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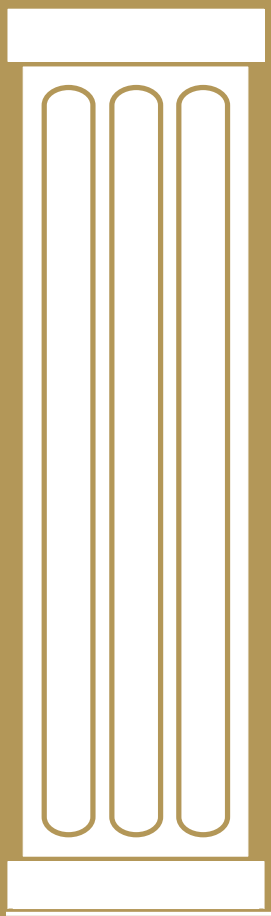

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American College of Civil Trial Mediators

MISSION STATEMENT

The ***American College of Civil Trial Mediators*** is a non-profit organization of dispute resolution professionals who are distinguished by their skill and professional commitment to civil trial mediation.

Membership is limited to active mediators, program administrators, and academics who have achieved substantial experience in their field as well as professional recognition for their accomplishments.

The Fellows of the College are dedicated to improving ethical and professional standards of mediation practice while fostering the growth of alternative dispute resolution systems throughout the country.

In fulfilling its mission, the College conducts advanced ADR education programs, supports ADR research, and encourages the growth of ADR systems. In addition, it is a principal objective of the College to publicly recognize those persons making major contributions to the ADR movement nationwide.

October, 1995

AMERICAN JOURNAL OF MEDIATION
Editorial Board Introduction

The American College of Civil Trial Mediators recently joined the ADR Section of the New York State Bar Association to co-sponsor what may well be the richest Law Student Writing Competition in the United States. The *NYSBA/ACCTM National Championship ADR Law Student Writing Competition* received over 50 submissions from law schools throughout the US and Canada vying for the $10,000 first place prize. Each submittal was reviewed, graded and ranked by a panel of judges to arrive at our grand prize winners featured in this issue of the *Journal*. The competition judging was done through the joint efforts of the Editorial Board of the ACCTM Journal of Mediation, a host of volunteer Fellows of the College and select members of the NYSBA Dispute Resolution Section. Each entry was reviewed in the blind and given an initial numerical grade by the judges. The twelve entries receiving the highest grades were then ranked against each other to select the final winner. What emerged to capture the grand prize and the top ranked articles were clearly "the best of the best**".** This issue of the *Journal* is dedicated to those final contenders.

We proudly lead off with our grand prize winner, "*How to Mitigate the Risk of Setting Aside or Refusal of Recognition and Enforcement of a Med-Arb Award"* written by **Sara Bendizi** (Harvard Law School 2017) followed by the highest ranked New York winner, *"The Past, Present and Future of 'Manifest Di**s**regard*'" by **Carl Mudd** (Brooklyn Law School, 2017).

We've also included in this issue four entries selected by members of our Editorial Board as their personal favorites with a short introduction from each explaining why. We hope you will enjoy the creativity and writing skills evident in each of these articles**.**

The College and the Journal recognize ACCTM Fellows, **Lela Love** (NY) and **John Salmon** (FL) who worked tirelessly on the Joint NYSBA/ACCTM Planning Committee over the past year to bring this program together. A very special vote of thanks is also due to our Editorial Board Members, **John Salmon, Wendy Trachte-Huber** (CO), **Jay Fraxedas** (FL), and **Don Philbin** (TX) who served as judges and lent invaluable support to the program. The College must also express a deep appreciation to Fellows **Stew Cogan** (WA), **Jill Sperber** (CA), **Richard Lord** (FL), **Peter Grilli** (FL), **Allen Schreiber** (AL), **Jay Sandak** (CT) and **Charles Crumpton** (HI) who volunteered their time to participate as judges in this significant program. Finally, we recognize Fellows **Josh Stulberg** (OH) and **John Wilkinson** (NY) who conceived the program at the ACCTM 2016 Annual Meeting and actively promoted its implementation within both organizations.

Lawrence M. Watson, Jr.
Editor In Chief

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MED-ARB: HOW TO MITIGATE THE RISK OF SETTING ASIDE OR REFUSAL OF RECOGNITION AND ENFORCEMENT OF A MED-ARB AWARD

Sarah Benzidi

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I. Introduction

Albert Einstein reportedly said: "The true sign of intelligence is not knowledge but imagination."[1] One field in which we can observe the human imagination is the field of dispute resolution mechanisms. Parties can choose among litigation, arbitration, mediation, negotiation, parenting cooperation, early neutral evaluation, mini-trial, settlement conference, and referral to the expert, and this enumeration is not even exhaustive.

One of the numerous options available to parties to solve their disputes is a process called med-arb. Although advantageous in many respects, this fairly recent alternative dispute resolution mechanism is not without its problems. Can those problems be overcome? This is what this paper seeks to examine.

The paper will be divided in three main parts. In the first part (II), we will issue a brief reminder about what med-arb is (A and B) and look at the reasons why med-arb has been developed in recent decades (C).

The second part of this paper (III) will be dedicated to an analysis of the issues raised by the hybrid nature of med-arb. Emphasis will be placed on four specific issues that might have a direct impact on the viability of an arbitral award rendered in the context of a med-arb. Those issues are the rule of confidentiality (A), the right to know of and to confront the other side's arguments (B), impartiality (C) and independence (D).

Finally, we will assess med-arb and its potential benefits in light of the four analyzed issues. Has our imagination gone too far? Or is this innovative form of ADR worth keeping, and if so, under what conditions? Is it possible to mitigate the risk of setting aside or refusal of recognition and enforcement of a med-arb award? This will be the subject of the last part of this paper (IV).

[1] Actually, this quote would not be entirely correct and would be constructed from this sentence: "Imagination is more important than knowledge" (interview of Albert Einstein by George Sylvester Viereck in the October 26, 1929 issue of the Saturday Evening Post).

II. Med-arb: a hybrid form of ADR

A. Definition of med-arb

As the word indicates, med-arb is an alternative dispute resolution mechanism that combines mediation and arbitration in sequence in a single case. Mediation is a "voluntary, confidential process in which a third-party neutral intervenes to assist the disputants to negotiate a mutually acceptable resolution." [2] Arbitration is "the most formal alternative to court adjudication wherein disputing parties present their case to one or more impartial third person who are empowered to render a binding decision." Med-arb, then, refers to "the hybrid process in which mediation is combined with arbitration."[3]

Med-arb is a two-stage dispute resolution mechanism. In the first stage, parties try to come to an agreement with the help of a third-party neutral called a med-arbiter, who first assumes the role of a mediator. If the parties do not solve their dispute during this first stage, they enter the second stage of the process, the arbitration phase, in which the med-arbiter switches roles from mediator to arbitrator. In that second stage, the parties relinquish control over decision making to the arbitrator, who conducts an adjudicative hearing to decide either the entirety of the dispute or the outstanding issues, if the parties reached a partial agreement in the mediation phase.[4]

The parties may also choose two different neutrals to serve as the mediator and the arbitrator in their dispute. However, this paper will focus on the situation, sometimes referred to as "same-

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[2] ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS: ANALYSIS AND CASE STUDIES at 8 (Otto J. Hetzel & Steven Gonzales eds., ABA Book Publishing, 2015).

[3] Gu Weixia, *The Delicate Art of Med-Arb and its Future Institutionalisation in China*, 31(2) PAC. BASIN L. J. 97, 97 (2014).

[4] Allan Barsky, "*Med-Arb": Behind the Closed Doors of a Hybrid Process*, 51 FAM. CT. REV. 637, 637-638 (2013). This author notes that the parties are free to "agree in advance whether the arbitrated decisions will be binding or nonbinding (sometimes called "recommendatory"). Most arbitrators and theorists favor binding arbitration so the process necessarily results in a definite outcome."

neutral med-arb," where the parties appoint the same neutral to serve both functions.[5]

Finally, it should be stressed that med-arb is a voluntary process. There can be no med-arb without an agreement of the parties to use this type of dispute resolution mechanism.[6]

B. How does it work in practice?

Both the mediation phase and the arbitration phase of a med-arb are closed to the public. It is therefore difficult to know what exactly goes on behind the closed doors of a med-arb.[7] Beyond the fact that all med-arb proceedings combine mediation and arbitration, the process may differ considerably from one med-arb to another. The overall structure and conduct of a med-arb proceeding will ultimately depend on the parties (including the specifications they have made in their dispute resolution clause or contract) and on the med-arbiter (her education, her experience, and her preferred approaches, which may vary based on the specific circumstances of each case). For instance, the usual definitions of "med-arb" imply that the mediation phase and the arbitration phase are separated, but with the agreement of the parties, the med-arbiter could also move back and forth between mediation and arbitration.[8]

Med-arb should be distinguished from other alternative dispute resolution mechanisms like early neutral evaluation[9] or, in

[5] Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 320 (2011).
[6] *Id*. at 323.
[7] Allan Barsky, *supra* note 4, at 638.
[8] Allan Barsky, *supra* note 4, at 638. Please note that this paper focuses on med-arb as defined as a process composed of a mediation phase chronologically followed by an arbitration phase.
[9] Like the med-arbiter, the early neutral evaluator may use techniques related to mediation and arbitration. However, her role is primarily to provide the parties with an evaluation of the case, based on the evidence and the arguments presented to her by each party. She might help the parties to reach an agreement but only after rendering an evaluation report, which is never binding (contrary to the arbitral decision rendered by the med-arbiter) (Allan Barsky, *supra* note 4, at 639). See also, on this topic, ALTERNATIVE DISPUTE RESOLUTION IN STATE AND

the context of family law, parenting coordination.[10] It also ought not to be confused with arb-med, in which the arbitral hearing occurs before the mediation session. In an arb-med, the arbitrator will usually issue an award and put it in a sealed envelope before the parties start mediating. If the parties reach an agreement, the neutral tears up the envelope and the decision will never be revealed. If they do not, the arbitrator reveals the award.[11] Arb-med does not raise the same issues as those created by med-arb. However, it can be more time-consuming and more expensive.

C. Why was med-arb developed?

1. General context

In recent years, the ADR community has seen increasing experimentation with med-arb, noting that med-arb proceedings are a "frequent feature in many mass-tort settlement ADR programs that have been reviewed and approved by the courts in recent years."[12] As early as 1997, a survey indicated that med-arb was the preferred ADR procedure for 23% of the survey's respondents in the service industry, and 13% in the transportation, communications, and utilities group.

LOCAL GOVERNMENTS: ANALYSIS AND CASE STUDIES at 28 (Otto J. Hetzel & Steven Gonzales eds., ABA Book Publishing, 2015).

[10] A parenting coordinator will use methods similar to mediation and arbitration but also akin to evaluation, parenting education, co-parent counseling, monitoring or enforcement. The scope of the techniques used by a parenting coordinator is thus broader than that of a med-arbiter. Moreover, the parenting coordination usually is less formal than med-arb, especially in its second stage (for instance, the parenting coordinator may decide on certain issues without "conducting a court-like hearing for each issue to be decided"). Also, parenting coordination will usually occur after a judicial decision has been rendered and is supposed to help the parents to implement the order, whereas med-arb is usually used by the parties with the hope of avoiding going to court (Allan Barsky, *supra* note 4, at 638-639).

[11] Kristen M. Blankley, *supra* note 5 at 335 (footnote 63).

[12] Thomas J. Brewer & Lawrence R. Mills, *Combining mediation & arbitration*, 54(4) DISP. RES. J. 32, 34 (1999).

Table 8
Preferred ADR Procedure by Industry (in percent)

Procedure	Mining/ construction	Durable mfg.	Non-durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Mediation	60	70	65	63	56	68	59	50
Arbitration	30	16	23	18	18	17	19	17
Med-arb	0	6	3	13	8	2	5	23
In-house grievance	0	5	4	4	13	2	11	10
Mini-trials	0	1	0	0	0	0	0	0
Fact-finding	0	1	3	0	3	6	0	0
Peer review	0	0	1	0	0	0	3	0
Ombudsperson	10	1	0	4	2	4	3	0

Source: see footnote 13

More recently, Robert N. Dobbins noted that hybrid processes, particularly med-arb, were "growing in popularity."[14] And a 2008 survey among practitioners indicated that process concerns about med-arb were decreasing.[15]

How can we explain the growing interest in med-arb? The process first arose in the public sector[16] before gaining popularity in the private sector. According to Brian A. Pappas, interest in med-arb is rising among professionals who provide both mediation

[13] DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES – A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS at 12 (Cornell/PERC Inst. on Conflict Res., 1998). More than 600 companies responded to the survey.

[14] Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 162 (2005). See also Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40, 40 (2013).

[15] Questionnaires were sent to about 100 commercial arbitrators and mediators in the country. 68% of those answering agreed that an arbitrator "may serve" as both mediator and arbitrator. "The percentage, noted Phillips, may have been even higher, because in retrospect, the question may have been misleading—some who answered 'should not serve' likely answered based on their own risk-benefit analysis, rather than based on the facts that persuade parties to want an opportunity to have a conflict mediated and then, if necessary, arbitrated by the same neutral." (Gerald F. Phillips, *Back to Med-Arb: Survey Indicates Process Concerns Are Decreasing*, 26 ALTERNATIVES TO HIGH COST LITIG. 73, 78 (2008)).

[16] "In order to reach a collective bargaining agreement, particularly in important industries in which striking is not a viable option for the public good" (Kristen M. Blankley, *supra* note 5, at 323-324). For more details about the historical development of the med-arb process, see Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 665 (1991).

and arbitration services, because of the increasing legalization of ADRs: "Mediation is becoming more evaluative and adversarial, arbitration and litigation are increasingly similar, and arbitration is viewed as too costly, too inefficient, and effectively, the 'new litigation.'" [17] Med-arb seems to offer a process combining the best of mediation and arbitration: it guarantees a final resolution of the conflict ("finality") but leaves some room for settlement ("flexibility"), which promotes "efficiency and cost-savings over the use of arbitration."[18] In short, med-arb proponents consider that it resolves the problems of mediation and arbitration: "The Med-Arb 'solution' is to combine arbitration's finality with mediation's flexibility in order to gain efficiency and the best of both processes."[19]

2. Med-arb's appealing features

Features contributing to the appeal of med-arb are many and, as mentioned, include finality, efficiency and flexibility.

A med-arb process offers the parties greater flexibility when compared to pure arbitration, because the parties can try to resolve their dispute by themselves in a first step, which is especially valuable if the parties want to preserve their relationship. Therefore, they have more control over the overall dispute resolution process.

Parties are also sure to find a solution to their dispute, either by their amicable agreement or by the arbitral award. Med-arb's finality guarantees the parties that a decision will be made if they cannot settle by themselves. This guarantee does not exist in a pure mediation, where the parties who do not reach an agreement will have to incur the expenses of a new process (e.g., arbitration, litigation).

Relatedly, med-arb is also generally regarded as an efficient dispute resolution mechanism. Once the parties recognize that no agreement can be reached, the arbitration phase can go

[17] Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 159 (2015).
[18] *Id.* at 159.
[19] *Id*. at 166-167.

relatively fast. The med-arbiter will already know the issue, the facts, and the positions of the parties upon entering the second phase of the med-arb. Contrary to a "pure arbitrator," the med-arbiter will be able to carry out her mission without having to study the case from scratch. The med-arbiter may thus not need as much time to decide the case as a judge or an arbitrator would.[20]

Since the parties are supposed to try to find a solution by themselves in the presence of the potential arbitrator of their case, the parties to a med-arb may be incentivized to be more reasonable.[21] For instance, "research in commercial uses of med-arb suggests that clients tend to be more conciliatory and less hostile in med-arb as compared to pure mediation (…) Clients know that they mediate in the shadow of arbitration; accordingly, they may be more likely to reach a decision."[22] Hence, med-arb may be useful in a particularly high-conflict situation where the parties (or at least one of them) tend to be unreasonable. This latter aspect may have the effect of encouraging the parties to resolve their dispute more rapidly, which can have a positive impact on the overall cost of the process.

As just mentioned, cost might be an appealing factor too. A med-arb proceeding will likely be less expensive than litigating the dispute in court. By opting for a "same-neutral med-arb," the parties will contract with one person to deliver two services and

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[20] Patrick Van Leynseele, *Med-Arb et tierce décision obligatoire: les enjeux, les écueils, les solutions et les précautions à prendre*, 1 JURIM PRATIQUE, 104-105 (2014); JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL at 229-230 (West group, 2nd edition 2001).

[21] *Id.* at 106. See also Brian A. Pappas, supra note 17 at 159 (the "*finality of arbitration is utilized as the stick to promote good behavior in mediation*"); JACQUELINE M. NOLAN-HALEY, *supra* note 20 at 229; Bette J. Roth, Med-arb, Arb-med, Binding Mediation, Mediator's Proposal, and other Hybrid Processes, 2 (American Arbitration Association Advanced Mediator Training, November 6, 2009, available online at http://www.rothadr.com/pages/publications/aaa%20medarb.pdf (later visited April 20, 2017).

[22] Allan Barsky, *supra* note 4, at 640. See also John T. Blankenship, *Developing your ADR attitude: Med-Arb, a template for adaptive ADR*, 42 TENN. B.J. 28 (2006). Some studies also demonstrate that parties were substantially more motivated to settle during the mediation phase to avoid the loss of control that would come in the arbitration phase (Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40 (2013)).

will thus most likely pay less than if they had to appoint two different persons to fill the roles of mediator and arbitrator.[23]

Another advantage of combining mediation and arbitration is that it may allow the parties to substantially narrow their dispute during the mediation phase, leaving only the outstanding issues for the arbitration stage. In some cases, it may be useful to the parties for the arbitration of the outstanding issues to take place "as soon as possible following the narrowing of the dispute accomplished during the mediation phase. (…) If the mediator has earned their confidence, the parties may prefer to have the mediator decide the remaining issues over any other neutral."[24] Parties could also ask the med-arbiter to decide between the parties' last best offers, or within the range bounded by those offers.[25]

These factors may make med-arb particularly attractive for parties involved in small cases that do not warrant big dispute-resolution costs. Parties also might be willing to use med-arb in bigger disputes that they would like to solve in a fast, efficient and cost-effective manner over which they would like to retain relative control.[26]

III. Four potentially problematic issues regarding med-arb

Despite all the advantages to parties, in allowing the same neutral to play the role of mediator and arbitrator in the same case, med-arb raises important practical, ethical, and legal issues.

The choice of a med-arbiter might present a practical difficulty. Although one might think that the parties can save time in the appointment process, since they only need to find one person instead of two to intervene as a mediator and arbitrator – which may be true in some cases – the parties might actually have trouble finding and agreeing on the choice of a neutral who has the (very unique) skills required to assume both functions. If the med-arb is

[23] For different tips about how to reduce the cost of a med-arb process, see Kristen M. Blankley, *supra* note 5 at 326-327.
[24] Thomas J. Brewer & Lawrence R. Mills, *supra* note 12 at 35.
[25] *Id*. at 35.
[26] *Id*. at 34-35; Patrick Van Leynseele, *supra* note 20 at 104.

not properly conducted, it might also be difficult for the parties to know exactly when the mediation phase has ended and when the arbitration phase has begun. Who should decide that the mediation has failed and that it is time for the parties to enter arbitration? When should such a decision intervene? Also, efficiency – in theory one of med-arb's advantages – might not be achieved if the set of facts relevant to mediation differs from the facts pertinent to the arbitration.[27]

The hybrid nature of med-arb may also alter the behavior that parties would have in a "pure" mediation. Because they know that their mediator can potentially become their arbitrator, parties may be reluctant to fully participate in the mediation process and may avoid talking openly from fear that what they would say during the mediation could be used against them in the arbitration phase.[28] The parties may also seek to ingratiate themselves with the neutral during the mediation phase: "Perhaps this could manifest itself in the parties acting as if they are on their 'best behavior,' but it could also involve deception or trying to paint the opposing party in a negative light."[29]

Last but not least, med-arb raises the risk, analyzed in detail below, of the neutral using confidential information disclosed in the mediation (particularly in caucus) in fashioning the arbitration award. Furthermore, the right to be heard and the med-arbiter's independence and impartiality may also be at risk, as explained in the next sections of this paper.

Those reasons explain why acceptance of the "same-neutral med-arb" system is not universal. For instance, the American Arbitration Association recommends that the same person not serve as both mediator and arbitrator in the same case: "Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or

[27] Kristen M. Blankley, *supra* note 5 at 336-337.
[28] *Id.* at 325; Patrick Van Leynseele, *supra* note 20 at 106; HANDBOOK ON MEDIATION at 175 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., American Arbitration Association, 2006).
[29] *Id*. at 336.

it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator." [30] The AAA nevertheless offers a sample med-arb clause to those parties who would like to use med-arb to resolve their disputes: "If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator."[31]

This chapter will focus on four major issues that may hinder the process of the execution and recognition of the arbitral award rendered at the end of a med-arb. They include: (A) the rule of confidentiality in mediation, (B) the right to know of and to confront the other side's argument, (C) the rule of impartiality, and (D) the rule of independence. In the last chapter (IV), we will discuss whether these issues can be addressed in such a way that the risk of challenging med-arb awards may be reduced.

A. Med-Arb and Confidentiality

1. Presentation of the Issue

The Uniform Mediation Act (UMA), which has been adopted in twelve jurisdictions and introduced in another two,[32] provides parties to a mediation with a general privilege [33] protecting the mediation communications from involuntary

[30] American Arbitration Association, *Drafting Dispute Resolution Clauses – A practical Guide*, 33 (2013), available online at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited April 18, 2017).

[31] *Id*. at 34.

[32] See the enactment status map on the Uniform Law Commission's website http://www.uniformlaws.org/Act.aspx?title=mediation%20Act (last visited April 12, 2017).

[33] The UMA distinguishes between the privilege (Sections 4-6) and the confidentiality (Section 8). "The evidentiary privilege granted in Sections 4-6 assures party expectations regarding the confidentiality of mediation communications against disclosures in subsequent legal proceedings. However, it is also possible for mediation communications to be disclosed outside of proceedings, for example to family members, friends, business associates and the general public. Section 8 focuses on such disclosures." (UMA, Comment on Section 8). It would thus be more accurate to use the word "privilege" rather than "confidentiality" in the present paper. However, I use the term "confidentiality" since this is the word systematically used in the doctrine.

disclosure in later proceedings,[34] explicitly including the arbitral proceedings.[35] The privilege may be waived, but if fewer than all parties waive the privilege, the non-waiving party will be able to prevent the use of mediation communications in the subsequent procedure.[36] Moreover, even the states that have not adopted the UMA may also prohibit the use of mediation communications in other proceedings. And further complicating the situation, some states may regulate the mediation communications within a specific subject area (such as labor law in Massachusetts).[37]

The confidentiality of mediation communications functions on two levels. First, this rule applies to the joint sessions held during a mediation and thus binds all the mediation participants (the parties and the mediator). This is what I call the first level of confidentiality. But this rule also operates at a second level, by protecting the information communicated by one party to the mediator during what are called "caucuses." A caucus is a "private meeting between mediator and one party to explore new options, to clarify proposals, to allow the parties to cool down, to gather facts

[34] "(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
(b) In a proceeding, the following privileges apply:
(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation" (UMA, Section 4).

[35] "Proceeding means: (A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process" (UMA, Section 2(7)).

[36] "(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:
(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant." (UMA, Section 5).

[37] See Mass. Ann. Laws ch. 150, § 10A (1999).

for the mediator's use or to give the parties a break from negotiations." [38] This private session, requested by either the mediator or one of the parties, also allows the other party to meet with his/her own party members, make the necessary phone calls, and rest.[39] Caucuses can be very useful to the mediator to facilitate agreement when the conversations in the joint sessions are not constructive anymore: each party has the opportunity to talk in private to the mediator with the assurance that all the information she does not want to share with the other party will remain confidential. This is what I call the second level of confidentiality.

In mediation, it is thus perfectly conceivable that the process ends with some information disclosed to the mediator but still withheld from the other parties. This asymmetry is not problematic because the mediator does not have any decision-making power—her role is to help the parties to find a solution to their dispute, not to arbitrate the conflict.

By contrast, this unilateral exchange of information from one party to the neutral, to the exclusion of the other parties, is far more problematic when the neutral is invested with a decision-making mandate, as in the case of the arbitrator. Most ethical rules governing arbitrations expressly forbid *ex parte* contacts with the arbitrator, i.e. in the absence of the other parties to the arbitrated dispute. For instance, the American Arbitration Association's Commercial Arbitration Rules provide that "No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration," except for the purpose of selecting a candidate arbitrator.[40]

If information in a mediation can be communicated exclusively to the mediator during caucuses, and if such unilateral

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[38] ABRAHAM P. ORDOVER with G. MICHAEL FLORES and ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION at 54 (Notre Dame, Ind.: NITA, 2nd ed. 1993).

[39] *Id.* at 54.

[40] American Commercial Association Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Rules Amended and Effective October 1, 2013 Fee Schedule Amended and Effective July 1, 2016, R.19. Available online at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004130 (last visited April 18, 2017).

communication of information is strictly forbidden in an arbitration, what is the correct rule in med-arb, which is supposed to combine the characteristics of mediation and arbitration?

2. Confidentiality Issue In Caucuses

There are different ways to address the question of the communication of confidential information during caucuses.

Option 1: Confidential information can be communicated during caucus but cannot be used in the arbitration phase

A first way to address that question would be to allow the med-arbiter to hold caucuses during which confidential information can be communicated to her by one party, but to prohibit the med-arbiter from using that confidential information in her arbitral deliberations. This option would both preserve the confidentiality of caucuses and respect the rule preventing the arbitrator from deciding based on *ex parte* communication. Hence, this option seeks to maintain the specific features of, respectively, mediation and arbitration, making med-arb a simple juxtaposition of a "pure" mediation and a "pure" arbitration.

Martin C. Weisman has adopted this position, arguing that the med-arbiter must be able to disregard mediation communications during the arbitration phase and that nothing disclosed in caucus can be considered in the arbitration phase unless introduced by either party independently during the arbitration.[41] The med-arbiter should thus "forget" about all the confidential information she was told in private sessions.[42]

Is that solution realistic? Studies show that "judges

[41] Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40, 40 (2013).

[42] This solution is also the one proposed by PatrickVan Leynseele: "the mediator cannot incorporate in his/her final decision elements that he or she is aware of thanks to the caucus if these elements have not been debated before him during the arbitration phase. He must, in some way, *repress them ('forget them')* so that they do not influence his sentence either explicitly or implicitly" (Patrick Van Leynseele, *supra* note 20 at 127) (free translation from French; emphasis added).

frequently cannot 'close the valves of (their) attention.' The presumption that people can ignore what they know, or use it for some purposes but not for other purposes, may sometimes be true, but often is little more than a convenient fiction."[43] This is why the authors of those studies, Wistrich, Guthrie and Rachlinski, recommend, for instance, that a judge who supervises settlement discussions not serve as the fact finder in the same case.[44] Further, research has shown that judges are less able to ignore inadmissible information when making determinations that they consider less amenable to judicial review.[45] Those findings have led Brian A. Pappas to write, in response to Martin C. Weisman: "If judges are unable to reliably disregard information, how can we expect arbitrators (who face little risk of review) to not consider mediation communications during the arbitration phase? (…) Being human means that we are not completely in control of our thought processes."[46] Accordingly, even the most ethical med-arbiter may be challenged by a solution of "deliberate amnesia."

Option 2: Confidential information may be communicated during caucus but has to be disclosed to the other parties later on in the mediation

In a second option, a med-arbiter would be permitted to hold caucuses during the mediation stage, but everything said during those private sessions would have to be disclosed to the other parties at some point during the mediation.[47] In this second option, the parties would know that anything they tell to the med-arbiter during caucuses would have to be communicated to the other party later on in the mediation phase. In such a framework, the purpose of caucusing would be limited to facilitating the

[43] Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, Cornell Law Faculty Publications, Paper 20, at 1330-1331 (2005). Available online at http://scholarship.law.cornell.edu/lsrp_papers/20 (last visited April 12, 2017).
[44] *Id.* at1259.
[45] *Id.* at 1259.
[46] Brian A. Pappas, *Med-Arb: the best of both worlds may be too good to be true: a response to Weisman*, 19.3 DISP. RES. MAG. 42, 42 (2013).
[47] And in any case, before the beginning of the arbitration phase (for the same reasons why a judge or a "pure" arbitrator should not start the proceedings knowing some information that a party would have communicated to her outside the presence of the other parties).

dialogue between the parties. Because it might be difficult to reveal some things in front of all of the participants of the mediation, caucuses as described here would enable a party to reveal some information to the mediator first, and then, as a second step, disclose that information to the other parties, with the help of the mediator, if necessary.

However, this option is not satisfactory either, because it does not guarantee the appearance of impartiality. A party could be legitimately concerned that not all of the information that has been communicated to the med-arbiter during caucuses will be disclosed later in the mediation. Moreover, this option could end up working against the parties, because mediation is supposed to be a safe place for discussion and open dialogue between the parties and also between the parties and the mediator. Consider the situation in which one party feels comfortable enough to start telling the med-arbiter confidential things that she does not want to be known by the other parties. That party would have no other choice than to disclose that confidential information to the other parties. However, it would be contrary to the spirit of mediation in my view to "punish" the party for being "too ready" to talk openly to the mediator.

Option 3: No caucus can be held in a med-arb

The third option would consist of preventing the med-arbiter from holding caucuses. In this scenario, all the information disclosed by one party would be communicated to the mediator, as well as the other parties, at the same time, during the joint sessions.

This third option is the only one that, from a strictly legal perspective, does not raise any issue. It is true that option 3 is tantamount to depriving the med-arbiter of a powerful tool in the mediation phase. Many praise the efficiency of caucusing in mediation.[48] However, one should not forget about the specificities of med-arb. It is quite common that a mediator decides to caucus when she feels that the tension between the parties is too important to generate constructive discussions. But we have already seen that

[48] See for instance Patrick Van Leynseele, *supra* note 20 at 105. However, several authors underline the dangers of caucusing (see for instance JACQUELINE M. NOLAN-HALEY, *supra* note 20 at 124-126).

parties may be incentivized to be more reasonable in a med-arb than in a "pure" mediation because they know that the med-arbiter is empowered to decide the final outcome of their case if they cannot find an agreement (see *supra*, p. 9). We can thus assume that the situations where caucuses would be necessary or useful would be less likely to occur in a med-arb than in a pure mediation. Of course, caucuses are not limited to situations where the parties are being unreasonable. There are other reasons why a mediator might want to caucus, for instance, when a party seems a bit lost or feels pressured in the process. In those cases, unfortunately, the inability of the med-arbiter to ask for a private session with a party might be a real disadvantage. Nevertheless, this disadvantage compared to a pure mediation is, in my opinion, acceptable, because med-arb offers a guarantee that a pure mediation does not: the parties are certain that their dispute will be solved at the end of the process (through the mediation phase or if not, through the arbitration phase). Of course, this third option reinforces the counsels' and the med-arbiter's duty to provide accurate information to the parties before the med-arb starts. In such a scenario, the parties' counsels and the med-arbiter should ensure that the parties have a clear understanding of what a caucus is, and what its advantages are, and that they would be deprived of private sessions with the neutral if they opted for a med-arb rather than for a pure mediation.

3. Confidentiality Issue in Joint Sessions

We have addressed the issue of confidentiality in the context of caucus (what I called the second level of confidentiality in mediation, which binds one party and the mediator). What about the confidentiality issues raised by the general mediation process (what I called the first level of confidentiality in mediation, which binds all the participants in a mediation – the parties and the mediator), beyond the confidentiality issues specific to private sessions?

According to some authors, the confidentiality protecting mediation implies that the med-arbiter in the arbitration phase can only use the pieces of information that a "pure arbitrator" would have at her disposal: namely the elements contained in the file of

the case or the elements that would be exposed by the parties during the arbitral hearings.[49] This position results from a strict interpretation of the different acts (such as the Uniform Mediation Act), statutes or guidelines providing that the mediation communications cannot be used in other proceedings, including arbitral proceedings, with no exception for med-arb.

When taking over the role of the arbitrator, the med-arbiter obviously knows already the facts of the case and, depending on how far the mediation process went, potentially knows more than what a "pure arbiter" could find in the file of the case, including the feelings of the parties, their personal past, the history of their personal relationship, their underlying conflicts, and more. Should the med-arbiter forget about everything she heard while acting as a mediator that has not been formally discussed in the arbitration phase? Does the first level of confidentiality in mediation prevent the med-arbiter from making use of that additional information in her arbitral deliberations?

I do not think so. We have already seen that "deliberate amnesia" is not a reliable solution, since human beings struggle to ignore information of which they are aware. More importantly, "deliberate amnesia" would not be consistent with the decision of the parties to opt for med-arb. Med-arb is a voluntary process: the parties to a med-arb have chosen, among a broad variety of dispute resolution mechanisms, a kind of ADR precisely characterized by the fact that the mediator is supposed to turn into an arbitrator should the parties reach an impasse in the mediation phase.[50] As explained above (see pp. 8-9), one of the reasons why parties might choose med-arb over pure arbitration is that they wish to avoid having to re-explain the case from scratch to a new arbitrator, in the interest of economy and/or efficiency. Moreover, the parties have chosen the specific track of mediation to start their dispute resolution process. They have thus chosen a form of ADR centered on discussions that are generally more focused on the parties' interests than on their positions, which is a kind of

[49] Patrick Van Leynseele, *supra* note 20 at 127-128.

[50] We assume that the parties were well aware of the fact that one same neutral could successively be the mediator and the arbitrator. In any case, the med-arbiter should ensure that the parties have clearly understood that before starting the med-arb.

discussion normally not held during arbitration proceedings. Is the choice of med-arb not an indication that the parties actually wish the med-arbiter to rely on the in-depth knowledge of the case she acquired during the mediation phase? If not, what would be the point of appointing the same neutral to perform as mediator and arbitrator in the same dispute?

The different regulations prohibiting the use of mediation communications in subsequent arbitration proceedings do not account for the situation where the parties have deliberately chosen the same person to be the mediator and the arbitrator of their dispute. I think that those rules should be adapted to take into account the specific situation of a "same-neutral med-arb."

Currently, the med-arbiter is only allowed to take into account mediation communications in fashioning her award if the parties have expressly consented to it in writing. The case law demonstrates that without such an express consent, a losing party who can prove the use of mediation information by the med-arbiter during the arbitration phase can successfully challenge the med-arb award.

In *Bowden v. Weickert*, for instance, the Ohio Court of Appeals vacated a med-arb award because the med-arbiter clearly used mediation communications to fashion it. The court reasoned: "the arbitrator had a duty to remain impartial (…) and to protect the confidentiality of all mediation communications."[51] Hence, the med-arbiter could only rely upon evidence presented at the arbitral hearing when crafting his arbitration award. Because he failed to do so, the Court concluded that he had exceeded his authority. The Court nevertheless recognized the parties' right to engage in med-arb, but some rules had to be respected "at the outset:"

> At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a

[51] Bowden v. Weickert, 2003-Ohio-3223, ¶ 36 (Ct. App.).

> written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process by (the Ohio law) in the event that their disputes are later arbitrated.[52]

The same year, the Texas First District Court of Appeals concluded that: "Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties' dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties." [53] Three years later, a Massachusetts Superior Court ruled that any waiver of the mediation privilege had to be clear and explicit by the parties holding the privilege, even in the med-arb context.[54]

In summary, according to current doctrine, med-arb awards rendered based on mediation communications, as opposed to arbitration evidence, may be subject to being vacated under the Federal Arbitration Act or a similar state statute without a proper waiver by the parties allowing the med-arbiter to use mediation communications in the arbitration phase.[55]

Given the very nature of the "same-neutral med-arb," I think that the various statutes, acts and guidelines governing arbitration in the United States should be adapted to take into account the specificities of med-arb. It would be much more consistent with both the characteristics of med-arb and with the choice made by the parties to opt for med-arb rather than for "pure" mediation followed by "pure" arbitration, that the default

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[52] Bowden v. Weickert, 2003-Ohio-3223, ¶ 35 (Ct. App.).
[53] *In re* Cartwright, 104 S.W.3d 706, 714 (Tex. App. 2003).
[54] Town of Clinton v. Geological Servs. Corp., 21 Mass. L. Rep. 609 (2006), summarized by Kristen M. Blankley, *supra* note 5 at 353. See also Twp. of Aberdeen v. Patrolmen's Benev. Ass'n, Local 163, 286 N.J. Super. 372, 669 A.2d 291 (Super. Ct. App. Div. 1996) where the Superior Court of New Jersey held that mediation communications cannot form the basis for an arbitration award. In this case, though, the Court did not answer the question as to whether a waiver by the parties would make the use of mediation communications by the med-arbiter in the arbitration phase valid.
[55] Kristen M. Blankley, *supra* note 5 at 322.

rule allow the med-arbiter to use mediation information in the arbitration phase, including in fashioning her award. I thus think that in the specific circumstances where the parties have agreed to appoint, in the same dispute, the same person as a mediator and arbitrator, the confidentiality imposed on the mediator should be attached only to the *person* of the mediator and not to the *function* of the mediator. In other words, if the mediator is the same *person* as the arbitrator in the same case, she should not be prevented upon assuming the different *function* of arbitrator from making use of the additional knowledge she acquired during the mediation phase, even if that information would not be provided to a "pure arbitrator" in a typical case.[56]

Two clarifications must be made. First, here I am only considering the mediation information communicated during the joint sessions, as opposed to caucus, which I think should be avoided in med-arb for the different reasons explained in this paper.[57] Second, of course, the parties should remain able to prevent the med-arbiter from using mediation information in the arbitration phase (despite the risks that this artificial solution presents)[58] but, in order to do so, their written agreement should be required. My suggestion is thus to reverse the current default rule: under the rule proposed here, a waiver by the parties would no longer be required to *authorize* the use of mediation communications in crafting the award. Instead, a written agreement of the parties would be necessary to *prevent* such use.

B. The right to know of and confront the other side's arguments

The second issue raised by the hybrid nature of med-arb concerns the right to know of and confront the other side's arguments.

"It is a firmly established rule of common law that a judge or anyone exercising a judicial function must hear both sides of

[56] And provided that this additional information is shared by all the parties involved in the med-arb (see the following developments).
[57] See *supra* pp. 15-18 and the sections B, C and D *infra*.
[58] See *supra* p. 17.

every case: not only the plaintiff or prosecutor, but also the defendant must be heard."[59] In the United States, this principle is part of the broader concept of "due process."

Due process also applies to arbitration. Indeed, despite the private nature of arbitration:

> Making certain the award is enforceable is one of the most central duties of the arbitral tribunal. If the arbitral tribunal wants to issue an enforceable award, the process has to meet certain quality standards. These minimum quality standards are, of course, procedural. They can be called due process requirements just like the minimum standards in ordinary court procedure. In the same way, they establish the minimum procedural safeguards necessary for someone to be deprived of his property or other rights. As such, they can be considered aspects of such elements as procedural fairness, *opportunity to be heard, and equal treatment* as well as access to justice.[60]

Due process in arbitration thus encompasses the right of the parties to equal treatment[61] and the right to be heard (on a claim or on a fact alleged or on some evidence presented by the other party). The right to be heard in arbitration,[62] or at least the right to "have a meaningful opportunity to be heard" [63] in arbitration proceedings, has been upheld by the American courts on several

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[59] John M. Kelly, *Audi Alteram Partem; Note*, NATURAL LAW FORUM. Paper 84, 103 (1964).

[60] MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION at 1-2 (Oxford Univ. Press, 2nd ed. 2010) (emphasize added).

[61] TIBOR VÁRADY, JOHN J. BARCELÓ III, STEFAN KRÖLL & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE at 649 (St. Paul, MN: West Academic Publishing, 6th ed. 2015).

