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Confessions and Redemption—and Politics—for an Un-Neutral Person Who Mediates

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goals of the arbitration system.

Corporations already are picking and choosing which claims they want to litigate and which they want to arbitrate, based on their own view about when arbitration or litigation provides them with the biggest advantage over their potential adversaries. What corporations do not want is a state court or legislature acting to try to level the playing field by regulating the way that companies can make those self-interest-maximizing choices.

Which brings me to my final point: that corporate hostility to arbitration reveals how the FAA's preemptive reach has been interpreted too broadly and that states should have greater leeway to regulate arbitration to protect the interests of their citizens.

As mentioned at the beginning of this article, corporate interests have vigorously fought against any state regulatory efforts as representing "hostility" to arbitration that is preempted by the FAA. Yet, corporate carve-outs reflect the belief that arbitration can be an inferior form of dispute resolution for certain types of claims or when utilizing certain types of procedures.

State efforts to regulate arbitration are no different: They reflect a view that certain types of claims are less well-suited for arbitration than others, or that certain procedures in arbitration may make the process unfair or significantly disadvantageous for one party.

If corporations can write their arbitration clauses to acknowledge the uncontroversial

proposition that arbitration may sometimes be a less-fair alternative to litigation, then state courts and legislatures should also be allowed to craft laws and doctrines that recognize this reality.

* * *

Improving the legitimacy—and also the perceived legitimacy—of arbitration is important for all parties involved. Failing to do so creates the risk that Congress will enact legislation, as has been proposed for many years, to dramatically alter the arbitral landscape. Taking note of and responding to corporations' own hostility to arbitration is important for maintaining arbitration's reputation as a legitimate form of dispute resolution into the future. ■

Commentary

Confessions and Redemption—and Politics— For an Un-Neutral Person Who Mediates

BY MARJORIE CORMAN AARON

My color choices are bold over neutral. I am not known for taking anything but strong positions on politics, economics, education, ethics, aesthetics, you name it. My political views are now so strongly formed and deeply felt that I avoid learning political affiliations of mediation parties or lawyers, or my students, to preserve my ability to serve as a neutral mediator or fair professor. I hereby confess that I reject editorial columnists' scolding to respect the other side in political conversations, unless to gain insight and strategic advantage for their eventual persuasion.



My inner railings and outer rants about what is wrong-headed, immoral, cruel, unjust, ineffective, misdirected, and dishonest within our current political and economic realities prompt questions for me:

So, why am I a professional neutral? Why have I spent 30-plus years as a mediator and occasional arbitrator? When I mediate, I lack ultimate power to effectuate an outcome I believe to be right. Even in arbitration,

I am constrained. I cannot jettison lawful contracts, even if they seem usurious to me. What are the consequences of putting one's professional energies into a profession that aims at settlement, instead of advocacy?

Long ago, Prof. Owen Fiss decried ADR for choosing settlement as its goal. I rejected Fiss' *Against Settlement* (93 *Yale L.J.* 1073 (1983-1984) (available at <https://bit.ly/2OCJupg>)) at the time. Recent ruminations cause me to wonder whether I should regret that—even if too late to undo.

Acknowledging the allure of a redemption narrative, can I find one that is intellectually honest? Can we mediators who are decidedly un-neutral as to morality, politics, and justice claim professional neutrality in ADR as a positive force?

After a step back, and some reckoning with the world as it is, not as Fiss believed it to be, I'm relieved to report that my answer is yes. Perhaps this relief is unfortunate, as it rests on the reality of flawed justice and legal systems that often make settlement or private process the better alternatives.

As mediators and arbitrators, we can and often do achieve good and right results, defined as diminishing financial and emotional harm,

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Commentary

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at least for an individual and sometimes for many.

'ROMANTICIZED UNREALITY'

Better decisions are based in reality, not romanticized unreality.

Some romanticizing helps us stay married. If spousal realities are not recognizable in the romantic illusion, however, the consequences of staying will inevitably become real. Separation is the wiser decision.

The parties' decision to settle, or to mediate in hopes of settlement, may be seen as a decision to separate from our formal legal system. Even where settlements occur "in the shadow of the law," they are not bound by what law or judicial process might impose.

Given the realities of the legal system's inevitable flaws and frequent failures to meet parties' needs, an ADR neutral's or ADR program's facilitation or encouragement of that separation decision is a kind act.

Arguments against settlement of individual cases, as articulated by Prof. Fiss, belie a fantasy, a romantic view of the relationship between justice, truth, law and our legal system. Fiss wrote that "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised." *Id.* at 1075.

