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Foreword: ADR for the Masses

In 1921, the *Oregon Law Review* became the first law journal in the Pacific Northwest, a distinction resonant with the mythology of the explorer—someone whose trail-forging, map-drawing, adventure-seeking boldness makes further discovery possible. Students began running the *Review* in 1967;[1] since then, student editors have taken their pioneering heritage seriously, seeking out and publishing

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1 *About*, OR. L. REV., http://law.uoregon.edu/org/olr/about.php?menu=about (last visited Jan. 31, 2012). The *Review* has published many important and iconoclastic legal thinkers. For a quick look at the wide array of authors who have appeared in the pages of the *Review*, see for example, Alfred T. Goodwin, *How the Supreme Court Employs Inferior Courts as Messengers*, 75 OR. L. REV. 699 (1996); Wayne L. Morse, *International Justice Through Law*, 26 OR. L. REV. 7 (1946); Sandra Day O'Connor, Speech, *"Professionalism,"* 78 OR. L. REV. 385 (1999).

groundbreaking scholarship using diverse publication strategies and formats.

In 2011, the *Review* launched the Scholarship Series, an initiative designed to track and highlight emerging trends in the law. Like a themed symposium issue, the Scholarship Series allows editors to solicit articles under a common thematic umbrella; unlike a themed symposium issue, however, the Scholarship Series avoids common issue-specific concerns such as timing constraints, uneven quality of submissions, and topic/length balance considerations. Instead, under the Series model, *Review* editors evaluate whether incoming articles are part of the ongoing Series and, if so, label the articles accordingly. This strategy allows the *Review* to monitor a particular scholarly trend over a period of time instead of compiling a snapshot of solicited research within a single volume. Articles that receive the Series label appear both in the regular volumes and on the OLR website, indexed within their applicable Series. In this way, the *Review* can timely deliver new scholarship while also providing the substantive and practical benefits of anthologizing under a common theme.

The 2012 Scholarship Series, "ADR for the Masses," begins with the present issue and will continue throughout the year.[2] The Series examines the proliferation of alternative dispute resolution (ADR) processes in large-scale contexts—such as mass torts, environmental and public policy decision making, collaborative governance, consumer disputes, and organizational dispute systems design—and encompasses both post-dispute processes (designed to accompany or replace traditional legal approaches to dispute resolution in mass contexts) and pre-dispute processes (designed to manage widespread or large-scale conflict and disputes earlier and more effectively). Sometimes ADR serves as a response or fix to the shortcomings of the legal system in situations involving multiple disputants or decision makers; sometimes ADR is an upstream strategy for managing disputes that, among other things, may render formal legal intervention unnecessary; sometimes ADR is a companion piece to traditional legal processes, pre- or post-dispute, when managing a mass disaster or large-scale dispute or conflict. The Series is an opportunity to identify not only the creative possibilities of these

[2] *2012 Scholarship Series: ADR for the Masses*, OR. L. REV., http://law.uoregon.edu/org/olr/scholarshipseries.php?menu=scholarshipseries (last visited Jan. 31, 2012).

innovations and hybrids, but also to explore the logistical difficulties or ideological tensions that these new developments may present.

Traditional legal processes are not always suited to large-scale disputes, multiple disputants, mass disasters, or public decision making.[3] Recent Supreme Court decisions tightening up requirements around pleading, class actions, and summary judgment demonstrate how hard it is to keep the competing concerns of the civil law system—docket and other efficiencies, access to justice, and responsible regulation of individual and corporate behavior among them—in reasonable balance.[4] Alternative processes have proliferated over the past thirty years in part because they offer extra bandwidth to an overloaded legal system through additional upstream and concurrent processes, both inside and outside the courthouse.[5] Some disputes still end up in court, but an increasing number of cases are diverted into arbitration, court-annexed mediation, hybrid mediation-arbitration processes (med-arb), early neutral evaluation, and other early case management processes.[6] Additionally,

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[3] *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 80–81 (2011).

