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# Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR

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## I. INTRODUCTION: A BRIEF INTELLECTUAL HISTORY OF THE “HAVES” IN LITIGATION

Marc Galanter’s essay, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*<sup>1</sup> (*Why the “Haves” Come out Ahead*), published twenty-five years ago, set an important agenda for those who care about the distributive effects of legal processes, including those of us who have been engaged in jurisprudential, intellectual, and empirical debates about the relative advantages and disadvantages of alternative and conventional legal procedures. As a document of legal intellectual history, this Article was formed in the crucible of the Legal Mobilization and Modernization program at Yale Law School that spawned so many “law and . . .” studies, including legal pluralism, law and society, critical legal studies, and in its own way, even law and economics studies. A seminal work in the socio-legal studies canon, Galanter’s article demonstrates the complex patterns of how law and legal institutions actually work, beyond descriptions of legal doctrines and assumed efficacy and “penetration” of law. In some senses, it is a continuation of legal realism, reminding us of the importance of studying the legal institutions in which the law is embedded and suggesting, at its end, how we might reform or “adjust” those institutions to produce optimal social change (in this case, redistribution of resources and delivery of justice).

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<sup>1</sup> See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

Yet, it is also, though Marc Galanter would probably not identify it as such, one of the significant pieces of work associated with critical legal studies, for it provides the theoretical analysis for operationalization and empirical testing of the proposition that “the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systemically equalizing) change.”<sup>2</sup> In this, the piece recognizes the limits of law, legal institutions, and perhaps of rights strategies, so essential to much of the critical scholarship on the legal system written in the 1970s and 1980s.

In this landscape-shaping work, Galanter reminds us that legal institutions and social change are structurally marked. The components of the legal system, parties, lawyers, institutions, rules, and “alternatives to the official system,” in their social, economic, and political variations and interactions, shape the outputs of courts, litigation, and disputes. Galanter criticizes the political dysfunction of a system that allows certain advantaged participants (the “repeat players”) to maximize their long-term gains over those “one-shotters” who may seek justice, but participate with fewer resources. Galanter thus uses a sociology of law to uncover the “myths” or fictions of a faith in law, doctrine, and legal institutions that appear to promote “equal justice” but, in reality, deliver power instead.<sup>3</sup> Law, embedded in society, produces not universalistic truths but variable outcomes that are effected by the endowments of the players who are, in turn, embedded in social structures that shape and transcend what law itself can do.

The intellectual problem that Galanter set for himself was to consider, sociologically, “under what conditions can litigation be redistributive?”<sup>4</sup> implicitly assuming, of course, that redistribution (or equalization efforts) in the system are normatively desirable. Within the frame of a social scientific perspective, Galanter began his piece with a series of propositions-hypotheses about how the constituent elements of a legal system produce outputs (rules, adjudications, and enforcements) that may be less than optimal for those seeking such normatively desirable ends (of redistribution).<sup>5</sup>

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<sup>2</sup> *Id.* at 95.

<sup>3</sup> For a useful reframing of the tensions in socio-legal studies between justice and power, see generally JUSTICE AND POWER IN SOCIOLEGAL STUDIES (Bryant Garth & Austin Sarat eds., 1998).

<sup>4</sup> Galanter, *supra* note 1, at 95.

<sup>5</sup> That the article was rejected by many conventional law reviews and is now one of the most cited pieces of legal scholarship demonstrates how resistant legal scholars

Aside from Galanter's many astute observations about the patterning of the legal system and its players, his article is prescient in its acknowledgment of "court-like agencies" and "alternatives to the official system"<sup>6</sup> that will comprise this Article's basic concern—why the "Haves" are still coming out ahead in current alternatives to the official systems of adjudication.

The continued relevance of *Why the "Haves" Come out Ahead* in a time of somewhat diminished interest in litigation<sup>7</sup> is evidenced by Galanter's own recognition that not all cases would make it to high-level or "peak" institutions.<sup>8</sup> Thus, even twenty-five years ago, Galanter recognized that much law would be made, developed, and enforced either in "field level" agencies or in "alternatives to official systems" such as those which were "appended" to formal institutions (e.g., routine case processing, plea bargaining, court-oriented settlement, and even negotiation between the parties) or those which were "private remedy systems" (religious courts, arbitration tribunals, institutional grievance mechanisms, ombuds, mediation, conciliation, trade associations, unions, complaint bureaus, and even public opinion).<sup>9</sup>

While the bulk of *Why the "Haves" Come out Ahead* is devoted to resource mobilization and advantage of certain parties in litigation, the end of the piece traces the effects of "Haves" advantage in these less official

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and law schools were to the idea that law and legal institutions are themselves sociologically variable. In an era when both the "right" and the "left" had something of an overblown faith in law and legal institutions, the notion that law might not be the preeminent discipline and explanatory force was difficult to accept. Query: why have law and economics, and now law and humanities, found such greater acceptance as alternative methodological approaches to the evaluation of whether law does its job well (in terms of efficiency and justice)?

<sup>6</sup> Galanter, *supra* note 1, at 96, 124.

<sup>7</sup> Whether there is in fact more or less litigation either over time, in the federal or state systems in the United States, or in the United States compared to other legal regimes, is another of the major socio-legal questions to which Marc Galanter has devoted much effort. See, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Planet of the Aps: Reflections on the Scale of Law and Its Users* (1999) (unpublished manuscript, on file with author).

<sup>8</sup> Galanter, *supra* note 1, at 96-97.

<sup>9</sup> *Id.* at 97, 124, 126, 128.

arenas<sup>10</sup> and thus, is most timely for revisiting in this era of increased use of “alternatives to official systems,” or as it is currently termed, “alternative dispute resolution” (ADR). In this section of his article, Galanter accurately notes that what processes parties might use for their disputes, conflicts, and transactions would depend on the “‘density’ of the[ir] relationships”—that is, how often they interacted with each other.<sup>11</sup> He predicted that parties who often interact with each other (repeat players with repeat players) would be less likely to use the official litigation system and would be more likely to employ the less official systems of private remedies.<sup>12</sup> Thus, it is particularly useful for us now to look at how repeat players and one-shotters are faring in environments of increased use of less “official” dispute resolution systems.

I begin by reframing slightly and by making somewhat more complex the normative question. If Galanter was concerned with the question of under what conditions redistribution (social change and equalization) could be effectuated in litigation,<sup>13</sup> I begin with the question of under what conditions and in which processes justice can be achieved. Is redistribution the same as justice? How should we measure either justice or redistribution—from the perspective of aggregative, external views or from the point of view of the parties internal to the dispute, conflict, or transaction?<sup>14</sup>

When I began my own critiques of the litigation system and the “appended” negotiation processes that occurred within its shadow some fifteen years ago,<sup>15</sup> it was precisely because, from a different perspective, I theorized that litigation was sometimes inadequate for the task of solving both structural and distributive problems, as well as more individual ones.<sup>16</sup>

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<sup>10</sup> See *id.* at 124–35.

<sup>11</sup> *Id.* at 130.

<sup>12</sup> See *id.* at 130.

<sup>13</sup> See *id.* at 95–96.

<sup>14</sup> I have explored this question in Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995). Cf. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2647 (1995). Marc Galanter is well aware of both the normative and the measurement problems posed here. See Marc Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 DENV. U. L. REV. xi, xiv (1989).

<sup>15</sup> See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

<sup>16</sup> See *id.* at 794–95.

To the extent that certain structural aspects of litigation, also commented on by Galanter, tended to create binary win or lose results, that enforcement was often weak, that individualization of cases was inadequate to monitor larger social problems, and that even “wins” were often modified quickly in actual practice,<sup>17</sup> I argued that other conceptual approaches to legal problem solving, outside of litigation, were often, if not always, more appropriate.<sup>18</sup>

Underlying needs and interests of parties and larger constituencies such as communities, employees, and governments might perhaps better be addressed in other fora—with different conceptions of dyadic negotiations, mediation, public policy fora,<sup>19</sup> and the more multifaceted use of processes that we now call “appropriate dispute resolution,” not alternative dispute resolution. There is a vigorous debate about the use of these words and the ideologies which they attempt to express,<sup>20</sup> which I will not address fully here. To the extent that negotiation, mediation, arbitration, settlement, and other forms of dispute processing represent most of Galanter’s iceberg<sup>21</sup> and Hart and Sack’s pyramid<sup>22</sup> of the disputing in our society, some of us have urged that we stop using “alternative” where full scale adjudication in a court is now more the alternative than the norm.<sup>23</sup> The term “appropriate” signals that one role of a legal system is to provide a variety of choices about how best to handle particular issues, problems, disputes, conflicts, and transactions—now called a menu, a “multi-door courthouse,”

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<sup>17</sup> See Galanter, *supra* note 1, at 137–39.

<sup>18</sup> See, e.g., Menkel-Meadow, *supra* note 15, at 794.

<sup>19</sup> See generally CONSENSUS BUILDING INSTITUTE, THE CONSENSUS BUILDING HANDBOOK (Lawrence Susskind et al. eds., 1999) (describing alternative processes for the resolution or management of a wide variety of legal, political, allocative, community, and environmental issues).

<sup>20</sup> See, e.g., Eileen Barkas Hoffman, *The Impact of the ADR Act of 1998*, TRIAL, June 1999, at 30, 30.

<sup>21</sup> See Galanter, *supra* note 1, at 144.

<sup>22</sup> See HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 158–68 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>23</sup> See LEONARD RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 51 (2d ed. 1997); Albie Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It*, 4 NEGOTIATION J. 55, 62 (1988); Leonard Riskin & James E. Westbrook, *Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509, 509 (1989).

or “variet[ies]” of “dispute processing.”<sup>24</sup> On the other hand, opponents of the use of “alternatives” to court, as a critique of increased privatization of disputing (also noted presciently by Galanter in 1974<sup>25</sup>), do not want such processes labeled as “appropriate” at all.<sup>26</sup>

At the same time that I and others were making this qualitative argument for moving some disputes outside of litigation,<sup>27</sup> debates about whether the litigation system was in fact overloaded caused many court

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<sup>24</sup> Frank E. A. Sander, Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 111, 111–13 (1976). Some have argued that parties’ choices about what kind of dispute processes to use are more appropriately left to consensual contracting. See, e.g., Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 340 (1998). Others find that contracting for “alternatives” to court is especially problematic because of the advantage taken by repeat players in contracting over single-shot contractors. See, e.g., Paul Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 266 (1998).

<sup>25</sup> See Galanter, *supra* note 1, at 124–35.

<sup>26</sup> See, e.g., Luban, *supra* note 14, at 2637; see also Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Bryant Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POL. & SOC’Y 367, 368 (1992); Judith Resnik, *Many Doors? Closing Doors?: Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261–65 (1995).

<sup>27</sup> See, e.g., Thomas Lambros, *The Summary Jury Trial and Other Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, in 103 F.R.D. 461 (1984); see also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991); DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987); Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982); Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents’ Perception of Their Processes and Outcomes*, MEDIATION Q., Summer 1989, at 71; Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Mary P. Rowe, *The Non-Union Complaint System at M.I.T.: An Upward-Feedback, Mediation Model*, 2 ALTERNATIVES TO HIGH COSTS LITIG., Apr. 1984, at 10; Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC’Y REV. 461 (1986).

personnel, including Supreme Court Justices<sup>28</sup> and court administrators,<sup>29</sup> to seek diversionary programs away from full scale adjudication to reduce case loads in the courts. While some argued a version of “[w]hy the ‘Haves’ come out ahead” by suggesting that the least powerful were being forced into systems of second class justice in neighborhood justice center mediation<sup>30</sup> just as they were achieving more legal rights “on the books,” others pointed out that it was the “Haves” who were in fact exiting the system by first choosing more streamlined and controlled forms of private justice when they disputed with each other,<sup>31</sup> and now when they impose mandatory private dispute resolution on their employees, clients, customers, patients, franchisees, and licensees.<sup>32</sup> To put it simply, the

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<sup>28</sup> See, e.g., Warren Burger, *Isn't There a Better Way?: Annual Report on the State of the Judiciary, Remarks at the Mid-Year Meeting of the American Bar Association* (Jan. 24, 1982), in 68 A.B.A. J. 274, 275 (1982).

<sup>29</sup> For a thoughtful and qualitative assessment of ADR efforts in the courts, see generally Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303. Cf. 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, 16-17 (1991) (arguing that the positive and qualitative advantages of ADR were becoming co-opted by increased use within the adversarial litigation system).

