtue of being part of an unregulated profession, that in most states enjoys strong confidentiality protections, runs roughshod over participants and makes a mess of the process and the result. In a recent presentation, for example, Art Hinshaw described a mediator in Arizona who preyed upon unhappy women who came to him seeking divorce mediation services. Not only did this mediator start up dead end romantic relationships with these women while they were parties in mediation, but he also flagrantly overcharged them.<sup>171</sup>

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167. See Moffitt, *supra* note 20.

168. *But see* Cole, *supra* note 78, at 1421 (arguing that lawyers routinely break mediation confidentiality and that courts look the other way).

169. See, e.g., Sean F. Nolon, *Second Best Practices?: Addressing Mediation’s Definitional Problems in Environmental Siting Disputes*, 49 IDAHO L. REV. 69, 70 (2012) (providing case studies showing how calling those who mediate environmental siting disputes “mediators” actually can complicate resolution and compromise the public’s understanding of mediation generally).

170. Of course, many courts require their mediators to have certain qualifications before allowing them to work as mediators in court-connected contexts. Additionally, as mentioned earlier, organizations such as JAMS have developed to help participants and lawyers sort through mediators since no state credentialing is available. Yet with all this in mind, as Professor Susskind has pointed out, credentials might not be helpful in certain mediation settings, such as large and contentious public disputes. In those cases, appointing a mediator with name-recognition or other authority would make a positive difference. See Susskind, *supra* note 23, at 35 (“Almost all the participants felt that [Congressman Tim] Wirth’s clout was a key ingredient in achieving the settlement that was obtained.”).

171. See Art Hinshaw, *Regulating the Rogue Mediator*, Presentation at the 2012 AALS ADR Section Works-in-Progress Conference (Nov. 8, 2012) (slides on file with the author). Professor

Given the importance of the mediator (whether rogue or well-intentioned) in mediation, an enormous literature has developed around making mediators more effective. Some of this scholarship examines how new mediators are trained;<sup>172</sup> some assesses existing approaches to mediation and often proposes new ones;<sup>173</sup> and some focuses on regulating mediation more closely.<sup>174</sup> The Model Standards of Conduct for Mediators, for example, articulates “fundamental ethical guidelines for persons mediating in all practice contexts” that set baseline norms for the practice.<sup>175</sup> These model standards along with the rest of these improve-the-mediator ideas may be thought to benefit consent-based processes by making mediators as process guides more skilled at and accountable for tailoring the process more closely to the parties’ priorities, thereby lessening the likelihood that luck will influence the mediation outcome.

Yet, these improvements do not necessarily strengthen party consent. Improve-the-mediator ideas generally do not address—and indeed may create—the luck problem related to the proliferation of available alternative processes.<sup>176</sup> It may be that a sound regulation scheme, for example, might deem the major mediation approaches (facilitative, evaluative, transformative, narrative) as license-worthy. In court settings, however, most mediations may be primarily about facts and legal issues.<sup>177</sup> In this kind of situation, especially if parties are not represented, having a variety of

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Hinshaw recently told me that the mediator in question, Gary Karpin, may have ended up marrying one of his former clients. It is hard to decide, however, whether that improves his professional record as a mediator. Telephone Interview with Art Hinshaw, Clinical Professor of Law, Sandra Day O’Connor College of Law at Arizona State University (Aug. 7, 2013).

172. See, e.g., Raines et al., *supra* note 142; see also Paula M. Young, *Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques*, 40 SW. L. REV. 127 (2010).

173. Recent examples focus on the question of mediator neutrality and activism. See, e.g., BERNARD MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004); Christopher Harper, *Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation*, 2006 J. DISP. RESOL. 595 (2006); Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection*, 3 FLA. COASTAL L.J. 167 (2002).

174. See generally Joseph “Josh” B. Stulberg et al., *Creating and Certifying the Professional Mediator-Education and Credentialing*, 28 AM. J. TRIAL ADVOC. 75 (2004); but see Michael L. Moffitt, *The Four Ways To Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191 (2009).

