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### Mediation and Millennials: A Dispute Resolution Mechanism to Match a New Generation

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# MEDIATION AND MILLENNIALS: A DISPUTE RESOLUTION MECHANISM TO MATCH A NEW GENERATION

SHAWNA BENSTON<sup>1</sup> & BRIAN FARKAS<sup>2</sup>

**Abstract:** Millennials have been the subject of intense media scrutiny for more than a decade. Studies have examined their social, financial, technological, and work habits. But few studies have examined this generation's attitudes or proclivities towards civil litigation. Such an examination presents two problems: First, the absence of data on litigants' age makes an empirical study virtually impossible. Second, generalizations about an entire generation are inherently problematic, glossing over countless cultural, economic, familial, and demographic differences. Nevertheless, this Article argues that millennials' experiences and educations have primed them, at the margins, to avoid litigation more so than prior generations. Instead, this generation will be more likely to select mediation when a formal method of dispute resolution is required. Mediation, with its emphasis on compromise and self-determination, comports with many millennials' financial risk-aversion as well as their uniquely interdisciplinary educations. Finally, this Article suggests that law schools must redouble their efforts to adapt their curricula to this emerging reality. Such adaptations include a greater focus on process choice at the outset of a dispute, better integration of practitioners as teachers, and broader clinical opportunities for students to act as both neutrals and advocates in mediation.

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## I. INTRODUCTION

It is difficult to pick up a magazine or newspaper without stumbling across another trend piece about millennials. Stories about mil-

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lennials—broadly defined as those born between 1980 and 1995<sup>3</sup>—are everywhere. Reporters constantly explore their spending habits,<sup>4</sup> their savings habits,<sup>5</sup> and their work habits,<sup>6</sup> to name just a few common inquiries. The press has described them as both self-centered and committed to public service; both ambitious and lazy; and both entitled and deeply unsettled.

These contradictory qualities ascribed to millennials show just how silly it can be to generalize about an entire generation of Americans (to say nothing of millennials around the world). One cannot accurately describe millions of people with any sweeping adjectives or characteristics. Individual differences in family background, socioeconomic status, race, ethnicity, sexual and gender identity, and religion add countless footnotes to any such generalities. Still, this generation seems to haunt the American psyche, especially given its coming of age during the Recession and post-Recession years, unwittingly representing our country's greatest hopes and deepest fears.

Despite such heightened scrutiny, one aspect of millennials' behavior has escaped investigation: their feelings on litigation. Traditionally, the United States is considered one of the most litigious countries in the world.<sup>7</sup> But do American millennials litigate at the same rate as members of earlier generations? Do millennials litigate at the same rate as members of earlier generations did when *they* were in their 20s and 30s?

<sup>3</sup> PwC's NextGen: A Global Generational Study, available at <http://www.pwc.com/gx/en/hr-management-services/pdf/pwc-nextgen-study-2013.pdf> (last visited Dec. 1, 2017).

<sup>4</sup> See, e.g., Kristopher Fraser, "Why Have Millennials Fallen Out of Love With Diamonds?", *The Daily Beast*, May 2, 2016, available at <http://www.thedailybeast.com/articles/2016/05/02/why-have-millennials-fallen-out-of-love-with-diamonds.html> (last visited Dec. 1, 2017).

<sup>5</sup> See, e.g., Aime Williams, "Why millennials go on holiday instead of saving for a pension," *The Financial Times*, February 12, 2016, available at <https://www.ft.com/content/94e97eee-ce9a-11e5-831d-09f7778e7377> (last visited Dec. 1, 2017).

<sup>6</sup> See, e.g., Seth Abromovitch, "Hollywood's New Era of Millennial Assistants: Mom's Complaints to the Boss, Less Subservience," *The Hollywood Reporter*, November 6, 2014, available at <http://www.hollywoodreporter.com/news/hollywoods-new-era-millennial-assistants-746861> (last visited Sept. 1, 2017); see also, Margaret McFarland, "Why Can't We Finance Main Street?" 45 No. 2 REAL ESTATE REV. J., Art. 6 (Summer 2016) ("Younger generations are driving less, postponing marriage and choosing more urban living arrangements. Millennials are choosing to rent rather than buy").

<sup>7</sup> See, e.g., Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015) (discussing the perceived litigiousness of American society and "reasons why the litigation world looks and feels bigger" over the past few decades); see also David F. Pike, Why Everybody Is Suing Everybody, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50 (discussing rising public perception that American society had become more litigious); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1980-81) (noting that the United States has a uniquely litigious culture).