He described claimants in mediation as "plea bargaining" away their opportunity for real justice. He characterized these claimants as left with an unrequited yearning for justice in the form of adjudication that yields truth and legal vindication.

The real truth is that it's naive to believe that court judgments—judicial rulings and jury verdicts—deliver pure justice under the law, that their judgments are somehow true or right.

Far too many years of elections, litigation, mediation, classroom and CLE experiments, and trial competitions, and far too much reading in news outlets and research literature on decision-making, establish the folly of confidence in the "justice" or "rightness" of *any* human judgment in *any* human system. Consider the following:

- In every election, voters perceive and evaluate candidates and issues differently. A candidate seems inept and evil to some, clever savior to others. It's true that the electorate need not measure a candidate against legal standards; voters' judgments may reflect different values, priorities or information sources. Still, elections offer dramatic and consequential evidence of human variation in observation, perception, information processing, and critical analysis.
- Even decision makers viewing *exactly* the same evidence, applying the same legal

Defending ADR

The neutral's burden: Coming to the mediation table with beliefs. And biases.

The challenge: How the current realities—'the way law and polity are now'—affect settlement.

The conclusion: '[W]e need not be neutral about the integrity and humanity with which we conduct dispute resolution in our own spaces.'

standards reach different findings and decisions. Even when facts are undisputed, they reach different conclusions. For example, a federal case may be tried in equity to a judge and appealed to a circuit court panel of three; two join in an opinion to uphold, one dissents. Which decision is justice? One hundred lawyers hear and decide the same simulated arbitration. One-third of the group finds no liability and awards \$0; two-thirds finds liability and awards damages ranging from \$100,000 to \$6 million. Which verdict represents "justice"?

- Do judges and juries "apply the law" as it was intended? I ruminate over the failed mediation of a business case involving a plaintiff who, to my ears, had been the victim of deceit and malfeasance. The plaintiff later won the jury trial but lost

on appeal based on a legal argument I had thought preposterous. The appellate judges and I all went to law school: What result was just? That same party then lost on her adversary's defamation suit, also based on an argument I would have dismissed on summary judgment. Was this justice too? What if these rulings had gone the opposite way?

- And what of disputed facts? So often, including in cases with social and civil rights implications, parties' accounts of what happened differ wildly. Each recounts vivid perceptions and memories, convinced of the other's villainy.

Science tells us perception and memory are subject to bias, distortion, and unconsciously reconstructed narratives. "Justice" must choose a side. So, what's a jury or a judge to do?

They can only apply their own cognitive filters, biases, perceptions of witnesses, documents, and other evidence, and try to discern a narrative of what happened. That's all the system can ask for.

The romantic sees justice as law applied to truth, law as clear, and truth determinable. To that vision, I say, look at the messy, human world in which law and courts originate and operate. In this world, no one should imagine jurors' or judges' findings represent "the truth" or its consequences "justice."

Is it fair to ask litigants to go all the way through the realities of a costly, slow, and draining litigation process in our court system, where results are inevitably uncertain and often unable to address their interests or protect their legal rights? Will the parties really be better off for enabling those judgments to be rendered?

What Fiss calls "capitulation," I would call a practical and wise decision given those realities.

A SEARCH FOR GRACE

In our rotting institutional landscape, there's a search for grace in ADR's houses.

Drawn from philosophy and political theory, early and sweeping critiques of alternative dispute resolution were premised on the notion the law's foundation is morally and publicly derived, laudably expressing moral and public values.

A benefit of adjudicated outcomes would be that they effectuate those laws within the polity, and thus benefit the public—individually and collectively. ADR's settlements would undermine the law's foundation and diminish the public's benefit.

In these times, I regret to say that this notion seems terribly quaint and regrettably untrue. In the United States of 2020, the deeply sunk pillars undergirding any romanticization of law and legal process have been proven fictional or so rotted as to have disintegrated. We have witnessed destruction of faith in the power of legal, moral, and political norms. Of course, the notion that democracy “with liberty and justice for all” ever existed derives from uninformed and naïve white privilege.

Perhaps worse has been disintegration of faith in law as public morality, as we have watched lawmakers' failure to correct executive overreach and stark cruelty to individuals and populations of vulnerable human beings.