175. Model Standards of Conduct for Mediators, *supra* note 83, Preamble.

176. Frank Sander’s admonition that “the topic [of consent in mediation] probably deserves greater emphasis than has been the case in most [mediator] training programs” gets at this problem but does not lay out a vision for what such emphasis would look like. Sander, *supra* note 130, at 10.

177. See Hensler, *supra* note 89, at 96.

trained and/or licensed mediators offering different approaches to the same types of fact and law-based problems could create a justice concern.<sup>178</sup> Hensler suggests that one answer may be to standardize the process that court-connected mediators use, which would improve consistency, but would run the risk of putting disputants into cookie cutters and expecting them to fit the mold given.<sup>179</sup>

One answer might be that a truly “improved” mediator spends time acquainting the parties with her approach and seeking input on party interests and process before launching into the mediation.<sup>180</sup> These kinds of disclosures are important but may be difficult to comprehend fully, depending on the participants’ level of process sophistication and engagement.<sup>181</sup> And for the low-end justice market or the large-scale public sector arena, this kind of conversation may happen too close in time to the actual dispute resolution or decision-making to mitigate luck problems effectively.<sup>182</sup>

### *B. Improving the Context*

Related to mediator improvements are improve-the-context ideas, which aim to improve the quality of consent by addressing three lucky aspects of alternative contexts: nonstandard processes and norms across contexts, variable information about the particular process at hand, and time pressures. The first-time small claims mediation participant, for example, likely does

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178. See, e.g., Search for Justice, *supra* note 6, at 87 (noting that “[c]ourt mediation without knowledge of legal rights has the capacity to confuse, coerce, and mislead unrepresented parties”).

179. See Hensler, *supra* note 89, at 96-97; see Riskin & Welsh, *supra* note 75.

180. See, e.g., Tanya M. Marcum et al., *Reframing the Mediation Lens: The Call for a Situational Style of Mediation*, 36 S. Ill. U. L.J. 317, 334 (2012) (recommending that mediators adjust their style to meet the “demands of the situational context”).

181. Even an educated and/or otherwise engaged person may not be able to understand a new process (the incentives, the pitfalls, the applicability, etc.) that is laid out right before the person goes through that process. Studies on informed consent in the medical context suggest that retention is greatly improved when the information is provided well in advance. See, e.g., Suellen Miller et al., *How To Make Consent Informed: Possible Lessons from Tibet*, IRB ETHICS & HUMAN RESEARCH, Nov.–Dec. 2007, at 7 (recounting study showing that comprehension improved from 20% to 80% when the information was provided seven to ten days in advance, instead of right before the comprehension assessment was taken); see also Mary Cipriano Silva & Jeanne Merkle Sorrell, *Enhancing Comprehension of Information for Informed Consent: A Review of Empirical Research*, 10 IRB 1, 3 (1988) (“Researchers suggest that a beneficial method of presentation of information for informed consent may be to provide time for patients to study the information before signing the informed consent document.”).

182. See, e.g., Patrick Field, *Informed Consent in Public Sector Dispute Resolution*, DISP. RESOL. MAG., Winter 2008, at 16, 18 (describing the importance of an “education period at the start of the process” when working with multiple stakeholders).

not know what to expect from mediation, yet is expected to know whether she wants to participate (unless she is ordered into mediation by the judge), whether it makes sense to continue with the process, and ultimately whether the proposed settlement is acceptable. As noted earlier, these consent points throughout the process make the resultant agreement—even if substantively unjust—difficult to unwind, regardless of whether the consents themselves were low quality.

The major problem is non-standard processes across contexts, court-connected and otherwise. From the unrepresented small claims mediation participant to the community member receiving a flyer about an upcoming town hall on the topic of environmental remediation, lack of knowledge about what the process entails, what the participants' rights and responsibilities are, how the process will unfold, and where the decision points will make consent less meaningful for those participants.<sup>183</sup> In fact, without foreknowledge of how the process works, participants are likely to rely on what they perceive as the background rules for the sponsoring institution. In the case of small claims mediation, for example, unrepresented first-time participants may assume that they would hear about any legal entitlements they have and that other parties cannot misrepresent the law or their chances of winning in court.<sup>184</sup> These would be incorrect assumptions that may form the basis of a consented-to agreement and thus present an example of luck impinging on justice.