<sup>30</sup> See, e.g., Mark H. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 119, 120 (Richard L. Abel ed., 1982); see also CHRISTINE HARRINGTON, *SHADOW JUSTICE* 105-06 (1985).

<sup>31</sup> The Center for Public Resources (CPR) was founded in 1979 and is comprised of the Fortune 500 companies’ lawyers, both general counsel and major law firm lawyers, to explore more effective and efficient forms of disputing, using, among other methods, private mini-trials, public summary jury trials, mediation, arbitration, evaluation, and other forms of ADR. See CPR Inst. for Dispute Resolution, *CPR Institute for Dispute Resolution Homepage* (last modified Nov. 10, 1999) <<http://www.cpradr.org/>>. To date there are more than seven thousand corporations and their subsidiaries who have signed a CPR pledge to explore various forms of ADR with each other. Others have criticized the extensive use of private “rent-a-judges” in California (and now nationwide with JAMS-Endispute) by those who can afford to exit the system and pay for their own justice systems. See, e.g., Robert Gnaizda, *Rent-a-Judge: Secret Justice for the Privileged Few*, 66 JUDICATURE 6, 11 (1982); Richard Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53, 55.

<sup>32</sup> See Mark Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 272 (1995); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 332-33; Samuel Estreicher, *Predispute Agreements to*



“Haves” come out ahead by being able to choose and manipulate what process will be used to enforce substantive rights.

Thus, with the increased use of “alternatives to official systems”<sup>33</sup> (to use Galanter’s terms) at both ends of the economic and political spectrum, the question of whether power recapitulates itself in all forms of dispute systems is clearly ripe. In this Article, I will explore theoretically and address empirically (by reporting on the little but evocative currently available data) the question of whether the “Haves” come out ahead in ADR too, as they do in the more official arena of litigation.

## II. THE ARGUMENT AND SOME TERMS OF DEFINITION

Marc Galanter’s basic argument in *Why the “Haves” Come out Ahead* was that certain classes of litigants (repeat players) are more able to mobilize legal and other resources to maximize long-term gain in litigation (formal adjudication of disputes in courts).<sup>34</sup> Galanter began by decomposing the constituent elements of litigation into parties (divided into repeat players or one-shotters), lawyers, institutions (different layers of courts and court-like agencies), and rules and alternatives.<sup>35</sup> He then theorized that, in most cases, repeat players could use the litigation system to their advantage and, to successfully repel serious efforts to use the courts for legal rule change, to achieve power and economic equalization or social redistributive effects.<sup>36</sup> With many cases in the system, repeat players have

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*Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1345 (1997); Carrie Menkel-Meadow, *California Court Limits Mandatory Arbitration*, 15 ALTERNATIVES TO HIGH COSTS LITIG. 109, 121 (1997); David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) [hereinafter Sternlight, *Panacea or Corporate Tool?*]; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997); Caroline E. Mayer, *Hidden in Fine Print: “You Can’t Sue Us,” Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A-1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue: Arbitrators, Not Courts, Rule on Complaints*, N.Y. TIMES, Mar. 10, 1997, at A1.

<sup>33</sup> Galanter, *supra* note 1, at 124.

<sup>34</sup> See Galanter, *supra* note 1, at 98–103.

<sup>35</sup> See *id.* at 97–135.

<sup>36</sup> See *id.* at 103–04.

low stakes in any one case and thus can maximize long-term gain by resisting settlements, developing advance intelligence, and being able to plan for future engagement. Further, repeat players can cultivate a “bargaining or litigation reputation” to accomplish particular goals or simply to develop trust and legitimacy<sup>37</sup> with court personnel, developing long-term relationships with institutional incumbents, by participating actively in procedural as well as substantive rule construction and adoption.<sup>38</sup> Thus, winning any one case may not matter as much as being a player in the system who can manipulate rules, decisionmakers, and court personnel to deliver, over the long-term, optimal and reliable outcomes. Lawyers, as representatives of some repeat players, likewise develop substantive expertise; their knowledge of institutional incumbents,<sup>39</sup> reliable business-getting strategies, and reputations allow them to serve as brokers or gatekeepers to the larger system.

Institutions, such as overloaded courts, also serve to advantage repeat players because, with the deflection of cases away from full scale litigation, currently existing rules will be less likely to be challenged and knowledge of the system will add to the bargaining endowments that occur in the shadow of the law and courts.<sup>40</sup> With large case loads and great delay, Galanter posited, powerful repeat players (especially when defending against plaintiffs seeking rule changes) will benefit from a lack of rulings and the inability of one-shotters to enforce or monitor rule changes.<sup>41</sup> Possessors (landlords, creditors, and employers) will be more likely to be able to hold on to what they have when the system works slowly. In an ironic twist, Galanter suggested that the more process there is (remember, this was written at the time of the procedural due process revolution), the more delay and status quo protection there will be for the “possessors” (the

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<sup>37</sup> The repeat player role of the Solicitor General of the United States in Supreme Court litigation is one example here. See the recent controversial report of the role of the Solicitor General in some hotly contested cases in EDWARD LAZARUS, *CLOSED CHAMBERS* 230–34 (1998).

<sup>38</sup> See Galanter, *supra* note 1, at 100–01, 123–24.

<sup>39</sup> For a demonstration of what Felstiner and Sarat have described as lawyers who are valued not for what they know but who they know, see AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 90–91 (1995) and Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*, 20 L. & SOC’Y REV. 93, 99–116 (1986).

<sup>40</sup> See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 985, 990 (1979).

<sup>41</sup> See Galanter, *supra* note 1, at 121–24.

“Haves”).<sup>42</sup> Given the expense of mobilizing lawyers who know and can use the system and its rules, the one-shot litigant, especially one who seeks to challenge the status quo, will often, but not always,<sup>43</sup> be overwhelmed and unsuccessful. Thus, rule change for the one-shot “Have-not” will be expensive, incremental, and largely symbolic.<sup>44</sup> In Galanter’s words, “[l]itigation then is unlikely to shape decisively the distribution of power in society.”<sup>45</sup>

In the final portion of his paper, Galanter urged social structural changes so that litigation could be made more effective; thus, he did not abandon litigation as a site of social change activity. He sought instead to offer reforms to alter power relations between the parties.<sup>46</sup> He suggested that one-shotters need to become more like repeat players. For this he offered a variety of suggestions which have been utilized in the last twenty-five years, particularly by those who seek social change through law.<sup>47</sup> Class actions and aggregations of claimants can make some one-shotters more like repeat players, as can organizational client groups and organizational litigation strategies (like those of the NAACP, Inc. Fund) which also focus on long-term gain, perhaps sometimes sacrificing an

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<sup>42</sup> See *id.* at 124.

<sup>43</sup> Galanter recognizes that some “Have-nots” sometimes can be repeat players too—for instance, multiple criminal offenders and repeat debtors. See *id.* at 103. Additionally, one-shotters sometimes can benefit from the status quo. Due process hearings before welfare termination, for example, make some one-shotters “possessors,” if only temporarily. See *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (“The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.”). Due process and delay sometimes do protect “Have-not” possessors, like tenants who cannot be evicted without some process. For a thoughtful description of how repeat players were able to manipulate even due process protections, see Lazerson, *supra* note 30, at 119–22.

<sup>44</sup> Galanter’s critique of the symbolic, rather than tangible, nature of successful rule changes in the litigation system is close to my own. When I was a legal services lawyer and a repeat player in the litigation system of institutional rule change, we would often “win” institutional lawsuits to gain rule change of welfare regulation, employment practices, and prison practices, only to have the actors adapt by changing behaviors back or quickly modifying rules and regulations. See Galanter, *supra* note 1, at 149–50.

<sup>45</sup> *Id.* at 150.

<sup>46</sup> See *id.* at 135–44.

<sup>47</sup> See *id.*

individual case.<sup>48</sup> Use of repeat player lawyers (such as legal services lawyers and other public interest or cause lawyers committed to particular social change objectives and not just to professional roles) to bring well-planned and strategized test cases are all ways of converting one-shotters into repeat players in the system. To the extent that such strategies were successful,<sup>49</sup> Galanter reminded us of the resistance to such equalization of power. In defense of then Governor Ronald Reagan's veto of the California Rural Legal Assistance (CRLA) program, the head of the California Office of Economic Opportunity's legal services program said, "[w]hat we created in CRLA is an economic leverage equal to that of a large corporation. Clearly that should not be."<sup>50</sup> Such lawyer leverage was successful in both substantive and procedural rule changes, notably, for example, with respect to attorneys fees statutes and the "due process revolution," as well as in consumer rights, civil rights, and employment discrimination cases.

On the other hand, Galanter's focus on changing the social structure of litigation to maximize its effects for rule change was missing one very

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<sup>48</sup> See LAZARUS, *supra* note 37, at 170–217, for a description of how the choice of the *McCleskey v. Kemp*, 481 U.S. 279, 315–18 (1987), capital punishment case was not optimal for the empirical attack on the racism of the administration of the death penalty.

<sup>49</sup> There is some debate in the literature on social movement and cause lawyers about how effective these strategies have been. See generally NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND (1989); JOEL HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978); John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 181 (Austin Sarat & Stuart A. Scheingold eds., 1998); PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (Burton A. Wesbrod et al. eds., 1978); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1992); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995); Robert G. Meadow & Carrie Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociological Ambivalence in the Delivery of Legal Aid for the Poor*, 9 LAW & HUM. BEHAV. 397 (1985); Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121; Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996).

<sup>50</sup> Galanter, *supra* note 1, at 144, 151 n.144.

important component—one which became strikingly real in the years that followed publication—politics. By calling for increased mobilization of legal resources to turn one-shotters into repeat players, Galanter assumed that courts and official decisionmakers would be responsive to substantive equalization goals. This has proved to be less than true, even with all of the successful public interest and other class mobilization of repeat, but “Have-not,” claimants.<sup>51</sup> That litigation is less successful for social change ultimately may be more dependent on conventional party and judicial politics than social structure. To the extent that the more liberal judges of the 1960s and 1970s were replaced, at least in the federal judiciary, by increasingly conservative judges and justices, redistributive and equalization results from courts became less and less likely, even with all the repeat play advantages that could be mobilized. Thus, while litigation continued, social change advocates returned to political processes including lobbying, legislative advocacy, and grassroots activities.<sup>52</sup> To the extent that Galanter’s repeat player advice has worked for “Have-nots,” it has been most successfully deployed by personal injury plaintiffs’ lawyers who, in some cases, have moved rapidly from trying difficult-to-prove cases to maintaining hugely successful mass tort practices. This has converted the lawyers, if not the clients, into very successful repeat players.<sup>53</sup>

Galanter’s analysis also suggested that as interaction increases between repeat players themselves, there will be increased privatization, decentralization, and legal pluralism, and less public norm enforcement.<sup>54</sup> In this he was prescient as well, because so many repeat player interactions, even predispute, have been converted to more informal, bilateral forms of dispute resolution in the pluralistic, particularistic, and decentralized forms of ADR that are so common now (such as exclusive internal organizational

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<sup>51</sup> For modern examples of “impact” studies that have demonstrated the less than perfect success of organized litigation strategies, see generally GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) and RICHARD SOBEL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

<sup>52</sup> See generally Kilwein, *supra* note 49; GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Peter Edelman, *Public Interest Lawyering* (1998) (unpublished materials, on file with author); Michael Wald, *Legal Strategies for Social Change* (spring 1996) (unpublished materials, on file with author).

<sup>53</sup> See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 9–10* (1985); RICHARD KLUGER, *ASHES TO ASHES: AMERICA’S HUNDRED YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILLIP MORRIS 639–77* (1996).

<sup>54</sup> See Galanter, *supra* note 1, at 110–14.

arbitration programs). It is to the issues of repeat players and the “Haves” and “Have-nots” in the increasing use of ADR to which I now turn.

