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Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*

Deborah R. Hensler**

I. INTRODUCTION

Twenty-seven years ago, Professor Frank Sander urged American lawyers and judges to re-imagine the civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system.¹ Professor Sander's vision of the justice system encompassed traditional litigation leading to trial, but his speech at the 1976 Roscoe Pound Conference drew attention to alternatives to traditional dispute resolution that he argued would better serve disputants and society than traditional adversarial processes.²

Today, interest in dispute resolution is high.³ This interest cuts across many domains, ranging from the family, to the schoolyard, to

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As feminists of a certain age will recognize, my title draws its inspiration from a famous health manual, *Our Bodies, Ourselves*, whose title reflected the understanding that the personal and the political are intertwined. See BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES FOR THE NEW CENTURY: A BOOK BY AND FOR WOMEN* (1998). As my paper indicates, I think the dispute resolution movement in the United States similarly reflects the mixing of personal and socio-political aims and desires.

1. Frank Sander, *Varieties of Dispute Processing*, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79, 111 (1976).

2. *Id.*

3. There are many indicators of this interest, but in the spirit of the times, in preparing this paper, I searched the Internet for evidence of the proposition. Using Yahoo as my search engine, I found more than one million pages mentioning,

workplaces and sales transactions, to community decision making, and to the courts. It is reflected in academic degree programs, law school and business school curricula, executive training, and continuing legal education.⁴ The dispute resolution procedures of interest include negotiation, mediation, arbitration, and hybrids such as “med-arb”⁵ and “reg-neg.”⁶ While in some domains, such as schools and neighborhoods, dispute resolution procedures are championed as alternatives to individual or social violence, in the business and legal sectors the primary stated objective of alternative dispute resolution is to avoid litigation and trial.

Alternative dispute resolution (“ADR”) procedures have not displaced traditional litigation; hundreds of thousands of lawsuits are filed annually in state and federal courts. But there are some reasons to believe that the ADR movement has had some success

respectively, mediation, arbitration, and conflict resolution and more than eighty thousand pages mentioning peace studies. Under “bus & econ/shopping & services/law/alternative dispute resolution/companies & firms,” I found 274 sites related to dispute resolution. The sites included individuals and organizations; groups offering professional services and groups offering volunteer opportunities; and entities providing information about dispute resolution, training, and general and specialized dispute resolution services. There were specialists in divorce and family law, securities, “major financial controversies and complex multi-party disputes,” construction and legal malpractice. There were rosters of judges and there were cyberspace dispute resolution services, including “cybersettle” and “iCourthouse.” Under “conflict resolution,” I found undergraduate and graduate education programs, community organizations in states around the nation, and projects and institutes in countries around the world. Searching for texts on Amazon.com, I found 1,268 books on “conflict resolution,” 654 books on “dispute resolution,” 1,654 books on arbitration, and 1,041 books on mediation. Note that both the web search and the Amazon book search categories are non-exclusive, meaning that some web pages and books are counted more than once.

4. Scholars and practitioners in these fields variously term their subject alternative dispute resolution (“ADR”), conflict resolution, litigation risk management, negotiation theory, and peace studies. For convenience, I use the term dispute resolution to refer generally to all of these, and alternative dispute resolution to describe the movement to substitute or complement traditional litigation procedures with mediation, arbitration, and other procedures that are perceived as less adversarial.

5. In a “med-arb” procedure, a third party neutral first attempts to help the parties to fashion a resolution of their dispute. But if this proves impossible, the neutral then hears and decides the outcome of the dispute. Some dispute resolution practitioners oppose this melding of mediation and arbitration on the grounds that it may erode the perceived neutrality of mediators.

6. In a “reg-neg” proceeding, an administrative agency invites those affected by a proposed new regulation to participate in the drafting of the regulation, assisted by a third-party neutral. The goal is to avoid lawsuits challenging the final regulation. Congress endorsed “reg-neg” in the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11(a), 110 Stat. 3870, 3873. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rule-Making*, 46 DUKE L.J. 1255 (1997).