> [T]he constitutional concept of courts as a basic public service provided by government is under siege. Pressures come from the demands imposed by the host of new claimants who, because of twentieth-century equality movements, gained recognition as rights holders; from institutional defendants arguing the overuse of courts and proffering alternatives; and from competition for scarce funds in government budgets.

Id.

[4] In 2007, the Supreme Court moved to a "plausibility" standard of pleading in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and made clear that this standard applied to all Rule 8 pleadings in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The recent case of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), appears to sharply limit the possible use of class actions in workplace bias cases. Finally, the famous "1986 trilogy" of summary judgment cases—*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)—made it considerably easier to "dispos[e] of cases short of trial when the district judge feels the plaintiff's case is not plausible." Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010).

[5] *See, e.g.*, Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009) (listing various forms of alternative dispute resolution).

[6] *See, e.g.*, 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 (2008) (suggesting ways for courts to determine and effectuate disputants' preferences in court-connected processes).

innovative processes such as dispute systems designs, negotiated rulemaking (reg-neg), and collaborative governance through multiparty consensus building are helping organizations and government offices manage conflict and head off potentially large disputes before they ripen into litigation.[7] As new dispute contexts and challenges emerge, enterprising scholars and practitioners have championed the potential of ADR to optimize existing legal and political frameworks and provide the elusive "win–win" for disputants and the system.[8]

Of course, with new processes come new problems, and alternative processes are no exception. Ideally, the Series will illuminate not only the possibilities of innovative processes in mass disputes and decision making, but also the tensions that such innovation—particularly when scaled upward—can create. Court-annexed mediation, for example, has not proven as quick or inexpensive as initially thought, indicating the need to reconsider the efficiency benefits of concurrent ADR processes in legal contexts.[9] Government agencies, corporations, and other organizations are much more enthusiastic about ADR than private individuals appear to be, suggesting intriguing questions around the institutional legitimacy of

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[7] *See generally* CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS (1996); WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1993). Organizational dispute systems design often features an ombuds, an employee of the organization who addresses complaints from a particular group, such as employees or consumers, and provides constructive feedback to the organization. Carole S. Houk & Lauren M. Edelstein, *Beyond Apology to Early Non-Judicial Resolution: The MedicOm Program as a Patient Safety-Focused Alternative to Malpractice Litigation*, 29 HAMLINE J. PUB. L. & POL'Y 411 (2008) (advocating within the dispute systems design context for the use of medical ombuds/mediator programs to resolve patient and provider disputes and medical malpractice claims in a non-adversarial way).

[8] For example, the collaborative law movement has attempted to capture the benefits of legal representation while avoiding the downsides of gameplay and litigation-based strategies. In collaborative law arrangements, the parties agree to limit the scope of legal representation to creative problem solving and mutually agreeable negotiated outcomes, and further agree that should anyone decide to pursue litigation, both attorneys are disqualified and the parties must hire new lawyers. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 9 (2008).

[9] *See* Shestowsky, *supra* note 6, at 551 ("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.").

ADR and individual perceptions of justice and due process.[10] Efforts to regulate mediation practice through licensing and professional standards have been controversial, because the qualities that make mediation potentially valuable—neutral guidance through informal, creative, non-prescriptive, party-driven, flexible solutions—also make mediation services difficult to monitor and potentially harmful.[11] Compulsory alternative processes, such as mandatory arbitration and early case management, may seem like an enlightened private-ordering reform of existing public legal processes but also threaten the core ADR values of voluntariness and flexibility and accordingly may not deliver the benefits generally expected to attend private ordering.[12] Criticisms that ADR processes perpetuate existing power imbalances or foist ethnocentric norms on non-Western peoples become even more pressing when thinking about deploying these processes to mass audiences.[13] Managing the inevitable structural, institutional, professional, and ideological tensions that emerge in mass ADR contexts, then, is one of the primary challenges of the next generation of process designers and policymakers working on mass dispute resolution and decision making.