For all of his foresight, the one part of dispute resolution that Galanter did not wholly predict was the differential social structure of “alternatives to the official system.” Although his description of the iceberg of disputing was less continuous with the official system of adjudication than the 1950s structuralist-functionalist pyramid of Hart and Sacks, positing both appended and private remedial schemes,<sup>55</sup> what we are faced with now in the “landscape of disputing” are highly privatized forms of disputing (form or adhesion contracts in consumer, health, employment, securities, banking, and education requiring compulsory arbitration) that are strongly supported by the formal justice system.<sup>56</sup> To the extent that Supreme Court jurisprudence over the last ten years increasingly has sustained mandatory arbitration provisions in private contracts,<sup>57</sup> some have argued that the state has, in effect, privatized the dispute resolution system, providing an odd relationship between the public and private dimensions of the legal system.<sup>58</sup> In addition, increased use of various forms of ADR within the courts has increased the use of “appended, but also private” forms of dispute resolution within the official justice system, raising some serious questions about whether such programs are public or private and what rules of procedure, ethics, and substance should be applied in such hybrid settings.<sup>59</sup> Thus, with increased use of both public and private dispute

<sup>55</sup> Compare Galanter, *supra* note 1, at 134 n.97, 144 with HART & SACKS, *supra* note 22, at 158–68.

<sup>56</sup> See *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 471 (declaring that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (1994), codifies a federal policy in favor of arbitration).

<sup>57</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 33, 35 (1991) (holding that a securities broker’s statutory age discrimination claim was subject to mandatory arbitration pursuant to an arbitration agreement set forth in his securities registration application).

<sup>58</sup> See Reuben, *supra* note 31, at 55–57. Richard C. Reuben has gone so far as to suggest that Supreme Court and lower court approval of private dispute resolution agreements amount to state action and should subject even private ADR to the requirements of due process. See Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, 85 CAL. L. REV. 577, 615–19 (1997).

<sup>59</sup> See, e.g., Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer’s Responsibilities*, 38 S. TEX. L. REV. 407, 412–13 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*]; Carrie Menkel-Meadow, *Ethics in ADR*

resolution processes, and with increased public imprimaturs applied to private disputing forms, the question of whether the "Haves" come out ahead in ADR is manifest. Further, the question of what is private and what is public about disputing has become quite blurred, with both legal and social justice consequences that remain murky.

Recent efforts to consider fairness, justice, and redistributive standards in ADR have attempted to confront questions regarding who are repeat players in ADR and what difference repeat playing makes for the individuals involved, as well as for the larger justice system.<sup>60</sup>

Note the many ways in which there may be repeat players in the use of alternative justice systems. The corporation, employer, health care provider, bank, educational institution, securities broker, or other repeat play institution using a clause in a form contract<sup>61</sup> to provide or offer services<sup>62</sup> and requiring as a condition of service, employment, or sale of product that the customer, consumer, employee, or client submit to

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*Representation: A Roadmap of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3, 3.

<sup>60</sup> I am currently chairing the CPR-Georgetown Commission on Ethics and Standards in ADR, which is preparing position papers, drafting ethical rules, and collecting best practices on issues involving uses of ADR. These efforts require consideration of such issues as individual third party neutral roles, client-consumer roles, representative roles in ADR, and issues surrounding providers (public and private) of ADR services; all of these individuals and groups are potential repeat players in the alternative justice system. See PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS Principle V cmt. & n.19 (Working Group on ADR Provider Organizations, CPR-Georgetown Commission on Ethics and Standards in ADR, Tentative Draft 1999) (on file with author); TAXONOMY OF ADR PROVIDER ORGANIZATIONS (Working Group on ADR Provider Organizations, CPR-Georgetown Commission on Ethics and Standards in ADR, Tentative Draft 1998) (on file with author).

<sup>61</sup> This is often called "ex ante" dispute resolution. Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 1 (1995).

<sup>62</sup> In the most extreme example yet, employees have been held to mandatory arbitration clauses that appeared in the employment application, but not in any employment contract or personnel manual delineating the terms of the employment relation, for instance in Form U-4, which is utilized in the securities industry. See, e.g., *Gilmer*, 500 U.S. at 23, 25; *Palmer-Scopetta v. Metropolitan Life Ins. Co.*, 37 F. Supp. 2d 1364, 1366-68 (S.D. Fla. 1999); *Hart v. Canadian Imperial Bank of Commerce, Inc.*, 43 F. Supp. 2d 395, 398-99, 406 (S.D.N.Y. 1999); *Thomas v. Bear, Sterns & Co.*, No. CIV.A.3:98-CV-1970D, 1998 WL 684232, at \*2-\*3 (N.D. Tex. Sept. 25, 1998); *Carrington & Haagen*, *supra* note 32, at 369. Almost as surprising is the enforcement of a similar clause in a changed employee manual, 26 years after initial employment. See *Estreicher*, *supra* note 32, at 1347 n.11.

mandatory arbitration or other dispute resolution<sup>63</sup> is a repeat player, in choice of forum<sup>64</sup> as well as form, with implications for choice of law, convenience, cost, and stake in litigation. These clauses often eliminate choices with respect to decisionmaker, rules of evidence, and procedure or substantive law<sup>65</sup> to be applied. They also set limits on appeals, define the standard of review to be applied if there is an appeal,<sup>66</sup> and determine whether or not there will even be a written decision elaborating the reasons or basis for a decision (in arbitration).<sup>67</sup>

To the extent that ADR systems designers<sup>68</sup> are hired specifically to institutionalize forms of disputing in labor relations, corporations, hospitals, government agencies, universities, and the like, individuals

<sup>63</sup> Some contracts might provide for mediation and some for particular providers, like the one I was asked to sign in leasing my home, which required use of JAMS-Endispute to arbitrate any and all claims arising out of the lease agreement. I crossed out the clause. See generally Meier, *supra* note 32, at A1.

<sup>64</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), *superseded* by Vessel Owners Liability Act, Pub. L. No. 102-587, § 3006, 106 Stat. 5039, 5068 (1992) (codified as amended at 46 U.S.C. app. § 183c (1994)). The 102d Congress amended the Vessel Owners Liability Act after *Carnival* was decided; it now allows a claimant to bring suit in “any [instead of “a”] court of competent jurisdiction . . . .” The legislative history demonstrates that the Act was fully intended to overturn *Carnival* because part of the Court’s reasoning was that the forum selection clause was acceptable because it did not “take away [plaintiffs’] right to trial by ‘a trial by [a] court of competent jurisdiction’ . . . .” *Carnival*, 499 U.S. at 596 (quoting 46 U.S.C. app. § 183c (1988) (amended 1992)). It just limited plaintiff to litigation in a Florida court. See 138 CONG. REC. H11785 (daily ed. Oct. 5, 1992) (statement of Rep. Studds) (providing that the amendment was necessary because the Supreme Court’s ruling in *Carnival* “allowed a cruise line to enforce a forum selection clause”). This amendment to the statute overruling *Carnival* may aid one-shotters, but only one-shotters on cruise ships. See *Yang v. M/V Minas Leo*, No. 94-15168, 1996 WL 32161, at \*1 (9th Cir. Jan. 26, 1996) (stating that the amendment to the Vessel Owners Liability Act “discounts forum-selection clauses only in the passenger context”).

<sup>65</sup> See Stephen Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 725 (1999); William J. Woodward Jr., *Changes in the UCC: Where in the World Will Your Contract Be Governed By?*, LEGAL INTELLIGENCER, Apr. 12, 1999, at 7.

<sup>66</sup> See Stephen J. Ware, “Opt-In” for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT’L ARB. 263, 265 (1997).

<sup>67</sup> See *Gilmer*, 500 U.S. at 31.

<sup>68</sup> See generally CATHY CONSTANTINO & CHRISTINA MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).



contracting with large organizations will have virtually no ability to choose, let alone to mobilize legal or other resources needed to defend, as well as claim, in certain contexts. The obvious placement of such cases in Galanter's Type II or III (RP (repeat player) vs. OS (one-shotter) or OS vs. RP) of types of disputes<sup>69</sup> makes clear the various advantages that will flow to the repeat player who controls virtually all aspects of the disputing process.

Even in mid-dispute or post-dispute<sup>70</sup> use of ADR, some of the same effects may occur. Repeat players such as large corporations, who expect repetitive litigation, may not be able to contract in advance for a particular form of dispute resolution in all cases, but once a case is ripe or is filed, they may be able to control some aspects of the disputing process. For example, one large law firm which specializes in employment cases uses the same ADR firm repeatedly to mediate its cases when it is able to persuade employment claimants to use "voluntary" mediation.<sup>71</sup> Thus,

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<sup>69</sup> See Galanter, *supra* note 1, at 108-09.

<sup>70</sup> Though some have labeled this "ex post" use of ADR because ADR may be chosen (or mandated, as in court ADR programs) after the dispute has ripened, it is probably more accurate to describe this as use of ADR during, not after, the dispute.

<sup>71</sup> Beyond the use of one ADR firm as a repeat provider, this law firm represented to me that a single mediator had been used over 300 times in one year! The repeat play law firm (by specialty) was able to maximize its use of a single repeat play mediator. So far, neither ethics regulations nor other rules require the law firm or the mediator to disclose to one-shot litigants that he had performed for this firm before. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.5.3(b)(1) (CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Draft 1999), reprinted in Carrie Menkel-Meadow, *Professionalism and Ethics in Non-Adversarial Lawyering*, 26 FLA. ST. U. L. REV. (forthcoming 1999) (providing that "[a] lawyer who serves as a third party neutral should . . . [d]isclose to the parties all circumstances, reasonably known to the lawyer, why the lawyer might not be perceived to be impartial," including, among other things, "any existing or past financial, business, professional, family or social relationship with any of the parties, including, but not limited to any prior representation of any of the parties, their counsel and witnesses, or service as an ADR neutral for any of the parties . . ."). On the other hand, to the extent that employment claimants often use the same or a limited number of specialized lawyers, there may be some knowledge or "consent" to the use of an ADR provider who is effective by the repeat play plaintiff's lawyer. Those most in danger of being taken advantage of are one-shot claimants with one-shot or "new to the territory" lawyers. The disclosure rules (of past or repeat play work of the third party neutral) for arbitration are clearer and more codified, both in state regulatory schemes and in the private rules of the American Arbitration Association (AAA). See, e.g., CAL. BUS. & PROFESSIONS CODE § 7085.5(c) (West 1995 & Supp. 1999); see also COMMERCIAL ARBITRATION Rule 19 (American Arbitration Ass'n 1999).

some disputants may be repeat players in the use and choice of particular third party neutrals, who may, in turn, have repeat play expertise, either in substance or with respect to the parties (mediators, arbitrators, private judges, or evaluators) or particular processes (some repeat players prefer the finality of decisions in arbitration and others prefer the flexibility of mediation).<sup>72</sup> In some cases, as in labor-management arbitrations, where collective bargaining has institutionalized the selection processes to include partisan arbitrators in repeat play labor contract grievances, the disputes may fall more fairly into Box IV of Galanter's taxonomy (RP vs. RP).<sup>73</sup>

Third party neutrals may themselves become repeat players, either through specification in predispute contracts or assignment to court rosters, or by developing specialized expertise. It is common in some areas of law, for example, for the parties to seek "wise elders"<sup>74</sup> who understand the substance of the dispute or the community in which it is embedded, such as in intellectual property cases.<sup>75</sup> Lawsuits already have (thus far unsuccessfully) challenged the bias of presumed repeat players who are thought to represent the repeat player interest of securities brokers or the securities industry<sup>76</sup> or who are too homogeneous demographically and not

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<sup>72</sup> See Jeffrey Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 340-44 (1996) (distinguishing between decision-seeking ADR-like arbitration and settlement-seeking ADR-like mediation).

<sup>73</sup> See Galanter, *supra* note 1, at 110-13.

<sup>74</sup> Martin Shapiro describes the third party neutral as a wise elder or "the big man," enmeshed in the dispute and sought out precisely because he is a repeat player who knows the community, the disputants, and the likely remedies. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 6 (1981).

<sup>75</sup> This, in turn, presents great opportunities for conflicts of interests. See N.D. CAL. LOC. R. ADR 2-5(d) (regarding conflicts of interests for third party neutrals); *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1491 (D. Utah 1995).

