

***Iqbal* and the  
Role of the  
Courts**

I Could Have Been a Contender: Summary  
Jury Trial As A Means to Overcome *Iqbal*'s  
Negative Effects Upon Pre-Litigation  
Communication, Negotiation and Early,  
Consensual Dispute Resolution

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### INTRODUCTION

For decades, lawyers' bilateral negotiations, rather than trials, have resolved a majority of the civil actions filed in courts in the U.S.<sup>1</sup> Increasingly, lawyers and clients now conduct these negotiations within

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1. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL AND LEGAL STUD. 459 (2004); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1954-55 (2009) (using Administrative Office data to calculate an approximate 67.7% settlement rate for federal civil cases terminated in 2005); Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 (2006) ("When the federal rules of civil procedure were enacted in 1938, about 18 percent of civil cases in federal court were resolved by trial. That figure fell to about 12 percent in 1962 and today it is 1.7 percent."); Gillian Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 730-733 (2004) (suggesting that with various coding and statistical corrections to the Federal Judicial Center's Integrated Data Base for 1970-2000, the rate of settlement was 68.7% in 2000 and 66.6% in 1970 for contested terminations); Hope Viner Samborn, *The Vanishing Trial: More and More Cases are Settled, Mediated or Arbitrated without a Public Resolution. Will the Trend Harm the Justice System?*, 88-OCT A.B.A. J. 24, 27 (2002) ("Still, many judges and lawyers view the drop in jury trials as a positive sign. They say that ADR is working and that litigants are settling cases for fair sums without spending exorbitant amounts of money."); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (suggesting that two-thirds of cases settle with a judicial ruling).

court-encouraged or court-mandated mediation.<sup>2</sup> Some commentators decry these developments,<sup>3</sup> while others argue that the drafters of the Federal Rules of Civil Procedure always intended to provide disputants with the tools needed to investigate and then resolve their own disputes.<sup>4</sup> From the latter perspective, a self-sufficient and democratic people (and the legal profession that has developed to serve them<sup>5</sup>) should be

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2. See Nancy A. Welsh, *Institutionalization and Professionalization*, in THE HANDBOOK OF DISPUTE RESOLUTION 487 (Moffitt et. al. ed., 2005) (discussion of the increased use of mediation within the courts and the effects institutionalization has had on mediation); Dorothy J. Della Noce et. al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 40 (2002) (“Court-connected mediation programs are increasing, as courts look to mediation to control their dockets and increase the public’s satisfaction with the judicial system.”); Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule*, 26 JUST. SYS. J. 253 (2005); Craig A. McEwen & Roselle L. Wissler, *Finding Out if it is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131 (2002) (“[C]ourt-based mediation programs for civil cases have expanded significantly over the last fifteen years . . .”).

3. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing ADR should not be allowed because parties are often coerced to settle and absence of judicial involvement raises various concerns); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1045, 1549-50 (1991) (opposing mandatory family mediation because it requires parties to interact in forced setting, women often feel obliged to maintain connection with ex-partner during process, and it is potentially destructive because parties were once involved in intimate relationship); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-88, 1391 (1985) (stating ADR does little to counter historical and subconscious prejudice, and arguing judicial system should be used to encourage fairness and deter prejudice because such systems are formal, subject to more control, and can reduce prejudice); see also Howard M. Erichson, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009); Eric Yamamoto, *ADR: Where Have All the Critics Gone?* 36 SANTA CLARA L. REV. 1055 (2006); see also Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 425 (2004-2005) (counseling deliberation and care in institutionalizing mediation so that it assists courts in achieving substantive, procedural and efficient justice and providing appropriate forums); but see Carrie Menkel-Meadow, *Whose Settlement Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

4. See Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 950-51 (2004) (“Discovery produces a great deal of information, some about one’s own case and almost as much about the other side’s case. It is not surprising that such information will sometimes produce converging estimates of the likely outcome of the trial. . . . On the basis of this information the parties will often settle. That point is important: modern discovery itself *produces* settlements, regardless of the judge’s behavior or the availability of devices like early neutral evaluation and settlement conferences. Comparative data again illuminate, suggesting that civil-law systems—in which parties cannot force discovery—have trial rates ranging between 30-70 percent higher than those in any U.S. jurisdiction.”).

5. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 28 (2nd ed. 1994) (1982); but see RONIT DINOVITZER, ET AL.,

expected to take the initiative to identify alleged harms, communicate with each other, listen to each other's perspective, review necessary information, and ultimately attempt to reach customized solutions *before* turning to expensive and intrusive public resources—i.e., judges and juries—for decisions enforceable by the state.<sup>6</sup>

In fact, empirical research has demonstrated repeatedly that allegedly litigious Americans overwhelmingly attempt to resolve their disputes privately before turning to the courts for help.<sup>7</sup> Meanwhile, increasing numbers of institutions in the public and private sectors now incorporate explicit, formalized opportunities for communication and evaluation to resolve disputes with employees, customers, citizens and vendors. These in-house innovations are occurring with sufficient frequency that the discipline of “dispute system design” has emerged, with a dispute system defined as “one or more internal processes that have been adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution.”<sup>8</sup> The dispute systems that include consensual procedures—i.e., communication, negotiation, mediation, non-binding evaluations, ombudspersons—have been found effective in resolving many of the disputes that institutions inevitably confront and, over time, can even improve business and workplace relationships. Obviously, successful resolution of disputes through these procedures also permits the parties to avoid accessing our public justice system.

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AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 19 (2004); Nancy Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45 (“Increasingly, too, profit-maximizing considerations have led segments of legal practice to emulate corporate employment, making one-on-one, personal interaction with real, individual clients less likely and thus humanistic practice less attainable . . . . The goal of feeling like a lawyer who will be called upon to assist clients with human, moral dilemmas appears particularly difficult to achieve for new lawyers in the mega-firms, with 100 or more lawyers in a single office. Though only 18% of new lawyers and 8% of all lawyers actually work in this practice setting, the money is best at these firms, and they dominate many law students’ and law schools’ aspirations.”); Mark J. Osiel, *Book Review: Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2039, 2039 (1990) (“In sum, a first step toward improving Abel’s theoretical account would be to note that the natural temperament of lawyers might better be characterized not as that of monopolists but of heliotropes: gravitating to the sources of power and privilege within society and occasionally employing monopoly to further that end.”).

6. Note the irony here of the ease with which arbitral awards are transformed into judgments and thus enforceable.

7. See Section II, *infra*.

8. Stephanie Smith & Jan Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009); see also Lisa Blomgren Bingham, Susan Summers Raines, Timothy Hedeon, & Lisa Marie Napoli, *Mediation in Employment and Creeping Legalism: Implications for Dispute System Design* (Oct. 9, 2009) (unpublished manuscript, on file with author).

The success, likelihood and character of formalized consensual procedures, however, must be understood as operating within the shadow of the “default” procedures offered by normal, private life on one hand and those required by public courts (and agencies) on the other hand. It is fairly straightforward to appreciate that the ubiquity and success of “settlement on the courthouse steps” has always been a by-product of the threat of an impending trial. Rational individuals and organizations generally make concessions in negotiation (and now, presumably, in mediation) because such concessions make sense.<sup>9</sup> The negotiators either anticipate a meaningful gain as a result of a negotiated outcome or fear the loss they may suffer if they refuse to reach an agreement. The more powerful of these two motivators, it turns out, is the fear of loss,<sup>10</sup> and such fear has long motivated settlements.

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9. But not always. See Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION* 98-100 (Kenneth Arrow et al. eds., 1995) (noting that the existence of a negative relationship can lead negotiators to focus on ensuring that they do better than the other negotiator, even though they incur risk in pursuing this goal); Arnold H. Rutkin et. al., *Family Law and Practice: General Tactical Consideration*, 8A CONN. PRAC., FAMILY LAW & PRAC. § 49.2 (2d ed.) (“If the client is intent upon assigning blame, seeking revenge or inflicting punishment, he or she may not be in favor of a course of action which seems to involve declaring a truce or working with ‘the enemy.’ Apart from the reluctance to even enter into negotiations, such a client may be initially unwilling to agree to terms which are reasonable enough for realistic inclusion in a separation agreement.”); RAOUL FELDER, *BARE-KNUCKLE NEGOTIATION: SAVVY TIPS AND TRUE STORIES FROM THE MASTER OF GIVE-AND-TAKE* 71 (2004) (“Even with the new no-fault divorce system, clients still want to hire a lawyer to be an instrument of revenge. Some clients have less interest in obtaining the most money from a settlement than in destroying the other party in a final and rancorous battle to the end.”); see also Gillian K. Hadfield, *The Civil Trial: Adaption and Alternatives: Symposium Article: Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1315 (2005) (“Intraorganizational cases are significantly more likely to settle (five to ten percentage points) than cases brought by individual plaintiffs. And organizations suing individuals are significantly more likely to settle than when the positions are reversed.”); Amy Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009) (cautioning that dispute resolution system designers need to acknowledge that for a variety of reasons, institutions do not make decisions or behave in a manner that is identical to individual persons).

10. See Mark Kelman, Yuval Rottenstreich, & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996); Vincent Di Lorenzo, *Does the Law Encourage Unethical Conduct in the Securities Industry?*, 11 FORDHAM J. CORP. & FIN. L. 765, 789 (“Loss aversion is a finding that individuals fear losses, indeed they fear losses roughly twice as much as they enjoy gains.”); Thomas Lee Hazen, *Public Policy: Rational Investments, Speculation or Gamble?—Derivatives Securities and Financial Futures and Their Effect on the Underlying Capital Markets*, 86 NW. U. L. REV. 987, 1001 (1992) (“This has been explained in psychological terms by the phenomenon that the pain of a loss looms twice as large as the pleasure of an equivalent gain.”).

Perhaps less obviously, public and private institutions' decisions to adopt internal, consensual procedures, along with the character and success of these procedures, are similarly influenced by the desire to avoid the financial and reputational costs of civil litigation<sup>11</sup> and to improve the chance of winning in the event that litigation is unavoidable.<sup>12</sup> In other words, court-connected negotiation and mediation and the consensual components of agencies' and companies' internal dispute systems do not work simply because they are magic or "nice." They work, and have been introduced, due in significant part to the viability of an alternative procedure that is perceived as uncontrollably risky—i.e., today's civil lawsuit, with its costly and revealing threats of discovery and public trial before a judge or jury.<sup>13</sup> In the U.S., therefore, negotiation, mediation and other consensual dispute resolution procedures—whether offered by courts, agencies or private institutions—should be understood as component parts of both the *private* "risk management" system and our *public* "justice" system.<sup>14</sup> These consensual procedures have been institutionalized because they help to manage the risk of significant disruption to the *status quo*. They

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11. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEG. L. REV. 137, 178 (2000) ("Compared with the attorneys, executives are much more satisfied with ADR than litigation. As there is no significant difference between the three groups' evaluations of ADR, the difference in relative evaluations is a reflection of executives' greater distaste for litigation than greater absolute satisfaction with ADR.").

12. See Hadfield, *The Civil Trial*, *supra* note 9, at 1315.

13. Geert Hofstede has handily illustrated how the introduction of external forces may work to change a culture that would otherwise be characterized by behaviors and values that reflect and reinforce each other. Participation in civil litigation may represent such an external force. Uncontrolled technology—e.g., YouTube and the posting of unedited videos—may represent another such a force. See GEERT HOFSTEDÉ, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* 12 (2nd ed. 2001).

14. See Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142 (2004) (urging mediation advocates "to help our courts overcome their current problems and regain an appropriate measure of self-respect for their unique role in enabling a democratic people to govern themselves" and a "symbiotic relationship" between the courts and ADR); Nancy A. Welsh, *One American Law Professor's View of the Future of Mediation in The Netherlands* Slide Presentation (June 29-30, 2006) (on file with author); see also Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000) (suggesting the intersection of a public justice system and a private alternative dispute resolution system); Bruce E. Meyerson, *The Dispute Resolution Profession Should Not Celebrate The Vanishing Trial*, 7 CARDOZO J. CONFLICT RESOL. 77 (2005) (urging that mediators and arbitrators need to work to improve the quality of the justice system); John Lande, *How Much Justice Can We Afford? Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213 (2006).

achieve this through their provision of individualized resolution and their ability to offer a sufficient experience of procedural and substantive justice.