There are no longitudinal studies exploring these questions. Indeed, empirical data would be virtually impossible to collect. Plaintiffs are not required to list their ages on a civil complaint before filing it in state or federal court.<sup>8</sup> Moreover, millennials are still young, relatively early in their personal and professional lives—and many have not yet reached the milestones necessary for the specter of litigation to come knocking. So perhaps the better question is *will* American millennials litigate with the same enthusiasm as have members of prior generations over the course of their lifetimes?

The answer to this question could have profound implications for the justice system and the legal industry. It could have similarly significant implications for legal academia. If there is, in fact, a generational shift in attitudes about litigation, what changes need to be made to law school curricula to reflect such a shift? How should we train law students to resolve disputes in a manner consistent with their current and future clients' habits and preferences?

We write as two attorneys—and two millennials—who also teach part-time: Shawna Benston, a bioethicist, teaches conflict resolution to undergraduate and graduate students, as well as burgeoning multidisciplinary professionals, at Yale's Interdisciplinary Center for Bioethics, focusing on medical ethics disputes. Brian Farkas, a practicing litigator, teaches arbitration and mediation at Cardozo School of Law, and teaches dispute resolution to undergraduates at the City University of New York. We are also mediators ourselves and have trained students in mediation processes for legal and non-legal settings. We base our conclusions on our instruction experiences (teaching primarily millennials), our professional experiences (representing some millennial clients), and personal experiences (as millennials ourselves).

This Article makes three interrelated arguments: First, we argue that millennials are uniquely predisposed to avoid litigation over the course of their lives as compared with recent prior generations. Second, we argue that millennials are uniquely predisposed to prefer mediation and other forms of negotiated resolution to resolve conflicts. And third, we recommend that law schools adapt their curricula to provide far more extensive training in “alternative” processes for conflict management. Instead of continuing to serve as an elective afterthought to the curriculum, dispute resolution must become centralized in students' conception of lawyering. Only then will legal edu-

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<sup>8</sup> See, e.g., “Pleadings,” 3B Carmody-Wait 2d § 27:40 (discussing requirements for pleadings; age is not a requirement); David F. Herr, “Pleading the Case,” *Fundamentals of Litigation Practice*, §§ 8:1-8:13 (2016 ed.) (same).

cation suitably prepare future counselors for the legal landscape created and faced by millennials.

## II.

### A GENERATION RAISED IN ECONOMIC UNCERTAINTY

Why do we suggest that mediation—which, almost by definition, entails self-sacrifice and compromise—should appeal to a reputedly self-centered millennial? There are several reasons, from the cultural to the political. But perhaps the largest is economic.

Millennials, born in the 1980s and 1990s, have spent their conscious lives surrounded by financial uncertainty. They saw the dot-com boom and bust; they saw the September 11, 2001 terrorist attacks rock the geopolitical order; they saw the web and housing bubbles burst; and they saw the catastrophic effects of the 2008 financial crisis.<sup>9</sup> Perhaps they watched their parents' retirement accounts rise and fall with mercurial markets and fraudulent Ponzi schemes, or knew highly educated neighbors at all stages of their careers lose their jobs. They themselves struggled—and continue to struggle—to find work, even after ample education and (often unpaid) internship experiences.<sup>10</sup>

This economic turmoil has affected the financial consciousness of millennials in profound ways. A 2016 Wells Fargo study surveyed more than 1,400 millennials and reported that more than 50% are “not very confident” or “not at all confident” in the stock market.<sup>11</sup> A 2014 UBS survey of a similar number of millennials revealed that most devote less than 30% of their portfolio to stocks, and over 50% of their portfolio to cash.<sup>12</sup> By contrast, non-millennials keep almost 50% of their portfolio in stocks and less than 25% in cash.<sup>13</sup> Combine

<sup>9</sup> Meghan M. Boone, *Millennial Feminisms: How the Newest Generation of Lawyers May Change the Conversation About Gender Equality in the Workplace*, 45 U. BALT. L. REV. 253, 256 (2016) (noting how millennials' “coddled home lives existed in sharp contrast to the headline events that shaped their youth—the shootings at Columbine, the terrorist attacks of September 11th, and the economic meltdown that, for many Millennials, marked their entrance into the professional workplace”).

<sup>10</sup> Jana Kasperkevic, “Tired, poor, huddled millennials of New York earn 20% less than prior generation,” *The Guardian*, April 25, 2016, available at <https://www.theguardian.com/us-news/2016/apr/25/new-york-millennials-great-depression-economic-crisis> (last visited Dec. 1, 2017).

<sup>11</sup> “2016 Wells Fargo Millennial Survey,” Wells Fargo's Wealth and Investment Management (WIM) Market Research Center, available at [https://www.wellsfargo.com/about/press/2016/survey-millennials-retirement\\_0803/](https://www.wellsfargo.com/about/press/2016/survey-millennials-retirement_0803/) (last visited Dec. 1, 2017).