To address this problem more globally, policymakers have promulgated the Uniform Mediation Act<sup>185</sup> and the Mediator Model Standards of Conduct, as discussed earlier. Both were intended to provide more regularity to the process regardless of context. Other sources of global process guidance come from professional organizations, law schools, and industry resources. These sources are intended, at least in part, to make process more predictable and easier to understand.

Additionally, in more local contexts, some jurisdictions carefully manage their process pieces around mediation. Courts not only create rules around who can mediate and maintain rosters of eligible mediators, but also sometimes specify what ethical standards and guiding principles should

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183. *Id.*

184. *See* sources cited *supra* Part III.C.

185. National Conference of Commissioners on Uniform Laws, Uniform Mediation Act (Aug. 2001), available at <http://www.mediate.com/articles/umafinalstyled.cfm>. The act was adopted by the ABA House of Delegates in February 2002. Marcia S. Cohen, *The Mediation Privilege*, 87 FLA. B.J. 14, 19 n.6 (2013).

govern court-connected mediation. In Florida and Minnesota, the courts wrote guidelines that declare the importance of self-determination in the mediation process.<sup>186</sup> Similarly, in Oregon and likely elsewhere, judges as a matter of course will deliver verbal instructions to small claims mediation participants to provide some broad contours around substantive entitlements as well as acceptable process and conduct. Nolan-Haley's recommendation that, in the absence of legal representation, mediators be empowered and expected to provide legal information—at a minimum, to say that the participants' legal rights may be at stake—is another example of a context improvement.<sup>187</sup> Nolan-Haley indexes this responsibility to a sliding scale with three weights: voluntariness of the mediation (freely chosen or mandated); location (outside of court or in courthouse); and representation (having a lawyer or not).<sup>188</sup> Ultimately, Nolan-Haley's context recommendation that mediators should provide legal information strives to improve the quality of consent by making that consent more informed.

Other context improvements focus on the legal regime surrounding mediation and the mediation agreement.<sup>189</sup> As previously stated, mediators are relatively insulated from charges of misconduct, and mediated agreements are difficult to unwind. Scholars have suggested improvements to the relevant legal context that work to protect consent by limiting the damage that unrepresented, or even represented, parties can inflict upon themselves. Adjustments to particular legal doctrines could allow parties to exercise greater self-determination after the fact; for many parties, unfortunately, it is only after the fact that they realize they may have consented to something unfair.

For example, Nancy Welsh has called for reweighing the defaults on a number of contract defenses<sup>190</sup> and providing a non-waivable “cooling-off period” for mediated agreements that would give parties three days to think

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186. See *Thinning Vision*, *supra* note 116, at 57-58.

187. See *Informed Consent*, *supra* note 118, at 825-26. *But see* Michael T. Colatrella, *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 *CARDOZO J. CONFLICT RESOL.* 705, 707 (2014) (arguing that “[i]mposing the duty of informed outcome consent on the mediator would create a significant conflict with the mediator's ethical obligations”).

188. *Id.* at 827.

189. See, e.g., Elad Finkelstein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts*, 25 *OHIO ST. J. ON DISP. RESOL.* 667 (2010) (arguing that public regulation of mediation procedure, process, and contract is necessary to preserve access to justice); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 *OHIO ST. J. ON DISP. RESOL.* 619 (2007) (suggesting ways to improve ADR that will meet social needs in the future, including potential regulations and practices to prevent coercion and ensure voluntariness).