The extent of the relationship between the private risk management system and the public justice system, however, is subject to change. The systems may appear to overlap significantly or operate almost autonomously. A key factor is the ease with which relatively powerless plaintiffs can escape the private system and gain access to the public system. Such access has been quite liberal since 1938, when notice pleading was institutionalized in the Federal Rules of Civil Procedures. With *Conley v. Gibson*,<sup>15</sup> the U.S. Supreme Court provided an important and expansive affirmation of notice pleading, which will be discussed in some detail *infra*.

Notice pleading certainly has its problems. It can encourage a variety of ills: frivolous lawsuits, coercion by powerful plaintiffs, careless lawyering, abuse of judicial time and resources. But notice pleading also helps to make real the promise of “room in [the courts] for those who have relied and must continue to rely on the hospitality of the courts for vindication of their rights.”<sup>16</sup> Unpopular, marginalized, underfunded and individual plaintiffs—like the four African-American union members who were expected to remain silent as their jobs disappeared but who chose instead to bring the lawsuit that led to *Conley v. Gibson*—are certainly among those who have relied on such hospitality.<sup>17</sup>

Imagine now, though, that you are in a different role. You are an institutional defendant, who faces a potential suit brought by just the sort of plaintiff who must access the courts in order to achieve vindication. What if you know that you can find out very quickly whether you must deal with this plaintiff’s threats of discovery and public trial, *even before you are required to file an answer, make the initial disclosures required by Rule 26(a) of the Federal Rules of Civil Procedure, or permit wide-ranging discovery?* And what if you also know that the court is likely to share your worldview and thus will likely dismiss this plaintiff’s action

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15. *Conley v. Gibson*, 355 U.S. 41 (1957).

16. THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 91 (A. Leo Levin & Russell R. Wheeler, eds., 1979) (quoted in McAdoo & Welsh, *Look Before You Leap*, *supra* note 4, at 432).

17. Importantly, however, others have noted that monied, commercial interests also have turned to the courts to ensure enforcement of their generally-contractual rights. See STEPHEN N. SUBRIN ET.AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 85 (Aspen Publishers, 3rd ed. 2008) (regarding Judge Clark’s mixed motives in introducing notice pleading).

before she has a chance to tell her (possibly dramatic and heart-wrenching) story? Now, would you offer to engage in pre-litigation negotiation or mediation with such a plaintiff? Perhaps you would if you were concerned about this plaintiff's ability to disrupt your workplace or community<sup>18</sup> or felt some individualized moral obligation to deal with people regardless of their status or popularity.<sup>19</sup>

In general, however, I fear that a coldly rational institutional defendant would *not* make the offer to negotiate and would not respond favorably to such a request from this sort of plaintiff.<sup>20</sup> Negotiation under these circumstances would represent a waste of the time, money and effort that could be allocated more productively elsewhere—and the negotiation itself could prolong a conflict that might otherwise dissipate. In fact, this is just the sort of assessment made by many institutional repeat players already, particularly those that have *not* initiated pre-litigation dispute systems that include negotiation, mediation or other forms of consensual dispute resolution.<sup>21</sup> If they are not *required* to listen to and negotiate with marginalized claimants, many will not do so.

The Supreme Court's recent decisions in *Ashcroft v. Iqbal*<sup>22</sup> and *Bell Atlantic v. Twombly*<sup>23</sup> have the potential to exacerbate this trend and even encourage the dismantling of the dispute resolution initiatives already undertaken by public and private institutions.<sup>24</sup> With *Iqbal* and

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18. Such power suggests, however, that this plaintiff would not fit the definition of "marginalized."

19. See Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 791 (2001) (pointing out that when lawyers have a responsibility to act zealously in favor of their client, they do not violate any rules if in doing so they maintain their obligation to treat all the persons involved in the legal process with consideration).

20. But see Ellen Dannin, Michelle Dean & Gangaram Singh, *Law Reform, Collective Bargaining, and the Balance of Power*, 11 WORKING USA 219 (2008) (finding that the bargaining power of union and management have been affected, to the detriment of unions, by judicial interpretations of the NLRA that permit employers' replacement of strikers and implementation of the employer's last best offer upon the occurrence of impasse in collective bargaining negotiations—but that negotiations still occur); Michael Moffitt, *Iqbal* and Settlement (manuscript on file with author) (using economic models to predict that settlement will decrease as a result of *Iqbal* but also noting that "predictions against the wave of settlement have been fools' bets over the last half century").

21. See Margaret M. Clark, *While some employers see no incentive for EEO mediation, others find benefits—HR News*, HR MAGAZINE, Jan. 2004, available at [http://findarticles.com/p/articles/mi\\_m3495/is\\_1\\_49/ai\\_112799809/](http://findarticles.com/p/articles/mi_m3495/is_1_49/ai_112799809/) (last visited Mar. 15, 2010) ("The EEO contracted with Professor E. Patrick McDermott and colleagues at the Perdue School of Business at Salisbury State University to find out why only about 30 percent of employers agree to mediate as opposed to about 80 percent of charging parties.").

22. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

23. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007).

24. And my concern about this likely future has only grown after the Supreme Court's even more-recent decision in *Citizens United vs. Federal Election Commission*,



*Twombly*, the Supreme Court may be intentionally or unintentionally “throwing the fight,”<sup>25</sup> at least in the legal contests between many civil rights claimants and institutional defendants. The most obvious feared effect is reduction of civil rights claimants’ access to the expressive and coercive power of the courts.<sup>26</sup> Less obviously, the Supreme Court may be effectively undermining institutions’ motivation to negotiate, mediate—or even communicate with and listen to—such claimants. Thus, the Supreme Court’s recent decisions have the potential to deprive marginalized claimants—and our society—of alternative, effective avenues for the airing and resolution of disputes with powerful institutional players.

Ironically, it was just this sort of deprivation that led the Supreme Court to announce its expansive vision of notice pleading in *Conley v. Gibson*. *Conley* foretells the need for our courts to maintain a robust public forum for those who are marginalized by the default procedures of normal life—not only to provide redress to the parties directly involved

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130 S. Ct. 876 (2010), to permit corporations to pour apparently limitless funds into election campaigns. Many state judges, after all, are elected—and it is elected legislators who appoint the remaining state and federal judges.

25. ON THE WATERFRONT (Columbia Pictures 1954) (in reference to a conversation between the Malloy brothers, Terry and Charley, in which Charley tells Terry his misfortune in boxing is because of Terry’s manager. Terry then confronts his brother and tells him it was Charley’s fault that he didn’t make it far in boxing because he had asked him to throw a key fight: “It wasn’t him, Charley, it was you. Remember that night in the Garden you came down to my dressing room and you said, ‘Kid, this ain’t your night. We’re going for the price on Wilson.’ You remember that? ‘This ain’t your night!’ My night! I coulda taken Wilson apart! So what happens? He gets the title shot outdoors on the ballpark and what do I get? A one-way ticket to Palooka-ville! You was my brother, Charley, you shoulda looked out for me a little bit. You shoulda taken care of me just a little bit so I wouldn’t have to take them dives for the short-end money.” The scene culminates with Terry telling Charley the most famous line in the film: “You don’t understand. I coulda had class. I coulda been a contender. I coulda been somebody, instead of a bum, which is what I am, let’s face it. It was you, Charley.” Terry goes on to fight outside the ring—defying corrupt union officials and ultimately winning his co-workers’ respect and support.).

26. See Victor C. Romero, *Interrogating Iqbal: Intent, Inertia, and a (lack of) Imagination*, 114 PENN ST. L. REV. 1419 (2010) (observing how purportedly neutral rules or criteria ultimately seem to favor dominant members of society); Shoba Sivaprasad Wadhia, *Business As Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485; Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443 (2010); but see Lee H. Rosenthal, *Pleading, for the Future: Conversations After Iqbal*, 114 PENN ST. L. REV. 1537 (2010) (indicating that statistics show no increase in the dismissal of civil rights claims after *Iqbal*, though there has been some increase in the number of dismissals in contract cases); Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317 (2010) (suggesting that *Iqbal* has not really changed anything for lawyers representing civil rights claimants because they already know that they need to engage in fact pleading due to many courts’ *de facto* heightened pleading requirements in that context).

in particular disputes but because the viability of such a forum has the indirect and salutary effect of forcing institutional players to find a way to sufficiently approximate the fair dialogue and resolution modeled in our courts.<sup>27</sup> Professor Isabelle Gunning has summed up this challenge (and promise) quite beautifully, observing that in our still-young democracy, marginalized individuals “need, even more so than advantaged group members, a forum in which their authentic voices and experiences can be expressed” and that private, consensual forums that permit such expression can offer “another locus in American political, social and legal life where ideas about equality are defined and redefined.”<sup>28</sup>

In an attempt to acknowledge legitimate concerns regarding the inefficiency and costs of today’s civil litigation process in some cases, while still protecting the courts’ essential role in providing a forum for marginalized parties, this Article will suggest that courts take a second look at the summary jury trial, a dispute resolution process that has fallen into some disuse. The summary jury trial is an expedited form of trial conducted before an advisory jury and followed by negotiation or mediation between the parties and their lawyers. Relatively early and appropriate use of this process could effectively prompt resolution *and* dialogue—i.e., private dialogue between the parties before the process is to occur; a stylized form of public dialogue during the trial phase of the process itself; and another private dialogue, potentially with assistance from a judge or mediator, after the advisory jury has been dismissed.

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27. See McAdoo & Welsh, *Look Before You Leap*, *supra* note 3, at 402 (noting that in the published proceedings of the 1976 Pound Conference, three former ABA presidents advocated reform of civil litigation because American citizens had *too much* desire for the “respectful attention and thoughtful consideration that they do not think they get anywhere else”) (quoting THE POUND CONFERENCE, *supra* note 3, at 11); see also Andrea Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT’L L. & POL. 789, 818 (2009) (“For international disputes, particularly those dealing with transitional justice, the rule of law must first be established in courts before the values of procedural justice can be realized in consensual processes”); Lisa Blomgren Bingham, et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 259 (2009) (concluding, based on empirical study, that “parties in ADR and litigation cases request, and are granted, about the same amount of relief”).

28. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 67 (1995) (cited in Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theory*, 54 J. LEGAL EDUC. 49, 56-57 (2004); see also *The Future of Mediation: Court-Connected Mediation in the U.S. and The Netherlands Compared*, 1 FORUM VOOR CONFLICTMANAGEMENT 19, 22 (2007) (observing that Dutch citizens may choose, and the Netherlands provides financial support for, several different “paths to justice”).

This Article will begin with *Conley v. Gibson* and its history, which demonstrates the connection between access to the expressive and coercive power of the courts on one hand and the likelihood and character of pre-litigation negotiation on the other hand. The Article will then review research that reveals the “default” procedures of normal life and consider briefly the procedures currently offered by the courts that are designed to counter these default procedures and provide otherwise-marginalized one-shot players with access to information and the courts’ expressive and coercive powers. The Article will then turn to the consensual dispute resolution procedures that have been adopted by courts, agencies and private companies to resolve disputes and consider the extent to which such procedures reflect the default procedures of *both* normal life and civil litigation. This Article will then suggest the effect of *Iqbal* and *Twombly* on the likelihood, timing and character of negotiation, mediation and other consensual forms of dispute resolution in contests between marginalized one-shot parties and institutional repeat players. Finally, the Article will propose adaptation of the summary jury trial as a response to the excesses of civil litigation and as a means to continue the courts’ role in encouraging and modeling pre-litigation negotiation and resolution.

I. CONLEY AS NEEDED ENCOURAGEMENT OF PRE-LITIGATION  
COMMUNICATION AND NEGOTIATION

Every first-year law student knows that the Federal Rules of Civil Procedure, adopted in 1938, ushered in the era of notice pleading. As Judge Charles Clark, the principal draftsman of the Rules and subsequently a judge on the U.S. Court of Appeals for the Second Circuit, observed in the 1944 case of *Dioguardi v. Durning*,<sup>29</sup> the new Rule 8(a) intentionally did not require pleadings to “stat[e] ‘facts sufficient to constitute a cause of action,’ but only that there be ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”<sup>30</sup> Judge Clark used this interpretation of Rule 8(a) to find that a nearly-unintelligible complaint, drafted by an Italian immigrant who had refused the assistance of legal counsel, could be understood to state a claim. In *Conley v. Gibson*,<sup>31</sup> a case involving four African-Americans who claimed that their union had violated its duty of providing fair representation by refusing to consider the concerns they had raised following their employer’s abolition of their jobs, the U.S. Supreme Court further cemented the liberality of the standard by explaining that

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29. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

30. *Id.* at 775.

