

*ADR AND SOME THOUGHTS ON THE SOCIAL  
IN DUNCAN KENNEDY'S  
THIRD GLOBALIZATION OF LEGAL THOUGHT*

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In this short comment, I consider how one of my primary fields of inquiry, alternative dispute resolution (ADR), maps onto Duncan Kennedy's third globalization of legal thought. The question that motivates this comment is how Kennedy's categories help to explain both the aspirations and limitations of legal reform movements that offer popular, bottom-up alternatives to adjudication, and what studying these movements may add to his conceptual scheme. I will suggest that, as Kennedy would predict, despite ambitions to transcend conventional legal categories, ADR in the United States exists in an academic and practice-oriented space that is circumscribed by what Kennedy calls neoformalism, on the one hand, and conflicting considerations, on the other hand. But I will also suggest that the specific ways ADR proposes to integrate and transform dominant legal ideals may offer some broader insights into changing ideas of the social in our present political moment.

First a brief review of Kennedy's categories. Kennedy distinguishes among three globalizations of legal thought that spread throughout the West and elsewhere. The first, which Kennedy calls classical legal thought (CLT) and dates between 1850 and 1914, was characterized by a strict division between public and private law and an emphasis on individualism, will theory, and formal deductive logic as an approach to legal reasoning.<sup>2</sup> The second, which Kennedy calls the social and which he dates between 1900 and 1968, began when critics of CLT refashioned law to address the widespread consequences of industrialization and urbanization, among other social

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<sup>2</sup> Kennedy, Du. "Three Globalizations of Law and Legal Thought: 1850-2000." *The New Law and Economic Development: A Critical Appraisal*. Eds. David M. Trubek & Alvaro Santos. Cambridge: Cambridge University Press 2006, 19, 25.

transformations.<sup>3</sup> In the social period, law became “a purposive activity, . . . a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations.”<sup>4</sup> Legislatures, judges, and administrative agencies reasoned instrumentally from “the social ‘is’ to the adaptive ought for law” which they, in turn, often “anchored in the normative practices (‘living law’) that groups intermediate between the state and the individual were continuously developing in response to the needs of the new interdependent social formation.”<sup>5</sup>

The third globalization—and subject of our symposium—began during the second half of the twentieth century and comprises reconfigured elements of both CLT and the social in an unsynthesized fashion. As Kennedy explains, during the third globalization, “one trend was to think about legal technique . . . as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy.”<sup>6</sup> In other words, Kennedy identifies two contemporary approaches to legal analysis. One is rights-based neoformalism grounded in judicial supremacy. Its analytical roots are in CLT but it applies to human as much as to property rights. The second is pragmatic policy analysis. Its analytical roots are in the social but it no longer purports to advance a single desirable social end but rather to balance conflicting considerations. Significantly, Kennedy describes all these modes of legal thought as “consciousnesses” or “languages”—they provide the vocabulary through which numerous kinds of regulations, cases, and justificatory legal arguments can be articulated. For Kennedy, modes of legal thought are therefore not political ideologies: CLT, the social, neoformalism, and conflicting considerations have all had right and left, conservative and progressive articulations on the ground.<sup>7</sup>

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<sup>3</sup> *Id.* at 36.

<sup>4</sup> *Id.* at 22.

<sup>5</sup> *Id.* at 40.

<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at 22-23.

So how does ADR map onto Kennedy's third globalization? Here is a possible, if also partial, account. In the United States, modern ADR was born in the late 1970s, during roughly the same historical moment that several scholars describe as a highwater mark for left-liberal faith in the progressive power of courts.<sup>8</sup> Or as Kennedy puts it, during the third globalization leftist faith in the power of the social transformed into "a revival of faith in rights . . . in legal formality . . . and in the judiciary as a nonpolitical, nonmurderous defense against the military-industrial-welfare-administrative state that the social had seemed to have become."<sup>9</sup> One suggestive way to understand ADR's emergence during this period is as a progressive reaction to rights formalism.<sup>10</sup>

Indeed, early ADR aspired to answer two sets of criticisms of adjudication. The first set of criticisms emerged from a social-left tradition. Left proponents of informal dispute resolution described legal rights, and the courts that enforce them, as hierarchical, abstract, individuated, and hence nontransformative. In response, they emphasized the political, in addition to the therapeutic, value of mediation as a progressive alternative to rights-based litigation, which they viewed with growing disenchantment.<sup>11</sup> Richard Hofrichter, for example, expressed the hope that community mediation programs would provide "a public forum for questioning the foundations of the legal system" that could "lead to expansion of extralegal methods of protest and organization of the community around collective interests."<sup>12</sup> A distinct (if small) movement within ADR thus claimed a space for the social outside of rights discourse. Here scholar-practitioners saw possibilities for generating

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<sup>8</sup> See, e.g., Kramer, L. D. "Popular Constitutionalism, Circa 2004." *Cal. L. Rev.* 92 (2004): 959, 964-666.