<sup>12</sup> “Think you know the Next Gen investor?” UBS Wealth Management, available at <https://www.ubs.com/content/dam/WealthManagementAmericas/documents/investor-watch-1Q2014-report.pdf> (last visited Dec. 1, 2017).

<sup>13</sup> *Id.*

these statistics with the fact that, according to the Wells Fargo survey,<sup>14</sup> more than one-third of millennials expect to receive no retirement income from Social Security, and one can easily see a trend: rational distrust in long-standing financial institutions.

To top it off, millennials face unprecedented amounts of student debt. The median debt for students after college is about \$23,000, with a standard loan repayment plan of 10 years at a cost of about \$2,858 per year.<sup>15</sup> Instead of beginning to save for retirement in their 20s, many young college graduates feel the crushing weight of student loan repayments, consequently missing out on the most important decade for retirement savings. Only about 30% of Baby Boomers funded their education with loans; by contrast, about 60% of millennials did.<sup>16</sup> This substantial rise in loan prevalence and amount leaves little income to invest or save.

Employment rates are also depressed. Those between the ages of 18 and 29 are less likely to be employed (63%) than those in Generation X (70%) or Baby Boomers (66%) had been when in the same age bracket. Even those who are employed often struggle to make ends meet, and “more than a third depend on financial support from their families.”<sup>17</sup>

Taken together, these economic brush strokes paint a bleak portrait: American millennials face volatile employment prospects and enter the working world with significant—indeed, life-altering—debt. They tend to prefer a savings account that they can see and touch to less tangible investment products that might promise higher returns coupled with greater risk.<sup>18</sup>

What does all of this economic data have to do with dispute resolution? For all of the coverage of “start-up culture” and risk-taking,

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<sup>14</sup> *Supra*, note 11.

<sup>15</sup> “As Student Debt and Unemployment Hit Record Highs Young Adults Seek Smart Ways to Build Credit,” PRWeb (Apr. 3, 2012), *available at* <http://www.prweb.com/releases/2012/student-credit/prweb9358385.htm> (last visited Dec. 1, 2017) (“Saddled with \$1 trillion in student loans and the highest unemployment rate since the government began keeping track in 1948, today’s college students may be the unluckiest since the 1930s. . .”).

<sup>16</sup> Derek Thompson, “The Unluckiest Generation: What Will Become of Millennials?” *The Atlantic*, April 26, 2013, *available at* <http://www.theatlantic.com/business/archive/2013/04/the-unluckiest-generation-what-will-become-of-millennials/275336/> (last visited Dec. 1, 2017).

<sup>17</sup> Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.L. SCH. L. REV. 561, 578 (2012).

<sup>18</sup> Jessica Dickler, “More Americans prefer cash or real estate to stocks,” CNBC.com, July 19, 2016, *available at* <http://www.cnbc.com/2016/07/19/more-americans-prefer-cash-or-real-estate-to-stocks.html> (last visited Dec. 1, 2017).

the generation as a whole is financially risk-averse.<sup>19</sup> This proclivity makes sense, given millennials' lived experiences. Considering the two decades in which they came of age, millennials have an almost Pavlovian aversion to risk. When faced with a legal dispute—whether an affirmative claim or defense of a claim—millennials can be particularly frightened of the prospect of an “all or nothing” resolution in front of a judge. Mediation appeals to millennials' desire to manage their money through a party-controlled dispute resolution mechanism. It is a process they can manage themselves, with the outcome remaining in their own hands. Compromise reduces exposure.

### III.

#### A GENERATION TRAINED WITH AN INTERDISCIPLINARY EDUCATION

Millennials with college and postgraduate education have experienced more multidisciplinary and interdisciplinary curricula than did previous generations.<sup>20</sup> Increasingly, colleges and universities have fostered collaboration among academic departments to create relatively new interdisciplinary fields like American Culture, Bioethics, Media Studies, and Science, Technology & Society.<sup>21</sup> These areas, which have expanded dramatically in the 1980s, 1990s, and 2000s, examine the interconnections between and among previously distinct disciplines.<sup>22</sup>

The Teagle Foundation's 2006 white paper, “Interdisciplinary Education at Liberal Arts Institutions,” documents this rise in interdisciplinary education.<sup>23</sup> The report describes the “myriad new initiatives designed to prepare students for interdisciplinary worlds of scholarly research, professional work, and civic responsibility.”<sup>24</sup>

<sup>19</sup> Steven Russolillo, “Chart of the Day: Millennials Are Really Risk Averse,” *The Wall Street Journal*, May 29, 2014, available at <http://blogs.wsj.com/moneybeat/2014/05/29/chart-of-the-day-millennials-are-really-risk-averse/> (last visited Dec. 1, 2017).