31. *Conley v. Gibson*, 355 U.S. 41 (1957).

“all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant *fair notice of what the plaintiff’s claim is and the grounds upon which it rests*.”<sup>32</sup> The Court’s opinion went on:

The illustrative forms appended to the Rules plainly demonstrate this. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that *the purpose of pleading is to facilitate a proper decision on the merits*.<sup>33</sup>

In addition, of course, *Conley* has long been known for the apparently unconditional embrace of notice pleading described by the Court as an “accepted rule.” Writing on behalf of the Court, Justice Black explained that “a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief*.”<sup>34</sup>

This language must be understood in context. The petitioners were four African-American members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (“the Brotherhood”), suing on behalf of themselves and other African American members similarly situated. The respondents were the Brotherhood and the American Federation of Labor, their Local Unions 6051 and 28, and the locals’ chairmen. According to allegations in the complaint: the Brotherhood had been named the exclusive bargaining representative for petitioners; petitioners were required to be members of

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32. *Id.* at 47 (emphasis added).

33. *Id.* at 47, 48 (emphasis added).

34. *Id.* at 45, 46 (emphasis added). Professor Emily Sherwin has written a very helpful history of *Conley v. Gibson* in *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 281 (Kevin M. Clermont ed., 2004). She notes that Justice Black nearly quoted, but without attribution, from James Moore’s influential treatise, the second edition of Moore’s Federal Practice which stated that a motion to dismiss for failure to state a claim “should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim” and that Moore was the protégé of Judge Clark. *Id.* at 287, 302; see also Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1021 (2009) (observing that “after *Conley* and *Swierkiewicz* it was fairly clear that an employment discrimination plaintiff need only provide a basic statement of the claim in order to proceed during the early stages of the case. There was still some ambiguity in the Court’s pronouncement of the proper standard, but, for the most part, it would cause difficulty only for those cases in the margins. The typical employment discrimination plaintiff knew what must be alleged to survive a motion to dismiss.”)

the Brotherhood as a condition of employment; and the Brotherhood had established segregated—and unequal—local lodges. Local 28 was composed entirely of white employees; African-American employees were members of Local 6051. Beginning with the ominous observation that “[o]nce again” African-American employees were before the courts to request judicial assistance in compelling unions to “represent them fairly[.]”<sup>35</sup> Justice Black went on to recount the petitioners’ allegations as follows:

Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May, 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. *Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given to white employees.* The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners’ right under the Railway Labor Act to fair representation from their bargaining agent.<sup>36</sup>

The Railroad’s announcement of the abolition of the African-American employees’ jobs followed the Railroad’s decision to lease certain portions of the docks at the Houston Freight House to another company, the Southern Pacific Transport Company (“Transport Company”). The Brotherhood did not provide any advance notice to affected employees regarding the abolition of their jobs.<sup>37</sup> Union officials did assert, however, that “nothing could be done about it.”<sup>38</sup> This assertion would have rung true if the Railroad faced a business necessity and had been forced to lease its docks to an unrelated third party. Suspiciously,

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35. *Conley*, 355 U.S. at 42.

36. *Conley*, 355 U.S. at 43-45 (emphasis added).

37. See Complaint at No. VIII. But see Brief for Respondents at 8, 28, *Conley v. Gibson*, 355 U.S. 41 (1957).

38. See Complaint at No. VIII; Brief for Respondents at 8, 28.

however, the Transport Company was a subsidiary of the Railroad.<sup>39</sup> The African-American employees complained to the Brotherhood, but the Brotherhood refused even to “consider”<sup>40</sup> their grievances. Rather, the Brotherhood “suffered [the discharges] to occur without in any manner coming to the aid of the plaintiffs . . . and *did decline to hear* plaintiffs on this question of discharging repeatedly and without reason.”<sup>41</sup>

I have highlighted particular language in the previous two paragraphs because the dynamic described here relates to the general theme of this Article. The affected African-American employees apparently sought to be heard by their union, seeking its assistance in being heard by their employer (which, apparently, had previously refused to listen to all of its workers and thus triggered their unionization). The employees thus sought to communicate and negotiate internally, before turning to an outsider, the court. The Brotherhood, however, refused to hear and did nothing to respond to these employees’ pleas. Why would the Brotherhood behave in this manner? The following answer appears quite “plausible”: because neither the Brotherhood nor the Railroad had perceived listening and responding to these less-powerful, marginalized individuals as in their interests, and they were not going to listen and respond until someone more powerful forced them to do so.<sup>42</sup>

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39. See Complaint at No. IX; see also Sherwin, *supra* note 34, at 295.

40. Poignantly, in their complaint, the petitioners sought “the right to have all legitimate grievances considered by the union and the right to be treated by said union with the utmost candor, fairness, and straight forwardness [sic].” Complaint, No. I, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley01.pdf>.

41. *Id.* at No. VIII (also cited in Sherwin, *supra* note 34, at 295 (quoting from Transcript of Record at 11) (emphasis added)).

42. See Sherwin, *supra* note 34, at 303 (describing the state of the law regarding employment discrimination claims and pointing out that the Civil Rights Act had not yet been passed, few states had fair employment laws, and actions by private employers were not generally considered to meet the requirement of state action for application of the Fourteenth Amendment (citing to MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 636 (6th ed. 2003); Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 156 (1957); Michael I. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 563-65 (1962)); see also Ellen Dannin & Gangaram Singh, *More Than Just a Cool T-Shirt: What We Don’t Know About Collective Bargaining—But Should—To Make Organizing Effective*, 25 HOFSTRA LAB. & EMP. L.J. 93 (2007) (“Workers do not join unions just to be members or to get cool t-shirts and sing ‘Solidarity Forever.’ Workers join unions because they want what unions can get them—better pay, just cause employment, respect, and a say in workplace conditions. Organizing alone cannot get these things. Organizing is only a vehicle that leads to the collective bargaining power that wins workplace rights . . . . Through collective bargaining, workers can earn more money, have greater job security, exercise greater control over their jobs, and create a community that supports one another. The National Labor Relations Act (NLRA) itself recognizes organizing and joining unions as important

This was not a new dynamic in the railroad industry in particular or in labor-management relations more generally. Decades earlier, Congress had passed the Railway Labor Act<sup>43</sup> (RLA) to grant railroad workers a rather constricted right to unionize. In 1934, Congress amended the RLA to create an administrative agency, the National Railroad Adjustment Board, to resolve claims of discriminatory administration of contracts.<sup>44</sup> The Board was composed of labor and management delegates. This composition would seem to ensure appropriate checks and balances in labor-management relations<sup>45</sup>—unless labor and management found common cause in the appropriateness of discriminating against a particular, marginalized group of workers. This is exactly what African-American union members and their lawyers perceived as occurring, as they were forced by law and contract to seek redress in yet another inhospitable forum.

Therefore, they had sought—and were winning—access to the federal courts. In the process, as Professor Emily Sherwin has observed, their “narrative [had] beg[un] to unfold,” and judges had felt “pressure to solve the human problems that appear[ed], even when no solution [was] available under established rules of law.”<sup>46</sup> If employers, school officials, unions, administrative adjudicators, state legislators, state governors, Congress, and even the President refused to hear, acknowledge and respond to these marginalized parties, the federal courts would at the very least offer them a meaningful opportunity to tell their stories, express their concerns and receive dignified, even-handed consideration of their claims.<sup>47</sup> And by 1954, the year that the African-

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because they lead to collective bargaining and create the power necessary to secure improved wages and working conditions and promote economic security.”).

43. 45 U.S.C. § 151 (1926); *see also* Lisa Catherine Tulk, *The 1926 Railway Labor Act and the Modern American Airline Industry: Changes and “Chaos” Outline the Need for Revised Legislation*, 69 J. AIR & COM 615, 617 (2004).

44. *See* Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

45. *See* Michael S. Maza, *Arbitrator Selection and Neutrality Under the Railway Labor Act: An Airline Employee’s Perspective*, 4 J. OF AM. ARB. 327 (2005) (describing Northwest Airline’s system for the arbitration of airline pilots’ grievances).

46. Sherwin, *supra* note 34, at 305; *see also* JAN B.M. VRANKEN, *EXPLORING THE JURIST’S FRAME OF MIND: CONSTRAINTS AND PRECONCEPTIONS IN CIVIL LAW ARGUMENTATION* 104-06 (2006) (urging the greater suitability of mediation for cases in which courts cannot “protect” an important emotional interest with judicial remedies or a party’s legal claim does not represent her real interest).

47. Note that these are all meaningful characteristics of those processes that have been found to provide “procedural justice.” *See* Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, in *THE NEGOTIATOR’S FIELDBOOK* 165, 169 (Andrea K. Schneider & Christopher Honeyman, eds., 2006) (“First, people are more likely to judge a process as fair if they are given meaningful opportunity to tell their story (i.e., an opportunity for voice. Second, in a process that feels fair, people receive assurance that the decisionmaker has listened to them and understood and cared about what they had to

American employees in *Conley* brought their action, the Supreme Court had signaled its willingness to respond to the plight of African-Americans suffering discrimination in employment<sup>48</sup> as well as education.<sup>49</sup>

In order to be heard by the federal courts regarding their grievance-related claim against the Brotherhood, however, the African-American employees in *Conley* had to frame the union's alleged inaction as a violation of its obligation to represent all employees within their bargaining unit "without hostile discrimination, fairly, impartially, and in good faith"<sup>50</sup>—a standard that had been established by Supreme Court in the collective bargaining context. Though the petition for a writ for certiorari referenced only "acts and omissions,"<sup>51</sup> the petitioner's brief went into some detail regarding the allegations that demonstrated the union's "hostile discrimination":

[S]olely because of their race, the union bars them [petitioners] from membership in its local lodge which carries on the collective bargaining process; uses its statutory position to compel them to maintain membership in an inferior, racially segregated local; refuses to exert any effort toward maintenance of the collective agreement insofar as it pertains to the Negro members of the craft, resulting in their loss of employment and employment rights; and refuses either to hear their charges of discrimination or to take any steps to investigate and redress their wrongs[.]<sup>52</sup>

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say. Third people watch for signs that the decision-maker is trying to treat them in an even-handed manner. Finally, people value a process that accords them dignity and respect."); Nancy A. Welsh, *What's Justice Got To Do With It: Making Deals in Court-Connected Mediation*, 79 WASH. U. L. Q. 787, 830-58 (2001) (examining the application of procedural justice research and theory to court-connected mediation).

48. See *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (establishing the duty of fair representation in the collective bargaining process); Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); see Sherwin, *supra* note 34, at 303-07.

49. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

50. See *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

51. In their Petition for A Writ of Certiorari, petitioners described the issue regarding the union's violation of its duty of fair representation as follows:

Whether acts or omissions, racially discriminatory in nature, practiced by the exclusive bargaining representative of a craft, against Negro members of the craft, where there are no allegations that the bargaining representative was unlawfully selected nor that the collective agreement is discriminatory in its provisions, is such a breach of the statutory duty imposed upon such representative by the National Railway Labor Act as might be redressed by Negro members of the craft so harmed by suit in the Federal District Court for injunctive relief and for damages?

*Id.* at 2, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley02.pdf>.

52. Petitioner's Brief, at 3, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley04.pdf>.



Not surprisingly, the Brotherhood and its chairmen did not agree that their “passive”<sup>53</sup> failure to protest or prevent the Texas and New Orleans Railroad from abolishing and then refilling those 45 jobs represented “hostile discrimination”<sup>54</sup> by the union. Indeed, in their brief, respondents urged that “[p]erhaps the most important single problem of this brief is to correctly state the issues involved. In view of what we regard as a grossly exaggerated statement of the questions presented by Petitioners in their brief to this Court, we are persuaded that precise clarification of the issues presented by the Complaint is of the utmost importance if academic argument is to be avoided upon racial discrimination questions which are here not actually involved.”<sup>55</sup> According to the Brotherhood, the petitioners’ complaint alleged only that the *Railroad* had discriminated by abolishing certain jobs—and the petitioners had not sued the Railroad.<sup>56</sup> The complaint failed to allege that *the Brotherhood* had specifically: participated in the Railroad’s

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53. Brief for Respondents at 40-41, *Conley v. Gibson*, 355 U.S. 41 (1957) (No. 7) (“Simply stated, the complaint alleges only that the Union has permitted, *through failure to prevent*, the existence of the alleged discriminatory practices of the Railroad.”).