190. See *Thinning Vision*, *supra* note 116, at 78-86.



about and possibly modify their agreement before it goes into effect.<sup>191</sup> Such an improvement would both strengthen consent—by ensuring that the resultant agreement is, indeed, something everyone agrees to—and, somewhat paradoxically, limit consent.<sup>192</sup>

Another example of a context improvement meant to protect parties from themselves is the so-called “czar/czarina provisions” in settlement agreements that empower judges to settle interpretation disputes during the drafting process and during post-agreement implementation.<sup>193</sup> Czar/czarina provisions invest judges with settlement enforcement jurisdiction, and must appear in the agreement.<sup>194</sup> The totalitarian spirit of such provisions is evident from the following 1995 declaration by an Oregon federal judge:

I will act as czar with regard to the drafting of the settlement papers and the construction of this settlement and the execution of this settlement. And that means that if there is any dispute that is brought to me by counsel, I will decide the matter according to proceedings which I designate in the manner that I designate, and that decision will be final without any opportunity to appeal.<sup>195</sup>

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191. *Id.* at 87.

192. Professor Welsh explains:

By far, however, the most significant objection to the imposition of a cooling-off period is that it would permit parties to back out of agreements much more easily, possibly based only on buyers' or sellers' remorse. . . . This concern squarely raises the challenge of “walking the talk” of self-determination. If self-determination—not settlement—is the fundamental principle underlying mediation, the benefits provided by this cooling off proposal clearly outweigh the possible risks.

*Id.* at 91.

193. I first heard of czar/czarina provisions from Chief Judge Ann Aiken of the District of Oregon. Judge Aiken notes that the provisions have been used in the District since the late 1980s. Email from Ann Aiken, Chief Judge of the District of Oregon, to Jen Reynolds, Assistant Professor of Law, University of Oregon School of Law (Aug. 10, 2013). For more on judges as settlement czars, see generally Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 FED. CTS. L. REV. 2 (2003); Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlement in Federal Civil Actions*, 36 IND. L. REV. 33 (2003).

194. Parness & Walker, *supra* note 193, at 38.

195. *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995). As it turned out, this declaration was not enough. According to *Kokkonen v. Guardian Life Insurance of America*, 511 U.S. 375 (1994), a judge's czar status must appear in the settlement agreement. A 2008 example of a czar/czarina provision, from a Release and Hold Harmless agreement supplied by Chief Judge Ann Aiken of the District of Oregon (on file with author):

IT IS FURTHER UNDERSTOOD AND AGREED that any dispute regarding the terms of the settlement agreement shall be resolved by United States District Judge Michael R. Hogan.

As a policy matter, czar/czarina provisions recognize that disagreements between the parties about the consented-to agreement may arise for a number of reasons and may tempt the parties to embark upon additional, and possibly destructive, litigation. With this in mind, parties use czar/czarina provisions to make willing concessions of autonomy in exchange for the benefits of targeted and impartial judicial intervention.<sup>196</sup> Although czar/czarina provisions assume judicial involvement in the settlement context and are therefore not relevant in all alternative contexts (e.g., small claims mediation), they represent a context improvement that can provide more stability to private consensus-based agreements.

These improve-the-context ideas are appealing in part because they do not require much by way of initiative from the parties themselves. Like all process improvements, these ideas seek to direct participants in particular ways by limiting options and encouraging—or discouraging—certain behaviors. Promulgating uniform rules and standards around mediation, creating eligibility standards for court-connected mediators, and funneling interpretation disputes directly back to a judge are all examples of reengineering the context so that the ignorant participant is less exposed to luck distortions in alternative processes.

In addition, context improvements create new opportunities for participants to learn about and internalize what it means to participate authentically in the process. Legal information from the mediator may raise a party's awareness of his or her rights. A three-day cooling-off period may encourage disputants to reflect on their decisions, and presumably ask their lawyers to review their newly mediated agreement. Of course, whether parties are capable in the stressful moment of mediation to appreciate the legal information from the mediator, or whether they actually avail themselves of additional time after making the agreement, are open questions beyond the scope of context improvements.

But really, if we are expecting most unrepresented participants to use this extra space to seek the counsel of a lawyer and thus make their consent more educated and meaningful, we are fooling ourselves. As Nolan-Haley writes, simply reminding parties that they should consult lawyers before agreeing to anything may be “disingenuous[,] given the pervasive inability

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196. Judge Aiken also points out that in addition to preventing disputants from litigating interpretive differences later, czar/czarina provisions ensure that the pre-agreement drafting process is not marred by gamesmanship but instead captures the intention of the agreement. See Email from Ann Aiken, *supra* note 193.

to afford lawyers.”<sup>197</sup> Perhaps these improve-the-mediator and improve-the-context ideas can be rounded out by another set of ideas around improving participants.

