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A Deliberative Look at Alternative Dispute Resolution and the Rule of Law

Peter Muhlberger*

Scholars typically consider democratic deliberation (DD) and alternative dispute resolution (ADR) as related approaches. For instance, Professor David Kahane, a political theorist and practitioner of deliberation, writes about both without distinguishing between them, and critiques them for their common notion of neutrality and handling of cultural differences.¹ Professor of Public Service Lisa B. Bingham, a legal scholar who has written extensively about ADR and collaborative governance, juxtaposes the two as forms of governance, in contrast to government.² While government utilizes top-down mechanisms, governance involves steering through collaborative arrangements between organizations as well as stakeholders, including the public. Bingham also places DD and ADR on a continuum of governance approaches for addressing various stages of policy including legislation (upstream), implementation (midstream), and judicial or quasi-judicial (downstream). In this classification, DD applies upstream and midstream, while ADR applies midstream and downstream.

Though scholars sense that DD and ADR are related, the two approaches developed to a substantial degree independently and are separately addressed in most theory, research, and practice. Because of the midstream overlap of the two approaches, they might, however, be viewed as rival practices in some contexts. Moreover, some scholars contend there are deep conceptual rifts between DD and ADR, even while others promote cooperation between practitioners of these approaches.³ Despite potential gulfs between the two approaches, this paper contends there is, in fact, a deep conceptual affinity between DD and ADR, one that sets them apart from and in opposition to the adversarial theory and practice, emerging from the liberal democratic and rational choice traditions. It will explore this affinity by examining the similarities in both criticisms and commendations of DD and ADR, and uncovering the theoretical roots of these similarities. The affinity between the two approaches and a common, powerful opponent in

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1. David Kahane, *Dispute Resolution and the Politics of Cultural Generalization*, 19 NEGOTIATION J. 5, 6-9 (2003).

2. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 277-78, 282-86 (2009).

3. Compare Hiro Aragaki, *Deliberative Democracy as Dispute Resolution: Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL. 407, 446 (2009) (contending that deliberation and ADR are deeply at odds, as will be elaborated later in this text), with Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L. J. 347, 348-51 (2005) (contending that ADR and deliberation are closely related approaches that can learn from each other).

adversarial theory suggests the desirability of collaboration between DD and ADR in theory, research, and practice.

Though DD and ADR are in agreement in the intellectual clash over liberalism, there remain ambiguities in ADR theorists' understandings of just how ADR works its transformative powers of dispute resolution. Into this gap steps a theorist, Hiro Aragaki, Professor of Legal & Ethical Studies at Fordham University, who resolves that ambiguity so as to draw another strong divide between DD and ADR—as will be elaborated below. Part of that analysis includes a criticism of DD as overly focused on reason while disputes and ADR properly revolve around emotion, identity, and other social and psychological processes. This paper critiques the foundations of Aragaki's analysis, but also gives credit on the importance of dealing with people as less than fully rational. The critique suggests, again, a deep commonality between DD and ADR and potential improvements to both approaches. True collaboration between these approaches, however, requires some re-theorizing of both, including a reconsideration of rationality itself. This paper will sketch some ways in which this might be achieved and, in particular, how DD theory and research may prove helpful for ADR.

I. THE SEPARATION BETWEEN THE TWO APPROACHES

Historically, DD and ADR developed separately, with roots that go back centuries. Rather than tracing those roots, the more helpful focus is on historical periods of increased attention. The most recent period of increased attention for ADR in the United States, and its evolution into current forms, began as a way to address post-World War II labor and social conflict in the 1960s.⁴ The development of ADR accelerated in the 1970s in response to a number of pragmatic concerns, including the overloaded court system; the need for less expensive and less time-consuming methods of resolving disputes, one accessible to lower- and middle-income people; the need for more flexible, simplified, and participant-tailored processes; and the need for results that better served participants and society.⁵

ADR is typically oriented to resolving concrete disputes between parties and includes such methods as arbitration, mediation, and negotiation.⁶ ADR is used as a substitute for formal litigation, downstream in Bingham's terms, and to resolve the more concrete public policy disputes that occur in policy implementation (midstream). ADR at times utilizes mediation techniques, such as seeking to transform value or position disputes into disputes over underlying broad interests, uncovering or constructing superordinate goals, and avoidance.⁷

Recent attention to democratic deliberation in the United States revolves in part around the availability of major theoretical works by preeminent German

4. Bingham, *supra* note 2, at 282-83.

5. See LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS. 12-14 (Abridged 3rd ed. 2005); see generally Derck C. Bok, *A Flawed System of Law Practice and Training*, 33 J. OF LEGAL EDUC. 570, 570-85 (1983) (arguing that the adversarial system is too costly and fails to achieve justice while the ADR approach should improve the situation).

6. In arbitration, a neutral third party considers a dispute and imposes a solution. In mediation a third party helps disputants find consensus on a solution. In negotiation, the disputants seek a consensus solution without a third-party. See RISKIN ET AL., *supra* note 5, at 13-15.

7. Steven E. Daniels & Gregg B. Walker, *Collaborative Learning: Improving Public Deliberation in Ecosystem-Based Management*, 16 ENVTL. IMPACT ASSESSMENT REV. 71, 81-82 (1996)

philosopher and political theorist Jürgen Habermas in English, beginning in the 1980s.⁸ These writings helped stimulate a flourishing theoretical literature on deliberation starting in the 1990s.⁹ With increased theoretical attention, political and communication researchers began to investigate the properties of deliberation.¹⁰ Simultaneously, a number of organizations, such as the League of Women's Voters, the National Issues Forums, and Public Agenda, that had for some time been concerned with advancing civic education—specifically improving public knowledge of public policy and political candidates—began to describe some or all of their efforts as “deliberation.”¹¹ Other organizations arose in the late 1980s, and subsequent years, to specifically pursue public deliberation—AmericaSpeaks, Study Circles, Everyday Democracy, and E-democracy.org.

One pragmatic impetus behind public deliberation is a desire to address the low levels of knowledge and understanding of politics and public policy in much

8. See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., MIT Press 1989) (describing deliberation in practice and theory during the development of the modern state, including the flourishing of deliberation in English, coffee-shop society); 1 & 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., Beacon Press 1984) (providing a philosophical analysis of communicative rationality, a form of rationality that appears to call for deliberation as the basis of any legitimate democratic system) [hereinafter *THE THEORY OF COMMUNICATIVE ACTION*].