<sup>76</sup> See *Olson v. American Arbitration Ass'n*, 876 F. Supp. 850, 851 (N.D. Tex. 1995); see also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 212 (D. Mass. 1998), *aff'd in part*, 170 F.3d 1, 4 (1st Cir. 1999) (reversing district court's refusal to compel arbitration on the grounds of "structural bias" in the New York Stock Exchange arbitral forum, but affirming order to deny motion for arbitration because the arbitration agreement at issue did not meet the standards of the 1991 Civil Rights Act amendments to Title VII, 42 U.S.C. § 1981 note (1994) (Alternative Means of Dispute Resolution), for enforcing arbitration clauses). The amendments to Title VII discussed in *Rosenberg* encourage arbitration "where appropriate," *id.*, and the First Circuit found arbitration inappropriate here because there was not even a "minimal level of notice to [Rosenberg] that statutory claims are subject to arbitration." *Rosenberg*, 170 F.3d at 21. Interestingly, after the district

sufficiently representative of the claimants.<sup>77</sup> And, courts may select repeat players by maintenance of court rosters of mediators and arbitrators<sup>78</sup> or by selection of mediators or arbitrators during litigation.<sup>79</sup> Disputants also may choose from private rosters of repeat play third party neutrals when they turn to the lists of such organizations as the American Arbitration Association (AAA), the Center for Public Resources (CPR), the National Academy of Arbitrators, Resolve, JAMS-Endispute, or the increasing

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court's opinion was handed down, Merrill Lynch stopped requiring its employees to sign agreements to arbitrate employment discrimination claims; however, the change in policy did not apply retroactively. This change was motivated by a class action settlement in *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460 (N.D. Ill. 1998). See *Rosenberg*, 170 F.3d at 6-7; see also *Cowle v. PaineWebber, Inc.*, No. 98 CIV 2560 JSM, 1999 WL 194900, at \*3 (S.D.N.Y. Apr. 7, 1999) (discussing partiality in arbitrators).

<sup>77</sup> The National Association of Securities Dealers, Inc. (NASD) has recently begun a major recruitment effort to diversify its arbitrators.

<sup>78</sup> In the interest of full disclosure, I am a mediator on the roster of the United States Court of Appeals for the District of Columbia.

<sup>79</sup> In a recent case, the contracted-for third party neutral, JAMS-Endispute, refused to accept a case which did not meet its own due process protocols. The court ordered the parties to arbitration with the AAA instead. See *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 224-25 (3d Cir. 1997). The California Supreme Court suggested that a potentially fraudulently represented arbitration system in a health care contract might have been more acceptable if an independent and well-known provider of ADR services, such as the AAA or JAMS-Endispute, were provided for in the contract, rather than use of a self-administered arbitration program. See *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 925 (Cal. 1997). How are we to know that such established ADR providers, as repeat players, are any fairer than the self-administered program maintained by Permanente? See *Menkel-Meadow*, *supra* note 32, at 109, 121-23; see also *Rosenberg*, 170 F.3d at 6 (discussing the lack of independence of New York Stock Exchange repeat play arbitrators); *Desiderio v. National Assoc. of Sec. Dealers, Inc.*, 2 F. Supp. 2d 516, 521 (S.D.N.Y. 1998) (contrasting the NYSE arbitrators' lack of independence with the NASD provision for selection of a majority of arbitrators from outside the securities industry); *Hooters of Am., Inc., v. Phillips*, 39 F. Supp. 2d 582, 627 (D.S.C. 1998) (finding unconscionable Hooters' provisions for arbitrator selection because Hooters controlled the selection of individuals for the list of available arbitrators). The *Phillips* court relied heavily on testimony from well-respected experts in ADR, including Lewis Maltby, the cochair of the AAA National Advisory Committee on Employment Arbitration, who all said that the arbitration agreement at issue would not be accepted by any reputable provider because of its lack of due process protocols and its overwhelming unfairness. See *id.* at 600-01.

development of lists maintained by government agencies,<sup>80</sup> often “sorted” for subject matter expertise.

Finally, the lawyers themselves who routinely appear in ADR proceedings may be repeat players in all of the ways originally documented by Galanter.<sup>81</sup> Just as repeat play plea bargainers may bargain away the cases of their individual clients for long-term credibility or long-term goals, union lawyers, repeat play lawyers in mass torts hearings,<sup>82</sup> and repeat play representatives in ongoing ADR proceedings may enable repeat play “Have” disputants to get their way—not only in system design of the whole process, but in the concrete results achieved in each case. Increasingly, lawyers and law firms are seeking training in “mediation advocacy” to enable them to learn how to “win in ADR.”<sup>83</sup>

To the extent that many forms of ADR do not permit class actions, reasoned or even written opinions, punitive damages, or other remedial possibilities,<sup>84</sup> the very individuation of claims in ADR processing potentially eliminates all of the reforms suggested by Galanter to counter the advantages of repeat players against the “Have-not” one-shotter.<sup>85</sup> So what is the currently existing evidence of dangers to justice or other equalization goals in the use of ADR by repeat players? And, what is the possibility of reform if what Galanter suggested is not feasible?<sup>86</sup>

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<sup>80</sup> See, e.g., CHARLES POU, JR., INTERIM REPORT TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY ON ISSUES IN ESTABLISHING AN EPA-SPONSORED ROSTER FOR NEUTRALS’ SERVICES IN ENVIRONMENTAL CASES 5–6 (1997).

<sup>81</sup> See generally Galanter, *supra* note 1.

<sup>82</sup> See conflicts noted in Carrie Menkel-Meadow, *Taking the Mass out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Judging, Alternative Dispute Resolution, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 532 n.64 (1998).

<sup>83</sup> See DEFENSE RESEARCH INST., INC., ADR FOR THE DEFENSE: ALTERNATIVE DISPUTE RESOLUTION INCLUDING WINNING NEGOTIATION TECHNIQUES 1–2 (1995) (advertising a seminar designed to teach its participants how to “develop[] skills as an advocate in ADR, rather than serv[e] as a neutral”); see also JOHN W. COOLEY, MEDIATION ADVOCACY 48 (1996); ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 81 (1994).

<sup>84</sup> These issues currently are being considered by the courts in the context of arbitration but not mediation. See Carrington & Haagen, *supra* note 32, at 331–33.

<sup>85</sup> See Galanter, *supra* note 1, at 135–48.

<sup>86</sup> At least one commentator has suggested that courts employ a two-tiered system of review of arbitration conducted under the FAA, 9 U.S.C. §§ 1–16 (1994), to take account of whether the parties are “insiders” to a self-regulating community or whether the arbitrated dispute is between an insider and outsider (another way of framing the

### III. DO THE “HAVES” OF ADR DO BETTER? THE DANGERS OF REPEAT PLAYING IN ADR

Here I will review briefly both the theoretical and speculative claims that have been made about the dangers of repeat play in ADR, as well as the little we have already learned from empirical studies and court decisions. I will conclude with suggestions for some very important further questions for research to test these claims and propositions, just as we have tested Galanter's original propositions.

With the increased use of ADR for a variety of different reasons, one of the greatest ironies of the “movement” for better disputing<sup>87</sup> has been its recent adoption as a “mandatory” process in both private, contractual contexts (usually involving mandatory predispute arbitration clauses) as well as in-court referrals to ADR in the public sector (either through some mandatory assignment or in “optional” application of ADR menus or choices).<sup>88</sup> To the extent that courts, employers, banks, health care providers, the securities industry, franchisors, manufacturers, and now even educational institutions are insisting on mandatory arbitration clauses in their contracts and relationships with customers, clients, and patients, it must be that such repeat players who deal with large volumes of customers and clients believe there is some advantage to insisting on such processes. To date, there has been little empirical testing of whether such mandatory ADR processes in fact redound to the benefit of repeat players, but it is quite clear that representatives of consumers, patients, employees, and other individual claimants clearly believe that such mandated processes are

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repeat player, one-shotter issue). See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 942-43 (1999). For other statutory proposals in the area of consumer-based arbitration, see Paul Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 231-32 (1998), and Richard Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 app. at 1093 (1998).

<sup>87</sup> For a fuller treatment of these issues, see Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1872 (1997).

<sup>88</sup> Also at issue is a hybrid form of ADR referral in which the parties are requested by judges to try ADR, but feel more or less “coerced.” For a catalogue of ADR activity in the 94 federal district courts, see generally ELIZABETH PLAPINGER & DONNA STIENSTRA, *FEDERAL JUDICIAL CTR. & CPR INST. FOR DISPUTE RESOLUTION, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1996).

problematic. To demonstrate, let us review the developments in a few selected fields.

### A. *Employment*

Perhaps the most interesting illustration of the role of repeat players in ADR has occurred with respect to employment disputes. Following the Supreme Court's approval of predispute allocation to mandatory arbitration in a securities broker's registration application by requiring the claimant to bring his age discrimination claim to securities arbitration,<sup>89</sup> the courts have been faced with a series of legal questions as a myriad of employers have sought to enforce predispute arbitration clauses on a wide variety of employees. Employment lawyers protest that such "predispute" allocations to arbitral fora, particularly involving important statutory claims (like discrimination and other civil rights claims), are highly suspect as "cram-down arbitration."<sup>90</sup> They maintain this "force-fed" arbitration advantages employers, prevents full evidentiary presentations, avoids jury trials, and prevents the possibility of some kinds of remedies (i.e., punitive damages), often in settings where the decisionmakers have little or no expertise in the complex statutory environment. There are some remaining legal questions, such as whether employment (outside of immediate contact with interstate commerce) will be exempt from the provisions of the Federal Arbitration Act (FAA).<sup>91</sup> Also still unresolved is whether *Gilmer* does or does not

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<sup>89</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 35 (1991).

<sup>90</sup> Wayne Outten, Speech at CPR Winter Meeting (Jan. 1997). (Mr. Outten is the former President of the National Employment Lawyers Association, an association of employment plaintiffs' lawyers.) Others have labeled this practice the "new yellow dog contract." Judith Vladeck, *Validity of ADR for Job Disputes: 'Yellow Dog Contracts' Revisited*, N.Y.L.J., July 24, 1995, at 7; see also Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 1-10 (1994); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996).

<sup>91</sup> 9 U.S.C. §§ 1-16; see also *Gilmer*, 500 U.S. at 25 n.2 (discussing potential exclusion of employment contracts in section 1 of the FAA); Estreicher, *supra* note 32, at 1345, 1363-72. Conflicts have arisen in court cases. See *Rushton v. Meijer, Inc.*, 570 N.W.2d 271, 275 (Mich. Ct. App. 1997) (holding that predispute agreements to arbitrate statutory employment discrimination claims were invalid according to public policy). Subsequently, the court in *Rembert v. Ryan's Family Steak Houses, Inc.*, 575 N.W.2d 287, 288 (Mich. Ct. App. 1997), decided, contrary to *Rushton*, that such clauses were permissible, so a special conflicts panel was convened to reconcile the

overrule the Supreme Court's prior ruling that collective bargaining arbitration would not preclude litigation in courts with respect to statutory claims,<sup>92</sup> and whether employees must "knowingly and voluntarily" waive

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cases. In *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 210 (Mich. Ct. App. 1999) [hereinafter *Rembert II*], the original *Rembert* opinion was vacated and *Rushton* was overruled. *See id.* at 230. *Rembert II* found that predispute arbitration agreements were valid, provided that the procedures they encompassed were fair and the agreement waived no substantive rights and remedies. *See id.* The court also maintained that section 1 of the FAA strongly favored arbitration and then cited subsequent cases interpreting the FAA in favor of arbitration of employment statutory claims. *Rembert II* cited *Cole v. Burns* with approval when discussing its sanctioning of predispute arbitration agreements for employment claims. *See id.* at 222, 224-26, 228 (citing *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487-88 (D.C. Cir. 1997) (sustaining employment predispute arbitration as long as certain protections are met, and claimants have some costs paid by employers)). Thus, *Rembert II* is no longer in conflict with *Cole*, as *Rushton* was. *See Rushton*, 570 N.W.2d at 275; *see also* Paladino v. Arnet Computer Tech., 134 F.3d 1054, 1056 n.1 (11th Cir. 1998) (citing volume of scholarly work disagreeing with narrow construction of section 1 of the FAA, finding section 1 did not exempt plaintiff because he was not directly engaged in the movement of goods in interstate commerce); James B. Geren, Recent Development, 13 OHIO ST. J. ON DISP. RESOL. 263, 266 (1997). *Compare* *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (construing section 1 of the FAA narrowly so that it covers employees only directly engaged in the movement of interstate goods in commerce) *with* *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (holding section 1 of the FAA does not apply to employment or labor contracts after a lengthy discussion of legislative history and statutory construction). *See Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 363-64 (7th Cir. 1999) for a listing of the many circuits that have upheld employment contracts as included in the reach of section 1 of the FAA. *But see* *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356 (7th Cir. 1997) (denying enforcement of a predispute mandatory arbitration clause in employment); Matthew Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329, 329-35 (1997).