### C. *Improving Participants*

What do church basements and the Constitution have in common? According to constitutional law professor and legal journalist, Garrett Epps, church basements and the Constitution together create an opportunity for raising legal consciousness, enlightened or otherwise, of everyday people:

In October I spent a crisp Saturday in the windowless basement of a suburban Virginia church attending a seminar on “The Substance and Meaning of the Constitution.” I was told the secrets the “elite” have concealed from the people: the Constitution is based on the Law of Moses; Mosaic law was brought to the West by the ancient Anglo-Saxons, who were probably the Ten Lost Tribes of Israel; the Constitution restores the fifth-century kingdom of the Anglo-Saxons. . . . These were earnest citizens who had come to learn about America and its Constitution. What they were being taught was poisonous rubbish.<sup>198</sup>

Non-lawyers cannot just pick up the Constitution and figure out how constitutional law works today. An educated understanding of constitutional law requires background and analytical frameworks before one can start a meaningful study of our country’s foundational document. This may seem like an unfortunate anti-populist development, but as Epps points out, this is indeed how non-lawyers are learning about the Constitution now—by listening to arguments made by experts with agendas. He concludes that to the extent we believe that non-lawyers are ignorant about the history and meaning of the Constitution, progressive law professors must take responsibility for reaching out as educators:

Trapped in that ghastly church basement last year, I made a resolution that I would try to help rescue the Constitution from “constitutionalists.”.†.†. [I]f any group of citizens anywhere wants to meet in a church basement to discuss these issues, I will either go

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197. Informed Consent, *supra* note 118, at 838; see also Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 FAM. CT. REV. 87, 88 (2013) (providing reasons for rise in self-representation in family law, including cost of hiring attorneys; belief that the case is simple enough not to require an attorney; and fear of attorneys adding more conflict to the situation).

198. Garrett Epps, *Stealing the Constitution*, NATION, Jan. 20, 2011, available at [www.thenation.com/print/article/157904/stealing-constitution](http://www.thenation.com/print/article/157904/stealing-constitution).

there to help or try to find someone who will. It's time for progressive constitutional scholars to stop mumbling about deconstruction and speak up for democracy.<sup>199</sup>

This Article argues that the ADR community has a similar problem: there is insufficient “consent literacy” (analogous to what might be described as the “constitutional law literacy” described above), and in the absence of positive information about concepts like consent and self-determination, unrepresented participants in alternative processes are unlikely to engage meaningfully. And so, like Epps’s promise about meeting in the church basement, the ADR community should consider whether there are untapped opportunities for public education that could improve participant understanding of alternative processes and, in particular, the primacy of self-determination and consent.

Little legal scholarship exists in this area. Public sector dispute resolution scholars and practitioners probably have made the most headway in promoting best practices for informing communities of upcoming large-scale processes that may or may not include opportunities for public participation.<sup>200</sup> But as noted above, most mainstream ADR proponents focus on context and mediator improvements, likely on the theory that a sound (not lucky) process will support the ordinary uninformed and unrepresented person in achieving self-determination and reaching just results. This theory makes an important and questionable assumption—that people come into the process with the requisite legal consciousness and agency to participate meaningfully in determining their own interests and ends.<sup>201</sup> On this view, seeking to educate the general public is not required, and even if it were desirable, it still might seem impracticable as a matter of system design.<sup>202</sup>

What might “improving participants” look like, with the aim of making consent more meaningful and outcomes less lucky? Nolan-Haley’s idea of having mediators provide legal information to participants is one possibility, in that having such information arguably raises awareness of one’s legal predicament and prerogatives. Of course, a person’s ability to assimilate this

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199. *Id.*

200. *See, e.g.*, Field, *supra* note 182; *see also* LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT’S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* (2006) (developing new meeting norms that deemphasize procedural formalities and majority rule in favor of greater participation, information sharing, and consensus).