54. Brief for Respondents at 13-14, *Conley v. Gibson*, 355 U.S. 41 (1957) (No. 7) (“In substance, the factual allegations of the Complaint, which are unfairly described by Petitioners as a planned course of conduct designed to discriminate against Petitioners because of their race or color, are limited to action exclusively by the Railroad in abolishing certain of Petitioners’ jobs and curtailing their seniority rights, in none of which the Brotherhood is alleged to have participated, agreed to, assisted in, conspired for, known about, or done anything more than “suffered” such action by the Railroad ‘to transpire’ and ‘did not come to the aid’ of Petitioners after the Railroad had acted. We do not think that such conduct or omission by the Brotherhood constitutes either hostile discrimination because of race or color or an abuse of its statutory authority and power as claimed by Petitioners.”). This language is unfortunately reminiscent of debates regarding the point at which government supervisors can become liable for the acts of other employees; see Kit Kinports, *Iqbal and Supervisory Liability*, 114 PENN ST. L. REV. 1291 (2010).

55. Brief for Respondents Pat J. Gibson, et al. at 2, *Conley v. Gibson*, No. 7 (Oct. 2, 1957). The reframing attempted here probably was in response to the entry of Judge Joseph C. Waddy into this case. Judge Waddy, an African-American, was at that time a lawyer located in Washington D.C. specializing in civil rights litigation. Previously, the petitioners had been represented by a local Texas law firm—and had lost before both the district and circuit courts, though they were granted certiorari by the Supreme Court. See Sherwin *supra* note 34, at 296; see also Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409 (2009) (emphasizing the important role of African-American lawyers in assisting members of the African-American community to navigate the complicated pathways of the law and gain their rightful place in the policy-making forums of a democratic nation). This language in respondents’ brief is also strikingly reminiscent of the Supreme Court’s description of *Iqbal*’s claims as “extravagantly fanciful.” *Iqbal*, 129 S. Ct. at 1951.

56. Respondents had also moved for dismissal for failure to join a necessary party. Apparently, petitioners chose not to sue the Railroad because this would have clearly required them to take their claim to the National Railway Adjustment Board, when they preferred to be in the federal courts. See Sherwin, *supra* note 34, at 311.

abolition of the jobs, participated in any discussions with Railroad officials regarding the abolition of such jobs, conspired in the abolition of such jobs, acceded to the perpetration of the Railroad's acts "or that Respondents in fact took any action in the alleged deprivation of Petitioner's rights under the bargaining agreement."<sup>57</sup> Asserting the necessity of deferring to the union's assessment of a grievance's merit before determining whether to pursue it, respondents asserted that petitioners' real objective was "to obtain a holding that a bargaining representative must process on behalf of Negro employees any grievance regardless of its merits."<sup>58</sup> Ultimately, the respondents argued that petitioners had not stated a claim against the union and should have brought their action against the Railroad, rather than the Brotherhood.

Justice Black wrote the words "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" because this was a well-respected, though debated,<sup>59</sup> understanding of the pleading requirements of Rule 8—and because *these petitioners needed the federal courts to provide a public forum for the voicing and investigation of their harms and the development of a fair response*.<sup>60</sup> For purposes of this Article, though, it is useful to consider the precise action the petitioners sought from the courts. Ultimately, it was to shame<sup>61</sup> or force<sup>62</sup> their union to listen,

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57. Brief for Respondents, *supra* note 55, at 18; *see also id.* at 4. This is reminiscent of defendants' arguments in *Twombly* that "[e]ven 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recognize[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful'" and the Court's later conclusion that because there was no "independent allegation of actual agreement among the ILECs" . . . [n]othing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy." *Twombly*, 550 U.S. at 553-554, 564, 566.

58. Brief for Respondents, *supra* note 55, at 16.

59. Sherwin, *supra* note 34, at 300-302.

60. *See* Sherwin, *supra* note 34. Professor Sherwin notes quite provocatively that several of the justices had played a part in the creation of the New Deal, and were men of action. Professor Sherwin also has provided an interesting aside regarding Justice Black's possible frame of mind when this case was heard and decided: "Black, a widower then aged 71, married his administrative assistant in September 1957, one month before the oral arguments in *Conley*. His biographer reports that after his marriage, he spent less time at the Court. He also began to give himself shots of testosterone." Sherwin, *supra* note 34, at 300-301 (citing ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 469 (2d ed. 1997)).

61. Consider the potential effect of the majority and dissenting opinions in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Even though the Supreme Court found there that Ms. Lassiter's right to procedural due process had not been violated, North Carolina subsequently amended its statute to provide counsel for indigent parents facing termination of their parental rights; *see Lassiter* 452 U.S. at 18; N.C. GEN. STAT. 7(b)-1109(b)(1999); *see* Subrin, *supra* note 17, at 85 (In fact, "all states have adopted

communicate, perhaps negotiate with, and even advocate for, *all* of its members, not just those its local officials favored.

Other commentators have argued quite persuasively that the petitioners did not actually need Justice Black to be so expansive in order to justify reversal of the lower courts' dismissal of their claims.<sup>63</sup> But these African-American employees did need the Supreme Court to force the lower courts, the Brotherhood, the Railroad and the Transport Company to at least hear their claims.

How common is the sort of need exhibited by the African-American union members who chose to sue in *Conley*? Unfortunately, it appears that this need remains quite common for those who bear the burden of marginalization—and even demonization—in our society. This Article will now turn to civil litigation's role and promise in disrupting and potentially realigning the default procedures of normal life.

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statutes that either direct or permit judges to appoint counsel for parents or their children when the state seeks to terminate parental rights.”).

62. The U.S. Supreme Court did the same thing recently in its series of cases addressing the procedures—or perhaps more accurately, the non-procedures—established by the Bush Administration, with the acquiescence of Congress, for the indefinite detention of enemy combatants in this country's continuing War on Terror. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008); Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 972, 973 (2009); Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantanamo*, 42 CASE W. RES. J. INT'L L. 125 (2009) (considering how the organizational culture literature can help to explain the military culture's resistance to the institution of greater political control over military commissions); Laura K. Donohue, *The Brennan Center Jorde Symposium on Constitutional Law: The Perilous Dialogue*, 97 CALIF. L. REV. 357, 385 (2009) (“With the legislature restricted in its ability to check and monitor the executive, the task of pushing back falls to the judiciary.”).

63. *See Twombly*, 550 U.S. at 562 (2007) (“To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention that understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.”); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically*, 59 AM. U.L. REV. 553, 561(2010) (“In other words, the Union argued that the complaint's allegations of discrimination were conclusory. Justice Black could have responded in kind to the Union's lack-of-specificity argument by either pointing out that the complaint did make such allegations, or that the specificity the Union wanted was irrelevant under the substantive law. Instead, the Court retorted with the general philosophy of notice pleading.”).

## II. THE DEFAULT PROCEDURES OFFERED BY NORMAL LIFE AND CIVIL LITIGATION

Over two decades ago, William Felstiner and his colleagues examined the transformation of harms into disputes.<sup>64</sup> They found, first, that people often do not even perceive harms as injuries. These harms are simply incident to living. At some point, however, certain harms are “named” by society as injuries, and for some percentage of these injuries, injured parties identify someone who is to “blame.” For an even smaller percentage of these injuries, injured parties transform their injuries into “claims”—by approaching the alleged wrongdoer directly with a demand for compensation or by invoking the power of a court or some other neutral forum.<sup>65</sup> The multiple and psychological steps involved in this transformation process help to explain why researchers have found that relatively few harms are transformed into lawsuits.<sup>66</sup>

Marc Galanter has similarly demonstrated that despite Americans’ reputation for litigiousness, a remarkably small percentage actually transforms its identified injuries into claims. The likelihood of such transformation has been found to be particularly low in the area of discrimination.<sup>67</sup> For many victims of long-standing discrimination, perhaps the very act of making a claim, with its inevitable call for attention and redress, requires a willingness to escalate conflict and face unpleasant consequences.<sup>68</sup> Not everyone is able or willing to bear such

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64. See William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 631 (1980); see also Marc Galanter, *Access to Justice in a World of Expanding Social Capacity*, 37 FORDHAM URB. L.J. 115, 117-119 (2010) (describing the dispute perspective in legal studies and the “dispute pyramid”).

65. Felstiner, *supra* note 64, at 635-36.

66. See Kevin Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1953 (2009) (observing that based on empirical research, “litigation is by no means a knee-jerk or common reaction in the United States, as overall only 5% of the survey’s grievances ultimately resulted in a court filing”) (citing Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 544 (1981)).

67. 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, 14 (1983) (almost three quarters failed to move from grievance to claim) (citing Miller & Sarat, *supra* note 66, at 537, table 2).

68. See e.g., Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84 (2007) (research suggesting that women who behave assertively in negotiation are judged more harshly than men who behave similarly); CATHERINE H. TINSLEY, ET AL., NEGOTIATING YOUR PUBLIC IDENTITY: WOMEN’S PATH TO POWER, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE (Christopher Honeyman, James Coben and Giuseppe De Palo, eds. 2009) (arguing that women are perceived as more effective negotiators if they use the caretaker stereotype and thus should frame their demands in terms of caring for

consequences, and this dynamic alone could explain many marginalized parties' hesitation to transform their harms into concrete disputes, claims and demands.<sup>69</sup> Alternatively, marginalized parties may anticipate that their claims will simply be ignored. Indeed, data from the Equal Employment Opportunity Commission shows that while 80% of employee-claimants express willingness to accept the agency's offer to try mediation, only 30% of employer-respondents are willing to do so,<sup>70</sup> thus suggesting that marginalized parties are wise to expect some degree of stonewalling.

Several areas of research also suggest that once a marginalized party effectively initiates a claim and begins to pursue a negotiated result, she is likely to face obstacles in achieving a clearly advantageous outcome. In part, this is simply the result of human beings' general bias toward maintenance of the *status quo*.<sup>71</sup> The *status quo* inevitably favors the dominant party, and thus a change threatens the dominant party with loss of status or access to some other valued resource, which as noted *supra*, most human beings resist.<sup>72</sup> But in addition, recent procedural justice

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others); Laura Kray, *Leading Through Negotiation: Harnessing the Power of Gender Stereotypes*, 50 CAL. MGMT. REV. 159 (2007) (urging women to exploit caretaker stereotype).

69. See LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 4 (Princeton University Press 2003) (reporting that in one study, men were eight times more likely than women to negotiate for their salaries; in another study, men were nine times as likely to ask for more money than was offered as payment for participation in an experiment; and in a third experiment, men reported initiating four times as many negotiations as women); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 n.337 (2004) (suggesting this dynamic for parents of children with special needs); RUBIN ET. AL., *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* 117-67 (3d ed. 2004) (describing the escalation of conflict, conditions that lead to stalemate, and how de-escalation begins).

70. See Clark, *supra* note 21. These results are consistent with research conducted by Mediation Center with the Minnesota Human Rights Department in the 1980s, when the Department first introduced the use of mediation to resolve discrimination claims. See JUDITH L. JUHALA, SANDER H. LUND & BARBARA MCADOO, *EVALUATION OF A SIX MONTH PROJECT ON THE EFFECT OF TELEPHONE FOLLOW-UP ON PARTY WILLINGNESS TO MEDIATE DISCRIMINATION DISPUTES* iii, 12 (Mediation Center, 1989) (finding that "charging parties were most likely to reject mediation because: they 'don't trust the other party' (45%), 'don't believe the other party will be reasonable' (50%) or 'don't know enough about mediation (37%)'. . . . More than three-fourths (83%) of respondents who declined mediation did so as a result of a belief that the other party did not have a case worth mediating." Only 16% of charging parties identified this as their reason to decline mediation. Ironically, "[a]lmost three quarters in both groups endorsed the statement 'people should communicate and cooperate when they have a dispute.'").

71. See Anthony Vitarelli, *Happiness Metrics In Federal Rulemaking*, 27 YALE J. ON REG. 115, 129 (2010) ("The endowment effect describes an individual's propensity to overvalue the retention of a currently owned asset.").