<sup>9</sup> Kennedy, *supra* note 2, at 62.

<sup>10</sup> To be sure, there are also cynical explanations for ADR's rapid ascension in U.S. law. Some scholars argue that ADR in fact reflected conservative backlash against rights-based victories won in courts by minorities, women, consumers, environmental interests, and other newly empowered users. See, e.g., Auerbach, J. S. *Justice without Law*. New York: Oxford University Press 1983, 120-32.

<sup>11</sup> For a few examples, see McThenia, A. W. and Shaffer, T. L. "For Reconciliation." *Yale L. J.* 94 (1985): 1660, 1660, 1665; Engle Merry, S. "Albie M. Davis: Community Mediation as Community Organizing." *When Talk Works: Profiles of Mediators*. Ed. Deborah M. Kolb. San Francisco, CA: Jossey-Bass, 1994, 245, 261; Menkel-Meadow, C. "The Many Ways of Mediation: The Transformations of Traditions, Ideologies, Paradigms and Practices." *Negot. J.* 11 (1995): 217, 220; Simon, W. H. "Legal Informality and Redistributive Politics." *Clearinghouse Review* 19 (1985): 384.

<sup>12</sup> Hofrichter, R. "Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective." *The Politics of Informal Justice: The American Experience*. Ed. Richard L. Abel. New York: Academic Press, 1982, 207, 243.

bottom-up practices of “living law” within collectives—or rather, more accurately, within geographically bounded neighborhoods and “communities”—as a potential tool to pursue a social redistributivist vision.

The second, and more mainstream, set of criticisms of adjudication was different—it reflected what Kennedy calls a legal realist critique of the social. Here ADR scholars emphasized the limited capacity of central decision-makers to resolve highly contextualized problems under conditions of uncertainty and imperfect knowledge. Although many early ADR proponents regularly invoked the legacy of Roscoe Pound (even naming their foundational conference after his 1906 essay, *The Causes of Popular Dissatisfaction with the Administration of Justice*<sup>13</sup>), the institutionalized movement they inspired had little in common with Pound’s second globalization ambitions to achieve the “socialization of the law.”<sup>14</sup> All too aware of “conflict between desiderata,”<sup>15</sup> these ADR proponents assessed the intrinsic difficulties (as well as the inefficiencies and paternalism) in adjudicating what social ends, in fact, are: they emphasized the challenges of making reliable predictions about human desires and behavior and of understanding the real interests of individuals and groups.<sup>16</sup> In response, they infused a conflicting considerations consciousness with bottom-up participation. Aptly reflecting Kennedy’s third globalization description of conflicting considerations, ADR proponents did not envision social-legal problem solving as a project of Society in any unitary or coherent fashion. Instead, they described multiple, even privatized “socials” characterized by fragmentation, the proliferation of identities, the management of difference, and the demise of the idea of one right answer. But although they called for pragmatic and conciliatory strategies to negotiate these sites of difference, they rejected what Kennedy calls “the

<sup>13</sup> See Addresses Delivered at the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, April 7-9, 1976. F.R.D. 70 (1976): 79.

<sup>14</sup> Pound, R. “Social Problems and the Courts.” *The American Journal of Sociology* 18 (1912): 331, 338.

<sup>15</sup> Kennedy, *supra* note 2, at 60.

<sup>16</sup> For a few examples, see Mnookin, R. H. “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy.” *Law & Contemp. Probs.* 39 (1975): 226; Elkin, M. “Divorce Mediation: An Alternative Process for Helping Families to Close the Book Gently.” *Conciliation Cts. Rev.* 20 (1982): iii, at v; Patton, L. K. “Settling Environmental Disputes: The Experience with and Future of Environmental Mediation.” *Envtl. L.* 14 (1984): 547, 550; Phillips, B. A. & Anthony C. Piazza “The Role of Mediation in Public Interest Disputes.” *Hastings L.J.* 34 (1983): 1231; Menkel-Meadow, C. “Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases).” *Geo. L.J.* 83 (1995): 2663, 2688-90.

hero figure of the third globalization,” namely, the judge.<sup>17</sup> Instead, they exalted para-professional, open-ended, and flexible processes to foster bottom-up problem solving from below. ADR, we could say, was politically indeterminate.