[62] See for instance *Township of Montclair v. Montclair PBA Local No. 53*, Superior Court of New Jersey -- Appellate Division (May 22, 2012), Case No. A-0657-1154, 2012 N.J. Super. Unpub. LEXIS 1122 (Sup. Ct. N.J. 2012) (unpublished opinion quoted by Christian P. Alberti & David M. Bigge, *Ascertaining the content of the applicable law and iura novit tribunus: approaches in commercial and investment arbitration*, 70(2) DISP. RES. J. 1-20 (2015)).

[63] Ewing v. Act Catastrophe-Tex. L.C., 375 S.W.3d 545, 551-52 (Tex. App. 2012); Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 928 (Tex. 1995).

occasions. Failure to respect those minimum procedural standards would constitute a ground for successfully challenging the award.

Those principles imply that, similar to a judge, an arbitrator can normally make a decision only on the basis of elements that are known by all the parties and on which all parties have been given the opportunity to comment. This is partly why an arbitrator, once appointed, cannot have a private meeting with one party in the absence of the other parties.[64]

Again we see the clash between the core procedural requirements applicable to arbitration and the common practice of caucusing in mediation. The right to be heard and the right to equal treatment in arbitration constitute additional reasons as to why caucuses should be avoided during the mediation phase. By authorizing the use of caucuses in the first part of a med-arb process, the risk is created that the med-arbiter will take into account some information provided by one party without giving the other parties a fair chance to confront that information during the arbitration phase, which constitutes a blatant violation of due process requirements.

What if the parties want to be able to caucus with the med-arbiter during the mediation phase? Given the rights at stake, a simple agreement of the parties to maintain the use of caucus in med-arb is not satisfactory. The parties should at least *expressly* agree, *in writing and in advance*, that the med-arbiter can hold caucuses *and* that the med-arbiter can use the information received during those caucuses in fashioning the award. However, even this precaution might not be sufficient to remove any risk of annulment of the award by court. I am not aware of cases that have addressed that question under US law, but the risk does exist that a court will refuse to enforce an agreement by which the parties actually agree to waive in advance (without any exact knowledge regarding what they are renouncing) their right to confront the arguments made by the other parties during caucuses. The courts could indeed consider that there is more at stake than the sole *private* dispute of the

[64] This rule can also be explained by the necessary independence and impartiality of the arbitrator (which is why even the contacts between the arbitrator and one of the parties that took place prior to the arbitrator's appointment must be disclosed).

parties and that such agreement might undermine the confidence of the public in the arbitrators' integrity, for instance. The same is true in an international context. Some jurisdictions are likely to consider for public policy reasons that a party cannot waive in advance his or her rights to due process, or some aspects of due process such as the right to confront the other parties' arguments.[65]

Therefore, and in addition to the previous developments regarding the confidentiality issue (see *supra*, pp. 15-18), it is safer not to hold caucus in a med-arb, in order to obtain the execution and recognition of med-arb awards.

C. Med-arb and Impartiality

We have already seen that the confidentiality rule in mediation and the right to know of and to confront the other parties' arguments are an obstacle to the use of caucus in med-arb. So is the principle of impartiality, defined as the absence of any inclination or disinclination towards the parties. Indeed, case law indicates that the execution and the recognition of awards rendered in "pure arbitration" are declined for breach of impartiality when it is proven that the arbitrator has had unilateral contacts with one party while the dispute was ongoing.[66] Therefore, the holding of caucus meetings during the mediation phase of a med-arb is likely to lead to the same outcome.

A judge is presumed to be "impartial until proven otherwise. However, subjective impartiality requires a very delicate effort in judging; judges should endeavor not to have any

[65] This might be the case in Europe for instance. According to the jurisprudence of the European Court of Human Rights, a waiver "must be supported by minimum procedural guarantees commensurate to the importance of the rights waived" (*Nordstrom-Janzon and Nordstrom-Lehtinen* v. *Netherlands*, Application No. 28101/95, 22 November 1996). "Therefore, for a waiver to be valid, it must be clear and unambiguous, as well as express and informed, and must not run counter to an important public interest. This latter requirement suggests that not all rights can be completely waived (e.g. such as the rule against partiality), but this is a question on which there is no authority and which, ultimately, is not clear" (JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION at 107 (Cambridge University Press, 2009)).

[66] See for instance Nolan v. Colorado Cent. Consol. Min. Co., 63 F. 930, 1894 U.S. App. LEXIS 2460 (8th Cir. Colo. 1894).

bias, prejudice, or precondition, and should avoid the *appearance* of favoring or hindering any party to a case."[67] No matter how righteous the med-arbiter is, the simple fact that a party meets the arbitrator of their case in the absence of the other parties is enough to make those parties fear that the med-arbiter is no longer impartial.[68]

The style adopted by the med-arbiter in the mediation phase may also cause the parties to question the fairness of the med-arb in its arbitration phase. Mediators can use a variety of different styles and approaches. Generally, styles range from purely facilitative to purely evaluative. In a purely facilitative approach, a mediator will assist the parties in "identifying and exploring interests, concerns, motivations, goals, common ground and possible resolutions. However, the mediator will avoid drawing conclusions for the parties or offering opinions as to value, legal positions, rights, merits of the case or potential litigation outcome."[69] In sum, such a mediator does not evaluate the case. By contrast, in using an evaluative style, "a mediator is likely to offer opinions on strengths and weaknesses of a case, to predict the outcome at trial and to initiate proposals for settlement."[70] Evaluative mediations focus more on the merits of the parties' legal positions, which is why not everyone in the mediation community is in favor of evaluative mediation. Some even view it as an oxymoron.[71] In any case, even the proponents of this style of mediation stress the importance for the mediator to be cautious because "once an evaluation is made, the mediator's appearance of impartiality may be impaired."[72] This risk is even greater in med-arb. Could a party sincerely believe that she will benefit from a fair, comprehensive, and equal examination of her file if she is told by the med-arbiter during the mediation phase that

[67] Kemal Sahin, *Impartiality of the Judiciary*, 1 ANKARA BAR REV. 17, 17 (2008). Also available online at http://www.ankarabarosu.org.tr/siteler/AnkaraBarReview/tekmakale/2008-1/3.pdf (last visited April 11, 2017) (emphasis added).
[68] See *supra*, p. 18.
[69] BENNETT G. PICKER, MEDIATION PRACTICE GUIDE, A HANDBOOK FOR RESOLVING BUSINESS DISPUTES at 38 (Bethesda, Md.: Pike & Fischer, Inc., 1998).
[70] *Id*. at 39.
[71] *Id.* at 38.
[72] *Id.* at 40.

her claim is excessive and that she is unlikely to get what she demands in court?

In short, the evaluative approach, whose use is already criticized by some in a "pure mediation," increases the risk that a party who received a negative evaluation of her position during the mediation phase will ultimately challenge the award rendered at the end of the med-arb process. To avoid any suspicion of impartiality, the med-arbiter should thus refrain from providing the parties with an evaluation of their case.

Finally, and more generally, a med-arbiter might have to pay more attention to deciding the case impartially compared to a judge or an arbitrator. Indeed, unlike a judge or an arbitrator, the med-arbiter will have spent a couple of hours with the parties (listening to their stories, witnessing their feelings, and trying to discover their interests), before starting the arbitration phase. However, mediators, like arbitrators, are already subject to the duty of being impartial. Med-arbiters should thus be properly acquainted with dealing with that imperative.

D. Med-arb and Independence

It is another fundamental principle in arbitration that an arbitrator must be and remain independent throughout the whole arbitration process. By independence, I refer to the absence of personal, professional or financial interests and ties with one party, whether direct or indirect.[73] Such ties could influence the arbitrator in her decision-making process. A lack of independence may be a ground to challenge an award. Hence, it must be guarded against from the outset.

Again, this core principle of arbitration may be at risk in the context of med-arb. The mediator will probably learn the potential settlement range of the parties during the mediation phase. "Once in arbitration, however, the neutral is charged with impartially rendering the award according to the evidence, and decisions falling outside the settlement range will naturally be met

[73] TIBOR VÁRADY, JOHN J. BARCELÓ III, STEFAN KRÖLL & ARTHUR T. VON MEHREN, *supra* note 62 at 383.

with displeasure by the disadvantaged party."[74] The fact that an arbitrator may arrive at a decision through objective and legal assessment that does not fall into the settlement range reached by the parties at the end of the mediation phase may create a fear of appearing partial, and thus potentially impede the med-arbiter's independence. "In sum, the Med-Arb hybrid provides additional pressure for the arbitrator to issue a compromised award that 'splits the baby,' a common critique of arbitration."[75]

Is this challenge insurmountable? I do not think so, but the responsibility of the med-arbiter in this respect is even greater than in a "pure" arbitration.

First of all, the med-arbiter should pay special attention to the necessity of rendering an award by reference to legal principles. Of course, we have seen that the parties could limit the med-arbiter's discretion (to the settlement range reached by the parties during the mediation phase for instance), and the med-arbiter should respect the parties' intent. But in doing so, the med-arbiter should still abide by the law[76] unless otherwise agreed by the parties.[77]

Second, the parties should be explicitly informed that if they do not find an amicable settlement to their dispute, the med-arbiter will have to decide the case *by reference to legal principles* (again, unless otherwise agreed by the parties). The med-arbiter should specifically insist on the fact that the application of the legal principles to the facts of the case could lead her to render an award that may or may not correspond to the position of a party, or that might potentially not be within the range of settlement the parties reached in the mediation phase.

Furthermore, the duty to motivate the award should be enhanced, out of respect for the parties who have trusted the med-

[74] Brian A. Pappas, *Med-Arb: the best of both worlds may be too good to be true: a response to Weisman*, 19.3 DISP. RES. MAG. 42, 42 (2013).
[75] *Id*. at 42.
[76] So in the two examples, the med-arbiter should choose, between the options allowed by the parties, the one that is the closest to what the law dictates.
[77] For instance, in a commercial dispute, parties could agree to ask the arbitrator to decide their dispute by reference to commercial practices or customs (via "honorable engagement clause", also referred to as "equity clause").

arbiter enough to appoint her as med-arbiter but also, much more pragmatically, to decrease the risk of a party challenging the award.

IV. Conclusion

It is time now to make a final assessment of the "single-neutral med-arb." Among other drawbacks, I have focused on four issues. Those issues pertain to the core principles of mediation (the confidentiality rule) or of the judicial function (the right of the parties to know of and confront the other side's arguments, and impartiality and independence of the med-arbiter). Does that mean that there should be no place for med-arb among the dispute resolution mechanisms? It all depends on how we envisage med-arb.

If we see med-arb as a simple sequence of a classic mediation and a classic arbitration, then we must conclude that med-arb fails to respect the basic procedural rights of the parties and, therefore, should not be granted the same value as other dispute resolution mechanisms.

In contrast, if we accept that med-arb is a dispute resolution mechanism *as such*, that it is a real hybrid figure, a real product that combines mediation and arbitration in a unique synthesis, rather than the result of a simple addition of mediation and arbitration, if we recognize, in other words, that med-arb is called "med-arb" and not "mediation-arbitration," then there is no reason to deprive ourselves of this original type of ADR, which can be both effective and cost-efficient.

In my view, med-arb deserves to be regulated as a full-fledged dispute resolution mechanism. The current regimes respectively applicable to mediation and arbitration do not fit the med-arb model. They have proven unable to meet med-arb's features, which, I think, explains why some are reluctant to use it.

The current acts, statutes, rules or guidelines regulating mediation and/or arbitration in the United States and also internationally, such as the ICC rules, should incorporate a section dedicated to med-arb that includes the following points:

- They should define med-arb as an alternative dispute resolution mechanism characterized by the existence of two distinct phases – the mediation phase and the arbitration phase should the parties fail to reach an amicable agreement by themselves in the mediation phase – in which the mediator and the arbitrator appointed by the parties would be the same person. The word "med-arb" would thus be limited to the "same-neutral med-arb." By contrast, "mediation-arbitration" would refer to a mediation followed by an arbitration proceeding with two different neutrals assuming the roles of mediator and arbitrator. Indeed, the word "med-arb" indicates that it is a dispute resolution mechanism governed by its own regime (such as the one proposed below). Some adjustments to the rules governing mediation and arbitration are necessary precisely because the mediator and the arbitrator are the same person. By contrast, no adjustments are required if the mediator and the arbitrator are two different persons, which is why the words "mediation-arbitration" are adequate, and that there is no need to atrophy them.

- The regulations should make clear that they apply only to med-arb as defined in the previous point (same-neutral med-arb) and not to mediation-arbitration.

- They should also state that the rules normally applicable to mediation and arbitration, respectively, apply to med-arb, subject to the following adjustments.

    - Contrary to "pure" mediation, the default rule should be that the med-arbiter would be allowed to use the information received during the joint sessions of the mediation in the arbitration phase. Parties could agree to derogate from this default rule, by explicitly and in writing, preventing the med-arbiter from using mediation information in the arbitration phase, after having been warned by the med-arbiter that studies demonstrate that people can hardly ignore what they know (which of course is not a reason for the med-arbiter not to make the best efforts to disregard mediation communications).

  - Unless otherwise agreed by the parties, the med-arbiter should be prevented from caucusing during the mediation phase, because of the legal and ethical issues those private sessions raise. The parties that would nonetheless agree to maintain caucus should sign a written agreement explicitly allowing the med-arbiter to caucus with the parties separately and to make use of the information communicated by them to the med-arbiter during those caucuses. However, the med-arbiter should draw the attention of the parties to the risk that such an agreement might not be enforced by the courts, whether in the United States or abroad, for public policy reasons and that consequently, the courts might refuse to execute or recognize a med-arb award if one party can prove that the med-arbiter actually used information received during caucuses in fashioning the award.

  - The med-arbiter should adopt a facilitative approach and avoid an evaluative one, unless expressly and clearly required by the parties in writing. In practice, it might be hard to draw a line between the respective spectrums of the evaluative and the facilitative approaches, but in essence, the med-arbiter should refrain from giving one party the impression that she has already made up her mind on the dispute and that there is no point in presenting his or her case in the arbitration phase. An evaluative approach should also be avoided in mediation because there is no certainty that the med-arbiter will reach the same conclusion based on the evidence that is presented later on during the arbitration phase.

- The parties should be required to expressly agree, in clear and unambiguous terms, to opt for med-arb as defined above, with a same neutral designated as the mediator and the arbitrator of their dispute. This agreement would count as recognition that they are subject to all of the above rules.

- Finally, parties should be allowed to appoint only neutrals who can demonstrate that they are accomplished and experienced in both mediation and arbitration.

There is much more to say about med-arb. For instance, the question of evidence in med-arb and the question of the necessity of specific training to perform as med-arbiter[78] could each be the subject of an entire paper. However, the rules that I propose in this paper have the merit of clarifying the framework of med-arb and securing to the maximum extent possible the viability of med-arb awards.

Some might think that the idea of regulating med-arb runs counter to the flexibility supposed to characterize alternative dispute resolution mechanisms and that the use of med-arb should not be constrained by rules. I disagree. The rules that I propose are only a default regime. Parties would remain able to derogate from those rules (true, with certain formalities to be respected but parties would still be free to choose the kind of med-arb that they think is best suited for them). Moreover, flexibility must not be granted at the expense of elementary procedural rights. There is no point in refusing to regulate med-arb in order to preserve flexibility if the courts can refuse to recognize or execute the med-arb award because minimum safeguards have not been respected in the med-arb proceeding.

To conclude, the rules that I propose require from med-arbiters as well as the parties' counsels an enhanced duty to provide information to the parties. Parties cannot opt for a med-arb process if they do not know what mediation is, what arbitration is, what a caucus is, what the (truly powerful) advantages of caucusing are, and what the difference between an evaluative and a facilitative approach is, etc. This enhanced duty to inform the parties may seem like a heavy burden, but this obligation provides an opportunity to educate the parties about the countless ways to resolve a dispute, and that will only benefit the realm of ADR.

[78] As underlined by Martin C. Weisman, "There are mediation and arbitration protocols governing the ethical standards in each process, but none of the standards encompasses their combination" (Martin C. Weisman, *Med-Arb: The Best of Both Worlds,* 19 DISP. RESOL. MAG. 40 (2013)).

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THE PAST, PRESENT, AND FUTURE OF THE DOCTRINE OF "MANIFEST DISREGARD"

Carl J. Mudd

I. Introduction

Since the Supreme Court's decision in *Hall Street Assocs. L.L.C. v. Mattel, Inc.*[1] courts, commentators, and practitioners have questioned the continuing viability, and even the existence, of the doctrine of manifest disregard of the law ("manifest disregard," "doctrine," or "standard"). Some argue that *Hall Street* effectively abrogated manifest disregard.[2] Others claim that the doctrine survived *Hall Street* as either a judicial gloss or a shorthand for the grounds enumerated in Section 10 of the Federal Arbitration Act.[3] Still others, though a minority, assert that *Hall Street* did not eliminate the traditional, pre-*Hall Street* understanding of manifest disregard as a common-law, non-statutory, ground for vacating arbitral awards.[4] In light of these differing and diverging interpretations, it seems appropriate for the United States Supreme Court to step in and resolve the controversy; however, the Court has yet to explicitly hold what the correct interpretation is, though the opportunity to do so has been presented.[5] The lack of direction regarding the viability of manifest disregard, coupled with confusion surrounding the doctrine's "correct" interpretation and application (if still viable), has caused many to question the fate of manifest disregard as a ground for vacating arbitral awards.

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[1] *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576 (2008).

[2] Carolina Rizzo, *Why 'Manifest Disregard' Survives As An Independent Standard For Vacatur of Arbitral Awards Even After Hall Street*, 3 Arb. Brief 1, 12-13 (2013). *See infra* Part IV(a)(i)-(iii).

[3] Carolina Rizzo, *Why 'Manifest Disregard' Survives As An Independent Standard For Vacatur of Arbitral Awards Even After Hall Street*, 3 Arb. Brief 1, 12-13 (2013). *See infra* Part IV(c)(i)-(ii). *See also*, *infra* Part IV(d).

[4] *See infra* Part IV(b). *See also*, *infra* Part IV(d).

[5] *See e.g.*, *Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672, n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 585, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."); *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*, __ U.S. __, 135 S. Ct. 145 (2014); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).

This paper examines this puzzling predicament, and attempts to provide guidance regarding the future of the manifest disregard standard. Part II briefly reviews the generally understood meaning of "manifest disregard of the law." Part III investigates the origins and development of the doctrine by examining (a) the Supreme Court's decision in *Wilko v. Swan*, (b) approaches to applying manifest disregard following *Wilko*, and (c) the Court's 2008 decision in *Hall Street*. Part IV examines how the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits interpreted *Hall Street*, and how these interpretations have influenced each circuits' position regarding how the manifest disregard standard should be understood. Part V examines the future of manifest disregard, and takes the position that the doctrine remains viable, if not as common-law, as a shorthand/judicial gloss for the grounds set forth in FAA § 10. Part VI suggests that the most effective way to resolve the circuit split would be for the Supreme Court to issue an opinion explicitly setting forth the "correct" interpretation and application of *Hall Street* and the doctrine of manifest disregard. Part VII contains concluding remarks and recapitulates this papers findings.

II. What is "Manifest Disregard of The Law"?

Section 10 of the Federal Arbitration Act[6] ("FAA") provides the statutory basis for vacating an arbitral award, including "where the award was procured by 'corruption,' 'fraud,' or 'undue means,' and where the arbitrators were 'guilty of misconduct,' or 'exceeded their powers.'"[7] In addition to the statutory grounds contained in FAA § 10, there are also various non-statutory, judicially created, grounds for vacatur.[8] Manifest disregard of the law is generally understood to be one of these judicially created grounds for vacating an award,[9] though it "has not consistently or

[6] Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (1925) [Hereinafter "FAA"].
[7] *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576, 578 (2008); FAA § 10.
[8] Annie Chen, *The Doctrine of Manifest Disregard of the Law After Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts*, 32 Fordham Int'l L.J. 1872, 1879 (2008-2009); Hiro N. Aragaki, *The Mess of Manifest Disregard*, THE YALE LAW JOURNAL, at 1 (Sep. 29, 2009), *available at*: http://www.yalelawjournal.org/pdf/817_hert8o16.pdf ("Manifest disregard is a common-law exception to the limited grounds for vacatur of arbitral award enumerated in the Federal Arbitration Act (FAA)."); *see* Carbonneau, *infra* note 9; Huber, *infra* note 11.
[9] Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 Cardozo J. Conflict Resol. 593, 604-606 (2013); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 Penn St. L. Rev. 1103, 1110 (2008-2009); Lisa J. Banks & Matthew S. Stiff, *The Federal Arbitration Act, ALI-CLE: Advanced Employment Law and Litigations 2013*, KATZ, MARSHALL & BANKS,

exclusively been viewed as a common-law expansion of the FAA" (discussed in greater detail below).[10] Although debate exists regarding the origins of the manifest disregard standard and its status as a common-law means for vacating an arbitral award, according to Stephen Huber, the standard approach to manifest disregard requires "a showing that the arbitrator knowingly failed to apply clearly applicable law."[11] An arbitrators mere ignorance of the law is not enough;[12] rather, the moving party must affirmatively show "that the arbitrator: [1] knew about the existence of relevant law; [2] knew that the law was controlling; and [3] intentionally refused to apply the law."[13]

III. Origins & Development of "Manifest Disregard"

The exact origin of "manifest disregard for the law" is a topic of debate, with no clearly discernable answer. This section examines the origins and development of the doctrine of manifest disregard, starting with the generally accepted view that the doctrine originated from dicta in the United States Supreme Court's decision in *Wilko v. Swan*. After discussing *Wilko*, this paper examines various approaches to applying the doctrine of manifest disregard following *Wilko* (but before *Hall Street*). With these approaches in mind, this paper then discusses the Supreme Court's decision in *Hall Street*, and the implications that decision has had on the continuing viability of the doctrine of manifest disregard.

a. *Wilko v. Swan*: The Debate Begins

The origin of the doctrine of manifest disregard is a contested issue; however, most commentators agree that the manifest disregard standard originated from dicta in the United States Supreme Court's 1953 decision in *Wilko v. Swan*,[14] where the Court stated that "the interpretation of the

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LLP, at 15 (last visited May 6, 2017), http://www.kmblegal.com/wp-content/uploads/ALI-CLE-Arbitration-Feb-2013.pdf; Chen, *supra* note 8, at 1879.

[10] Jill I. Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard*, 37 Sec. Reg. L.J. 232, 270 (2009).

[11] Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 Cardozo J. Conflict Resol. 509, 557 (2008-2009).

[12] Huber, *supra* note 11, at 557.

[13] Huber, *supra* note 11, at 557.

[14] Reuben, *supra* note 9, at 1110 ("The manifest disregard standard is a non-statutory ground that emanates from dicta in the *Wilko v. Swan* case….); Chen, *supra* note 8, at 1879 ("The doctrine of manifest disregard of law traces its origins to 1953…in *Wilko v. Swan*…. The entire doctrine of manifest disregard of the law has developed out

law by … arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." [15] Although *Wilko* was subsequently overruled on other grounds, this statement has been understood to indicate, as Ashley Sundquist and Michael LeRoy suggests, that manifest disregard of the law may be a permissible ground for vacating an arbitral award, but arbitrators mistaken interpretation of the law, or a judge's disagreement regarding how the law was interpreted, does not provide "a justifiable reason for vacature." [16] However, the extent of the *Wilko* Court's discussion on the topic of manifest disregard is limited; no attempt is made to elaborate on the meaning of manifest disregard, [17] making it difficult for courts to

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of…dictum from *Wilko*, a case that has been since overrule on its principle ruling."); Matthew Wolper, *"Manifest Disregard" Not Yet Entirely Disregarded*, 86 Fla. B.J. 27, 37 (2012) ("The origin of manifest disregard of the law is found in the Supreme Court's opinion in *Wilko v. Swan*…."); Banks & Stiff, *supra* note 9, at 15 (Manifest disregard for the law "originated in the dictum of [*Wilko v. Swan*]…."); Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duck L.J. 547, 566-67 (2005) ("The 'manifest disregard' locution originated in the Supreme Court's decision in *Wilko*…."). Gross, *supra* note 10, at 236 ("The 'manifest disregard' standard originated from a statement by the Supreme Court in *WIlko v. Swan*…"); Stephan J. Ware & Marisa V. Maleck, *Authorities Split After the Supreme Court's Hall Street Decision: What is Left of the Manifest Disregard Doctrine?*, THE FEDERALIST SOCIETY, at 119 (Mar. 31, 2010), *available at*: http://www.fed-soc.org/publications/detail/authorities-split-after-the-supreme-courts-hall-street-decision-what-is-left-of-the-manifest-disregard-doctrine ("The manifest disregard doctrine is traced to the Supreme Court's decision in *Wilko v. Swan*…"). *See also*, Adam Miliam, *A House Built on Sand: Vacating Arbitration Awards For Manifest Disregard of the Law*, 29 Cumb. L. Rev. 705, 708 (1998-1999) ("circuits derive the manifest disregard of the law standard either from the dicta in [*Wilko v. Swan*] or as an implied defense arising under section 10(a)(4) of the FAA…"). *But see*, Michael H. LeRoy, *Are Arbitrators Above The Law? The "Manifest Disregard of The Law" Standard*, 52 B.C. L. Rev. 137, 157 (2011) ("Dictum in *Wilko* is mistakenly cited as a souce of the manifest disregard standard. The Court in *Wilko* did not adopt this standard but simply discussed it as a hypothetical.").

[15] *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (*overruled on other grounds in Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989)).

[16] Ashley K. Sundquist, *Do Judicially Created Grounds for Vacating Arbitral Awards Still Exist? Why Manifest Disregard of the Law and Public Policy Exceptions Should be Considered under Vacatur*, 2015 J. Disp. Resol. 407, 411 (2015); LeRoy, *supra* note 14, at 158 ("In this advisory statement" the Court "said that a judge may review [a arbitral award] if it manifestly disregards the law, but not if the judge disagrees with its legal interpretation.").

[17] Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. Kan. L. Rev. 47, 61 (2010-2011). *See* LeRoy, *supra* note 14, at 158 (the Court did not give any "further details on what manifest disregard of the law meant, and it gave no indication that it ever intended manifest disregard to constitute a new ground for vacating arbitration awards under the FAA.").

> determine the meaning of, and the amount of weight that should be afforded to, *Wilko's* ambiguous statement.[18]

Further complicating the issue is the fact that *Wilko* did not directly concern the scope of judicial review with regards to arbitral awards.[19] Rather, the issue confronted by the Court "was whether anti-fraud claims brought under § 12(2) of the Securities Act of 1933 could be arbitrated, or whether public policy required that such claims be litigated in state or federal court."[20] The Court's statement regarding "manifest disregard" was merely a byproduct of this analysis;[21] as Kenneth Davis notes, after addressing the main issue, the Supreme Court "lapsed into muddled dicta, which has cast the issue of the scope of judicial review of arbitration awards into uncertainty for over half a century."[22] This uncertainty resulted in confusion amongst courts, as acknowledged by Fifth Circuit in *Citigroup Global Mkts. Inc. v. Bacon*, where the court stated that it was unsurprising that "lower courts initially grappled with the uncertain implications" of the *Wilko* Court's ambiguous statement.[23]

Despite the confusion and lack of direction regarding the meaning and application of the manifest disregard standard following the decision in

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[18] *See* Milam, *supra* note 14, at 708 ("[N]o secure basis exist upon which courts can apply the standard, thus leading to arbitrary and inconsistent interpretations and application among the circuits."). *See also,* Scodro, *supra* note 14, at 569 ("Without statutory or other grounding aside from conclusionary dicta in *Wilko*, however, defining 'manifest disregard' has been a slippery task.").

[19] Kenneth R. Davis, *The End of an Error: Replacing "Manifest Disregard" with a New Framework for Reviewing Arbitration Awards*, 60 Clev. St. L. Rev. 87, 92 (2012-2013).

[20] Davis, *supra* note 19, at 92.

[21] *See* Carbonneau, *supra* note 9, at 604 ("The [*Wilko*] opinion make only an incidental reference to [manifest disregard], possible by pure happenstance.")

[22] Davis, *supra* note 19, at 94. *See* Carbonneau, *supra* note 9, at 604 (Manifest disregard…actually has little to do with Wilko.").

[23] *Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349, 354 (5th Cir. 2009). *See San Marine Compania De Navegacion v. Saguenay Terminals Ltd*., 293 F.2d 796 (9th Cir. 1961) ("Frankly, the Supreme Court's use of the words 'manifest disregard' has caused us trouble here. Conceivably the words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. Thus if the award was based upon a mistaken view of the law, but in their assumption of what the law was, the arbitrators had not gone too far afield, then, the award would stand; but if the error is an egregious one, such as no sensible layman would be guilty of, then the award could be set aside. Such a 'degree of error' test would, we think, be most difficult to apply. Results would likely vary from judge to judge. We believe this is not what the court had in mind when it spoke of 'manifest disregard.'"). *See also*, Davis, *supra* note 19, at 94.

Wilko, all circuit courts[24] eventually adopted/recognized the doctrine (though some courts have since repudiated their acceptance[25]).[26] This was partially due, at least for certain circuits, to the Supreme Court's opinion in *First Option of Chicago, Inc. v. Kaplen*, where the Court cited *Wilko* with approval and stated that a party can still "ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances."[27] Other than *First Option*, however, the Supreme

[24] *See e.g.*, *Advest, Inc. v McCarthy*, 914 F2d 6 (1st Cir. 1990); *Trafalgar Shipping Co. v Intl. Milling Co.*, 401 F2d 568 (2d Cir 1968); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bobker*, 808 F2d 930 (2d Cir 1986); *Ludwig Honold Mfg. Co. v Fletcher*, 405 F2d 1123 (3d Cir 1969); *Upshur Coals Corp. v United Mine Workers, Dist. 31*, 933 F2d 225 (4th Cir 1991); *Williams v Cigna Fin. Advisors*, 197 F3d 752 (5th Cir 1999); *Anaconda Co. v Intl. Asso. of Machinists & Aerospace Workers*, 693 F2d 35 (6th Cir 1982); *Health Servs. Management Corp. v Hughes*, 975 F2d 1253 (7th Cir 1992); *Stroh Container Co. v Delphi Indus., Inc.*, 783 F2d 743 (8th Cir 1986); *French v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F2d 902 (9th Cir 1986); *Jenkins v Prudential-Bache Sec., Inc.*, 847 F2d 631 (10th Cir 1988); *Montes v Shearson Lehman Bros.*, 128 F3d 1456 (11th Cir 1997); *Kanuth v Prescott*, 292 US App DC 319, 949 F2d 1175 (1991); John Diaconis & Ari Diaconis, *Six Years After Hall Street: The Continued Viability of Manifest Disregard, Jurisdiction by Jurisdiction*, BLEAKLEY PLATT, at 10 (last visited May 6, 2017), http://www.bpslaw.com/files/20150729043546-ARIAS%20Quarterly%202015%20First%20Quarter%20-%20Six%20Years%20After%20Hall%20St.pdf (citing *McCarthy v. Citigroup Global Mkts., Inc.,* 463 F.3d 87, 91 (1st Cir. 2006); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Duluhos v. Stasberg*, 321 F.3d 365, 370 (3d Cir. 2003); *Three S Delaware, Inc., v. DataQuick Info Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007); *Prestige For v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-96 (5th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros*, 70 F.3d 418, 420-21 (6th Cir. 1995); *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008); *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 430 F.3d 1269, 1275 (10th Cir. 2005); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 821 (D.C. Cir. 2007)).

[25] *See infra* Part IV(a)(i)-(iii); *infra* note 25.

[26] Davis, *supra* note 19, at 94 ("Despite the vagueness of the *Wilko* dicta, the circuit courts, one by one, recognized the manifest disregard standard."); Chen, *supra* note 8, at 1879 ("Prior to *Hall Street*, manifest disregard as an independent ground for vacatur was well accepted by all circuit courts except for the Seventh Circuit."); Burch 61 ("every federal circuit court of appeals has adopted [the doctrine of manifest disregard] (although the Fifth and Eleventh Circuit have since renounced it), many state courts have adopted it…"); Scodro, *supra* note 14, at 567 ("Despite its humble origins and lack of explication from the Supreme Court, the 'manifest disregard' doctrine has taken hold in every federal circuit and in many state courts."); LeRoy, *supra* note 14, at 158-59.

[27] *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 942 (1995) (citing 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan*, 346 U.S. 427, 436-437, 98 L. Ed. 168, 74 S. Ct. 182 (1953)

Court seldom addressed the doctrine of manifest disregard,[28] and as Burch references in relation to *Hall Street*, "only recently did the Court give it any substantive analysis."[29] As a result, lower courts have been left to apply the doctrine absents clear direction or constraint, resulting in differing articulation and application of the standard.[30]

Approaches to Applying the Doctrine of Manifest Disregard Following Wilko (but before Hall Street)

Following *Wilko*, various approaches to and applications of the doctrine of manifest disregard surfaced, "some very broad, some extremely narrow, but all attempting to balance arbitration's competing goals of efficiency and accuracy."[31] Thomas Burch, referencing Stephan Hayford, [32] divides these varying applications into three possible approaches: (1) the "futility-acknowledge"[33]approach; (2) the "big error"[34] approach; and (3) "presumption-based"[35] approach.[36]

(parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)).

[28] Burch, *supra* note 17, at 62 (citing *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 942 (1995)(citing *Wilko* and mentioning manifest disregard in a parenthetical following the cite); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987) (citing *Wilko* and quoting its sentence on manifest disregard); *McMahon*, 482 U.S. at 258-59, 268 (Blackmun, J., concurring in part and dissenting in part)(acknowledging manifest disregard and citing *Wilko*); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) (stating that arbitration awards may be overturned if they are in manifest disregard of the law)); *Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). *See also*, Scodro, *supra* note 14, at 567 ("A majority of the Supreme Court has only even hinted approval of the doctrine on one occasion since *Wilko* was decided in 1953.").

[29] Burch, *supra* note 17, at 62.

[30] For more information regarding the various circuits' recognition, interpretation, and application of manifest disregard following the Court's statement in *Wilko*, *see* LeRoy, *supra* note 14, at 160-69; Davis, *supra* note 19, at 94-96; Burch, *supra* note 17, at 62-65; Chen, *supra* note 8, at 1881-1883; Huber, *supra* note 11, at 560-63.

[31] Burch, *supra* note 17, at 62.

[32] Stephan Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key To Restoring Order To The Law Of Vacatur*, 1998 J. Disp. Resol. 117.

[33] *Id.* at 125-24 (citing *Prudential-Bache Secs., Inc., v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990)); Burch, *supra* note 17, at 62 (citation omitted).

[34] Burch, *supra* note 17, at 63.

[35] *Id.* at 64 (citing Hayford, *supra* note 32, at 128-32 (internal citation omitted)).

[36] *Id*. at 62-64. *See also*, Hayford, *supra* note 32, at 125-132.

The "futility-acknowledge" approach is the narrowest approach and is "based on the level of difficulty involved in determine whether an arbitrator has consciously decided to ignore known, applicable law, especially if the arbitrator did not issue a reasoned award."[37] Courts following this approach only apply the doctrine of manifest disregard when "direct evidence exists that the arbitrator consciously disregarded the law."[38] This approach can be seen in *Advest, Inc. v. McCarthy*. There, the First Circuit stated that, in order for an arbitration award to be vacated for manifest disregard of the law, "'there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.'"[39] The court went on to state that "disregard" in this context "implies that the arbitrators appreciated the existence of a governing legal rule but [willfully] decided not to apply it."[40] As the *Advest* court's articulation implies,[41] this approach is severely limited. This is because a court utilizing this approach most likely will not overturn an award absent a reasoned award,[42] "or a transcript of the proceedings showing that the arbitrator explicitly refused to follow the law…."[43] This, Burch asserts, essentially renders the doctrine a nullity.[44] Nonetheless, it appears that "[m]ost courts that recognize manifest disregard as a ground for overturning awards…use this approach."[45]

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[37] Burch, *supra* note 17, at 62 (citation omitted).
[38] *Id.*
[39] *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (quoting *O.R. Securities, Inc. v. Professional Planning Assoc., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988)).
[40] *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bobker*, 808 F.2d 930, 933 (2d Cir. 1986))
[41] Note, however, that the court in *Advest* did find that, "[i]n certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug." *Id*. However, the court found that "[t]he case at bar…is not cut to so rare a patter…." *Id.*
[42] *See O.R. Sec., Inc. v Prof'l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir 1988) ("In fact, when the arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law.")
[43] Burch, *supra* note 17, at 63 (citing Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 505-506 (1998)("given the fact that arbitrators seldom write opinions explaining their decisions, there is little likelihood that a losing party in an arbitration will be able to persuade a reviewing court that the arbitrators manifestly disregarded the law.")).
[44] *Id*.
[45] *Id*.

The broadest approach, the "big error" approach, focuses on "whether the arbitrator made and egregious mistake[,]"[46] and unlike the "futility-acknowledge" approach, does not require direct evidence indicating that the arbitrators consciously disregarded the law.[47] Instead, courts are allowed to "overturn an arbitration award by *assuming* that the arbitrator consciously disregarded known, applicable law based simply on the law's clarity and the arbitrator's failure to apply it." [48] This approach is illustrated by the Second Circuit's language in *Willemijn Houdstermaatschappij, BV v Std. Microsystems Corp*.[49] There, the court agreed that manifest disregard of the law can be found where a arbitrator "'understood and correctly stated the law but proceeded to ignore it.'"[50] However, the court determined that "a court may infer that [an arbitrator] manifestly disregarded the law if it finds that the error made…is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator."[51] As this statement indicates, a court applying this approach may infer from the facts of the case that an arbitrator knew applicable law, and assume he/she ignored it based on the law's clarity. This, Burch asserts, is in contrast to the *Wilko* court's statement "that awards should not be reviewed for 'error in interpretation,'"[52] which may indicate why this approach is the least frequently used.[53]

The third approach, "presumption-based" approach, falls between the first two approaches, and can be understood as somewhat of a middle ground. Under this approach, courts review "the record of the arbitration proceedings and will overturn the award if something in that record

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[46] *Id*.
[47] *Id*.; Hayford, *supra* note 32, at 127-128 ("This second model for the 'manifest disregard' of the law analysis is the most troublesome of the three…. It raises the prospect of vacatur when a party believes that (i) the controlling law is beyond dispute, and (ii) the award is clearly inconsistent with that law. … Reduced to its essence, this second approach to the 'manifest disregard' of the law analysis consists of nothing more than a determination of whether the arbitrator made an error of law that a reviewing court is unwilling to tolerate.")
[48] Burch, *supra* note 17, at 63 (citation omitted).
[49] *Willemijn Houdstermaatschappij, BV v. Std. Microsystems Corp.*, 103 F.3d 9, 12-13 (2d Cir. 1997).
[50] *Id*. (citing *Siegel v Titan Indus. Corp.*, 779 F.2d 891, 893 (2d Cir. 1985) (quoting *Bell Aerospace Co. Div. of Textron* v. *Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973), *rev'd on other grounds*, 500 F.2d 921 (2d Cir. 1974))).
[51] *Id*. (citing *Merrill Lynch*, 808 F.2d at 933). *See also*, *supra* note 40.
[52] Burch, *supra* note 17, at 63-64 (citing *Wilko*, 346 U.S. at 436-37)
[53] *Id*. at 63.

creates a presumption that the arbitrator ignored known, applicable law."[54] For example, in *Montes v. Shearson Lehman Bros., Inc.*,[55] the Eleventh Circuit overturned an arbitral award on the ground that the arbitrator manifestly disregarded the law.[56] In making this determination, the court examined the arbitral award (there was no written opinion), and noted that the panel was "flagrantly and blatantly urged" by the prevailing party to ignore known applicable law.[57] According to Hayford, during arbitration the prevailing party asserted "that the controlling law was 'not right,'" and repeatedly exhorted "to the arbitration panel that they should do what was right, even if it produced an outcome inconsistent with the pertinent law."[58] The court found that this, coupled with the fact that "nothing in the award or elsewhere in the record" suggested that the arbitrator "did not heed" the prevailing party's plea,[59] indicated that the arbitrator knew the law but consciously ignored it. As the Eleventh Circuit's decision illustrates, the "presumption-based" approach does require a degree proof that the arbitrator knew the law and ignored it, but "direct proof that the arbitrator made a conscious decision to ignore the law" is not a necessary prerequisite for vacatur.[60]

As the above illustrates, the precise standard utilized by Circuit Courts following *Wilko* varied from circuit to circuit.[61] According to Weathers Bolt, however, most circuits generally agreed (with the

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[54] *Id.* at 64; Hayford, *supra* note 32, at 130 ("The framework for analysis under this third model works backwards from an arbitral outcome the reviewing court believes to be flawed as a matter of law, confirmed by an exhaustive evaluation of the factual record made in arbitration. This judicial rethinking of the factual questions and the questions of application of law to facts integral to the resolution of the matter in arbitration is coupled with a search for evidence in the record upon which the court can base a presumption of arbitral knowledge of the correct law. Once that evidence is identified the court is free to 'bootstrap' its way to the inference that the arbitrator must have ignored the relevant law in fashioning an award the court believes is contrary to the law.").