72. See Lorenzo, *supra* note 10, at 789; Christopher S. Elmendorf, *Ideas, Incentives, Gifts and Governance: Toward Conservation Stewardship of Private Land*, In *Cultural*

research indicates that a higher-status party is likely to maintain a single-minded focus on achieving the advantageous outcome he believes he deserves, regardless of the procedural niceties offered by lower-status parties.<sup>73</sup> In contrast, a lower-status party is quite likely to accept a disadvantageous outcome if she perceives that the higher-status party provided her with the opportunity to speak, considered what she said and tried to be open-minded and respectful. Indeed, when people find themselves in situations that accentuate hierarchy and unequal status—situations that then trigger strong suspicions that scarce resources will be allocated on the basis of identity-based status rather than situation-specific merit—they are particularly likely to notice if they have been treated in a procedurally just manner.<sup>74</sup> All of this suggests that if parties with less power and lower status are treated like valuable members of a group, they will tend to accept less advantageous outcomes. Though this may be good for the preservation of community harmony, it does not bode well for marginalized parties' substantive success in negotiation.<sup>75</sup>

Simply on an instrumental basis, marginalized parties often have fewer options and thus less ability to demand a good deal by threatening to walk away. In two studies comparing car dealers' initial quotes to and final deals with white males vs. white females vs. black males vs. black females, for example, the white males received the best (lowest) initial quotes and final deals; the black males and black females received the

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and *Psychological Perspective* 2003 U. ILL. L. REV. 423, 464 (2003) ("Group identification and intergroup tension rise hand in hand when groups compete with one another for resources, and conflict is more likely when groups reject each other's central values."); Robert J. Fisher, *Intergroup Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION 166, 169 (observing that intergroup conflict arises when there is unequal access to a valued resource).

73. See Ya-Ru Chen, et al., *When Is It "A Pleasure To Do Business With You?" The Effects of Relative Status, Outcome Favorability, and Procedural Fairness*, 92 ORG. BEHAV. & HUM. DECISION PROCESSES 1 (2003); see also JANE W. ADLER, ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 76, 83 (1983) (Unlike unsophisticated individual litigants, institutional litigants who made extensive use of the arbitration program appeared to care little about "qualitative aspects of the hearing process. They judge arbitration primarily on the basis of the outcomes it delivers.")

74. See Jan-Willem Van Prooijen, et al., *Procedural Justice and Status Salience as Antecedent of Procedural Fairness Effects*, 82 J. PERSONALITY & SOC. PSYCHOL. 1353, 1359 (2002).

75. See Nancy Welsh, *Perceptions of Fairness in Negotiation*, *supra* note 47, at 171; see also Kristina A. Diekmann et al., *Does Fairness Matter More to Some than to Others? The Moderating Role of Workplace Status on the Relationship Between Procedural Fairness Perceptions and Job Satisfaction*, 20 SOC. JUST. RES. 161, 163 (2007); Jan-Willem Van Prooijen et al., *Procedural Justice and Intragroup Status: Knowing Where We Stand in a Group Enhances Reactions to Procedures*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 644 (2005); Jody Clay-Warner, *Perceiving Procedural Injustice: The Effects of Group Membership and Status*, 64 SOC. PSYCHOL. Q. 224 (2001).

worst (highest) initial quotes and final deals.<sup>76</sup> The researchers hypothesized that dealers anticipated that the white men would be most likely to shop around; they thus required the best deals. The black males and females, in contrast, were perceived as having less time and tendency to comparison-shop. The dealers could treat them less well, without suffering any negative consequences.

Research thus indicates that the default procedures of normal life reflect and serve to maintain hierarchy and the unequal allocation of resources and power.<sup>77</sup> Some people and institutions are likely to be heard and to receive the resources to which they believe themselves to be entitled. Other people and institutions are much less likely to be heard and, if treated respectfully, will generally be willing to accept a smaller allocation of resources.

In contrast, and particularly following the expansive definition of notice pleading proclaimed in *Conley*,<sup>78</sup> the courts have seemed to promise something different to those who perceive that their place in the hierarchy and their share of coveted resources are so unfair and unprincipled that they must be inconsistent with the rule of law. Marginalized individuals who access the courts also gain access, at least in theory, to the courts' expressive and coercive power to force several significant changes in the default procedures of normal life. First and perhaps most powerfully, the courts offer to the marginalized plaintiff a forum in which to tell her story in full, initially in her written complaint and ultimately before a judge or jury. The institutional defendant, meanwhile, may be required to do many things in the course of civil litigation that it is not required to do in normal life—e.g., respond directly and in writing to the plaintiff's claims; reveal information to the plaintiff; listen as the plaintiff makes her argument and offers her evidence to an impartial and powerful adjudicator; make its own arguments and offer its own evidence to the adjudicator; make these arguments in a public forum; and abide by the decisions of the adjudicator. As Professor Owen Fiss has observed, civil litigation promises to equalize power—and though it regularly fails to achieve this

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76. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995).

77. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 19 (1984) ("[T]he rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction (the duality of structure).").

78. Of course, heightened pleading is required by Rule 9(b) of the Federal Rules of Civil Procedure, as well as by statute or by the courts in certain contexts. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551 (2002).

promise, civil litigation's default procedures certainly have the effect of modeling a modification to the balance of power that exists in normal life.<sup>79</sup>

As noted *supra*, however, most litigated cases settle before trial,<sup>80</sup> and most disputes are resolved without resort to litigation. This Article now considers how the different default procedures of normal life and civil litigation influence the likelihood and character of pre-trial and pre-litigation consensual dispute resolution.

### III. THE INFLUENCE OF THE DEFAULT PROCEDURES OF NORMAL LIFE AND CIVIL LITIGATION ON THE LIKELIHOOD AND CHARACTER OF PRE-TRIAL AND PRE-LITIGATION COMMUNICATION, NEGOTIATION AND OTHER FORMS OF CONSENSUAL DISPUTE RESOLUTION

Beginning in the 1980s, and then with encouragement from Congress<sup>81</sup> and various state legislatures,<sup>82</sup> the courts have embraced negotiation, mediation and other consensual dispute resolution procedures conducted in the shadow of judicial hearings and trials.<sup>83</sup>

79. See Fiss, *supra* note 2, at 1076; but see Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1874-75 (1997) (contrasting ADR advocates with litigation romanticists); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 560-61 (2006) (explaining that family experience with the Holocaust and personal experience as a legal services lawyer have kept her from becoming a "litigation romanticist").

80. See Galanter, *Vanishing Trial*, *supra* note 1.

81. Civil Justice Reform Act, 28 U.S.C.S. § 471-482 (1990); Alternative Dispute Resolution Act of 1998, 28 U.S.C.A. § 651-658 (1998).

82. See Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 9 (Donna Stienstra & Susan M. Yates, eds. 2004) (describing various state statutory schemes requiring courts to offer ADR, establishing pilot projects and enabling local courts to establish their own programs).

83. In 2004, for example, 13,566 federal district court cases were referred to mediation; in 2005, 68 of 94 federal district courts had authorized referral to mediation. See Donna Stienstra, *Emerging Issues in Federal Court ADR*, Presentation at The Dickinson School of Law of the Pennsylvania State University (Sept. 12, 2005) (presentation materials on file with author). In 2006-2007, 2,070 general district court mediations and 280 circuit court mediations occurred in Virginia; see ADR—The Wave of the Future, Overview and Statistics, [http://www.courts.state.va.us/drs/general\\_info/overview\\_and\\_statistics.pdf](http://www.courts.state.va.us/drs/general_info/overview_and_statistics.pdf). In 2005-06, all twenty Florida judicial circuits ordered some percentage of substantial (\$15,000) non-family civil cases (i.e., "circuit" cases) into mediation. FLA. STATE COURTS, FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM 73 (19th ed., 2005-2006), [http://www.flcourts.org/gen\\_public/adr/bin/2006Compendium.pdf](http://www.flcourts.org/gen_public/adr/bin/2006Compendium.pdf). Seven of those circuits kept sufficient data to report that they had ordered 8,947 circuit court cases into mediation in 2005-2006, while 6,494 of these were mediated. *Id.* at 75; see also Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 55 (2003) (observing that Florida's "'official' statistics only tell part of the story because court supported mediators and mediation programs exist alongside a thriving private mediator sector").



Rule 16 of the Federal Rules of Civil Procedure specifically provides for the discussion of settlement in court-ordered judicial pre-trial conferences and the use of other procedures, such as mediation, to facilitate settlement.<sup>84</sup> Indeed, courts have now become such advocates for the use of mediation and its potential to reduce the expense and time associated with civil litigation<sup>85</sup> that some now require parties to participate in mediation *before* discovery or after the completion of only “bare bones” discovery.<sup>86</sup> Professor Michael Moffitt, meanwhile, has advocated for negotiation *as a condition precedent* to the filing of a civil action.<sup>87</sup>

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84. F.R.C.P. R. 16(a)(5) and (c)(2)(I) (also requiring authorization by statute or local rule for use of “special procedures to assist in resolving the dispute”).

85. See Bobbi McAdoo, *All Rise, the Court is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 394-97 (2007).

86. See e.g., ADR POLICIES AND PROCEDURES, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, § 3.4(B) (“Unless otherwise ordered, the mediation shall be held within 60 days after the Initial Case Management Conference (Rule 16) or issuance of the Initial Case Management Order, whichever occurs first.”); Drake v. Laurel Highlands Found., Inc., 2007 U.S. Dist. LEXIS 87185, \*3 (W.D. Pa. 2007); Hughes v. InMotion Entm’t, 2008 U.S. Dist. LEXIS 63369, \*15 (W.D. Pa. 2008). See also Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. OF DISP. RESOL. 241, 290-92 (2002) (describing the positive effects of requiring early mediation in civil litigation in Ottawa and Toronto); McAdoo, *All Rise*, *supra* note 85 at 386 (urging the development of rules for the early use of mediation).

87. Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 749-56 (2005). Professor Moffitt has elaborated quite persuasively upon pleadings’ potential to chill optimally-productive negotiations:

Negotiation best practices counsel disputants away from virtually every one of the effects of pleadings. Problem-solving theorists advise jointly constructing a multi-factored, complex vision of the past. Pleadings demand the opposite. Emotional and non-rational aspects of bargaining take center stage in much negotiation literature. Pleadings suggest scrubbing problems of all such considerations. Theorists argue that complex, systematic problems are best addressed when every affected party gains a fuller understanding of the contribution systems at play, so that a long-term solution can be crafted. Pleadings focus the inquiry on blame allocation, with “contribution” treated as merely a matter of proportional blame. Negotiation advice consistently recommends maintaining a focus on the future, rather than on the past. Pleadings speak only of the past, with the exception of assertions of entitlement going forward. Classic negotiation theory advises considering underlying interests, ongoing relationships, and multiple possible options, as a means of jointly creating an efficient resolution to the problem. Pleadings limit considerations according to legal relevancy, making integrative adjudicated outcomes virtually impossible. A negotiation specialist charged with designing a difficult-to-resolve problem could scarcely do better than to impose the problem-definition conditions created by pleadings.

*Id.* at 747; see also Michael Moffitt, *Iqbal* and Settlement, *supra* note 20 (observing that because *Iqbal* is likely to delay settlement conversations and enhance parties’ focus on pleadings, it is also likely to reduce the *quality* of settlements—i.e., increase zero-sum thinking, reduce the potential for creative solutions, and reduce the ability to save

Though lawyers' bilateral negotiations settle most civil lawsuits, remarkably little is known about their clients' perceptions of this procedure and its results.<sup>88</sup> Court-connected mediation, in contrast, has been the subject of substantially more study. First, it appears that most court-connected mediations would not occur except for the fact of judicial encouragement or mandate.<sup>89</sup> Second, in the court-connected context, it is not surprising (and arguably quite appropriate<sup>90</sup>) to find that mediation discussions are dominated by the lawyers' and mediators' consideration of the law and litigation risk analysis.<sup>91</sup> Third, research nonetheless shows that most parties perceive that they had significant input into the resolution of their dispute<sup>92</sup> and are both satisfied with the

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opportunity costs and transaction costs). Presumably, much as the courts found after they began ordering parties to "participate in good faith" in mediation, they would need to determine the circumstances under which they would sanction parties who failed to attempt or respond to such pre-pleading negotiation. See SARAH RUDOLPH COLE, NANCY HARDIN ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* § 7:6 (2008) (regarding good faith requirements generally); John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 78-86 (2002); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591 (2001); but see Samara Zimmerman, *Judges Gone Wild: Why Breaking the Mediation Confidentiality for Acting in "Bad Faith" Should Be Reevaluated in Court-Ordered Mandatory Mediation*, 11 CARDOZO J. CONFLICT RESOL. 353 (2009) (examining *Doe v. Francis* and its implications for the interaction between good faith participation requirements and the promise of confidentiality in mediation).