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[10] *See, e.g.*, 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 "institutional support" for ADR outstrips "voluntary usage," and suggesting that concerns about due process and legitimacy account for this lack of popular adoption of ADR).

[11] *See, e.g.*, Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002) (examining the overlap between mediation and law practice).

[12] *See, e.g.*, Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) (arguing that compulsory ADR may further disenfranchise structurally weak parties). Moreover, informal ADR processes may divest participants of procedural safeguards, perpetuate power imbalances, or overextend state control. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

[13] For a feminist critique of mediation practice, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991). Grillo claims that mandatory mediation "often imposes a rigid orthodoxy as to how [the parties] should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties' speaking with their authentic voices." *Id.* For a critical perspective on dispute system design methodologies and assumptions in mass contexts, see Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009) (suggesting that scaling individual dispute resolution models to larger dispute and deal contexts may perpetuate existing social inequalities).

Consider an example from the work of Ken Feinberg. Feinberg is a mediator who has overseen some of the most high-profile large-scale compensation cases in American history.[14] After the terrorist attacks of September 11, Congress appointed Feinberg the special master of the Victim Compensation Fund (VCF), tasked with determining and distributing awards and, in so doing, avoiding ruinous litigation against the airlines.[15] In managing the fund, Feinberg used a combination of traditional ADR methods (e.g., active listening and empathetic treatment as well as broad, inclusive definitions of what could be discussed in meetings) and more traditional legal frameworks (e.g., damage models using traditional tort compensation metrics, such as earning levels).[16] Over two years, Feinberg awarded almost seven billion dollars from the fund, with awards ranging from $500 to $7.9 million.[17]

As a claims management system, the VCF succeeded remarkably on its goals, compensating more than ninety-five percent of potential claimants and significantly limiting the exposure of the airlines.[18] Feinberg's approach laid the groundwork for post-disaster, pre-litigation dispute management and arguably led to his continued involvement in subsequent high-stakes accountings.[19] Even so, at the

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14 *See* Terry Carter, *The Master of Disasters*, A.B.A. J., Jan. 2011, at 32 (reviewing Feinberg's career and the "Feinberg Way" for dispute resolution in mass contexts).

15 *See* FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, *available at* http://www.justice.gov/final_report.pdf.

16 Feinberg used traditional tort compensation models, taking into account economic and non-economic losses, but without punitive damages. *Id.* at 3–4. Additionally, all awards were offset by collateral payments from other sources. *Id.* Feinberg described the VCF hearings as "exorcisms" for participants seeking not just economic compensation but "psychological closure" through the process of showing pictures, sharing memorabilia, and telling stories about their lost loved ones. KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 99 (2005). These hearings required skills commonly associated with ADR practice. "No lawyer ever receives training for this personal aspect of the practice of law—providing what is, essentially, a combination of psychologist's office and confessional." Peter T. Elikann, Book Review, 90 MASS. L. REV. 48, 48–49 (2006) (reviewing FEINBERG, *supra*).

17 *See* Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1315 n.3 (2004); Aaron Smith, *The 9/11 Fund: Putting a Price on Life*, CNN MONEY (Sept. 7, 2011, 9:38 AM), http://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/index.htm.

18 *See* Carter, *supra* note 14, at 37 (stating that ninety-seven percent of possible claimants opted into the VCF).

19 In 2007, Feinberg oversaw the distribution of $8 million to families involved in the Virginia Tech shooting. *Id.* at 34. In 2010, he became the "Pay Czar" for the Obama administration, determining compensation for executives at bailed-out corporations, and

time many commentators questioned the normative justifications for payout disparities based on the income levels of the victims. Feinberg himself, reflecting on the process, openly regretted the traditional valuation metrics in determining payouts. In his view, the ethical and moral dimensions of such determinations change dramatically depending on the magnitude of the process:

> In the case of Sept. 11, if there is a next time, and Congress again decides to award public compensation, I hope the law will declare that all life should be treated the same. Courtrooms, judges, lawyers and juries are not the answer when it comes to public compensation. I have resolved my personal conflict and have learned a valuable lesson at the same time. I believe that public compensation should avoid financial distinctions which only fuel the hurt and grief of the survivors. I believe all lives should be treated the same.[20]