<sup>92</sup> *See* *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36, 59-60 (1974); *see also* *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 395, 397 (1998) (holding that a collective bargaining agreement did not expressly waive trial of statutory rights and properly remit to arbitration). Thus, the tension between the *Gilmer* and *Alexander* lines of cases is not resolved by this Supreme Court decision. *See* *Beason v. United Techs. Corp.*, 37 F. Supp. 2d 127, 130 (D. Conn. 1999) (following *Wright* by explaining that the court will not compel arbitration of statutory claims if the collective bargaining agreement provision regarding forum is not clear and unmistakable while also making the point that the Supreme Court did not resolve the tension between *Gilmer* and *Alexander*); *see also* *Greer v. Norfolk & W. Ry. Co.*, No. 97-74934, 1999 WL 704232, at \*4 & n.6 (E.D. Mich. May 27, 1999); *Stanton v. Prudential Ins. Co.*, Civ. A. No. 98-4989, 1999 WL 236603, at \*4 (E.D. Pa. Apr. 20, 1999).

their rights to a judicial setting;<sup>93</sup> however, most courts have sustained employment arbitration against a wide variety of attacks.<sup>94</sup>

In a classic illustration of Galanter's suggested reforms for reallocating power in disputing, the employment plaintiffs' bar organized and threatened a boycott of any and all organizations that provided arbitration services when contracts provided for "predispute" arbitration in nonconsensual settings. The National Employment Lawyers Association (NELA) threatened to boycott the AAA, JAMS-Endispute, and other providers of ADR services who agreed to arbitrate employment statutory claims through contractual assignments that were contrary to Equal Employment Opportunity Commission (EEOC) policies.<sup>95</sup>

As a result of concerns about and objections to compulsory arbitration of employment statutory claims expressed by the organized plaintiffs' bar

<sup>93</sup> *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1197 (9th Cir. 1998) (quoting 137 CONG. REC. S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)). The Ninth Circuit (and Judge Rheinhardt, in particular, himself a former labor lawyer and repeat player in this type of litigation) has been particularly active in striking down nonvoluntary assignments of employment disputes to predispute contractual arbitral fora. *See id.* at 1185 (holding a female securities broker did not have to arbitrate her sex discrimination claims where underlying rights were protected by a judicial forum under Title VII); *see also Wright*, 119 S. Ct. at 397; *Nelson v. Cyprus Baghdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997); *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1108 (9th Cir. 1997); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994).

<sup>94</sup> There has been a split in the circuit courts of appeals on some of these issues. *See, e.g., Seus v. John Nuveen & Co.*, 146 F.3d 175, 187 (3d Cir. 1998); *Carrington & Haagen*, *supra* note 32, at 370-71; *Estreicher*, *supra* note 32, at 1345; *Sternlight, Panacea or Corporate Tool?*, *supra* note 32, at 672 & n.210; *Stephen Ware, Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996). *Compare Koveleskie*, 167 F.3d at 376 (concurring with the majority of other circuits that allow predispute arbitration agreements in Title VII statutory claims) and *Mouton v. Metropolitan Life Ins.*, 147 F.3d 453, 457 (5th Cir. 1998) (finding no need for a knowing and voluntary waiver of access to a judicial forum and compelling arbitration of Title VII claim) with *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 21 (1st Cir. 1999) (finding<sup>94</sup> "minimal level of notice" to plaintiff regarding mandatory arbitration as reason not to compel arbitration) and *Duffield*, 144 F.3d at 1203 (disallowing compulsory arbitration of civil rights claims and finding unenforceable securities exchange registration because it required compulsory arbitration as a condition of employment).

<sup>95</sup> *See Menkel-Meadow*, *supra* note 29, at 56 n.66 (providing fuller accounts of these boycott threats); *see also Estreicher*, *supra* note 32, at 1348; *National Employment Lawyers Will Boycott ADR Providers*, 6 WORLD ARB. & MEDIATION REP. 240, 240 (1995).



and other civil rights organizations that testified before the Dunlop Commission on the Future of Worker-Management Relations, a *Due Process Protocol* was developed by participating organizations that included the AAA, the NELA, the Federal Mediation and Conciliation Service, the American Bar Association—Labor Section, the American Civil Liberties Union, the National Academy of Arbitrators (NAA), representatives of several unions, management law firms, and the Society for Professionals in Dispute Resolution.<sup>96</sup> Unfortunately, the ad hoc group which created the employment *Due Process Protocol* deadlocked on an important issue and thus created a somewhat confusing document. Because the participating groups would not agree to prohibit totally predispute contractual arbitration clauses for statutory claims, employers, therefore, were not prohibited from adopting such clauses.<sup>97</sup> Yet, at the same time, the protocol states that “[e]mployees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.”<sup>98</sup> Thus, the *Gilmer-Alexander* tension (between statutory employment rights being guaranteed a judicial hearing in addition to or in lieu of contractual arbitration)<sup>99</sup> remains in this private protocol, just as it remains somewhat unresolved in the legal arena. The Protocol attempts to establish some minimal procedural protections such as a right of representation (including a recommendation of employer reimbursement of at least part of the attorneys fees and costs),<sup>100</sup> access to information, a recommendation for mediators and arbitrators with statutory expertise and training, disclosure of conflicts of interest, use of statutes and other legal materials in granting relief, authority to grant any and all relief which would be available to courts enforcing relevant laws, and a written

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<sup>96</sup> See JOHN T. DUNLOP & ARNOLD ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 45 (1997); *Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes*, 9A Lab. Rel. Rep. (BNA) (534 Individual Empl. Rts. Manual) 401, 404 (May 9, 1995).

<sup>97</sup> See *Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes*, 9A Lab. Rel. Rep. (BNA) (534 Individual Empl. Rts. Manual) at 401-02.

<sup>98</sup> See *id.* at 402.

<sup>99</sup> See *supra* note 92 and accompanying text.

<sup>100</sup> An approach which at least one court has required. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (H. Edwards, C.J., former labor law professor and arbitrator).

opinion<sup>101</sup> (which is final and binding and thus subject to the complex confusion of labor law and general arbitral finality).<sup>102</sup>

At around the same time, other private organizations of dispute resolution providers adopted similar protocols to avoid the threat of a boycott or because of their own concerns about due process and fairness in compulsory arbitration settings.<sup>103</sup> Most recently, the major players in securities arbitration have announced various policies (after both threatened and actual lawsuits challenging compulsory arbitration in employment contexts) to withdraw contractual mandatory arbitration of statutory employment claims and to approve of more “voluntary” arbitration in the employment context for securities brokers and other employees.<sup>104</sup>

So what is all the fuss about it and does it matter? On one level, it is ironic that arbitration should be such a hot-button issue in labor relations. Arbitration of collective bargaining grievances has long been the mainstay of labor disputing in the union context as the condition for prevention of strikes and as negotiated for by the repeat players of union and management. Yet, as the rate of unionization decreases and as the “law of the land” rather than the “law of the shop” is more relevant to the pursuit of both individual and group statutory claims, employees, labor lawyers, and civil rights activists have been most distrustful of an “employer-controlled” dispute resolution system that is thought to lack many procedural due process protections and which may be controlled by decisionmakers who do not understand the legal entitlements at issue.<sup>105</sup>

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<sup>101</sup> See Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes, 9A Lab. Rel. Rep. (BNA) (534 Individual Empl. Rts. Manual) at 402-04.

<sup>102</sup> See Federal Arbitration Act § 10, 9 U.S.C. § 10 (1994); The Steelworkers Trilogy, 363 U.S. 564, 567-68, 577-78, 569-99 (1960).

<sup>103</sup> The NAA, JAMS-Endispute, and CPR all prepared and circulated their versions of due process protocols, both for their ADR providers and for guidance to drafters of clauses and system designers.

<sup>104</sup> On June 23, 1998, the Securities and Exchange Commission announced that as of January 1, 1999, employees of the securities industry no longer would be required to refer their employment discrimination claims to arbitration under a proposed and approved change of the NASD Code of Arbitration Procedure. See *SEC Eliminates Mandatory Arbitration*, ADR REP., July 8, 1998, at 4, 4.

<sup>105</sup> Many experienced labor arbitrators have weighed in heavily against mandatory arbitration of statutory claims. See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 383-84 (1996); Robert Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 653.

Preliminary evidence suggests that critics of “cram-down” arbitration are right and often right exactly for the reasons Marc Galanter would have predicted. In what is one of the first most rigorous assessments of employment arbitration, researcher Lisa Bingham has found that some repeat players may do better in certain kinds of employment arbitration and that the rule systems do matter.<sup>106</sup> In a study of AAA employment cases processed under the Commercial Arbitration Rules (and used principally by high-level managers with contracts), in contrast to those processed under the separate Employment Arbitration Rules (used more by lower-level employees subject to compulsory arbitration clauses), being a “Have” or a repeat player mattered. Higher-level employees with resources for representation and use of the Commercial Arbitration Rules were more likely to gain favorable results than those lower-level employees who were subject to the Employment Arbitration Rules.<sup>107</sup> Earlier studies have documented that in some industrial settings, having a lawyer representative does affect outcomes, and some arbitrators are clearly partial to one side.<sup>108</sup>

Yet, with all of the concerns about compulsory arbitration in the employment area, some other important issues may be missed. As the Dunlop Commission was originally poised to support ADR in employment cases in order to cut costs, reduce processing time, and generally increase access to fora for resolving employment disputes (especially in settings where the potential for ongoing relationships between employees and

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<sup>106</sup> See Lisa Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L. J. 108, 113–16 (1996).

<sup>107</sup> See *id.* For more recent results and an excellent review of the literature, empirical studies, and implications for employees as one-shotters, see Lisa Bingham, *Focus on Arbitration After Gilmer: Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 189, 212–15 (1997) (suggesting that employees in nonunion contexts are still mostly one-shotters and are often unrepresented; also that employees in arbitrations against repeat player employers do not fare as well as employees against nonrepeat player employers). *But cf.* Lisa Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 N.Z. J. INDUS. REL. 5, 5–19 (1998); Lisa Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes?: An Analysis of Actual Cases and Outcomes*, 6 INT’L J. OF CONFLICT MGMT. 369, 380–84 (1995) (suggesting that arbitrators are not biased in favor of employers in nonunion arbitrations).

<sup>108</sup> See, e.g., Richard Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 553–54 (1987). Authors of the 1995 Government Accounting Office study of use of ADR in over two thousand businesses expressed some concern about the lack of due process in some settings. See DUNLOP & ZACK, *supra* note 96, at 75.

employers might suggest different kinds of relief), the debate over the desirability of at least some forms of ADR and the issues surrounding more consensual ADR may have been lost. Some other studies have suggested that ADR may not always be a bad thing in these contexts. Craig McEwen's recent evaluation of a pilot project in mediation for the EEOC demonstrated some success, both with respect to settlement rates and satisfaction with the process.<sup>109</sup> Even the former Chair of the EEOC has suggested that while "not a panacea" for employment discrimination cases, ADR can help resolve cases in ways which are perfectly consistent with civil rights laws.<sup>110</sup> He has argued that "there remains this culture of litigation that believes the only way to be effective is to litigate."<sup>111</sup>

To the extent that some parties might actually do "better" in some ADR settings, with more creative solutions to their problems, or by achieving transfers, promotions, or front pay, some forms of ADR, notably mediation, might turn out to provide more Pareto optimal remedies for certain parties. For instance, in cases of systematic discrimination, EEOC actions or class actions are still possible. Thus, what is "better" for particular individual litigants, in comparison to classes of litigants, is not always clear.

Differences in the needs of particular claimants and in particular kinds of employment claims have led to debates among the claiming communities. While some advocates are opposed to the privatizing nature of mediation of sexual harassment claims, for example, others suggest that more claims will be brought, along with increased access to justice, if both parties can be assured of some privacy and the possibility of appropriately tailored solutions.<sup>112</sup>

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<sup>109</sup> CRAIG A. MCEWEN, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S PILOT MEDIATION PROGRAM 52-66, 72-84 (1994).

<sup>110</sup> DUNLOP & ZACK, *supra* note 96, at 132; Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 583.