88. But see E. Allan Lind, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 958 (1990).

89. See e.g., Macfarlane, *Culture Change?*, *supra* note 86; Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L.R. 403 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Lawyer Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MISSOURI L. R. 473 (2002); Rosselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 263-5 (2005) (finding that confer and report rules alone did not increase the frequency of lawyers' early ADR discussions, but judicial suggestions regarding use of voluntary ADR did increase the frequency of ADR discussions at some point during litigation). There is no reliable data, however, regarding the exact extent of private mediation.

90. See McAdoo & Welsh, *Look Before You Leap*, *supra* note 3, at 423 (suggesting that perceptions of judges, lawyers and parties indicate that they seek mediated outcomes that are fair and consistent with the rule of law).

91. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Connected Mediation*, 15 GEO. MASON L. REV. 863, 874-75 (2008); Nancy A. Welsh, *Making Deals*, *supra* note 47, at 805-806; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 25-27 (2001).

92. See Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 661 (reporting that "[a] majority of the litigants not only felt the mediation process was fair (72%), but that they had a sufficient chance to tell their views of the dispute (84%) and also had

mediation process and perceive it as fair.<sup>93</sup> For marginalized plaintiffs who have brought an action against an institutional defendant, the mediation may represent their first and only opportunity to be heard effectively by someone they perceive as a representative of the courts—the mediator—and by the decision-makers representing the institution.<sup>94</sup> In some mediation sessions—and more broadly, in some thoughtfully-designed court-connected mediation programs<sup>95</sup>—the parties and lawyers may even be willing to discuss and resolve the non-legal, as well as legal, issues and interests that gave rise to the litigation and will help achieve real resolution.<sup>96</sup> Importantly, most of these benefits of mediation *would not be realized for many marginalized plaintiffs if they did not have access to the courts.*

Public agencies have similarly institutionalized negotiation and mediation in the shadow of adjudicative procedures. In the special education context, for example, the IDEA originally provided only for individualized education program (IEP) meetings between school officials and the parents or guardians of children with special needs and, in the event of disagreement between the school officials and parents or guardians, due process hearings with appeal to the state educational agency and then to state or federal court; after several years of

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considerable input in determining the outcome (63%)” and that 55% expressed satisfaction with their experience in mediation).

93. See Wissler, Court-Connected Mediation, *supra* note 92, at 690-95 (reporting that “[a] majority of the litigants not only felt the mediation process was fair (72%), but that they had a sufficient chance to tell their views of the dispute (84%) and also had considerable input in determining the outcome (63%)” and that 55% expressed satisfaction with their experience in mediation); Julie Macfalane, *Will Changing the Process Change the Outcome? The Relationship between Procedural and Systemic Change*, 65 LA. L. REV. 1487, 1493-94 (2005); Welsh, *Making Deals*, *supra* note 47, at 830-58 (2001) (examining the application of procedural justice research and theory to court-connected mediation).

94. See Welsh, *Making Deals*, *supra* note 47, at 838-46, 851-55 (examining the opportunity for “voice” and “consideration” in court-connected mediation); Welsh, *Stepping Back Through*, *supra* note 69, at 629-32 (examining parents’ post-mediation perceptions regarding the opportunity to be heard and comparing them to the perceptions of school officials); *but see* Riskin & Welsh, *Is That All There Is?*, *supra* note 91, at 876, 894-95 (describing situations in which plaintiffs in medical malpractice actions would have preferred conversation with doctors, who were not present because they were not perceived as decision-makers with settlement authority) (citing Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 456-59 (2007)).

95. See Riskin & Welsh, *Is That All There Is?*, *supra* note 91, at 920-21, 929-30 (describing the various mechanisms used by the U. S. Court of Appeals for the Ninth Circuit, U. S. District Court of the Northern District of California, and Dutch judges to invite lawyers and parties to discuss relevant non-legal, as well as legal, issues and interests in mediation).

96. See Riskin & Welsh, *Is That All There Is?*, *supra* note 91, at 902-21 (proposing three mechanisms to broaden the “problem definition” of court-oriented mediation sessions).

experience with these procedures, Congress amended the IDEA to offer mediation as a voluntary step before the due process hearing.<sup>97</sup> Some states require school districts to participate in the process if it is elected by the parents or guardians,<sup>98</sup> a policy which makes sense as a means to avoid the costs and risk of a due process hearing and, potentially, to improve the school officials' working relationship with the parents or guardians. Research suggests that parents elect to participate in special education mediation only after they have concluded that they are unable to communicate effectively with school officials in their regularly-scheduled IEP meetings *and* because they fear the likely financial, emotional or relational toll of due process hearings.<sup>99</sup> After all, their children generally remain in the same schools or school districts, under the supervision of the very same officials and teachers likely to participate in the due process hearing. Mediation—and the availability of a mediator to facilitate more effective communication, both in terms of speaking *and* listening—appears a responsive, somewhat less contentious option under the circumstances presented. Nonetheless, the availability of the due process hearing plays an important role, both in motivating school officials to participate in mediation and in signaling to the parents federal recognition of their children's potential, the right to be meaningfully included in decision-making about their children's education, and judicial assistance in enforcing such rights.

Other institutional defendants have also introduced mediation as an option to avoid making a formal claim. The U.S. Postal Service (USPS), for example, offers its employees the opportunity to mediate disputes among employees and managers through the REDRESS program. If USPS employees perceive that they are being treated unfairly, they may “lump it” (probably complaining to family members, friends and colleagues but not actually working to resolve the problem) or access several avenues to pursue a “claim,” including raising and discussing their concerns directly with their managers; bringing a grievance under their collective bargaining agreement; bringing an EEO claim (which

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97. See Welsh, *Stepping Back Through*, *supra* note 69, at 612-19 (describing the legal context of special education mediation); Grace D'Alo, *Accountability in Special Education Mediation: Many A Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 202 (2003) (describing the history and experience of Pennsylvania's program for special education mediation and the inclusion of mediation in the IDEA's procedural safeguards).

98. See *id.* at 617, n.192.

99. See Welsh, *Stepping Back Through*, *supra* note 69, at 620-23 (describing parents' pre-mediation perceptions of the value of special education mediation); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 40-41 (1997) (noting that due process “hearings have large personal and transactional costs” and that both “[p]arents and school officials find them stressful, draining, and traumatic”).

will result in an investigation and may be followed by civil litigation); *or* requesting mediation, with an outside mediator paid by the USPS. Many USPS employees have voluntarily chosen mediation as the best of these options.<sup>100</sup>

Importantly, the USPS mediation program arose out of civil litigation—an employment discrimination class action. As part of the settlement of that case, USPS agreed to institutionalize mediation in its operations in Florida, as an alternative to the filing of an EEO claim.<sup>101</sup> The experiment was so successful in reducing EEO claims that the USPS decided to make it a national program. Interestingly, however, the USPS required its REDRESS mediators to move from a “facilitative” to a “transformative” mediation approach.<sup>102</sup> The key differences between these approaches are that transformative mediators do not have settlement as their primary goal and do not offer evaluations of parties’ claims or defenses.<sup>103</sup> The role of the transformative mediator is to ensure that parties have the opportunity to express themselves, hear each other, and exercise self-determination in both the procedure and resolution. The transformative mediator’s ultimate objective is to help the parties improve their “conflict interaction” with each other.<sup>104</sup> The focus is thus enhancement of the productivity of this interpersonal interaction, rather than evaluation of the merits of the particular discrete dispute.

Professor Lisa Bingham, who has conducted extensive research regarding the effects and operations of REDRESS, has explained that the USPS choice to use transformative mediation related entirely to the organization’s goals for the process.<sup>105</sup> Top administrators hoped to improve the workplace environment at USPS. It may be useful to recall here that the term “going postal” had recently emerged as a result of several dramatic workplace killings involving USPS employees as

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100. See Lisa B. Bingham, *Why Suppose? Let’s Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 115 (2002) (noting that 74% of employees voluntarily chose to participate in USPS REDRESS mediation).

101. *Id.* at 112-13.

102. See Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 401-02 (2001); Lisa B. Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service* 14-15 (2003), available at [http://www.businessofgovernment.org/pdfs/Bingham\\_Report.pdf](http://www.businessofgovernment.org/pdfs/Bingham_Report.pdf).

103. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 217 (Revised ed., 2005).

104. See James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS (TM) Program*, 18 HOFSTRA LAB. & EMP. L.J. 429, 430-31 (2001) see also Welsh, *Stepping Back Through*, *supra* note 69, at 591-94 (generally describing transformative mediation at the USPS).

105. See Bingham, *Why Suppose?*, *supra* note 100, at 114-15.

shooters and victims.<sup>106</sup> The top USPS administrators also wanted employees to enter into mediation voluntarily, as an alternative to filing an EEO claim. If REDRESS mediators began evaluating the legal merits of employees' claims, top USPS administrators anticipated that most employees inevitably would hear that their claims were without legal merit and would be dismissed by the EEOC or the courts.<sup>107</sup> Soon, employees would reject mediation as an alternative to filing an EEO claim, believing that mediation was just another USPS mechanism for promising to address but ultimately squelching its employees' complaints. Requiring the use of transformative mediation avoided this outcome.

Indications are that the REDRESS program has worked. Most mediations result in case closure.<sup>108</sup> EEO filings continue to be reduced,<sup>109</sup> and the USPS can also show cost savings as a result of using mediation.<sup>110</sup> Managers report improvements in their ability to listen to their employees and handle conflicts.<sup>111</sup> Brilliantly, the USPS established a program that gained legitimacy from its placement as an alternative to the EEO's legal/administrative procedure but actually delivers a non-legal, vaguely therapeutic process for parties caught in dysfunctional work relationships. Importantly, once again, it is civil litigation that triggered the introduction and design of this useful, consensual procedure—and may be available in the event that mediation does not work.<sup>112</sup>

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106. Nicole Buonocore Porter, *Victimizing the Abused: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 276 (2006) ("Many fear employees 'going postal' (a derogatory phrase derived from the string of murders in post office locations around the country).").

107. The vast majority of EEO claims at the USPS had been found to be without sufficient merit to proceed further. Many have argued more generally that employees often access this legal-administrative mechanism as their only avenue to express very real but non-legally-cognizable frustrations.

108. See Lisa B. Bingham, et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 31 (2009) (reporting case closure rate of 72.3%); Lisa B. Bingham & Mikaela Cristina Novac, *Mediation's Impact on Formal Discrimination Filing: Before and After the REDRESS™ Program at the U.S. Postal Service*, 21 REV. PUB. PERSONNEL ADMIN. 308, 311 (2001).

109. See Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 158 (2004); Bingham & Novac, *Mediation's Impact on Formal Discrimination Complaint Filing*, *supra* note 108, at 326.

110. See David B. Harwi and George Reath, Jr., *Conflict, Management and Mediation* (2002) available at <http://www.niacr.org/papers/article7.htm>.

111. See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 607-08 (1997); Bingham, *Case for Mediation*, *supra* note 109, at 158.

112. Now, after *Twombly* and *Iqbal*, this is true if the discrimination claim can survive a 12(b)(6) motion—and the question of such survival is the subject of some

Over the past decade, other agencies and companies have also created dispute systems designed to provide internal—and consensual—opportunities to identify and resolve workplace disputes, with the effect of improved management systems and the avoidance of litigation and liability. Research suggests that these employers, like the USPS, are achieving their goals.<sup>113</sup> Some employers have institutionalized an entire continuum of dispute resolution procedures<sup>114</sup> to deal with employment-related disputes. It appears that for employers with such a continuum, the consensual processes effectively screen out the cases in which employees have strong claims, leaving only the weakest to proceed to binding arbitration<sup>115</sup> or civil litigation. Outside the employment context,

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debate. See e.g., Suja Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. (forthcoming 2010).