Indeed, when Feinberg administered the Virginia Tech fund following the 2007 mass shooting at that institution, he successfully pressed for a compensation model in which all survivors received the same amount.[21]

The Feinberg example is illuminating on several levels. At the outset, both the VCF and the Virginia Tech compensation funds demonstrate how using alternative processes in mass disaster contexts have creative potential (e.g., preserve value, promote closure, avoid destructive litigation) as well as destructive potential (e.g., "fuel the hurt and grief" with disparate awards). It is not entirely clear whether Feinberg believed that scaling up traditional compensation models actually revealed a defect in governing assumptions of the existing legal system or simply created a normative distortion experienced only in the aggregate.[22] This is an important question; but either way, the Feinberg experience is evidence of the possibility of process change and adaptation, the ability to interrogate established norms and then rework a more socially just vision of what those norms should be. Perhaps the greatest promise of "ADR for the Masses" is

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currently, he is administering the $20 billion Deepwater Horizon Disaster Victim Compensation Fund. *Id.* at 37; *see also* Joe Nocera, *Justice, Without the System*, N.Y. TIMES, Nov. 20, 2010, at B1.

[20] Kenneth Feinberg, *What Is the Value of a Human Life?*, NPR (May 25, 2008), http://www.npr.org/templates/story/story.php?storyId=90760725.

[21] *Id.*

[22] At first, Feinberg appears to criticize the general legal rule, but then he frames his solution in the context of future mass disasters, not in traditional tort scenarios. *See id.*

that creative, customizable, non-entrenched procedures may lead to new dialogues and learning conversations around our governing assumptions, thereby creating a space for legal and political reforms that seem otherwise unreachable.[23]

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The "ADR for the Masses" Scholarship Series features authors at the forefront of groundbreaking scholarship in alternative or appropriate dispute resolution, administrative law, and related fields. The present volume contains three articles in the series, two from law professors and one from a third-year law student. Each of these authors offers useful, nuanced perspectives on some of the most important issues in our current business and legal landscape: the appropriate devices to curb wrongful corporate activity and to protect individual consumers and shareholders. Society manages corporate behavior in part through civil plaintiffs and "private attorneys general"[24] who bring actions on their own behalf or on behalf of others. Calibrating this plaintiff activity to the correct level of regulation is a primary concern of legal procedure, and figuring out how ADR processes and values interface with these policy goals and these legal rules adds a layer of complexity to the analysis.

Noted arbitration expert Jean Sternlight opens our Series with a trenchant critique of the U.S. Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*.[25] Comparing the *Concepcion* decision with a tsunami, Sternlight argues that this latest installment in a series of pro-arbitration opinions from the Supreme Court has the destructive force of a giant wave sweeping aside state and federal efforts to regulate industries, deter corporations from wrongdoing,

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[23] Modern ADR is characterized by the interplay of utopian idealism—the belief, for example, that we can successfully engineer value-creating solutions that benefit all participants and employ creative solutions—and the rejection of what is perceived as the dystopia of traditional legal processes. This juxtaposition may make it more difficult for ADR to recognize its own dystopian inclinations. The study of mass ADR processes will help illuminate how and when ADR is delivering (or not) on its utopian promises. *See* Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. (forthcoming 2012).

[24] As Professor Bagenstos puts it, "Civil rights laws don't enforce themselves." Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1460 (2007). Congress uses the "private attorneys general" model to encourage injured individuals to bring lawsuits and thus provide industry regulation. *Id.* at 1461.