[55] *Montes v. Shearson Lehman Bros., Inc.,* 128 F.3d 1456 (11th Cir. 1997). *See also*, *Hilligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

[56] The court agreed that a claim of manifest disregard only applies where the arbitrator is "conscious of the law and deliberately ignore[s] it," *Montes v Shearson Lehman Bros.*, 128 F.3d at 1461, and that incorrect interpretation of the law will not satisfy this standard. *Id*.

[57] *Montes*, 128 F.3d at 1461. *See* Hayford, *supra* note 32, at 19; Burch, *supra* note 17, at 64.

[58] Hayford, *supra* note 32, at 129. *See also*, Burch, *supra* note 17, at 64.

[59] *Montes*, 128 F.3d at 1461.

[60] Bruch, *supra* note 17, at 64; *see* Hayford, *supra* note 32, at 125-32 (comparing all three approaches).

[61] *See* Gross, *supra* note 10, at 236.

exception of the Seventh Circuit[62]) that successful use of manifest disregards as a ground for judicial review and vacatur after *Wilko* (but before *Hall Street*) required:[63] "[1] the arbitrator or arbitrators knew the law and [2] deliberately failed to apply the applicable law."[64] Bolt also notes, and Jill Gross confirms,[65] that many circuits "also required that the law be clearly applicable to the situation at bar."[66]

b. Hall Street

After more than fifty years since the Court's decision in *Wilko*, the Supreme Court decided the case of *Hall Street Assocs. L.L.C. v. Mattel, Inc.*,[67] which has raised many questions and concerns regarding the continuing viability of the doctrine of manifest disregard.[68] In *Hall Street* the Supreme Court addressed (in dicta) the ambiguities associated with *Wilko's* comments regarding the scope of judicial review of arbitral awards. The issue before the Court was "whether the parties to an arbitration agreement could validly agree to expand the ground prescribed in § 10 and § 11 of the FAA for vacating or correcting an arbitration award."[69] The Court answered this question in the negative, holding that the grounds for vacating and modifying an award under the FAA are exclusive.[70]

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[62] *See* Weathers P. Bolt, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions*, 63 Ala. L. Rev. 161, 164 (2011-2012).
[63] Note, however, that according to John and Ari Diaconis, despite the Circuit Courts' diverging interpretations and application of manifest disregard, a common theme emerged among the circuits: "courts rarely and only in the most egregious of circumstances vacated [arbitral awards] based on manifest disregard." John and Ari Diaconis, *supra* note 23, at 10-11.
[64] Bolt, *supra* note 62, at 164.
[65] According to Jill Gross, "[w]hile the precise test varied from circuit to circuit, most courts agreed that, to persuade a court to vacate an award on manifest disregard ground, the losing party must show: (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether; and (2) the law that the arbitrator ignored was well defined, explicitly, and clearly applicable to the case." Gross, *supra* note 10, at 236.
[66] Bolt, *supra* note 62, at 164 (citing *Duferco Int'l Steel Tracing v. T. Klaveness Shipping A/S*, 333 F.3d 87, 91 (1st Cir. 2006)("[W]e mean by manifest disregard of the law a situation where it is clear from the record that the arbitrator recognized the applicable law—and ignored it.")).
[67] *Hall St. Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576 (2008).
[68] Huber, *supra* note 11, at 558.
[69] Davis, *supra* note 19, at 99. *See* Kevin Patrick Murphy, *Alive But Not Well: Manifest Disregard After Hall Street*, 44 Ga. L. Rev. 285, 300 (2009-2010).
[70] *Hall Street*, 552 U.S. at 578. *See also*, Chen, *supra* note 8, at 1889; Ann C. Gronlund, *The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in*

In arguing that grounds set forth in FAA §10 and § 11 were not exclusive (*i.e.*, the parties' had a right to contractually expand the scope of review of an arbitration of award), Hall Street "pointed out that courts have been permitted to expand review beyond section 10 and 11 of the FAA since *Wilko* created manifest disregard."[71] Hall Street asserted that the Court's statement in *Wilko* "meant that manifest disregard was a further ground for vacatur in addition to the ground listed in section 10," and therefore Supreme Court precedent "allowed for nonstatutory vacatur."[72] In response, the Court acknowledged that a number of Circuit Courts had recognized manifest disregard as an additional ground for vacating an award beyond § 10 of the FAA,[73] but the Court disagreed with Hall Street's argument, in part, because *Wilko* expressly rejected what Hall Street was asking for: "general review for an arbitrator's" legal errors.[74] The Court, however, did not stop there. Instead, the Court attempted to explain the meaning of its earlier statement in *Wilko*, writing:

> Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them …. Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.' We, when speaking as a Court, have merely taken the *Wilko* language as we found it, with out embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[75]

Light of the Supreme Court's Ruling in Hall Street Associates, L.L.C. v. Mattel, Inc., 96 Iowa L. Rev. 1351, 1362 (2010-2011); Murphy, *supra* note 69, at 300; John Diaconis & Ari Diaconis, *supra* note 23, at 13; Huber, *supra* note 11, at 588-60.

[71] Murphy, *supra* note 69, at 300.

[72] Gronlund, *supra* note 70, at 1362.

[73] Murphy, *supra* note 69, at 301.

[74] *Hall Street*, 552 U.S. at 585. *See* Huber, *supra* note 11, at 558 ("This argument was easily turned away by the Court: judicial interpretation that expands the scope of review does not provide a basis for private parties alter review by private agreement. Besides, Wilko 'expressly reject just what Hall Street asks for here, general review for an arbitrators' legal error.'")

[75] *Hall Street*, 552 U.S. at 585.

This statement has caused many courts and scholars to question the viability, and possibly the existence, of the doctrine of manifest disregard (at least in federal courts).[76] Although the Court "did not expressly reject 'manifest disregard' as a valid ground for review," according to Jill Gross, "it did not embrace it either."[77] This uncertainty has lead a number of Circuit Courts to construct differing interpretations of the Court's decision in *Hall Street*, prompting divergence among courts and disagreement regarding the future of the doctrine.

IV. Manifest Disregard After *Hall Street*

Since the Supreme Court's decision in *Hall Street*, Federal Circuit Courts have grappled with the issue of whether manifest disregard remains a valid ground for vacating arbitral awards. This has resulted in varying views and responses regarding the current viability and application of the doctrine of manifest disregard. Each Circuits' view, Jonas Cullemark suggests, relates to the meaning attributed to the word "exclusive" in *Hall Street*,[78] and each Circuits' response tends to depended, according to Davis, "on whether the circuit viewed the manifest disregard standard as statutory or nonstatutory."[79] As discussed below, the Circuits that have definitively addressed the issue have taken three positions regarding the doctrine of manifest disregard.[80] The first position, which I have labeled the "abandonment" group, holds that manifest disregard is no longer a viable basis for vacatur. The second position, the "non-statutory" group, believes that manifest disregard as a non-statutory basis for vacatur survived *Hall Street*. The third position, labeled the "shorthand or judicial gloss" group, holds that manifest disregard remains viable as a judicial

[76] Huber, *supra* note 11, at 559; Murphy, *supra* note 69, at 300 ("The Court's response to [Hall Street's assertion that court have been permitted to expanded review since *Wilko* created manifest disregard] has prompted a debate over whether the fifty-five-year-old doctrine is no longer good law, if indeed it ever was.")

[77] Gross, *supra* note 10, at 236.

[78] Jonas Cullemark, *Wachovia Securities, LLC v. Brand (2012): The Fourth Circuit's Dubious Position in the Ongoing Federal Circuit Split in the Application of "Manifest Disregard of the Law" as a Basis for Vacatur of Arbitration Awards Following the U.S. Supreme Court's Hall Street Decision (2008)*, 22 U. Miami Bus. L. Rev. 1, 13 (2013-2014).

[79] Davis, *supra* note 19, at 102-103.

[80] *See* Davis, *supra* note 19, at 103-107; Stanley A. Leasure, *Arbitration Law in Tension After Hall Street: Accuracy or Finality?*, 39 UALR L. Rev. 74, 84-101 (2016); Cullemark, *supra* note 78, at 13-17; Mylinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S. C. L. Rev. 407, 424-430 (2010-2011). *See also*, Huber 560-577

gloss on the grounds listed in FAA § 10, or as a shorthand for FAA §§ 10(a)(3) and 10(a)(4). In addition to these three positions, some courts have acknowledged the continuing viability of manifest disregard, but have not definitively set forth whether the doctrine remains valid as a non-statutory, common-law, ground or as a shorthand/judicial gloss for the grounds enumerated in FAA § 10.

a. Abandonment

The Fifth, Eighth, and Eleventh Circuits have interpreted *Hall Street* as effectively eradicating the doctrine of manifest disregard—*i.e.*, the doctrine no longer remains a viable basis for vacating arbitral awards post-*Hall Street*.[81] This section briefly examines decisions in each circuit denying the continuing validity of the doctrine of manifest disregard.

i. *Fifth Circuit*

The Fifth Circuit in *Citigroup Global Markets, Inc. v. Bacon* addressed the issue of "whether manifest disregard of the law remains a valid ground for vacatur of an arbitration award in light of the Supreme Court's recent decision in *Hall Street*…."[82] Relying on the history of the law of vacatur and the development of FAA,[83] the court rejected manifest disregard as an independent, non-statutory ground for vacating arbitral awards.[84] In so holding, the court determined that the Supreme Court's language in *Hall Street* made clear that the grounds for vacatur set forth in Section 10 of the FAA were exclusive.[85] As a result, the court concluded that "manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."[86]

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[81] Leasure, *supra* note 80, at 84.

[82] *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009).

[83] *See id.*; Leasure, *supra* note 80, at 85; Leigh F. Gill, *Manifest Disregard After Hall Street: Back from the Dead—The Surprising Resilience of a Non-Statutory Ground for Vacatur*, 15 Lewis & Clark L. Rev. 265, 272 (2011).

[84] *Citigroup Global Markets*, 562 F.3d at 358 ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").

[85] *See id.*; Cullemark, *supra* note 78, at 15; Gill, *supra* note 83, at 272; Sims & Bales, *supra* note 80, at 425.

[86] *Citigroup Global Mkts.*, 562 F.3d at 358. Although manifest disregard as a non-statutory, common-law, ground for vacatur may not have survived *Hall Street*, according to John and Ari Diaconis, manifest disregard "did survive *Hall Street* insofar as an arbitrator will 'exceed its power' under FAA Section 10(a)(4) when it 'is fully award of

ii. *Eighth Circuit*

In *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, the Eighth Circuit confirmed its view that the bases for vacating an arbitral award are limited to the express grounds set forth in the FAA.[87] According to Stanley Leasure, the court further confirmed "its understanding that *Hall Street's* practical effect was to establish the grounds specifically enumerated in the FAA as the exclusive grounds for vacatur."[88] Accordingly, the court concluded that appellant's claim that the arbitrator manifestly disregarded the law was "not cognizable" since such ground was "not included among those specifically enumerated in §10…."[89] The court reaffirmed its position in *Air Line Pilots v. Trans State*, where the court described manifest disregard as a "defunct vacatur standard."[90] The court's reasoning, John and Ari Diaconis suggest, was "that manifest disregard is a non-statutory ground for vacatur and thus impermissible under *Hall Street's* pronouncement that FAA Section 10 is to be read exclusively."[91]

iii. *Eleventh Circuit*

In *Frazier v. CitiFinancial Corp.* the Eleventh Circuit adopted the Fifth Circuit's position regarding the viability of manifest disregard.[92] The court held that manifest disregard, as a "judicially-created" basis for vacatur, was "no longer valid in light of" the Supreme Court's decision in

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[a] controlling principle of law and yet does not apply it.'" John and Ari Diaconis, *supra* note 23, at 19 (quoting *Citigroup Global Mkts. Inc. v Bacon*, 562 F3d 349, 357-58 (5th Cir 2009)). However, John and Ari note that the Fifth Circuit tends to perceive the phrase "manifest disregard" negatively; as a result, "litigants should refer to only FAA Section 10(a)(4) when arguing on what would otherwise be manifest disregard grounds." *Id. See also*, *McKool Smith, P.C. v. Curtis Int'l, Ltd.*, 650 F. App'x 208, 213 (5th Cir. 2016) ("Assuming—without deciding—that manifest disregard of the law can be a *statutory* basis for vacatur, Curtis fails to show that the arbitration award was in manifest disregard of Texas law.").

[87] *Med. Shoppe Int'l, Inc. v Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) ("We have previously recognized the holding in *Hall Street* and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA. *See Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street*, 552 U.S. at 584).")

[88] Leasure, *supra* note 80, at 87.

[89] *Med. Shoppe Int'l*, 614 F.3d at 489 (citing *Hall Street,* 552 U.S. at 586)

[90] *Air Line Pilots Ass'n Int'l v Trans States Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011).

[91] John & Ari Draconis, *supra* note 23, at 20-21.

[92] *Frazier v Citifinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010).

Hall Street.[93] In so holding, the court agreed with the Fifth Circuit "that the categorical language of [*Hall Street*] compels such a conclusion."[94] The Eleventh Circuit reconfirmed this position in *Campbell's Foliage, Inc., v. Federal Corp Insurance Corp.*, where that court determined that "the only viable ground for vacatur in [the Eleventh Circuit] were those enumerated in the FAA."[95]

b. Non-Statutory

The Sixth Circuit is the only circuit to maintain its pre-*Hall Street* position that the doctrine of manifest disregard exists as a non-statutory, common-law, ground for vacating arbitral awards. This section examines Sixth Circuit decisions illustrating the circuit's view that manifest disregard remains a viable non-statutory means for vacatur.

i. Sixth Circuit

In *Grain v. Trinity Health*, the Sixth Circuit determined "that manifest disregard of the law is no longer a ground for modify an award;" [96] however, the court did not determine whether or not the doctrine remains a viable means for vacatur. According to John and Ari Diaconis, "[d]istrict courts within the Sixth Circuit seem to agree that manifest disregard has survived *Hall Street*."[97] In support of this conclusion, the district courts cite the Sixth Circuit's unpublished opinion in *Coffee Beanery v. WW*.[98] There, the court held that application of *Hall Street* is limited to circumstances involving contractual expansion of the grounds for review.[99] In so holding, the court acknowledged that *Hall Street* "significantly reduced the ability of federal courts to vacate arbitration

[93] *Id*. at 1324.
[94] *Id.* (citing *Hall Street*, 552 U.S. at 586 ("the text compels a reading of the §§ 10 and 11 categories as exclusive"); *id*. at 589 ("the statutory text gives us no business to expand the statutory grounds"); *id*. at 590 ("§§ 10 and 11 provide exclusive regimes for the review provided by the statute")).
[95] Leasure, *supra* note 80, at 89; *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828 (11th Cir. 2014), *cert. denied*, __ U.S. __, 135 S. Ct. 145 (2014).
[96] Jack Rephan, *Is Manifest Disregard of the Law a Ground for Vacating Arbitration Awards*, PENDER & COWARD (March 2, 2016), *available at*: https://www.pendercoward.com/resources/blog-opinions-and-observations/is-manifest-disregard-of-the-law-still-a-ground-for-vacating-arbitration-awards-march-2016/.
[97] John & Ari Diaconis, *supra* note 23, at 19.
[98] *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).
[99] Rephan, *supra* note 96.

awards for reasons other than those specified in 9 U.S.C. § 10," however, the court found that "it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law." [100] Consistent with this statement, the court found that, although its "ability to vacate an arbitration award is almost exclusively limited to these grounds…it may also vacate an award found to be in manifest disregard of the law."[101] The court then endorsed the pre-*Hall Street* view that the doctrine of manifest disregard applies if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."[102] This indicates, as John and Ari Diaconis suggest, that the Sixth Circuit "recognizes manifest disregard as an independent ground for vacatur, separate and apart from FAA Section 10."[103]

c. Statutory: Shorthand / Judicial Gloss

Though many circuits no longer advocate for the non-statutory, common-law, understanding of manifest disregard, a number of Circuit Courts still believe the doctrine survived *Hall Street* as a shorthand for, or a judicial gloss of, the grounds enumerated in FAA § 10. As Jack Rephan notes, "[a] number of Federal Circuits…have interpreted [*Hall Street*] as not rejecting *in toto* manifest disregard as basis for seeking to vacate an award, but that it has survived as being merely shorthand for the statutory grounds under §10(a)(3) and § 10(a)(4), or as a judicial gloss on the statutory ground." The courts that have definitively maintained this position following *Hall Street* include the Second Circuit and the Ninth Circuit.[104]

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[100] *Coffee Beanery*, 300 F. App'x at 418.

[101] *Id*. at 418 (citing *Wilko v. Swan,* 346 U.S. 427, 436 (1953) (overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)).

[102] *Coffee Beanery*, 300 F. App'x at 418.

[103] John and Ari Diaconis, *supra* note 23, at 19. According to John and Ari Diconis, the court supported this position by arguing that the Supreme Court's opinion in *Hall Street* is open to multiple interpretations, and therefore provided insufficient means for overruling "a doctrine which prior to 2009 was 'universally' recognized by the Courts of Appeals." *Id.*

[104] Some commentators assert that the Fourth Circuit falls within this group; however, as discussed *infra* Part IV(d)(i), the Fourth Circuit does not appear to have definitively adopted the position that the doctrine of manifest disregard survived *Hall Street* as a judicial gloss/shorthand or as independent, non-statutory, ground for vacatur.

i. Second Circuit

In *Stolt-Nielsen SA v. AnimalFeeds International Corp.* (overruled on other grounds), the Second Circuit confirmed its view that *Hall Street* did not "abrogate the 'manifest disregard' doctrine."[105] The court conceded, Jack Jarrret notes, that the Second Circuit "had previously indicated that the judicially named grounds were separate from the ground specified in the FAA."[106] However, in *Stolt-Nielsen* the court stated that it "reconceptualized" their understanding of the doctrine of manifest disregard "as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA…."[107] The Second Circuit recently reconfirmed this position in *Sutherland Global Services v. Adam Technologies*. There, the court first noted that "the specific grounds for vacatur provided in the FAA are generally exclusive,"[108] but then stated that manifest disregard "'remains a valid ground for vacating arbitration awards'" as "'judicial gloss on the specific grounds for vacatur…'" set forth in FAA § 10.[109] Thus, it appears that the Second Circuit has adopted the view that manifest disregard remains viable as a judicial gloss.

ii. Ninth Circuit

In *Comedy Club, Inc. v Improv W. Assocs.*, the Ninth Circuit read the Supreme Court's decision in *Hall Street* as merely identifying several possible interpretations of the doctrine of manifest disregard.[110] These "possible readings of the doctrine"[111] included the understanding that manifest disregard was a shorthand for the statuary grounds enumerated under Section 10 of the FAA,[112] which the court acknowledged was the

[105] *Stolt-Nielsen SA v AnimalFeeds Int'l Corp.*, 548 F3d 85, 95 (2d Cir. 2008).
[106] Jack Jarrett, *What's in a Name? Why Judically Named Grounds for Vacating Arbitral Awards Should Remain Available In Light of Hall Street*, 20 Geo. Mason L. Rev. 909, 922 (2012-2013) (citing *Duferco Int'l Steel Trading v. T. Kalveness Shipping A/S*, 333 F.3d 383, 289 (2d Cir. 2003)).
[107] *Stolt-Nielsen*, 548 F.3d at 94.
[108] *Sutherland Global Servs. v Adam Techs. Int'l SA de C.V.*, 639 F App'x 697, 699 (2d Cir. 2016) (citing *Hall Street*, 552 U.S. at 584).
[109] *Sutherland Global*, 639 F App'x at 699 (citing *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451-52 (2d Cir. 2011) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010))).
[110] Leasure, *supra* note 80, at 96; C*omedy Club, Inc. v Improv W. Assocs.*, 553 F.3d 1277 (9th Cir 2009).
[111] C*omedy Club, Inc. v Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir 2009).
[112] Rephan, *supra* note 96.

accepted view in the Ninth Circuit.[113] Thus, the court concluded "*Hall Street Associates* did not undermine the manifest disregard of law ground for vacatur, as understood in the [Ninth Circuit]…."[114] The Ninth Circuits reaffirmed its position in *Wetzel's Pretzels, LLC v Johnson*, where the court stated that "[i]n order for us to vacate the award on the ground that the arbitrator exceeded his powers under § 10(a)(4)," the moving party must "show that the award was 'completely irrational, or exhibit[ed] a manifest disregard of law….'"[115] In order to vacate an arbitration award for manifest disregard of the law, the court noted, "'it must be clear from the record that the arbitrators recognized the applicable law and then ignored it.'"[116] Thus, it is clear that that the Ninth Circuit has adopted the view that manifest disregard remains a viable means for vacatur as a shorthand for the statutory grounds set forth in FAA § 10.

d. Surviving, But Unsure

The doctrine of manifest disregard has survived in the both Fourth and Tenth Circuits; however, both circuits have not taken a definitive position on whether or not the doctrine survives as a judicial gloss/shorthand or independent, non-statutory, ground for vacatur.

i. Fourth & Tenth Circuits

In *Wachovia Securities v. Brand*, the Fourth Circuit determined that its pre-*Hall Street* understanding of manifest disregard[117] remained controlling.[118] However, the court did not affirmatively determine the status of the doctrine; rather, the court found that "manifest disregard continues to exist as either an independent ground for review or as a judicial gloss, we need not decide which of the two…."[119] This position

[113] C*omedy Club*, 553 F.3d at 1290, 1283.
[114] *Id.* at 1283.
[115] *Wetzel's Pretzels, LLC v Johnson*, 567 F App'x 493, 494 (9th Cir. 2014) (citing *Biller v. Toyota Motor Corp.,* 668 F.3d 655, 665 (9th Cir. 2012) (internal quotation marks and citations omitted)).
[116] *Id*.
[117] *See Wachovia Sec., LLC v Brand*, 671 F3d 472, 483 (4th Cir. 2012) ("[W]e adopted a two-part test that a party must meet in order for a reviewing court to vacate for manifest disregard: '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle.' We do not read *Hall Street* or *Stolt-Nielsen* as loosening the carefully circumscribed standard that we had previously articulated for manifest disregard." (Citation omitted)).
[118] John & Ari Diaconis, *supra* note 23, at 18.
[119] *Wachovia*, 671 F.3d at 483.

The task of grading over fifty entries for this contest was equally enjoyable and challenging. The rubric for making our individual selections as to the best entries required that we consider not only the relevance and usefulness of the author's chosen topic to the field of ADR but originality as well. Excellent writing quality was a given.

For me, this article was by far the most original of all. By pure coincidence, this article was the very first one I read having been drawn to it by the title. I was particularly intrigued by the historical analysis and the discussion relating to the appropriate choice of law to be applied in outer space. It will be interesting to see if the author's proposals for resolving conflicts in outer space come to fruition.

I surmise that both Gene Roddenberry and George Lucas might have enjoyed reading this article as well. It was truly "Out of this World".

John W. Salmon
Editor ACCTM
American Journal of Mediation

ADR THAT IS OUT OF THIS WORLD: A REGIME FOR THE RESOLUTION OF OUTER-SPACE DISPUTES

George Khoukaz

I. INTRODUCTION

Gone are the days when we perceived outer-space exploration as a science-fiction movie. In 2004, President George W. Bush announced ambitious goals in the pursuit of space exploration.[1] The goals included returning to the moon by 2020, using the moon as a launch point for future exploratory missions, in addition to sending humans (and a number of different explorative equipment) to Mars.[2] To put it in simple terms, Bush's plan aimed at "boggl[ing] the imagination" and to "test our limits to dream."[3] Space exploration is obviously not a new endeavor; however, Bush's speech revived a movement of increased space explorations: It is now part of an expansive foreign policy strategy that involves having American power on a "broad geographical canvas from the Middle-East to outer space."[4] The United States' interest in expanding and increasing its presence in outer space is an extension of its current geographically expansive military presence around the globe.[5] These outer-space exploratory goals are compared to the expansionist aspirations of ocean-born European empires of the 17th and 18th century;[6] and therefore project a future where nations will compete over space-control to gain a geostrategic advantage on earth.

A. A Brief Historical Background

The military-inspired space race is not a new phenomenon; it is the hallmark of the Cold-War era. After the Second World War, the United States and the Soviet Union emerged as the sole superpowers and each

[1] *President Bush Announces New Vision for Space Exploration Program*, THE WHITE HOUSE, https://history.nasa.gov/Bush%20SEP.htm (last visited Feb. 11, 2017).
[2] *Id*.
[3] *Id*.
[4] *New Age of Exploration*, THE WASHINGTON TIMES, http://www.washingtontimes.com/news/2004/ mar/4/20040304-082405-1445r/ (last visited Feb. 11, 2017).
[5] *Id*.
[6] *Id*.

became increasingly more suspicious of each other's activities.[7] The Soviets refused the "Open Skies" proposal, which would have allowed each nation to fly reconnaissance aircrafts over the other.[8] As a result, President Eisenhower announced the United States' plan to launch a satellite into space in 1955.[9] The Soviets reciprocated by announcing they would work on achieving the same goal.[10] The space race was triggered and a general public fear started to build. Whichever power reached space first would claim it for itself while excluding the other, leading to a military confrontation.[11]

This Comment is influenced not only by the military's exploration of outer space, but also by a much more recent and interesting development, that is the increased role of private entities in space exploration and space-related activities. In June 2004, SpaceShipOne became the first private-venture craft to leave the earth's atmosphere and enter the space.[12] Less than a decade later, in October 2012, another private company launched the first commercial flight to the International Space Station (ISS).[13] Since then, SpaceX has launched at least six other missions into the ISS and has recently started the process of using cost-effective, reusable rockets for private space missions. [14]

As of 2013, the "global space economy" was valued at $314.17 billion.[15] Interestingly, the private sector accounted for the 76% lion-share

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[7] *Space Race Time Line*, PBS NOVA, http://www.pbs.org/wgbh/nova/astrospies/time-nf.html (last visited Feb. 11, 2017).
[8] Caroline Arbaugh, *Gravitating Toward Sensible Resolutions: The PCA Optional Rules for the Arbitration of Disputes Relating to Outer Space Activity*, 42 GA. J. INT'L & COMP. L. 825, 827 (2014).
[9] *Id*.
[10] *Id*.
[11] Glenn Harlan Reynolds, *Space Law in the 21st Century: Some Thoughts in Response to the Bush Administration's Space Initiative*, 69 J. Air. L. & Com. 413, 414 (2004).
[12] Ka Fei Wong, *Collaboration in the Exploration of Outer Space: Using ADR to Resolve Conflicts in Space*, 7 Cardozo J. of Conflict Resolution 445, 446 (2006).
[13] *First Official Commercial Cargo Flight Heading to International Space Station*, CNN, http://www.cnn.com/2012/10/07/us/spacex-launch/index.html?hpt=hp_t1 (last visited Feb. 11, 2017).
[14] Stephen Clark, *SES 10 telecom satellite in Florida for launch on reused SpaceX rocket*, SPACEFLIGHT NOW (January 17, 2017), https://spaceflightnow.com/2017/01/17/ses-10-telecom-satellite-in-florida-for-launch-on-reused-spacex-rocket/
[15] Marcia S. Smith, *Space Foundation: Space Economy Grew by 4 Percent in 2013*, SPACE POLICY ONLINE (May 19, 2014, 9:36 PM), http://www.spacepolicyonline.com/news/space-fou ndation-space-economy-grew-by-4-percent-in-2013.

of all space-related expenses, while government expenditures were limited to the remaining 24% of the global space economy.[16] Unlike State-sponsored missions, privately-funded space activities have a much broader scope, resulting in significantly more complicated legal consequences. For example, a number of companies are developing the required technology to mine asteroids in outer space for their precious metals such as gold.[17] Other companies are looking at the outer space from a different perspective, they are working to send interested wealthy people to the outer space as tourists.[18] Virgin Galactic, for instance, claims to have more than 500 to-be space-farers presently signed up for its space tourism ventures, including celebrities like Tom Hanks and Angelina Jolie.[19]

B. Purpose and Outline

The purpose of this Comment is to project into the future by addressing the resolution of disputes, caused by private entities, in outer-space. This author is well-aware that such a projection seems improbable today and sounds like science fiction story. However, we should remember that almost sixty years ago, reaching the moon was a matter of imagination, while today it is a reality. The point is that technology is evolving so quickly that outer-space disputes will become reality sooner or later. Assuming such a dispute takes place in outer-space, we will need to think about its legal implications. We will face difficulties relating to the choice of law: what law should apply? Which legal system has jurisdiction to address the dispute? If a judgment was somehow entered, how will the plaintiff enforce it in the defendant's home country? The answer to these questions is unpredictable at this point because there is no internationally-agreed upon structure which addresses these matters. This Comment will therefore formulate a proposal which calls for international efforts to

[16] *Id*.
[17] Charles Arthur, *Google Pair Back Plan to Lasso Asteroids and Mine them for Precious Metals*, THE GUARDIAN (Apr. 24, 2012, 2:21 PM), http://www.guardian.co.uk/science/2012/ apr/24/mining-asteroids-on-moon-precious-metals?INTCMP=SRCH.
[18] Mike Wall, *Next Giant Leap for Space Tourism: A Trip Around the Moon*, SPACE.COM (Apr. 28, 2011), http://www.space.com/11502-space-tourism-moon-mission-space-adventures.html.
[19] Patrick Manning, *World's First Spaceport Nearly Ready in New Mexico*, ASSOCIATED PRESS (Sept. 24, 2012), http://www.foxnews.com/science/2012/09/24/world-first-spaceport- nearly-ready-in-new-mexico/.

develop a legal structure similar to the one in place for international commercial disputes.

Section II will primarily address the choice of law problem. The Comment will first highlight different methods currently used in non-sovereign locations such as in Antarctica and the high seas and address whether the proposed structure should rely on these methods or not. This section will later address the different modern alternatives that have been developed and assess their viability. Section III will delve into the different organizations and conventions that have been put in place since the mid-20th century to tackle space-exploration disputes. This section will underline the successes and failures of the different conventions, which will help us develop a more efficient proposal by relying on past experiences. Finally, section IV will stress the importance of developing a structure similar to the one for international commercial disputes but with a focus on outer-space disputes. This section will emphasize the benefits of such a proposal, while explaining the benefits of an ADR-oriented structure vis-à-vis a litigation one. It will also heavily rely on the legal benefits that the New York Convention[20] and the UNCITRAL's Model Law[21] provided to international commercial disputes, and incorporate these benefits into the proposal.

[20] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention," is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. It "seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards." The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. *See generally* the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1958); http://www.newyorkconvention.org/

[21] The (UNCITRAL's) Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. *See generally* "UNCITRAL Model Law

II. CHOICE OF LAW: A COMPLICATED MATTER

A. Lack of a Uniform Choice of Law System: Examples from Non-Sovereign areas

Imagine this:

> "*An American biologist is conducting an experiment aboard an orbiting multinational space station (MSS) built by the United States, Canada, Japan, and the European Space Agency. The biologist is passing through the Canadian module, where a French astrophysicist is repairing an instrument panel. The astrophysicist carelessly pushes aside a wrench, which floats away and injures the biologist. Which state's choice of law rules—and institutions—determine which state's substantive laws will apply to the issues of the astrophysicist's liability and the American's ability to recover damages*"[22]

This fact pattern is the nightmare of any first-year Civil Procedure law student. Thankfully, law students do not have to provide an answer at this moment, but the legal profession will have to do so at some point in the near future. The issue raised by the scenario above relates to the choice of law: which substantive law should govern in a dispute involving individuals from different countries and where the dispute takes place in a non-sovereign, "jurisdiction-less," location? Since outer-space is deemed as part of the "common heritage of humankind,"[23] no state may assert control or exclusive dominion over any part of outer-space.[24] Subsequently, when a dispute arises in outer-space, such as in the example above, the decision as to which substantive law applies is hard, if not impossible, to figure out. It has been suggested that when addressing the choice of law issue, the decision-maker (i.e., the court or the arbitrator)

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on International Commercial Arbitration (1985), with amendments as adopted in 2006;" http://www.newyorkconvention.org/

[22] Helen Shin, "*Oh, I have slipped the surly bonds of earth": Multinational Space Stations and Choice of Law*, 78 Cal. L. Rev. 1375, 1376 (1990).

[23] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. I, 18 U.S.T. 2410, 2412-13, 610 U.N.T.S. 205, 207-08.

[24] *See*, e.g., *id*. art. II, 18 U.S.T. at 2413, 610 U.N.T.S. at 208 (outer space "is not subject to national appropriation by claim of sovereignty").

should take into consideration a number of factors such as (1) the registry state of the MSS module at issue; (2) the nationality of the plaintiff; and (3) the nationality of the defendant.[25] However, it is likely that the courts applying this test might knowingly or unconsciously favor their own laws, which would result in an unpredictable system. Therefore, the inherent problem in this example is the lack of a uniform choice of law which would govern disputes (or torts in this case) aboard an MSS in outer-space.[26]

As explained above, the choice of law problem tends to be even more confusing in "jurisdiction-less," non-sovereign territories (i.e., outer-space) because of the lack of applicable procedural and substantive law. The following two subsections will highlight how the international community addressed the choice of law problem in two non-sovereign places on earth, and subsequently think about whether these examples serve as a helpful model for outer-space disputes.

i. Antarctica

Antarctica is an interesting example to rely on because a number of states claim sovereignty over different parts of this territory.[27] However, the Antarctic Treaty of 1959 froze these disputes,[28] resulting in an absence of a sovereign entity imposing its laws on the territories of the Antarctic[29]—a similar situation to outer-space. The lack of a sovereign legal system, however, does not mean that each country is free to do what it pleases. The Antarctic Treaty imposed some standards of conduct in addition to some methods of dispute resolution for activities carried on the territory.[30] In other words, the Antarctic Treaty binds signatory countries to a standard of conduct, and provides a framework for punishing breaching states.

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[25] Shin, *supra* note 22, at 1378.
[26] *Id*. at 1377.
[27] These states include Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. J. MYHRE, THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW, AND DIPLOMACY 7 (1986).
[28] Art. IV, sec. 1 of the Antarctic Treaty provides that nothing in the treaty shall be interpreted as a renunciation by any signatory of previously asserted claims to territorial sovereignty in Antarctica, or as affecting a signatory's recognition or non-recognition of any other state's claim to such sovereignty. *See* Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 796, 402 U.N.T.S. 71, 74.
[29] Shin, *supra* note 22, at 1379.
[30] Antarctic Treaty, supra note 28, art. VI, 12 U.S.T. at 797, 402 U.N.T.S. at 76.

However, the focus of this Comment is on the activities of individuals and private entities—rather than state actors—in non-sovereign territories (such as outer-space or Antarctica in this case). The Antarctic Treaty fails to regulate the wrongdoings of private parties from non-signatory countries.[31] It solely provides jurisdiction by a signatory state over its nationals who are performing scientific or exploratory missions.[32] If a French scientists commits a tort in Antarctica, he would only be subject to the jurisdiction of the French courts. A scientist from Mexico—a non-signatory country—for example, would not necessarily be subject to the jurisdiction of the Mexican courts nor to any other particular courts system and a question arises as to how to assert jurisdiction over her. The Antarctic Treaty fails to provide a predictable and reliable legal solution to the wrongdoings of nationals of non-signatory states—which are numerous—and, therefore, could not serve as a model to be applied in outer-space disputes.

ii. The High Seas

Unlike land, the majority of the oceans and seas are not claimed (and could not be because of international agreements) by a state.[33] The aggregate of all unclaimed water areas (mainly oceans) constitutes the high seas, which no state is allowed to claim sovereignty over.[34] Despite the lack of an exclusive sovereign over the high seas, international law and treaties provide a legal framework for activities undertaken on the high seas.[35] However, unlike the Antarctic Treaty, the various treaties and agreements are equally enforceable to all states and their nationals.[36] For example, it is custom that the state under which the ship sails—also known as the flag state—has jurisdiction over that state in the high seas.[37] Concurrently, a flag state will maintain primary jurisdiction over a defendant for misconduct occurring on the ship while on the high seas, despite the generally accepted notion of a state maintaining jurisdiction

[31] Antarctic Treaty, supra note 28, art. VIII.
[32] *Id*.
[33] A coastal state can claim extensive (though not exclusive) jurisdictional rights in a zone up to 200 miles from an established baseline. *See* R. CHURCHILL & A. LOWE, THE LAW OF THE SEA 133 (rev. ed. 1988).
[34] *Id*. at 164-65.
[35] These treaties include the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1883 U.N.T.S. 397; and The Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.
[36] Shin, *supra* note 22, at 1381.
[37] R. CHURCHILL & A. LOWE, supra note 33, at 168-69.

over its nationals who are within the jurisdiction of another state.[38] Therefore, despite the lack of an explicit choice of law structure which dictates the applicable substantive law, international agreements and customs provide a uniform rule from which a choice of law decision could be made.[39]

An important distinction, however, could be drawn between the example of ships sailing in the high seas and space shuttles. As explained above, ships sail under the flag of a state and therefore can easily be associated with a set of national substantive and procedural laws. Since space activities require significant effort and financial investments, it is customary for private companies to team up with other companies (or even foreign State agencies). When a space exploration mission is undertaken by a an association of different private companies it becomes much harder for a court to figure out the applicable state law. Subsequently, the choice of law method applied in the case of high-seas is unlikely to be effective in outer-space disputes.