201. Note that this assumption of “consent literacy” implicates not only those historically marginalized and socioeconomically vulnerable groups that have been the concern of long-standing critiques of ADR, *see sources cited supra* note 16, but broader swaths of the population as well.

202. *See* Thinning Vision, *supra* note 116, at 81 (stating that it is not realistic to teach mass audiences about self-determination).

kind of information in the moment might be compromised by the psychic strain or cognitive overload posed by learning and participating at the same time.<sup>203</sup> Welsh's cooling-off period may ease this situation, but still only provides three days and takes place after the agreement is already penciled out, which may raise issues of sunk costs, loss aversion, or deal fatigue for participants.<sup>204</sup>

Perhaps we can move beyond the immediate disputing environment (context and mediators) when thinking about how to help improve the participation of unrepresented people in alternative processes. Epps's church basement idea speaks to a more ambitious agenda for promoting justice in legal systems and processes through grassroots efforts of legal experts.

With that in mind, this Article proposes radically reorienting the law school's pedagogical focus toward external constituencies in the community. This would not be so much breaking from tradition as it would be using tradition to disrupt the relative insularity of law school communities. Law libraries have long served as support networks for those appearing pro se,<sup>205</sup> and the legal clinic movement historically has striven to improve access to justice for vulnerable populations.<sup>206</sup> But these services generally are not thought of as central to the law school's pedagogical mission. A radical

203. As noted before, the timing of new information plays an important role in comprehension and retention. See sources cited *supra* note 181.

204. The "sunk-cost fallacy" refers to an individual's tendency to use past investments as part (or all) of the rationale to continue investing in a project ("throwing good money after bad"). Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 LOY. U. CHI. L.J. 1377, 1397 (2013). Loss aversion is "the tendency of individuals to favor the status quo because they overestimate the possibility that an action will have negative consequences." *Id.* at 1394. "Deal fatigue" can crop up when settlements take time. See, e.g., J.Q. Newton Davis, *Tips for a Successful Client M&A Strategy*, ASPATORE, 2008 WL 8444328 (2008) (arguing that deal fatigue can kill deals if no one takes responsibility for shepherding it through the process); see also FISHER & URY, *supra* note 64, at 57 ("All too often negotiators 'leave money on the table'—they fail to reach agreement when they might have, or the agreement they do reach could have been better for each side.").

205. "Equitable and permanent public access to legal information is the heart of law librarianship. Without equitable and permanent access to legal information, law librarians cannot continue to improve the quality of justice in our free and democratic society." *Principles and Core Values Concerning Public Information on Government Websites*, AM. ASS'N LAW LIBRARIES, ACCESS TO ELECTRONIC LEGAL INFORMATION COMM. (March 24, 2007), <http://www.aallnet.org/main-menu/Advocacy/access/aeliccorevalues.pdf>.

206. See, e.g., Julie Macfarlane, *Bringing the Clinic into the 21st Century*, 27 WINDSOR Y.B. ACCESS TO JUST. 35, 35 (2009).

reorientation must involve faculty, students, classes, and high-level administration, as well as the broader community.

Law schools could do more, and in fact must do more because it is not clear who else will do it. Consider this statement from a recent book on the Occupy movements in the United States:

The corruption of the legal system—the ability of the state to make legal what was once illegal—is always the precursor to totalitarian rule. The timidity of those tasked with protecting our Constitutional rights—the media, elected officials, judges, the one million lawyers in this country, and the thousands of law school professors and law school deans—means there is no internal mechanism with which to decry or prevent abuse.<sup>207</sup>

Hedges and Sacco argue that public matters, which run alongside and are interwoven within the workings of the market, implicating law and politics are not just of interest to legal communities, but they impose responsibility on legal communities, particularly law schools, to cultivate and support public discourse and greater understanding. This position aligns with Epps's church basement position as well as the broader claim that non-lawyers are starved for resources that would help them deal with the complexities of modern disputes and decision-making.