over the past twenty-five years in changing business and legal decision-makers' views of how best to resolve legal disputes. Courts' civil caseloads have declined significantly over the past decade in many jurisdictions.⁷ At the same time, there has been a dramatic decrease in the fraction of civil cases reaching trial.⁸ Federal courts are now required by law to offer some form of ADR,⁹ and many state courts require parties to attempt to resolve their cases through mediation before they can obtain a trial date.¹⁰ Outside the courts, the use of binding arbitration appears to be on the rise.¹¹ How did these changes come about? What factors have created the surge of interest in alternatives to litigation? What do these developments portend for our legal system?¹²

7. For trends in state court case filings, see Nat'l Center for State Courts, *Caseload Highlights*, at http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html (last visited June 27, 2003). For trends in federal court filings, see Admin. Office of the U.S. Courts, *Statistical Reports*, at <http://www.courts.net/fed/index.html> (last visited June 27, 2003).

8. See Patrick Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002).

9. Alternative Dispute Resolution Act, 28 U.S.C. §§ 651-658 (2003).

10. The National Center for State Courts tracks ADR developments in state courts. See, e.g., Nat'l Center for State Courts, *Court Links to the 50 States*, at <http://www.ncsc.dni.us/KMO/Topics/ADR/States/ADRusmap.htm> (last visited June 27, 2003). For descriptions of ADR programs in federal appellate and district courts, see ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1997); ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1996).

11. The American Arbitration Association reports having administered more than 200,000 arbitration proceedings in 2002. See Am. Arbitration Ass'n, *Fast Facts*, at <http://www.adr.org/index2.1.jsp?JSPssid=16235> (last visited June 27, 2003). From 1990 to 2002, the AAA's caseload increased 379 percent, as calculated from data provided by the AAA on file with the author.

12. These changes are not limited to the United States. ADR is a key feature of the civil justice reform program recently adopted in the United Kingdom, see *Lord Woolf's Final Report*, available at <http://www.lcd.gov.uk/civil/finalfr.htm> (last visited July 30, 2003), and mediation is encouraged or mandated in other common law systems. See Mandatory Mediation, Courts of Justice Act Rule 24.1, R.R.O. 1990, REGULATION 194, *Amended to Ontario Reg. 263/03*, Ontario, Canada; Supreme Court, New South Wales, Australia, *Practice Note 88: Differential Case Management, Part 10 Alternative Dispute Resolution*, available at <http://www.lawlink.nsw.gov.au> (last visited Aug. 11, 2003). Moreover, the World Bank has adopted ADR as a key component of its judicial reform agenda for developing economies. See Manuel Gomez, *Shooting first and finding out later? The Inclusion of ADR within the World Bank's Judicial Reform Agendas (2002)* (unpublished seminar paper, Stanford Law School) (on file with author). Many of these developments outside the United States are modeled on the United States' experience.

To my knowledge, no one has yet written a comprehensive history of the dispute resolution movement in the United States.¹³ In any event, there are no doubt myriad understandings of that history. In this paper, I present a perspective on just one part of that history: the evolution of alternative dispute resolution in the legal world. It is my personal perspective, drawing on the literature of the past several decades, as well as my experience working in this field as a policy analyst, legal scholar, and law teacher. It is a critical perspective that would be contested by many of my colleagues in the field. I offer it to provoke thinking and discussion, recognizing that others would interpret the evidence differently.

II. HISTORICAL ANTECEDENTS: PURITANS, POPULISTS, AND UTOPIANS

Discontent with the law's approach to resolving disputes seems endemic to human societies. Roman citizens extolled Cicero when he defended popular figures, but turned against him when he took on unpopular causes.¹⁴ In Shakespeare's *King Henry VI*, Dick the butcher offers to rebel Jack Cade the memorable suggestion: "The first thing we do, let's kill all the lawyers."¹⁵ Charles Dickens devoted an entire novel to the tale of an interminable lawsuit, *Jarndyce and Jarndyce*, which grinds through the court so slowly that by the time the suit is concluded there is nothing left of the inheritance the disputants were arguing about.¹⁶

But we do not need to go beyond our shores to find historical antecedents for the contemporary alternative dispute resolution movement. As Paul Carrington tells us, the Puritan settlers of New England had little use for law or legal process.¹⁷ Jacksonian populists had little use for lawyers.¹⁸

Members of America's utopian societies yearned for social harmony and eschewed conflict.¹⁹ One of their goals was to eliminate adversarial legal processes. In Edward Bellamy's utopia, depicted

13. *But see* Paul Carrington, *ADR and the Future of Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485 (1996).