9. See, e.g., generally JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (Oxford Univ. Press 2000) (arguing that democratic theory has become dominated by the deliberative approach and addressing arguments of critics); JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* (MIT Press 1996) (addressing how democratic deliberation can be viable in the face of policy complexity, plural values in the public, and social inequality); SIMONE CHAMBERS, *REASONABLE DEMOCRACY: JÜRGEN HABERMAS AND THE POLITICS OF DISCOURSE* (Cornell Univ. Press 1996) (developing Habermas's theory into an analysis of why public deliberation is essential for modern democratic systems); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (Belknap Press 1996) (arguing that modern democracies suffer a “deliberative deficit” and examining how deliberative practices are necessary to address a variety of concrete public policy issues); see also Scyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 *CONSTELLATIONS* 26, 26-52 (1994) (analyzing the prerequisites for legitimacy in modern democracies to conclude that only a deliberative engagement of the public can achieve legitimacy).

10. See e.g., Cynthia Farrar et al., *Disaggregating Deliberation's Effects: An Experiment Within a Deliberative Poll*, 40 *BRIT. J. OF POL. SCI.* 333, 333-47 (2010) (finding that deliberation and not other aspects of the field experiment results in opinion change, though more on non-salient issues); Peter Muhlberger & Lori M. Weber, *Lessons from the Virtual Agora Project: The Effects of Agency, Identity, Information, and Deliberation on Political Knowledge*, 2 *J. OF PUB. DELIBERATION* 1-39 (2006) (presenting evidence from a random sample of Pittsburgh, PA that deliberation results in objective knowledge gains among participants who understand good citizenship in deliberative terms), available at <http://services.bepress.com/jpd/vol2/iss1/art13>; Jason Barabas, *How Deliberation Affects Policy Opinions*, 98 *AM. POL. SCI. REV.* 687, 687-701 (2004) (presenting research findings that deliberation changes opinions and increases knowledge, even among those with strongly held views); Robert C. Luskin, James S. Fishkin & Roger Jowell, *Considered Opinions: Deliberative Polling in Britain*, 32 *BRIT. J. OF POL. SCI.* 455, 455-88 (2002) (finding that a deliberative engagement of a national sample of British citizens affected attitudes through changes in information levels).

11. See generally Participedia, <http://www.participedia.net/wiki/Special:BrowseData/Organizations> (last visited April 26, 2011) (describing deliberative efforts of a wide array of civil society organizations).

of the public.¹² Addressing poor knowledge and building a notion of the common good through deliberation also an avenue to resolving “wicked” public policy problems—serious problems that persist because of basic value conflicts, unclear solutions, and a public unwilling to bear the sacrifices needed to address them.¹³ In addition, some hope that public deliberation will affect a transformation in participants and make them more civically minded, and engaged in the future.¹⁴ Finally, deliberation seeks to obtain authoritative decisions about the values guiding policy choices, values that in a democracy can only legitimately be decided upon by the public.

Public deliberation techniques generally involve small group discussion, at times many organized small groups work to inform each other. Participants are given balanced information (which fairly represents the views of major parties in a dispute), often developed with the collaboration of organizations reflecting the views on all major sides of an issue, about the policy issues under discussion and, in several methods, a chance to ask questions of experts. Each group typically has a moderator who gives participants a primer on deliberative norms prior to the discussion and seeks to guide the discussion according to these norms, including respect, equality, and listening.

Deliberation is used to resolve conflict over public policy, both at the level of legislation and implementation. The conflict is often between a small fraction of ideologues on different sides of an issue whose voices are normally heard over that of the general public. Deliberations typically seek to engage, inform, and seek resolutions from that general public. Deliberative techniques might also be applied to larger numbers of stakeholders—for instance, to get the nuanced views of many members of a teacher’s union rather than simply the views of its leaders. Deliberation usually operates to directly access a larger group, potentially working around leaders. In democratic groups, this might be embraced by the leadership as a way to give members a direct voice. Few large interest groups, however, appear to be democratic in this way. In one effort, the author and two colleagues sought to involve over 100 national interest groups, many of them public interest groups with strong pro-democracy rhetoric, in deliberations among members concerning federal agency rules.¹⁵ In only six cases did the groups ultimately mention the projects to their members.¹⁶ Ultimately, pro-democratic group rhetoric

12. See generally James S Fishkin, *The Voice of the People: Public Opinion and Democracy* (1997). (arguing that deliberations that educate participants are essential to address distortions of public opinion through misinformation).

13. See generally Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 *Policy Sciences* 165-187 (1993) (contending that wicked public policy problems can be addressed only through public engagement and deliberation).

14. See John Gastil et al., *From Group Member to Democratic Citizen: How Deliberating with Fellow Jurors Reshapes Civic Attitudes*, 34 *HUM. COMM. RES.* 137, 137-69 (2008) (presenting research findings that jury deliberations may enhance citizenship by increasing confidence in political institutions and other members of the public); Mark Warren, *Democratic Theory and Self-Transformation*, 86 *AM. POL. SCI. REV.* 8, 8-23 (1992) (summarizing deliberative theorists’ analysis that deliberative engagement can transform people into more publicly-minded and other-regarding citizens).

15. Peter Muhlerberger, Jennifer Stromer-Galley & Nick Webb, *Public Policy and Obstacles to the Virtual Agora: Insights from the Deliberative E-Rulemaking Project*, 16 *INFO. POLITY* 3 (forthcoming 2011).

16. *Id.*

would appear to be inconsistent with an unwillingness to allow thoughtful engagement by members.

Both theory and research in DD and ADR appear to be relatively distinct clusters. DD theory is substantially the domain of political theorists who have developed a form of democratic theory, focused on questions of democratic legitimacy, to better understand DD. ADR is substantially the domain of legal theorists concerned with justice and the legal system. DD research, in keeping with the general objectives of deliberation, examines such questions as whether DD enhances participants' knowledge and changes their attitudes; and whether DD affects transformations that may make participants into better citizens, such as by increasing future propensity to participate and making participants more civically minded.¹⁷ Because of its close association with academia, DD research frequently involves scholars either studying "professional" deliberations or holding their own deliberation.¹⁸ Thus, much research involves field experiments. Perhaps, as well, many DD researchers expect that it is the real world context of DD—people coming together as citizens to have a word about actual policy—that may be responsible for its effects. ADR research, again consistent with its general objectives, focuses on practical program evaluation and such questions as perceptions of justice and mechanisms responsible for successful mediation.¹⁹ An important part of ADR research involves focused, laboratory experiments—for instance, legal, psychology, and business scholars studying what factors impact negotiation success.²⁰

The author has had firsthand experience with the potential rivalry between ADR and DD in seeking collaboration with a high-level federal agency ADR official.²¹ The author and his colleagues sought to experimentally introduce online deliberative processes, with high-tech automated facilitation capabilities, as a helpful addition to negotiated rulemakings. The official greeted the proposed DD process with great skepticism—suggesting that online discussion would be unable to bring disputants together (a point that may not hold for properly designed online deliberations) and not being swayed by the observation that online deliberation could reach a much wider audience.