Having said that, ADR nonetheless encountered two kinds of political criticisms from the left. The first came from public law neoformalism: think, paradigmatically, of Owen Fiss. For Fiss, adjudication was a public social process of deliberative (really foundational) reason, and it *was* the country’s bulwark against its neoliberal slide towards governance by the private market. By contrast, he argued that ADR was a private self-interested process that reproduced classical legal thought—contract and individual will theory—to resolve legal disputes.<sup>18</sup> Intriguingly, the second criticism was entirely different. Other scholars recycled Foucauldian critiques of the social against ADR. They did not see ADR (like Fiss and many others) as a renewed manifestation of market ideology. Rather, they described ADR as a revival of second globalization public managerial forms of social control designed to deploy harmony ideology and diffuse social conflict, but that operate (unlike earlier social-bureaucratic forms) through the illusion of voluntarism.<sup>19</sup>

Proponents of ADR offered two responses. In the early years of the movement, the first, and exceedingly dominant, response was an unselfconsciousness endorsement of public law neoformalism (perhaps unsurprising, given Kennedy’s observation that in the third globalization neoformal rights consciousness and conflicting considerations consciousness can coexist together<sup>20</sup>). To that end, ADR reformers marshaled their own separate spheres or Legal Process logic—what Frank Sander and Stephen Goldberg called “fitting the forum to the fuss,”<sup>21</sup> and what

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<sup>17</sup> Kennedy, *supra* note 9, at 65.

<sup>18</sup> For an elaboration of this argument, see Cohen, A. J. “Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values.” *Ford. L. Rev.* 78 (2009): 1143, 1151-53. *See also* Fiss, O. M. “Forward: The Forms of Justice.” *Harv. L. Rev.* 93 (1979): 1; Fiss, O. M. “The Social and Political Foundations of Adjudication.” *Law & Hum. Behav.* 6 (1982): 121; Fiss, O. M. “Comment: Against Settlement.” *Yale L.J.* 93 (1984): 1073.

<sup>19</sup> For a few examples, see Abel, R. L. “Introduction” to *The Politics of Informal Justice*, *supra* note 12; Harrington, C. B. *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*. Westport, CT: Greenwood Press, 1985; Hofrichter, R. *Neighborhood Justice in Capitalist Society: The Expansion of the Informal State*. Westport, CT: Greenwood Press, 1987.

<sup>20</sup> Kennedy, *supra* note 2, at 63.

<sup>21</sup> Sander, F. E. A. and Goldberg, S. B. “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure.” *Negot. J.* 10 (1994): 49.

Austin Sarat criticized as “the new formalism.”<sup>22</sup> The idea (articulated in dispute resolution literature most prominently by Lon Fuller<sup>23</sup>) was that experts could identify particular kinds of conflict characteristics and make appropriate processes recommendations. Capturing this, ADR proponents responded to their (neoformal-rights-Fissian) critics by offering to specify the conditions under which courts remained superior to ADR: for example, most, if not all, early ADR proponents endorsed rights-based adjudication for conflicts they deemed to involve the public’s interest.<sup>24</sup>

The second response was more subtle but also more ambitious. A group of ADR proponents theorized ways to expand the sphere of social conflict that they argued was properly resolved using conflicting considerations rather than formal rights-based techniques. But they justified this expansion by arguing that conflicting considerations problem solving offered new, inventive and plural spaces not for judges or legislatures to engage in policy analysis but rather for individuals themselves to manage their own conflicts and generate their own norms. (This response prefigures the direction that later alternative movements in law, such as new governance, would explicitly, if also uneasily, pursue.<sup>25</sup>)

A good early example is Robert Mnookin’s work advocating for the resolution of divorce and custody disputes via negotiation and mediation rather than adjudication.<sup>26</sup> Against critics who argued for formal rights-based legalism in family matters, Mnookin insisted that emotional relationships as well as power imbalances

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<sup>22</sup> Sarat, A. “The New Formalism in Disputing and Dispute Processing.” *Law & Soc’y Rev.* 21 (1987): 695.

