

A Reply to Professor King

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In her Response to my article *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*¹ (*Controlling Processes*), Professor Carol King has missed the point. This is clearly indicated by her title, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*² (*Response*). Of course justice and harmony are not mutually exclusive, but justice and *coercive harmony* may indeed be mutually exclusive. Let me briefly reiterate my position about how controlling processes work through discourses. The issues are intricate, and ideological static is getting in the path of understanding thick description, or what anthropologists call ethnography.

Marc Galanter's article, *News from Nowhere: The Debased Debate on Civil Justice*,³ summarizes the first part of the Alternative Dispute Resolution (ADR) story. Galanter notes that, even now:

Public discussion of our civil justice system resounds with a litany of quarter-truths: America is the most litigious society in the course of all human history; Americans sue at the drop of a hat; the courts are brimming over with frivolous lawsuits; courts are a first rather than a last resort; runaway juries make capricious awards to undeserving claimants; immense punitive damage awards are routine; litigation is undermining our ability to compete economically.⁴

Galanter continues, "[e]ach of these is false, but in a complicated way. . . ."⁵ He then proceeds patiently, once again, to summarize the evidence that does not support the "familiar factoid in the rhetoric. . . ."⁶ Galanter concludes: "Notwithstanding the deficiencies of our legal system . . . American institutions provide influential models for the governance of business relations, the processing of disputes, and the protection of

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¹ Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

² Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 OHIO ST. J. ON DISP. RESOL. 65 (1994).

³ Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993).

⁴ *Id.* at 77.

⁵ *Id.*

⁶ *Id.*

citizens."⁷

Thus, to begin with, one need not argue that the judicial system is perfect. One need only argue, as Galanter and others have, that the critics of the judicial system falsely portray its deficiencies and thus have mobilized energies for alternatives. As Galanter argues, "[w]e need to develop a reliable knowledge base. . . ." ⁸ Reform should be based on an adequate knowledge base, rather than "a debate dominated by bogus questions and fictional facts."⁹ By now, many scholars, Galanter included, have argued that the Alternative Dispute Resolution movement has been built on a foundation of sand, which is not to argue that there are no solid bases for legal reform.

The second part of the story includes the action initiated by those who proceeded with a legal reform movement based on false portrayal (or at least on a quarter-truth portrayal) of the judicial system. In the case of the ADR movement for legal reform, I did not imply in *Controlling Processes* that the action was conspiratorial, in spite of Professor King's argument to the contrary in her *Response*.¹⁰ Webster's Dictionary defines a conspiracy as "a combination of persons banded secretly together and resolved to accomplish an evil or unlawful end."¹¹ However, ADR was publicly declared in 1976 at the Roscoe Pound Conference in St. Paul, Minnesota. Later the proceedings were published,¹² and soon thereafter, the project began to be institutionalized.

The Pound Conference was a turning point on a public debate that began, for present purposes at least, in the 1960s when opposing groups of people voiced dissatisfaction with the American legal system. One issue that was debated was access to law. The first group wished to reform the legal system by the inclusion of excluded citizens. The second group wished to find alternative solutions; solutions that were outside of the judicial system for some of those same constituents — consumers, civil rights activists, environmentalists, workers, and others. Those of us who were privileged to attend the Pound Conference can remember the press, the television crews, and the fanfare surrounding what anthropologists in other contexts would call a social drama. It was argued that the "garbage cases," as they called them, should come before alternative forums; the courts should be reserved

⁷ Galanter, *supra* note 3, at 102.

⁸ *Id.*

⁹ *Id.*

¹⁰ King, *supra* note 2, at 65.

¹¹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 485 (1986).

¹² *Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (A.L. Levin & R.R. Wheeler, eds. 1979).

for more important cases.

The third part of the story concerns the institutionalization of ADR, and here the fabric gets even denser. Many people, lawyers and others, were attracted to ADR out of frustrations with a judicial systems that indeed had serious problems. ADR appeared to them to be a solution. Such people were hopeful that alternatives would be more respectful and more humane in their treatment of people's legal problems. In other words, they were often (but not always) people on the rebound, jumping from the frying pan into the fire, critical of what they were moving away from but not of what they were moving towards. For the most part these were the people who helped to institutionalize, normalize, and fuel the ADR movement. These are the people, I have argued, who did so uncritically.