While not discussed, there may be some additional sources of tension in this context. Some ADR practitioners devote their careers to rulemaking dispute resolution and may therefore view alternative methods that do not rely on their skills as rivalrous.²² Also, while ADR has a well-established legal framework within

17. Gastil, *supra* note 14; also, Warren, *supra* note 14.

18. Farrar et al., *supra* note 10; Muhlberger and Weber, *supra* note 10; Luskin et al., *supra* note 10; PETER MUHLBERGER, REPORT TO THE DELIBERATIVE DEMOCRACY CONSORTIUM: BUILDING A DELIBERATION MEASUREMENT TOOLBOX (2007) available at http://www.deliberative-democracy.net/index.php?option=com_docman&Itemid=93.

19. See generally E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOCIETY REVIEW 953-996 (1990) (presenting evidence regarding the perceived fairness of various ADR and trial procedures); Deborah R Hensler, *ADR Research at the Crossroads*, J. DISP. RESOL. 71-78 (2000) (describing the RAND evaluation of ADR effectiveness and suggesting further practically-oriented empirical research).

20. For example, Thomas M. Tripp & Harris Sondak, *An Evaluation of Dependent Variables in Experimental Negotiation Studies: Impasse Rates and Pareto Efficiency*, 51 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 273-295 (1992).

21. Muhlberger et al., *supra* note 15.

22. The Administrative Dispute Resolution Act of 1996 codifies the need for federal agencies to develop dispute resolution efforts and have official Dispute Resolution Specialists. Offices of dispute

government rulemaking, DD does not—raising questions about how deliberative discussion can be included. Finally, one of the benefits of DD is that it may obtain a wider range of views from existing organizations than their leaders acknowledge by tapping members directly. This, however, challenges that leadership, at least in the many less than democratic interest groups, with which ADR practitioners may need to maintain good relationships.

Some general differences between ADR and DD include: ADR was motivated by practical concerns over the cost and length of formal legal processes, while DD began with more idealistic goals such as achieving democratic legitimacy.²³ On the other hand, it can be argued that ultimately DD has a deeply pragmatic concern in being one of the few conceivable ways to address “wicked” policy problems, including ones with potentially catastrophic implications for the Western way of life. ADR processes are often private, while DD’s theoretical commitments require public openness and transparency. ADR is typically directed at narrow conflicts, while DD focuses on broader public issues. Finally, DD is not typically focused on people who are familiar with or partisan about an issue. ADR focuses on people who are directly affected and partisan.

II. DISCOVERING AFFINITIES IN CONTRAST

Despite originating from different underlying objectives, a reading of the critics and proponents of ADR, and of critics and proponents of DD shows strikingly parallel lines of argument. These similarities point to deep conceptual affinities between DD and ADR, which will be elaborated on in the next section. The conflict in political science over deliberation is substantially between proponents of deliberative and liberal democratic theory.²⁴ Liberal democracy (LD) may be understood, for now, as focused on representation and adversarial relationships—politics as usual.²⁵ Deliberative democracy may be understood as a politics requiring a broad public search for the true and the good.²⁶ While no doubt

resolution have appeared in various agencies, such as the FAA Office of Dispute Resolution for Acquisition. People thus have careers focused on ADR-related approaches involving their skills as dispute resolution facilitators. A deliberation procedure such as the one the author and his colleagues were pursuing replace human facilitation with natural language processing software that seeks to cover some of the same functions as human facilitators such as answering questions and summarizing arguments. Also, deliberation methods in general are different than dispute resolution methods. In both cases, someone whose career depends on ADR approaches may perceive that their skills are devalued in such a deliberation. Perceptions of deliberation as a threat to an ADR career may well be incorrect because deliberation and its methods may be better viewed as helping to extend the reach of dispute resolution, to large numbers of people, rather than to serve as an alternative to ADR.

23. Fischer, *supra* note 13; RISKIN, *supra* note 5.

24. Warren, *supra* note 14, at 8.

25. *Id.* at 8-9.

26. JÜRGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION, VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY* 20-22 (BEACON PRESS) (1984) (presenting the notion of communicative rationality, a concept central to the thinking of deliberative theorists); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOLUME TWO: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 77-111 (BEACON PRESS) (1984) (presenting an analysis of the social developmental role of communicative rationality as the community pursuit of the true and good through thoughtful discussion.); CHAMBERS, *supra* note 9, at 90-107, 155-163 (summarizing Habermas’s analysis of communicative rationality and seeking to connect Habermas’s thought with practical deliberative democracy).

idealistic, the aforementioned deliberative theorists present a strong case that democratic legitimacy depends on an informed public that is centrally involved in the construction of a common good. Elites, including scientific ones, are not qualified to decide matters of value in a democracy. The conflict in law over ADR will be taken as that between proponents of ADR and proponents of traditional litigation (TL)—here understood narrowly as formal, adversarial justice in contrast to more limited and cooperative ADR. LD, DD, TL, and ADR are all here taken as ideal types—a wide variety of practices fall under each of these labels, but for analytic purposes, these differences will be collapsed. Dividing the debate in Manichean terms will no doubt omit important nuances, but will help clarify a broader picture.

To summarize the argument to be developed, in the debates over DD and ADR, several parallels emerge: DD and ADR are described as cooperative, while LD and TL are described as adversarial.²⁷ DD and ADR are criticized as not addressing inequalities due to unequal resources among participants, while LD and TL purportedly address these problems.²⁸ DD and ADR are commended for better promoting fairness, legitimacy, and satisfaction.²⁹ DD and ADR are commended as educational and transformative.³⁰ Both DD and ADR are criticized for being insufficiently authoritative and institutionalized.³¹

In one of the opening salvos of the ADR debate in law, Derek Bok, then President of Harvard University, stated that, in training students largely for “legal combat” rather than for mediation and negotiation, law schools contribute to one of the most costly and inefficient legal systems in the world.³² He places his hopes for a better system on, “tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry.”³³ Few would contest that the formal legal system is, as typically labeled, adversarial.³⁴ In his well-known response to Bok, Owen Fiss, at the time Professor of Public Law at Yale University, contended that combativeness serves a public purpose; he did not contest the conflictual nature of the system.³⁵ The commitment of ADR to collaboration and compromise is seen in mediation and negotia-

27. Bok, *supra* note 5 at 582-83. GUTMANN & THOMPSON, *supra* note 9, at 1.

28. Owen M Fiss, *Against Settlement*, 93 YALE L.J. 1076-78 (1984); see Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 347-76 (1997).

29. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2666, 2669-70, 2673-75 (1994). Benhabib, *supra* note 9.

30. *Id.* at 2673, 2692. Mark Warren, *The Self in Discursive Democracy*, in THE CAMBRIDGE COMPANION TO HABERMAS 167, 167-95 (Stephen K. White ed., Cambridge Univ. Press 1995) (analyzing Habermas's arguments to the effect that deliberative engagement can transform the individuals involved). Warren, *supra* note 14, at 8-9.