<sup>20</sup> It is more difficult to generalize about secondary school curricula, which vary tremendously from one state or county to the next.

<sup>21</sup> A cursory examination of the nation's leading liberal arts colleges and universities shows the interdisciplinary and multidisciplinary nature of much of the coursework. See, e.g., Course Catalogue, VASSAR COLLEGE, <http://catalog.vassar.edu> (last visited Dec. 1, 2017); Online Course Information, YALE UNIVERSITY, <https://students.yale.edu/oci/search.jsp> (last visited Dec. 1, 2017); Stanford Course Bulletin, STANFORD UNIVERSITY, <https://explorecourses.stanford.edu> (last visited Dec. 1, 2017).

<sup>22</sup> Diana Rhoten et al., “Interdisciplinary Education at Liberal Arts Institutions,” Teagle Foundation White Paper (2006), available at [http://www.teaglefoundation.org/Teagle/media/GlobalMediaLibrary/documents/resources/Interdisciplinary\\_Education.pdf?ext=.pdf](http://www.teaglefoundation.org/Teagle/media/GlobalMediaLibrary/documents/resources/Interdisciplinary_Education.pdf?ext=.pdf) (last visited Dec. 1, 2017).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1.

Voices from across the academy, the report notes, “advocate the importance of interdisciplinarity, arguing that many of today’s pressing questions in areas such as the environment, health, technology, global security, and urban culture demand the cross-fertilization of disciplinary skills, theories, methods, and ideas.”<sup>25</sup> According to Teagle’s survey of 109 representative American colleges and universities, 61.71% of all liberal arts institutions report offering interdisciplinary studies majors and 65.42% expect to increase their interdisciplinary offerings over the next five years.<sup>26</sup> On average, about one-fifth of all liberal arts students in the survey sample (class of 2006) graduated with an interdisciplinary major. The most popular degrees came in the fields of International Relations, American Studies, Environmental Studies, Neuroscience, and Gender Studies.<sup>27</sup> In short, the report reveals that those educated in the 1990s and 2000s have increasingly been exposed to, and have elected, interdisciplinary pedagogy.

Interdisciplinary educations are likely to create a comfort with the mediation process, especially compared to litigation, which is an inherently law-focused process. In litigation, the schedule of discovery and disclosure is largely preordained by relevant rules of federal or state civil procedure. Lawyers focus on legal arguments in extensive written briefs, attempting to apply cases and statutes to the facts at hand. They make arguments and presentations to the finder of fact—a judge or jury—connecting to specific legal elements that must be proven or disproven. Scientific or social evidence can be introduced into trial, but only in a highly circumscribed manner. The testimony that parties and their witnesses can give is equally curtailed by various evidentiary rules.

Conversely, mediation offers a far more open process, allowing parties to introduce *non-legal* or *extra-legal* information, including emotional statements such as disappointment, regret, or apology. Further, non-legal professionals can aid the primary mediator in resolving the dispute. Collaborative law has become increasingly popular, particularly in the divorce context,<sup>28</sup> and involves multiple professionals

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> Dafna Lavi, *Can the Leopard Change His Spots? Reflections on the Collaborative Law Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61 (2011) (“Collaborative law is defined as a process in which a couple considering separation and divorce agrees, together with their attorneys, to make every effort to try to resolve the conflict between them in good faith, without recourse to legal proceedings. . . . The attorney’s role in collaborative law is different from his role in conventional representation. As opposed to the traditional adversarial role, in collaborative law the



working to resolve various aspects of a dispute. These professionals could include psychologists, social workers, financial planners, and childcare specialists, as well as attorneys.

Having been academically trained to problem-solve by seeking multiple points of view, millennials are primed to embrace an intrinsically collaborative mode of dispute resolution. When faced with a personal or business dilemma, they are likely to reject a mono-disciplinary, constricted approach like litigation. Obligated to work in groups from primary school through college<sup>29</sup> (and, of course, well after college in many professions<sup>30</sup>), millennials are accustomed to accommodating diverse opinions and achieving compromise. Despite—or, indeed, because of—millennials' dislike of group assignments,<sup>31</sup> they have emerged particularly adept at being so-called “team players,” even when facing interpersonal difficulties.<sup>32</sup> The skill of fostering collaborative and productive interaction is extraordinarily valuable in the mediation setting. Whether a millennial is serving as a mediator or a disputing party, the ability to hear challenging assertions and incorporate them into a creative solution will prove critical to a mutually beneficial outcome.

Legal problems have many non-legal causes and solutions. While litigation applies only legal norms to conflict, mediation can flexibly apply psychological, economic, social, or even religious norms. Thus, a collaborative and interdisciplinary approach to dispute resolution will be particularly appealing to millennials, who are accustomed to viewing complex situations through diverse lenses.

