Rights and Resolution in Mediation
Our Responsibility to Debate the Reach of Our Responsibility

By Wayne D. Brazil

Enabling individuals and entities to use the power of the state to enforce substantive rights through neutral, predictable, and largely transparent procedures that are administered and refereed by government has been considered essential to the rule of law. Does mediation pose a threat to the rule of law, so considered? What is the relationship between conventional notions about what the rule of law consists of and mediation? Can mediation be integrated into a larger system of civil justice in ways that promote the rule of law—or is there some irreconcilable tension between the two paradigms of dispute resolution?

These issues, of course, are not new. They have lurked in the shadows of our field forever. Over the past couple of decades, some high visibility and thoughtful critics have pointed to real perils that can accompany overdevotion to settlement and to rigid orthodoxies that elevate what mediators would view as enlightened values over what the traditionalists would call substantive rights. Mediators, it is argued, are jeopardizing the rule of law by being too ready to sacrifice rights in pursuit of resolution.

The mediation community has never mounted a systematic effort to address the critics' concerns or to tease out, in detail, the character, extent, or implications of the problem. One reason for this state of affairs, of course, is that neither mediation nor the "mediation community" are even remotely monolithic. Some forms of mediation are very rights driven. The role that "rights" play in the dynamics of the mediation process can be vastly different in different forms of mediation, as it is, for example, in the evaluative and in the transformative versions of the process.

Despite these realities, concern persists in many quarters that there is an "orthodoxy" in the ADR world that helps mediators, in particular, rationalize the sacrifice of rights for the sake of promoting resolution. This orthodoxy, in the eyes of the critics, holds that achieving settlements, promoting understanding between parties, and encouraging people to focus on the future are much more important than identifying past wrongs and compelling wrongdoers to make amends for the consequences of their past conduct.

Concern about this kind of mediation orthodoxy has surfaced, dramatically, in a series of opinions by courts of appeal in California that have struggled to reconcile that state's very strict statutory protection of mediation confidentiality with the courts' interests in honoring substantive rights and with the judiciary's responsibility to preserve procedural and evidentiary fairness. This set of judicial struggles to preserve fundamental fairness in individual cases has exposed how confidentiality rules (sometimes enacted at the behest of mediators) can expose the way our community has chosen to strike the balance between resolution and substantive rights. If we want to protect that balance, we had better be prepared to counter accusations, sometimes by judges, that mediators care more about protecting themselves and their precious (literally) process than they do about whether parties comply with substantive societal norms.

What are some of the other reasons we should launch a serious effort to explore the tension between rights and resolution at this juncture in our history? Several reasons occur to me—but one of them most definitely is not a waning belief in the importance of our movement. The values that some forms of mediation can help parties pursue are among the most beautiful in the human experience. And no other forms of dispute resolution are more likely to lead parties to such profound shifts in perspectives and relationships. I believe, however, that some of our critics have pointed to problems that, if ignored, could cause considerable harm to the values that our movement is most committed to serving.

One purpose of this article is to provoke debate about the character, magnitude, and significance of the tension between rights and resolution. I hope we can use debate and dialogue about this issue to refine our thinking about our roles and to locate zones of ethical comfort that are grounded in hard and frank thought about this question, rather than in an easy moral inertia.

The "rights v. resolution" issue has taken on considerable added significance with the apparently increasing marginalization of our courts, the institutions whose processes and powers have so long been viewed as the core source of protection of our rights. The growing disproportion between transaction costs and case value, measured in money, has had two consequences of concern for us. One is well recognized: many cases of modest economic value and many litigants of limited means have been effectively priced out of the court system. So more and more people must look to something other than the adjudicatory process to address their problems.

The second consequence of the acceleration of transaction costs is that higher percentages of litigants who decide to brave the court system are doing so without lawyers. These trends invite us to focus on an issue of great importance in the "rights v. resolution" debate: do we and our critics assume that litigation in fact protects parties'
rights? Does such an assumption square with the realities of litigation in our society today? How likely is it that the adjudicatory system will protect the rights of a person who tries to navigate it without a lawyer? How likely is it that the adjudicatory system will protect the rights of a person whose lawyer is compelled by economic constraints to forgo use of some of the basic procedural tools of the process? And why do we assume that a jury verdict following even a vigorously and well-litigated case will protect the parties' competing rights? Do most knowledgeable observers believe that most juries get it "right" almost all the time, or even most of the time? Or, is what the Seventh Amendment "guarantees" really our right to a tie rather than our substantive rights?