31. See Fiss, *supra* note 28, at 1089-90; see David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2639-40 (1995); see Menkel-Meadow, *supra* note 29, at 2695-96; see generally ARCHON FUNG ET AL., DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (THE REAL UTOPIAS PROJECT vol. 4) (Verso 2003) (seeking to address criticism that deliberative democracy practice is inadequately integrated into existing political institutions).

32. Bok, *supra* note 5, at 582-83.

33. *Id.* at 583.

34. See generally Fiss, *supra* note 28 (articulating the view that the traditional legal system is in fact adversarial).

35. *Id.* at 1073-90.

tion—participants must come to a mutually acceptable consensus solution, with no authority to impose a solution.

Deliberation likewise offers a more cooperative approach than the LD alternative. Amy Gutmann, at the time Professor of Politics and Dean of the Faculty at Princeton University, and Dennis Thompson, Professor of Political Philosophy and Associate Provost at Harvard, view deliberation as a process in which participants reason with each other until they “reach mutually acceptable decisions.”³⁶ In deliberations, citizens seek to resolve conflict by effecting a genuine “change of heart” in each other by building “mutual understanding” through an open and sincere sharing of reasons.³⁷ These theorists incorporated Habermas’ view of ideal deliberation as a situation in which only the force of the better reasons prevail.³⁸ This contrasts with typical (LD) political bargaining in which the well-endowed can leverage the power of their resources to impose choices on others that those others deem coercive and illegitimate. This kind of context encourages all parties to view politics as an adversarial game in which there is no internalized norm of ethical behavior (though rules of the game may be imposed from outside) and every reason to do whatever is necessary to maximize their gains.

In his “Against Settlement,” Fiss argued that settlement fails to address inequalities between parties that are, to an extent, addressed by TL.³⁹ He pointed out that parties may have unequal resources in obtaining and analyzing information, and that the less resource endowed may be forced to settle for less because of a pressing need for settlement money and insufficient resources to continue the process.⁴⁰ TL, contended Fiss, addresses inequalities through procedures and the active intervention of judges. Bok, however, raised an interesting counterargument that the high cost and time-consuming nature of the TL system itself exacerbates the inequalities, while Galanter presented reasons to think the legal system is systematically biased through the strategic choices of the resource endowed.⁴¹

In her “Against Deliberation,” University of Chicago Political Science Professor Lynn M. Sanders offered highly parallel arguments questioning deliberation.⁴² She pointed out that disadvantaged groups have unequal capacities for the kind of rational-universalistic arguments needed to prevail in deliberations—similar to Fiss’ point about the unequal ability of the disadvantaged to obtain and analyze information.⁴³ Sanders added another wrinkle by suggesting that in deliberations people may not listen to comments by low status persons—a point that could as well be used to fortify Fiss’ case.⁴⁴ Finally, Sanders pointed out that the disadvantaged are systematically less likely to participate in deliberations, presumably because they will not have the resources needed to attend.⁴⁵ This is broadly similar to Fiss’ charge that in settlement, the disadvantaged will be

36. GUTMANN & THOMPSON, *supra* note 9, at 1.

37. CHAMBERS, *supra* note 9, at 99.

38. HABERMAS, VOL. 1, *supra* note 26, at 117-118; CHAMBERS, *supra* note 9, at 99.

39. FISS, *supra* note 28, at 1077-78.

40. *Id.* at 1076.

41. Compare Bok, *supra* note 6, at 575-76, with see generally Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOC'Y REV. 95, 97-104 (1974).

42. Sanders, *supra* note 29, at 347-76.

43. *Id.* at 348-49, 370-73.

44. *Id.* at 349.

45. *Id.* 352-53.

unable to take full advantage of settlement because they are pressed for resources.⁴⁶ Sanders suggested that the LD system more readily represents the interests of the disadvantaged because occasional voting requires fewer cognitive and other resources. Again, this characterization of LD might be challenged by evidence that the disadvantaged are less likely to participate and that the system seems to yield results highly favorable to the resource endowed.⁴⁷

Carrie Menkel-Meadow, Professor of Law and Co-Director of the UCLA Center for Conflict Resolution, contended that ADR processes will be considered legitimate because of the values they promote, such as, “consent, participation, empowerment, dignity, respect, empathy, . . . equity, access, and yes, even justice.”⁴⁸ The perceived legitimacy and fairness, as well as satisfaction, said Menkel-Meadow, derives from a number of aspects of ADR processes.⁴⁹ ADR allows exploration not merely of positions (wants) but of people’s “real needs and interests,” allowing a resolution that meets those needs and interests.⁵⁰ It allows compromise, including among non-monetary values, that acknowledge points of ethical strength and weakness as well as ethical ambiguities, rather than imposing winner-take-all decisions.⁵¹ It can accommodate the special circumstances of a case better than TL and incorporate sources of principle not included in the law.⁵² Similarly, theorists contend that deliberation, which involves broad and informed public participation, consent, and exercise of public reason, is uniquely qualified to lend democratic legitimacy.⁵³ Such a process should be perceived as fair and satisfying.

Menkel-Meadow also stated that ADR processes are, “more humanely ‘real,’ democratic, participatory, and cathartic than more formalized processes, permitting in their best moments, transformative and education opportunities for parties in dispute as well as for others.”⁵⁴ By direct involvement, ADR participants should learn something, but how would they be transformed? Perhaps they would be transformed, as Menkel-Meadow stated earlier, because ADR seeks to uncover people’s real interests and needs, and helps them distinguish these from what they want.⁵⁵ Similarly, as described earlier, a central pragmatic concern of DD is educating the public on policy and politics. Deliberative theorists also contend that the deliberative context is one of the few contexts in which people have an incentive to challenge a person’s deeply-held beliefs and values.⁵⁶ In responding to

46. See Fiss, *supra* note 29, at 1076.

47. See generally JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (Simon & Schuster 2010) (providing an extensive examination of research suggesting that the political system has in the past 30 years become clearly biased in favor of the extremely rich); RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? (Yale Univ. Press 1980) (presenting a range of data showing that the educated, who are typically also those of higher income, are appreciably more likely to vote).

48. Menkel-Meadow, *supra* note 29, at 2663, 2669-70 (1994).

49. *Id.* at 2666.

50. *Id.* at 2673.

51. *Id.* at 2674-75.

52. *Id.*

53. Benhabib, *supra* note 9.

54. Menkel-Meadow, *supra* note 29, at 2692.

55. *Id.* at 2673.

56. See Warren, *supra* note 30, 167, 167-95.

such challenges, deliberators need to articulate these beliefs and values, and may come to realize that they were uncritically adopted and problematic. Such reflection, contend deliberative theorists, encourages people to become more publicly-minded and connected to the community, and builds their autonomy by helping them critically evaluate social understandings and identities they have thoughtlessly adopted.⁵⁷ Thus, both DD and ADR are said to promote self-transformation—constructing a different motivational matrix among participants.