B. Traditional Choice of Law Approaches on Earth

Given that the above examples of non-sovereign areas were deemed non-helpful and not fully applicable for outer-space choice of law matters, we turn our attention to some of the traditional choice of law methods used on Earth. The following subsections will address the concept of Lex Loci Delicti and the subsequent developments in the legal field.

i. The Traditional Approach: Lex Loci Delicti

Under the theory of Lex Loci Delicti, courts are likely to apply the substantive laws of the location where the wrongdoing took place.[40] Some courts will look at the location "where the last event necessary to make an actor liable for an alleged tort takes place."[41] The benefits of this approach is that it provides uniformity and predictability: as long as the act is committed while on a sovereign territory, the courts will easily be able to determine the applicable law of the jurisdiction.[42] Therefore, because

[38] *Id*. at 169.
[39] Shin, *supra* note 22, at 1381-82.
[40] Ernst Rabel, *The Conflict of Laws: A Comparative Study*, 2 Ann Arbor: U. Mich. Press, 235-37 (2d. 1960).
[41] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).
[42] Shin, *supra* note 22, at 1391.

of the straight-forward applicability of the jurisdiction's laws, the plaintiff will have no opportunity to "shop-around" for a more favorable law.[43] Generally, most of the states with current abilities to send exploratory missions to outer-space—with the exception of the United States—rely on the Lex Loci Delicti theory.[44]

Despite its benefits and long-use, Lex Loci Delicti is not necessarily the best approach for outer-space. We should first keep in mind that most United States state courts are abandoning this approach in favor of other alternatives.[45] One could question whether this approach will get the needed international support when the United States—a major player in outer-space activities—does not rely on it. Another obstacle to the adoption of the theory is about determining the location (and therefore the applicable substantive laws) for outer-space disputes. Unlike on earth, there are no sovereign territories beyond the earth's atmosphere. Therefore, the whole purpose of the Lex Loci Delicti theory will be undermined by the lack of sovereign jurisdictions with applicable substantive laws. One author has suggested, in reliance on maritime law, that "the registration of the space station with a state makes the station an actual orbiting fragment of the registry state, so that any tort is actually committed 'in' the registry state."[46] However, following the failure of such an argument in maritime law disputes, and the complexities explained above of private space ventures the author acknowledges the shortcomings of the proposal.[47]

The choice of law question remains unanswered at this point and needs be taken into consideration for any future proposal addressing disputes in outer-space. Section II tackled the choice of law issue from a theoretical perspective by providing highlighting and explaining different methods used around the world in diverse circumstances. Since the mid-20th century, international actors put in place a number of applicable conventions and different organizations with the aim of tackling outer-space activities in its different forms. These efforts went beyond the jurisdictional question that Section II above addressed: they should be understood as an aggregate of diplomatic efforts by the powerful nations

[43] *Id.*
[44] *Id*.
[45] *See* CRAMTON ET AL., CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS 226-27 (4th ed. 1987) (as of publication date, only 15 out of 50 states apply the traditional choice of law rules).
[46] Shin*, supra* note 22, at 1393.
[47] *Id*. at 1393-94.

to regulate space activities. Section III below expands on these efforts, and the resulting conventions and international organizations, as well as their contribution to the field from a practical legal perspective, in addition to their short-comings.

III. DECADES OF INTERNATIONAL DIPLOMATIC EFFORTS: SCATTERED BENEFITS AND SHORTCOMINGS

A. Outer-Space Treaty

In 1967, the United Nations adopted the first international treaty relating to outer-space, the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*—commonly known as the outer-space treaty or OST.[48] This treaty became known as the "constitution of outer-space" because of its broad scope and content.[49] Despite it being a novelty at the time, OST was forged during an era of increased tensions and therefore reflects international aspirations to de-escalate the potential confrontation.[50] In other words, OST is a reflection of the cold-war era and mirrors the interests the geopolitical interests of the two superpowers.[51] Subsequently, OST underlined the peaceful aspect of any future explorative mission and urged states to abide by that.[52] Furthermore, the treaty maintained that the outer-space shall not be subject to the control of any single state,[53] thus that every state has a "non-exclusive right to the peaceful use, study, and exploration of outer space."[54] The treaty also calls for "cooperation and mutual assistance"

[48] *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].
[49] Brian Abrams, *First Contact: Establishing Jurisdiction Over Activities in Outer Space*, 42 GA. J. INT'L & COMP. L 797, 801 (2014).
[50] Brian Beck, *The Next, Small, Step for Mankind: Fixing the Inadequacies of the International Space Law Treaty Regime to Accommodate the Modern Space Flight Industry*, 19 ALB. L.J. SCI. & TECH. 1, 12 (2009).
[51] Abrams, *supra* note 49, at 802.
[52] Outer Space Treaty, *supra* note 48, arts. I, VI.
[53] *Id*.
[54] Arbaugh, *supra* note 8, at 833 (citing GERARDINE MEISHAN GOH, DISPUTE SETTLEMENT IN INTERNATIONAL SPACE LAW: A MULTI-DOOR COURTHOUSE FOR OUTER SPACE 164 (2007), at 140).

between the different states (mainly the United States and the Soviet Union at the time) for any outer-space activity.[55]

From a relevant legal perspective, the treaty addresses individual state's liability in case of harm. States, in their official capacities, are held ultimately responsible for any damage caused by their activities and the activities of their nationals.[56] In addition, the treaty holds the state liable for damages caused by a space object which the state has either launched or assisted in its launching.[57] Subsequently, the treaty puts the burden on the state for regulating and overseeing space ventures.[58] The treaty, despite it being the "constitution" of space activities, failed to mention private entities and their space ventures. Understandably, the treaty was drafted during a period in which it would be hard to anticipate private space ventures; and the focus of the document was geared toward preventing a destructive confrontation rather than regulating the minute details of private space ventures.

B. The Liability Convention

In 1972, the *Claims Commission of the Convention on International Liability for Damage Caused by Space Objects*—also known as the Liability Convention—was entered into force.[59] It was enacted to clarify and supplement the outer-space treaty.[60] While the treaty imposed liability on states for their outer-space activities, the liability convention set the standard for the liability.[61] Interestingly, the liability convention went into more details than the OST, such as distinguishing between harm caused in outer-space and the one caused by space objects on the surface of the earth or in the air.[62] Article II of the liability convention sets out the following: "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."[63] Article II imposes a strict liability standard

[55] Outer Space Treaty, *supra* note 48, arts. IX–XII.
[56] *Id.* art. VI.
[57] *Id*. art. VII.
[58] *Id*. art. VI.
[59] Arbaugh, *supra* note 8, at 833-34.
[60] *Id*.
[61] Abrams, *supra* note 49, at 805.
[62] *Id*.
[63] Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, 10 I.L.M. 965, art. 2 [hereinafter Liability Convention].

to any harm caused on the surface of the earth or in the air by space objects launched by a state. Such a standard is different than the "negligence" one stated by article III for harm caused in outer-space.[64] In either cases, the liability convention imposes liability solely on the states, and not on individual actors or private companies.[65] So once again, as with the OST, the liability convention fails to cover wrongdoings committed by the future main actors of outer-space activities.

On the positive side, however, the liability convention moves one step ahead by laying out a dispute resolution process, in case of a space object-related dispute (either in outer space, in the air, or on the surface of the earth). It sets out a two-tier process for settling disputes between states.[66] The process encourages diplomatic efforts to solve the dispute; therefore the use of bilateral (or multilateral, in case more parties are involved) diplomatic channels to settle the dispute peacefully.[67] Only when the diplomacy fails after one year of good faith efforts, a state is allowed to bring a claim under the liability convention.[68] This second option involves the setting of a Claims Commission—an *ad hoc* type of a commission—to solve the matter.[69] The commission is similar to an arbitration tribunal: it consists of three members, one chosen by each side and a third whom both parties agree on.[70] The commission will make its decision after evaluating the merits, and has the authority to award a monetary compensation.[71] The commission's award is binding only if the parties agree to that, in writing, beforehand.[72]

It is important to note that the liability convention does not impose exclusive means to seek redress: parties are free to seek a remedy through other means, but are prevented from seeking the same remedy through different means at the same time—such as bringing a claim the national

[64] *See generally Id*. art. 3: In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.
[65] Abrams, *supra* note 49, at 805; *see also* Liability Convention, *supra* note 63, art. 2 & 3.
[66] Abrams, *supra* note 49, at 806.
[67] Liability Convention, *supra* note 63, art. 9.
[68] *Id*. art. 14.
[69] *Id*.
[70] *Id*. art. 15.
[71] *Id*. art. 18.
[72] *Id*. art. 19.

courts of the state while having a pending claim with the commission.[73] Despite the author's appreciation of the efforts of the liability convention to lay out a dispute resolution process, one could question its viability from a practical standpoint and could question whether a state would be willing to bind itself to a decision of a commission over which it has no control. After all, the liability convention has never been called on, so far, and we cannot predict its efficiency at this point.[74]

C. The International Court of Justice

One recurrent suggestion for addressing outer-space disputes has been to involve the International Court of Justice (ICJ) in the ADR process. Particularly, the suggestion is for the establishment of a chamber within the ICJ for outer-space disputes, similar to the chamber created back in 1993 for environmental matters.[75] Even though the idea of using the ICJ for particularly narrow matters is not new,[76] the idea got some support among space lawyers.[77] This idea sounds interesting because if gives the parties the chance to solve their dispute infront of a specialized chamber, while keeping the door open to transfer the case to the full court, if needed.[78] The environmental chamber of the ICJ has, so far, proven to be unpopular.[79] The chamber has not heard a case because no state filed a claim there.[80] A number of reasons exist as to why the environmental chamber has been rather unsuccessful in carrying out its job. One of the relevant reasons, for our topic, is the lack of a uniform internationally

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[73] *Id*. art. 11.
[74] Michael Listner, *A New Paradigm for Arbitrating Disputes in Outer Space*, THE SPACE REVIEW: ESSAYS AND COMMENTARY ABOUT THE FINAL FRONTIER (Jan. 09, 2012), http://www. thespacereview.com/article/2002/1.
[75] The ICJ established a special seven-member Chamber of the Court for Environmental Matters in 1993. *See Chambers and Committees*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/court/index.php?p1=1&p2=4.
[76] Sylvia-Maureen Williams, *Dispute Settlement and Space Activities: A New Framework Required?*, *in* PROCEEDINGS OF THE 39TH COLLOQUIUM ON THE LAW OF OUTER SPACE 61, 64 (1996).
[77] THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 68TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION (1998) TAIPEI, TAIWAN (REPUBLIC OF CHINA), 247 (May 1998), http://heinonline.org/HOL/Page?handle=hein.ilarc/ilarc1998&div=1&id=&page=&collection=ilarc
[78] 1945 I.C.J Statute, Art. 26.3.
[79] Lotta Viikarri, *Towards More Effective Settlement of Disputes in the Space Sector*, 1 Lapland L. Rev. 226, 241 (2011).
[80] *Id*.

agreed-upon environmental law under which the parties could bring their claims.[81] For example, in a case involving both Hungary and Slovakia, the former relied on the principles of international environmental law while the latter focused on the law of treaties.[82] Similarly to environmental matters, there is a lack of uniformity of space law at the international level. In this sense, even if a space chamber was initiated, we could expect some cumbersome procedural conflicts; let alone the parties' willingness to bring their disputes there because of a lack of currently agreed-upon international agreements that would allow parties to effectively solve their dispute.[83]

The viability of a space chamber as part of the ICJ is, therefore, subject to future experiences despite it being an unlikely first choice. Away from courts and litigation, some scholars have suggested arbitration as a method to solve outer-space disputes. Section IV below will go into further details about the need to create an internationally agreed upon structure to resolve any future space-related disputes. Furthermore, the Comment will address whether litigation or alternative dispute resolution methods (mainly arbitration) would better serve the needs the space disputes; and finally, elaborate on the proposal of this Comment on the need to rely on past experiences in different legal fields to come up with an adequate way to address space-related disputes.

IV. TOWARD A UNIFORM ARBITRAL INSTITUTION

As explained in the introduction, the goal of this Comment is to develop a proposal for the creation of a firm structure for addressing outer-space disputes. A number of questions arise: Why do we need an internationally agreed-upon dispute resolution method? What are the benefits of developing such a structure? Should it involve litigation, or should we think about alternative disputes resolution methods; and if so, which one? The proposed structure in this Comment is one that heavily relies on a binding arbitration process, very similar in form to the one used for international commercial disputes. Section IV will address the questions raised above and elaborate on the proposed structure.

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[81] *Id*.
[82] *See generally*, Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. Rep 7, (September 25).
[83] Viikarri, *supra* note 79, at 241.

A. The Need and Benefits of an Arbitral Institution

A significant existing arbitral institution is the Permanent Court of Arbitration (PCA). Established in 1899, the PCA was the very first permanent inter-governmental institution to provide a number of ADR services.[84] Despite it being initially established for political reasons, including the objective of limiting the increased armament in Europe,[85] the PCA quickly evolved into an international institution, strategically located in the Hague, Netherlands[86] "perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community."[87] With more than 120 member states,[88] the PCA is not, despite its name, a court in the traditional sense but rather a permanent framework for resolving disputes.[89]

In 2009, the PCA realized the existing gaps in the current system and felt the need to address the development of an effective alternative dispute system for space-related disputes.[90] The Administrative Council of the PCA has called for the creation of an Advisory Group of legal experts[91] which was tasked with considering the "desirability of, or need for, arbitration rules specifically targeted at the resolution of space-related disputes."[92] After an extensive study, the Advisory Group reached its conclusion, making three relevant points.[93] It found that (1) there is a need for an international forum to address outer-space disputes, and the forum should be equally applicable to both state and non-state actors;[94] (2) the scope of activity of this forum should be broad enough to address all space-related disputes rather than those covered by the narrow treaties in place;[95] and (3) despite the existence of other dispute resolution alternatives for private parties, a space-focused mechanism is

[84] PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/about/introduction/history/ (last visited Feb. 11, 2017).
[85] *Id*.
[86] PERMANENT COURT OF ARBITRATION, https://pca-cpa.org/en/about/ (last visited Feb. 11, 2017).
[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] Fausto Pocar, *An Introduction to the PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*, 38 J. SPACE L. 171, 172 (2012).
[91] *Id*.
[92] *Id*. at 173
[93] Arbaugh, *supra* note 8, at 837.
[94] *Id*.
[95] *Id*.

worthwhile.[96] The Advisory Group concluded that establishing an international arbitral forum, specifically geared toward outer-space disputes, would be the most advantageous way to proceed forward.[97]

Developing a new ADR-oriented forum to address outer-space disputes provides a number of benefits. Space activities require cooperation between the different international players.[98] If a superior dispute resolution system—different from the confrontational aspect of litigation—is created, it will result in a better, more cooperative, and less hostile environment.[99] Such an environment could allow for better relief subsequent to a dispute—such as help in cleaning disasters—which will trigger a series of positive reactions (due to the parties understanding that the benefits of entering into the venture overcomes the costs of solving a potential dispute) between both private and public actors, reflecting the initial aspirations of a peaceful, cooperative space exploration program.[100] Another major benefit relates to the choice of law problem addressed above. ADR procedures could allow parties to negotiate the applicable substantive and procedural law, or in case they fail to reach an agreement, the panel could instead make the choice of law decision.[101] Granted, the panel's role in deciding the applicable law is very similar to a national court's role in making that decision, however, the panel would be relying on internationally-agreed upon set of rules rather than the national laws of individual countries, resulting in much more predictability of outcome.[102] A more predictable and friendly environment will encourage and attract increasing investments by private parties, which will lead to more research and scientific advancements in outer-space activities.[103]

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[96] *Id*.
[97] Pocar, *supra* note 90, at 177.
[98] *See generally*, Phillip D. Bostwick, *Going Private with the Judicial System - Making Creative Use of ADR Procedures to Resolve Commercial Space Disputes*, 23 J. SPACE L. 19 (1995) (discussing how creative uses of mediation and arbitration may prove beneficial to both sides of a dispute in private commercial businesses in the space industry)
[99] Wong, *supra* note 12, at 465.
[100] *See generally* Outer Space Treaty, *supra* note 48, art. I.
[101] *See, e.g.*, Shin*, supra* note 22 (arguing for the benefits of arbitration procedures, which are more flexible than judicial proceedings).
[102] *See generally* Marc S. Firestone, *Problems in the Resolution of Disputes Concerning Damage Caused in Outer Space,* 59 TUL. L. REV. 747 (1984) (discussing the need to develop a rational and uniform law for outer space by international organizations).
[103] Wong, *supra* note 12, at 463.

Unlike litigation or the current treaties or conventions addressed above, a potential ADR structure could apply to all major outer-space actors, such as states, private entities, and intergovernmental agencies.[104] Furthermore, an "isolated," well-structured, and predictable ADR process tends to be a more attractive option to states, vis-à-vis submitting themselves to a binding multilateral treaty which requires all disputes to be solved by the ICJ or some other court system.[105] An arbitral structure would also allow for a speedy and final decision with a narrow possibility of appeals.[106] Given that timing plays a significantly important role in space activities—such as time window for landing or atmospheric re-entry—a speedy and final decision is well-received and beneficial in these circumstances.[107] Arbitrating parties will get to pick expert decision-makers (the arbitrators) who can better understand space matters, in contrast to a local judge who, despite her legal expertise, might lack the technical and scientific knowledge about space activities.[108] Additionally, any ADR process—including arbitration—protects the confidentiality of information exchanged, unlike open court sessions.[109] In the current circumstances, the relevant information might involve matters of national security or scientific breakthrough which should obviously be protected, and arbitration provides the best venue for doing so.[110]

B. An UNICTRAL-Like Arbitral Structure for Outer-Space Disputes

As mentioned in the introduction, this author believes in the efficacy of the well-known arbitral system put in place to address transnational commercial disputes and consequently believes on relying on past experiences in the commercial sphere when formulating an ADR structure for outer-space activities. In order to better understand the following discussion, a brief overview of the current arbitral legal regime follows. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (also known as the "New York Convention" or the "Convention"), signed in 1958, is the foundational international legal agreement for the enforcement of foreign arbitral awards.[111] The

[104] Arbaugh, *supra* note 8, at 842.
[105] FABIO TRONCHETTI, FUNDAMENTALS OF SPACE LAW AND POLICY 55 (Joseph N. Pelton ed., 2013).
[106] *Id*.
[107] Arbaugh, *supra* note 8, at 843.
[108] *Id*. at 844.
[109] *Id*.
[110] Pocar, *supra* note 90, at 179.
[111] *See generally* The New York Convention, *supra* note 20.

Convention is considered as one of the most successful multilateral agreements ever signed,[112] with more than 150 signatory countries.[113] Briefly stated, the Convention requires signatory states to enforce an arbitral award made in another signatory country,[114] so long as none of the exceptions applies.[115] The grounds for refusing enforcement are mainly, but not entirely, procedural in nature, and aim to guarantee a fair arbitral process.[116]

Complementary to the New York Convention, two other relevant legal documents deserve to be addressed. The UN Commission on International Trade Law (UNCITRAL) adopted the first final version of the *Arbitration Rules* in 1976.[117] They consist of a comprehensive set of procedural rules which parties can rely on or even adopt for the conduct of an arbitral procedure arising out of commercial disputes.[118] Since its adoption, the UNICTRAL Arbitration Rules have been widely used by both institutional and *ad hoc* arbitration procedures; and have been revised in 2010 so that it reflects the needs and expectations of our times.[119] Later on, in 1985, the UNICTRAL adopted what became known as the proposed *Model Law on International Commercial Arbitration* (The Model Law).[120] The Model Law aims to harmonize the national arbitration laws of individual states in order to increase uniformity across states.[121] The Model Law covers all stages of an arbitral procedure, all the way from the initiation of an arbitration and the composition of the arbitral tribunal, to the recognition and enforcement of an arbitral award.[122] The Model Law has also been a success, reflecting worldwide consensus on key aspects of

[112] Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 U. of Miami Inter-Am. L. Rev. 23, 24 (2004).
[113] NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/countries (last visited Feb. 12, 2017).
[114] The New York Convention, *supra* note 20, art. III.
[115] *See generally* The New York Convention, *supra* note 20, art. V, § 1-2.
[116] Neuhaus, *supra* note 112, at 25.
[117] *UNCITRAL Arbitration Rules*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2017), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.
[118] *Id*.
[119] *Id*.
[120] *See generally* UNICTRAL's Model Law, *supra* note 21.
[121] Saturnino E. Lucio, *The UNCITRAL Model Law on International Commercial Arbitration*, 17 U. of Miami Inter-Am L. Rev. 313, 313 (1986).
[122] *See generally* UNICTRAL's Model Law, *supra* note 21.

international arbitral procedures, as adopted in different regions around the globe.[123]

This author recommends that any future space-oriented ADR structure heavily relies on previous experiences in the commercial sphere, while incorporating it to the needs of the outer-space community. In fact, an interesting proposal would be to develop a hybrid system, which relies on both the Liability Convention and the UNCITRAL Rules both addressed above. The international enforceability of arbitral awards—by the signatory countries of the New York Convention—provides an excellent guarantee that arbitration awards will be respected. However, the major distinction between the commercial sphere and the outer-space one is, in this author's view, the contractual aspect of the relation between the disputants. When there is a commercial transaction, the partners will enter into a contract before (or while) performing their commercial duties. In this sense, commercial partners will have an opportunity to agree to a dispute resolution procedure before, and in anticipation, of any possible future dispute. Subsequently, the act of agreeing to a binding arbitration procedure under the New York Convention happens at a pre-dispute stage. The sequence of events in the outer-space scenario is drastically different in most cases: because of the different types of disputes that may arise in the outer-space case (i.e, torts claims or property damages) parties are hardly able to agree to submit themselves to arbitration before any dispute arises. It is virtually impossible for a private company to enter into an arbitration agreement with every single potential future plaintiff, simply because it is hard, or even impossible, to anticipate who might be harmed by the companies' actions.

Therefore, based on this author's personal reasoning, the first step would be in formulating an international agreement (probably in the form of a UN-sponsored convention) where any entity harmed by a foreign party (both States and private actors), in the course of carrying an outer-space activity, would resolve its dispute through an arbitration process. The award of the arbitral tribunal will later be enforced in most countries, pursuant to the New York Convention.[124] Currently, there is no internationally-agreed upon framework which forces claimants to submit

[123] *Id*.
[124] *See generally* The New York Convention, *supra* note 20.

themselves to arbitration;[125] they are rather allowed to pursue whatever course they wish, causing some unpredictability and a lack of uniformity. Once this first step is met, the remaining steps to undertake will be a matter of procedure and brainstorm in terms of tailoring an effective dispute resolution procedure.

C. A Hybrid, Space-Oriented, New ADR Structure

The proposal, which is a lenient, flexible, one involves a hybrid system bringing aspects from both the Liability Convention and the Model Law. In fact, some authors have suggested a tiered process which involves both diplomacy, mediation, and arbitration.[126] Since outer-space disputes may involve State agencies, a voluntary diplomatic effort to solve the dispute might be suggested as a first step.[127] However, a complication arises when a private entity and a state agency are involved in the dispute: formal diplomatic channels are non-existent in this case. In such a scenario, the parties could still agree to mediate the dispute in good faith. If, within a certain period of time, diplomatic efforts (or mediation) fail, then any party could move to request an arbitral tribunal to solve the dispute. Once a request for arbitration has been made, the subsequent arbitration procedural matters could mirror the UNCITRAL's *Arbitral Rules* discussed above.[128] For example, the procedural matters would involve deciding the number of arbitrators; the location of the arbitration proceeding; the applicable law; and many other details.

A final, significantly important, point to address relates to the tricky choice of law problem addressed above in Section II. It has been suggested that the parties should be free to agree on the applicable substantive law during the arbitration proceeding.[129] Such a proposal makes sense in the transnational commercial sphere where parties would contract about the applicable substantive law before a dispute arises. It is unlikely parties would reach an agreement post-dispute, as is the case in the outer-space case. The alternative to this problem is either for the arbitral tribunal to decide the substantive law based on a clear set of

[125] As discussed above in Section III, the Liability Convention is binding upon the parties only if they agree to submit themselves to it, after a dispute arises. *See generally*, Liability Convention, *supra* note 62.
[126] Wong, *supra* note 12, at 469.
[127] Wong suggests that parties can agree to either negotiate or mediate the dispute, which would both be categorized as falling under "diplomatic relations." *See id.*
[128] *See generally*, *UNCITRAL Arbitration Rules*, *supra* note 117.
[129] Wong, *supra* note 12, at 470.

factors, or for the international community to develop a new set of substantive laws relating to potential disputes in outer-space. In either case, current laws need to be modified and tailored in such a way as to fit outer-space disputes.

V. CONCLUSION

This Comment has hopefully served to highlight the need to put more efforts into outer-space-related disputes, and the viable methods to resolve these disputes in a predictable, well structured, manner. Section I briefly addressed the historical development of space exploration; it also compared the military aspect versus the civilian one for these activities, while emphasizing our focus on the privately oriented, civilian, type. Section II expanded on a very essential legal question that still needs to be answered by the legal community before proceeding forward in any space-related ADR structure. Section II also provided some comparison with other non-sovereign territories and international waters, in order to better highlight and explain the issue at hand. Section III elaborated on the different conventions and treaties currently in place. The goal of section III was to inform the reader about the efforts put so far in addressing outer-space activities, while explaining their benefits and drawbacks. By clearly showing the lack of any effective international agreement for the resolution of outer-space disputes, Section III led the way into the need to develop a new ADR-oriented space structure. Section IV aimed to bring together different relevant and effective legal concepts, from different fields of law, in order to make a final proposal. It is very clear at this point that gigantic efforts still need to made in order to come up with an effective end-result. The road to this end-result is a lengthy and arduous one, however, the earlier the international community begins its work, the better it is for our societies. Science is moving forward so quickly that, if we do not start thinking about these topics, technological developments will outpace the evolution of the law.

Selecting one article as the best among several excellent ones is a daunting task. Reading the articles from the finalists was an enlightening experience, but selecting one over the rest was a difficult decision. Inevitably, the personal predilections of readers is a factor. For this reader, the international scope of the article was a plus and what topic can compare in importance to "genocide, war crimes and ethnic cleansing"?

Other readers reasonably preferred domestic topics, and those central to the usual scope of Alternative Dispute Resolution. Preventing mass atrocities is obviously desirable, but that topic might be regarded as too amorphous to some.

In addition to being well written and research, as well as of considerable length but without filler, this article succeeds in saying something important and original about perhaps the greatest plague facing nations throughout the world.

Elizabeth Trachte-Huber
Editor ACCTM
American Journal of Mediation

EARLY NON-MILITARY INTERVENTION TO PREVENT ATROCITY CRIMES

Sarah Lesser*

I. INTRODUCTION

The term "mass atrocities" does not have a technical legal definition.[1] However, it is generally understood as the international crimes of genocide, war crimes, crimes against humanity, and ethnic cleansing.[2] In the Rome Statute of the International Criminal Court ("Rome Statute"), these crimes are described as the "most serious crimes of concern,"[3] and since the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") was signed in 1948, the international community has been working to prevent and punish the perpetration of such crimes.[4] The field in which scholars,

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[1] *See generally* RECONSTRUCTING ATROCITY PREVENTION (Tibi Galis et al. eds., Cambridge University Press 2016).

[2] *Id.* Ethnic cleansing is not a legal term. It refers to the process by which a city, state, etc. is made ethnically pure, and can involve aspects of the other crimes listed above.

[3] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF 183/9, *adopted* July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998), (entered into force July 1, 2002). [hereinafter Rome Statute].

[4] *See* Convention on the Prevention and Punishment of the Crime of Genocide, U.N. Doc. X/XXX (1948), 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/39/51, 1465 U.N.T.S. 85; 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31/ [1958] ATS No. 21 [hereinafter Geneva Convention I]; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.TS 85/ [1958] ATS No. 21 [hereinafter Geneva Convention II]; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135/ [1958] A.T.S. No. 21 [hereinafter Geneva III]; 1949 Geneva Convention (IV) Relative to the Protection of Civilian

policymakers, and others work toward the elimination of these crimes has become known as atrocity prevention.

One of the preeminent issues in atrocity prevention, if it is working one hundred percent effectively, is that there will be no indication that the process is working at all, because there will be no more atrocities and thus no means of tracking whether said atrocities have been prevented.[5] This is called the "non-event problem."[6] Also, due to the fact that a lot of these mechanisms have developed so recently, they have not had time to take root on an institutional level, and their effectiveness cannot be easily assessed as such.[7]

Many of the existing atrocity prevention mechanisms are designed to have a deterrent effect, and provide an *ex post facto* condemnation of the atrocities and their perpetrators. These tools include a variety of treaties and tribunals, such as the Geneva Conventions[8] and the International Criminal Court ("ICC").[9] Proponents of these mechanisms argue that threat of punishment is a significant deterrent, but it should be noted that although some of these mechanisms have existed for decades, atrocity crimes continue to be perpetrated around the world.[10] It is necessary to

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Persons in Time of War, 75 U.N.T.S. 287/ 1958 A.T.S. No. 21 [hereinafter Geneva IV]; INT'L COMM'N ON INTERVENTION AND ST. SOVEREIGNTY, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY: THE RESPONSIBILITY TO PROTECT (2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf. [hereinafter ICISS].

[5] *See generally* SCOTT STRAUS, FUNDAMENTALS OF GENOCIDE AND MASS ATROCITY PREVENTION (2016).

[6] The phrase "non-event" is used to describe events that did not happen. This is a phenomenon that exists across disciplines. *See* John T. Morris, *Non-Events*, 34 PHILOSOPHICAL STUD.: INT'L J. FOR PHIL. ANALYTIC TRADITION 321, 321–324 (1978).

[7] *See generally id*.

[8] *See infra* Section II (A).

[9] *See infra* Section II (B).

[10] For further reading, see *Past Genocides and Mass Atrocities,* UNITED TO END GENOCIDE, http://endgenocide.org/learn/past-genocides/ (last visited Aug. 22, 2017); *see also Watch List*, UNITED TO END GENOCIDE, http://endgenocide.org/whos-at-risk/watch-list/ (last visited Aug. 22, 2017); *Alerts and Warnings*, U.S. DEPT. OF ST.: PASSPORTS AND INT'L TRAVEL, https://travel.state.gov/content/passports/en/alertswarnings.html (last visited Oct. 8, 2016) (this is a list of countries which the U.S. State Department recommends

develop new mechanisms in order to move closer towards the complete elimination of atrocities.[11]

A developing and critical aspect of atrocity prevention is the doctrine of the Responsibility to Protect ("R2P").[12] R2P centers around the belief that sovereign states have a fundamental responsibility to protect their own citizens from atrocities such as those described above.[13] States can request assistance from the international community in this endeavor. And, should a state fail to protect its own citizens, the international community is obligated to intervene.[14] More often than not, the assistance provided by the international community takes the form of late-stage military intervention.[15] However, this form of intervention is problematic for several reasons: military intervention has high costs, both with regards to finances and human life; this type of intervention is frequently interpreted as a violation of state sovereignty, and cast as a form of neo-imperialism;[16] and, due to the consensus required, it often takes a long time to initiate.[17]

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avoiding due to violent conflict and political instability—the website also provides a description of the situation in each state listed, and it can be deduced from these descriptions which states are currently experiencing atrocity crimes); *Situations Under Investigation*, INT'L CRIM. CT., https://www.icc-cpi.int/Pages/Situations.aspx (last visited Oct. 8, 2016); *Preliminary Examinations*, INT'L CRIM. CT., https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx (last visited Oct. 8, 2016).

[11] "At a time when international capacity to respond to current crises is strained, it is imperative that Member States and other international actors devote more energy and resources to effective prevention and accelerate efforts to put an end to the ongoing perpetration of such crimes." Report of the Secretary General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, U.N. Doc. A/69/981–S/2015/500 (2015).

[12] *See generally* Eileen F. Babbitt, *Mediation and the Prevention of Mass Atrocities*, *in* THE INTERNATIONAL POLICY OF HUMAN RIGHTS: RALLYING TO THE R2P CAUSE? 29, 29–47 (Monica Serrano & Thomas Weiss eds., 2014); Galis et. al., *supra* note 1. It should be noted that R2P is a soft-law norm.

[13] ICISS, *supra* note 4.

[14] *Id*.

[15] *See generally id*.; Galis et. al., *supra* note 1. See *infra* Section III for a more detailed explanation of why this is the case.

[16] See Noam Chomsky, *Humanitarian Imperialism: The New Doctrine of Imperial Right*, 60 MONTHLY REV. 22, 22–50 (2008) for a more nuanced analysis of neo-imperialism under the guise of humanitarian aid.

[17] Galis et. al., *supra* note 1, at ch. 2.

Since the publication of Gregory Stanton's "Eight Stages of Genocide,"[18] atrocity prevention scholars have generally accepted that atrocities are a process rather than an event.[19] It would therefore be prudent to intervene at a point in the process prior to the occurrence of mass killings. As noted atrocity prevention scholars Tibi Galis, Sheri Rosenberg, and Alex Zucker observe, "[w]e need to know what engagement points are available beyond structural assistance, but before the tipping point of direct killings has been reached."[20] With this in mind, in 2014 the United Nations ("U.N.") proposed the Framework of Analysis for Atrocity Crimes ("U.N. Framework of Analysis") which delineated a wide variety of Risk Factors[21] and indicators.[22] For example, the Risk Factors for crimes against humanity include "signs of a widespread or systematic attack against any civilian population" ("Risk Factor 11"), and "signs of a plan or policy to attack any civilian population" ("Risk Factor 12"). Within each Risk Factor is a list of corresponding indicators that describe specific events.[23] These Risk Factors are arranged by specific crime, and can be understood as potential points for early intervention in line with the doctrine of R2P.[24]

[18]Gregory Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, http://www.genocidewatch.org/genocide/tenstagesofgenocide.html (last visited Oct. 10, 2016) (Initially, Stanton explained genocide as an eight-stage non-linear process. He has since added two additional stages).

[19] United Nations, Framework of Analysis for Atrocity Crimes, (2014) [hereinafter U.N. Framework of Analysis]. In other words, there is no single moment in time that can be pinpointed and labeled as the precise moment at which a war crime occurred.

[20] Galis et al., *supra* note 1, at 7.

[21] "Risk Factors are conditions that increase the risk of or susceptibility to negative outcomes. Those identified in this framework include behaviours, circumstances or elements that create an environment conducive to the commission of atrocity crimes, or indicate the potential, probability or risk of their occurrence." U.N. Framework of Analysis, *supra* note 19.

[22] "The indicators included in this framework are different manifestations of each risk factor, and therefore assist in determining the degree to which an individual risk factor is present." *Id.*

[23] *Id*.

[24] *Id*.

An effective mechanism for prevention would incorporate the U.N. Framework of Analysis into the R2P toolbox, and act as a capacity building tool for the global atrocity prevention community.[25] In theory, such a mechanism could work with any Risk Factor; however, this Note will focus on Risk Factor 7, "Enabling circumstances or preparatory action,"[26] which is a common Risk Factor.[27] The benefit of working with a common Risk Factor is that one system of prevention can work to reduce the risk of all three atrocity crimes. Additionally, the majority of the indicators within this particular Risk Factor are both tangible and quantifiable,[28] and, as such, it will be difficult for the perpetrator to deny the presence of the indicators—which will allow for more effective intervention.

These developing methodologies should be merged into a new, more effective system of atrocity prevention. This Note explores the possibility of victim-offender mediation or negotiation[29] as a means of early non-military intervention for atrocity crimes, in situations in which indicators from Risk Factor 7 of the U.N. Framework of Analysis[30] are present, and argues that the international community should turn to such forms of mediation and negotiation more often in order to prevent atrocities. Section II provides a brief history of atrocity prevention, and explores other proposals for early warning and non-military intervention. This section also highlights the shortcomings of existing atrocity prevention models. Section III evaluates situations in which victim-offender mediation and negotiation have

[25] *See generally* ICISS, *supra* note 4; U.N. Framework of Analysis, *supra* note 19.

[26] In this context, "enabling circumstances" refers to those conditions that could be conducive to the perpetration of mass atrocity—situations in which potential perpetrators have taken positive steps toward executing atrocity crimes. A more detailed explanation of how these situations are conceptualized within the U.N. Framework of Analysis can be found in *infra* Section IV (C).

[27] When a Risk Factor is described as "common," this means that rather than serving as a warning sign for a specific atrocity crime, it is applicable to atrocity crimes in general.

[28] *See* U.N. Framework of Analysis, *supra* note 19.

[29] Or other forms of Alternative Dispute Resolution. *See infra* Section III (B).

[30] U.N. Framework of Analysis, *supra* note 19. (Risk Factor 7 addresses enabling circumstances or preparatory action.).

been used to resolve situations of violent conflict,[31] and analyzes the differences and similarities between those situations and the circumstances described in Risk Factor 7. The primary purpose of this section is to examine the various Alternative Dispute Resolution ("ADR") mechanisms that have been used in the past to combat violent conflict. Lastly, Section IV outlines what an interventionist system of victim-offender mediation and negotiation based on Risk Factor 7 of the U.N. Framework of Analysis would look like; discusses the potential effectiveness of such a system; and addresses what added value such a mechanism would have to the "preventative toolbox."[32]

II. BACKGROUND

A. *The Origins of Atrocity Prevention: Naming the Problem*

The roots of atrocity prevention can be traced to the end of World War II. One of the first efforts toward preventing atrocities was the creation of the United Nations. According to the U.N. Charter, the purpose of the U.N. is "to maintain international peace and security, and to that end: to take effective measures for the prevention and removal of threats to the peace . . ."[33] To achieve these goals, the U.N. Charter created a complex system of international agencies and councils tasked with mandates on a variety of issues, ranging from human rights to security.[34] One such body is the General Assembly, which is frequently described as the legislative branch of the U.N.. The General Assembly can pass non-binding resolutions and adopt treaties.[35] Perhaps the most important U.N. body for the purpose of preventing atrocities is the Security Council. The Security Council is effectively the

[31] Violent conflict is not necessarily an atrocity crime. While "atrocity crime" refers specifically to genocide, crimes against humanity, and war crimes, "violent conflict" is a broader term, encompassing any use of force by two or more parties. PAYSON CONFLICT STUDY GRP., A GLOSSARY ON VIOLENT CONFLICT (2001), http://reliefweb.int/sites/reliefweb.int/files/resources/6C8E6652532FE542C12575DD00444F2D-USAID_may01.pdf.

[32] *See infra* Section II (B).

[33] U.N. Charter art. 1, ¶ 1.

[34] *See generally* U.N. Charter.

[35] *See generally id.*

executive branch of the U.N.. Its resolutions are binding, and it possesses the authority to pass any resolution it deems necessary "for the maintenance of international peace and security."[36] This includes authorizing the use of armed force. There are two situations in which it is permissible to use armed force: self-defense, and as a counter to threats to international peace and security. Typically, those acts that the Security Council deems threats to international peace and security are analogous to atrocity crimes.[37] Although countless atrocities have been committed since the U.N. was created, the Security Council has authorized the use of armed force only twice.[38] This is due to an inherent flaw in the structure of the Security Council. The Security Council is composed of fifteen U.N. Member States.[39] Ten of these Member States have non-permanent seats, and serve two-year staggered terms.[40] The other five states have permanent membership.[41] These permanent members are China, France, Russia, the U.K., and the U.S. Each of the permanent members has veto power—if a single one of the five votes against a resolution, it does not pass.[42] They all must reach a consensus.[43] Recently, the five permanent members have been accused of using this veto to preserve their

[36] U.N. Charter, art. 24.

[37] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[38] One of these instances was an explicit authorization, and the other was a tacit authorization by failing to retroactively condemn the action. The explicit authorization was in the case of Libya, and the tacit authorization occurred with respect to intervention in the Former Yugoslavia. Press Release, Security Council, Security Council Authorizes 'All Necessary Measures' to Protect Civilians in Libya, U.N. NEWS CTR. (Mar. 17, 2011), http://www.un.org/apps/news/story.asp?NewsID=37808#.WMUZBBIrL-Y;
Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659

[39] U. N. Security Council, *Current Members*, U.N., http://www.un.org/en/sc/members/ (Oct. 25, 2016).

[40] *Id*.

[41] *Id*.

[42] U.N. Charter, art. 27.

[43] *Id*.

own interests.[44] The reason that the Security Council has not authorized intervention in Syria is because Russia consistently votes against resolutions authorizing intervention.[45]

Once the Security Council, Generally Assembly, and other U.N. bodies were established, one of the first measures taken by the U.N. was the signing of the Genocide Convention in 1948.[46] The passage of this convention was the result of many years of work by Raphael Lemkin, a Polish lawyer whose family perished in the Holocaust.[47] This document outlines a specific definition for the crime of genocide:

> any of the following acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[48]

In addition, the Convention establishes a legal obligation to prevent genocide.[49] However, it does not set up a framework for prevention, and enforcement mechanisms are broad and difficult to

[44] Patrick Goodenough, *Security Council Must Stop Using Veto in Cases of Genocide, Group Says*, GLOB. POLICY FORUM (Dec. 10, 2008), https://www.globalpolicy.org/component/content/article/196/42660.html.