At the close of both of the last two jury trials over which I presided, even though all parties were represented by competent lawyers, I felt no confidence that I really knew whether anyone's rights had been invaded or vindicated. I suspect that a disproportionate percentage of the cases that go to trial are the close ones—the ones in which rights are most difficult to determine. But experiences like these make me worry that we overestimate the certainty in the determination of "rights" that the trial process generally yields.

As these questions and comments suggest, one of the benefits of addressing the "rights v. resolution" issue would be refining and making more realistic our appreciation of what the word "rights" means, as well as our understanding what the traditional system of civil adjudication actually delivers.

There are additional reasons, in some ways more compelling, for systematically exploring this issue. One is that ADR, once marginal, is now mainstream, in part as a result of the same economic pressures that have driven parties away from the court system. ADR occupies important space in both the private and the public sectors, and a constellation of pressures and incentives promises to push its reach further and further into the fabric of our society.

In fact, I believe that ADR, especially mediation in its various forms, already has displaced the trial process as the principal locus of dispute resolution in our society. If ADR is doing, or soon will be doing, the lion's share of the dispute resolution work in our country, and if confidence in the vitality of rights (as well as fear of their enforcement) is important to the health of our polity, we better pay attention to what happens to rights in ADR.

Stated differently, as the role of ADR in our dispute resolution system expands, so does our responsibility to consider the extent of our responsibility for the alignment of outcomes with legal entitlements.

The recent dramatic shift in our national political landscape is the third reason for grappling with the rights-resolution tension now. Liberals now occupy the principal seats of power. And liberals have been the most vocal and incisive critics of the rush to resolution and the pressure to push complainants out of the court system. Liberals worry about the little guy—and it is the little guy, or the big guy with the little problem, whose interests and rights have been most clearly jeopardized by the economic forces that have vitalized the ADR movement. This is ironic because liberals share the values that animate most fundamentally the philosophic leaders of the ADR movement. If push comes to shove, however, and the liberals with political power feel that they must choose between protecting the rights of the less powerful and promoting right-less resolution of their disputes, they are sure to sacrifice resolution in the name of rights. Liberals want access to justice, not just access to resolution. So we better figure out how to reassure them, and ourselves, that push has not come to shove.

The liberals are right, of course, about the importance of rights. It is a necessary precondition to our society's viability that there be a widespread and clear understanding among the people that they have rights and that the system will protect them. Knowing that their rights will be enforced provides people with the confidence, the trust, that they need to make the commitments, to do the work, and to follow the rules that are the essential prerequisites to the functioning of a free society.

To maximize our movement's capacity to move the real world, we must reassure the skeptics, the thoughtful as well as the cynical, that it is the real world in which our methods and theses are rooted. We must be understood as appreciating fully the importance of having visible and real sources of discipline in our human affairs. To err is human. To be lazy is human. To be greedy is human. To cut corners and to "look out for number one" is human. Given all these natural and ubiquitous facts of life, it is especially important that the people perceive that there are systems of external checks on these nonmalicious but problem-causing or advantage-taking tendencies and temptations. If mediation is a principal vehicle for dispute resolution, it may be important that mediation serves, or has the capacity to serve, as a foreseeably effective external check on our problem-causing tendencies.

It follows that if ADR came to be seen as pushing resolution at the expense of rights, or if ADR in fact often compromised rights, significantly, en route to securing resolution, the long-term viability of our movement would be jeopardized, and we would risk doing serious harm to the health of our democracy.