Finally, both DD and ADR are criticized for being insufficiently authoritative and institutionalized. Fiss asserted that traditional litigation has the authoritative power to bring a recalcitrant reality more into line with public ideals, while ADR (settlement) merely negotiates a compromise on such ideals.⁵⁸ Luban extended Fiss' point by arguing that the private character of much settlement prevents the cumulative development of societal values through the exercise of public reason in settlement cases, unlike with TL.⁵⁹ Menkel-Meadow suggests guidelines for when aspects of settlements should be made public, including when settlements involve court approval or to satisfy important public needs.⁶⁰ Likewise, critics of deliberation contend that deliberative practitioners and theorists concern themselves over whether and how DD practices can be integrated into institutionalized representative (LD) institutions and whether DD practices are meaningful without such integration.⁶¹

III. A PHILOSOPHICAL CONNECTION

Behind the similar criticisms and commendations of ADR and DD lies a deep philosophical connection—ADR and DD share assumptions that differ from TL and LD. As Mark Warren clarified at length, the underlying assumption of LD theory is that people's preferences are fixed pre-politically and that those preferences are typically self-interested rather than social or pro-social.⁶² These LD assumptions are deeply engrained and taken to an extreme in fields that emerged from early LD theories, particularly economic and rational choice theory in which people are assumed to be pure rational egoists; or, equivalently, "efficient socio-paths."⁶³ In contrast, according to Warren, DD assumes that people in substantial part are social creatures whose preferences include concern for others.⁶⁴ Moreover, DD requires that people's preferences can be modified through deliberation in the political arena. The LD and DD assumptions regarding preferences have powerful consequences for conceptions of politics and society. In particular, in DD

57. Warren, *supra* note 14, at 8-9.

58. See Fiss, *supra* note 28, at 1089-90.

59. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2639-40 (1995).

60. See Menkel-Meadow, *supra* note 29, at 2695-96.

61. FUNG ET AL., *supra* note 31.

62. Warren, *supra* note 14, at 9.

63. See, e.g., Jon Elster, *Introduction*, in RATIONAL CHOICE I, 1-33 (Jon Elster ed., N.Y. Univ. Press 1986) (presenting the key assumptions of rational choice theory).

64. Warren, *supra* note 14, at 13; see generally GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (Charles W. Morris ed., Univ. of Chi. Press 1962) (presenting a formative analysis, for deliberative theory, of the constitution of the self through social perspective taking).

people come to the political arena to discover the common good or to better understand their roles as citizens.

In LD, people come to the political arena with an unchangeable and known list of preferences, and proceed to bargain with each other unconstrained by moral sentiments. It is conceivable that participants could acquire information from others that might clarify what concrete goods could best meet their preferences. Unfortunately, participants would also seek their own advantage by supplying false information about the relationships of preferences to goods. Because of such “cheap talk” among self-interested individuals, the prospects for meaningful and transformative discussion are bleak under LD. People might come to trust the input of others, but only after vetting them for ideological and value similarity.⁶⁵ Such limited trust would not be conducive to transformative discourse.

The differences between LD and DD constitute fundamentally different conceptions of rationality—that is, different conceptions of how reason should inform choices (or, perhaps, how people should live under reason). Reason has some generally accepted properties, such as logical consistency, mechanisms to adjust beliefs in light of evidence, and theory building. While reason may remain the same under LD and DD, how it should inform choices—rationality—differs because of the different assumptions these theories make about the nature of human choices. LD lends itself to “instrumental” or “strategic” rationality—reason that focuses on how to maximize the overall achievement of fixed, known preferences through efficient action on the world. DD rests on what Habermas calls communicative rationality or action—reason that focuses on discerning the true and the good through public discourse.⁶⁶

In DD, people engage others with indeterminate preferences abstracting from the notion of preference and conceptions of self, including social role. They must consult with others to build their heavily social self-concept, even to gain the broad social perspective needed for an autonomous personal identity. And, because others can to a degree be trusted, due to their pro-social inclinations, they are quite crucial to determining what is true. Habermas argued that communicative rationality is deeply embedded in the structure of language, with all statements involving at least implicit normative and truth claims that a person implicitly warrants as true and can redeem in public discourse.⁶⁷ This, at a minimum, suggests that communicative rationality is deeply embedded in a key human thought processes—language—though it is not clear what implications this has for actual motivation and cognition. A social-psychological theory may be needed to better ground the implications of communicative rationality—a project the author has begun to sketch elsewhere as a theory of human agency.⁶⁸

It seems evident that ADR is not compatible with LD, but may be compatible with DD and communicative rationality. The very possibility of making progress

65. See generally ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (Cambridge Univ. Press 1998) (analyzing the implications of rational choice theory for trusting information from political discussion partners).

66. *THE THEORY OF COMMUNICATIVE ACTION*, VOL. 1, *supra* note 26, at 19-22, 117-118. Chambers, *supra* note 9, at 90-105.

67. *Id.*

68. See Peter Muhlberger, *Human Agency and the Revitalization of the Public Sphere*, 22 *POL. COMM.* 163, 163-78 (2005).

in a dispute using no coercion or positional bargaining but only words seems unlikely in a LD world. People would come to the dispute knowing their unchangeable preferences and distrusting any information from those who do not fundamentally agree with them. In addition, the notion of transformative discussion, in which people come to realize their real interests and needs, is impossible in a LD world, because it is assumed that people already know their real preferences. While preferences may differ from interests and needs, preferences are a superset of the latter, at least as the term is used in economic theory. Certainly DD assumptions could help account for people realizing their real preferences in ADR settings. Whether ADR actually fits these assumptions, however, may depend on just what mechanisms ADR proponents believe to yield such realizations. Those mechanisms are somewhat underspecified in the ADR literature, so perhaps DD could helpfully provide some answers.

It is possible, using LD and DD assumptions, to reproduce substantial portions of the debate over ADR, suggesting that this debate may originate in these assumptions. Under LD assumptions, adversarial politics and legal processes emerge as necessary responses to a world of rational egoists with fixed preferences. Thus, under LD assumptions the collaborative nature of ADR is naïve and harmful. In particular, in a world of calculating egoists, collaborative discussion based on an exchange of reasons does little besides exposing people to manipulation, which raises concerns regarding the well-being of those disadvantaged in their capacity for rational discussion, challenges the legitimacy of ADR proceedings, redefines “transformation” as a product of manipulation, and suggests that the compromises in ADR proceedings will be a give-away rather than a defense of important values. Under DD assumptions, the non-adversarial nature of collaborative reasoning in ADR would be desirable. This is because it enhances legitimacy, yields positive transformations helpful for autonomy, and could yield compromises that defend important values.