<sup>23</sup> See, e.g., Fuller, L. L. “Mediation—Its Forms and Functions.” *S. Cal. L. Rev.* 44 (1970): 305; Fuller, L. L. “The Forms and Limits of Adjudication.” *Harv. L. Rev.* 92 (1978): 353.

<sup>24</sup> See, e.g., Menkel-Meadow, C. “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference.” *UCLA L. Rev.* 33 (1985): 485, 500; Lieberman, J. K. and Henry, J. F. “Lessons from the Alternative Dispute Resolution Movement.” *U. Chi. L. Rev.* 53 (1986): 424, 433; Susskind, L. and Cruikshank, J. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. New York: Basic Books, 1987, 17; Ury, W. L., Brett, J. M. and Goldberg, S. B. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*. San Francisco: Jossey-Bass, 1988, 17.

<sup>25</sup> See, e.g., Dorf, M. and Sabel, C. “A Constitution of Democratic Experimentalism.” *Columbia L. Rev.* 98 (1998): 267 (offering a decentralized, deliberative, experiential version of conflicting considerations that, they argue, could eventually become capacious enough to restructure our entire constitutional legal apparatus).

<sup>26</sup> Mnookin, R. H. and Kornhauser, L. “Bargaining in the Shadow of the Law: The Case of Divorce.” *Yale L.J.* 88 (1979): 950.

and externalities can and should be managed within the institutions of ADR (at times with the aid of the state, which could alter baseline bargaining endowments). And against critics who compared ADR to earlier (second globalization) forms of social control, Mnookin argued that he was calling for volitional, self-determining forms of private ordering based on the principles of individual liberty and efficiency.<sup>27</sup> His idea, in brief, was to enable individuals to manage the emotional, altruistic, and simultaneously self-interested relationships that cut across all the spheres of their existence by combining contractual exchange with principled, normative negotiation.

As I have traced in detail elsewhere, the particular combination of relational norms and contractual exchange that Mnookin and others were working out in the 1970s and 1980s as a new model of dispute resolution became, by the 1990s and 2000s, the dominant discourse of the field.<sup>28</sup> Today, ADR regularly envisions communities of people who resolve legal conflict, correct criminal behavior, make deals, and manage organizations because they are bound together by affective, interpersonal, and principled ethical relationships, as much as by the mutual self-interest of the market or the collective political belonging of the nation-state. In the remainder of this comment, I want to suggest that ADR's vision of localized problem-solving communities points towards a reconstructed idea of the social that is, perhaps, increasingly characteristic of third globalization legal thought.

In the last two decades, we have witnessed an explosion of efforts that, like ADR, have infused a relational discourse of the social into both market and political governance—for example, terms like social capital, social networks, and social trust. Here the social is not wholly as Kennedy describes it. In the third globalization, Kennedy identifies the presence of the social in two distinct forms. The first form, as suggested above, is the transfiguration of the social into conflicting considerations policy analysis, which, Kennedy explains, is politically indeterminate. The second form is an independent or “left-over social [that] is now, in the law of the market, almost always a progressive stance,” and which is characteristically expressed in the

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<sup>27</sup> See generally, Mnookin, R. H. “Divorce Bargaining: The Limits on Private Ordering.” *U. Mich. J.L. Reform* 18 (1985): 1015. See also Mnookin, *supra* note 16.

<sup>28</sup> Cohen, A. J. “The Family, the Market, and ADR.” *J. Disp. Resol.* (2011): 91.

language of human rights.<sup>29</sup> And, certainly, there is that—a phenomenon that is well analyzed by scholars who have traced the social's reintegration into global economic discourse, and who have observed the various ways in which its progressive potential is instrumentalized to serve market ends.<sup>30</sup>

But I think there is something else too: namely, a reconstructed idea of the social that is neither left-wing progressive activism (framed in rights discourse or otherwise) nor right-wing market cooptation. Rather, it is much closer to the understanding of the social that economic philosopher Friedrich Hayek endeavored to recover in his writings on the rule of law—one that is illustrative of interactive and localized human processes.<sup>31</sup> Here the social is not a normative/redistributivist idea that signifies “that ‘society’ ought to hold itself responsible for the particular material position of all its members”<sup>32</sup> (at work, Kennedy explains, in the second globalization social “study”<sup>33</sup>). Nor is it a normative/functional idea that dictates “that the processes of society should be deliberately directed to particular results”<sup>34</sup> (perhaps made most famous in U.S. law by Roscoe Pound<sup>35</sup>). It is instead reminiscent of

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<sup>29</sup> Kennedy, *supra* note 2, at 64.