Glib responses and superficial reassurances won't cut it in this arena—the issues are too important. We need to resist, visibly, the temptation to bury all concern about this issue by attacking exaggerations of its magnitude or its inevitability. We would disserve ourselves and the people who use ADR processes if we simply contended that

Wayne D. Brazil is on the faculty at Berkeley Law. Before that, he was a United States Magistrate Judge in the Northern District of California for 25 years. He is a member of the Dispute Resolution Magazine editorial board. He can be reached at wdbrail@law.berkeley.edu.
this question is based on a false dichotomy, if we insisted (superficially) that the only kind of resolution we promote is resolution that honors and protects rights. Perhaps, in a perfect world, this should be our mission and should be the product of the ADR work we do, but the world falls a bit short of being perfect.

We also must be alert to the risk that we will respond superficially to the issues in the rights-resolution debate by mouthing (without real reflection) the well-worn mantras of party self-determination and process integrity, or by taking moral refuge in the indeterminacy of civil litigation.

Is it sufficient to insist that because party self-determination is one of our core values, it is entirely the responsibility of the parties to fix, for themselves, the balance between rights and resolution? What should be our role if the two parties fix this balance at different places, but we have a very well-grounded conviction that, in fixing this balance, one of the parties clearly has misunderstood and significantly underserved his or her rights?

At a different level, shouldn’t we ask ourselves how realistic it is, at least in some circumstances, to expect parties to be able to fix this balance intelligently? To do that, wouldn’t parties need to have discovered all the significant evidence, to have secured rulings on and to understand accurately all the law that would be applied in their case, to understand and to be able to control themselves, and to enjoy full freedom of decision making? How often will parties be so well equipped? And wouldn’t we end up sacrificing some of ADR’s most significant potential benefits if we insisted that, before we hold our ADR sessions, the parties at least have acquired all the information that would be needed to enable them to strike reliably the rights/resolution balance?

Moreover, sometimes when parties sense that we expect them to fix the balance between rights and resolution, they expect us to help equip them to do so, that is, they expect us to give them well-grounded evaluative inputs. It won’t do for us to insist that it is not our role to provide such input. In some settings some of us will steadfastly decline to do so. But in many others, the parties will press us for such help. Yet we often will remain reluctant to provide it. Why? A theory about what our role should be is not the only answer. Another and more instructive source of our reluctance often is our awareness (sometimes acute) that we don’t know anywhere near enough to responsibly identify the place where the balance should be struck.

Sometimes even well-represented parties also are acutely aware that they don’t know enough to locate their own point of balance. That awareness can make them feel that it is unfair to make them do so. So sometimes they want us, their mediators, at least to share this responsibility with them. They look to us for guidance. And when they are paying customers, they may feel that one of the things they are paying for is that guidance (or, phrased differently, an expert second opinion). The upshot of all this is that in more than a few cases when the parties exercise their right of self-determination, they end up self-determining that they will rely (in part) on us to help protect them from unfairness or an ill-advised resolution decision. In these circumstances, we will find it very difficult to use the concept of party self-determination to escape the tension between rights and resolution.

Can our commitment to integrity of process insulate us from concern about tensions between rights and resolution? To address this question intelligently, we first must be sure that we know what we mean by the phrase integrity of process. There are two loci of process integrity: (1) our conduct, and (2) the conduct of the other participants in our ADR proceedings. Maintaining process integrity in our own conduct (as a mediator, for example), may seem to consist primarily of honoring negatives—not lying, not misleading, not manipulating, not pressuring. Not expressing, or at least not advocating, our substantive views. It is not clear to me how we could escape all responsibility for imbalance between rights and resolution simply by honoring these kinds of negative commandments.

The situation becomes even more muddled when we focus on the conduct of the other participants. What if some of the participants are lying, or concealing important information from their opponents, and we know it? What if one of the participants is taking advantage of another participant’s situational vulnerability? What if some of the participants are manipulating other participants and we sense it? What if that manipulation is promoting resolution? If our concept of process integrity prohibits us from taking action that benefits or protects only one party, in this kind of situation, the effect of honoring our concept of process integrity may very well be to elevate resolution over rights.

What about the indeterminacy of civil litigation? Does it provide us with a refuge from the rights-resolution debate? Is indeterminacy a reality in all civil litigation? To the same degree? Or, in some cases, is the degree of indeterminacy sufficiently small to render this concept inaccessible as a moral excuse?