IV. THE CHALLENGES OF DIVERSITY AND THE EXTRA-RATIONAL

Aragaki, however, contends that ADR and DD part ways due to fundamentally different assumptions.⁶⁹ As will be elaborated below, he gives an account of the transformation of wants (positions) into interests in ADR that seems to make it incomparable to transformation of preferences under DD, a central point in the analysis above.⁷⁰ Before taking up this rather specific issue, it is imperative to better understand the implicit conceptual foundations of Aragaki’s analysis, foundations that appear broadly similar to that present, implicitly as well, in Sanders, Kahane, and other academics, and which occur among ADR practitioners.⁷¹

Underlying Aragaki’s analysis is a negative account of rationality and a related theory of incommensurable diversity. The author will here seek to sketch a reconstruction of the often implicit assumptions and logic behind Aragaki’s analysis. Aragaki conceptualizes people as, ultimately, unique composites of interests that cannot be rationally chosen or decided between (hence “incommensurable”).

69. See generally Aragaki, *supra* note 3.

70. *Id.* at 446.

71. Sanders, *supra* note 28; Kahane, *supra* note 1.

Interests are like everyday preferences—they are arbitrary, not reasonably subject to rational reconsideration, and are what define people.⁷² Diversity between persons consists of the unique combination of interests present in a person or group of persons. Respecting diversity involves respecting the underlying, real, and extra-rational interests that form identity.⁷³ Seeking to apply rationality to determine which interests are “good” interests, as democratic deliberation seeks to do, is coercive.⁷⁴ Deliberative rationality requires people to select reasons, and hence interests, that can be defended to a general public.⁷⁵ Thus, it seeks to impose a specific conception of interests, one historically and culturally constructed by certain people (white, male, and Western), on others when there is no correct way to privilege this particular bundle of interests over others.⁷⁶

While this may be the structure of Aragaki’s analysis, the motivation to embrace such a view may rest elsewhere. Aragaki gives an impassioned defense of the need to work within people’s existing interests and identities as well as to work with their emotions and social commitments, such as group solidarity, beliefs, and ideologies. Aragaki’s vision of ADR is as a mechanism that resolves disputes working with people as they are, while he views deliberation as pursuing the likely impossible task of shoe-horning people into one arbitrary cultural identity merely through the use of public reason.⁷⁷ This kind of discourse implies that, if successful, the deliberative approach would subjugate people’s diversity and interests to a dominating and indefensible paradigm of the privileged. Thus, ADR is practical and emancipatory, while deliberation is impractical at best and subjugating at worst. It also fails to allow us to understand and appreciate the diversity of human interests.

Considered more carefully, however, Aragaki’s analysis proves problematic. An important point is that while particular constructions of rationality may be suspect, some conception of living under reason seems necessary. To not find some way to apply reason to choice implies contentment with choosing in the absence of consistency, of beliefs not based in or responsive to empirical information, and of any kind of attempt to understand how the world works—that is, theory. While some philosophers have been willing to challenge the value of reason, such philosophers could be asked such practical questions as whether, when ill, they are indifferent to being treated by scientific medicine or witchdoc-

72. Aragaki, *supra* note 3, at 450 (stating his belief that interests are arbitrary), 421-23 (suggesting that conflicts involve real, extra-rational, and group-based—hence identity-involving—interests), 462-69 (rejecting the view that good reasons should cause people to reconsider their interests, including identity-based interests).

73. *Id.* at 421-23, 473-74 (rejecting the view that some reasons are better than others).

74. *Id.* at 446, 474-75.

75. *Id.* at 417-18.

76. *Id.* at 420-21, 476 (likening the logic of deliberation to Carol Gilligan’s depiction of what she considers faulty or incomplete male moral logic), 431 (pointing out that dominant white deliberation participants reject the arguments of black participants as poorly reasoned while in fact they are themselves racially motivated), 470 (charging that the deliberative conception of reason is uniquely Western and liberal-democratic), 446 (arguing that deliberation seeks to determine, through reason-giving, which interests are good or bad, while dispute resolution seeks an “authentic and freely chosen way to accommodate” “profound and irresistible needs” or interests).

77. *Id.* at 417-18, 421-23, 470.

tors.⁷⁸ On the assumption that most people would not want a life in which choices are divorced from reason, it seems there must be some acceptable construction or constructions of living under reason—that is, some acceptable construction of rationality. Aragaki, however, implies there is just one type of rationality for believers in deliberation, but that such a conception of rationality is seriously flawed, leaving little room for living under reason.⁷⁹

Aragaki's critiques are more pertinent to strategic rather than communicative rationality. Strategic rationality assumes non-social and, effectively, non-psychological people and thus fails to take into account people's social commitments, and fails to understand people's social and psychological dimensions.⁸⁰ Strategic rationality is also the dominant paradigm of many elites in Western societies. For example, an analysis of the fields of economics, game theory, political science, public administration, and public policy—the commanding heights of modern political and economic systems—suggests that these fields rest predominantly on strategic rational assumptions, with the minor caveat that some theories now call for recognizing people's information processing limits.⁸¹ Strategic rationality (and the related LD) assumptions permeate not only politics and economics, but increasingly educational and other socializing institutions, likely with corrosive effects.⁸²

The content of communicative rationality is underspecified by Habermas, for whom the term involves an ideal and general procedure for settling conflicts over the true and the good.⁸³ Nevertheless, it must involve reasoning about social roles and identity. This contrasts with a rather disturbing view of identity in Aragaki's analysis.⁸⁴ While Aragaki implies that people's core identities are in part socially shaped, they have no way to critically evaluate these identities because they are

78. See generally PAUL FEYERABEND, *AGAINST METHOD* (3rd ed. 1993) (arguing that science proceeds without a rational method); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (Princeton Univ. Press 1979) (challenging the analytic tradition in philosophy and, thereby, modern notions of rationality).

79. Aragaki, *supra* note 3, at 417-18, 421-23. On these pages, Aragaki maintains that proponents of deliberation require that participants offer each other, no matter how diverse they or their beliefs are, reasons that would count as good for all. Such reasons, recognized by all regardless of diversity, implies a unitary and universal rationality. Aragaki then analyzes conflicts, such as those between pro-life and pro-choice disputants, and dismisses the view that such conflicts are ultimately rooted in cognitive disagreements (such as different conceptual frameworks or moral perspectives), suggesting they are instead more deeply the products of fear, rage, frustration, and distrust. If this is correct, such conflicts cannot be resolved deliberatively and the deliberative notion of peaceful coexistence brought about through rational discourse. To the extent that we cannot resolve basic conflicts through deliberative notions of rationality, that notion is seriously flawed. People would have difficulty living under the deliberative application of reason both because they could not resolve conflicts or address the non-cognitive roots of many of their own inclinations. (A critical comment: Aragaki needs to explain why fear, rage, frustration, and distrust are not ultimately dependent on cognitions.)