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attorneys (who represent each of the parties) encourage their clients to take part in a joint resolution of the problems. The attorneys themselves are attorneys in the field of personal status law, who have undergone special training to engage in collaborative law and to guide the parties in arriving at peaceful solutions”). *See also*, Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113 (2009) (discussing the emergence and practicalities of a collaborative law approach to family disputes; Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131 (2008) (discussing potential legal ethics questions surrounding the changing role of lawyers in this process).

<sup>29</sup> B. Payne & E.M. Turner, “Students' Perceptions of Group Projects: The Role of Race, Age, and Slacking,” 40 COLLEGE STUDENT J. 132 (2006).

<sup>30</sup> Jeff Nevid, “Teaching the Millennials,” *available at* <http://www.psychologicalscience.org/publications/observer/2011/may-june-11/teaching-the-millennials.html> (last visited Dec. 1, 2017).

<sup>31</sup> Chris Gurrie, “Group Work: A Millennial Myth—Improving Group Work in the Basic Course and Beyond,” 5 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND HUMANITY 962 (2015).

<sup>32</sup> T.J. Fogarty, “The Millennial Lie,” 23 ISSUES IN ACCOUNTING EDUCATION 369 (2008).

## IV.

A GENERATION PRIMED ON ISSUES OF INTERNATIONAL  
CITIZENSHIP AND DIVERSITY

In the 21st century, it is accurate, if clichéd, to say that the world is more interconnected than ever before. Most American millennials were raised in a world where they had the ability to connect to almost anyone, anywhere, at any time. They were raised in a world where foreign newspapers, movies, television, and social media were just clicks away. This technological interconnectivity allows for greater tolerance of unfamiliar cultures. Physical exposure is increasing as well, as study abroad programs have become commonplace not just during and after the undergraduate years, but also as early as high school.<sup>33</sup> Millennials have been exposed to curricular and extracurricular information on diversity, both nationally (diversity within the United States) and globally (diversity among and between nations).

When disputes inevitably emerge, American millennials imbued with such cross-cultural and international sensitivity will be likely to promote a greater spirit of compromise and collaboration regardless of background. Such a spirit might be more difficult to achieve in litigation, where differences between parties are accentuated. The litigation process is designed to magnify areas of disagreement, whether or not those areas are central to the underlying dispute.<sup>34</sup> Mediation, by contrast, highlights common interests. And yet, it is difficult to enter a mediation process when one lacks trust or respect for an opponent. Millennials' exposure to, and comfort with, difference can only enhance both their desire to select mediation as a mode of dispute resolution and the mediation process itself, which thrives on parties' willingness to move past surface-level differences.

There are no scientific studies on conflict among millennials of disparate cultures, or on millennials' likelihood to diverge from Baby Boomers' preferred methods of dispute resolution. This sort of "experiment" would be difficult to operationalize. But at a minimum, it seems logical to conclude that millennials have been more likely to encounter—and therefore appreciate—other cultures (whether foreign or domestic) at earlier ages than did any previous generation. We suspect that this exposure will lower the barriers to collaborative con-

<sup>33</sup> See, e.g., "High School Study Abroad Programs," available at <http://www.studyabroad.com/high-school-worldwide> (last visited Dec. 1, 2017).

<sup>34</sup> See, e.g., Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1680 (2016) ("Motions that should never have been filed and discovery disputes that should never have been brought to court account for [a] fertile and thriving source of excessive practice [and are] a staple of wasted effort, unnecessary expense, and delay").

flict resolution, notably when cultural, economic, geographic, or racial diversity exists.

## V.

### MILLENNIALS AND MEDIATION

While acknowledging the inherent impossibility of generalizing across an entire generation, we have laid out several core experiences shared by many American millennials. We believe that these shared experiences will contribute to this generation's potential preference for mediation over litigation when facing certain legal disputes.

This Article's co-authors have both enjoyed academic and practical experience in alternative dispute resolution. Beginning with a foundation in bioethics graduate school (Benston) and law school (Benston and Farkas), including Cardozo Law School's Mediation Clinic and Divorce Mediation Clinic, we both learned to mediate in a variety of contexts: medical clinics, small claims court, family court, community centers, and high schools. Both authors now teach mediation, as well as other dispute resolution processes, to millennials. Thus, we have seen first-hand the elements of mediation that are most attractive to this generation.