<sup>30</sup> See, e.g., Fine, B. *Social Capital versus Social Theory: Political Economy and Social Science at the Turn of the Millennium*. London and New York: Routledge, 2001, 138-54; Shamir, R. “Corporate Social Responsibility: Towards a New Market-Embedded Morality?” *Theoretical Inquiries L.* 9 (2008): 371; Rittich, K. “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social.” *The New Law and Economic Development*, *supra* note 2; Pahuja, S. “This is the World: Have Faith.” *European J. Int’l L.* 15 (2004): 381.

<sup>31</sup> Hayek, F. A. *The Mirage of Social Justice*. Chicago: University of Chicago Press, 1976, 78. Despite his fame as a foundational neoliberal thinker, it is worth observing that Hayek’s own theory of law does not reflect a renewal of CLT, at least not in any straightforward or simple way. His evaluation of the limits of reason and rational deliberation led him to reject not only what he described as the socialist’s idea of law as an instrument to advance desirable social ends, but also the classical liberal’s idea of law as a set of positive explicit “premises from which the whole system of rules of just conduct could be logically deduced,” *id.* at 44, and which sees “individual man as the starting point and supposed him to form societies by the union of his particular will with another in a formal contract.” Hayek, F. A. *Individualism and Economic Order*. Chicago: University of Chicago Press, 1948, 10. In place of both visions, Hayek offered a distinctively socio-cultural-evolutionary theory of law. He argued that the rules of social cooperation (private law) are known through the social fact of being already observed and are produced through a collective winnowing and sifting of social practice, values, and conventions—selected because they enable the societies that adopt them to prevail over others, and often made effective through unorganized social pressure rather than explicit sanctions. See, e.g., Hayek, F. A. *Rules and Order*. Chicago: University of Chicago Press, 1973, 43, 72-73, 95, 99.

<sup>32</sup> Hayek, *The Mirage of Social Justice*, *supra* note 31, at 79.

<sup>33</sup> Kennedy, *supra* note 2, at 43.

<sup>34</sup> Hayek, *The Mirage of Social Justice*, *supra* note 31, at 79.

<sup>35</sup> See, e.g., Pound, R. “The Scope and Purpose of Sociological Jurisprudence.” *Harv. L. Rev.* 25 (1911): 140, 140-47.



Kennedy's second globalization description of "the normative practices ('living law') that order interdependent social formations."<sup>36</sup> But unlike in the second globalization, today these normative practices do not necessarily belong to "groups intermediate between the state and the individual,"<sup>37</sup> nor do they necessarily address themselves to a legislative or judicial audience for "new rules of state law."<sup>38</sup> Rather the social is now often a descriptive idea used to commend the processes among people—or, more accurately, among individuals participating in networks—who collaborate successfully to produce both relationships and things.

I began to contemplate this reconstructed idea of the social by considering how a small group of ADR proponents proposed to combine relational and economic logics as they worked out a theory of private dispute resolution designed to limit the force of adjudication and rights discourse and to infuse dominant forms of pragmatic policy balancing with a bottom-up, relational ideal. But, again, this idea of the social is not confined to ADR. It emerges quite prominently, for example, in writing devoted to improving relations of market exchange. Consider two brief examples. In 1988, James Coleman published an article widely credited for coining the term social capital.<sup>39</sup> In that article, he described how intra-family and community relations—in distinction to material resources like money or human resources like education—influence children's performance in schools. Coleman, in turn, used these models of the family and the community to describe what he famously called capital that is produced through "*relations* among persons," and to challenge dominant depictions of market exchange grounded solely in principles of utility maximization rather than equally in "norms, interpersonal trust, social networks, and social organization."<sup>40</sup>

Building on Coleman's ideas, in 1995, Francis Fukuyama argued for the creation of "a high degree of trust between individuals who [are] not related to one another, and hence a solid basis for social capital."<sup>41</sup> He explored how families

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<sup>36</sup> Kennedy, *supra* note 2, at 40.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Coleman, J. S. "Social Capital in the Creation of Human Capital." *Am. J. Soc.* 94 (1988): S95.