113. See Nancy Welsh, *What is “(Im)Partial Enough” in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395 (2010) (“In some instances, as well, it appears that the employers who adopt employment arbitration have institutionalized a continuum of other dispute resolution processes that screens out the strongest cases, leaving only the weakest to proceed to arbitration.”) (citing Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 323, tbl.2 (Samuel Estreicher & David Sherwyn eds., 2004); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amid the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 414-415 (2007)); see Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 885 (2002) (observing how designers of dispute systems can choose how, when, and whom to empower). Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in THE HANDBOOK OF DISPUTE RESOLUTION, 487 (Moffitt et. al. ed., 2005); Howard Gadlin, *Addressing the Thornier Complexities of Racial Discrimination Complaints in the Workplace*, DISP. RESOL. MAG. Spring 2009, at 25, 26.

114. See Lisa B. Bingham & Tina Nabatchi, *Dispute System Design in Organizations*, in THE HANDBOOK OF CONFLICT MANAGEMENT 105, 116 (William J. Pammer, Jr. & Jerri Killian eds., 2003) (“An integrated conflict management system is a coordinated network of conflict resolution options that is available to persons for resolving conflict in an organization.”); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 630 (2007) (“The ADR field has developed a subfield for policymaking about disputing, called “dispute system design” (DSD). DSD focuses on systematically managing a series of disputes rather than handling individual disputes on an ad hoc basis. Private businesses use it to manage conflicts with employees, customers, and suppliers.”); see generally Stephanie Smith & Jan Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, (2009).

115. See Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 323, tbl. 2 (Samuel Estreicher & David Sherwyn eds. 2004); Welsh, *supra* note 50; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration*

hospitals are also now adopting mediation and other procedures to try to reach resolution and reduce the likelihood of medical malpractice claims.<sup>116</sup> Many companies have also institutionalized mediation and other procedures to resolve disputes with customers and vendors.<sup>117</sup>

All of these in-house initiatives recognize that people bring claims for both legal and non-legal reasons.<sup>118</sup> From the perspective of institutional defendants, if potential plaintiffs' non-legal concerns can be acknowledged and dealt with, there may be no need for legal action with its attendant—and risky—obligations to answer, permit discovery, respond to plaintiffs' emotional appeals and narratives with legal arguments, and abide by third parties' decisions.<sup>119</sup> While the institutionalization of negotiation, mediation and other consensual dispute resolution processes also seems designed to improve the likelihood of early identification and resolution of disputes, as well as contribute to increased levels of satisfaction and productivity, it is

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*Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 807-808 (2003); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 9.

116. See Christopher Guadagnino, Ph.D., *Malpractice Mediation Poised to Expand*, PHYSICIAN'S NEWS DIGEST (Apr. 2004) ("The first institution in Pennsylvania to adopt a formal co-mediation program is Drexel University College of Medicine in Philadelphia, which recently became self-insured after its previous malpractice insurer pulled out of the medical malpractice line of business, according to Drexel's Chief Counsel Tobey Oxholm, Esq." and "Penn State Hershey Medical Center has used mediation for about three years as part of its approach to dealing with medical malpractice. . . ."); see Sorry Works! Coalition, About Us, [http:// www.sorryworks.net/about.phtml](http://www.sorryworks.net/about.phtml) (last visited Apr. 26, 2009).

117. See Welsh, *Institutionalization and Professionalization*, *supra* note 2, at 489 (listing Motorola, Toro, General Mills, Bank of America, Shell International, American Airlines, Coca-Cola Enterprises, Aetna, and CIGNA as examples of companies that have institutionalized dispute resolution procedures, including mediation).

118. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Connected Mediation*, 15 GEO. MASON L. REV. 863 (2008); Smith, *supra* note 6, at 124 (stating that a lawyers role has changed from purely legal duties to a problem solver. "They are called upon to be organizational problem solvers as members of multidisciplinary teams. And—most interesting to us—attorneys in these broader roles sometimes have the opportunity to help organizations create or improve systems that prevent or address conflicts before and after they evolve into full-fledged disputes."); Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 467 (2007); TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 139-41 (2009) (noting that female lawyers representing hospitals were unusual in their intention to use mediation to serve extralegal, as well as legal, goals).

119. See Michelle A. Travis et. al., *Dispute Resolution in Action: Examining the Reality of Employment Discrimination Cases: Proceedings of the 2007 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination and Alternative Dispute Resolution*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 139 (2007) (observing that facilitative mediators produce a "compressed range of settlements" while the average financial settlement was higher with mediators using evaluative interventions; the authors "deemed this phenomenon 'Feel Good vs. More Money'").



unlikely these benefits would have been realized if institutions had not been seeking to avoid the risks presented by the default procedures of civil litigation.

It is important to acknowledge that the default inequities of normal life do not entirely disappear in mediation. A study comparing the results achieved by Hispanic and Anglo parties in mediation produced distressingly disparate results—except, interestingly enough, when the co-mediators were both Hispanic.<sup>120</sup> The parents participating in special education mediation, described *supra*, clearly perceived the school officials as the most powerful actors in their mediation sessions.<sup>121</sup> Howard Gadlin, ombudsman and director of the Center for Cooperative Resolution at the National Institutes of Health, has raised concerns about institutional exploitation of mediation and other consensual procedures, suggesting that they can serve to entrench managers' and administrators' power and discourage legal action when it should be pursued.<sup>122</sup> He has been joined by Professor Leah Wing who argues that mediation is not achieving the social justice goals that advocates originally intended.<sup>123</sup> These are not the first commentators to raise serious and well-founded

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120. See MICHELLE HERMANN ET AL., METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED CASES AT THE METROPOLITAN COURT MEDIATION CENTER (1993); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996); see also Leah Wing, *Mediation and inequality reconsidered: Bringing the discussion to the table*, 26 CONFL. RESOL. Q. 383 (2009).

121. See Welsh, *Stepping Back Through*, *supra* note 69, at 652-55.

122. See Howard Gadlin, *Bargaining in the Shadow of Management*, in THE HANDBOOK OF DISPUTE RESOLUTION 381 (Michael Moffitt & Robert Bordone, eds.) (2005) (describing how mediation and other dispute resolution processes have been co-opted by managers to reassert their authority); Gadlin, *Addressing the Thornier Complexities of Racial Discrimination*, *supra* note 113, at 25, 26 (expressing uneasiness about use of mediation to respond to employment discrimination claims and noting that "most people in the field are quick to dismiss neutrality as a myth and to challenge the ideal of impartiality as illusory even while those terms continue to be employed in most formal and informal mediator job descriptions"); see also Amalia Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES IN LAW 423 (2009) (exploring how the potential transplant of European conciliation courts to America was rejected as patriarchal and deference-based and thus inappropriate for independent and individualistic Americans who demanded a formal, adversarial adjudication process which also promoted freedom and free enterprise).

123. Leah Wing, *Mediation and Inequality Reconsidered: Bringing the Discussion to the Table*, 26 CONFL. RESOL. Q. 383 (2009); see also Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 PEPP. DISP. RESOL. L.J. 211, 249 (2009) (concluding that "the processes of mediation, the outcomes of mediation, and the mediators themselves warrant greater scrutiny than they have been subject to thus far").

concerns about blind advocacy for mediation and other consensual procedures. As I have noted elsewhere:

First, critics argue that mediation . . . do[es] not effectively protect disputants from preexisting social, political, and economic inequalities. The resulting incorporation of such inequalities means that disadvantaged disputants cannot truly engage as equals in the deliberation and decisionmaking that occur within a dispute resolution process. Second, because these dispute resolution processes and their outcomes often are private, the broader citizenry is unable to engage in public discussion and deliberation. Last, because the freedom and equality of the disputants are not guaranteed and their deliberations are not public, critics argue that there is no assurance that the resulting “distribution of goods [will be] just (or at least not unjust).”<sup>124</sup>

These past and current commentators’ concerns deserve (and have received) attention. Yet, it is difficult to argue that a democratic people *should not even be allowed to try* to resolve their disputes themselves, through the mechanisms of negotiation, mediation or other consensual procedures, *as long as the procedures and results are sufficiently fair*.<sup>125</sup> Mediation’s actual and potential faults, however, illustrate the need to ensure that adjudicative procedures exist as a robust counterbalance to consensual procedures. Tellingly, some of the commentators who have raised concerns about the use of mediation have called for a “renewed focus on making democratically selected judges and juries more

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124. Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 57 (2004).

125. Even as I make this argument, I recall the arguments made by judges during the *Lochner* era, that immigrant workers—men, women, children—should be allowed to enter into employment arrangements providing for 60 hour weeks, 7 days a week, and unsafe working conditions. It is always possible for the more powerful to exploit the less-powerful’s questionable ability to engage in effective self-determination. The doctrine of unconscionability in contract law may operate as a brake on such exploitation, at least for those who take their cases to court. See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004) (“Although the unconscionability norm presents drawbacks, it remains an essential tool for policing arbitration terms in contracts.”); but see Jill I. Gross, *McMahon Turns Twenty: the Regulation of Fairness in Securities Arbitration* 76 U. CIN. L. REV. 493, 495-96 (2008) (“[T]he Supreme Court’s FAA decisions in the past twenty years have imbued the FAA with super status: the FAA governs virtually every arbitration clause arising out of a commercial transaction, including securities arbitration, it applies in both state and federal court, it preempts any conflicting state law, and it embodies a strong national policy favoring arbitration as an alternative dispute resolution mechanism. This policy naturally disfavors extensive judicial review of arbitration awards and has led lower courts to develop a stringent test to prevail on a challenge to the procedural fairness of an arbitration proceeding.”)

accessible on a timely basis and at a reasonable cost”<sup>126</sup> in order to test the appeal of negotiation and mediation for marginalized parties. They clearly did not anticipate the *reduced* access to judges and juries that is now potentially signaled by *Twombly* and *Iqbal*.

#### IV. *TWOMBLY’S AND IQBAL’S* DISCOURAGEMENT OF PRE-LITIGATION COMMUNICATION AND NEGOTIATION

Procedural change rarely captures the public imagination, but its societal effects can be profound. With its expansive affirmation of notice pleading in *Conley*, the Supreme Court strengthened plaintiffs’ hands—in response to a pattern of unions’ and employers’ refusal to respond to individuals they apparently believed they could marginalize without suffering any negative consequence.

In contrast, *Twombly* and *Iqbal* urge federal judges to decide *not* to hear and *not* to engage with marginalized parties whose claimed legal harms fail to comport sufficiently with an individual judge’s “judicial experience and common sense”<sup>127</sup> and thus are unable to be “nudged . . . across the line . . . to plausible.”<sup>128</sup> The reliance on individual judges’ experience and common sense is particularly troubling. Professor Jayne Docherty, examining different cultural approaches to the handling of conflict and its resolution, has observed that “our own cultures are largely invisible to us; they are simply our ‘common sense’ understandings of the world.”<sup>129</sup> Professor Jeff Rachlinski has suggested that many of our current judges may now share a common culture as past prosecutors,<sup>130</sup> a common world view that emerges out of that shared experience, and a common sense that may not be entirely common.<sup>131</sup>

126. Welsh, *Remembering the Role of Justice* *supra* note 124, at 58 (citing Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Deborah Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (2002); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155 (2002)).

127. *Iqbal*, 129 S. Ct. at 1950.

128. *Twombly*, 550 U.S. at 570.

129. Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711, 715 (2004).

130. And prosecutors generally enjoy more power than defense counsel in the negotiations that occur in the criminal context—i.e., plea bargaining. See Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?*, 91 MARQ. L. REV. 145 (2007).

131. See Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN ST. L. REV. 1247 (2010); see also Darrell A. H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1011 (2010) (urging that judges should learn to make appropriate use of empathy, with our system of rules “encourage[ing] perspective taking to compensate for experiential deficits, while simultaneously arresting the empathetic process at the moment it turns into altruism, prejudice or bias”).