With these admittedly anecdotal perspectives, we notice that millennials enjoy mediation's lack of judgment. Mediation is a process for resolving conflict in which the dialogue between the parties is facilitated by a third-party neutral. Unlike in adjudicative processes such as litigation or arbitration, "a mediator does not have the responsibility to determine an appropriate remedy or a just distribution. That is for the parties themselves to do."<sup>35</sup> Instead, the mediator "must attend to the process, help the parties recognize the legitimacy of different perspectives on justice, and work towards a resolution that comports with the parties' considered views of a fair and acceptable outcome."<sup>36</sup> In litigation and arbitration, justice "comes from above," while in mediation, the goal is to "help those who ultimately have the most intimate understanding of the complexities of their situation achieve a resolution they find 'just.'"<sup>37</sup>

In other words, the mediation *process* belongs entirely to the parties, with the help of the mediator to set parameters and facilitate communication. This approach stands in contrast to adjudicative venues, where strict rules of civil procedure—or a judge or arbitrator's

<sup>35</sup> Lela P. Love & Jonathan M. Hyman, *If Portia Were A Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 158 (2002).

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

<sup>37</sup> *Id.* at 160.

preferences—may dictate the process. How much discovery will there be? What sort of information is “admissible” and worthy of consideration? When must written materials be exchanged? These rules are designed to create fairness and predictability for disputants; however, they can hamper creativity, honesty, and broader communication that can give disputants a fuller understanding of one another’s interests. The rigid deadlines and timetables can be oppressive for both sides. The authors have seen both millennial clients and students rebel against litigation’s top-down formalism.

When teaching classes on dispute resolution, Farkas sees that millennial students are immediately perturbed by litigation’s straightjacketed process, cost, and total uncertainty. In numerous role-play exercises, students seem to prefer creative mediators, *even when* the mediation process leads ultimately to fundamental compromises of their assigned positions. Put differently, students are willing to sacrifice a monetary outcome (i.e., they will receive less money in the role-play) in exchange for a collaborative rather than a hostile and adjudicative dispute resolution mechanism.<sup>38</sup> In this way, students exhibit an appreciation for the perceived fairness and cooperative process of mediation, regardless of some sacrifice in the outcome.<sup>39</sup>

In her interdisciplinary career, Benston has similarly witnessed the benefits and transferable skills of mediation. Since 2012, Benston has taught self-designed courses, “Narrative Medicine and Bioethics Mediation” and “Ethics at the End of Life,” in the Yale Interdisciplinary Center for Bioethics Summer Institute. Benston’s practical experience as a mediator has greatly informed class discussions of clinical ethics mediation theory, literary analysis of medical narratives, and students’ engagement in mediation simulations; concurrently, the students’ diverse cultural and academic backgrounds bring a rich multidisciplinary approach that enhances collaboration in both bioethics and mediation. Perhaps most compelling is the intersection of bioethics and mediation. Bioethics is an intrinsically interdisciplinary field that routinely finds debates among philosophers, scientists, physicians, humanists, and lawyers. Mediation, meanwhile, necessarily seeks to reconcile diverse perspectives, working to weave disparate

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<sup>38</sup> Disputants (of all ages) appreciate an attorney with a mediator’s mindset, even when the attorney is serving as an advocate in litigation or arbitration. In meeting privately with clients, lawyers should appreciate the benefits of “reality testing” – that is, emphasizing weaknesses in one’s own case to set realistic expectations. While some clients might initially interpret this tactic as a sign of weakness or lack of resolve to “fight,” most eventually appreciate honest evaluation as grounding unreasonably high expectations and preventing them from making errors in judgment.

<sup>39</sup> Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001).

voices into one harmonious narrative. In Benston's classroom, the strains of bioethical and conflict-resolution discussion help hone students' ability to navigate unpredictable narrative terrain. Building this skill in turn allows students to better interact with individuals they meet outside the relative safety of the classroom. Whether in higher education, internships, jobs, or networking events, millennial students are more adept at parsing others' personal and professional narratives and understanding their own roles in complex interpersonal interactions.

Again, we must be wary of simplistic overgeneralizations. It is obviously not true that *every* millennial from *every* background will prefer mediation for *every* dispute. One cannot generalize about tens of millions of people. One also cannot generalize about all disputes, many of which truly belong in the courtroom.<sup>40</sup> But with those crucial caveats in mind, we can still appreciate the unique experiences that define this generation: geopolitical uncertainty, economic chaos, intensifying internationalism, and an academic background that is increasingly interdisciplinary.

## VI.

### ADAPTING LAW SCHOOLS' CURRICULA

When we think about educating the next generation of dispute resolvers, we naturally focus on law schools as the trainers of future legal professionals.