[45] Julian Borger & Bastien Inzaurralde, *Russian Vetoes Are Putting U.N. Security Council's Legitimacy at Risk, Says US*, GUARDIAN, (Sept. 23, 2015) https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us.

[46] Genocide Convention, *supra* note 4.

[47] SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 17–60 (2002).

[48] Genocide Convention, *supra* note 4, at art. 2.

[49] *Id*.

apply.[50] The only preventative measures provided are that the alleged genocide should be brought to the attention of the Security Council and that state perpetrators of genocide can be prosecuted before the International Court of Justice[51] ("ICJ"). However, the ICJ only possesses the authority to prosecute states. To date, no individual has been prosecuted for genocide in a permanent international tribunal, only in *ad-hoc* tribunals.[52]

The year after the Genocide Convention was passed, the international community came together to update the Geneva Conventions[53] for the fourth time.[54] These conventions form the basis of international humanitarian law ("IHL").[55] The Geneva Conventions view war as an inevitability, and convey the idea that if war is going to be waged, it should be waged in such a manner as to preserve as many lives as possible.[56] The Geneva Conventions are considered an essential part of atrocity prevention, and outline a wide variety of actions that can be labeled as war crimes. However, they do not establish a formal mechanism for prosecuting war criminals, nor do they propose a system for

[50] Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 505 (1998).

[51] Genocide Convention, supra note 4, at art. 9. The International Court of Justice, or ICJ, is the judicial body of the United Nations. U.N. Charter, art. 92.

[52] Both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have convicted individuals of genocide. However, all of the persons convicted by the ICC have been convicted either of war crimes or crimes against humanity.

[53] There are four Geneva Conventions—Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. *See* Geneva I, Geneva II, Geneva III, and Geneva IV, *supra* note 4.

[54] *Treaties and Customary Law,* ICRC (Oct. 29, 2010), https://www.icrc.org/en/document/treaties-and-customary-law.

[55] *The Geneva Conventions of 1949 and their Additional Protocols,* ICRC (Jan. 1, 2014), https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.

[56] *See* 1949 Geneva Convention (I), *supra* note 4; 1949 Geneva Convention (II), *supra* note 4; 1949 Geneva Convention (III), *supra* note 4; 1949 Geneva Convention (IV), *supra* note 4.

preventing the war crimes from occurring.[57] There is no tribunal established by the Geneva Conventions—the expectation is that violators will be prosecuted in domestic tribunals, and this series of treaties relies upon reciprocity as its primary motivation for compliance.

In 1949, a new addition was made to the four Conventions. Because it is one of the features that each of the Conventions has in common, it has become known as Common Article 3. Previously, the conventions set forth rules to be applied in times of international violent conflict.[58] However, the international community was aware that atrocities do not always extend beyond borders, so Common Article 3 was written to protect humanity in times of non-international violent conflict.[59]

> Common Article 3 establishes fundamental rules from which no derogation is permitted. It is like a mini-Convention within the Conventions, as it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character.[60]

The addition of Common Article 3 represents the formal establishment of what is known in human rights law as *jus cogens* norms.[61] *Jus cogens* means "compelling law" in Latin,[62] and the name is apt—the principles that comprise *jus cogens* are preemptory and non-derogable.[63] States are compelled to adhere to these norms under any and all circumstances. In addition to the war crimes delineated in Common Article 3, prohibitions on genocide, torture, and slavery have all come to be considered *jus cogens* as well. There is a body of substantive law to support the

[57] *See id*.
[58] *See id*.
[59] *Id.*
[60] *Treaties and Customary Law*, *supra* note 54.
[61] *The Geneva Conventions of 1949 and their Additional Protocols*, *supra* note 56.
[62] *Jus Cogens*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[63] *Id*.

idea that these acts are all *jus cogens*, including the aforementioned Genocide Convention, and the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment ("CAT"). CAT, passed in 1984, specifies that, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[64] This language implies a preemptory nature, and there is similar language in the international agreements pertaining to the other acts that are considered *jus cogens*.

Each of the three atrocity crimes discussed in this Note—genocide, war crimes, and crimes against humanity—are considered *jus cogens* norms.[65] This means that the commission of the crime need not be connected to a state party—the grounds for criminal jurisdiction are different for *jus cogens* crimes than for other crimes.[66] All states are not only *permitted* to prosecute alleged perpetrators of *jus cogens* crimes, they are *obligated* to do so.[67] However, there are those who believe that prosecution may not be the most effective response to atrocities.

B. *Atrocity Prevention in the Modern Era: Mechanisms for Enforcement and Intervention*

The late 1990s and early 2000s represented a shift in the atrocity prevention paradigm—the international community began to push for the development of new enforcement mechanisms for the existing atrocity prevention schema. In 1998, a group of states[68] came together at a conference to adopt the Rome Statute of the International Criminal Court ("Rome Statute"), which

[64] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4.

[65] *See generally* United Nations, *Report of the International Law Commission*, U.N. Doc. A/69/10 (2014); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Oligatio Erga Omnes*, 59 L. AND CONTEMP. PROBS. 63 (1996).

[66] BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 13–21(3d ed. 2014).

[67] *Id*.

[68] The states parties to the Rome Statute participate in the Assembly of States Parties, the managing body of the ICC. *See* Rome Statute, *supra* note 3.

established the ICC.[69] The ICC works towards holding individuals accountable for the perpetration of mass atrocities, with criminal accountability acting as a deterrent in the same way it does in many domestic systems of criminal law.[70] This idea is derived from the primary functions of international criminal law.[71] While many proponents of the ICC argue that prosecution is an effective deterrent to the perpetration of atrocity crimes, the Court certainly has its critics. In his discussion on transitional justice[72] in Kenya, Amboko Wameyo highlights some of the issues with prosecutorial discretion.[73] Several ICC member states feel that the Prosecutor would have too much power in this regard, but still can be swayed by political affiliations—a dangerous combination.[74] While some member states and legal theorists were concerned about the ICC having too much power, other critics claimed that international legal institutions lack the enforcement mechanisms to act as a legitimate deterrent.[75] This fear was legitimized when the United States withdrew from the ICC in 2001 after signing the Rome Statute in 2000, and again in 2016 when Russia withdrew.[76] There

[69] Rome Statute, *supra* note 3.

[70] William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J INT. LAW 701, 706 (2004); VAN SCHAACK & SLYE, *supra* note 66 at 17–21.

[71] VAN SCHAACK & SLYE, *supra* note 66, at 17–21.

[72] *See*, *infra* Section III (A).

[73] This discretion is called *propiro motu*, and can be used to initiate investigations and subsequent prosecutions in states that did not self-refer or were not referred by the Security Council. Amboko Wameyo, *Transitional Justice, A Two-Prong Approach: Reconciliation and Criminal Responsibility for Kenya Post 2007 Elections Violence*, 17 S. AFR. Y.B. INT'L L. 411, 432 (2009).

[74] *Id.*

[75] *See generally* Fredric L. Kirgis, *Enforcing International Law*, AM. SOC'Y OF INT'L L. (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law; *see also* Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 5 (2006).

[76] The U.S. withdrew prior to invading Afghanistan in 2001 so that military actions there would not be subject to ICC jurisdiction. Interestingly, Russia withdrew immediately following the results of the 2016 U.S. Presidential Election, after the ICC issued a report called Russian annexation of Crimea an occupation, and after there were calls for investigating. The exact reason for Russia's withdrawal remains unclear. *US Opposition to the International Criminal Court*, GLOB. POLICY FORUM, https://www.globalpolicy.org/us-un-and-international-law-8-24/us-opposition-to-the-icc-8-29.html (last visited Oct.

is also a contingent of legal scholars who are of the belief that prosecution is a wholly inappropriate response to atrocity crimes, and that the law cannot adequately capture the nature of these crimes.[77]

Proponents of international criminal prosecutions as a form of atrocity prevention argue that the ICC is one of most effective mechanisms developed by the international community. Located in The Hague, the ICC has jurisdiction over three international crimes: war crimes, crimes against humanity, and genocide.[78] As of 2017, state parties have the ability to ratify a provision allowing jurisdiction over the crime of aggression.[79] The Rome Statute details specific acts that fall under the umbrella of each crime.[80] The ICC has jurisdiction over a defendant when:

> the crimes were committed by a State Party national, or in the territory of a State Party, or in a

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10 2016); Shaun Walker & Owen Bowcott, *Russia Withdraws Signature from International Criminal Court Statute*, GUARDIAN (Nov. 16, 2016, 9:14 AM), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute; *Russia Withdraws from International Criminal Court Treaty*, BBC NEWS (Nov. 16, 2016), http://www.bbc.com/news/world-europe-38005282; Lizzie Dearden, *Russia to Withdraw from International Criminal Court Amid Calls for Syria Air Strikes Investigation*, INDEPENDENT (Nov. 16, 2016), http://www.independent.co.uk/news/world/europe/russia-international-criminal-court-icc-leaves-pulls-out-withdraws-putin-assad-syria-war-aleppo-a7420676.html; Robbie Gramer, *Why Russia Just Withdrew from the ICC*, FOREIGN POLICY (Nov. 16, 2016, 10:18 AM), http://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/; Nick Robins-Early, *What Russia Leaving the International Criminal Court Really Means*, HUFFINGTON POST (Nov. 17, 2016), http://www.huffingtonpost.com/entry/russia-international-criminal-court_us_582c6ea5e4b0e39c1fa7312f.

[77] *See generally* Mark Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2000). *See generally* MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW (1999).

[78] *See generally* Rome Statute, *supra* note 3. The Rome Statute defines crimes against humanity as widespread or systematic attacks against a civilian population that includes (but is not limited to): apartheid, forcible transfer, rape, and violations of *jus cogens* norms.

[79] *Id*.

[80] *Id*.

> State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under chapter VII of the U.N. charter.[81]

This means that the ICC's primary means of gaining jurisdiction over an offender is state consent via ratification.[82] Certain states involved in the development of the Court have actively refused to consent to the jurisdiction of the ICC.[83] For example, after signing the treaty, the United States has not only issued a statement declaring its refusal to consent to the jurisdiction of the court, but it has concluded agreements with other states affirming that said states will not turn in U.S. nationals for prosecution by the Court.[84] This imposes a limit on the power of the ICC, because these types of agreements are contrary to the Court's object and purpose. As such, its capacity to act as an effective atrocity prevention mechanism is diminished.

Despite the fact that states must opt-in to the ICC's jurisdiction, the Court has had a fair amount of success. To date, the Rome Statute has 124 states parties,[85] and has commenced proceedings against individuals from multiple countries, including Kenya, Uganda, Mali, Côte d'Ivoire, and Libya.[86] Proceedings at the ICC contain many phases, including Preliminary Examinations, Investigations, and Pre-trial.[87] The Court examines the evidence to see whether there is cause to move forward, and then the court evaluates the evidence in pre-trial/indictment, and then later at full

[81] INT'L CRIM. CT., *How the Court Works* (Oct. 15, 2016) https://www.icc-cpi.int/about/how-the-court-works.

[82] However, there are other means by which a state or citizen of a state could come before the Court. The Security Council can refer a situation to the Court; or the Prosecutor can choose to investigate a situation. *See id*.

[83] Schabas, *supra* note 70, at 709–10.

[84] *Id*. at 701–02.

[85] INT'L CRIM. CT., *Parties to the Rome Statute*, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 20, 2016).

[86] INT'L CRIM. CT., *Situations* (Oct. 15, 2016) https://www.icc-cpi.int/pages/situations.aspx.

[87] *How the Court Works*, *supra* note 81.

trial.[88] A key aspect of the ICC's proceedings is the reparations stage, in which the convicted perpetrator is obligated to make reparations to the affected population in a manner determined by the Court.[89] Although the ICC has made efforts to remain impartial, one major criticism of the court is that the majority of the cases they take on are in African states;[90] in fact, South Africa, Burundi, and Gambia have chosen to withdraw from the ICC over this perceived bias.[91]

In addition to the creation of the ICC, other attempts at strengthening atrocity prevention began to take shape in the early 2000s. In December 2001, the International Commission on Intervention and State Sovereignty ("ICISS") published a report entitled "The Responsibility to Protect."[92] The ICISS wrote the report in response to the NATO intervention in Kosovo in 1999, and the failure of the international community to intervene in Rwanda in 1994.[93] The international community was having a difficult time reconciling notions of sovereignty with the idea that certain acts, such as genocide and crimes against humanity, should be prevented at all costs.[94] Many states viewed military intervention, such as the NATO intervention in Kosovo, as a threat to their sovereignty.[95] However, other states viewed such intervention as a necessary facet of atrocity prevention.[96] The ICISS report reconciles these concepts by arguing that protection of the civilian population is a crucial aspect of effective sovereign governance.[97]

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[88] *Id*.
[89] INT'L CRIM. CT., *Situations*, *supra* note 86.
[90] *Id*.
[91] Camila Domonoske, *South Africa Announces Withdrawal from International Criminal Court*, NPR: THE TWO-WAY (Oct. 21 2016), http://www.npr.org/sections/thetwo-way/2016/10/21/498817513/south-africa-announces-withdrawal-from-international-criminal-court
[92] ICISS, *supra* note 4.
[93] *See generally id.*
[94] *Id.*
[95] *Id*.
[96] *Id*.
[97] *Id*. at 19.

This report is considered the basis for the doctrine of R2P,[98] and it outlines three pillars under which this responsibility can be carried out.[99] The first pillar of R2P is that pursuant to the principles of sovereignty, the state has an obligation to protect its citizens from atrocity crimes.[100] Should the state possess inadequate resources and capacity to protect its citizens, it may seek assistance from the international community.[101] This is the second pillar of R2P.[102] If both of the first two pillars fail to prevent the state from manifestly failing, the international community is then obligated to intervene under the third pillar of R2P.[103] However, as of the writing of the report, there has yet to be a consensus regarding the meaning of intervention:[104]

> Some would regard any application of pressure to a state as being intervention, and would include in this conditional support programmes by major international financial institutions whose recipients often feel they have no choice but to accept. Some others would regard almost any non-consensual interference in the internal affairs of another state as being intervention— including the delivery of emergency relief assistance to a section of a country's population in need. Others again would regard any kind of outright coercive actions—not just military action but actual or threatened political and economic sanctions, blockades, diplomatic and military threats, and international criminal prosecutions—as all being included in the term. Yet others would confine its use to military force.[105]

The definition of "intervention" provided in the ICISS report is effectively a laundry list of every possible type of intervention.

[98] *See generally* Galis et. al., *supra* note 1.
[99] *See generally* ICISS, *supra* note 4.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *See generally* ICISS, *supra* note 4, at 13.

The authors of the report chose to focus on non-consensual intervention against a state or its authorities.[106] They broke this down further into military intervention and its alternatives, such as sanctions and criminal prosecution.[107] The commission is careful to make a distinction between states having a "right to intervention," and a responsibility to protect.[108]

Pursuant to the doctrine of R2P, there are three criteria that must be met before successful prevention measures can be initiated.[109] First there must be a system of "early warning" in place to identify high risk situations; second, parties responsible for organizing preventative intervention must possess knowledge of all available policy and civil society mechanisms that could potentially affect change (preventative toolbox); and third, political leaders and bodies must have a desire to aid in prevention (political will).[110] The tools that the ICISS identifies as currently being in the preventative toolbox are: economic sanctions; diplomatic sanctions, such as naming and shaming; legal means of intervention, such as international criminal prosecution, and others described above; and military intervention.[111] In addition, the ICISS emphasizes that in order for preventative mechanisms to be effective, they must involve civil society to the greatest extent possible, and maintain a sense of local ownership while using the resources and capacity of the international community and international organizations.[112] Although the report addresses non-military intervention, its primary focus is when it is appropriate to use military force, and how such force should be used. Since R2P is an emerging norm, the international community has not had many opportunities to apply it.

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[106] *Id*.
[107] *Id*.
[108] *Id*. The Commission states that the outcome of intervention should be the furtherance of the well-being of the civilian population, not the furtherance of the goals of the international community or of the intervening state(s).
[109] *Id*. at 20.
[110] *Id*. System of early warning addressed in Section IV, *infra*.
[111] ICISS, *supra* note 4, at 23–25.
[112] *See generally id*.

C. *Looking Ahead: The U.N. Framework of Analysis*

In 2014, the United Nations Office of the Special Adviser on the Prevention of Genocide published its Framework of Analysis for Atrocity Crimes.[113] This document outlines the significance of atrocity prevention, and further elaborates on some of the concepts expounded in the ICISS Report on R2P. Based largely on the notion that mass atrocities are a process rather than an isolated event, the U.N. Framework delineates broad Risk Factors that apply generally to all mass atrocities, as well as Risk Factors specific to each mass atrocity.[114]

These Risk Factors cover a wide variety of potential issues spanning many phases of the process of mass atrocity. There are eight common Risk Factors, and two specific Risk Factors for each of the three atrocity crimes.[115] The specific Risk Factors exist to address the elements of each atrocity crime, and their respective precursors.[116] One such specific Risk Factor is Risk Factor 7: Enabling Circumstances and Preparatory Action.[117] This Risk

[113] U.N. Framework of Analysis, *supra* note 19.
[114] *Id*.
[115] *Id*.
[116] *See generally id.*
[117] U.N. Framework of Analysis, *supra* note 19.

> Atrocity crimes, and in particular genocide and crimes against humanity, are processes that take time to plan, coordinate and implement. They cannot be explained as isolated or spontaneous events that perpetrators decided to commit without some level of preparation. Also, as mentioned in a previous risk factor, perpetrators need to possess sufficient resources to be able to commit massive or widespread acts of violence. Such resources are not always readily available and can take time to assemble. Consequently, throughout the development of these processes, it should be possible to identify events, actions or changes that point to the likelihood that certain actors are taking steps towards a scenario of mass violence and possibly atrocity crimes. Alternatively, such events, actions or changes can also serve to create an environment that favors or even encourages the commission of such crimes. Recognizing such indicators and establishing a causal link to the probability of atrocity crimes is not always easy, but it is of great relevance. As with all risk factors,

Factor addresses events such as "Marking of people or their property based on affiliation to a group,"[118] "Imposition of emergency laws or extraordinary security measures that erode fundamental rights," and "[e]xpulsion or refusal to allow the presence of NGOs, international organizations, media or other relevant actors, or imposition of severe restrictions on their services and movements,"[119] among many other such acts. The Framework explains that such acts are indicative of progression along the process of mass atrocity, and should be regarded as serious warning signs.

There are several reasons why this Note will focus on Risk Factor 7 as opposed to the other Risk Factors in the Framework. The first reason is that Risk Factor 7 is a common Risk Factor, which means that it applies to each of the three atrocity crimes.[120] If this Note were to focus on one of the specific Risk Factors, the system of prevention would only serve to eliminate a single atrocity crime; or alternatively, the creation of three separate prevention systems would be required. Risk Factor 7 was also selected due to the visible nature of its indicators. Certain Risk Factors contain indicators that are difficult to observe or measure, which makes their presence refutable. For example, Risk Factor 6, Absence of Mitigating Factors, contains indicators such as "Limited or lack of empowerment processes, resources, allies or other elements that could contribute to the ability of protected groups, populations or individuals to protect themselves;"[121] and "Lack of a strong, organized and representative national civil society and of a free, diverse and independent national media."[122] Criteria such as these are difficult to measure, and their presence or absence is more easily refuted than the aforementioned indicators from Risk Factor 7. As such, this Note will solely focus on Risk Factor 7; however, that is not to say that it would be impossible to

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> analysis of this risk factor should take into consideration a context in which other risk factors might also be present."

Id.

[118] *Id*.

[119] *Id.*

[120] *Id*.

[121] U.N. Framework of Analysis, *supra* note 19, at 6.1.

[122] *Id.* at 6.2.

develop systems of early intervention based on other Risk Factors in the future.

III. DISCUSSION

A. *An Overview of the Shortcomings of Prosecution and Military Intervention as Preventative Mechanisms*

International criminal law has played a significant role in post-atrocity processes of conciliation and transitional justice for many years. And, much like in the domestic system, the threat of prosecution is designed to act as a deterrent to prevent individuals from perpetrating atrocity crimes.[123] However, prosecution and military intervention should not be thought of as the only available means of atrocity prevention, and it can be argued that they are not wholly effective in the first place.

Military intervention is not only problematic for the reasons outlined in Section II (A), but so-called humanitarian intervention often costs more lives than it saves.[124] While collateral damage is permissible under IHL, the primary purpose of atrocity prevention is to avert any and all unnecessary violence.[125] It seems counter-intuitive to prevent violence with further violence. If there are less violent means for preventing atrocities, such methods should be utilized first.

Since the very first international criminal trials in Tokyo and Nuremberg after WWII, legal scholars have taken issue with their existence. Some, such as Justice R.B. Pal, a justice on the Tokyo Tribunal, believed that international tribunals were purely political tools through which nations asserted sovereignty over one another.[126] This phenomenon is known as "victor's justice."[127] In

[123] Sheri P. Rosenberg, *The Relationship between the International Criminal Court and the Prevention of Mass Atrocities*, GENOCIDE PREVENTION NOW, http://www.ihgjlm.com/wp-content/uploads/2016/01/Relationship_ICC_Prevention_HU.pdf.

[124] Benjamin A. Valentino, *The True Costs of Humanitarian Intervention*, 90 FOREIGN AFF. 60, 64 (2011).

[125] STRAUS, *supra* note 5.

[126] VAN SCHAACK & SLYE, *supra* note 66, at 106.

post-conflict situations, victor's justice can lead to more animosity between the parties.[128] Additionally, criminal prosecutions are not conducive to the parties feeling as though their voices have been heard.[129] This feeling exists for two reasons. First, there are procedural limitations to prosecutions. Certain types of evidence may be inadmissible, and courts tend to be limited with regards to how much time they can spend on each case.[130] Second, there is no incentive for honesty in criminal prosecutions.[131] There is a school of thought that suggests that justice should be secondary to truth, as truth allows the parties to move on, and put the animosity of the conflict in the past.[132] Criminal prosecutions do not allow for this.[133]

Modern criticisms of international criminal prosecutions revolve around the nature of the jurisdiction involved. As discussed above, several states have withdrawn from the ICC in recent years. If all of these states parties to the Rome Statute can withdraw at will without consequence, the Court has no power whatsoever—a state whose nationals are under investigation can simply remove itself from the jurisdiction of the court. The withdrawals of the African states are indicative of a larger issue in international human rights law. The ICC, like other international human rights mechanisms, is viewed by many in African, Latin American, and some Asian states as a tool of Western imperialism.[134] This creates a lack of trust in the institutional foundations of the ICC. To be effective, atrocity prevention mechanisms should be viewed as promoting a state's values rather than as attacking them.[135] Another issue with the jurisdiction of the ICC is that it is not retroactive. That is, the ICC only has the authority to prosecute crimes that occurred on the territory of a

[127] *Id.* at 113.
[128] *Id.* at 99–113.
[129] *Id.* at 17–28.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] W Douglas Smith, *The International Criminal Court: The Long Arm of Neocolonialism?*, INT'L AFF. REV. (Nov. 1, 2009), http://www.iar-gwu.org/node/87.
[135] *See generally* STRAUS, *supra* note 5.

state party after that state consented to the jurisdiction of the court, either by signing the Rome Statute, or by granting *ad-hoc* consent.[136] This means that in theory, states could wait until their nationals have completed the commission of international crimes before consenting to jurisdiction, thus sheltering said nationals from ICC prosecutions. The final issue with the jurisdiction of the ICC is that it does not conduct trials *in absentia*,[137] and perpetrators of international crimes often evade capture for years.[138]

B. *Alternative Dispute Resolution, the R2P Toolbox, and Transitional Justice*

In addition to the legal enforcement mechanisms developed by the international community, the past seventy years have also seen the promulgation of a variety of complements[139] to traditional methods. Human rights scholars and practitioners alike often feel as though these complementary mechanisms developed out of necessity—to compensate for the shortcomings of the legal enforcement mechanisms addressed above.[140] Several of these complementary methods of atrocity prevention emerged as part of a multifaceted post-conflict process commonly referred to as transitional justice. Pablo De Greiff, the United Nations Special Rapporteur for the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence,[141] asserts that "there have been very few attempts to articulate a conception of transitional justice

[136] VAN SCHAACK & SLYE, *supra* note 66, at 144.

[137] However, there are valid criminal law and human rights principles for not conducting trials in absentia.

[138] Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court's Limitations*, N.Y. TIMES (June 15, 2015), https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html?_r=0.

[139] These methods are designed to work in conjunction with, as opposed to replace, international criminal prosecutions and, in extreme cases, use of force.

[140] VAN SCHAACK & SLYE, *supra* note 66, at 6–11.

[141] The terminology has developed in recent years as a more extensive replacement for the phrase "transitional justice," which some scholars find to be reductive. However, for purposes of length and clarity, the phrase "transitional justice" will be used almost exclusively in this note.

systematically."[142] There is no single agreed upon picture of what transitional justice looks like, or what it should be. In a 2004 report to the Security Council, U.N. Secretary General Kofi Annan[143] defined transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[144] This is a very broad definition, and the list of mechanisms that fall under the umbrella of transitional justice is long. The Secretary General goes on to say that "these [processes] may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[145]

The term "reconciliation" has become a popular phraseology in recent years. Legal scholars, such as Jens Meierhenrich, have called into question the legitimacy of the uses of this term.[146] He feels that frequently oppressed or victimized groups are forced into compromise in the name of reconciliation.[147] According to Meierhenrich, the purpose of reconciliation is to resolve the dispute in a manner that is acceptable to all involved parties.[148] In this way, he argues, reconciliation and associated processes (such as transitional justice) are effectively a form of alternative or appropriate dispute resolution.[149] It could also be argued that because many transitional justice mechanisms developed as an alternative to international criminal prosecutions, they are a form of ADR.

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[142] Pablo de Greiff, *A Normative Concept of Transitional Justice*, 50 POLITORBIS 17 (2010).

[143] Kofi Annan served as U.N. Secretary General from 1997 through 2006.

[144] Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc S/2004/616 (2004).

[145] *Id*.

[146] *See generally* Jens Meierhenrich, *Varieties of Reconciliation*, 33 L. & SOC. INQUIRY 195 (2008).

[147] *Id.* at 197.

[148] *See generally id*.

[149] *See generally id*.

> [ADR] refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. It is normally thought to encompass mediation, arbitration, and a variety of 'hybrid' processes by which a neutral [party] facilitates the resolution of legal disputes without formal adjudication.[150]

Traditionally, ADR is defined as comprising of mediation, negotiation, arbitration, and conciliation, however, it is not limited to these mechanisms—some ADR scholars assert that any legally-based litigation alternative is a form of ADR.[151] Meierhenrich asserts that the process of reconciliation is most similar to the ADR process of conciliation.[152] It should be noted, however, that effective transitional justice processes can still involve some form of traditional adjudication.

One of the most well-known transitional justice mechanisms is truth commissions. Truth commissions have been used across the globe in states such as El Salvador, Guatemala, Rwanda, Somalia, Argentina, the Former Yugoslavia, and South Africa, among others.[153] The specific structure of each truth commission is tailored to the needs of the state, but each one involves a degree of victim-offender mediation, and these commissions are typically implemented in situations in which litigation is thought to be inappropriate.[154] Truth commissions can be viewed as a form of mediation in that they enable all involved

[150] Robert Mnookin, *Alternative Dispute Resolution*, HARV. L. SCHOOL JOHN M. OLIN CTR. FOR L., ECON. AND BUS. DISCUSSION PAPER SERIES, http://lsr.nellco.org/cgi/viewcontent.cgi?article=1020&context=harvard_olin.

[151] *Dispute Resolution Processes*, A.B.A. SEC. DISPUTE RESOL., https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.html (last visited Nov. 5, 2016).

[152] Meierhenrich, *supra* note 146.

[153] Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 337–38 (1997).

[154] *See generally id*. Pricilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597; Gabor Rona, Visiting Professor, Benjamin N. Cardozo School of Law, Lecture (Nov. 13, 2016).

parties[155] to have their voices heard through a process of sharing, and feel as though they played a role in shaping reconciliation processes. This sharing is significant:

> [n]ational reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their stories, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help move them beyond the pain of the past.[156]

This assessment of truth commissions echoes analyses and applications of mediation. The primary purpose of mediation is to help the parties reach a mutually agreeable solution with the assistance of a neutral third party.[157] Like mediation, truth commissions seek to insure that parties feel as though they have played an active role in the process.[158] However, unlike traditional concepts of mediation, truth commissions work towards an objective truth, and are predicated on a right to truth.[159]

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[155] Truth commissions hear the stories of all victims, many of whom are regular citizens. However, their capacities are often limited, and they are unable to address the needs of the entire population. Additionally, some critics of truth commissions feel that like traditional adjudication, truth commissions are another form of victors' justice, and that they are structured to benefit the regime in power after the conflict and legitimize it.

[156] Scharf, *supra* note 153, at 379.

[157] *Mediation*, BLACK'S LAW DICTIONARY (10th ed. 2014); Am. Bar Ass'n, *The Road to Settlement: ADR Offers Cost—Effective Alternatives to Trial*, 28 A.B.A. SEC. FAM. ADVOC. 10, 10–12 (2005).

[158] Another key aspect of truth commissions is that they are typically state sanctioned and sponsored. This is for several reasons: first, the new state is more likely to govern effectively if there has been reconciliation, and if all of the nationals accept the legitimacy of the new state. It is therefore in the interest of the state to promote reconciliation. Second, truth commissions often function as an alternative to criminal prosecution, and some truth commissions grant amnesty to the perpetrators. Only the state can grant amnesty, thus truth commissions require minimal state approval. LOUIS HENKIN ET AL., HUMAN RIGHTS (2nd ed. 2009); Scharf, *supra* note 153; Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315 (1999).

[159] Hayner, *supra* note 154, at 611; *see also* HENKIN ET. AL., *supra* note 158.

Additionally, there is no single individual acting as mediator, but rather, a commission; and the parties are society at large rather than private individuals.[160] Additionally, the commission is not usually a third-party neutral, but is backed by the transitional government.[161] Acknowledgement of the truth is believed to help a state collectively move beyond the atrocity and achieve a sense of closure, thus allowing it to develop a new, stable system of governance.[162]

If transitional justice mechanisms such as truth commissions are supposed to "ensure accountability, serve justice and achieve reconciliation,"[163] and it is accepted that atrocities are a process rather than an event,[164] then would it not be prudent to simply apply these mechanisms earlier in the process—say, before the onset of mass killings, ethnic cleansing or other such horrors? Why not employ some sort of commission that functions as a human rights ombudsman?

In fact, it is not unprecedented for mediation or other forms of ADR to be suggested as a form of early intervention. In the ICISS Report on R2P, one of the categories of "direct prevention efforts"[165] is legal methods, and the first legal method listed is mediation.[166] Arbitration is also presented as a form a direct legal prevention, as is monitoring compliance.[167] Following the adoption of the principles of R2P by the U.N. General Assembly, the U.N. Department of Political Affairs developed a Mediation Support Unit as part of their efforts to strengthen the U.N.'s capacity for preventative diplomacy.[168] Many scholars argue that

[160] *See generally* Hayner, *supra* note 154; Scharf, *supra* note 153; HENKIN et. al. *supra* note 158.

[161] Eric Brahm, *What is a Truth Commission and Why Does it Matter?*, 3 PEACE & CONFLICT REV. 1, 1–14 (2009).

[162] *See generally id*.

[163] Rep. of the S.G., at 8, U.N. Doc S/2004/616 (2004).

[164] U.N. Framework of Analysis, *supra* note 19; Stanton, *supra* note 18.

[165] ICISS, *supra* note 4, at 23.

[166] *Id*.

[167] *Id*.

[168] DEBORAH MAYERSEN, CURRENT AND POTENTIAL CAPACITY FOR THE PREVENTION OF GENOCIDE AND MASS ATROCITIES WITHIN THE UNITED

the reconciliation process is, in and of itself, a form of ADR.[169] As Valerie Rosoux writes, "[c]ase studies indicate that the so-called 'reconciliation process' can actually be considered as a continuous negotiation after peace agreements are reached, sometimes through informal channels, but sometimes through more conventional negotiations."[170] Transitional justice processes often involve an amalgamation of ADR mechanisms.

C. *Applying ADR in Situations of Atrocity and Conflict*[171]

There are many situations of atrocity and conflict in which various forms of ADR have been utilized to bring about an end to the hostilities. In certain instances, these ADR mechanisms were more effective than others. This subsection provides a summary and analysis of some of the ways in which ADR has been employed in situations of atrocity and conflict.

1. The South African Truth and Reconciliation Commission

One of the most well-known truth commissions is the South African Truth and Reconciliation Commission ("TRC").[172] The TRC was created as a part of the broader transitional justice scheme in South Africa in order to bring about reconciliation following the atrocities of apartheid.[173] The structure of the TRC

NATIONS SYSTEM, AUSTRALIAN POLITICAL SCIENCE ASSOCIATION CONFERENCE 2010: CONNECTED GLOBE: CONFLICTING WORLDS.

[169] Valarie Rosoux, *Is Reconciliation Negotiable?*, 18 INT'L NEG. 471 (2013).

[170] *Id*.

[171] This Section discusses four specific conflicts. It would be impossible to capture the complexity and nuance present in each of these situations in just a few paragraphs. None of the following subsections, taken either in whole or in part should be interpreted as fully representing the situations that they describe. However, given the importance of developing context-specific conflict resolution mechanisms, this Note does provide a bit of context solely for the purpose of furthering the understanding the mechanisms used.

[172] When attempting to conduct research on truth commissions in other states (such as Argentina), the majority of the scholarly articles suggested by the database discuss the South African TRC.

[173] Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 MOD. L. R., 1 (2000); André du Toit, *Experiments with Truth and Justice in South Africa: Stockenström, Gandhi and the TRC*, 31

is closely aligned with the general description of truth commissions provided in Section III (A) of this note. However, the TRC differs from the modern conception of truth commissions in that it possessed certain legal powers, such as subpoena and search and seizure, among others.[174] In this way, the TRC combined more traditional, litigation-based mechanisms with tools that are most appropriately described as ADR. The process of sharing one's story and synthesizing it with the stories of others to construct an objective truth is a form of mediation. Superimposing a legal framework on top of this story-telling mechanism imbues it with a sense of legitimacy, much like traditional forms of ADR.[175] The TRC and the effective transition process in South Africa demonstrate that in order to successfully end a period of violent conflict, one must apply ADR mechanisms in addition to, if not in lieu of, international criminal prosecutions.

2. Kenyan Transitional Justice Mechanisms

Like truth commissions, other forms of post-conflict ADR are designed to serve a similar purpose; that is, bring a sense of closure or conciliation, and allow the state to collectively move on from the crimes and/or atrocities of the past. However, not all forms of post-conflict ADR involve the entire affected population. For example, the reconciliation process in Kenya (called the Kenya National Dialogue and Reconciliation) following the 2007 election violence relied heavily on mediation, but did not involve each and every single victim.[176]

For 40 years, the Kenyan government was a single party system.[177] The 2002 elections marked the first time that an opposition party won a majority of seats in the Parliament.[178]

J. SOUTH AFR. STUD. 419 (2005). The Rome Statute categorizes apartheid as a crime against humanity. *See* Rome Statute, *supra* note 3, at 7(1)(j).

[174] Allen, *supra* note 158.

[175] For example, arbitration is frequently utilized in business disputes, and mediation is often used in divorce proceedings.

[176] *See* ABDULLAHI BORU HALAKHE, GLOB. CTR. FOR RESP. TO PROT., R2P IN PRACTICE: ETHNIC VIOLENCE, ELECTIONS AND ATROCITY PREVENTION IN KENYA 9 (2013).

[177] Wameyo, *supra* note 74, at 414–15.

[178] *Id*.

However, the hopefulness wore off quickly, as Kenyans realized that the new government was not any less corrupt than the old government had been.[179] The 2007 elections began amidst much unrest and ethnic tension, which was fueled by the slow vote counting process, amongst other issues.[180] Violent riots erupted as the votes were still being counted, and after the incumbent was announced as the winner, the opposition leader declared that the election results were illegitimate.[181] The violence escalated rapidly and lasted for two months, during which over a thousand people were killed and hundreds of thousands were displaced.[182]

The African Union ("AU") sent a team of religious and political leaders to mediate and negotiate an end to the conflict.[183] One of the primary goals of this process was to promote reconciliation between the various ethnic groups in Kenya, and to enable marginalized Kenyans to feel as though they had an opportunity to be heard.[184] The AU delegation's policy was based on the idea that the key to establishing lasting peace was "placing victims, rather than perpetrators, at the centre of public attention, [in order to] mobilize civic and governmental support for initiatives to provide them with much needed reparation."[185] There were a variety of commissions and committees established to aid in the reconciliation process, including the Truth, Justice and Reconciliation Commission.[186] While the effectiveness of these committees has been called into question in recent years, political analysts such as Halakhe believe that the judicial reforms lay the groundwork for strengthened accountability in the future.[187] Some transitional justice scholars feel that the Kenyan process attained this level of success because it focused on the victims and their stories.[188]

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[179] *Id*.
[180] *Id.* at 416–17.
[181] *Id.*
[182] *Id* at 417–18.
[183] Wameyo, *supra* note 73.
[184] *See generally* HALAKHE, *supra* note 175; Wameyo, *supra* note 73.
[185] Wameyo, *supra* note 73, at 420.
[186] *Id*.
[187] HALAKHE, *supra* note 176.
[188] Wameyo, *supra* note 73, at 445.

3. Alternative Dispute Resolution and the Israeli-Palestinian Conflict

Mediation is sometimes used in situations in which the conflict is ongoing—for example, the Israeli-Palestinian conflict began in 1948 and is unlikely to end in the near future.[189] While Israel's founding is cause for celebration in much of the Jewish community, it was a traumatic event for Palestinians, 80% of whom either fled or were forced off of their land.[190] These events created land disputes that can be said to be the root cause of the modern Israeli-Palestinian conflict.[191]

In 1993, American President Bill Clinton mediated a peace agreement between Israeli Prime Minister Yitzchak Rabin[192] and the President of the Palestinian Authority, Yasser Arafat.[193] This agreement became known as the Oslo Accords, and was instrumental in the creation and recognition of the Palestinian Authority.[194] The Oslo Accords also led to mutual recognition between the Palestinian Liberation Organization and Israel, and

[189] When Israel declared its independence in May of 1948, it was attacked by its neighbors, Jordan, Lebanon, Egypt, and Syria. *See generally* Dean G. Pruitt, *Ripeness Theory and the Oslo Talks,* 2 INT'L. NEGOT. 237 (1997); Louis Kriesberg, *Mediation and the Transformation of the Israeli-Palestinian Conflict*, 38 J. PEACE RES. 373, 375 (2001).

[190] *Id.*

[191] What constitutes Israel or Palestine is defined completely differently by different people depending upon their relationship to the conflict. Tensions are exacerbated by outside actors, including the United States, Egypt, Lebanon, and others. *See generally* Pruitt, *supra* note 189; Kriesberg, *supra* note 189.

[192] Prime Minster Rabin was assassinated shortly after the Oslo Accords consider a quotation or ending the sentence after "Accords" or "process" for his participation in the negotiation process which was viewed by right—wing extremists in Israel as a betrayal. Dexter Filkins, *Shot in the Heart*, THE NEW YORKER (Oct. 6, 2015) http://www.newyorker.com/magazine/2015/10/26/shot-in-the-heart.