<sup>111</sup> DUNLOP & ZACK, *supra* note 96, at 132; *cf.* Mandatory Binding Arbitration and Employment Discrimination Disputes, 3 EEOC Compl. Man. (BNA) (Notices) 3101, 3103-04 (July 10, 1997) (stating that arbitration systems imposed as a condition of employment are fundamentally inconsistent with the civil rights laws); Ellen J. Vargyas, *EEOC Explains Its Decision: Verdict on Mandatory Binding Arbitration in Employment*, 52 DISP. RESOL. J., Fall 1997, at 10, 14. Of course, these positions of the EEOC spokespeople can be reconciled easily by noting the differences in arbitration and mediation processes—not all ADR in employment is the same thing.

<sup>112</sup> *See, e.g.*, Howard Gadlin, *Sexual Harassment Mediating*, in *SEXUAL HARASSMENT ON CAMPUS* 186, 186-87 (Bernice Sandler & Robert Shoop eds., 1997); Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 NEGOTIATION J.

To the extent that there are serious questions about repeat play advantage and fairness, some (including myself) would argue that the ADR process itself should be made more responsive and fair to one-shotters rather than assuming that just because there are repeat player advantages in ADR, they will not be present in court as well.<sup>113</sup>

For some, the issues of fairness and advantage can be dealt with by program or system design. The internal employee grievance and dispute system used at Brown and Root<sup>114</sup> is often cited as one which attempts to minimize repeat player advantage by having costs (of the arbitration, of claimant's lawyer's fees, and of some witness fees) paid for by the employer and by utilizing a multitiered program in which employees use internal grievances (an "Open-Door Policy"), nonbinding mediation, or internal conferences, and then finally binding arbitration processes which approximate some system of informality, coupled with formality and

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139, 142-48 (1991); James Hoenig, *Mediation in Sexual Harassment: Balancing the Sensitivities*, DISP. RESOL. J., Dec. 1993, at 51, 51-52.

<sup>113</sup> In other contexts I have labeled this "litigation romanticism." See Menkel-Meadow, *supra* note 87, at 1900. Those who criticize ADR fail to remember Galanter's original messages—the "Haves" come out ahead in court, *see Galanter, supra* note 1, at 98-103, so leaving ADR for court will not necessarily correct the problems. In at least one suggestive finding, claimants were found to do better in some kinds of civil rights cases before judges without juries, suggesting perhaps that single decisionmakers (whether judges or arbitrators) may deliver more "justice" than the jury trial so often desired by plaintiffs' attorneys. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1171 (1992); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1586 (1989) (reporting on complexity of outcomes at trial in certain kinds of civil rights cases and suggesting that cases that go to trial are often a "skewed" picture of representative disputes or legal issues). Of course, judges are not arbitrators, and many have argued that judges in particular are needed to rule on discrimination claims. See Alleyne, *supra* note 105, at 392-94; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986); Gorman, *supra* note 105, at 641. In a recent illustration of how wrong the intuition or "folklore" about plaintiffs' advantages in the judicial system can be, an African-American lawyer won a sizable jury verdict for discrimination from his law firm (for partnership denial and work assignments), and then the D.C. Circuit reversed completely for lack of substantial evidence. See *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997); *see generally* PAUL BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999).

<sup>114</sup> See *DUNLOP & ZACK, supra* note 96, at 75-78, 82-83, 86, 90-91 (describing a private arbitration system in employment thought to include many employee protections).

“tiers” of appeals.<sup>115</sup> Additionally, mediators and arbitrators may be chosen from outside the company<sup>116</sup> when “legally protected rights” are at issue.<sup>117</sup> Although such programs continue to present other repeat play issues (such as whether a system paid for by the employer is likely to be experienced as “neutral” by the employee), they represent an attempt to balance cost and delay reduction for both employer and employee with attempts to enforce employee rights. These systems also make it possible for employers to engage in early monitoring and correction of problems, both in individual cases and by the data collection and observations of patterns that are made possible by such systems.

This is an area in which the controversies are likely to continue, with legal issues still unresolved, until and unless the Supreme Court definitively decides that all employment matters, like the securities and consumer cases it has decided, can be referred to mandatory predispute arbitration. If the Supreme Court does decide to do this (as it has deferred to arbitration in so many other areas), it may lead to an increased spurt of unionization or other collective action on the part of employees, as well as by their representatives. In the meantime, many commentators and practitioners continue to suggest reforms (not unlike Galanter’s suggestions) to make employment arbitration more responsive to individual employees—by encouraging employers to pay for representation, by observing the *Due Process Protocol*, and by allowing lawyers to act as substitute repeat players when they appear in the same fora.<sup>118</sup> The idea is that macro justice concerns can be met and indeed enhanced with use of ADR where ADR can increase access and reduce cost and time for employee grievances, as

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<sup>115</sup> *See id.*

<sup>116</sup> Clearly, the perceived fairness of such a program depends on the perceived fairness and diversity of the mediators and arbitrators. So far, most of the lawsuits attacking the lack of demographic diversity among mediators or arbitrators (especially in the securities field) have failed. *See, e.g.*, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (rejecting claims of lack of diversity of arbitrators for no showing of harm, but refusing to enforce compulsory employment arbitration clause in securities case when statutory rights, i.e., sexual harassment, were at issue); *Olson v. American Arbitration Ass’n*, 876 F. Supp. 850, 852 (N.D. Tex. 1995), *aff’d*, 71 F.3d 877 (5th Cir. 1995). However, organizations like the NASD and the EEOC have made conscious efforts to recruit more diversified ADR providers. *See DUNLOP & ZACK, supra* note 96, at 107.

<sup>117</sup> *See* program description in *DUNLOP & ZACK, supra* note 96, at 75–76, and *Estreicher, supra* note 32, at 1351.

<sup>118</sup> *See, e.g.*, *DUNLOP & ZACK, supra* note 96, at 45; *Alleyne, supra* note 105, at 426–27.

well as provide for more tailor-made solutions, at least in some cases. Indeed, although there are those who argue that the main advantage for repeat players is the ability to manipulate rules, fora, and decisionmakers, some are concerned that if alternative justice systems are perceived as efficient and receptive to good solutions, they may actually increase the amount of claiming.<sup>119</sup> As some have argued, use of ADR has enabled organizations to internalize their disputing, in both employment and other arenas, by placing their dispute mechanisms within the organization and taking them “out of court” altogether.<sup>120</sup> The tension for repeat players is to create a system which is fair enough to pass judicial or collective action muster, but not one that invites so many claims that control and efficiency are lost.<sup>121</sup> At least one repeat player institution has already recognized this dilemma, and it is to that field that I now turn.

## B. Health

In one of the few cases that has recently questioned the use of mandatory predispute allocation to an arbitral forum, **the Supreme Court of California recognized the power of repeat players to control the forum, decisionmaker, and rules in order to maximize outcomes.** In *Engalla v. Permanente Medical Group, Inc.*, the court remanded for further fact finding a claim that a major health organization had fraudulently represented its arbitration program in health care contracts governing malpractice claims.<sup>122</sup> In a rare use of empirical data, the trial court had found, citing a statistical study of Kaiser’s (defendant health care organization’s) arbitration program, that instead of the sixty days promised in promotional material and the contract for choice of arbitrator and commencement of the process, it was taking an average of 674 days to

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<sup>119</sup> See, e.g., George Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 557–59 (1989).

<sup>120</sup> See Lauren Edelman & Mark Suchman, *When the Haves Hold Court: The Internalization of Disputing in Organizational Fields*, 33 L. & SOC’Y REV. (forthcoming 1999).

<sup>121</sup> Some research has already demonstrated that “internal dispute resolution systems” may in fact increase claiming within organizations. See generally Lauren Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC’Y REV. 497 (1993); see also Edelman & Suchman, *supra* note 120.

<sup>122</sup> See *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 916, 925 (Cal. 1997).

appoint a neutral third arbitrator (in a three person panel) and 863 days (nearly two and a half years) for the average case to reach an arbitration hearing.<sup>123</sup> This was in contrast to a finding that a lawsuit in the county in which the case occurred would have come to trial within ten months. Among the various aspects of the program that troubled the court was the fact that Kaiser maintained a self-administered arbitration program, choosing not only the partisan arbitrator, but the neutral third arbitrator, and using its own counsel to manage the entire proceeding.<sup>124</sup> Without finding the contract to be one of adhesion or legally unconscionable, the court did express concern about how much real bargaining had taken place,<sup>125</sup> especially when Mr. Engalla's employer was too small to negotiate terms and was offered the health plan on a "take it or leave it basis."<sup>126</sup>

The *Engalla* case has proven to be a rallying point for consumer activists who have been contesting compulsory arbitration clauses in a wide variety of consumer contracts, including banking,<sup>127</sup> franchising,<sup>128</sup> and securities transactions.<sup>129</sup> Although the *Engalla* court did not ultimately accept an unconscionability or adhesion contract theory,<sup>130</sup> the court did

<sup>123</sup> *See id.* at 912–13, 917.

<sup>124</sup> *See id.* at 918, 925.

<sup>125</sup> *See id.* at 925.

<sup>126</sup> *Id.* at 924.

<sup>127</sup> *See* *Badie v. Bank of Am.*, No. 944916, 1994 WL 660730, at \*8 (Cal. App. Dep't Super. Ct. Aug. 18, 1994) (allowing addition of an arbitration clause to already existing contract with bank's customers), *rev'd in part*, 79 Cal. Rptr. 2d 273, 276, 280, 290–91 (Cal. Ct. App. 1998) (holding a compulsory arbitration clause unenforceable because the addition of the arbitration clause was not agreed to by both parties—it was sent in a "bill stuffer" by the bank to its customers. The court also stated the decision had little to do with California's acknowledged public policy supporting ADR; this was a matter of a one-sided contract provision of which the court disapproved.); *see also* ERIK MOLLER ET AL., PRIVATE DISPUTE RESOLUTION IN THE BANKING INDUSTRY 31–32 (1995) (reporting that banks found private binding arbitration to be cost-effective for the institutions by reducing cases, achieving smaller verdicts, and resulting in lower litigation costs. The report raises public policy concerns about the loss of deterrence for consumer fraud or other unfair trade practices when disputes are privatized.).

<sup>128</sup> *See* *Doctors Assocs. v. Cassaroto*, 517 U.S. 681, 682–83 (1996).

<sup>129</sup> *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995).

<sup>130</sup> *See Engalla*, 938 P.2d at 925. A few cases have struck down arbitration clauses as not being freely contracted for or as unenforceable contracts of adhesion. *See* *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1132 (7th Cir. 1997); *Stirlen*



look, for the first time, at the actual operation of the program.<sup>131</sup> Thus, data on outcomes and obvious patterns of unfair outcomes may become significant in future cases.

To respond to the *Engalla* case, the Kaiser Foundation Health Plan and the Kaiser Permanente Medical Group established the Blue Ribbon Advisory Panel to make recommendations to revise the program and respond to some of the court's concerns. The report of that committee recommended some changes to the arbitration program (shortening time for processing, moving to single person arbitration panels, establishing system-wide ombuds, and using an independent arbitration administrator, as well as encouraging early settlement discussions), but it did not recommend abandoning mandatory arbitration, which it found to be an industry norm.<sup>132</sup> Thus, in the name of trying to ensure fast and efficient processes for consumers and cost savings to themselves, large institutions likely will continue to attempt to require arbitration or other forms of mandatory ADR while they tread the delicate line of meeting judicial standards for approval.<sup>133</sup>

### C. Securities

I will not review in great detail here the substantial literature and cases reporting on and sustaining the use of mandatory arbitration in disputes between investor-customers and brokers and brokers as employees<sup>134</sup> which

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v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 151-52 (Cal. Ct. App. 1997); Anthony Arons, *Packaging ADR*, CAL. LAW., Feb. 1998, at 27, 27; Michele Marcucci, *Freeing ADR*, CAL. LAW., Feb. 1998, at 29, 74-75 (noting that former CEO of Supercuts became the CEO of JAMS-Endispute! Dispute resolution, apparently, can be delivered like haircuts!).

<sup>131</sup> See *Engalla*, 938 P.2d at 912-13, 917-18.

<sup>132</sup> See EUGENE F. LYNCH ET AL., *THE KAISER PERMANENTE ARBITRATION SYSTEM: A REVIEW AND RECOMMENDATIONS FOR IMPROVEMENT 1-2* (1998).