Law schools have embraced training in the theory and practice of dispute resolution to varying extents.<sup>41</sup> Some schools offer extensive coursework and clinics in all major dispute resolution modes; others offer only coursework but no clinical opportunities; and still others incorporate negotiation exercises into first-year legal writing or lawyering skills courses, but offer few or no advanced courses or clinics.<sup>42</sup> There are philosophical differences as well. Some schools value the

<sup>40</sup> Domestic violence is a common example of a type of dispute that is inappropriate for mediation. There, "[the] parties are not on equal footing because the abuser has taken away power through physical and/or emotional abuse. Mediation will not be successful if the parties are not equal in bargaining power. . . ." Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559 (2002); see also, Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425 (2011) (discussing various types of domestic violence and the applicability of mediation).

<sup>41</sup> For a more comprehensive examination of the ways in which the Great Recession of 2008 may impact law school curricula, particularly with respect to dispute resolution, see Lela P. Love & Brian Farkas, *Silver Linings: Re-Imagining the Role of ADR Education in the Wake of the Great Recession*, 6 NORTHEASTERN LAW J. 1 (2013).

<sup>42</sup> See generally Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO

substance of ADR *theory* (e.g., the unique values of consensual, as opposed to adversarial, dispute resolution), while others emphasize the *skills* that ADR imparts (e.g., the interviewing and listening skills that come from negotiation and mediation training). Some schools value theory and skills equally.

We present three recommendations for how law schools' curricula can be adapted to more appropriately match the millennial clientele that many attorneys are likely to encounter.

First, there should be greater focus on dispute resolution methods in the first-year curriculum. Presently, most schools' first-year courses are almost entirely focused on litigation, particularly legal theory and appeals,<sup>43</sup> and generally are taught by full-time tenured or tenure-track professors. In the second and third years, students enjoy elective courses that might delve into dispute resolution processes. But students nevertheless will view litigation as the *default* after the indoctrination of the first-year curriculum. Schools have long been criticized for overemphasizing appellate practice and theory, particularly during the first year.<sup>44</sup> These areas are less directly applicable to the work of most entry-level attorneys, who enter practice without much exposure to pre-trial advocacy. Few courses, especially "standard" first-year courses, delve deeply into the avenues of non-litigation or pre-litigation dispute resolution processes.

This approach is a mistake. We therefore recommend that law schools place greater value on process choice—that is, teaching first-year students about the different dispute resolution mechanisms that may (or may not) apply to their clients' situations. To accomplish this, schools could better incorporate the practical expertise of adjunct professors in first-year teaching. Adjunct professors with litigation experience – who now teach largely legal writing courses – could

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ST. J. ON DISP. RESOL. 25, 26 (2010) (surveying and categorizing the teaching of dispute resolution in American law schools).

<sup>43</sup> See, e.g., John C. Kleefeld, *Rethinking "Like a Lawyer": An Incrementalist's Proposal for First-Year Curriculum Reform*, 53 J. LEGAL EDUC. 254 (2003) (discussing proposals to increase skills and dispute resolution in the first-year curriculum); Bobbi McAdoo, *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J.L. & POL'Y 39 (2012) (discussing a first-year integrated course on "Practice, Problem-Solving and Professionalism").

<sup>44</sup> See, e.g., Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 11 Writing*, 39 LOY. U. CHI. L.J. 123 (2007) (discussing the challenges of improving legal analysis in the current first-year framework); Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166 (2008) (discussing the practicality of adding a course more heavily focused on statutes to the first-year curriculum); Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. TOL. L. REV. 705 (2003) (discussing the addition of practical examples into the standard contracts course).

effectively communicate the role of trials and appeals as *exceptions*, rather than the rule, in lawyers' arsenal. These instructors should be woven into the first-year experience, rather than cast exclusively as teachers of legal writing or specialized second- and third-year elective courses. Despite the large number of adjuncts, "too often [they] remain shadowy figures who enter the law school under cover of darkness, rarely participating in the intellectual dialog of the institution."<sup>45</sup> Even more rarely do they "participate in discussions about changing pedagogical styles, testing methods, or other topics pertinent to teaching" first-year students.<sup>46</sup> Their absence is another mistake in legal education. New law students would benefit from learning directly from practitioners at the outset of their legal educations. These individuals can serve as perhaps the most relevant resources for a greater understanding of dispute resolution process choice.

Second, we recommend expansion of mediation clinics for second- and third-year students. Mediation clinics provide excellent training not just for future mediators, but for future legal practitioners of all stripes. "When law students are mediators, they have the opportunity . . . to grapple with the justice issues in the parties' disputes in ways not available to them in the classroom or a litigation clinic," as two scholars have noted.<sup>47</sup> "Mediation provides students an opportunity to view a dispute from the vantage point of a neutral and to have a real effect on the lives of real people. . . . While the monetary stakes are often small, the human drama is vivid, and issues of fairness and justice abound."<sup>48</sup> Mediation also teaches invaluable soft skills, such as close listening, fairness, and empathy. These are the types of skills likely to be necessary for successful assistance of clients, and particularly millennial clients.