We should acknowledge that while we appreciate, after a great deal of experience, that considerable indeterminacy attends much litigation, many litigants (especially
those who are not institutional repeat players) might not understand or accept this unsettling fact of litigation life!
We understand (sort of) that litigation indeterminacy wobbles the notion of rights. But litigants want to have rights; they want to believe that they have rights that are real—and that are made real by being protected by the system of civil justice. It follows that many parties are likely to feel confused and alienated by a message from us that suggests that their expectations about rights and about the system of civil justice are misplaced.

Moreover, if our ADR processes are occupying, or about to occupy, most of the field of civil justice, is it wise for us to try to promote resolution by sending messages to parties that challenge their belief in the reality of rights, that undermine their confidence in the rule of law? When we emphasize such messages (e.g., to encourage “flexibility” in the parties’ settlement positions), we may, in effect, promoting resolution in individual cases at the cost of intensifying parties’ alienation from the system of civil justice. In so doing, we risk elevating resolution over rights.

These questions should prompt us to step back and to consider how important it might be to discourage the public from assuming that mediation necessarily involves the compromise of rights in the pursuit of resolution. They also should prompt us to launch a sustained examination of the tension in our field between rights and resolution—to press vigorously for the tools to decide how far we should cast our net of responsibility for the outcomes of our mediations.

There will be no “one-size-fits-all” answer to these questions. In some measure, at least, each of us will need to work out our own answers—and to acknowledge that even the answers we fashion for ourselves are likely to vary with the circumstances in which we are working at any given time. Appropriate responses to these dilemmas are likely to be very context-specific, and the factors we weigh when we try to fix the boundaries of our responsibility could vary significantly from one setting to another.

It is not obvious, for example, that the magnitude or character of the possible tension between rights and resolution will be the same in criminal cases as in civil disputes, or, within the civil arena, in family law proceedings as in securities class actions. Similarly, the problem may have different dimensions in civil cases between sophisticated, well-heeled, and well-represented institutional players, and in civil cases that are brought or defended by individuals proceeding in pro per. Nor is it clear that the issues will be the same in ADR proceedings that are designed, paid for, and conducted entirely in the private sphere, and in those into which parties are ordered in court programs. How we assess such tensions also could depend in part on the character of the specific ADR process on which we are focusing and/or the role the neutral plays. And in every context we must take into account the expectations of the parties, any implicated interests of nonparties, and the competing policies that inform confidentiality rules.

Viewed as a whole, the task of teasing out all the analytical strands in this arena seems overwhelming. But if the issues are too important to be ignored, and the risk of real harm to values we hold dear would be too great if we quit the field and let others control the debate. So let’s move forward, tackling manageable pieces of the challenge one at a time.

Endnotes
3. In the U.S. District Court for the Northern District of California, for example, “In 2008, pro se cases constituted 38 percent of all civil cases, the highest percentage in at least ten years.” [See Richard W. Wiegand, Clerk of Court, Statistical Report 2008, United States District Court, Northern District of California, p. 1.] Similar trends have been visible at the appellate level in the federal system. Between 1993 and the year 2000, for example, pro se appeals rose nearly 30% in the Ninth Circuit, while total filings during that same period rose only about 10%. See United States Courts, Ninth Circuit, Annual Report and Ten-Year Retrospective (2000).

Which Is Better, Food or Water? (continued from page 8)

they once touted as delivering speed, efficiency, finality, and subject-matter expertise, many participants now see as having been infested by the rule of law kudzu. In each of these views, dispute resolution was working well until parasitic rule of law notions came and poisoned the process.

This parasitic imagery to describe the relationship between the rule of law and dispute resolution is flawed in at least two ways. First, each story relies on a questionable vision of how things looked before the "invasion" of the other. Each story gives its own side a primordial prominence and independence that would be difficult to support empirically. Second, neither explains why the parasite has been so difficult to remove. Whatever time line one imagines, if the “other” were truly so unwelcome, we ought to see at least some instances in which the parasite is absent. Both sides’ parasite imagery is almost certainly flawed.