[193] *See generally* Pruitt, *supra* note 189; Kriesberg, *supra* note 189. Yasser Arafat was the first head of the Palestinian Authority, and previously served as the head of the Palestinian Liberation Organization. The second, and present, head of the Palestinian Authority is Mahmoud Abbas, who changed the title from President to Prime Minister. *Profile: Mahmoud Abbas*, BBC NEWS, http://www.bbc.com/news/world-middle-east-20033995 (Nov. 29, 2016).

[194] *See generally* Pruitt, *supra* note 189; Kriesberg, *supra* note 189.

created a roadmap for future negotiations.[195] The Oslo Accords were the result of a series of negotiations, which are a form of ADR.[196] While the Oslo Accords were highly successful in certain regards,[197] they did not bring about an end to the conflict. And, in more recent years, they have come to be criticized for solidifying the preexisting power structure.[198] This is a common issue in negotiations. If there is a power imbalance between the parties, the stronger party will likely have an advantage.[199] In international, multinational, and national[200] negotiations and mediation, there is frequently a power imbalance, as one party is always a state actor, and the other party is likely a non-state actor.[201] In most cases, the state actor will have more power. Such issues must be taken into account when attempting to resolve conflict or an early atrocity situation—the mediator or facilitator must make it clear to the state actor that they are being asked to "give up more" because they have more to begin with.[202]

4. *Loya Jirgas* in Afghanistan

Other forms of ADR are frequently utilized in post-conflict states. For example, the *Loya Jirgas* that took place in Kabul, Afghanistan[203] in 2002 and 2010 were negotiation processes

[195] Pruitt, *supra* note 189, at 237.

[196] *Alternative Dispute Resolution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[197] I.e. the creation of the Palestinian Authority, and the mutual recognition by the two parties.

[198] INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE (Susan M. Akram, et al. eds., 2011).

[199] Arnold H. Rutkin, *Alternatives to Litigation*, this is an ABA sec, yes? 12 FAM. ADVOC. 52, 54 (1990).

[200] As opposed to interpersonal situations, in which the balance of power varies.

[201] *See* Claudia Hofmann & Ulrich Schneckener, *Engaging Non-State Armed Actors in State and Peace-Building: Options and Strategies*, 93 INT'L REV. RED CROSS 1, 3 (2011).

[202] The role power imbalance plays in negotiation was examined by Karen Cook and Richard Emerson in their 1978 study, the findings of which were confirmed by subsequent studies. *See generally* Karen S. Cook & Richard M. Emerson, *Power, Equity and Commitment in Exchange Networks*, 43 AM. SOC. REV. 721, 721–39 (1978).

[203] Afghanistan was the focus of several proxy wars between world powers which began in the late nineteenth century and lasted through the end of the Cold War. The United States, Great Britain, and the Soviet Union all vied for

intended to bring about reconciliation. *Loya Jirga* is Pashto for Grand Council,[204] and these councils have long served as decision-making bodies in Pashtun culture.[205] Following the collapse of the Soviet backed government, an extremist group of *mujahedeen* called the Taliban rose to power, taking advantage of the *mujahedeen*'s inability to reconcile with one another.[206] This group committed many atrocity crimes against the Afghan people, including denying women education and healthcare. The United States government did not intervene.[207]

Following September 11th, 2001, however, when Taliban officials provided refuge to Osama Bin Laden and other Al Qaeda leaders, the United States decided to intervene and remove the Taliban from power.[208] The *Loya Jirga* in 2001 was for emergency purposes, and was intended to legitimize the new Afghan government.[209] In this process, the attendees of the *Loya Jirga* selected Hamid Karzai as President of Afghanistan.[210] The 2011 *Loya Jirga* involved representatives of the Afghan government, including President Hamid Karzai, and representatives of Afghan Taliban.[211] The traditional role of the *Loya Jirga* was to act as a legislative body, performing tasks such as ratifying the Constitution, or appointing an interim President.[212]

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influence in Afghanistan leaving the country a volatile mess. During the Cold War, the United States supported anti-Soviet *mujahedeen*, or "those engaged in *jihad*." Ebrahim Afsah & Alexandra Hilal Guhr, *Afghanistan: Building a State to Keep the Peace*, 9 MAX PLANCK Y.B. U.N. L. 373, 380; *A Historical Timeline of Afghanistan*, PBS NEWS HOUR (May 4, 2011), http://www.pbs.org/newshour/updates/asia-jan-june11-timeline-afghanistan/.

[204] Sarah Darehshori, *Pursuing Peace in an Era of International Justice*, 50 POLITORBIS 83, 91 (2010); Afsah & Guhr, *supra* note 203, at 379.

[205] Afsah & Guhr, *supra* note 203, at 380.

[206] *Id*.

[207] *Id*.

[208] *Id.*

[209] Afsah & Guhr, *supra* note 203, at 413; Darehshori, *supra* note 204.

[210] Darehshori, *supra* note 204.

[211] Rosoux, *supra* note 169, at 473.

[212] Tim Luccaro & Sanaullah Tasal, *Karzai Calls for Meeting to Discuss U.S.-Afghan Relationship*, U. S. INST. PEACE (Nov. 14, 2011), http://www.usip.org/publications/karzai-calls-meeting-discuss-us-afghan-relationship#top; Scott Worden, *The Law and Politics Behind Afghanistan's "Traditional" Loya Jirga*, FOREIGN POL'Y (Nov. 15, 2011) http://foreignpolicy.com/2011/11/15/the-law-and-politics-behind-afghanistans-

However, the 2011 *Jirga* served a different purpose—making peace between the Afghan government and the Taliban.[213] The 2011 *Loya Jirga* was successful in that it integrated traditional methods into the transitional justice system in Afghanistan. However, it was less effective with regards to achieving its original goal of merging the former government (the Taliban) with the new government.[214] Perhaps these negotiations failed because neither party was willing to compromise on their demands.[215] This failure indicates the importance of integrating local customs into the transitional ADR mechanism so that the forum is one with which the parties feel familiar. But it is also important that the involved parties understand what they can expect to get out of the adjudication, otherwise the process could go on endlessly.

D. *Application of Risk Factor 7 of the U.N. Framework of Analysis*

This Section explores whether or not it would have been possible to intervene prior to the instigation of violence in any of the above circumstances pursuant to Risk Factor 7 of the U.N. Framework of Analysis. In retroactively applying Risk Factor 7 to the early stages of each of the conflicts discussed above, it is apparent that different indicators are relevant to different phases of each conflict. Different indicators, and different numbers of indicators are applicable to each situation.

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traditional-loya-jirga/; Thomas Ruttig, *The Upcoming Jirga: An Agenda with Possible Backdoors*, AFG. ANALYSTS NETWORK (Nov. 4, 2011), http://www.afghanistan-analysts.org/the-upcoming-jirga-an-agenda-with-possible-backdoors/.

[213] Ruttig, *supra* notes 212.

[214] At the time this note was written, the Afghan government was still engaged in this process. *See* Hashmat Moslih, *The Taliban and Obstacles to Afghanistan Peace Talks*, AL JAZEERA ENGLISH (Feb. 25, 2016), http://www.aljazeera.com/indepth/features/2016/02/taliban-obstacles-afghanistan-peace-talks-160225095920107.html; U.N. GAOR, 71st Sess., 47th plen. mtg. at GA/11858 (Nov. 17, 2016).

[215] Frequently, the goal of such negotiations is to reach a compromise. Negotiations are more successful when the parties are willing to compromise. *See* Susan M. Chesler, *An Introduction to Negotiations for Future Transactional Lawyers*, BUS. L. TODAY (Apr. 2011), https://www.americanbar.org/publications/blt/2011/04/training_tomorrow.html.

In each of the conflicts discussed in Section III (B), one could argue that both indicators 7.13 and 7.14 were present. Indicator 7.13 is "[i]ncreased politicization of identity, past events or motives to engage in violence,"[216] and indicator 7.14 is "[i]ncreased inflammatory rhetoric, propaganda campaigns or hate speech targeting protected groups, populations or individuals."[217] Some of the other indicators are applicable to a single case from the analysis in the previous subsections of this note. For example, indicator 7.12 ("[m]arking of people or their property based on affiliation to a group"[218]) was highly prevalent in pre-apartheid South Africa. Additionally, "[i]ncreased serious acts of violence against women and children, or creation of conditions that facilitate acts of sexual violence against those groups, including as a tool of terror,"[219] indicator 7.9, was present in Afghanistan under the Taliban.

Although all of these situations were deemed serious enough to merit the use of ADR, they each involved a different number of indicators. However, this does not provide any clarity as to how many indicators must be present to warrant intervention. Unfortunately, the U.N. Framework of Analysis does not provide a definitive answer. The only insight it provides into the significance of the number of Risk Factors and or indicators present is that:

> the more risk factors (and the greater number of relevant indicators) that are present, the greater the risk that an atrocity crime may be committed. Also, the greater the number of indicators of a particular risk factor that are present, the greater the importance and role of that factor in a particular situation.[220]

While this is helpful with regards to highlighting the overall seriousness of a given situation, it does not specify a cut-off point.

[216] U.N. Framework of Analysis, *supra* note 19.
[217] *Id*.
[218] *Id*.
[219] *Id*.
[220] *Id.*

In future instances, the U.N. Framework of Analysis should not be applied retroactively, but rather, should be used to monitor the situations in states as they arise, as that was the purpose for which it was created.[221] In each of the aforementioned situations, adjudicative intervention was staged before the point at which the events could be labeled atrocities in the legal sense.[222] While this was a step in the right direction, one of the goals of atrocity prevention is to avoid the loss of human life or the destruction of cultural property altogether.[223] This was certainly not the case in any of the above situations. Any future system of intervention should be set up in such a way that it is triggered at the first sign of the (confirmed and vetted) presence of indicators.

IV. PROPOSAL FOR A COMPREHENSIVE, INTERNATIONAL ADR MECHANISM FOR EARLY INTERVENTION

A. *Why is ADR the Ideal Adjudicative Tool in Situations of Atrocity Crimes?*

ADR is frequently utilized to resolve situations of atrocity, and should be utilized to prevent atrocities as well. This is because ADR offers a comprehensive solution to each of the root causes of atrocity crimes.[224] By allowing individual victims and perpetrators to come forward and have their voices heard, ADR ensures that each issue that led to the process of atrocity is addressed, which builds a more resilient society.[225] Criminal prosecution simply focuses on a single aspect of atrocity crimes, the perpetrator, and assigns them all of the blame, rather than addressing the issues that permeate society.[226] Furthermore, criminal prosecutions are often

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[221] *Id*.

[222] *See* Section II (C), *see also* Rome Statute, supra note 3.

[223] *See generally* STRAUS, *supra* note 5.

[224] Atrocity prevention scholars, such as Dr. James Waller, consider the root causes of atrocity crimes to be issues of economic imbalance and social fragmentation, among other things. JAMES WALLER, CONFRONTING EVIL: ENGAGING OUR RESPONSIBILITY TO PREVENT GENOCIDE (2016).

[225] *See id*. *See also.* Erika R. George, *After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability*, 5 LOY. UNIV. CHI. INT'L L. REV. 59 (2007).

[226] VAN SCHAACK & SLYE, *supra* note 71.

viewed as being one-sided, and can be seen as sacrificing peace in order to bring about justice.[227] The U.N. Framework of Analysis states that the ideal way to prevent atrocity crimes is "to build the resilience of societies . . . by ensuring that the rule of law is respected and that all human rights are protected, without discrimination…"[228] The best way to do this is to both build capacity and establish trust in state institutions. Processes of reconciliation facilitated through ADR mechanisms allow for this to happen because they provide individuals with a degree of involvement in the process. Furthermore, the nature of reconciliation and transitional justice is such that it is better served through ADR mechanisms than through international criminal prosecutions.

Not every atrocity prevention scholar would agree that it is preferable to use ADR in these situations. There are those, such as Kydd and Straus, whose default assumption is that military intervention is ideal.[229] Others might argue, as did Sewall, that military intervention is actually preferable to other forms of intervention.[230] Even those who propose ADR as an atrocity prevention mechanism are wary of its potential applications. Take, as an example, Nader and Grande, who say that; "mandatory mediation abridges freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view."[231] However, these adverse effects can be combated if the system is pluralistic and allows for the use of other legal methods, if it is collectivist in nature, and if it avoids strict adherence to a single form of ADR.[232] Being that this would not be the only legal system available, its primary purpose would be reconciliation, individual victims would

[227] *See generally* VAN SCHAACK & SLYE, *supra* note 71.

[228] U.N. Framework of Analysis, *supra* note 19.

[229] *See generally* Andrew H. Kydd & Scott Straus, *The Road to Hell? Third-Party Intervention to Prevent Atrocities*, 57 AM. J. OF POL. SCI. 673 (2013).

[230] Sarah Sewall, *From Prevention to Response: Using Military Force to Oppose Mass Atrocities*, *in* MASS ATROCITY CRIMES 159, 159–73 (Robert I. Rotberg ed., 2010).

[231] Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management In Africa and Elsewhere*, 27 L. & SOC. INQUIRY 573, 585 (2002).

[232] *See generally id*.

choose to opt-in, and the procedures have the capacity to evolve as the state and international community see fit, Nader and Grande's concerns are not particularly relevant. However, these are factors that do need to be reevaluated on a regular basis to make sure the mechanism is not being abused by the state, the international community, or other entities.

Both the international community and atrocity prevention scholars have considered mediation as a viable option for combating atrocities. The U.N. recently created a Mediation Support Unit, which now functions as part of its Peacekeeping Department.[233] James Waller also proposes mediation as a potentially useful preventative method in his book, *Confronting Evil: Engaging Our Responsibility to Prevent Genocide*.[234] However, what this Note seeks to propose is something new—a standardized international system of mediation as a mechanism for early intervention.

B. *Structure of the Mechanism*

The international community should establish a mechanism that would enable states to set up customized ADR systems and bodies designed to reconcile any issues that arise under Risk Factor 7 of the U.N. Framework of Analysis. These systems will allow for local ownership[235]—they will be designed by the states and members of civil society, and customs and social norms of each state will play a role in how the ADR system functions. However, assistance can, and should, also be provided by the international community on an as-needed basis, as states in volatile situations tend to lack capacity for structural changes.

There will be a multi-national monitoring and compliance body[236] that will determine when it is necessary for a state to

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[233] U.N. Dept. of Pol. Aff., *Prevention and Mediation*, U.N., http://www.un.org/undpa/en/diplomacy-mediation. (last visited Jan. 20, 2017).

[234] *See* WALLER, *supra* note 224.

[235] *See* Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J. L. & SOC. 265 (2008).

[236] This idea is loosely based on the concept of the United Nation's Mediation Support Unit. More information on this unit can be found at *Prevention and*

employ its ADR system. This monitoring body will consist of a panel of experts in atrocity prevention. Ideally, the individuals on the panel will come from a variety of cultural backgrounds, so as to better understand the idiosyncrasies of the states that they are observing.[237] Once the monitoring body has determined that a state is at risk for the perpetration of atrocities under the U.N. Framework of Analysis,[238] the state will be obligated to use their established ADR system under the first pillar of R2P.[239] Should they require assistance, it will be provided as per the second pillar of R2P.[240] And, pursuant to the third pillar of R2P, if a state should fail to engage their ADR system, an international reconciliation team will be sent in. Should all forms of ADR fail, the state will face further action (i.e. sanctions, criminal prosecutions, use of force, etc.) under existing U.N. doctrine.[241]

C. *Factors That Should be Taken Into Consideration in the Development of Each State's Mechanism*

The structure of the ADR mechanism employed will not only vary by state, but will be influenced by which indicators are present. For example, the reconciliation process for the development of militias would look different than the reconciliation process for the propagation of hate speech. This distinction is because the mechanisms employed will need to be designed to combat the specific issues arising under the U.N. Framework of Analysis—this mechanism cannot be a one-size-fits-all system. In most, if not all cases, an amalgamation of ADR

Mediation, U.N. DEPT. OF POL. AFF., http://www.un.org/undpa/en/diplomacy-mediation.

[237] This idea is based on the significance of maintaining a degree of local ownership in transitional justice processes—if panel members understand the culture of a particular state, they will be more likely to understand the logic behind structuring the ADR mechanism in a specific way.

[238] It is unclear whether it is better for there to be an established "cut-off point," i.e. a set number of indicators at which ADR processes become obligatory, or if this sort of thing should be more discretionary and on a case-by-case basis.

[239] ICISS, *supra* note 4.

[240] *Id*.

[241] *Id*. One of the means by which this could be accomplished would be through a Security Council Resolution.

mechanisms may be necessary for an effective transition.[242]

Past experience and local context and practices will inform the specific mechanisms used. This concept of local ownership is a necessary component of transitional justice:

> the tendency to exclude local communities as active participants in transitional justice measures is a primary flaw, raising fundamental questions of legitimacy, local ownership, and participation. Simply involving local people at the implementation stage of these initiatives is not enough. For a fully participatory process (we will argue) they should also take part at every stage in the process including; conception, design, decision making, and management.[243]

In order to maximize sustainability, the structure of each state's mechanism should be influenced by the culture of that state. If a state has traditionally employed a specific style of ritual negotiations, or of trials, elements of this traditional adjudication should be incorporated into the preventative mechanism. Incorporating traditional tools into the modern mechanism will also help address root causes.

Additionally, in order to ensure an effective and lasting transition, the balance of power must be taken into account.[244] Being that many of these situations involve non-state actors, it is important that a neutral third party be present in order to ensure that the state does not use the adjudication to reinforce the preexisting power structure.[245] If the power structure is reinforced, the root cause of the conflict will go unaddressed, and the conflict will not be resolved by the adjudicatory process.[246] In order to avoid this issue, an effective ADR prevention mechanism should rely upon a collective form of ADR that involves a neutral third

[242] *See generally* Meierhenrich, *supra* note 146.
[243] *See* Lundy & McGovern, *supra* note 233, at 268.
[244] *See* Cook & Emerson, *supra* note 20.
[245] *See id*.
[246] *See* WALLER, *supra* note 224.

party, such as mediation or conciliation. The third party should be fully aware of the context in which they are mediating, in order to adequately address the root causes of the conflict.

V. CONCLUSION

While the field of atrocity prevention has come a long way since its inception, there is still progress that must be made in order to completely prevent these crimes. Current mechanisms allow for rebuilding post-conflict, but there is no existing system that takes into account all of the root causes of atrocity crimes, and uses methods other than criminal prosecution—which is not the most effective deterrent,[247] to address these root causes and develop resilient state and civil structures.

Any future atrocity prevention mechanisms implemented must apply both R2P and the U.N. Framework of Analysis, as these mechanisms provide the necessary tools to confront the root causes of atrocity crimes and prevent recurrence.[248] R2P enables the international community to act as a support system without violating state sovereignty,[249] and the U.N. Framework of Analysis highlights which behaviors states should look out for.[250] The nature of criminal prosecution and traditional legal methods alone are not conducive to effective prevention. When implementing the U.N. Framework of Analysis as part of the R2P toolbox, it would be in the best interests of the international community to incorporate various forms of ADR. This is because effective transitional justice and reconciliation mechanisms are characteristically similar to ADR both in their purposes and structures.

[247] VAN SCHAACK & SLYE, *supra* note 71.
[248] STRAUS, *supra* note 5.
[249] ICISS, *supra* note 4.
[250] U.N. Framework of Analysis, *supra* note 19.

As a 30 year civil trial mediator largely focused on resolving commercial disputes, the concept of utilizing ADR processes in criminal matters has been both intriguing and puzzling to me. Concepts of "restorative justice" in criminal proceedings simply did not square with my personal notions of reconciling civil conflicts. Criminal law is supposed to be about retributive justice - finding fault and, where appropriate, punishing the guilty. How do you reach "compromise" in those situations?

In this beautifully written piece, Bhavya Mahajan of Pepperdine University School of Law outlines the role of Victim-Offender Mediation – an ADR process not only applied to property crimes where it had it origins almost three decades ago - but in violent crimes against the person as well. Traditional retributive justice procedures applied to crimes of sexual assault, battery, manslaughter, and even murder, while perhaps meeting some state goals of public order, tend to depersonalize both the victim and the offender in cold, stark legal proceedings. Both walk away from the experience dissatisfied, still holding uncured problems, and lacking closure. Through extremely well researched authorities and actual case studies, Bhavya Mahajan reveals the potential for emotional growth and internal resolution for victims and offenders through carefully facilitated personal confrontation in violent crime situations. A true eye-opener for any civil trial mediator; in my opinion, "*Victim-Offender Mediation: A Case Study and Argument for Expansion to Crimes of Violence"* is clearly one of the best submittals we reviewed.

Lawrence M. Watson
Editor in Chief ACCTM
American Journal of Mediation

VICTIM-OFFENDER MEDIATION: A CASE STUDY AND ARGUMENT FOR EXPANSION TO CRIMES OF VIOLENCE

Bhavya Mahajan

1. INTRODUCTION

Restorative justice, as an alternative to the retributive justice system, is a victim-centered response to crime. It gives the individuals affected by the crime, including the victim, the offender, their families, and the community representatives, an opportunity to be involved in a dialogue and respond to the harm caused by the crime.[1]

Victim Offender Mediation (VOM) is one of the broadest restorative justice policies serving the offenders and crime victims, by providing a process that allows the victims to meet and communicate with their offender in a safe and structured setting. The goal of the VOM is to hold the offenders directly accountable to the victims, and at the same time focus on providing assistance and adequate compensation to the victims.[2] It also provides the offenders an opportunity to take direct responsibility for their actions, understand the impact it has had on the victims, and plan to make amends.[3]

Both restorative justice and VOM specifically continue to be identified as primarily, if not exclusively, addressing non-violent property crimes and perhaps even minor assaults.[4] However, various studies present some empirical evidence which suggests that many of the principles of restorative justice can be applied in crimes of severe violence, including murder. Some even suggest that the deepest healing impact of restorative justice is to be found in addressing and responding to such violent crimes.[5]

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[1] Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* xxvii (1st ed. 2001).

[2] Id. at xxxvii-xxxviii

[3] Id.

[4] Id. at 255

[5] Id.

The aim of this paper is to study and analyze the efficacy of victim-offender mediation in violent crimes, using (or utilizing) existing case studies and analysis of cases as evidence. The first section will give an introduction about the VOM process, its historical background and the use of VOM in cases involving extreme violence cases. A brief description about existing VOM programs and well established case studies will be presented. Then, the author will present a relatively recent case study of the Grosmaires and Conor McBride case, which happened in 2010. Lastly, there will be a critical analysis from the author to understand the strengths and weaknesses of using VOM for violent crimes, especially in lieu of a trial.

1. VICTIM-OFFENDER MEDIATION: AN INTRODUCTION

With an increasing interest in alternative dispute resolution, restorative justice has gained popularity. Also, the application of mediation techniques in the context of victims and offenders has been introduced.[6]

Victim-Offender Mediation, as a branch of restorative justice, provides the victims of a crime with an opportunity to have a dialogue with their offender, in a safe and structured setting with the help of a trained mediator. It has become important to have a better understanding of the process in the American society, where the practice is still subject to various debates.[7]

Primarily, the goal of VOM is to hold the offenders directly accountable to the victims and simultaneously seek an adequate compensation for them. In many cases, restitution agreements between the victims and offenders are reached as well. This process also provides an opportunity for the offenders to take direct responsibility for their actions and to understand the impact of their actions.[8]

[6] Mark S. Umbreit, *Mediation of victim offender conflict umbreit*, 1988 J. Disp. Resol. 85 (1988).
[7] Id.
[8] Id. at 87

VOM practices have increased rapidly over the past few decades under the American system. It started from dealing with minor and property related crimes, but has now extended to cases of minor and occasionally severe assaults. While the instances of latter are few, there are people who strongly advocate the 'therapeutic' use of VOM and its efficacy.

2.1 HISTORICAL BACKGROUND

The practice of victim-offender mediation first began in the Ontario province of Canada, and was then referred to as criminal court mediation by many. This experiment in Elmira, Ontario in May 1974, is the earliest example of restorative reform in the justice system. Here, two young men pleaded guilty to twenty- two instances of property damage, and their probation officer and his colleague, using their insight, tried some basic peace-making principles to resolve matters between these men and the twenty-two victims. [9]

A recommendation was then made to the court, to allow these men to meet with every single victim and assess the loss that has occurred. After the meetings, the offenders had a better understanding of the impact of their criminal behavior. Finally, they were sentenced by the judge to pay restitution to these victims, , which was paid by the offenders themselves, three months later in full.[10]

This experiment led to the beginning of victim-offender reconciliation programs in North America. VOM, in Canada, has spread to nearly twenty jurisdictions and is mainly viewed as an 'alternative measures' program with regard to the Canadian Young Offender Act, 1984.[11]

Following the growth of VOM in Canada, similar programs were adopted in the States. VOM, primarily started in the Mid-

[9] Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* xlii-xliii (1st ed. 2001).
[10] Id at xliii.
[11] Id.

West with a few programs[12] but has gained popularity across various other jurisdictions. By 1989, these programs were reported to have expanded in at least 42 different jurisdictions across the United States. Canada, Germany, England, and New Zealand are other countries where VOM is becoming increasingly popular.[13]

The rise in the number of VOM programs has been steady, and it has grown from less than three dozen programs in the 1980s to over 200 programs by the year 1996. Currently, throughout the world, more than thirteen hundred VOM programs are known to exist, with the maximum of 450 programs in Germany and 302 programs in the United States.[14]

Accordingly, the increase in the number of cases dealt with by these programs has been consistent too. Generally, most of these cases focused on non-violent property offenses and minor assaults. However, a few programs also dealt with violent felony and some other severe violence crimes.[15]

The deeper roots of VOM are believed to be associated with the traditions of numerous indigenous peoples on many continents, who have long held the view that criminal offenses represent a tear in the social fabric, which must be healed, and face-to-face conversations between victims and offenders could prove very helpful in this.[16]

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[12] The first replication of VORP (Canada) in the United States occurred in 1978 when the Mennonite Central Committee, probation staff, and a local judge in Elkhart, Indiana, began accepting cases. By the mid-1990s, a network of approximately 150 victim offender mediation or reconciliation programs existed in the United States.

[13] John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks,* 1 (1) Western Crim. Rev. (1988) http://westerncriminology.org/documents/WCR/v01n1/Gehm/gehm.html

[14] Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* xliii-xlv (1st ed. 2001).

[15] Id.

[16] John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks,* 1 (1) Western Crim. Rev. (1988) http://westerncriminology.org/documents/WCR/v01n1/Gehm/gehm.html

Under one such practice in New Zealand each individual offender and his or her particular victim(s) are brought together to talk. They are joined by various representatives of the community who have a stake in the resolution.[17] In modern versions, such representatives may include the police, teachers, parents, and peers. The goal of such a face-to-face meeting is not simply victim reparation but also, the opportunity for dialogue, and reaching a consensus on the appropriate outcome or disposition for the case.[18] Among Native Americans, traditional Lakota and Dakota people employed a similar model.[19]

These models bear a striking resemblance to the modern-day Restorative Circles, where members, other than the victim(s) and offender(s), are present, and have a say in the final decision-making. These generally include, the attorneys, a mediator and even the families of victim(s) and offender(s).

To describe the ideology of these traditional approaches, John R. Gehm writes, "According to these approaches, not only must effective punishment publicly condemn, it must also make provision for reintegration of the offender back into the community. Without such a restorative component and concomitant ceremonies or rituals of inclusion, the potential for stigmatization becomes very great."[20]

2. VICTIM-OFFENDER MEDIATION IN SEVERE VIOLENCE CRIMES

A distinction is drawn between the retributive criminal justice system and the restorative justice system based upon its goal. While the former focuses on 'justice' by punishing the

[17] Id.

[18] Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* xliii-xlv (1st ed. 2001).

[19] John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks,* 1 (1) Western Crim. Rev. (1988) http://westerncriminology.org/documents/WCR/v01n1/Gehm/gehm.html

[20] Id.

criminal, the latter moves a step forward and focuses on individuals (victim and offender, both) and their healing.[21]

There has been an on-going debate about whether victim-offender mediation, in particular, or restorative justice, in general, can be used in severe violence crime cases. So far, both these practices have been used to predominantly address non-violent property crimes and perhaps even minor assaults.

A 1990 VOM survey showed that most of the programs in the juvenile justice system excluded violent and sex offenders. As many as two-thirds of cases reported under these programs in 1996-97 involved only misdemeanor cases and 45% of such programs dealt with juvenile offences only.[22] These figures support the notion that "VOM is typically used as a 'front-end' diversionary option, reserved primarily for 'lightweight' cases."[23]

On the contrary, various studies and cases present empirical evidence that suggests that many of the principles of restorative justice can be applied in crimes of severe violence, including murder. Some even suggest that the deepest healing impact of restorative justice is to be found in addressing and responding to such violent crimes.[24]

"A number of programs have now mediated violent assaults, including rapes, and mediations have taken place between murderers and the families of their victims. Mediation has been helpful in repairing the lives of surviving family members and the offender in drunk-driving fatalities."[25] As of year 1999, in Texas, there was a waiting list of nearly 300 victims of severe violence, including many parents of murdered children, who had requested a meeting with an offender through VOM/VOD of the Victim

[21] Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders,* 7. Disp. Resol. Mag. 8-11 (2000).
[22] Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* 174-175 (1st ed. 2001).
[23] Id.
[24] Id. at 255
[25] Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders,* 7. Disp. Resol. Mag. 8-11 (2000).

Services Unit, Texas Department of Criminal Justice.[26] Thus, in cases of severely violent crimes, VOM has not been a substitute for prison sentence, but seldom prison terms have been reduced post-mediation.[27]

Some studies have gone a step ahead to comment on the efficacy of VOM and restorative justice in capital punishment/death penalty cases. Those opposing VOM in such cases argue that the capital cases create special challenges, and are thus beyond the scope of restorative justice. Most importantly, in these cases, the victim is dead, so there is no relationship to be repaired, and the harm to the victims' family members is too extreme to be solely dealt with mediation.[28]

To address these concerns, it is important to understand that restorative justice in severe violence cases, is not done in lieu of trial or the retributive justice system, rather it is coupled with the retributive system. In this regard, a few studies have assessed such cases where the use of VOM proved effective between the convicted offenders and the family members of murdered victims.[29] An account of these studies, along with the remarks of victims and offenders will be given at a later stage in this paper.

To determine the effectiveness of VOM programs, scholars have often discussed the effects that it attempts to achieve. Accordingly, three broad goals of VOM have been stated. These are: (1) to benefit the victim and co-victims, (2) to benefit the offender and the offender's family, and (3) to benefit the community.[30]

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[26] Mark S. Umbreit et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue,* 6 Int'l Rev. of Victimology 321, 323 (1999).

[27] Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders,* 7. Disp. Resol. Mag. 8-11 (2000).

[28] Elizabeth Beck et al., *In the Shadow of Death: Restorative Justice and Death Row Families,* 23 (1st ed. 2007).

[29] Id. at 24.

[30] Rachel Alexandra Rossi, *Post-Sentence Victim-Offender Mediation in Capital Cases,* 9 Pepp. Disp. Resol. L. J. 185, 195 (2008-09)

Specifically, VOM attempts to provide victims with the opportunity to confront their offender, to have their questions answered, to participate in the criminal justice process, to be empowered through participation in developing a restitution agreement, and to forgive. VOM further allows offenders the opportunity to acknowledge their wrongdoing and experience sincere remorse, and brings personal healing to victims. Additionally, it assists in the offender's own rehabilitation, changes the way victims view the offender, and contributes to their spiritual well-being.[31]

More recently a "humanistic victim offender mediation" approach has been proposed, which re-focuses the goal of VOM to be healing through dialogue rather than arriving at a restitution agreement.[32] Many VOM programs have been adapted for cases of severely violent crimes, some highly therapeutic in form and others more "dialogue driven," but all focusing on the dialogue as the purpose of the mediation.[33]

Applying this approach, a Victim Sensitive Offender Dialogue (VSOD) model has been adopted, which utilizes three phases: (1) case development; (2) victim offender dialogue; and (3) follow up.[34] In the first phase, the possibility of mediation is assessed by visiting the victims, offenders, and other associated systems, numerous times. An agreement is then developed between the parties, regarding the expectations of the mediation, and preparing them as necessary. The second phase involves the actual dialogue between the parties including pre-dialogue briefing, and post-dialogue de-briefing. Finally, the last phase involves meeting with parties to talk about any unmet needs, to seek (or gather) feedback, and close the case.[35]

[31] Id.
[32] Id. at 192.
[33] Id.
[34] Id.
[35] Id.

3.1 EXISTING VOM/VOSD/VORP IN EXTREME VIOLENCE CASES

Several studies conducted regarding the existing VSOD and VOM programs present a point of view of victims and offenders associated with violent crime cases. Some interviews with the staff and volunteers also reiterated the point that each of these programs attempt to deal with the pain and loss of victims and help offenders take the responsibility for their actions. The director of the Texas VSOD project states, "The purpose of the process is healing. While it is not therapy, it's very therapeutic."[36]

Some of the existing VSOD and VOM programs existing across the United States and Canada will be outlined below:

1. VICTIM OFFENDER MEDIATION PROJECT, Langley, British Columbia

Beginning February 1991, the Victim Offender Mediation Project (VOMP) started working with the victims and offenders in cases of serious crimes such as sexual assault, serial rape, murder, and armed robbery. VOMP has its roots in the Victim Offender Reconciliation Programs (VORPs), which have been pioneered in Langley since 1979[37].

Over a period of years, with input from victims and offenders, the VOMP was developed to emphasize healing rather than reconciliation. Most of the cases rendered under this program are referred after sentencing and post-incarceration. Simply put, the VOMP have their focus on the therapeutic aspect of the VORP, only.[38]

With a structure slightly different and more rigid than other victim-offender mediation programs, VOMP works only with trained staff and may often include communication between victims and offenders via letters, videotaped interviews, and

[36] Mark S. Umbreit et al., *Victim-Sensitive Offender Dialogue in Crimes of Severe Violence: Differing Needs, Approaches, and Implications,* 6,7 (2001).
[37] Id. at 8

[38] Id.

exchange of video statements.[39] Despite the variations from the conventional ways of operation, the feedback by victims and offenders, in the past, has been very positive regarding their VOMP experience.

2. VICTIM OFFENDER MEDIATION/DIALOGUE PROGRAM - PENNSYLVANIA

The Pennsylvania Victim Offender Mediation program which operates under the auspices of the Department of Corrections is one of the programs that works with a range of violent crimes including those where the offender has a death sentence.[40]

The program was designed utilizing restorative justice principles over a period of five years the process/operations have been refined. It focuses on starting a dialogue where the victim may share the impact and trauma of the crime, ask questions about it and receive answers and additional information from the offender. Simply put, it "provides an opportunity for the victim to be heard" and "gives the offender an opportunity to accept responsibility for his/her actions and to express his/her feelings about the crime and its consequences."[41]

The programs are run by extensively trained staff and volunteers and also provide an option of indirect communication between the victims and offenders during the program.

3. VICTIM SENSITIVE OFFENDER DIALOGUE PROGRAM – MINNESOTA

The Victim Sensitive Offender Dialogue Program (VSOD) for crimes of severe violence began as a modest initiative in 1991, and worked with a limited number of cases in Minnesota and other states.[42] It was a direct response to a small, but constantly growing number of victims and survivors of severe violence who requested

[39] Id.
[40] Id. at 9
[41] Id.
[42] Id. at 10

assistance to meet with the involved offender.[43] Most of these offenders were inmates in a maximum-security prison.

The VSOD program is currently in a transition period. Initially the programs started with the efforts of Dr. Mark S. Umbreit and a few other mediators but it has now developed as a statewide initiative, at the request of the Minnesota Department of Corrections. The center continues to respond to requests initiated by victims from other states as well.[44] Cases from other states always require an on-site co-mediator to assist extensively with case development. As part of expanding the program, approximately 15 to 20 mediators will be trained and supported to work in this broader initiative. Today the VSOD program consists of three components: case services, training, and research.[45]

3.2 CLIENT SATISFACTION

VOM proponents often speak of humanizing the justice system. Traditionally, victims are not a part of the justice process. Neither victim nor offender get an opportunity to put forward their stories. The victims are represented by the state, and the offenders rarely get a chance to notice the impact of their actions on people, thereby, leaving the victims without a narrative or explanations and no choice, but to fill their thoughts with stereotypes and assumptions about the offenders.[46]

Reformers believe that VOM offers opportunities for both parties to come together in a controlled setting to share the pain of being victimized and to have answers to the questions of why and how. It was thought that by personalizing the consequences of crime, the satisfaction levels with the entire justice process will be increased.[47]

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[43] Such assistance was sought from Dr. Mark Umbreit at the University of Minnesota School of Social Work.

[44] Mark S. Umbreit et al., *Victim-Sensitive Offender Dialogue in Crimes of Severe Violence: Differing Needs, Approaches, and Implications,* 6, 10 (2001)

[45] Id.

[46] Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 Fed. Probation, 29, 30 (2000-2001).

[47] Id.

Most of the studies reviewed reported satisfaction of victims and offenders with VOM and its outcomes, in one way or the other. Researchers found high levels of participant satisfaction across different program sites, in different types of cases, and held by those of different cultural backgrounds. Before exploring the nature of this satisfaction further, it was noted that, from 40 to 60 percent of those offered with an opportunity to participate in VOM refused, making it evident that participation is a highly self-selective process.[48]

Expressions of satisfaction with VOM are consistently high for both victims and offenders regardless of whether the offense is violent or non-violent in nature. Typically, eight or nine out of ten participants report being satisfied with the process and with the resulting agreement.[49] A victim of violent crime indicated that prior to mediation, "I was consumed with hate and rage and was worried what I would do when he got out."[50]

These high levels of satisfaction with VOM also translated into relatively high levels of satisfaction with the criminal justice system. Where comparison groups were studied, those victims and offenders going through mediation were far more satisfied with the criminal justice system than those going through traditional court prosecution.[51]

The efficacy of VOM in crimes of severe violence has been best presented through case studies. A brief account of traditional VOM in violent crime, murder cases specifically, is presented in the case overview below.

3.2.1 CASE OVERVIEW-EXISTING

I. Jan Ellison-Allen Jones Case

Mark Ellison was murdered in August 1983 in a bungled robbery where a $15 Timex and a $20 silver chain were stolen. The man convicted for the killing, Allen Jones, was a small drug

[48] Id.
[49] Id.
[50] Id.
[51] Id. at 30-31

dealer and was high on booze, and drugs at the time of the incident. He was sentenced to a maximum-security prison for 27 years.[52] After Mark's death, Jan Ellison's (Mark's mother) grieved deeply. Her life was shattered. Overtime, she started interacting with other families who had lost their child and became active in the victim rights movement. It was then that she developed a desire to confront the man who killed her son.[53]

In spite of the odds, Allen Jones and Jan Ellison agreed to the meeting with a mediator present. The mediator worked several months pre-mediation to help both the parties understand the process and the aim of victim-offender mediation/dialogue. They were also asked to clarify their own needs and expectations. In May 1991, eight years after the murder of her son, Jan Ellison met with the man who had killed him. She wanted him to see her pain, to feel the harm that he has done, to have a glimpse of Mark, and to answer all those questions that were left unanswered.[54]

During the initial stage of the dialogue, a couple hours into the conversation, many questions were answered and deep pain was exchanged. Allen asked questions about Mark and expressed the pain he and his family had felt ever since that incident. Deeper into the conversation, they found areas of common ground. Allen had lost custody of his daughters because of his actions, and Jan and Allen both understood the pain of losing loved ones. In the end, he just hoped for forgiveness.[55]

While Jan wanted Allen to do well and did not see him as inhuman anymore, it was difficult for her to be able to forgive him. They met a second time nearly two years later, when Allen said, "This is really hard for me to say. I guess we each want something from one another. I want you to give me Mark, and you can't do that. You want me to give you forgiveness, and I can't do that. But

[52] Mark S. Umbreit et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue,* 6 Int'l Rev. of Victimology 321, 330(1999).
[53] Id.
[54] Id.
[55] Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* 269 (1st ed. 2001).

not giving you forgiveness doesn't mean that I don't want to help. I just can't. I tried."[56]

At that point, both were struggling with moving on. Although Allen did not receive forgiveness from Jan, he felt satisfied by the overall process. Jan was grateful for the opportunity to meet with Allen and felt it was necessary for her healing process. She now believed that there was a life for her after murder and while so many doors had closed, many others had opened too.[57]

4. CASE STUDY: GROSMAIRES-CONOR McBRIDE CASE

The January 2013 edition of the New York Times Magazine put limelight on a murder case that got resolved in a very unique way, and challenged all traditional ways of the retributive and restorative justice systems.