80. See generally Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. OF ECON. PERSPECTIVES 137, 137-58 (Summer 2000) (presenting results of a wide range of research showing that rational choice assumptions do not describe behavior with social-psychological motivations); Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, in *BEYOND SELF INTEREST* 25, 25-43 (Jane Mansbridge ed., 1990) (examining unreasonable and socially problematic outcomes if people were purely self-interested).

81. Muhlberger, Stromer-Galley, & Webb, *supra* note 15, at 5-12.

82. HABERMAS, Vol. 2, *supra* note 26, at 196.

83. *Id.* at 20-22; Chambers, *supra* note 9, at 90-107, 155-163.

84. HABERMAS, VOL. 1, *supra* note 26 at 19-22, 117-118; Chambers, *supra* note 9, at 90-105.

merely sets of incommensurable interests.⁸⁵ This leaves people entirely at the mercy of arbitrary social forces.

The arbitrariness of identity also raises the question of what insures that ADR could work. In Aragaki's account, dispute resolution digs into underlying interests behind wants or positions and is able to find accommodations between people's interests.⁸⁶ While a *reductio* via reference to Nazism is a rather crude argument, Aragaki himself introduces Nazis as a poorly understood population that could benefit from dispute resolution (fortunately, not FDR's strategy).⁸⁷ What, then, prevents the *underlying* real interests of a Nazi from being such as to make it impossible to resolve conflicts between Nazis and other populations? If interests are arbitrary, it is not unlikely that people's interests may be fundamentally incompatible, such as an underlying interest in the genocide of Jews and the destruction of democracy. Nevertheless, thoughtful people sense that the underlying real interests of Nazis or other extremists are not arbitrary and are more reasonable—for example, a desire to see themselves as valuable human beings in a social context that denies such worth. Regrettably, extremists *irrationally* project their anger over being denied worth onto various scapegoats. Still, the basic need is reasonable enough and deliberation, perhaps with conflict resolution techniques to temporarily circumnavigate irrationalities, might seek to help extremists understand their real needs, the fact of their unreasonable projection of anger, and options for a more socially constructive solution. Without some account of rationality, however, people seeking to resolve conflict regarding extremists would have no conceptual leverage to understand and address irrationality.

This situation seems to meet many of the demands of communicative rationality—reasonable underlying interests and some means of ultimately cognitive comprehension of underlying needs, comprehension and rejection of irrational defense mechanisms such as projection, and an ability to embrace frankly better interests and identities. Aragaki challenges whether it is possible to achieve such changes by use of public reason—a good point that will be addressed below.⁸⁸ Still, the end state described here is precisely what a deliberative theorist should want—an ultimately rational understanding of the flaws of the earlier extremist identity and the desirability of an alternative. It is this rational understanding that gives the participant in this process the capacity to choose a better identity in a way that fortifies their autonomy and is neither arbitrary nor at the mercy of social forces.

Aragaki's system, in contrast, offers no grounds for evaluation of identity, no matter how extreme or harmful. If identities are made up of arbitrary interests, each equally valid and not questionable by reason, no identity is better than another. While Aragaki calls Nazism "heinous," he cannot consistently offer a reason to consider it heinous.⁸⁹ He does not and offers only suggestions for accommodating Nazis.⁹⁰ Also, it is odd that he offers an article full of arguments for the view

85. Aragaki, *supra* note 3, at 421-23, 465-66, 472-75 (providing key examples of people with strong group identities: abortion opponents, fundamentalists, and Nazis).

86. *Id.* at 439-40.

87. *Id.* at 472-75.

88. *Id.* at 417-18, 421-23.

89. *Id.* at 473.

90. *Id.*

that rationality should be disregarded—his conclusion undermines his method of reason-giving for reaching that conclusion.⁹¹

Aragaki's focus is narrowly on serious conflict in which parties have strongly divergent interests and ideologies.⁹² The preponderance of the American public is not strongly ideological or committed to specific public policies, so deliberative methods may be more viable in many political contexts than a focus on extreme conflict would suggest.⁹³

Aragaki is on somewhat firmer footing in questioning the capacity of reason alone to resolve conflict. He charges that DD disregards emotion, group solidarity, empathy, mutual respect, and identity, seeking to heal all conflict through reason alone.⁹⁴ Communicative rationality, however, is not strategic rationality and is more open to social and psychological aspects of the person. Because it offers a way to reason about preferences and identities, it requires an exploration of emotions, group solidarity, and so forth. On the other hand, it processes these matters into linguistic descriptions and applies reasoning to them. This may be understood as an account of how people achieve their autonomy. For example, in self-regulation and agency theories, it is believed that much of what constitutes a person early in life are patterns of thought, emotion, and action that were modeled or internalized from the environment without reflection.⁹⁵ It is only by becoming aware of these patterns, through capturing them with language and then reasoning about them, that a person can become autonomous.

Nevertheless, Aragaki is correct that typical irrational or extra-rational social and psychological factors would likely make dispute resolution difficult in cases of extreme conflict. One response is that properly designed deliberative or dispute resolution efforts, evoking norms of citizenship and reasonableness, with good moderation, and with accountability for what people say and do, may go quite a distance in sidelining typical social and psychological effects. We simply do not know how effective this may be because deliberation has rarely been studied with groups that start with strong positions on an issue.

Still, it may prove to be the case that only dispute resolution techniques that operate via extra-rational means can help to open recalcitrant participants to conflict resolution. It is worth noting that Habermas was more sensitive to the limitations of his ideal speech situation, which defines the conditions for communicative rationality, than many later deliberative theorists.⁹⁶ According to Habermas, this

91. Aragaki, *supra* note 3, at 473-75 (rejecting the view that some reasons are better than others and characterizing his preferred dispute resolution process as one not depending on finding good reasons).

92. *Id.* at 430-32.

93. See generally, W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE* (Harvard University Press) (1986) (offering a book-length examination of the political sophistication and engagement of the American public).

94. *Id.* at 422, 426-27, 443-45, 451-58, 462-64.

95. See Charles S. Carver & Michael F. Scheier, *Themes and Issues in the Self-Regulation of Behavior*, in *PERSPECTIVES ON BEHAVIORAL SELF-REGULATION* 1, 1-106 (presenting research findings and a theory explaining behavior in terms of non-conscious mirroring processes, identity, and self-regulation) (Jr. Robert S. Wyer ed., Erlbaum Assocs. 1999); Muhlberger, *supra* note 68, at 164-66.