Of Evolution and Inseparability

Biology offers a second possible image of the relationship between two linked organisms—inevitability. Plant cells used to look different than they do today.
Today's plant cells include chloroplasts, organelles that convert sunlight into energy through photosynthesis. But chloroplasts have distinct genetic material and divide independently in a way that strongly suggests that chloroplasts were once entirely separate from plant cells. The most prominent biological explanations today hold that somewhere along the line, cyanobacteria (whose DNA is closely related to chloroplasts) infected primitive plant cells, or that primitive plant cells tried to eat the cyanobacteria. Eventually, the two developed a symbiotic relationship, with each profiting from the other's presence. And still later, as each evolved, they lost their independence. Today, chloroplasts cannot survive independent of a plant cell, and the presence of chloroplasts is part of what makes a plant cell a plant cell, because photosynthesis occurs only with the assistance of chloroplasts. In short, the two are no longer separable.

One could not sensibly have a conversation about whether chloroplasts are more important than plant cells. The two are so hopelessly intertwined that one could profitably describe their features, but one could not argue one's superiority over the other.

Might this imagery help with the conversation about the rule of law and dispute resolution? Are the two so inseparable as to make it effectively impossible to excise one from the other? Probably not.

One of the few things on which proponents of the rule of law and proponents of dispute resolution might heartily agree is that the two remain distinct. The rule of law and dispute resolution may hold some compatible ideals, and they may provide mutual benefits in practice, but they are not the same thing. One knows whether one is in mediation or in litigation. One can tell the difference between judge and arbitrator. One knows whether one is privately crafting a forward-looking deal or publicly arguing for the state to impose pre-established remedies based on a determination of what happened in this case. But being linked is different from being inseparable. Proponents on each side of the conversation continue to speak as though one could have one without the other, and so long as that is even a theoretical possibility, the two are not inseparable.

Of course, dispute resolution and the rule of law continue to evolve. Their foundational theories and the efforts to realize each in practice look different today than they did a hundred years ago. And a hundred years is a blip on the radar screen in evolutionary terms. So perhaps it is the height of hubris to declare that the two will forever be separate, no matter what happened with plant cells and chloroplasts. Perhaps their current linkage is a precursor to their eventual inseparability. But I don’t think we’re there yet, and I can’t currently envision how we ever would be.

Of Mutualism and Symbiosis

Biology offers a third image of linked organisms—symbiotic mutualism—which I think is more apt for the purpose of providing an image of the relationship between the rule of law and dispute resolution.

Relationships characterized by symbiotic mutualism appear in many contexts. For example, clown fish (including the cute ones that appear in Finding Nemo) commonly live among the tentacles of sea anemone. The territorial clown fish protect the anemone from invertebrates that eat anemones, and fecal matter from the clown fish provides nutrients to the anemone. At the same time, the anemone’s stinging tentacles provide a refuge for the clown fish, which has developed protection against the effects of the anemone’s poison.

Indeed, in some circumstances, the symbiotic relationship is so strong that one or both of the sides involved needs the other to survive. For example, our stomachs contain a combination of microorganisms known colorfully as “gut flora.” These bacteria and other organisms get a nice, warm place to live, and we get help with digesting last night’s buffalo wings.

The rule of law and dispute resolution have a mutual symbiotic relationship. Each depends on certain contributions from the other in order to thrive—and perhaps even to survive.

What the Rule of Law Provides for ADR

The rule of law, in its current incarnations, provides at least three things to the theory and practice of dispute resolution. First, the rule of law provides disputants and prospective disputants with at least some understanding of each party’s entitlements and legitimate expectations. Among the functions of law, although surely not its only function, is providing a clear picture of the rights each of us holds with respect to each other and with respect to the state. Absent some sense of these entitlements entering a dispute resolution process, resolution would be difficult to achieve because each party might reasonably have an unbounded set of expectations about the potential solution set.