Third, we recommend that law schools place greater emphasis on so-called "alternative" career paths that utilize dispute resolution skills, even if not necessarily requiring the juris doctor degree. Such positions include roles as human resource managers, ombudsmen, and labor relations specialists, among many others. These "alternative" career paths can be attractive for both their substance and availability, given that there are not enough "traditional" law-firm jobs to employ all graduates. Recent media commentary has condemned certain law schools that cannot promise a fair exchange of high tuition for career

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<sup>45</sup> Andrew F. Popper, *The Uneasy Integration of Adjunct Teachers into American Legal Education*, 47 J. LEGAL EDUC. 83 (1997).

<sup>46</sup> *Id.*

<sup>47</sup> Love, *supra* note 35, at 160.

<sup>48</sup> *Id.* at 161.

opportunities.<sup>49</sup> A crucial underlying reason for the lack of job prospects for many law school graduates—partly an outcome of the Great Recession—is the intense focus on litigation, “big law,” and private practice, with almost no consideration for so-called “alternative” or even extra-legal careers that would benefit from a well-rounded legal education.<sup>50</sup> Moreover, the shift in career focus could appeal to millennials who reject careers based on adversarial methods of problem-solving.

These three suggestions—(i) greater focus on process choice in the first-year curriculum as furthered by the integration of adjunct professors, (ii) expansion of students’ access to mediation clinics in the second- and third-year curricula, and (iii) greater emphasis on careers that value dispute resolution skills—are all interrelated. They all advocate for law schools to emphasize problem-solving skills central to dispute resolution of all varieties, rather than relegating such training to only niche courses buried within the general curriculum. Adjunct faculty members would be critical to these efforts and would help rectify many law schools’ failure to integrate sufficient numbers of practitioners into doctrinal courses.<sup>51</sup> And by expanding skill development and career services to include the promotion of professions that benefit from dispute resolution expertise, law schools would serve both themselves and their students, while better capitalizing on current students’ strengths and natural proclivities.

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<sup>49</sup> Noam Scheiber, “An Expensive Law Degree, and No Place to Use It,” *The New York Times* (June 17, 2016), available at <http://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html> (last visited Dec. 1, 2017); Steven J. Harper, “Too Many Law Students, Too Few Legal Jobs,” *The New York Times* (Aug. 25, 2015), available at <http://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html> (last visited Dec. 1, 2017).

<sup>50</sup> Elizabeth Olson, “2015 Law School Graduates Got Fewer Jobs in Private Practice,” *The New York Times* (Aug. 17, 2016), available at [http://www.nytimes.com/2016/08/18/business/dealbook/2015-law-school-graduates-got-fewer-jobs-in-private-practice.html?\\_r=0](http://www.nytimes.com/2016/08/18/business/dealbook/2015-law-school-graduates-got-fewer-jobs-in-private-practice.html?_r=0) (last visited Dec. 1, 2017); Michael I. Krauss, “Legal Education: What’s Wrong With It, And How Do We Fix It?” *Forbes* (Mar. 10, 2015), available at <http://www.forbes.com/sites/michaelkrauss/2015/03/10/legal-education-whats-wrong-with-it-and-how-do-we-fix-it/#75aa90345476> (last visited Dec. 1, 2017).

<sup>51</sup> See, e.g., Douglas E. Ray, *The Care and Appreciation of Adjunct Faculty*, 37 U. Tol. L. REV. 135 (2005) (discussing efforts by the Widener University School of Law in Delaware to integrate adjuncts into the community through extensive orientation, review, and engagement); Paul Frisch, Randall L. Hughes, Joan B. Killgore, *The Perspectives of Three Adjunct Professors*, 36 J.L. MED. & ETHICS 179 (2008) (discussing the perspective of three adjunct professors beginning their teaching careers, including their challenges in integrating into the law school curriculum and communities).



## VII. CONCLUSION

Only time will tell whether the United States will see a millennial generational decline in civil litigation, or a corresponding growth in mediation. And it remains uncertain whether any such shifts will correlate to the generational experiences discussed in this Article. Perhaps millennials will absorb the same litigiousness that has become a defining aspect of American life. But if there were ever a generation likely to eschew this cultural characteristic, it would be this one.

Throughout their lives, millennials will have personal and business conflicts, just like every prior generation. The question is how they will elect to resolve those conflicts. Based on their financial risk aversion, interdisciplinary educations, and unprecedented exposure to diverse communities nationally and internationally, it is likely that they will find mediation a far more natural fit than litigation. This is a reality for which law schools, and the legal system at large, should prepare.