14. ROBERT WILKIN, *ETERNAL LAWYER: A LEGAL BIOGRAPHY OF CICERO* (1947).

15. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH*, act 4, sc. 2. It is worth noting that Shakespeare depicts Dick as part of a disorderly rabble that Cade has attracted to his rebellion; the lawyers here symbolize the forces of order, not the forces of evil.

16. CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (1853).

17. Carrington, *supra* note 13, at 485-86.

18. *Id.* at 490.

19. *See* AMERICA'S COMMUNAL UTOPIAS (Donald E. Pitzer ed., 1997).

in his wildly popular 1888 novel *Looking Backward*, citizens are inducted into the army of a corporatist state to which all contribute and from which all receive the necessities of life.²⁰ As communitarian values replace private interest, economic competition, social conflict, and adversarial processes are eliminated. Wise citizens take the place of judges and juries in deciding when and how to punish bad behavior, lawyers' services become superfluous, and law itself is discarded.²¹ As one character in the novel observes:

We have no such things as law schools. The law as a special science is obsolete. It was a system of casuistry which the elaborate artificiality of the old order of society absolutely required to interpret it, but only a few of the plainest and simplest legal maxims have any application to the existing state of the world. Everything touching the relations of men to one another is now simpler, beyond any comparison, than in your day. We should have no sort of use for the hair-splitting experts who presided and argued in your courts.²²

Bellamy's novel inspired a new political movement known as Nationalism, which comprised a network of grassroots organizations dedicated to creating a utopian society devoid of economic and social conflict, and led to the establishment of the Populist Party.²³

Many in the Nationalist movement had ties with Theosophy, a contemporary religious movement.²⁴ Theosophy was dedicated to "substituting universal brotherhood and cooperation for competition," and its leaders were initially captivated by Bellamy's seemingly similar social vision.²⁵ But the roots of Theosophy lay in spiritualism²⁶ and the elevation of "the divine spirit within" individ-

20. EDWARD BELLAMY, *LOOKING BACKWARD, 2000-1887* (1960). I am grateful to my colleague Barbara Babcock for bringing Bellamy's novel and the Nationalist movement to my attention. Babcock describes the movement (and its ties to Theosophy) in her biography of Clara Foltz. See Barbara Babcock (2003) (unpublished manuscript on file with author). Bellamy's novel was second only to Harriet Beecher Stowe's *Uncle Tom's Cabin* in number of copies sold. See John Hope Franklin, *Edward Bellamy and the Nationalist Movement*, 11 *NEW ENG. Q.* 739 (Dec. 1938); Elizabeth Sadler, *One Book's Influence: Edward Bellamy's Looking Backward*, 17 *NEW ENG. Q.* 530 (Dec. 1944).

21. BELLAMY, *supra* note 20, at 142.

22. *Id.*

23. Erich Fromm, *Preface to EDWARD BELLAMY, LOOKING BACKWARD, 2000-1887*, at vi (1960).

24. J. Gordon Melton, *The Theosophical Communities and Their Ideal of Universal Brotherhood*, in *AMERICA'S COMMUNAL UTOPIAS* 396 (Donald E. Pitzer ed., 1997).

25. *Id.* at 398.

26. *Id.* at 400.

uals, and their leaders eschewed social activism and politics.²⁷ As the Nationalist leaders turned increasingly to electoral politics and socialism to implement their ideals, the two movements parted company.²⁸

Few today remember the movement Bellamy's novel inspired. But the rhetoric of the modern dispute resolution movement echoes the longing for greater meaning in one's personal life that characterized Theosophy, the desire for social harmony that characterized Nationalism, and both of these earlier movements' beliefs that spirituality and harmony will be facilitated by the decline of formal law and adversarial processes.

III. THE COMMUNITY JUSTICE MOVEMENT: WRESTING POWER FROM THE COURTS

The modern history of alternative dispute resolution in the law has multiple strands, which have been woven together in a complex fashion over the past several decades. One strand has been termed the "community justice movement," which arose in the late 1960s and early 1970s as a part of the community empowerment movement.