<sup>133</sup> This likely will require the use of more empirical research as developers of ADR systems, and those who attack them will need empirical data to prove their macro justice or fairness claims. The *Engalla* court seemed receptive to empirical data demonstrating how the program actually worked. See *Engalla*, 938 P.2d at 912-13, 917. Compare the resistance of the Supreme Court to presentation of empirical data in connection with challenges to the death penalty in *McCleskey v. Kemp*, 481 U.S. 279, 293-97 (1987), cited in LAZARUS, *supra* note 37, at 187.

<sup>134</sup> Some believe that these two very different sets of disputes should be treated differently, and the NASD has made some efforts in this regard. See *SEC Eliminates Mandatory Arbitration*, *supra* note 104, at 4-5 (discussing NASD rule change to

have been well canvassed elsewhere,<sup>135</sup> except to suggest that there is a certain irony in the use of mandatory arbitration in the securities field when brokers, who support arbitration in disputes with their customers, seek to avoid arbitration in their own employment disputes with brokerage houses. In short, the repeat player in one setting may not be the repeat player in another. In the securities field, complaints abound from both sides—that arbitration has become too judicialized and formal, that it is not formal enough, that it does not provide protection of procedures and remedies, and that it privatizes important public enforcement issues.<sup>136</sup> Like the Kaiser Foundation's Blue Ribbon Committee, the National Association of Securities Dealers, Inc. (NASD) has recognized that with increased use of, challenges to, and judicial scrutiny of compulsory arbitration systems, internal reforms may be the best way to sustain arbitration programs and whatever repeat player stability they may now have.<sup>137</sup> Thus, the NASD has begun a broadened recruitment effort to seek more "public" and diverse members of its arbitration panels in order to respond to criticism of repeat player industry dominance in arbitration panels as well as to engage in procedural streamlining of processes, intended to make the process more "investor-friendly."

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eliminate mandatory arbitration of statutory employment claims); *see also* ARBITRATION POLICY TASK FORCE, NATIONAL ASSOC. OF SEC. DEALERS, INC., *SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS 93* (1996) [hereinafter *ARBITRATION POLICY TASK FORCE*]; David S. Ruder, *Elements of a Fair and Efficient Securities Arbitration System*, 40 ARIZ. L. REV. 1101, 1105 (1998).

<sup>135</sup> *See generally* Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459 (1996); Carrington & Haagen, *supra* note 32; Sternlight, *Panacea or Corporate Tool?*, *supra* note 32.

<sup>136</sup> *See, e.g.*, Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1349–56 (1996); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 (1991) (reporting on how private settlements in securities actions threaten enforcement of important securities legal policies).

<sup>137</sup> *See* Ruder, *supra* note 134, at 1105; *see also* ARBITRATION POLICY TASK FORCE, *supra* note 134, at 17–18 (recommending several reforms, including the use of mediation and early neutral evaluation, discovery, and recruitment and training of arbitrators, but recommending a cap on punitive damages and continuing mandatory predispute arbitration). As Lauren Edelman and Mark Suchman have suggested, however, this "internalization" of disputing converts organizational repeat players into more than advantaged disputants. With such internal dispute resolution mechanisms certain organizations become disputant, lawyer, judge, and appellate body all at once. *See* Edelman & Suchman, *supra* note 120.

Thus, from several of the arenas we have reviewed—employment, health, and securities—it is clear that large organizations favor their dispute resolution systems (usually arbitration) so much that they are willing to undertake potentially substantial internal reforms to avoid judicial nullification.

#### D. Consumer-Commercial Disputes

Given that arbitration historically was founded in commercial disputes,<sup>138</sup> at least in the merchant-merchant context, **it is interesting that some of the most serious opposition to the use of compulsory contractual arbitration has come from commercial lawyers who suggest that in the consumer context (and even in the hybrid relationship of franchisor-franchisee), mandatory arbitration needs regulation.** Among others, Richard Speidel has suggested that the contractual basis of arbitration is lost when consent is not real or where there are great power disparities between the parties.<sup>139</sup> If courts are unwilling to examine the reality of contract formation,<sup>140</sup> then the FAA may itself need to be amended to protect important rights of the one-shot consumer<sup>141</sup> who cannot effectively bargain with a repeat play contractor.<sup>142</sup> Thus, where commercial lawyers may

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<sup>138</sup> See, e.g., JEROLD AUERBACH, JUSTICE WITHOUT LAW? 32 (1983).

<sup>139</sup> See Speidel, *supra* note 136, at 1339, 1349–50.

<sup>140</sup> Recently, two circuit courts of appeals split in their determination of whether virtually identical arbitration clauses in consumer credit contracts were enforceable. See *Randolph v. Green Tree Fin. Corp.*—Ala., 178 F.3d 1149, 1158 (11th Cir. 1999) (striking down a consumer loan arbitration clause that, because it was silent with respect to the issues of who would bear costs and fees and how much they might be, might violate the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1994 & Supp. III 1997)); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998). In contrast, the Third Circuit sustained an arbitration clause in a home improvement contract, despite the lack of mutuality between the (same) finance company and the homeowner, as long as the parties provided each other with consideration beyond the promise to arbitrate. The court rejected several claims of unconscionability, including the lack of mutuality in the promise to arbitrate, choice of arbitrator, the size of printed words, and location of the arbitration provision in relation to the rest of the contract, holding that the FAA provided both protections and justifications for upholding the contractual provision to arbitrate. See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181–84 (3d Cir. 1999).

<sup>141</sup> See Speidel, *supra* note 86, at 1079 (suggesting that we may need freedom from contract as well as freedom to contract!).

<sup>142</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150–51 (7th Cir. 1997) (sustaining a predispute arbitration clause where a purchaser did not even know he had

choose alternative dispute resolution or less formal processes in disputes with each other<sup>143</sup> (as repeat players to repeat players),<sup>144</sup> when disputes are between merchants (and large twentieth century merchants at that) and single consumers, the “informalism” may well work against the one-shotters.

Of course, as I shall suggest below,<sup>145</sup> we do not actually know much about whether one-shot consumers do worse in merchant operated arbitration or privatized dispute resolution systems than they do in court or in other fora (or if they do nothing at all). We assume they do fare worse because we assume that dispute resolution systems chosen and maintained by one of the disputants therefore must benefit that disputant. Why else would all these institutional disputants be defending their arbitration systems so vigorously against consumer legal attacks? It is clear that such institutional disputants believe that they do better, and that such systems are cheaper and better for them than other forms of disputing, but we do not really know.

Some companies that make “customer satisfaction” their top priority may actually be responsive to consumers through dispute or grievance systems, preferring a reputation for “the customer is always right” or at least fast resolution.<sup>146</sup> Clearly, we need, in the consumer area, the kind of rigorous examination of the repeat player and one-shot ADR outcome evaluations that Lisa Bingham is conducting in the employment arena.

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agreed to such a clause until the contract arrived, after he had opened the shrink wrap of his computer, and complained thirty days later about computer malfunctions), *cert. denied*, 118 S. Ct. 47 (1998). So now we are responsible for contract terms after the point of purchase! See Carrington, *supra* note 24, at 231 (proposing independent federal legislation to eliminate the use of mandatory arbitration clauses in some consumer and employment contracts).

<sup>143</sup> See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60-62 (1963).

<sup>144</sup> See Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 130 (1992).

<sup>145</sup> See *infra* Part IV.

<sup>146</sup> See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 5 (1993) (suggesting that ADR systems are *not* responsive to consumers, “passifying them” when they should, instead, litigate); see also RALPH NADER & WESLEY SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 298-300 (1996); Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99, 101-02 (1994).

### E. Education

Perhaps more troubling in the spread of usage of compulsory arbitration systems is the recent application of compulsory arbitration in education. The First Circuit recently sustained a compulsory arbitration clause in a private school's suspension process when parents of a student sought to raise an Americans with Disabilities Act<sup>147</sup> statutory claim.<sup>148</sup> Similarly, students enrolled in vocational schools in California were initially compelled to use a contractual arbitration process when they sued for misrepresentation, breach of contract, and failure to deliver educational services.<sup>149</sup> The court treated the enrollment contracts as consumer contracts and held them not to be contracts of adhesion. Further, the students were not specially protected by the Student Protection Act, which was intended to prevent the use of arbitration in educational matters. This judicial deference to compulsory arbitration procedures may represent a new low point in judicial efforts to clear caseloads by referring cases to private fora.<sup>150</sup>

### F. Courts and Judicial Processes

As Professors Carrington and Haagen have suggested, by developing a jurisprudence in favor of arbitration, the Supreme Court has allowed parties to contract for jurisdiction (or to dictate jurisdiction!), the one part of American procedure that we assumed was assured by constitutional and statutory rules and protections. In rulings that have sustained private arbitration as adjudication and supported both limited, as well as expanded, judicial appellate scrutiny of arbitration decisions (in seeming disregard of

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<sup>147</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (1994 & Supp. II 1996).

<sup>148</sup> See *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 (1st Cir. 1998).

<sup>149</sup> See *Webb v. Eldorado Colleges, Inc.*, 72 Cal. Rptr. 2d 101, 104 (Cal. Ct. App. 1998), *withdrawn*, No. S069405, 1998 Cal. LEXIS 3851, at \*1 (Cal. June 10, 1998).

<sup>150</sup> Note that not all ADR in educational matters is necessarily disadvantageous to students or parents. Some forms of mediation have proven to be quite effective in encouraging parental participation in educational decisions and in crafting customized solutions, particularly in the special education area. See JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, AND BUREAUCRACY* 103 (1986); Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J. OF L. & EDUC. 37, 44-48 (1999).

both law on federal court jurisdiction and the FAA's standards for judicial review),<sup>151</sup> courts seem to be moving jurisdictional lines fluidly between private and public fora. The U.S. Supreme Court has left standing a California ruling that permits arbitration to be used for classwide relief.<sup>152</sup>

Most recently, courts have expanded contractual enforcement of jurisdictional matters such as whether there might be judicial review and if so, what standard of review might be applied.<sup>153</sup> While the courts that have upheld these clauses have explained themselves by saying they are just enforcing contracts and that these clauses merely supplement the default review standard of the FAA, there is little discussion of why courts are allowing parties to dictate the jurisdiction of Article III courts. We all know that in other contexts, it has been settled and uncontested that parties may not confer jurisdiction by agreement (i.e., subject matter jurisdiction). Moreover, how is the one-shotter supposed to understand what she is giving up in an arbitration agreement that provides for more limited or heightened judicial appellate scrutiny of an arbitration award?

As "Haves" increasingly push the "Have-nots" into privatized justice systems, what will be left in the courts? Will Galanter's study of the "Haves" and "Have-nots" in litigation simply be of historical interest as employees, consumers, students, patients, investors, and all potential litigants are pushed into private arbitration systems?

Even when such parties perceive themselves as injured and try to litigate, they will find they are increasingly being channeled into various

<sup>151</sup> See Federal Arbitration Act § 10, 9 U.S.C. § 10 (1994).

<sup>152</sup> See *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 793 (Cal. Ct. App. 1998) (ruling that classwide arbitration was permissible where allowed by state law and was not preempted by the FAA), *cert. denied*, 119 S. Ct. 2338 (1999); see also *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 8 (1st Cir. 1988).

<sup>153</sup> See *New England Utils. v. Hydro Quebec*, 10 F. Supp. 2d 53, 71 (D. Mass. 1998) (allowing agreement for heightened judicial scrutiny with reservation); see also *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-98 (8th Cir. 1998) (putting off the question of whether parties can agree to heightened standard of review, giving credit to both sides of the debate). Compare *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (opinion of Posner, J.) (stating that parties cannot contract for federal jurisdiction) and *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (finding arbitration agreement unconscionable in part because employee acceded to "impaired or sharply curtailed judicial review") with *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) (allowing agreement for heightened judicial scrutiny) and *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-98 (5th Cir. 1995) (allowing agreement for heightened judicial scrutiny).