Second, the rule of law provides a vehicle for enforcing the outcome of a dispute resolution mechanism—giving effect to rights and obligations. This is true both for litigation and its alternatives. Declaring someone to hold an entitlement to something is hollow absent the prospect of enforcement, as I have previously noted:

The assumption that courts’ decisions will necessarily take effect is a given only to those whose experience is limited to relatively recent domestic litigation. Those of us who have worked internationally know that in many countries, it is far from obvious that a court’s decision will translate into action on the ground. Indeed, not so long ago, it was an open question whether an unpopular court order would take effect in the United States. The
compelling images of National Guard troops in Little Rock, Arkansas, helping to enforce the decision to desegregate schools are often rightly used to illustrate the triumph of law and justice. One might also reasonably use those images as a reminder of the fragile dependence of law and justice on implementation. Litigation’s promise includes the promise of implementation.\(^1\)

The rule of law supports dispute resolution efforts by providing some assurance that the terms upon which a dispute is resolved (whether through litigation, arbitration, mediation, or some other process) will take effect.

Third, the rule of law creates behavioral boundaries for those engaged in a dispute resolution process. If there were no threat of sanction under the rule of law, how often would private bargaining be characterized by fraud? How often would mediations be marked by coercion? How often would attorneys place knowingly perjured testimony into evidence or fail to be fully candid with the court or tribunal? I cannot make any empirical claims about the answer to any of these questions. Perhaps dispute resolution mechanisms would not devolve into purely Hobbesian nightmares. But every dispute resolution mechanism I can think of functions best when it has at least some assurance that its participants will not engage in the worst possible behavior. The rule of law can take much of the credit for providing that assurance.

**What ADR Does for the Rule of Law**

Similarly, dispute resolution provides the rule of law with at least two contributions on which the rule of law relies. The first of these contributions is that dispute resolution creates scale effects for the rule of law. In isolated instances, the state can step in, declare a set of rights to exist, and then enforce those rights in a way that upholds the rule of law. The state cannot, however, hope to create a society living under the rule of law if the state is required to act as the enforcement vehicle at every turn. Even under the most totalitarian, expansive vision of the role of government, the rule of law depends more on the decisions of private actors than it does on the intervention of the state. Virtually every human interaction raises the prospect of multiple different legal entitlements coming into play. A simple walk through a shopping mall raises the prospect of a variety of mischievous interactions that call to mind a law student’s first-year curriculum (contracts, torts, property, criminal law, etc.). And yet, the measure of whether the rule of law is working well in our daily lives is almost always the absence of the heavy hand of the state. We engage in transactions, resolve differences, and move on with our lives in ways that are consistent with the underlying themes of the rule of law because of interaction patterns rooted in dispute resolution.

Second, dispute resolution makes it possible for the state’s machinery to articulate and enforce the rule of law in those instances when doing so is necessary. In part, this is a simple matter of capacity: courts do not have the resources to address every grievance that could potentially give rise to a lawsuit. In short, courts would be buried to the point of ineffectiveness if there were no plea bargains and no settlements or alternatives to litigation.

But the interaction between dispute resolution and the rule of law is deeper than merely questions of institutional capacity. Dispute resolution removes a nonrandom selection of cases from courts’ dockets. If it is functioning well, dispute resolution filters out the “right” cases. It takes the cases for which dispute resolution’s structure is better suited—for example, those in which truly creative outcomes are possible, those in which nonadversarial exchanges can improve or heal relationships, and those in which a dispute potentially affects people who lack legal standing or the capacity to join in a law-focused resolution process. The cases dispute resolution leaves for the courts, then, are ones for which the courts are better matched. Dispute resolution, in effect, serves not just a docket-thinning function, but also a triage function for the courts. And in this way, courts’ resources better serve the rule of law.

Because I view the rule of law and dispute resolution as symbiotic and mutual, I could not begin to say which one is better. Each needs the other in order to meet its potential.

Now, which is better, the clown fish or the sea anemone? That is the sort of question my kindergartner could embrace. 

**Endnotes**


3. See, e.g., Kevin C. McMuigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833 (1990) (arguing that "we should worry about having too little rather than too much adjudication," given the effects of routine settlement on litigators’ practices); Luban, supra note 2 at 2623 (citing skills development for attorneys as a benefit of litigation).


5. Moffitt, supra note 1 at 1209.
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