[25] Jean R. Sternlight, *Tsunami:* AT&T Mobility v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

and provide access to justice for individuals.[26] In *Concepcion*, the Court upheld a class action waiver in an adhesive arbitration provision in an AT&T phone contract, even though the relevant state law would deem the waiver unconscionable.[27] For many commentators, the *Concepcion* decision sounded the death knell for class arbitrations, and indeed Sternlight reports that courts have already begun enforcing similar waivers against consumers and speculates that now that the Court has signaled its willingness to uphold class waivers, corporations will have little reason not to include these waivers in every contract.[28] To the extent that we use class devices as a way to regulate industry and to deter corporate wrongdoing, *Concepcion* makes it difficult to follow through on these policy mandates in any effective way.[29] Considering that state-driven reforms are likely preempted and therefore unhelpful, and considering that the federal courts appear content to construe arbitrability broadly, Professor Sternlight recommends intervention from the federal legislative or executive sides, either by passing the Arbitration Fairness Act; or by amending the Federal Arbitration Act to disallow class waivers; or by creating agency regulation and oversight of arbitration in particular sectors.[30]

Professor Michael Yelnosky looks at the same issue from a different angle, turning his attention to the proper role of state law in the arbitration regime.[31] The *Concepcion* case turned on the construction of the "savings clause," which holds written contract provisions to arbitration as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[32] Yelnosky notes that this provision, under which the Concepcions argued for the application of California's unconscionability rules, has long been understood to import state law and equity notions into the agreement.[33] He argues that this traditional reading of the savings clause is dicta and that a more

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[26] *Id.*

[27] 131 S. Ct. 1740 (2011).

[28] Sternlight, *supra* note 25, at 716–19.

[29] *Id.* at 724–25.

[30] *Id.* at 725–26.

[31] Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729 (2012).

[32] 9 U.S.C. § 2 (2006).

[33] Yelnosky, *supra* note 31, at 733.

sensible and historically accurate interpretation would instead empower federal courts to generate federal common law around the enforceability of arbitration agreements.[34] Yelnosky maintains that "federalizing" the savings clause will create a more robust, less patchwork decisional law around arbitration that will reflect the Supreme Court's preference for arbitration and make agreements more predictable and certain.[35] Moreover, Yelnosky believes that the federal courts already have at least one federal common-law doctrine in place that can, especially if developed through the common-lawmaking process, protect claimants from lopsided or unfair agreements.[36]

Joseph Barsalona takes yet another angle on corporate regulation through mass action, examining the shareholder derivative suit and considering how it can be made, through ADR processes, more effective.[37] He focuses primarily on the demand requirement, an early stage in the derivative suit in which the corporation is asked to sue itself, as a possible site for improvement of corporate governance.[38] Barsalona characterizes this provision as "the forgotten ADR mechanism available to all litigating shareholders" and walks through a proposed change to state corporate codes that would clarify the use of this provision and make it more effective as a tool of corporate reform.[39] Barsalona argues that ADR and mediation are effective tools in intracorporate disputes because they prevent avoidable value-destroying litigation while still empowering shareholders to monitor corporate activity.[40] Because the incentives of shareholders and directors should be aligned around the corporation's success, ADR provides a smoother bridge than class actions to deter wrongful conduct and redress injuries.[41]

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34 *Id.* at 734.

35 *Id.* at 759–70.

36 This is the "vindication of statutory rights analysis," under which some federal courts have refused to enforce arbitration agreements. *See id.* at 761–64.

37 Joseph Barsalona, Comment, *Litigation Supply Should Not Exceed Shareholder ADR Demand: How Proper Use of the Demand Requirement in Derivative Suits Can Decrease Corporate Litigation*, 90 OR. L. REV. 773 (2012).

38 *Id.* at 775–76.

39 *Id.* at 776.

40 *Id.* at 788 ("[T]he demand requirement is unquestionably an ADR mechanism that can bring shareholders and companies together to alleviate divisive problems within corporations.").

41 *Id.* at 786–87.

Each of these articles explores the interrelation of legal mechanisms, process innovations, and policy concerns that characterizes some of the most pressing issues facing the law today. The *Oregon Law Review* is proud to present these inaugural pieces in the 2012 Scholarship Series, "ADR for the Masses," and invites its readers to follow the series over the next several months, both in the print issues and in the online collection.