ADR proceedings within the courts themselves. I will not fully review here the extensive literature on the use of mandatory, referred, or voluntary ADR programs in the courts,<sup>154</sup> which remains highly controversial. Recent studies completed by the RAND Corporation and the Federal Judicial Center differed slightly in their findings about whether mediation, arbitration, early neutral evaluations, and other forms of ADR saved litigants and courts time and money. The studies did document relatively high levels of satisfaction with such programs by both litigants and the repeat players of the litigation system—lawyers, judges, and court administrators, findings that are now consistent with many studies of court-annexed arbitration and other ADR programs.<sup>155</sup> Though there remain concerns about less well-endowed litigants in these systems<sup>156</sup> and mixed data with respect to use when programs are not mandatory, it is clear that many courts will continue to require some form of ADR.<sup>157</sup> Though there

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<sup>154</sup> See generally DONNA STIENSTRA & THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS? (1995); Symposium, COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURT AND FUTURE RESEARCH NEEDS (Susan Keilitz ed., 1994); Menkel-Meadow, *supra* note 87.

<sup>155</sup> See, e.g., BARBARA MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 46, 63–69, 77–83, 85–93, 111–18 (1990); Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y REV. 953, 980 (1990). I recently completed an empirical evaluation of the arbitration program in the Federal District Court for the Eastern District of Pennsylvania and found similarly high satisfaction rates among users (principally lawyers and judges). See MENKEL-MEADOW, REPORT TO THE ARBITRATION COMMITTEE OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (1997) (on file with author). For results of RAND studies, see generally JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, JUST, SPEEDY AND INEXPENSIVE?: AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); and DONNA STIENSTRA ET AL., FEDERAL JUDICIAL CTR., A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997).

<sup>156</sup> See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2228–34 (1993) (criticizing, among other things, the potential for additional layers of costs imposed on poorer litigants who must arbitrate and risk loss of costs in *de novo* appeals for constitutionally protected trials).

<sup>157</sup> A new law enacted by Congress now requires all federal courts to consider some form of ADR. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 651(b), 112 Stat. 2993, 2294 (1998).

are differences of views within the judiciary as well as the bar about the advantages and disadvantages of adding ADR to more traditional court functions,<sup>158</sup> we still do not have good data on outcome differences or usage patterns of ADR with which to evaluate the strident claims made about ADR in the courts.<sup>159</sup> More importantly, we do not really know how the availability of ADR in courts (and in the private sector) affects choices about claiming behavior<sup>160</sup>—whether more will claim in the first place (the increased “access” argument) or whether the choice of how or where to claim will change (whether claimants will resist ADR and pursue litigation, pursue both, or whether more litigants are “lumping it”<sup>161</sup> after “losing” in ADR).

#### IV. DO THE “HAVES” COME OUT AHEAD? WHAT WE NEED TO KNOW

This Article might surprise some readers of my earlier work. I am, after all, a great proponent of ADR where its purposes are to provide greater party participation and more creative or flexible solutions to problems, conflicts, disputes, and transactions. But I have always been a proponent of pluralism in disputing, recognizing that the structuring of disputes may require different processes for different kinds of cases or issues.<sup>162</sup> To the extent that disputing in many quarters has moved away from litigation to ADR, and a particular form of ADR at that—compulsory predispute mandated arbitration (or analogous forms of arbitration in

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<sup>158</sup> See Brock Hornsby, *Federal Court-Annexed ADR: After the Hoopla*, 7 FJC DIRECTIONS 26, 26 (1994).

<sup>159</sup> See Craig McEwen, *Mediation in Context: New Questions for Research*, DISP. RESOL. MAG., 3:2 1996, at 16, 16; see also Deborah Hensler, *In Search of “Good” Mediation: Rhetoric, Practice, & Empiricism*, in JUSTICE & SOCIETY (Joseph Sanders ed., forthcoming 2000).

<sup>160</sup> See William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631, 636–37 (1981).

<sup>161</sup> William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 L. & SOC’Y REV. 695, 704 (1975); William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC’Y REV. 63, 71 (1974).

<sup>162</sup> See Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, AM. B. FOUND. RES. J., 1983, at 905, 925–28 (discussing contextual factors in evaluating disputing processes). I was once a civil rights and poverty lawyer.



mandatory court programs)—we now need to know more about what patterns of disputing are like in those settings.

We have little empirical verification of the claims made both for and against arbitration and ADR, including positive assertions made about reduced cost, speed, and access to dispute mechanisms, as we really do not have much data about whether one-shotters always do worse in institutionally established ADR, although the Bingham<sup>163</sup> and *Engalla* data do demonstrate some clear areas for concern.<sup>164</sup>

More problematically, we know even less about a wide variety of private uses of ADR, both within organizations (“internal dispute resolution” as Edelman and Suchman label it<sup>165</sup>) and in the millions of private disputes that use some form of ADR, with or without contracts. Even the major providers of ADR services, like JAMS-Endispute and others, have been resistant to external study.<sup>166</sup> We are beginning to see some important studies of micro-behavior within some private forms of ADR, like mediation, which demonstrate some concerns about other kinds

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<sup>163</sup> See Bingham, *supra* note 106, at 113–16.

<sup>164</sup> For some of the more qualitative reports of difficulties for disempowered classes in mediation, see generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991), and Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391–1400. *But see* MICHELLE HERMANN ET AL., THE METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIM CASES AT THE METROPOLITAN COURT MEDIATION CENTER 115–17, 129–34, 137–48 (1993); Gary LaFree & Christine Rack, *The Effect of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767, 788–93 (1996) (demonstrating that relationship of race and gender to mediation and litigated outcomes is more complex).

<sup>165</sup> Edelman & Suchman, *supra* note 120.

<sup>166</sup> I served as an advisor to an Institute for Social Analysis study, funded by the State Justice Institute, of private “rent-a-judge” proceedings in California, and JAMS-Endispute refused to release important “proprietary” data about such things as their “important” caseloads and fees paid to arbitrators, among others. For a final report, see generally JANICE ROEHL ET AL., PRIVATE JUDGING: A STUDY OF ITS VOLUME, NATURE, AND IMPACT ON STATE COURTS (1993), and for the difficulty of studying private dispute resolution, see Janice A. Roehl, *Private Dispute Resolution*, in COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURT AND FUTURE RESEARCH NEEDS, *supra* note 154, at 331, 131, 143, 151.

of “power imbalances” within ADR, including linguistic,<sup>167</sup> race, class, and gender<sup>168</sup> endowments, that may empower some other forms of “Haves” over “Have-nots,” but this research has just begun and often suggests more questions than it provides clear answers.

So, what do we need to know? Studies like Lisa Bingham’s in the employment arbitration context and Eisenberg and Clermont’s in the litigation context are rigorous attempts to assess patterns of outcomes in relation to particular processes. Do claimants do better or worse (as a percentage of what they demand) in arbitration or mediation<sup>169</sup> than in other fora? Do they claim more often? Less often? Does it make a difference if they are represented or not? By a lawyer or nonlawyer?<sup>170</sup> How do we measure outcomes if nonmonetary solutions (like job transfers, promotions, new or exchanged products) are achieved?<sup>171</sup> Do different processes have varying impacts on outcomes? Do repeat players have the same advantages in mediation as they might have in arbitration? What is gained by the use of particular processes? For example, the repeat player mediator or arbitrator who is expert in a particular field (like discrimination law) actually may provide not only “better” quality resolutions, but more efficient and claimant sensitive services.<sup>172</sup> These measurement questions

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<sup>167</sup> See JOHN CONLEY & WILLIAM O’BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 39–59 (1998); see generally David Greatbatch & Robert Dingwall, *Argumentative Talk in Divorce Mediation Sessions*, 62 *AM. SOC. REV.* 151 (1997); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 *L. & SOC’Y REV.* 613 (1989).

<sup>168</sup> See HERMANN ET AL., *supra* note 164, at 89–90; Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 *J. DISP. RES.* 55, 58–68.

<sup>169</sup> See, e.g., Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 *ME. L. REV.* 237, 254 (1981); Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 *L. & SOC’Y REV.* 515, 526–27 (1984).

<sup>170</sup> See HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 1–22 (1998).

<sup>171</sup> See Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 *L. & SOC’Y REV.* 341, 346–47 (1987) (suggesting that as long as attorney’s fees are monetized and contingent on monetary amounts, there will be a limit to the kinds of creative solutions that might be developed by lawyer representatives).

<sup>172</sup> Some ADR firms are being established that specialize in particular disputes, such as employment (Wittenberg, Shaw in New York), intellectual property, insurance, and construction (Bickerman and Associates). I believe that my “expertise” in Dalkon

are not new, but remain problematic for operationalization of studies about ADR.<sup>173</sup>

What are the “newer” problems associated with repeat play providers? Conflicts of interests, monopolization of services, quality control, barriers to entry in the field? Privatization and accountability?<sup>174</sup>

## V. IF THE “HAVES” COME OUT AHEAD—WHAT DO WE DO?

In the spirit of celebrating Marc Galanter’s important achievement, it seems only appropriate to end with some speculations for reform, posited on the yet-to-be-totally-proven notion that the “Haves’ Come out Ahead” in ADR, as they do wherever there are “Haves” and “Have-nots.” As Richard Speidel and others have suggested, statutory reform may be in order. If the courts continue to treat one-shotters as if they have willingly contracted for private dispute resolution, then statutory changes to the FAA providing some of the protections of the *Due Process Protocol* may be in order (representation, discovery, written opinions, and some judicial review are often suggested). Current efforts to “regulate” by private associations include the Consumer Bill of Rights for Arbitration<sup>175</sup> and the CPR-Georgetown Commission on Ethics and Standards in ADR,<sup>176</sup> both of which are seeking voluntary disclosure requirements and compliance with basic procedural rights. Some particular forms of disputing could be prohibited absolutely (e.g., certain conflicts of interest, lack of consent, discovery) or at least be disapproved of by the courts (as occurred in

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Shield arbitrations allowed me to be both more sensitive to claimant’s needs and more efficient at the same time. See Menkel-Meadow, *supra* note 82, at 531–34.

<sup>173</sup> See Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 436 (1989); see also John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499, 542–43 (1989).

<sup>174</sup> See generally Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 59; see also YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 18 (1996).

<sup>175</sup> See AMERICAN ARBITRATION ASSOC., *CONSUMER DUE PROCESS PROTOCOL: A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES* 1–4 (1998).

<sup>176</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.5.3(b)(1) (CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Draft 1999), reprinted in Menkel-Meadow, *supra* note 71.

*Engalla*<sup>177</sup>). Evaluation studies and exit polls of users might demonstrate more accurately what works, what does not, and why.

As the procedural justice literature has told us, parties may be content with an ability to be heard by a third person neutral if they are convinced the process is otherwise fair.<sup>178</sup> If representation matters, as we all suspect it does, must it always be a lawyer who assists one-shotters? Can consumers, employees, clients, investors, and others with disputes help each other gain repeat play advantage by collectivizing either their claims or their representational efforts? What efforts need to be made to publicize results and monitor patterns of claiming in order to educate both broader constituencies, as well as the institutions and users of a dispute resolution system, about what disputes are about, and what needs to be fixed or changed? Judge Jack Weinstein, among others, has suggested that modern disputing requires collectivization, through communitarian values, on the part of co-disputants, coupled with modern technological innovation, to improve communication between parties and among claimants, including video-taped information about cases and support group call-in lines for information and advice, as has been utilized in some modern mass torts.<sup>179</sup> The Internet presents an opportunity for new forms of claimant information and collective action.<sup>180</sup>

In short, we think we know that the “‘Haves’ Come out Ahead” in ADR, as they do in litigation, but they may come out ahead in different ways or for different reasons. Therefore, as socio-legal scholars who have much to thank Marc Galanter for, it behooves the legal and social empiricists and reformers among us to collect the data we need so we can be more certain that the solutions we suggest will solve the problems that actually exist and not the ones we simply think exist. If the “‘Haves’ Come out Ahead” in both litigation and ADR, then where will we go next to achieve social justice in disputing?

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<sup>177</sup> See *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 916–17 (Cal. 1997).

<sup>178</sup> See generally TOM R. TYLER & E. ALLAN LIND, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); see also Tom R. Tyler, *Justice and Power in Civil Dispute Processing*, in *JUSTICE AND POWER IN SOCIOLEGAL STUDIES*, *supra* note 3, at 309, 314, 320.

<sup>179</sup> See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATIONS: THE EFFECTS OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTI-PARTY DEVICES* 94–101 (1995).

<sup>180</sup> Indeed, the Internet has developed its own form of dispute resolution. The Virtual Magistrate is just one of many Internet-based dispute resolution services.



# Arbitrator Selection at the NASD: Investor Perception of a Pro-Securities Industry Bias

CHERYL NICHOLS\*

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