Restorative circles, a type of Victim Offender Mediation, had never been used to determine the outcome of a murder case before. What we have studied and read so far, about VOM in severe violence cases has focused on using this method in post-conviction cases for achieving therapeutic goals for victims and offenders, both. However, in the present case, a VOM model was applied to determine the goals usually achieved in the criminal justice system, the sentence of the offender, the restitution, as well as achieve the other goals that a conventional VOM aims at.

On March 28, 2010, Conor McBride shot his fiancée Ann Margaret Grosmaire in the head. Both of them were 19 years old and had been in a relationship for three years. After fighting with each other for 38 hours preceding the incident, Conor shot Ann in the head. Her last words were, "No, don't!"[58]

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[56] Id. at 270

[57] Id.

[58] Paul Titlis, *Can Forgiveness Play a Role in Criminal Justice?* The New York Times Magazine (Jan 4, 2013) http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html; All the following facts of this case have been taken from this article, unless cited otherwise.

Conor, after the incident, went to the Tallahassee Police Department and told the desk officer, "You need to arrest me. I just shot my fiancée in the head." Upon being asked by the watch commander to sit in his office, before further proceedings began, Conor began to weep.

It was later found that Conor had left Ann in his parents' house, where the incident took place, thinking that she was dead. He gave the keys to the house to the police, who later found Ann there, still alive but unresponsive. She was then taken to the hospital where she was kept alive on the life support system.

Ann's parents, who were by her side in hospital, kept praying. The family being devout Catholics, could only find their solace in prayer. However, Ann was certain that she was not going survive and believed that God always did 'wondrous things'. It was then that she started saying those two words, 'forgive him'! Listening to this, her father's response was frantic and he said that it was impossible. But Ann kept repeating it, she constantly kept asking for forgiveness for Conor.

Prior to the shooting the Grosmaires had a healthy relation with Conor, who had accepted him in all possible ways. To them it came as an utter shock that Conor was the one who had shot their daughter and put her on death's bed. Despite all the past relations, it was difficult for the Grosmaires to accept Ann's wish to forgive Conor.

Conor's parents, after listening to the news, hurried to the hospital to visit Ann. The close ties between the two families added emotional complications. However, these ties also helped them to realize and understand each other's pain and loss. As Andy (Ann's father) said after meeting with Michael (Conor's father), "I knew that we were somehow together on this journey. Something had happened to our families, and I knew being together rather than being apart was going to be more of what I needed."

By this time, Ann's condition did not improve, and she was removed from life support. Andy felt compelled to forgive Conor, as a part of his Christian faith and being a father, trying to fulfil his daughter's last wish.

Kate, Ann's mother, was on Conor's list of five people who could visit him in jail. Kate felt burdened by the thought of meeting the person who murdered her daughter. She said, "Before this happened, I loved Conor. I knew that if I defined Conor by the one moment- as a murderer- I was defining my daughter as a murder victim. And I could not allow that to happen."

After the charges for first-degree murder were filed, Grosmaires understood that Conor would at least receive a life sentence under the retributive justice system. However, they realized that they did not want him to spend his life in prison. Shortly after, they heard about restorative justice from an Episcopal priest who worked as a chaplain in the Florida prison system. But, the problem posed in front of them was that this system was not designed for cases of violence, and murder cases in particular. It was even more difficult for their case because Florida had not adopted restorative justice in any form.

Both, the Grosmaires and McBrides, had continued to spend time and support each other in the time of their loss. They both wanted to resolve the case through restorative justice, despite the odds. Julie's (Conor's mother), research led her to Sujatha Baliga, a former public defender and the director of restorative justice project at the National Council on Crime and Delinquency in Oakland.

Sujatha was shocked by the unusual request she received from both the families and had her apprehensions in applying a restorative justice form to this murder case. After constant persistence from Kate and Julie both and listening to the circumstances of the case, she said, "I just couldn't keep saying no."

The process soon began with a conference call among McBrides, Grosmaires, Baliga, Conor's attorney, and DeFoor (the episcopal priest). Once everybody was convinced that the matter was suitable for mediation, the only trouble left was to convince the prosecutor, Jack Campbell. Campbell, after doing his own research on restorative justice and being assured that it would not violated his duty towards the community in general, called Conor's lawyers to discuss the details.

Despite all the odds, the restorative circle started on June 22, 2011. Baliga made sure that the process was as humanized as possible, towards the victims, the offender as well the offender's family. To make sure that Ann was represented through the session too, her belongings were kept in the circle.

The sessions took place in a similar format as a usual VOM, except the fact that the attorneys were also present with the parties. Both the parties expressed how the incident had affected them. The Grosmaires spoke of Ann, her life, her dreams and how badly impacted they were after her death. Andy spoke of what Ann loved to do and how she wanted to open a wildlife refuge after graduating from college.

They talked in detail about her life, her infanthood, childhood, her adolescence and her dynamism in college. Baliga recalls how the circumstances were tough, despite the relations between the families. She said, "She (Kate) did not spare him (Conor) in any way the cost of what he did."

Campbell said, "It was excruciating to listen to them talk, to look at the photo there. I still see her. It was as traumatic as anything I have ever listened to in my life." Everybody else present in the room felt the intensity of the situation and the rising emotions, including Conor. In a way, he was not just the offender, he was a victim too, for he had lost his fiancée.

He later acknowledged how difficult it was to listen to their pain and to know that his actions had caused it. Afterwards, when it was Conor's turn to tell his story and explain how it happened, he said that it was difficult for him to get started but once he had, the words came out of his mouth effortlessly.

He talked about the fight that they had had the morning he shot Ann. He explained how they kept fighting frequently and despite the love they had for each other, they felt frustrated. They had been fighting since the morning, and things kept escalating quickly. After many rounds of shouting, and emotional outbursts, Ann said that she wanted Conor dead.

Conor then hurried to take a shot gun from his father's closet and had locked the door, when Ann started banging it.

Conor gained control of his thoughts, kept the gun on the table, and opened the door for Ann. He asked her what was wrong and how he could help her. Ann said that Conor did not care for her and she wanted to die. Conor, who admitted about his temper issues, said that he lost his mind at that time, picked up the gun, and shot at her.

This confrontation proved particularly difficult for the Grosmaires, who were under the presumption that the incident was probably an accident. Baliga recalled a change in Andy's demeanor. Acknowledging the sudden increase in tension, they halted the session when Campbell suggested to end the dialogue early. Kate, however, did not agree to it.

When the session resumed, Conor accepted the full responsibility of his act. He said, "What I did was inexcusable. There is no why, there are no excuses, there is no reason." The McBrides were equally shocked to hear what exactly had happened. While Julie could not believe that her son had done this, Michael regretted having kept a shotgun which he never imagined would have harmed another person.

After this was over, Baliga asked the Grosmaires what they wanted the restitution to look like. It was understood that this restitution would be in addition to the punitive sentence. Thus, the Grosmaires demanded that Conor does some good work for the society because Ann was not there to do her share and it was something she always wanted to do.

As far as the duration of the prison sentence was concerned, Grosmaires came up with a range of 10-15 years of sentence, and the McBrides agreed too. But, the mediation took place in a restorative-circle format and thus, it was important that the decision was reached with a consensus of all parties present. Campbell, being the representative of the retributive justice system, said that he needed to consult with the community leaders, heads of domestic violence shelter, and other authorities concerned.

Three weeks later, Campbell gave Conor a choice between 25 years of imprisonment and 20 years of imprisonment plus 10 years of probation. Conor chose the latter. Campbell, justified why

he needed to consult the others and how they came up with the figure. He said that he needed to feel certain that what he did was right.

Sujatha Baliga, in her article, presents a different viewpoint and struggle related to the case. She expressed the concerns she had about taking this case and the difficulties she faced once she accepted it. As she had said, one of the biggest challenges was introducing a restorative justice model in Florida. Even in California, where restorative justice is relatively popular, Baliga dealt with minor crime cases, mostly involving juveniles. The thought of handling a homicide case, in this case a first-degree murder, made her very uncomfortable.[59]

Further, she explains her journey through this case and the difficulties she faced to explain to people what she was about to do. It started with Conor's attorney, who after being told about a restorative circle said, "Never heard of anything like it. You want us all to sit down together and figure out what should happen to Conor? Face to face inside jail?"[60] Baliga went on to explain him that restorative justice practices were prevalent across the world and have been practiced in USA for a while too. After he understood that Baliga was not a member of the defense team but a neutral who would facilitate the dialogue, he understood things better and agreed to give it a try.[61]

Baliga admits that it did not come as a shock when she received a similar response from others. The prosecutor, the prison staff, reporters, and the community members, nobody had heard about such a process before. However, to her surprise, everyone was eager to learn about it and approved of it, for the uniqueness of the process and the humane element involved. "Each person whose approval or help I needed would stay on the phone just a few

[59] Sujatha Baliga, *The Day the Jail Walls Cracked: A Restorative Plea Deal,* Tikkun Magazine (January 10, 2012) http://www.tikkun.org/nextgen/the-day-the-jail-walls-cracked-a-restorative-plea-deal

[60] Id.

[61] Id.

minutes longer. In those extra moments I felt hearts and minds open to a different way of doing things,"[62] she added.

She explains the honesty, and bravery she witnessed that day and the willingness to try something that is not included in the criminal justice system. She said that the retributive system rarely sees the importance and need of including the victims in deciding what happens to the people who have done unimaginable damage to their lives.[63] Likewise, the retributive system does not recognize redemption or allowing the offender the opportunity to repair the irreparable before entering the doors of the courthouse.[64]

4.1 POINTS OF ANALYSIS

The biggest question that remained was, 'has the restorative-circle (VOM) worked'? On a larger scale, 'had it met the ends of community justice'?

To answer these questions, there are several aspects that need to be considered. First, comparing the outcome of this case with the goals of a VOM model, it is clear that all objectives were fulfilled. The offender was held accountable, the victims received closure, and the ways of restitution were agreed upon. Further, the punitive sentence was also decided through the restorative circle.

It is the Author's understanding that an underlying contention against the use of restorative justice techniques in severe violence cases has been that one cannot do away with the punitive sentence in such cases, and mere restitution is not enough to ensure accountability of the offender and ensure community justice. This case sets the perfect example where restorative justice was used to seek restitution and at the same time the punitive sentence was determined too. While the restorative circle was held 'in lieu' of a trial, it achieved what a trial would have. Additionally, the victims came up a with a restitution agreement, which seldom happens in severe violence cases.

[62] Id.
[63] Id.
[64] Id.

It is important to consider that the dynamics of the case were different than most of the other murder cases. Here, both the families were emotionally related and recognized each other's loss. The offender in this case, Conor, had himself surrendered to the police and accepted that he was the one responsible for Ann's death. Another emotional dimension was introduced with Ann's wish to forgive Conor. All these were the motivating factors for both, the Grosmaires and the McBrides to resort to a restorative circle and not go to a trial.

It is unlikely that all such circumstances will be present in any other murder case, and thus, both the parties may not agree to let go of a trial and resolve matters entirely through VOM or any other RJ model. However, there are numerous cases where the offenders plead guilty. We have also seen that victims' families have shown positive attitude and high willingness towards VOM practices. Thus, it could prove beneficial for both the parties to undergo a restorative justice method and resolve the case out of court.

Further, the overall process proved more satisfactory for the victims, who were given a say in the entire process. Unlike the retributive justice system, the Grosmaires were given an opportunity to determine the duration of prison sentence for Conor. Kate had earlier admitted to Baliga that she did not have much faith in the rehabilitative abilities of a prison and thus did not want Conor to serve more than 5 years of sentence. However, after listening to Conor's story and realizing that Ann's death was not an accident, she gave a range of 5-15 years of imprisonment. This shows the scope of flexibility available in a restorative circle and the amount of power available to the victims in determining the final outcome.

Another aspect that has been highlighted in this case is the sensitivity towards the offender's family. There are several proponents who have often said that VOM should focus on the needs of the offender's family as well, which has often been questioned by the rest. The biggest one being, why do they matter and why should they be included in the discussion of justice and

capital punishment.[65] While some think that the offender's family has contributed to the crime by raising a criminal, others hold them responsible for raising a child in abusive conditions.[66]

On the contrary, the proponents feel that the pain of offender's families is often overshadowed by the pain of victim's family, however, the loss of losing a loved one remains the same in both cases. Although the offenders, after conviction, start getting termed as a murderer, convicted felon, or an inmate, they still remain a child, mother, father, brother or sister to their family members.[67] The family members are not just only enraged by their loved one's actions but also by the shame with which society burdens them.

The McBride case has not only given the society, practitioners, and scholars a starting point to talk about VOM/ RJ (for crimes of severe violence) in lieu of trial, but also given them a push to start talking more about it in post-conviction cases. The Grosmaires, by participating in several programs to spread awareness about the restorative justice models, and the required changes in the criminal justice system have set an example for others.[68]

5. CRITICAL ANALYSIS

While the above-mentioned analysis presents author's opinions and support for using VOM or Restorative Justice in lieu of trial, in cases of extreme violence cases, there are certain points of criticism that may arise among various groups of the societies. Given below is a list of some of the possible critics and their probable point of view.

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[65] Elizabeth Beck et al., *In the Shadow of Death: Restorative Justice and Death Row Families,* 4 (1st ed. 2007).

[66] Id.

[67] Id. at 5

[68] Kate Grosmaire has recently published a book titled, *Forgiving my Daughter's Killer,* where she beautifully describes the liberating power of forgiveness. Part memoir, part spiritual testimony, this book is a story of a family whose faith was put to test and so found the capacity to do far more than they could have thought or imagined.

1. **Prosecutors**: Attorneys, prosecutors in particular, have an image of an adversary to the offender, thus, in a system that is sensitized towards offenders and their families, it is obvious that they may have some concerns. One of the points that came up in the McBride case, from the prosecutor's side, was about ensuring community justice. Campbell said that he agreed to try a restorative circle in this case, only after he was sure that he did not violate his duty toward every other parent and child in the town. Letting go of a trial and settling a case through restorative circle, for prosecutors, meant 'being easy' on the offender. While Campbell agreed to it, other members of the fraternity may not.

   The job of any prosecutor is to ensure justice, not only towards the immediate victim(s) but also the victims at large; the society. Many prosecutors may contend that restorative justice/VOM, while offering a chance of participation to the immediate victims does not seek participation from the community at large. The community has adopted the retributive justice system for ages and has established faith in it, where they are represented by the jury. Thus, to introduce a shift in the criminal justice system, and adopting restorative justice models, does not serve the community's rights and interests.

   Additionally, prosecutors may always question whether such measures actually ensure reformation of the criminal and reduce recidivism rates. A further disregard towards the practice may also result from the diminishing role of a prosecutor in a restorative justice model in comparison to an ordinary trial. It is known that other dispute resolution methods often receive lesser support from the attorneys because of their diminished participation. The same could be the case here.

2. **Domestic Violence Advocates**: The McBride case is also a case of domestic violence. As discussed before, the murder was a result of an escalated fight between the couple and happened in a moment of uncontrollable anger. For a layman, this may not be an incident of domestic violence because no physical abuse in the past was involved. However, for a domestic

violence advocate, there were elements of emotional abuse involved, and thus, a new dimension is added to the case.

The domestic violence advocates are likely to criticize the practice of restorative circles in lieu of a trial, because it may give signal to offenders, that it is acceptable to indulge in emotional and physical domestic violence, and hope to get away with it.

Conor was sentenced for murder, and domestic violence (as domestic violence advocates may contend) for 20 years, which is a short sentence for both the offences combined in the traditional justice system. For people, who may be involved in domestic violence alone, this may not set a good example. One of the objectives of the retributive justice system is to create deterrence among others, which is unlikely to be achieved by any restorative justice model.

3. **Community**: In a multi-cultural community, as ours, the definition of justice may vary largely. While some may be satisfied with an outcome of a particular case, others may not be. Similarly, there are several facets of the McBride case that may be seen differently by different members of the community.

   First, the offender in this case, is a White-American kid who practiced a Christian faith. No matter how advanced the society may have become, discrimination still prevails on its various levels, be it racial, religious, ethnicity-based or nationality-based. Many members of the community may ask whether an African-American, a Mexican, a Muslim or an immigrant would have been able to do away with a trial, and whether the authorities would have supported the use of restorative circle then?

   Second, there have been various emotional dimensions involved in this case, beginning from Ann's request to forgive Conor, to the Grosmaires' strong religious and spiritual beliefs. Though Grosmaires wanted to let go a trial based on these factors, and still believe that justice has been achieved, other members of the community, perhaps the majority, may hold a different position. For most of them, justice can only be

achieved through a retributive system, and hence, post-conviction VOMs would be the farthest they would want to go with restorative justice.

These are only a few concerns that may be raised within a community. It is difficult to generalize an opinion for large numbers of people; however, it may help to think of all possible reactions and concerns that they may have.

6. CONCLUSIONS

Victim-Offender Mediation and other restorative justice models have spread rapidly across various jurisdictions in the world and in the United States, since its commencement. Traditionally, these practices are being used to resolve minor and property related crimes, juvenile cases, and occasionally cases of assault. However, various studies, and cases present a great example of its effectiveness in severe violence cases, including murder cases.

These practices give victims, their families, offenders, and their families, a chance to get over the past and determine what they want for the future. While most of the VOMs are done post-conviction, Conor's McBride's case has set an example that it can be done in lieu of a trial as well, and can prove equally effective.

Many jurisdictions in the country still have not introduced restorative justice models in their criminal justice system, where it is much needed. Little has been said and written about such cases, and considerable study, research, and analysis ought to be invested. Thus, spreading awareness is the key in this situation, where all concerned parties have an eminent role to play.

To introduce a shift in the system, overnight, is impossible but slowly, by combining past experiences and research with new reforms and innovation, a shift in the present criminal justice system is possible. Such a shift would care more about restoration than retribution, give the real victims (not the state) a chance of direct participation to achieve the justice they want for themselves, and ensure higher levels of satisfaction.

This is a very timely and interesting subject since net companies such as Uber, Google, Amazon & Facebook present extraordinary problems in trying to fit them into old 19th & 20th century legal molds. These companies exist on the web and extend across the planet. By some definitions they are larger than even the largest nation states. For example the Facebook "Community" exceeds 2 billion people which is larger than the largest nation states such as China and India (with populations of roughly 1.4 billion people each). And the net worth of these companies exceeds the treasuries of many nation states. They are also hard to control legally with the advent of such things as Google offshore floating data centers which presumably put them outside the jurisdiction of nation states.

In any event with the exponential growth, rapidly evolving and morphing world of net entities, and the exponential explosion of Artificial Intelligence (AI), we are in an uncharted and strange world. The article I chose explores some of these issues and argues why ADR processes should be employed in reaching rational resolutions to some of the problems and challenges raised by net companies and AI.

J. Joaquin Fraxedas
Editor ACCTM
American Journal of Mediation

INDEPENDENT CONTRACTORS OR EMPLOYEES? WHY MEDIATION SHOULD BE UTILIZED BY UBER AND ITS DRIVERS TO SOLVE THE MYSTERY OF HOW TO DEFINE WORKING INDIVIDUALS IN A SHARING ECONOMY BUSINESS MODEL

Ethan Rubin*

I. INTRODUCTION

"Certain things I was told to do as an Uber driver basically directs you to the fact that they're treating you as an employee, even though they say you're an independent contractor," stated Levon Aleksanian, who was with Uber between August 2014 and September 2015.[1] Mr. Aleksanian is one of two Uber drivers in New York who broke free of their status as independent contractors after a New York court ruling in October 2016. The dispute over whether drivers are independent contractors or employees began in 2013, when Uber drivers from California and Massachusetts filed a class action lawsuit seeking pay and benefits

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[1] Dan Rivoli, *New York Uber Drivers Win Lawsuit to Obtain Benefits*, N.Y. DAILY NEWS (Oct. 13, 2016), http://www.nydailynews.com/new-york/new-york-uber-drivers-win-lawsuit-obtain-benefits-article-1.2830080.

from Uber.[2] The Uber drivers based their claim on the allegation that they were employees, which challenged Uber's definition of its drivers as independent contractors. In 2016, after three years of litigation, the two sides negotiated a settlement.[3] However, the settlement did not last long, as a federal judge rejected the settlement for not adequately compensating Uber drivers.[4] Third party viewers considered the settlement a victory for Uber because the company was permitted to label its drivers as independent contractors, which allows the company to avoid overtime pay, health benefits,[5] and other such benefits.[6] Even before the agreement was overturned, it was reported through surveys that a majority of Uber drivers were not content with the results.[7]

In addition to the ongoing California and Massachusetts litigation, Uber is now also facing a class action lawsuit from its New York drivers.[8] It is evident from all this strife that a majority of Uber drivers are not satisfied with their current status as independent contractors.[9] Nevertheless, Uber has refrained from

[2] O'Connor v. Uber Techs., No. 13-CV-3826, 2015 U.S. Dist. LEXIS 116482 (N.D. Cal. Sept. 1, 2015); *see also* Rivoli, *supra* note 1.

[3] O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016); *see also* Kia Kokalitcheva, *Uber's Fight Just Got More Complicated*, FORTUNE (Mar. 4, 2016), http://fortune.com/2016/03/04/uber-driver-unemployment/.

[4] Chris Isidore, *Judge Rejects $100 Million Settlement Between Uber and Drivers*, CNN (Aug. 19, 2016), http://money.cnn.com/2016/08/19/technology/uber-drivers-class-action-settlement/ ("The deal between Uber and drivers in California and Massachusetts did not compensate drivers enough, the judge ruled.").

[5] *Id.* ("The lawsuits had charged that the drivers should be treated as employees, rather than independent contractors. That would have entitled the drivers to a variety of benefits, including overtime and health insurance.").

[6] Mike Isaac, *Judge Overturns Uber's Settlement With Drivers*, N.Y. TIMES (Aug. 18, 2016), http://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html ("Uber has opposed having its drivers be categorized as employees, a more costly designation that would require the company to pay payroll taxes and ensure that drivers earn at least the minimum wage.").

[7] *Id.*

[8] CGS Taxi LLC v. City of N.Y., 2016 NY Slip Op. 30907(U) (N.Y. Sup. Ct. 2016); *see also* Abigail Tracy, *Thousands of Uber Drivers are Suing Over Their Employment Status*, VANITY FAIR (June 2, 2016), http://www.vanityfair.com/news/2016/06/uber-class-action-lawsuit-new-york.

[9] Isaac, *supra* note 6.

deeming its drivers as full-time employees[10], because in its opinion, it would defeat the company's mission.[11] Uber spokesman Matt Wing stated, "As employees, drivers would lose the personal flexibility they value most—they would have set shifts, earn a fixed hourly wage, and be unable to use other ridesharing apps."[12] From Uber's point of view,[13] the purpose of the Uber application ("app"), and what keeps the company so successful, is the fact that its drivers are independent contractors.[14] According to Uber,[15] the business plan of the company is to allow the ordinary person to sign in whenever and wherever in order to make extra money during their "free" time.[16] Without a doubt, the two sides stand far apart on the issue and even though a settlement was reached, negotiation has not solved the issue thus far.[17] A federal judge struck down the initial settlement because the court found the agreement did not properly compensate the drivers for the amount they could have pursued in litigation.[18] The purposes of this Note will be threefold; first, this Note will explore the background issues that arise in sharing economy businesses; second, this Note will suggest employing dispute resolution to find solutions; and third, this Note will theorize why dispute resolution can help a federal judge find a fair and equitable solution for both parties.

In an effort to do so, each section of this Note will address a different issue of the ongoing disputes between Uber and its drivers and suggest potential solutions for both parties. Section II focuses on the differences between Uber and its drivers' points of

[10] *Id.*

[11] Steven Musil, *Uber Drivers to Remain Independent Contractors Under Settlement*, C|NET (Apr. 21, 2016), https://www.cnet.com/news/uber-drivers-to-remain-independent-contractors-under-settlement/.

[12] Rivoli, *supra* note 1.

[13] *Id.*

[14] Musil, *supra* note 11, at 1 ("Uber had always contended … it gave them [drivers] a personal flexibility that allowed them to set their own schedule and be their own boss. 'Drivers value their independence -- the freedom to push a button rather than punch a clock.'").

[15] *Id.*

[16] *Id.*

[17] Isidore, *supra* note 4.

[18] O'Connor v. Uber Techs., No. 13-CV-3826, 2015 U.S. Dist. LEXIS 116482, at *45–49 (N.D. Cal. Sept. 1, 2015); *see also* Isaac, *supra* note 6.

view on whether Uber drivers should be considered employees or independent contractors via National Labor Relations Board ("NLRB") terminology. Section III discusses why it is difficult to label Uber and its drivers under traditional employment law terminology, as well as failures to do so through negotiation, litigation, and arbitration. Section IV proposes that with an appointed mediator, the Uber cases can be handled in the most effective and fair way for both Uber and its drivers, because in a new type of economy with little precedential case law and few applicable statutes, it is best to leave the outcome in the hands of market participants.[19] In conclusion, Section V briefly outlines why this note proposes that mediation is a better alternative to arbitration; why mediation is the best alternative for now; and why it is so important that this dispute is resolved by Uber and its drivers rather than by an arbitrator or judge.

II. BACKGROUND

A. *Uber Statistics*

In December 2014, it was recorded that Uber had a total of 162,037 "active drivers" complete at least four or more trips for services.[20] Uber released internal data in January 2015 showing their drivers are making more money as personal drivers from the app than professional taxi drivers do—$17 an hour in Los Angeles,[21] $23 an hour in San Francisco,[22] and $30 an hour in New York.[23] In addition, Uber drivers service more than eight million people; and add an average of 50,000 new drivers a month.[24] With these numbers on the rise, the debate about what companies like Uber mean for the economy and whether the work it offers is

[19] Isaac, *supra* note 6.

[20] Emily Badger, *Now We Know How Many Drivers Uber Has—and Have a Better Idea of What They're Making*, WASH. POST (Jan. 22, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/22/now-we-know-many-drivers-uber-has-and-how-much-money-theyre-making%E2%80%8B/.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Craig Smith, *By the Numbers 47 Amazing Uber Statistics (August 2016)*, DMR, http://expandedramblings.com/index.php/uber-statistics/ (last visited Aug. 3, 2017).

sustainable for the tens of thousands of people who have signed up has increased significantly.[25]

Some view Uber's success and growth as a hopeful future of work in a digital age where anyone with a car can be their own boss, choose their own hours, and determine their own income based on schedule flexibility.[26] On the other hand, critics see Uber's business platform as a way for the company to exploit drivers by paying them as independent contractors with no guarantees and no benefits.[27] This had led to interesting results; 71% of Uber drivers in a survey responded they had boosted their income and financial security since joining,[28] but the number of organized protests against the company because of fare cuts has increased.[29] As a result of Uber having so many drivers that use the platform in so many different ways spread across the country, it is difficult to come to a conclusion on what definition is most suitable and will leave the majority of the Uber drivers content. Nevertheless, there are groups of drivers both domestically[30] and abroad that are fighting for their right to employment benefits.[31]

B. *For Now, in 2017, Uber Drivers in the United Kingdom, are Company Employees— Not Independent Contractors*

In October 2016, a British court issued a landmark ruling that officially labeled United Kingdom's ("UK") Uber drivers as

[25] Badger, *supra* note 20; *see also* Musil*,* supra note 11 ("'That said, as Uber has grown – over 450,000 drivers use the app each month here in the US -- we haven't always done a good job working with drivers," he wrote. 'It's time to change.'").

[26] Rivoli, *supra* note 1.

[27] *Id.*

[28] Seth Fiegerman, *Uber Drivers to Join Protest for $15 Minimum Wage*, CNN (Nov. 28, 2016), http://money.cnn.com/2016/11/28/technology/uber-drivers-minimum-wage-protest/ ("'Hundreds' of drivers will protest alongside fast food workers, airport employees . . . for what is being bill as a 'Day of Disruption'.").

[29] Badger, *supra* note 20.

[30] *O'Connor*, 2015 N.D. Cal. LEXIS 116482, *supra* note 2; *see also* CGS Taxi LLC v. City of N.Y., 2016 NY Slip Op. 30907(U) (N.Y. Sup. Ct. 2016).

[31] *See O'Connor*, 2015 U.S. Dist. LEXIS 116482 at *5–11; *see also CGS Taxi LLC*, 2016 NY Slip Op 30907(U) at 2–5. .

employees,[32] which entitles UK Uber drivers to the same employment rights as other full time employees in Britain.[33] This trial court decision was the result of a case brought against Uber by two drivers backed by the British Trade Union ("GMB").[34] The ruling by the UK judge entitled Uber drivers to earn the national minimum wage, holiday pay, sick pay, and other benefits.[35] Uber unsuccessfully argued that it was a "technology platform" that enables users to schedule transportation, which also does not function as a transportation provider because transportation services are provided by "independent third party contractors who are not employed by Uber."[36] The reason for the argument was so Uber would not be obliged to provide the kinds of statutory employment rights full-time workers would expect.[37]

Maria Ludkin, the union's legal director, said the case represented "a monumental victory"[38] and claimed it would "have a hugely positive impact"[39] for Uber's drivers, of whom there are around 40,000 in Britain.[40] She went on to further state,

> Uber drivers and other directed workers do have legal rights at work. The question for them now is how those rights are enforced in practice. The clear answer is that the workforce must combine into the GMB union to force the company to recognize these rights and to negotiate fair terms and conditions for the drivers.[41]

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[32] Aslam v. Uber BV [2017] IRLR 4 (ET); *see also* Tom Mendelsohn, *Court: Uber Drivers are company employees not self-employed contractors*, ARS TECHNICA (Oct. 31, 2016), http://arstechnica.com/tech-policy/2016/10/uber-drivers-employees-uk-court-ruling/.

[33] *Aslam*, IRLR 4 at para 129–130.

[34] *GMB*, FREE DICTIONARY, http://acronyms.thefreedictionary.com/GMB, (last visited Feb. 5, 2017) ("GMB, British Trade Union, originally General Municipal Boilermakers; now known simply as GMB.").

[35] *Aslam*, IRLR 4 at para. 125; *see also* Mendelsohn*, supra* note 32.

[36] *Aslam*, IRLR 4 at para. 89; *see also* Mendelsohn*, supra* note 32.

[37] Mendelsohn*, supra* note 32.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

Uber, for now, is sticking to its independent contractor argument, and its UK general manager Jo Bertram has vowed to appeal the court's decision.[42] She stated,

> Tens of thousands of people in London drive with Uber precisely because they want to be self-employed and their own boss. The overwhelming majority of drivers who use the Uber app want to keep the freedom and flexibility of being able to drive when and where they want. While the decision of this preliminary hearing only affects two people we will be appealing it.[43]

However, the court in its ruling insisted that, "the notion that Uber in London is a mosaic of 30,000 small business linked by a common 'platform' is to our minds faintly ridiculous. Drivers do not and cannot negotiate with passengers … they are offered and accept trips strictly on Uber's terms."[44] Ms. Ludkin in response stated, "this judgment in no way affects driver flexibility, it merely guarantees them basic employment rights. Uber's decision to appeal is purely related to protecting their ample profits and nothing to do with protecting the drivers.".[45]

In addition to Uber appealing, Uber is currently conveying to its drivers that the decision only affects the two drivers who went before the tribunal. In an email sent to drivers after the ruling, Bertram wrote, "… it's very important to note that today's decision only affects two individuals and Uber will be appealing it. There will be no change to your partnership …"[46]

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[42] Mendelsohn, *supra* note 32 ("Civil cases will sometimes be dealt with by magistrates, but may well go to a county court . . . Appeals will go to the High Court and then to the Court of Appeal – although to different divisions of those courts."); *see also Structure of the Courts & Tribunal System*, COURTS & TRIBUNALS JUDICIARY (Sept. 2016), https://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/; *see also Aslam*, [2017] IRLR 4.

[43] Mendelsohn, *supra* note 32.

[44] *Aslam*, IRLR 4 at para. 90.

[45] Mendelsohn, *supra* note 32.

[46] *Id.*

Ms. Ludkin strongly responded to the email by stating,

> Even after the judge found Ms. Bertram's evidence lacked credibility and described her as 'grimly loyal,' she continues to try and advance a misleading and false set of facts. The Uber judgment applies to 40,000 UK drivers, not two. Ms. Bertram might be wise to think how this judgment reflects on her before she issues any more statements.[47]

Uber will not be ending the fight at this trial court as they plan to appeal the decision because of its detrimental impact on its business platform.[48] Based on the foregoing, Uber should hope they resolve their disputes with its American drivers as soon as possible or it may face the same fate. In order for Uber to prevent the same issues in the United States, it would be more strategic for the company to resolve this dispute through alternative dispute resolution–so they do not have to risk a bad loss.

C. *The Evolving Use and Perception of Alternative Dispute Resolution*

In 2011, for the second time in fifteen years, the leading counsels at many of the world's largest corporations participated in a landmark survey of perceptions and experience with alternative dispute resolution ("ADR"), including mediation, arbitration, and other third-party intervention strategies intended to produce better ways of managing and resolving conflict.[49] The survey was

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[47] *Id.*

[48] *Id.*

[49] Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation Arbitration, and Conflict Management in Fortune 1000 Corporations*, HARV. NEGOTIATION L. REV., Spring, 2014, at 1–2 ("In 2011, for the second time in fifteen years, leading counsel at many of the world's largest corporations participated in a landmark survey of perceptions and experiences with alternative dispute resolution ("ADR")—mediation, arbitration, and other third-party intervention strategies intended to produce more satisfactory paths to managing and resolving conflict . . . Including approaches that may be more economical, less formal, and more private than court litigation, with more satisfactory and more durable results.").

conducted by Cornell University's Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution ("CPR") for Fortune 1000 companies.[50] This survey in addition to perception and experiences with ADR, included approaches to avoid litigation that may be more economical, less formal than a courtroom, more private than court litigation, and provide more satisfactory and durable results.[51] When these attorneys' responses were compared to those of the mid-1990s, substantial evolutionary trends were observable.[52] Now, more corporations have embraced ADR methods, particularly mediation, and foresee its continuing use for a wide spectrum of disputes.[53] One reason for this is that corporate attorneys believe binding arbitration is not as effective as it used to be and consequently fewer companies are relying on arbitration to resolve its disputes.[54] As a result, the corporate bar is edging away from commercial arbitration and is putting decision-making back in the hands of market participants through mediation.

D. *The Growth of Mediation*

As a result of the survey, mediation has received considerable attention from public tribunals, practicing attorneys,

[50] David Lipsky, Fortune 1000 and Federal Agencies on Alternative Dispute Resolution (ADR), CORNELL UNIV. SURVEY RESEARCH INST. (Oct. 24, 2011), https://www.sri.cornell.edu/sri/projects.project.cfm?projid=123646 (unpublished survey report) (on file with author).

[51] Stipanowich & Lamare, *supra* note 49 at 2 ("[I]ncluding approaches that may be more economical, less formal, and more private than court litigation, with more satisfactory and more durable results."); *see also* Thomas J. Stipanowich, *ADR and "The Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004).

[52] *Stipanowich & Lamare, supra* note 48 at 2–3 ("Comparing their responses to those of the mid-1990s, substantial evolutionary trends are observable.").

[53] *Id.* at 3.

[54] *Id*. at 3. ("Binding arbitration has reached its tipping point: while some longstanding concerns about arbitration processes have lessened, fewer major companies are relying on arbitration to resolve many kinds of disputes (important exception being consumer and products liability disputes), and they are evenly divided regarding its future use.").

scholars, and coverage by the media.[55] Additionally, many attorneys are encouraging or directing companies to mediate cases in litigation;[56] courts are regularly called upon to interpret and enforce varied, often complex, contractual dispute resolution schemes.[57]

The survey offered important new insights regarding changes in the way large companies handle conflicts and it evidences key trends including a general shift in corporate orientation away from litigation and toward ADR.[58] Most importantly, for the purposes of this Note, it highlights the evolution of mediation. Mediation is being used significantly more than it was in the mid-1990s, and today, appears to be everywhere among major companies.[59] A major reason for this, as the survey shows,[60] is that there is evidence of corporations' growing sophistication and increasing emphasis on control of the process of managing conflict.[61] Mediation gives companies the ability to control the process because it puts the dispute in the hands of the parties rather than a judge or an arbitrator.[62]

Indications of corporations' newfound attention include reliance on early neutral evaluation and early case assessment.[63] These new approaches specifically focus on deliberate conflict

[55] *Id.*; *see also* Mitchell L. Bach & Lee Appelbaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147 (2004) (discussing the establishment of business and commercial courts around the country for the purpose of increasing confidence in the courts' ability to handle business litigation).

[56] Stipanowich & Lamare, *supra* note 49.

[57] Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law in the changing Landscape of Dispute Resolution,* 8 NEV. L. REV. 427 (2007).

[58] Stipanowich & Lamare, *supra* note 49 at 5–6 ("The New Survey . . . offers important new insights regarding changes in the way large companies handle conflict.").

[59] *Id.* ("Mediation appears to be even more widely used than in 1997 and is today virtually ubiquitous among major companies.").

[60] *Id.*

[61] *Id.* ("[T]he survey offers tangible evidence of corporations' growing sophistication and increasing emphasis on control of the process of managing conflict.").

[62] *Id.*

[63] *Id.*

management in its early stages as well as control over the selection of third party neutrals and increasing sophistication in the use of ADR.[64] This enhanced sophistication and attention is also reflected in the growing use of integrated approaches to conflict resolution in disputes arising in employment law.[65] Employment disputes have seen a significant contrast between the number of market participants that resolve conflict in mediation and arbitration.[66] The reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints.[67] Indications based on the survey are that the great majority of employment disputes are resolved informally in the early stages and rarely are dealt with in arbitration or litigation.[68] Based on this data, it seems Uber's most strategic method to resolve this issue is through mediation and not risking arbitration or litigation. In addition, Uber and its drivers are in an employment dispute, which according to the survey is dealt with more efficiently through mediation than other methods.

III. DISCUSSION

A. *History of Defining Employees and Independent Contractors*

As of 2017, negotiations have not been successful because of the continuous dispute of whether drivers can be considered employees rather than independent contractors. The Supreme Court has recognized that the definition of the term "employee" from the National Labor Relations Act's ("NLRA") does not

[64] Stipanowich & Lamare, *supra* note 49 at 6.

[65] *Id.* ("This enhanced sophistication and attention is also reflected in the growing use of integrated approaches to managing conflict, particularly in the employment sphere.").

[66] Stipanowich & Lamare, *supra* note 49, at 6 ("The Contrasts between frequency of use of mediation and of arbitration are even more striking in data relating to employment disputes.").

[67] *Id.*("The reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints.").

[68] *Id.*("Indications are that the great majority of disputes are resolved informally in the early stages and rarely in arbitration or litigation.").