We are now post-Mueller report, post-obstruction of congressional subpoenas, post-impeachment “trial,” post-onslaught of heinous laws criminalizing women's choices and walking the ramp toward a Supreme Court likely to vacate precedent and validate these laws, post- (and still) caging children and families, post-cruelty to refugees, post-shame at denial of all inconvenient truths—reality at the border, of police brutality, racial oppression, poverty's trap, poisonous chemical pollutants, and the earth's march to inhabitable climate conditions.

Oh yes, and yet again, these times include shameless and shameful lies to justify Afghanistan and other endless wars, in which no warmonger's kin will suffer or die, only distant poor, brown-skinned, or other “others” for the sake of distraction, capitalism, and reinforcing the powerful. Distorted racist narratives invoke national defense against refugees and civil rights protesters and ignore the need to defend our nation against radicalized home-grown militias.

Not morality, not humanity, not fealty to political or legal process built on truth, evidence, or just outcome: Only power is accorded value. When political party and presidential obeisance seem paths to the font of power, too many lawmakers abdicate responsibilities required by our political and legal system.

They fail to honor law-made separation between branches of government, fail to exercise oversight powers, fail to reject patently false information, fail to seek or insist on truth, fail to guard against corruption, fail to protect the electoral process, and fail to protect it from takeover by foreign agents.

ADR IN OUR CURRENT STATE

It is against these realities—the way law and polity are now—that we, as ADR neutrals and advocates and parties and administrators face the question of settlement in the current realm of dispute resolution.

Here's the question re-asked in light of our current state: Are settlements achieved through widespread and institutionalized systems of dispute resolution better than the alternative—a legal system without it? It would appear that individuals and the collective often gain more from the dispute resolution mechanisms than any abstract loss to the legal system.

What of the charge that ADR providers and promoters of institutionalized ADR have deepened power imbalances within our legal system? Not guilty!

I raise the charge and the verdict here because at its inception, the ADR movement was charged just that. Experience suggests the opposite is true: ADR systems may be credited with modest leveling of power imbalances in certain aspects of litigation.

Perhaps the more astute question is whether, in the majority of cases, are court proceedings—litigation and trial—better forums for rebalancing power than ADR? Both fortunately and unfortunately, mostly not.

At the risk of stating the obvious: Unequal resources cause power imbalances among litigating parties. Cases end because parties can't pay to prosecute their claims. Well-resourced parties buy high-priced lawyers, costly discovery, and motion-filled dockets. Default judgments are entered against consumers, tenants or small business owners who can't afford counsel and aren't aware of legitimate defenses. Justice delayed is indeed justice denied—and also tends to favor the powerful.

When the wait for compensation for real harms is long, people are forced into financial duress. Is it fair or useful ask an individual

plaintiff or a small company to bear the full costs of discovery—for whom? For what? To be squeezed so that they have even less power to negotiate on the eve of trial?

Even with contingency fee counsel, a litigant who might have bargained for an early fair settlement has far less bargaining power two years later, when reduced to financial desperation.

The same is true for the litigant who accrues full legal fees for motions, discovery and trial preparation before settlement is negotiated on the proverbial courthouse steps.

In light of these, the inability to tolerate that risk further weakened the bargaining position of the less wealthy and less powerful party. Among the first systemic reforms proposed by the ADR “movement” was earlier intervention to see if settlement was desirable or possible. These took the form of institutionalized prompts for settlement discussions, access to mediation programs and mediator panels long before trial was contemplated.

Some court-related ADR programs were targeted to early-stage litigation. It may have been impolite to mention the conflict between some lawyers' desire to bill more and clients desire to keep fees low.

Yet ADR practitioners knew it to be real. We also knew of lawyers and parties who might have welcomed earlier, more efficient moves but worried about “signaling weakness.” Institutionalized ADR prompts alleviated that concern.

In some cases, the parties chose settlements that might not have been available without ADR. In many, settlements were reached much earlier because of these ADR programs. Thus, it seems clear that ADR served to reduce power imbalances, at least to some degree, in some cases.

ABOUT POWER IMBALANCE

Over the past 30-plus years, one arena in which ADR has facilitated traditionally less powerful groups to exercise real power has been in class action or multi-district, multi-plaintiff litigation.

One can look to the series of gender and race discrimination class-action suits filed against the big-name investment firms as well as large consumer claims suits resolved in ADR

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processes. Drawing upon examples with which I'm familiar, programmatic relief was written into settlement documents, publicly filed, in the Merrill Lynch and Wells Fargo gender and race discrimination cases.