What would fulfilling this responsibility mean in practice? One possibility is offering classes to the public through the law school, taught by law faculty and/or students, or at a minimum creating informational handouts available at the entrance to the law library.<sup>208</sup> Some state bar associations, for example, host “people’s law schools” at local law schools.<sup>209</sup> These programs typically feature sessions with broad appeal, such as “Dealing with the I.R.S.” or landlord/tenant law.<sup>210</sup> In addition to learning more about the legal landscape, offering general courses in alternative processes, problem solving, and conflict resolution would

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207. CHRIS HEDGES & JOE SACCO, *DAYS OF DESTRUCTION, DAYS OF REVOLT* 240-41 (2012).

208. It sounds modest, but simply making more materials available through a trusted source, like a law school, could empower non-lawyers to represent themselves more authentically in alternative processes. In addition to, or instead of, classes and clinics, law schools could produce (perhaps through research efforts of clinic students) handouts describing the values and principles of mediation and other alternative practices. Law schools might also develop informational sheets of the sort Nolan-Haley envisioned in her work on informed consent. The basics of landlord-tenant law, of debts and collections law, and of other common legal predicates in small claims mediation, for example, could be useful to unrepresented participants, especially those appearing opposite repeat players. Even a sheet with relevant websites would help.

209. The University of Texas School of Law, for example, has provided a “People’s Law School” in cooperation with the Austin Bar Association. See *People’s Law School Offers Free Legal Education*, MAG. U. TEX. SCH. L., [http://www.utexas.edu/law/magazine/2011/02/07/people’s-law-school-offers-free-legal-education-february-26-2011-2/](http://www.utexas.edu/law/magazine/2011/02/07/people%27s-law-school-offers-free-legal-education-february-26-2011-2/) (last visited Aug. 14, 2013).

210. See, e.g., *People’s Law School Class Options*, AUSTIN BAR ASS’N, [http://www.austinbar.org/pages/PLS\\_Classes](http://www.austinbar.org/pages/PLS_Classes) (last visited Aug. 14, 2013).

promote consent literacy. Courses in mediation and negotiation would likely be popular (as they are in law school generally) and may foster cognitive and emotional awareness of concepts like consent and self-determination, even in the absence of an actual dispute.<sup>211</sup>

Another possibility might be resituating the law school as a public meeting venue, either for meetings initiated from the outside (e.g., the city council scheduling a town hall) or for meetings attempting to respond to disruptive events (e.g., the law school announces a community-wide meeting to discuss gun violence). Recasting the law school as a public space for community members would create more opportunities for discourse and exchange. Additionally, having faculty members attend as participants and process guides would help provide a key learning experience and likely a more consent-supportive environment.<sup>212</sup>

A third possibility could be developing more responsive, reality-based clinical offerings. As Julie Macfarlane has argued, the traditional model of a rights-default, lawyer-controlled clinical model does not fit with modern legal needs of many clients. Today, “[w]orking for social justice and equality” requires outreach not only in litigation capacities or institutionalized ADR but also in “community and group organizing,

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211. Additionally, one could imagine online or other media-based resources developed by law schools that would be immensely useful to unrepresented participants in alternative processes because they could feature some of the brightest luminaries in our field addressing a wide variety of issues around consent and alternative practice. One could imagine, for example, a short online presentation specifically about small claims mediation—what to expect, how to prepare, and why consent matters even in court-connected contexts. One could likewise imagine a MOOC (massive open online course) on participating in multiparty complex decision-making that provides insight and guidance for all different roles in the process—not just for process guides and legal counsel. The work of Noam Ebner, a pioneer of online teaching of negotiation and alternative practices, could serve as a model for developing public-oriented curriculum. See, e.g., Noam Ebner et al., *You’ve Got Agreement: Negoti@ting via Email*, 31 *HAMLIN J. PUB. L. & POL’Y* 427 (2010). Such resources could serve not only as stand-alone products of the legal academy but could also provide the basis for additional in-person conversations and trainings. In the style of the “flipped classroom,” for example, law schools could screen the online talks for the public, followed by panel discussions and Q&A sessions.