96. HABERMAS, VOL. 1, *supra* note 26 at 19-22, 117-118. Chambers, *supra* note 9, at 90-105. See generally JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (1990) (presenting a communicative action theory of moral reasoning sophistication in which he hints the upper stages are reached by very few people).

is an *ideal* situation that is at best approximated.⁹⁷ In his book on moral reasoning, for example, Habermas hints that most Western adults have not reached a level of cognitive development needed to be capable of deliberative discourse.⁹⁸ First, Habermas makes clear that deliberative discourse requires the cognitive operations Kohlberg postulates for post-conventional moral reasoning: universality, reciprocity, and reversibility.⁹⁹ Post-conventional reasoning comprise stages five and six of Kohlberg's six-stage theory of moral reasoning.¹⁰⁰ Second, Habermas's discussion of the empirical challenges facing Kohlberg's theory indicates an excellent grasp of the social science research behind the theory, including Kohlberg's inability to empirically find people at his postulated sixth stage of moral reasoning.¹⁰¹ Finally, Kohlberg estimated the population portion of post-conventional reasoners at 20 percent in the U.S.¹⁰² Given that Habermas likely knew of the small population portion of post-conventional reasoners, he appears to be saying that only a fraction of the population could engage in deliberative discourse. Likewise, he elsewhere suggests that people engaged in self-deception cannot engage in deliberative discourse and must be treated with "therapeutic critique" to overcome their self-deception.¹⁰³ A broad understanding of self-deception as motivated reasoning could include being blinded by emotion and group solidarity—in short, many of Aragaki's concerns. A key difference between Aragaki and Habermas, however, is that for Aragaki emotion and group solidarity are not self-deceptions and there is no ideal of overcoming these in favor of a widely-acceptable rationality.

Bridging the gap between ideal deliberation and a public incapable of genuine rationality may require a marriage of ADR and deliberation. ADR offers ways to address irrationalities, while deliberation offers broad ideals, ethical prerogatives, and methods for reaching sizable audiences and handling issues over which most of the public is not severely divided. Perhaps, and this might be empirically tested, participation in deliberation itself may be a good way to build capacity for communicative rationality. On the other hand, ADR approaches such as collaborative learning may help develop cognitive capacities, including systemic thinking that may be important for communicative rationality.¹⁰⁴ ADR approaches may be needed in contexts where emotion, group solidarity, and other factors block the possibility of thoughtful conversations that might help bring some self-insight and conflict resolution. A deliberative ethical caveat is that techniques that maneuver people around irrationalities, without appeal to reason, are manipulative and thus block autonomy and raise questions about consent. Manipulations should be followed by efforts to help the disputants cognitively evaluate their situations, including the manipulations themselves.

97. HABERMAS, VOL. 1, *supra* note 26 at 19-22, 117-118. Chambers, *supra* note 26, at 90-105.

98. HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 96, at 119-133, 171.

99. *Id.* at 122.

100. *Id.* at 119-133.

101. *Id.* at 171.

102. DENNIS COON & JOHN O. MITTERER, INTRODUCTION TO PSYCHOLOGY: GATEWAYS TO MIND AND BEHAVIOR 105 (Cengage Learning) (2008).

103. HABERMAS, VOL. 1, *supra* note 26 at 21.

104. Danicls & Walker, *supra* note 7, at 81.

V. CONCLUSION

While scholars sense an affinity between ADR (alternative dispute resolution) and DD (deliberative democracy), the two fields have acted like ships passing in the night—with largely independent theory, research, and practice. This paper has sought to strengthen the relationships between ADR and DD by pointing to similarities in how these approaches have been critiqued and commended, and suggesting that these similarities may emerge from a deeper theoretical agreement. Specifically, both ADR and DD reject the LD (liberal democracy) assumption that people come to the political or social arena with fixed and known preferences. This puts ADR on the same side of the divide as DD against LD theory and fields that accept LD assumptions, which are prevalent in economic theory, rational choice theory, political science, public administration, and public policy.¹⁰⁵ To the extent that these fields are deeply entrenched among those in the commanding heights of the economy and political life, it would seem that ADR and DD face powerful opposition. On the other hand, unlike DD, ADR has been appreciably written into institutional arrangements, though perhaps primarily as a pragmatic device for bracketing off problems caused by traditional litigation. The question is whether ADR can reach its transformative potential.

While ADR resides on the same side of a key intellectual divide as DD, Aragaki's analysis of how ADR fulfills its transformative role offers a vision of that role that is quite limited in comparison with the ambitions of DD or, as Aragaki would contend, far more realistic about what it can achieve.¹⁰⁶ Aragaki's analysis gives voice to concerns by many scholars as well as practitioners regarding the emphasis on reasoning in DD and their suspicion that DD dismisses emotions, group solidarity, and other factors. This paper offers a critique of Aragaki's analysis. His analysis rests on problematic and ultimately self-contradictory assumptions about human motivation and rationality. Many of his criticisms are pertinent to the strategic rationality of LD theory, not the communicative rationality of DD theory. His explanation of how ADR solves conflicts either fails to explain or proves hard to distinguish from communicative rationality. And, he does not give sufficient credit to the roles of identity and emotion in communicative rationality.

On the other hand, Aragaki may be correct that a purely rational approach will fail when confronted by strong emotion, identities, and other psychological processes. Habermas, the father of current DD theory, is not blind to such problems. He discusses cognitive developmental shortcomings of most people as well as motivated reasoning that would make full communicative rationality unlikely. DD theory does not offer guidance in the realm of the irrational, so it may be necessary to develop an emancipatory social psychology to bridge the gap.¹⁰⁷ Researchers and practitioners in DD and ADR should do what is necessary to resolve the conflict, particularly when this has the transformative potential to help people better understand themselves. DD would add, however, that manipulative techniques should be followed by efforts to help people understand from a rational

105. Muhlberger, Stromer-Galley, & Webb, *supra* note 15, at 5-12.

106. Aragaki, *supra* note 3, at 458-459 (describing how dispute resolution is satisfied with any resolution of a conflict that parties agree with because their interests are satisfied, while deliberation would also require that the result is fair, legitimate, and defensible via public reason).

107. Muhlberger, *supra* note 68 at 164-166.

standpoint. Without this, there is no check to determine that people have not simply been manipulated in a way in which they would not rationally consent. Also, without the rational turn, ADR and DD would not aid people in the development of their own autonomy, which is the true transformative potential of these approaches.

Ultimately, ADR is what its practitioners and theorists make it. They could embrace the limited, albeit pragmatic vision of Aragaki, in which ADR is simply a way to resolve disputes, by whatever means work. This vision specifically avoids seeking to alter people's interests, which are assumed to be unchallengeable. Alternatively, ADR practitioners and theorists could embrace a more transformative vision, one that brings it closer to DD. In that vision, ADR is also a means to help people understand themselves and make reasoned choices regarding who they wish to become, thus building autonomy.

Needless to say, ADR and DD have much to learn from each other in theory, research, and practice. This paper itself is an effort to develop insights on ADR and DD by examining the theories of both. ADR research may benefit from incorporating many of the key research questions, measurements, and research designs used in DD, and vice versa. ADR practice may be improved by incorporating communicative rationality, while DD practice would likely benefit from ADR techniques that address social and psychological blocks to conflict resolution.