The animating notion of the community justice movement is that formal legal institutions, including the courts, are mechanisms for maintaining the power of elite groups, allowing them to govern with impunity and to exploit the less powerful. These institutions impose dispute resolution norms that may be alien—or even harmful—to other members of the community. In addition, by monopolizing dispute resolution, formal legal institutions and their lawyer agents prevent community members (i.e., the non-elite) from learning how to master their own environments and ultimately, their own lives. To take control of their lives and communities, community justice advocates argue, people need to build grassroots justice institutions that apply community-based norms to disputes, and rely on community members to resolve disputes.²⁹

The community justice movement gained support when racial violence swept American cities in the 1960s, starkly illustrating the alienation and dis-empowerment of black Americans. The ideas associated with the community justice movement were consistent as well with the community/neighborhood empowerment ideology of

27. *Id.* at 399.

28. *Id.*

29. See, e.g., EDWARD W. SCHWERIN, *MEDIATION, CITIZEN EMPOWERMENT, AND TRANSFORMATIONAL POLITICS* (1995).

the Johnson administration's "war on poverty." But not all supporters of community-based justice were driven by leftist political ideology. Some envisaged community justice as a return to a time when religious institutions and village elders were primary sources of resolution of disputes within families and neighborhoods. Moreover, some left-oriented scholars—hearkening back to the same history but assessing it differently—opposed the rise of community justice institutions. To these scholars, "community justice" looked like an elite strategy for denying access to the public courts to less powerful members of the community who had only recently won legal remedies for infringements of their rights.³⁰

The most complete manifestations of community justice as empowerment and dispute resolution were the community boards established in San Francisco, which—as their name suggests—attempted to set up an alternative governance structure, including dispute resolution, at the local level.³¹ Most other communities adopted a more conservative vision, establishing community or neighborhood justice centers that provided neighborhood volunteers to resolve neighbor-to-neighbor and family disputes, but were not envisaged as alternative governance structures. Community justice centers were funded variously by the federal and local governments and national and local foundations that were seeking remedies for social violence.³²

From the first, community justice organizations adopted mediation and other conciliatory approaches, rather than adjudication, as their preferred mode of dispute resolution. While this may seem like an obvious decision for a movement aimed, in part, at a return to traditional modes of dispute resolution, it is worth noting, because while some traditional cultures rely on conciliatory dispute resolution processes, others use adjudicative processes.³³ The

30. RICHARD ABEL, *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* (1982); JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* (1983). For a more recent discussion of the disempowering potential of the dispute resolution movement, see Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

31. Raymond Shonholtz, *Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program*, in *THE POSSIBILITY OF POPULAR JUSTICE* (Sally Merry & Neal Milner eds., 1993).

32. Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282 (1993); Mark Hoffman, *Grants To Aid Study of Judicial Reforms*, BUS. INS., Apr. 11, 1988, at 14.

33. For example, although traditional Chinese culture is often perceived as embracing mediation, examination of historical records indicates that what was termed "conciliation" by the Chinese was often an adjudicative procedure admin-

adoption of mediation by community justice centers may have reflected a belief that mediation—often characterized by its supporters as antithetical to adversarial dispute resolution processes—was more likely to nurture positive relationships within the community. Because mediation leaves the power to decide a dispute in the disputants' hands, rather than relegating it to a third-party neutral, it may also have seemed consistent with the power-sharing ethos of some community justice activists. But reliance on mediation also may have reflected a recognition that community-based systems could only resolve disputes to the extent that disputants were willing to accept the outcomes of community processes.

Although rejection of formal legal norms was an aspect of the community justice movement, lawyers played significant roles in establishing and nurturing many neighborhood justice centers. And, in very short order, most neighborhood justice centers developed close working relationships with the courts that served their neighborhoods.³⁴ The genesis of these relationships suggests something interesting about Americans' preferences for dispute resolution. In most instances, neighborhood justice centers turned to courts for referrals of disputes because they discovered that fewer neighborhood residents sought out their services than they had anticipated. Indeed, some centers found that it was easier to find residents eager to be trained as mediators, than it was to find citizens who wanted the centers to mediate their disputes. The failure of neighborhood justice centers to generate large numbers of "clients" may have reflected barriers to dissemination of information about the centers' existence and what they offered; generally, these centers operated on shoe-string budgets and could not afford sophisticated marketing campaigns. Or the lack of large numbers of clients may have reflected a lack of understanding among neighbor and family disputants of the value of conciliatory dispute resolution processes, by comparison with litigation (or violence). But one study of disputes within a large urban community concluded that many citizens chose to take disputes to court, rather than to more informal dispute resolution institutions, because they valued public vindication of their

istered by local leaders who substituted informal social norms for formal legal rules of decision. See Xiaobing Xu, *Mediation in China and the United States: Toward Common Outcome* (2003) (unpublished J.S.D. dissertation, Stanford Law School) (on file with author). Moreover, even when Chinese third-party neutrals presided over a true mediation process, they often used the threat of formal adjudication as a means of exerting pressure on disputants to compromise. *Id.*