212. For example, law schools and law faculty hosted a recent series of roundtables on the topic of mandatory arbitration. The roundtables allowed participants to become better educated on the broad legal landscape, the priorities at stake, the truly difficult problems, and the low-hanging fruit. Perhaps having the roundtables at law schools encouraged participants to adopt a “school schema” and approach the issues with an open mind. See Nancy A. Welsh & David B. Lipsky, “*Moving the Ball Forward*” in *Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?*, *DISP. RESOL. MAG.* Spring 2013, at 14 (describing the rich learning environment cultivated by regular meetings facilitated by law faculty).



individual and group rights assertions, partisan negotiation and conflict resolution, and lobbying for law reform and policy alternatives.”<sup>213</sup> Macfarlane criticizes traditional legal clinics for hewing too closely to traditional adversarial models and missing opportunities for law students to learn how to bargain, how to settle, and how to build partnerships with clients.<sup>214</sup> Alternative clinics are no better insofar as they focus primarily on training law students as mediators (which is, after all, not what most law students will be doing in their careers), and miss opportunities for law students to work with clients in developing process musculature outside of mediation settings.<sup>215</sup> Why not create ADR clinics focusing on organizing protests and activist groups; on negotiation preparation; on lobbying and political bargains; on pre-mediation strategy (maybe in small claims settings working with unrepresented people); and on general skill-building for groups in the community?

All of these ideas situate and reestablish the law school as a community center for public legal knowledge.<sup>216</sup> Reinventing law schools as community knowledge centers would advance legal consciousness and culture—and thus promote higher quality consent in civil contexts—in at least two ways. One, the community-building benefits of a “people’s law school” or similar source of informational material, for example, would be enhanced by the inclusion of skill-building classes, trainings, and documents. Not only are skills some of the most interesting and immediately useful acquisitions, but it would also hearten the community to see that future lawyers are learning creative problem solving, listening, empathy, client-centered processes, and so on. Two, promoting the law school as a community resource will raise overall legal consciousness simply by creating a new public support organization for legal questions and concerns. The existence of such an organization will encourage community members to think of themselves as active and empowered agents who have the resources at hand to manage legal situations that may arise—even if these same community members never actually set foot in the law school.

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213. Macfarlane, *supra* note 206, at 46.

214. *Id.* at 47.

215. There are two notable examples of ADR clinics that are pushing the boundaries of what modern alternative practice looks like: Harvard Law School’s innovative Negotiation and Mediation Clinical Program (<http://blogs.law.harvard.edu/hnmcp/>) and Stanford Law School’s International Human Rights and Conflict Clinic (<http://humanrightsclinic.law.stanford.edu>).

216. I develop these suggestions in more practical detail in a forthcoming article.

## V. CONCLUSION

One might object that raising legal consciousness around consent through increased education and outreach is not enough. Heightened consciousness will not, without more, make consent more valid in contracts of adhesion, or make consent more powerful in public collaborative processes or mitigate the luck and contingencies that accompany human endeavors. That said, strengthening public understanding of what individual consent means, and identifying how modern legal regimes so often degrade that consent is surely a step toward fixing these problems. Having more self-aware and higher quality consent in alternative dispute resolution not only makes agreements more valuable, but it also instills better civic habits that, in a democratic community, should promote better access to justice and less harmful fictions in legal rules.

From intellectual, community, and administrative standpoints, law schools generally, and ADR faculty in particular, bear the responsibility for taking the lead on helping community members appreciate the significance of consent, especially their own consent, in civil processes and democracy writ large. At present, law schools spend a great deal of time training process leaders (mediators, lawyers, policymakers) who are eventually supposed to facilitate the engagement of participants who are often unrepresented and/or unfamiliar with any kind of process, much less ever-evolving alternative processes. Training these process leaders happens in advance of any specific process or problem; students learn theory and principles absent real-life complexities, providing time and space for reflection and integration. Similarly, law schools should seek to train the community generally, as part of civic engagement, and if possible, in advance of needing such training.

Education is not a cure-all to luck distortions in civil settlements, and certainly the erosive, intractable problems of agency in legal systems will never go away. That said, we are bound to do whatever we can to move us closer to real justice for people and away from lucky outcomes papered over by low-quality consents.