<sup>40</sup> *Id.* at S95-S98, S100-S101.

<sup>41</sup> Fukuyama, F. *Trust: The Social Virtues and the Creation of Prosperity*. New York: Free Press, 1995, 57.

produce various forms of sociability by cultivating shared ethical values as well as how “strong private economic institutions that go beyond the family” such as business organizations can foster similar forms.<sup>42</sup> Like ADR proponents, he argued against the organization of society based primarily on litigation, lawyering, and policing rather than active, participatory human collaboration—the more trust in a society, the less it requires an “intrusive, rule-making government to regulate social relations.”<sup>43</sup> And like Coleman, he challenged descriptions of economic behavior based exclusively on theories of rational self-interest. “[T]here is a mistaken tendency,” he claimed, “encouraged by contemporary economic discourse, to regard the economy as . . . a realm in which individuals come together only to satisfy their selfish needs and desires . . . . But in any modern society, the economy constitutes one of the most fundamental and dynamic arenas of human sociability.”<sup>44</sup> Thus Fukuyama—famous for his claim that liberal capitalism is “the end of history”<sup>45</sup>—envisioned a market economy comprised not of atomistic, narrowly self-interested individuals but rather of explicitly social forms of organization. These forms, he explained, are like the (idealized, well-functioning) family but “allow unrelated people to collaborate,” because they foster “social ties and moral obligation[s]” and even “social solidarity” that extend across associational, professional, not-for-profit and for-profit corporate networks and groups.<sup>46</sup> He thus argued for an understanding of the market as a place of community, social network, and morality, not simply alienation, selfishness, and greed.

We can read Fukuyama as providing a large-scale articulation of ADR. Like Fukuyama, ADR offers a theory of social problem solving that strives to make compatible oppositional logics such as efficiency and social connection: social relations are put into the service of economic exchange and economic exchange is configured as social relations. In our present political moment of late neoliberalism, this is a seductive harmonizing vision. Today the social dimensions of our collective life have continued to emerge transformed from state-enforced entitlements and

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<sup>42</sup> *Id.* at 49.

<sup>43</sup> *Id.* at 11, 51, 361.

<sup>44</sup> *Id.* at 6.

<sup>45</sup> See Fukuyama, F. *The End of History and the Last Man*. New York: Free Press, 1992.

<sup>46</sup> Fukuyama, Trust, *supra* note 41, at 150, 56, 156.

social insurance *not* (or not only) into rational self-interested calculations, absolutist claims for rights, or pragmatic policy analysis from above, but also into ethical aspirations to nurture responsible, morally-saturated, and localized social relations by market and political actors themselves: governors, businesses, employers, laborers, producers, citizens, and consumers.<sup>47</sup> In other words, I am venturing that today we have a relational ideal of the social that is neither public law neoformalism or even the pragmatic balancing of conflicting considerations, that is not materialist or identitarian, and that cannot be reduced to holdover ideas from the second globalization on the left.

This reconfigured social that has been cultivated in legal reform movements such as ADR is emphatically not a praxis of political choice driven by a vision of distributive justice to guide action in the face of undecidability.<sup>48</sup> But neither is it ideology invariably “skewed against the masses, and in favor of ‘the interests.’”<sup>49</sup> To theorize it on its own terms, it is yet another iteration of what Kennedy calls, like law, an “unmeetable demand for ethical rationality in the world.”<sup>50</sup> So, to conclude, I would suggest that today the social has regained some political indeterminacy.

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<sup>47</sup> See Rose, N. “Community, Citizenship, and the Third Way.” *Am. Behavioral Scientist* 43 (2000): 1395, 1395 (describing “the emergence of a new politics of conduct that seeks to reconstruct citizens as moral subjects of responsible communities”). For an intriguing example, in the Italian context, see Muehlebach, A. K. *The Moral Neoliberal: Welfare State and Ethical Citizenship in Contemporary Italy*, at xvii-xix (June 2007) (unpublished Ph.D. dissertation, University of Chicago) (arguing that the Italian welfare state “is shifting away from a public, state-mediated moral order” where citizens are bound through rights and political ties, and towards a “privatized, diffuse moral order” where citizens are bound through affective and personalized relations of care and duty).

<sup>48</sup> See Kennedy, *supra* note 2, at 73.

<sup>49</sup> *Id.* Kennedy, *supra* note 2, at 28.

<sup>50</sup> *Id.* at 72.