While this Article has presented courts' direct and indirect encouragement of pre-litigation and pre-trial consensual procedures as positive outcomes of *Conley*'s liberal pleading standard, *Twombly* and *Iqbal* suggest a different worldview regarding negotiation and settlement. In *Twombly*, Justice Souter relies on articles and cases that are nearly two decades old to posit the alleged futility of judicial case management and the "dark side" of consensual procedures:

And it is self-evident that the problem of discovery abuse cannot [be] solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries"; *the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings*. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with non "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a § 1 claim.<sup>132</sup>

Justice Souter frames communication, negotiation and settlement as unprincipled blackmail. He directs particular skepticism toward the time and effort required, and the ultimate futility, of judicial case management.<sup>133</sup> Similarly, in *Iqbal*, Justice Kennedy points out how civil litigation—and presumably, parties' required participation in judicial settlement conferences—can distract government officials from the accomplishment of their mission: "[W]e are impelled to give real content to the concept of qualified immunity for high-level officials *who must be neither deterred nor detracted from the vigorous performance of their duties*."<sup>134</sup> The sort of engagement required by civil litigation—responding to plaintiffs' claims, dealing with discovery, communicating with the judge—seems to be viewed here as unnecessary and unhelpful, particularly when corporate leaders are dealing with fierce global competition, agency heads are responding to a terrifying and invisible enemy, and judges are under pressure to make quick work of their caseloads. Listening, communicating, responding—the Supreme Court's language suggests that these represent a waste of time that needs to be directed elsewhere, especially when it is marginalized parties who are

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132. *Twombly*, 550 U.S. at 559 (emphasis added).

133. This is confusing since judicial case management has proven quite effective overall. See JAMES S. KAKALIK ET.AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (Rand 1996). Meanwhile, the cases and articles regarding judicial case management to which Justice Souter refers are quite old. *Id.*

134. *Iqbal*, 129 S. Ct. at 1954 (emphasis added).

asking for attention and thus demanding a different and unpopular allocation of scarce social resources.<sup>135</sup>

Though Judge Lee Rosenthal has urged quite persuasively that federal courts are being careful in their application of *Twombly* and *Iqbal* to civil rights claims,<sup>136</sup> it is difficult not to fear that these decisions' solicitous protection of the prerogatives of institutions and institutional officials will embolden them in just the way that lower courts' decisions in *Conley* seemed to encourage the Brotherhood and its leaders to behave as they did in the events leading up to the Supreme Court's decision. Less dramatically, courts may perceive that they have less need for pre-trial mediation to dispose of cases. Institutional actors may begin reconsidering and rescinding their offers to engage with employees and other marginalized parties in pre-litigation procedures. And even if courts continue to offer mediation and institutions maintain their dispute systems, *Twombly* and *Iqbal* are likely to weaken marginalized claimants' already-disadvantaged hands.

Pre-trial and pre-litigation consensual procedures that offer real voice and opportunity for effective dialogue and resolution to marginalized individuals should be lauded, not undermined. Surely our courts, as part of a democratic justice system, want to continue to encourage individuals *and* institutions to listen to each other and work together toward solutions, before accessing expensive and precious public resources. Assuring access to the courts helps to achieve this goal.

#### V. SUMMARY JURY TRIAL AS A POTENTIAL RESPONSIVE OPTION

Others have offered excellent alternatives to *Twombly* and *Iqbal* as part of this symposium<sup>137</sup> and elsewhere.<sup>138</sup> Professor Ray Campbell, in

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135. See Fisher, *supra* note 72; see also Rafeal Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. POVERTY LAW & POL'Y 205, 217 ("As a result of the failure to follow the objective paradigm envisioned in the attribution theory, a person's perception of the cause of another's behavior becomes vulnerable to a number of biases, thus becoming less accurate."); Keith G. Allred, *Anger and Retaliation in Conflict: The Role of Attribution*, in THE HANDBOOK OF DISPUTE RESOLUTION 236 (Moffitt et. al. ed., 2005).

136. See Rosenthal, *supra* note 26.

137. See Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN ST. L. REV. 1191 (2010).

138. See Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010). See also Angelique EagleWoman (Wambdi A. WasteWin), *A Constitutional Crisis When the U.S. Supreme Court Acts in a Legislative Manner? An Essay Offering a Perspective on Judicial Activism in Federal Indian Law and Federal Civil Procedure Pleading Standards* (manuscript on file with author) (commenting on proposed statutory solutions and noting that "[f]or scholars of federal Indian law, the Court's judicial activism has been a

particular, has proposed a potential two-step examination of plaintiffs' pleadings, with the plaintiff electing to submit to reduced scrutiny at the first step in order to gain limited discovery but then proceeding to a second step involving stricter scrutiny of her pleadings.<sup>139</sup> This option seems especially appropriate in the small percentage of civil lawsuits that are likely to involve disproportionate levels of discovery.<sup>140</sup> I will offer a brief addendum to this proposal, drawn from past experiments with one particular court-connected dispute resolution procedure that has largely fallen into disuse. My addendum is designed to respond to the concerns that have been expressed about costly and wasteful discovery in some cases while focusing on providing marginalized plaintiffs with a meaningful forum in which to tell their stories *and* engage in informed, consensual dispute resolution.<sup>141</sup> Specifically, I propose the use of summary jury trial to aid courts as they determine whether to allow plaintiffs to proceed into discovery—or after they have completed the limited discovery proposed by Professor Campbell.

The summary jury trial, which was first introduced by Judge Thomas Lambros in 1980,<sup>142</sup> combines elements of the jury trial with negotiation and judicial settlement conferences. Counsel present abbreviated arguments to a jury, supplemented by limited witness testimony and documentary evidence. The proceeding is short, generally lasting a half-day to one full day in more complex cases. Following the

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constant complaint rarely heeded by Congress. Now that the Court has expanded its judicial activism to limit vindication of federal rights created by Congress, the Court's oppressive tactics in federal Indian law may gain much needed attention.")

139. See Campbell, *supra* note 137.

140. See Elizabeth Thornburg, *Giving the "Haves" A Little More*, 52 SMU L. REV. 229, 246-49 (1999) (summarizing research showing that for the vast majority of lawsuits, there is no or a reasonable amount of discovery, but that a very small percentage—less than 5% to 10%—involved a large volume of discovery activity and discovery disputes; also indicating that the amount in dispute has the highest correlation with discovery problems); Thomas E. Willging, et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998) (reporting in Federal Judicial Center study that "the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and . . . discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases").

141. It appears that my proposal will thus be consistent with the request made by many lawyers responding to questions from the Federal Judicial Center regarding the impact of *Twombly* and *Iqbal*. See Thomas E. Willging & Emery G. Lee III, *In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation*, 34 (Federal Judicial Center, March 2010) ("Following the cost-focused theme of these interviews, more than half of the suggestions [from lawyers] clustered on procedures to increase opportunities for case evaluation and settlement during the early stages of civil litigation").

142. See Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 481, 468-89 (1984).

parties' presentation of their cases, the jury deliberates and returns with its verdict. The verdict is advisory, not binding. The lawyers often then poll individual members of the jury to determine why they decided as they did. The jury is thanked for its service and excused, and the parties and their lawyers then convene to try to negotiate a resolution, informed by the jury's verdict and individual jurors' reasoning. The judge may join the lawyers and parties, to facilitate their settlement discussions.

As Judge Lambros has noted, the proceeding "is designed to provide a 'no-risk' method by which the parties may obtain the perception of six jurors on the merits of their case without a large investment of time or money. . . . SJT is a predictive tool that counsel may use to achieve a just result for their clients at minimum expense."<sup>143</sup> The summary jury trial also provides the parties with the opportunity to present their narratives, listen to each other in a structured, respectful setting, and then negotiate to a resolution.

The particulars of the summary jury trial could be adapted in a myriad of ways to respond to today's needs. Discovery and motion practice preceding the summary jury trial could be limited, by agreement or by local rule. The number of jurors could vary. Members of the jury might be permitted to ask questions during the proceeding or submit written questions to the judge. The judge presiding over the summary jury trial could also provide her assessment of the parties' cases and anticipated verdict.<sup>144</sup> Liability and damages could be bifurcated. Public access could be required. A mediator, rather than a judge, could assist the parties' and lawyers' subsequent settlement negotiations.

Most significantly for purposes of this Article, a summary jury trial would provide a marginalized plaintiff with the opportunity to tell her story to a judge, jury and decision-makers for the defendant. It would approximate the experience of procedural justice provided by a "day in court" while also offering the opportunity for settlement—and risk management—through a consensual dispute resolution process.<sup>145</sup>

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143. *Id.*

144. This assumes that the judge would not also preside over trial, if the case did not settle.

145. See Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, LOY. L. A. L. REV. 1585 (2008) (describing Charleston County's use of summary jury trials for tort claims involving low damages); see also Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 204 (2010) (proposing the use of preliminary judgments and citing to use of summary jury trial as a similar procedure); Janine Robben, *Oregon's Vanishing Civil Jury Trial: A Treasured Right, or a Relic?*, 70-NOV OR. ST. B. BULL. 19, 24-25 (describing a proposed one-day "fast track" trial option with limited discovery and motion practice); but see Elizabeth Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Federal Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 567 (2010) (positing that summary jury trial may have a disparate impact on civil rights and employment

Even more important, it would be likely to trigger anticipatory consensual dispute resolution. Negotiations could (and likely would) occur prior to the summary jury trial. The sorts of internal dispute systems designed earlier likely would be maintained, in part to avoid the occurrence of a summary jury trial. Mediation could be made part of the summary jury trial—or could occur long before the process. The courts would continue to play a key role in encouraging and modeling mutual, respectful and productive pre-trial and pre-litigation communication, negotiation, mediation and other types of consensual dispute resolution.

#### CONCLUSION

Professor Marc Galanter has noted recently:

[T]he legal systems of (most?) modern democracies are designed in a way that if everyone with a legitimate claim invoked them, the system would collapse. The viability of such systems depends on: (a) the efficacy of “general effects,” i.e., exerting control through communication of information rather than actual enforcement; (b) the availability of informal proxies for legal action; and, finally, (c) the apathy, ignorance, cultural and cost barriers that inhibit the assertion of legal rights. Such systems are inherently tokenist and symbolic—rules are there to be celebrated and cherished, not to be applied in every instance that they presumptively cover.<sup>146</sup>

Judge Wayne Brazil, meanwhile, has written quite movingly about “the courts’ most precious and only necessary assets”:

[P]ublic confidence in the integrity of the processes the courts sponsor and public faith in the motives that underlie the courts’ actions. We must take great care not to make program design decisions that invite parties to infer that the courts care less about doing justice and offering valued service than about looking out for themselves as institutions (e.g., by reducing their workload, or off-loading kinds of cases that are especially taxing or emotionally difficult or that are deemed “unimportant”).<sup>147</sup>

Both Professor Galanter and Judge Brazil recognize the special role that our courts can and should play in delivering—and encouraging and modeling—sufficiently just procedures and outcomes to American citizens.

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discrimination cases, but acknowledging the difficulty in analyzing this); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

146. Galanter, *Access to Justice*, *supra* note 64, at 118-19.

147. Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 124 (2002).



Access to our courts is essential if our still-young democratic nation really means to fulfill its heady but difficult promises of political and social inclusion and mobility.<sup>148</sup> Our public justice system certainly relies upon the private risk management that occurs in negotiation, mediation and other consensual dispute resolution procedures, in order to avoid overload and the collapse referenced by Professor Galanter. Less obviously, the risk management that takes place in negotiation, mediation and other consensual processes must be counterbalanced by the expressive and coercive powers of a robust justice system, accessible to the marginalized and less powerful, in order to avoid cooptation by the inequities of the default procedures of normal life.

The experience of justice is certainly a public good,<sup>149</sup> but it is not a commodity. This is easy to forget in light of the valuation, purchase and sale of legal rights that occur so frequently within the shadow of our courthouses. Much like *real* science, *real* conversation, *real* music, *real* dancing and even *real* relationships, the experience of *real* justice requires mutual engagement and patience with a never-ending, ever-evolving process, characterized by constant give-and-take and unexpected twists and turns. And in all of these dynamic processes, every experiment, every word, every note, every step counts.

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148. See ORLANDO PATTERSON, LIBERTY AGAINST THE DEMOCRATIC STATE: ON THE HISTORICAL AND CONTEMPORARY SOURCES OF AMERICAN DISTRUST, in DEMOCRACY AND TRUST (ed. Mark E. Warren, 1999) (describing how Northeastern liberals were ready to “give the vote” to the disenfranchised but then found means to undermine their ability to exercise that vote); see also AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920, 137 (1981) (describing how some advocates for women’s suffrage actually were motivated by the desire to expand the Anglo-Saxon Protestant vote in order to reduce the voting power of Black men in the South and naturalized immigrant men in the North); Michael Kent Curtis, *The Klan, the Congress and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism*, A Brief Historical Review, 11 U. PA. J. CONST. L. 1381 (2009).

149. See generally Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).