Controlling Processes reviewed some of the literature on this background, but the article focused mainly on why the ADR advocates, the people who followed the initial innovators, were so uncritical.¹³ *Controlling Processes* proposed that coercive harmony and, more generally, harmony ideology (something which the article distinguished from the non-hegemonic uses of harmony) produces an environment which discourages critical thinking, and which furthermore strips people of their rights as underwritten in our less than perfect judicial system.¹⁴ In other words, like the judicial system, ADR has problems. But unlike the judicial system, these problems and flaws are not made public for the many reasons cited in *Controlling Processes*: "Mandatory mediation [or ADR] abridges American 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."¹⁵

Perhaps some of the confusion expressed in Professor King's remarks results from not being able to conceptually distinguish ADR fora, such as mandatory mediation, from the simultaneous spread of an ADR culture linked with coercive harmony. In section V of *Controlling Processes*, the culture of coercive harmony was tackled by looking at the large corporate law firm.¹⁶ Attention was called to the use of hierarchy and harmony as "soft" violence — a way to keep staff and law professionals in line with institutional goals that often precede the legal professional's goals.¹⁷ The same culture which is an interweaving of hierarchy and coercive harmony can be found to seep into the larger culture or to magnify habits in that part of the larger culture that fits within the ADR law reform ideology. A

¹³ See Nader, *supra* note 1, at 23.

¹⁴ See *id.*

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 14-20.

¹⁷ *Id.* at 18-20.

combination of hierarchy and coercive harmony produces powerful controlling processes, which encourage acquiescence and passivity. I am not alone or first in making such observations.¹⁸

There is a difference between ideal or normative culture and practice. Both are important, but they should be differentiated. In *Controlling Processes*, I wrote of both the ideal and practice. For example, ideally mediation is neutral, but in practice, especially when mandated, ADR mediation is not neutral and indeed may be coercive. Such practices are being studied and such research can "prove" that repression in the guise of harmony is "real." One need only read what Professor King herself articulates in the closed and culture bound nature of her kind of mediation forum that "[n]o change in the positions of the parties can be attended, and no settlement reached, if the parties fail to shift their perceptions of the strength of their case, or fail to appreciate the merits of their opponent's arguments."¹⁹

Professor King seems unaware that she is talking about a coercive persuasion (thereby underscoring Trina Grillo's argument²⁰), which is more properly based on techniques of psychotherapy rather than on a tradition of legal mediation, such as Lon Fuller might have described.²¹ She also seems unaware of the substantial legal literature on alternatives to the "burden on the courts" — such as preventative actions (i.e. legislation), or class action suits.²² In other words, her perspective is not situated. When it is situated in mediation, Professor King does not seriously consider the varieties of mediation practices. Such a lack of "situatedness" is confusing. When I speak of rhetoric she responds with a empirical instance; when I speak of practice she responds with statement about ideal practice. In other words

¹⁸ For a recent analysis on life in organizations and the troubling features of hierarchical division and dominant identification of self and job role, see Wayne Eastman, *Organization Life and Critical Legal Thought: A Psychopolitical Inquiry and Arguments*, 19 N.Y.U. REV. L. & SOC. CHANGE 721 (1992). This analysis of a Wall Street firm from an associate's perspective is substantial and, in content, goes beyond the analysis suggested in my article. (this needs a page)

¹⁹ King, *supra* note 2, at 74.

²⁰ For Tina Grillo's argument, see Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). The article argues that there is unequal power present between men and women in mediation of domestic disputes that causes patriarchy to flourish. *Id.* at 1600-07.

²¹ For Lon Fuller's argument, see Lon Fuller, *The Forms and Limits of Adjudication* (1961-1962) (unpublished manuscript Harvard Law School). A later version of this manuscript was published in Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

²² See LAURA NADER, *NO ACCESS TO LAW* (1980).

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Professor King shifts the ground and then develops an argument.

In sum, my paper is not about mediation *per se*. It is about coercive harmony and organizational hierarchy in the practices of law, in the context of a broad based legal reform movement. There is now a growing body of empirical research on the practice and implications of the ADR law reform movement. Some of this work speaks to the fact that “internal dispute resolution” functions to undermine legal rights.²³ In another context the media is reporting that, to acquire employment, potential employees are required to agree to submit claims of discrimination, including sexual harassment, to binding arbitration, precluding workers from filing lawsuits in Federal courts.²⁴ Losing the right to sue is serious business in democracy, and I would hope that we, in the academic world, would be able to shift our analysis from narrow protection of domains of self-interest to a wide angle of vision that includes the broader issues. In the end, Professor King would certainly agree with this.

²³ See Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) (arguing that the assimilation of law into the managerial realm may undermine legal rights de-emphasizing workplace discrimination).

²⁴ See, e.g., Steven A. Holmes, *Some Employees Lose Right to Sue for Bias at Work*, N.Y. TIMES, March 18, 1994, at A1 (discussing the fact that many companies are requiring employees to submit claims of discrimination to binding arbitration due to fears of large monetary damage awards).