"explicitly define the term, and has therefore held that the National Labor Relations Board ("NLRB"), the entity that applies the definition to working individuals in the United Sates, has the primary responsibility to make that determination.[69] However, the Supreme Court has also held that, generally, an employee is one who works for another for hire and that, in defining what constitutes an employee, the NLRB's decision must not clash with the NLRA's overall purpose of encouraging collective bargaining.[70] Therefore, the term "employee" is normally interpreted liberally.[71]

Nonetheless, the NLRA's definition does impose some limitations on the term by stating; "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" is an employee, so long as he "has not obtained any other regular or substantially equivalent employment."[72] As a result of this definition, one of the exceptions to those who can be considered an employee for NLRA purposes is an independent contractor because an independent contractor is not inhibited by labor disputes or unfair labor practices.[73] The Court in *NLRB v. Hearst Publs., Inc.* held that in determining who is an employee, the NLRB is not bound by traditional common law concepts.[74] After the 1947 amendments to the Act, now referred to as the Taft-Hartley Act, and to resolve reoccurring confusion, the NLRB came up with the "right–of–control test" to help differentiate between independent contractors and employees.[75]

[69] NLRB v. Hearst Publs., Inc., 322 U.S. 111, 136–137 64 S. Ct. 851 (1944) [hereinafter NLRB Case]; *see also* Fair Labor Standards Act of 1938 29 U.S.C. § 201 (1938) [hereinafter FLSA]; *see also* National Labor Relations Act of 1935 § 2.03, 29 U.S.C. § 152 (2006) [hereinafter NLRA].

[70] NLRB Case at 116.

[71] *Id.* at 118–119.

[72] *Id.* at 116.

[73] NLRA.

[74] NLRB Case at 125, *see also* FLSA; *see also* NLRA. ("The Court went on to hold that, in determining who is and who is not employee, federal law was determinative and concluded that the legislative history of the Act indicated that Congress did not intend that the board be bound by traditional common law concepts.").

[75] NLRA ("Shortly after the 1947 amendments, the Board stated that, in cases involving the independent contractor/employee issue it would use:").

The NLRB stated under this doctrine that it is generally recognized that an employer– employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished.[76] Conversely, an employer–independent contractor relationship exists where the control is merely limited to the result to be accomplished and does not apply to the method and manner of the services rendered.[77] The Board then propounded several factors to help the determination, noting that the list is not a limitation.[78] The important principles that the Board has expressed and would apply to Uber include: the right to hire and discharge; the permanence of the relationship; whether the work is part of the employer's regular business; the extent to which the employer can control the details of the work; the method and determination of the amount of compensation; whether the person doing the work is engaged in an independent business or enterprise; and the parties' belief as to the nature of the relationship created.[79]

The traditional differentiation between an independent contractor and an employee is the difference between working independently or under the direction of an entity.[80] For example, a dance instructor who selects their own dance routines to teach, locates and rent their own facilities, provides their own sound system, provide music and clothing, collect fees from customers, and is free to hire assistants is an example of an independent contractor.[81] However, a dance instructor working in a health club where the club sets hours of work, the routines to be taught, and pays the instructor from fees collected by the club is an example of an employee.[82] Although this distinction on its surface looks simple, this Note demonstrates how the Uber business model, which is based on a sharing economy, makes the distinction much

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] NLRA
[80] *NLRB* Case at 126.
[81] ALA. DEP'T OF LABOR, EXAMPLES OF INDEPENDENT CONTRACTORS, ALA.GOV., https://www.labor.alabama.gov/uc/EXAMPLES_OF_INDEPENDENT_CONTRACTORS_AND_COMMON_LAW_EMPLOYEES.pdf.
[82] *Id.*

more complicated with the Uber cases. A sharing economy is a hybrid of both the above examples because it encompasses traits of both an employee and an independent contractor.[83] This is illustrated in the Uber cases—an Uber driver can set their own hours, drive the passengers they desire, and get payments routed through Uber, but, at the same time, an Uber driver also works for Uber, can work a full day's work rather than a couple hours, and Uber takes a fee from each passenger.[84] In addition, another argument as to why Uber has an employer-employee relationship with its drivers is because it provides an evaluation system of the driver's services and the drivers' function as a core to Uber's central business operations.[85]

B. *Are Uber Drivers Employees?*

Uber views the role of its drivers as independent contractors because it sees itself as a platform to connect willing passengers with willing independent drivers.[86] The arrangement helps them avoid many significant expenses that taxi and other transportation companies are responsible to pay to their drivers.[87] Classifying these drivers as independent contractors has allowed Uber to avoid numerous business related costs such as payroll taxes, health insurance, car maintenance, fuel, and Social Security obligations.[88] The drivers that are against being labeled as independent contractors are in opposition because they want more

[83] The recent expansion of the so-called sharing economy concept is a hybrid market model in which people share access to goods and services. It has led to emerging new business models.

[84] *Driving Jobs vs. Driving with Uber*, UBER (Feb. 5, 2017), https://www.uber.com/driver-jobs/.

[85] Jonas Barre, *What are the Main Reasons that Uber is in an Employer-Employee Relationship with its Driver?* QUORA (Aug. 13, 2015), https://www.quora.com/What-are-the-main-reasons-that-Uber-is-in-an-employer-employee-relationship-with-its-drivers. ("For example, some detailed instructions, evaluation system and the driver services being core to Uber's operations point to it being an employer-employee relationship.").

[86] *Id.*

[87] Ryan Frazier, *Sharing is Caring: Are Uber, Lyft Drivers Dependent Contractors?*, KMC LAW (May. 2016), http://www.kmclaw.com/newsroom-articles-367.html.

[88] *Id.*

job security and benefits that an actual employee would receive.[89] Existing legal definitions to differentiate employees from independent contractors may be inadequate for addressing the modern labor market, including the emerging sharing economy, because they focus on more traditional business models.[90]

Under the Fair Labor Standards Act ("FLSA"), the determination of whether someone is an employee or an independent contractor is based on an assessment of various factors known as the "economic realities test."[91] These factors link to six major questions: (1) whether the work being done is an integral part of the employer's business; (2) whether the worker's managerial skills affect their opportunity to make a profit or loss; (3) how does the worker's investment compare to the employer's investment; (4) does the work being performed require special skill; (5) is the relationship between the two permanent or indefinite; and (6) the nature and degree of the employer's control in the relationship.[92] By using this traditional test, Uber and other sharing economy business platforms fit all of the criteria for either an employment-employer relationship or an independent contractor-employer relationship. Uber drivers driving passengers to their destination is an integral part of Uber's business and there is a degree of control because of the selection process and how Uber drivers collect fees.[93] However at the same time, Uber drivers control their own profit and loss, there is no special skill

[89] *Id.* ("Not only would Uber . . . be required to pay certain taxes and reimburse drivers for expenses, but they would also have to provide other employment-related protections, such as unemployment benefits, health insurance, and workers' compensation coverage. Drivers would also be protected by federal and state laws guaranteeing minimum wages and overtime.").

[90] *Id.*

[91] FLSA; *see also* Amy Groff et al., *Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees*, KLGATES (Dec. 2015), http://www.klgates.com/files/Publication/04dcde30-9c10-4003-b663-f7f5f2cdec32/Presentation/PublicationAttachment/805ddc72-69b2-426b-ad51-fe92be45434e/CLRI_2016.pdf.

[92] U.S. DEP'T OF LABOR, WAGE & HOUR DIV. ADMIN.'S INTERPRET. NO. 2015-1, APPLICATION OF FLRA'S "SUFFER OR PERMIT" STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS 3–10 (2015), http://www.blr.com/html_email/AI2015-1.pdf.

[93] Groff et al., *supra* note 91.

required, and the relationship is only as permanent as the driver chooses it to be.[94] This is a problem that not only Uber faces, but many participants in the sharing economy as well. The authors of the article *Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees* suggested new legislation in order to clear the confusion of how to label working participants in sharing economies. They stated. " . . . companies should be active in advocating for, and helping to shape, new laws that meet the needs of a new era of technology, that allow for new types of business opportunities, and that reflect the types of arrangements workers in today's economy seek."[95]

A new statute written specifically for companies engaged in a sharing economy business model would be useful not only for the Uber cases, but for similar companies as well. Working only on precedents and traditional terminology, gives neither party a strong enough argument to prevail in litigation. As a result, this Note suggests it would be in the best interest of lawmakers to draft a new statute that labels such workers as "hybrids,"[96] due to the overlap in characteristics of both employees and independent contractors in sharing economies. In describing how to classify hybrids for compensation and benefits, lawmakers would consider how "hybrids" engage in a sharing economy. Meaning, if an Uber driver chooses to only log in or out for a couple hours a week to make a few extra dollars, lawmakers would classify this "hybrid" as an independent contractor. However, if an Uber driver, with consent and knowledge of Uber, chooses to treat Uber driving as a full-time job, and works a 30-40 hour week,[97] lawmakers would classify this "hybrid" as an employee. This flexibility, rather than a broad, overarching label, allows Uber to continue its business

[94] Frazier, *supra* note 87.

[95] Groff et al., *supra* note 91.

[96] The author of this note proposes to define working individuals as "hybrids." The reason for this is because participants in a sharing economy share traits of both employees and independent contractors.

[97] Alison Doyle, *How Many Hours a Week is Full-Time Employment?*, THE BALANCE (Oct. 16, 2016) https://www.thebalance.com/how-many-hours-a-week-is-full-time-employment-2063404 ("The standard for full-time employment was typically 40 hours a week in the past. However, many employers now consider employees a full-time when they work fewer hours, i.e. over 30 hours.").

model and allows for those drivers that depend on Uber for employee benefits to receive those benefits. Since as of 2017 this law does not yet exist, mediation, a dispute resolution method that seeks middle grounds such as this proposed statute would provide is a better alternative to arbitration or litigation, which yields binary conclusions.

C. *Uber Disrupting the Law*

Uber is a prime example of a creative entrepreneurship disrupting the law and causing legal conflict. Traditionally, people would hail a taxicab on the street; now with Uber's technology, people can rely on an Internet app to hail rides and schedule pickups electronically.[98] In addition, traditional taxi services are highly regulated enterprises with government-licensed cars and full-time drivers; when on the other hand; Uber leverages part-time drivers who use their own cars, which allows practically anyone with a car and spare time to participate.[99]

From a business perspective, Uber's successful results are undeniable[100] and they have created a thriving industry. After operating for less than four years in New York, there are already more cars affiliated with Uber on the streets of New York City than there are taxicabs.[101] Uber was valued near $51 billion in its most recent investment round in 2017, tying Facebook as the highest-valued venture-backed company in history and reached the

[98] Jack Wroldsen, *Article: Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship,* 18 U. Pa. J. Bus. L. 733 (2016) ("Whereas traditionally people would hail a taxi cab on the street, Uber relies on an Internet app that allows riders and drivers to schedule a pickup electronically.").

[99] *Id.; see also* Bos. Cab Dispatch, Inc. v. Uber Techs, Inc., No. 13-CV-10769, 2015 U.S. Dist. LEXIS 8508, *1–2 (D. Mass. Jan. 26, 2015).

[100] *Bos. Cab Dispatch, Inc.*, 2015 U.S. Dist. LEXIS 8508, at *3.

[101] *Id.*; *see also* Melkorka Licea et al., *More Uber Cars Than Yellow Taxis on The Road in NYC*, N.Y. POST (Mar. 17, 2015), http://nypost.com/2015/03/17/more-uber-cars-than-yellow-taxis-on-the-road-in-nyc/ ("The company [Uber] has 14,088 black and luxury cars affiliated with it operating in the five boroughs, compared to 13,587 medallion cabs, according to the Taxi and Limousine Commission.").

$50 billion milestone, two years faster than Facebook.[102] In addition, Uber is currently the highest-valued venture-backed company in the US by a margin of roughly $40 billion.[103] Uber has been widely recognized in the sharing economy industry and has beat out similar companies, like FlightCar and Airbnb, for all kinds of awards and recognitions.[104]

From a legal perspective, Uber is creating a destructive legal conflict.[105] Since Uber's launch, it has faced many legal battles with its drivers and the cities trying to operate the company.[106] As regulators grapple with how to handle Uber's business model, traditional taxicab services continue to resist Uber's presence.[107] One Parisian taxi driver referred to Uber's

[102] Wroldsen, *supra* note 98; *see also* Douglas MacMillan & Telis Demos, *Uber Valued at More than $50 Billion*, WSJ (July. 31, 2015), https://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457.

[103] Wroldsen, *supra* note 98; *see also* Douglas Macmillan et al., *Uber Snags $41 Billion Valuation*, WSJ (Dec. 5, 2014), http://www.wsj.com/articles/ubers-new-funding-values-it-at-over-41-billion-1417715938.

[104] Wroldsen, *supra* note 98; *see also* Matthew Panzarino & Alexia Tsotsis, *Uber Wins the 2014 Crunchie for Best Overall Startup*, TECHCRUNCH (Feb. 5, 2015), http://techcrunch.com/2015/02/05/uber-wins-the-2014-crunchie-for-best-overall-startup/ ("Uber has won all kinds of awards and recognition in the entrepreneurial community, and though Uber is more prominent than its competitors, it is far from alone in the electronic ride-hailing market. Outside ride-hailing, other companies in the so-called "sharing economy" are also challenging legal rules with their innovative business models, such as car-sharing firms like Flight Car and Turo (Formerly called RelayRides), and home-sharing platforms like Airbnb.").

[105] Wroldsen, *supra* note 98 ("From a legal perspective, though, Uber is a poster child for creative destructive legal conflict. Chronicling "Uber's ongoing legal struggles," one commentator observes that "Uber is good at two things: running a taxi service and getting on regulators' nerves.").

[106] Wroldsen, *supra* note 98; *see also* Daniel Roberts, *A Brief History of Uber Scandals*, YAHOO FINANCE (Feb. 22, 2016), https://finance.yahoo.com/news/uber-scandals-timeline-michigan-shooting-140035801.html. *See also* Jacob Kastrenakes, *Uber's Bumpy Road to World Domination*, VERGE (Feb. 1, 2016), http://www.theverge.com/2014/12/15/7393693/uber-fights-to-expand-across-the-globe-storystream.

[107] Wroldsen, *supra* note 98; *see also* Alissa Rubin & Mark Scott, *Clashes Erupt Across France as Taxi Drivers Protest Uber*, N.Y. TIMES (June. 25, 2015), https://www.nytimes.com/2015/06/26/business/international/uber-protests-france.html.

business practices as "economic terrorism"—and actively fights for the taxi industry through litigation.[108] These taxicab drivers allege that Uber is engaged in unfair competition as an unlicensed taxi company[109] that avoids expenses such as medallion fees,[110] which can be hundreds of thousands of dollars for each licensed taxicab.[111] Although in New York City virtually all of those medallions are in the hands of very few owners, there are still people who have to pay a substantial amount of money in order to participate in the transportation space that Uber is not paying to be a part of. Additionally, state and local government regulators challenge Uber's compliance with a host of transportation and taxi regulations, such as insurance coverage minimums,[112] driver background checks,[113] and vehicle safety inspections[114].

[108] Wroldsen, *supra* note 98; *see also* Dan Levine & Edwin Chan, *Uber, Lyft Rebuffed in Bids to Deem Drivers Independent Contractors,* REUTERS (Mar. 11, 2015), http://www.reuters.com/article/2015/03/12/lyft-drivers-idUSL1N0WD2T520150312.

[109] Wroldsen, *supra* note 98; *see also* O'Connor v. Uber Techs, Inc., 2015 WL 1069092, at *1–4 (N.D. Cal. Mar. 11, 2015).

[110] Wroldsen, *supra* note 98; *see also* Josh Barro, *New York's Taxi Medallion Prices Fall Again*, NEW YORK TIMES, (Dec. 2, 2014), https://www.nytimes.com/2014/12/03/upshot/new-york-taxi-medallion-prices-fall-again.html.

[111] Wroldsen, *supra* note 98, at 769 ("These plaintiffs allege that Uber is engaged in unfair competition as an unlicensed taxi company that avoids expenses such as medallion fees, which can be in the hundreds of thousands of dollars for each licensed taxi cab.").

[112] *Id.*; *see also* Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers about Their Insurance Coverage*, 56 B.C L. REV. 11097, 1107–10 (2015).

[113] Jack Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*, 18 J. BUS. L. 733 (2016); *see also* Bos. Cab Dispatch, Inc. v. Uber Techs, Inc., No. 13-CV-10769, 2015 U.S. Dist. LEXIS 8508, at *1–2 (D. Mass. Jan. 26, 2015).

[114] Wroldsen, *supra* note 113; *see also* Brian Fitzgerald, *Uber Suspends Operations in Nevada,* WSJ (Nov. 28, 2014), https://blogs.wsj.com/digits/2014/11/28/uber-suspends-operations-in-nevada/.

D. *Other Entrepreneurships Disrupting the Law—Examples of how the Sharing Economy has frustrated other areas of the Law*

It is important to recognize that Uber is not the only technology-based company that is facing difficulties with existing statutory and regulatory models in order to understand the complexity of the issue Uber and its drivers are currently engaged in. Entrepreneurship throughout time has threatened to upend the stagnant market through innovation and in the process it often frustrates existing laws.[115] It is inevitable that when entrepreneurs create new industries it will simultaneously destroy the status quo.[116] The reason for this is because the leading descriptions of entrepreneurship, both in theory and in practice, involve disruptive innovation and creative destruction, where entrepreneurs introduce new products or new business models that threaten existing market leaders.[117] Tesla, an innovative manufacturer of electric cars, is another example of an entrepreneurship's disruptive innovation.[118]

Tesla is altering the way cars are sold to consumers by selling its cars directly to consumers over the Internet and through company-owned showrooms, rather than by going to a middleman and selling through an independently owned franchisee dealer. Though such direct sales practices are commonplace in most industries, direct sales of automobiles violate some states' franchise and independent franchisee laws, many of which were initially established when Ford was providing cutting edge technology.[119] As a result, some states have barred Tesla from

[115] Wroldsen, *supra* note 98 ("It is the classic story of law and entrepreneurship in which entrepreneurs threaten to upend a stagnant market through 'disruptive innovation' and in the process often run afoul of the law.").

[116] Wroldsen, *supra* note 98.

[117] *Id.*

[118] *Id.* at 762 ("A prominent recent example of creative destructive legal conflict is Tesla, an innovative manufacturer of electric cars.").

[119] *Id.* at 762 ("Though such direct sales practices are commonplace in most industries, direct sales of automobiles violate some states' franchise and car dealership laws, many of which were initially established when Ford's Model-T was cutting-edge technology.").

even operating a showroom because the company refuses to sell its cars through a middleman.[120]

Dealers in Massachusetts and New York argued that it is unfair for Tesla to sell directly to consumers[121] because all traditional car manufacturers sell through third-party dealerships.[122] In the dealerships' view, Tesla should not be an exception.[123] Tesla successfully argued, in both New York and Massachusetts, that it should be free to sell cars directly to consumers because Tesla has no independent dealers;[124] therefore it would be impossible for Tesla to undercut a dealership's prices because there are no Tesla dealerships.[125] Following the victories, the Michigan legislature took action to preempt a similar result in the heartland of traditional U.S. car manufacturers.[126] The Michigan legislature voted to amend its dealership statute to require all new motor vehicles to be sold through franchised dealers.[127] This amendment defeats the argument that Tesla successfully used in New York and Massachusetts because it makes the fact that Tesla has no franchised dealers irrelevant.[128]

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[120] *Id.*; *see also* Justin Hyde, *In Tesla Sales Fight, Automakers Take the Dealers' Side*, YAHOO! (Mar. 20, 2014), https://www.yahoo.com/news/bp/in-tesla-sales-fight--automakers-take-the-dealers--side-213905585.html; *see also* David Kravets, *West Virginia is the Latest State to Ban Tesla Direct Sales*, ARS TECHNICA (Apr. 4, 2015), http://arstechnica.com/cars/2015/04/west-virginia-is-the-latest-state-to-ban-tesla-direct-sales/.

[121] Wroldsen, *supra* note 98.

[122] *Id. See also* Mass. State. Auto. Dealers Ass'n v. Tesla Motors MA, Inc., 15 N.E.3d. 1152, 1156–62 (2014), *see also* Greater N.Y. Auto. Dealers Ass'n. v. DMV of N.Y., 969 N.Y.S.2d 721, 724–25 (Sup. Ct. 2013).

[123] Wroldsen, *supra* note 98.

[124] *Id.*

[125] *Id.*

[126] *Id.* ("Following Tesla's victories in New York and Massachusetts, however, the Michigan legislature took action to preempt a similar result in the heartland of traditional U.S. car manufacturers.").

[127] 2010 Bill Text MI H.B. 6100, Trade; Vehicles, Regulation of New Motor Vehicle manufacturers, distributors, and dealers and their relationships and dealings; *see also* Wroldsen, supra note 98; *see* Vince Bond Jr., *Tesla's Sales Limits in Michigan Tightened by One Word of Law,* AUTOMOTIVE NEWS (Oct. 20, 2014), http://www.autonews.com/article/20141020/RETAIL/141029995/teslas-sales-limits-in-michigan-tightened-by-one-word-of-law.

[128] *Wroldsen, supra* note 98.

The application of this amendment to Michigan's dealership law defeats Tesla's business model.[129]

Regardless of the particularities of state car dealership rules or antitrust law, the root of Tesla's legal conflict is because of disruptive innovation, which is manifested in two related ways.[130] First, Tesla's technology for manufacturing electric vehicles is a paradigm shift from the technology involved in producing gas–powered automobiles.[131] Second, Tesla's business model for selling and manufacturing new cars disrupts and alters how cars have been distributed since the invention of the automobile.[132] This is similar to Uber's business model for connecting drivers and passengers because the app is a paradigm shift from how people used to hail taxis and it disrupts and alters how the transportation business has operated since the invention of the taxicab medallions. Highlighting Tesla's struggles as another business engaged in the sharing economy furthers the need for mediation with these businesses over using a judge or arbitrator because it highlights the reoccurring issue that there is little precedential case law and statutes in place to help market participants solve their issues. When issues in a sharing economy are left in the hands of judges and arbitrators it can result in detrimental harm to either the individuals working in it or the entities using the platform.[133] Both Uber and Tesla currently face the risk of losing its business model, and in both circumstances, there are working participants that feel they are being slighted compared to their traditional working counterparts.[134]

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[129] *Id.*

[130] *Id.* at 764 ("Regardless of the particularities of state car dealership rules or antitrust law, the root of Tesla's legal conflict is disruptive innovation, which is manifested in two related ways.").

[131] *Id.* ("First, Tesla's technology for manufacturing electric vehicles is a paradigm shift from the technology involved in producing gas-powered automobiles.").

[132] *Id.* ("Second, Tesla's business model for selling and maintaining its cars flies in the face of the way new cars have been distributed since the invention of the automobile.").

[133] Rick Schmitt, *The Sharing Economy: Can the Law Keep Pace with Innovation?* SLS | STANFORD LAWYER (May. 31,2017) https://law.stanford.edu/stanford-lawyer/articles/the-sharing-economy-can-the-law-keep-pace-with-innovation/.

[134] *Id.*

E. *As of March 2017, Uber is Pushing for Arbitration and its Drivers are Pushing for Litigation*

Uber and its drivers are currently disputing whether this case should be decided in front of an arbitrator or a judge—Uber is fighting for an arbitrator and its drivers are looking to the court system.[135] Most recently, a Ninth Circuit Court judge held that Uber's arbitration clause is enforceable and the case should be determined through arbitration, overruling a California trial court's decision that the clause was unenforceable.[136] Since 2017 it looks like this case is going to be determined by an arbitrator, it is important to delve into why Uber and its drivers are looking for these alternatives and what the benefits of arbitration are for Uber.

Currently, in March 2017, Uber and its drivers are faced with a binary conclusion, either they are independent contractors or employees—there is no middle ground.[137] In such circumstances, when the law is either market participants is one or the other, an arbitrator could be best suited to come to a conclusion the parties cannot reach on their own.[138] An arbitrator has the capabilities to assess current laws, evaluate the surrounding facts, and come to a conclusion efficiently and less costly than litigation could provide.[139] In addition, an arbitrator possesses the authority to provide Uber and its drivers with a legally binding decision to end the dispute.[140] With an arbitrator, Uber and its drivers can end

[135] Mohamed v. Uber Techs., Inc., 836 F.3d 1102 (9th Cir. 2016); *see also* Guan v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 255839 (E.D.N.Y. Feb. 23, 2017) (affirming the duty to read a contract, even where there is need for help understanding the terms); *and see* Mohammed v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 20274 (N.D. Ill. Feb. 14, 2017) (distinguishing where consent is given by another, third party). *See also* Paresh Dave, *In stinging decision for Uber drivers, appeals court says they must go to arbitration*, L.A. TIMES (Sept. 7, 2016), http://www.latimes.com/business/technology/la-fi-tn-uber-lawsuit-20160907-snap-story.html.

[136] *Mohamed*, 836 F.3d at 1102.

[137] NLRA.

[138] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. REV. 695 (2001).

[139] *Id.* at 745 ("[A]rbitration (1) reduces dispute-resolution costs and increases deterrence benefits.").

[140] Balbir, *Arbitrator: His appointment, powers and duties*, PRESERVE ARTICLES, http://www.preservearticles.com/201104065087/arbitrator-his-

their dispute quicker than through litigation, less costly than litigation, and have an answer to their question that could not be disputed by either party.[141] After three plus years of negotiations without a resolution, it could be difficult for both parties to continue trying to find a solution themselves. Although a middle ground would be beneficial for Uber and its drivers, when the law is one way or the other, as with employment law as of March 2017 is,[142] the easiest direction to a resolution is through an arbitrator.[143] Nevertheless, in the proposal section, this Note will encourage Uber and its drivers to employ a mediator and leave the decision in the hands of the market participants rather than a third party. It is imperative for the future of the sharing economy that Uber and its drivers find a resolution that is not restricted by inapplicable terminology.[144] In addition, mediation is beneficial in circumstances when the disputing parties need to find a middle ground in binary laws.

IV. PROPOSAL

A. *Using Mediation to Resolve the Employment Classification Dispute*

Despite Uber and its drivers successfully negotiating a settlement, many of the drivers voiced objections to the process,[145] and a federal judge rejected it.[146] Going forward, as Uber and its drivers find themselves back at the negotiating tables, a mediator would be the best idea for both sides to find a settlement that a federal judge would uphold. Mediation is a process in which a

appointment-powers-and-duties.html (last visited Aug. 16 2017) ("An arbitrator is person selected by mutual consent of the parties to settle the matters in controversy between them. A person appointed to adjudicate the difference is called an arbitrator.").

[141] Drahozal, *supra* note 139.

[142] NLRA.

[143] Balbir, *supra* note 140.

[144] NLRA.

[145] Wroldsen, *supra* note 98.

[146] O'Connor v. Uber Techs., No. 13-CV-3826, 2015 U.S. Dist. LEXIS 116482 (N.D. Cal. Sept. 1, 2015).

neutral third party assists the parties in exploring the issues in the case.[147]

The mediator facilitates discussion between counsel and parties and guides the parties toward finding their own solution to the dispute.[148] The mediator plays a crucial role[149] because they can help each party understand what a federal judge will find acceptable.[150] This particular role in this type of a dispute is crucial because some of the Uber drivers were unsatisfied with their first settlement and a mediator can help find an agreement the parties will agree on. Although mediation has not been spoken about as an alternative, arbitration has been.[151] If Uber and its drivers decide to go through arbitration both sides take a major risk—Uber risks losing its business model and the drivers risk the possibility of any additional compensation and benefits for employee classification. A mediator could help both sides find an interesting compromise rather than giving the drivers the options of staying as independent contractors and working multiple platforms or choosing to be exclusive employees of Uber. In addition, it would be better for Uber and its drivers to use a mediator rather than an arbitrator because there is very little precedential case law or statutes to guide an arbitrator in a sharing economy. A mediator, unlike an arbitrator, leaves the decision making to the market participants who can better come to a solution rather than relying on precedential case law or statutes.[152]

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[147] Paul Fisher, *All You Need to Know About Mediation But Didn't Know to Ask-A Parachute for Parties in Litigation*, MEDIATE.COM (Nov. 2000), http://www.mediate.com/articles/fisher2.cfm.

[148] *Id.*

[149] *Id.* ("Each participant in the mediation has a critical role . . . each party benefits by helping plan the mediation process, and each needs to help his attorney says in her opening statement.").

[150] *Id.*

[151] Joel Rosenblatt, *Uber's $100 Million Driver Pay Settlement Rejected by Judge*, BLOOMBERG (August. 18, 2016), http://www.bloomberg.com/news/articles/2016-08-18/uber-s-100-million-driver-pay-settlement-is-rejected-by-judge ("A legal scholar who's been following the case said Uber may now decide it's better off trying to force the vast majority of drivers covered by the accord into arbitration, where the company can fight them one-on-one.").

[152] *Id.*

Mediation is a better alternative to negotiation as well because the problem with the first set of negotiations was that the parties had no direction on whether a federal judge would find the settlement permissible.[153] Although it is not the job of a mediator to make sure there is a *fair* agreement, a mediator can provide guidance on whether a federal judge will *uphold* a settlement.[154] However, a complicated part of this settlement is the logistics of the mediation. Uber is a constant, but there are many different sets of drivers in separate jurisdictions. In order for a single mediation to be effective for the other drivers who have not joined this class action, Uber could add a clause in its contract that states if a driver agrees to be a part of Uber, they are consenting to the terms of the settlement. This could be effective because rather than a state judge of California or Massachusetts looking over the settlement, a federal judge is. Therefore, if the settlement is found to be valid, it could be applied broadly across jurisdictions.[155]

Mediation and arbitration are often mentioned together because both are prime alternatives to litigation.[156] When considering whether mediation is a better choice than arbitration, it is important to consider these six factors: time; money; history, who decides the outcome, what decides the outcome, and maintaining a peaceful relationship between the parties.[157] For the Uber cases, the most significant factors to be considered are: history lesson, who decides the outcome, and what decides the outcome.

[153] Fisher, *supra* note 147.
[154] *Id.*
[155] *Id.*
[156] Rosenblatt, *supra* note 151.
[157] *Is Mediation a Better Choice than Arbitration?*, NEIMAN MEDIATION, http://www.neimanmediation.com/is-mediation-a-better-choice-than-arbitration/ (last visited Oct. 30, 2016) ("Mediation and Arbitration are often mentioned in the same sentence . . . but in fact are very different. When considering whether mediation is a better choice than arbitration, it is helpful to consider these six topics: (1) Time, (2) Money, (3) History Lessons, (4) Who Decides the Outcome, (5) What Decides the Outcome, (6) Amicability.").

1. History Lesson

As highlighted above, Uber's business model does not fit traditional labor and employment law criteria and it is just as difficult for an arbitrator to resolve the issue as it will be for a judge. Arbitration, like the trial process, requires fact-finding[158] and is responsible for uncovering the "truth" of events in order to assign responsibility, so the focus is on history.[159] In order for an arbitrator to do this successfully, lawyers from both sides present evidence to persuade the arbitrator that the event occurred in a particular way and explain why the opposite party is at fault.[160] This approach will likely be unsatisfying for the Uber cases because traditional terminology is inapplicable to Uber drivers as a result of an Uber driver having characteristics of both an independent contractor and an employee.

On the other hand, mediation takes a different approach. Rather than focusing on who is right or wrong, the mediator puts their focus on the *future*,[161] which encourages parties to engage in conversation to find ways to move beyond their conflict.[162] Although there is an opportunity for each side to tell the mediator its beliefs, the focus quickly shifts to how the parties can resolve their dispute.[163] Ultimately, the majority of the time is spent *collaborating* on a solution and reaching an agreement,[164] rather than presenting a case to an arbitrator hoping for a favorable outcome.

2. Who Decides the Outcome?

In arbitration, similarly to court,[165] a third-party arbitrator conducts a hearing, acting as a judge, and makes a ruling that is

[158] Fisher, *supra* note 146.
[159] Is Mediation a Better Choice than Arbitration?, *supra* note 157.
[160] *Id.*
[161] *Id*.
[162] Is Mediation a Better Choice than Arbitration?, *supra* note 157.
[163] *Id.*
[164] *Id.* ("The majority of time is spent collaborating on a solution and reaching an agreement.").
[165] *Id*.

binding on the parties.[166] In addition, only with a rare exception can an arbitrator's ruling be appealed, so in reality the parties are actually giving up more power over their case than in a trial.[167] This would be a very risky option in the Uber cases because Uber and its drivers have so much at stake. If an arbitrator rules in favor of Uber, then the drivers lose all ability to be compensated and to be given benefits as an employee. Similarly, Uber risks losing its sharing economy business plan model and would have to treat all of its drivers as employees, which could cause serious harm to the company.

On the other hand, mediation works differently. In mediation, the parties *themselves* determine the outcome by working with a facilitator who helps them *negotiate* a mutually acceptable resolution.[168] In addition, mediation is more conservative than arbitration and does not concretely bind both parties if the parties are unhappy with how negotiations are proceeding.[169] If the parties, for whatever reason, cannot reach an agreement, they cannot have a settlement imposed on them because mediation is not binding and the mediator does not make rulings.[170] Therefore, if mediation, for whatever reason, is not working for Uber and its drivers, they can always negotiate a solution themselves; unlike with arbitration, if a party is discontent with a result they are bound by the decision.[171] Therefore, mediation is a better alternative for parties that want to be responsible for their outcome rather than it being dictated by a third party.

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[166] *Id.*
[167] *Id.*
[168] *Is Mediation a Better Choice than Arbitration?*, *supra* note 157 ("Mediation works differently. The parties themselves determine the outcome by working with a facilitator who helps them negotiate a mutually-acceptable resolution.").
[169] *Id.*
[170] *Id.*
[171] *Id.*

When parties engage in private mediation, customarily the fees are split 50/50 between the parties.[172] However, in employment disputes, the burden of employing a mediator is usually placed on the company rather than the employee because in many circumstances most employees cannot afford to pay an attorney by the hour.[173] At the close of mediation, often one party, as part of the compromise, pays the entire fee, which in this case would be Uber because they are the company in an employment dispute situation.[174]

3. What Decides the Outcome?

When parties decide to use arbitration rather than mediation their rights and obligations are determined with reference to one thing: existing law.[175] Just like a trial, an arbitrator is required to follow the law and look to previous court cases and statutes to determine whether one side should be held legally responsible for the other side's damages.[176] However, in mediation existing law is only a "talking-point"[177] and is not the sole or even primary reference point for deciding an end result.[178] Instead, the parties discuss their *needs and interests* with each other, which are the factors that ultimately drive the outcome.[179] The primary focus is on collaboration and finding a settlement that fits the needs of both parties.[180] For the Uber case, a collaborative, interest-based

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[172] *Who Pays for Mediation?*, JABURG WILK, http://www.jaburgwilk.com/news-publications/who-pays-for-mediation (last visited Mar. 11, 2017).

[173] Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 500 ("Most employees cannot afford, as can their opponents, to pay an attorney by the hour.").

[174] *Who Pays for Mediation?*, *supra* note 171.

[175] *Is Mediation a Better Choice than Arbitration?*, *supra* note 156 ("When parties use arbitration, their rights and obligations are determined with reference to one thing: existing law.").

[176] Fisher, *supra* note 146.

[177] *Is Mediation a Better Choice than Arbitration?*, *supra* note 156.

[178] *Id.* ("Mediation works differently. Existing law is sometimes a consideration in the negotiations, but it isn't the sole or even a primary reference point for deciding the end result.").

[179] Fisher, *supra* note 146.

[180] *Id.*

solution would be one that allowed Uber to keep its sharing economy business platform and compensate those drivers, who use the app as a primary source of income. A mediator can help find a settlement that avoids broad generalizations and acknowledges that each driver uses the Uber's business platform in different ways. By doing so, the parties could avoid the binary conclusions current 2017 laws give and find a solution that works in both parties best interests.[181]

B. *A Fitting Mediator for the Uber Case*

A mediators' style can vary based on the parties, case, or the person. However, the most common approaches are usually referred to as "facilitative" and "evaluative."[182] Under the facilitative approach, the mediator serves as a facilitator for the exchange of views and positions between the parties.[183] For example, this may include encouraging parties to express their feelings and express their needs and wants.[184] It may also include helping each side better understand the points of view of the other side, which helps the parties find mutually beneficial solutions.[185] Under the evaluative approach, the mediator analyzes the parties' legal evidentiary, and factual positions,[186] and explains to the parties and their attorneys the strengths and weaknesses of each party's case.[187]

Honing in on the Uber case, this Note suggests the most successful type of mediator would not take the popular back and forth approach, but rather only the evaluative approach, because unlike most circumstances, Uber and its drivers are resorting to a mediator as a last resort rather than employing one during the early stages of a conflict. In most situations, a mediator is employed at

[181] FLSA.

[182] WAYNE R. OUTTEN, REPRESENTING THE EXECUTIVE (Yale D. Tauber & Donald R. Levy eds., 2003). The author of the note recognizes that Wayne Outten is a very well known, high profile employee-side lawyer.

[183] *Id.*

[184] *Id*. at 5 ("This may include, for example, encouraging parties to "vent" their feelings and express their needs and wants.").

[185] *Id*.

[186] *Id.*

[187] *Id.*

the onset of a dispute because the two parties are attempting ADR methods before resorting to litigation.[188] In such conflicts, it is important for both sides to express their discontent with one another and to encourage parties to attempt to better understand the other sides issues and displeasures.[189] Therefore, it is logical for a mediator to begin with a functional approach and then shift toward an evaluative approach in order to avoid litigation.

However, using a mediator in the Uber case would be a rare usage of a mediator. Both Uber and its drivers have been engaged in this dispute for more than several years. Uber and its drivers have already disputed this case in multiple trial courts and even reached a settlement that would still be intact if not for a judge's decision.[190] As a result of this case being far from its early stages, it would be best if a mediator in this case focused on the evaluative approach. The evaluative approach will allow the mediator to focus on how Uber can keep its business model and how the drivers in the lawsuit can be better compensated for acting as employees rather than independent contractors.[191] If Uber can find a mediator with a background in employment law, they could help Uber find the right settlement based on the legal, evidentiary, and factual positions of the case.

V. CONCLUSION

Having a mediator can help with the settlement process because in a new economy it is better to have the market participants resolve their disputes rather than have an arbitrator without much guidance give a binding decision. In addition, a mediator that employs the evaluative approach would help Uber significantly with gauging the strengths and weakness of its case and find a settlement that a judge would uphold. Employment law in this area is uncertain because of Uber's sharing economy business plan, which in theory treats its drivers as independent

[188] *Id.*
[189] *Id.*
[190] *O'Connor*, 2015 U.S. Dist. LEXIS 116482, *supra* note 2; *see also* CGS Taxi LLC v. City of N.Y., 2016 NY Slip Op. 30907(U) (N.Y. Sup. Ct. 2016); *see also* Aslam v. Uber BV [2017] IRLR 4 (ET).
[191] OUTTEN, *supra* note 182.

contractors, but also has thousands of drivers depend on it for fair compensation. By going to arbitration there is no precedent to work off, and therefore, both sides do not have any indication of whether they have a legitimate claim. For the long term, a new statute that defines market participants in a sharing economy can help avoid similar disputes. However, as of 2017, such a law does not exist; therefore, when the law only yields strict interpretations, a mediator is the best resolution to help both sides find a favorable outcome.

Uber must work quickly because thus far, both domestically and abroad, Judges have been extremely favorable towards Uber drivers. At this point, looking at the few precedents seen at trial court,[192] it would be in an Uber driver's best interest to continue litigating because they have been very successful. In the end, the pressure to come to a resolution through ADR is mostly on Uber. Both sides are already very deep in this dispute and if Uber continues to be unsuccessful through litigation there may be adverse consequences to not only just Uber, but to all companies that use a sharing economy business model.

[192] *O'Connor*, 2015 U.S. Dist. LEXIS 116842, *supra* note 2. *See* Rivoli, *supra* note 1; *see also* Mendelsohn, *supra* note 37.

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