With the assistance of the finest ADR systems design professionals and mediators, these were fashioned and negotiated with plaintiff's counsel, class representatives, and defense counsel. These actors were closely familiar with the way certain employment practices and policies facilitated discrimination as well as corporate interests, operations, and constraints.

These settlements resulted in corporate, class-wide, and individual redress and reform measures that would not have been achievable otherwise. Without question, these processes shifted the traditional balance of power between the parties in a positive way. Not guilty, ADR!

I can't resist noting that discussion of ADR power imbalances ignores the larger realm in which aggrieved parties decide whether to raise claims, retain counsel, file suit, and settle without any third-party neutral involvement.

An employee who needs her job may not raise claims that the company is shorting her commission payments. It should be common knowledge by now that employees who complain about racial or sexual harassment or discrimination risk retaliation, the U.S. Equal Employment Opportunity Commission notwithstanding. If they can't afford the risk, nothing happens.

An employee may not be able to afford legal advice regarding his complaint, and so may suffer injustice—unlawful injustice to. If the employee does take the complaint to the employer, with or without counsel, what realistic chance does he have of negotiating a settlement?

Power imbalances are real. They occur despite the law, outside of the formal legal system, with no realistic path to legal redress.

Strong-arming by financial power, and disregard for legal standards, are much more likely where grievances are stated privately, counsel has not been retained, or even with counsel, suit has not been filed. Greater financial resources or higher social, political, or employment positions translate to more power. It is both obvious and unfortunate, but nevertheless true.

The universe outside of ADR is entirely at the mercy of power imbalances. ADR does not create these, nor can it erase them. We do the best we can.

IN OUR OWN ROOMS

Within ADR's house, and now in our arbitration and mediation rooms, we mediators, court ADR administrators, process designers, and arbitrators can construct and conduct processes that reflect moral values our law makers seem to have abandoned. I'm recalling mediations and arbitrations with parties mystified or overwhelmed by costs, vagaries, and the aggressive tenor of litigation. Or parties pinning all hopes and resources on victory unlikely to be realized.

Sometimes, parties are trapped within constructed narratives of demons and foul deeds of former colleagues; they seek vindication and restoration of pride. Too often, despite counsel's best efforts, they are unable to see through the legal thicket.

In employment discrimination cases, the employer feels extorted, the employee suffers financial and psychological loss or disorientation. Plaintiffs want assurance that this won't happen again, that their claim will protect others. On both sides, litigation's complaints, answers, counterclaims, document discovery burdens, deposition cross examinations, can bruise and burn.

Autonomy and control are surrendered to judge, magistrate and/or the specter of a jury.

As arbitrators, we can fit the process rules to the circumstances. We can exercise

discretion to streamline and reduce cost burdens. We can run pre-hearing conferences in a respectful and even-handed manner, recognizing the challenges faced by the parties and counsel. We can patiently allow a pro se claimant to make a case and waive strict technicalities. We can respectfully hear what parties and counsel wish to say, without cutting them off due to evidentiary rules.

While required to make decisions consistent with operative law (in most instances), arbitrators can make well-reasoned, accessible, fair, and equitable rulings and awards.


As mediators, we can seek to create some good within the mediation process. We listen, we seek to understand and respect the parties, lawyers, and their experience of the conflict. We can gently explain negotiation and legal realities the parties won't or can't hear from their lawyers, while leaving choices in the parties' hands.

Case law and statutes are what they are. Mediators can offer or facilitate solutions that address people's business, professional or emotional needs and aspirations. We can lead people to find their way out of a litigated conflict trap that saps resources, energy, and emotional equilibrium.

We can conduct a process that enables people—even executives are people—to reckon with those they believe to have perpetrated or suffered harm. We can aid them in restoring some control over the destiny of their dispute, and own the decision to settle or not, subject to agreement by both sides.

Thankfully, within our tiny mediation and arbitration rooms in ADR's house, we can choose to be strong advocates for respectful, fair, and humane process.

The polity crumbles and my reality-based despair at craven actors' exercise of power remains. Fortunately, we need not be neutral about the integrity and humanity with which we conduct dispute resolution in our own spaces.

No regrets. 

Practice Skills

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Scenario No. 2, the Chinese company does not want to purchase the required amounts of

natural gas because the pandemic has reduced the demand for the product.

By contrast, in the third and fourth scenarios, the nonperforming party seeks to avoid liability based on circumstances created by the pandemic that *prevent*

performance. In particular, in **Scenario No. 3**, the reduced workforce caused by widespread infection prevents the German supplier from timely providing the required services, while in **Scenario No. 4**, the government order prevents the conference