34. Even the San Francisco community boards' movement ultimately found itself dependent on the court for case referrals. See Shonholtz, *supra* note 31.

rights or positions.³⁵ Perhaps at least some of those who eschewed the services provided by neighborhood justice centers deliberately rejected conciliation shaped by informal norms, in favor of adjudication based on formal legal norms.³⁶

In any event, over time, many community justice centers settled into relationships with their local courts in which the courts referred “minor” disputes, including criminal complaints, to the centers for resolution. Courts viewed the referrals as a means of reducing the workload of court personnel. Some judges who saw the same disputants before them time and again also hoped that neighborhood-based mediators might be more successful than they themselves were in producing lasting resolutions. Others wanted mainly to get troublesome cases—what judges sometimes refer to as the “cats and dogs”—out of their courtrooms.

Some types of referrals generated criticism, as when instances of family violence were referred to neighborhood justice centers for mediation. Feminists and others argued that the informality of mediation facilitated manipulation of women who were prone to submit to their more powerful male partners, particularly if mediators adhering to strict interpretations of mediator neutrality refrained from intervening to protect less powerful disputants from more powerful adversaries.³⁷ Some neighborhood justice center leaders worried that courts were simply using their centers as palliative measures to correct funding shortfalls.³⁸

35. SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990); Sally Merry & Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

36. For a discussion of individuals' relative preferences for mediation, adjudication, and other forms of dispute resolution procedures, see Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (2002).

37. Similar concerns have been raised about mediation of divorce and child custody disputes. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991). Richard Delgado has discussed the dangers of informal dispute resolution for people of color. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985). For empirical data suggesting that Grillo's and Delgado's concerns may be warranted, see David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989), and Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996).

38. On the appropriateness of courts using mediation to resolve criminal charges, see Albert Alschuler, *Mediation with a Mugger: Concerning the Shortage*

Questions about the propriety of referring violations of public law or denials of rights to private dispute resolution centers, and concerns about the possibility that less powerful individuals might be too easily manipulated by informal dispute resolvers, continue to be raised within the context of the community justice movement. But over time, some neighborhood justice centers grew and flourished. How they actually affected communities or the people they served is largely unknown; there have been few empirical analyses of their consequences.³⁹ But neighborhood justice centers introduced courts in many jurisdictions to the idea that alternative forms of dispute resolution, offered privately outside the court system, might assist courts in dealing with their own caseloads and serve some disputants better than could the courts themselves.

IV. THE RISE OF COURT ADR: RATIONALIZING COURT SERVICES

As community justice centers were evolving outside the courts, a new movement was evolving *inside* the courts. To tell this part of the story, I need to digress a bit to provide some background on developments within United States courts. Through most of our history, American courts have not been tightly managed. Judges dealt with their assignments without much supervision from other judges, and, in civil cases, many judges relegated control over case development and case processing time to the lawyers. This orientation towards court management seemed consistent with our party-centered adversarial system, in which a judge's role is primarily to rule on issues that are presented to her by the parties' lawyers. After World War II, this *laissez-faire* judicial system came increasingly under attack. Critics argued that courts needed to adopt a more business-like approach to utilizing public resources, including judge time. A new field of court administration emerged that produced professional "court administrators" to assist judges in managing their calendars. Courts also began to experiment with different approaches to preparing cases for trial and expediting resolution.⁴⁰ Decreasing public expenditures for courts, combined with increas-

of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 HARV. L. REV. 1808 (1986).

39. The San Francisco community boards are the most prominent exception to this observation; data on that program was assembled over a period of many years, providing a basis for a comprehensive evaluation. See Shonholtz, *supra* note 31.

40. See, e.g., AM. BAR ASS'N, ATTACKING LITIGATION COSTS AND DELAY (1984); STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN U.S. DISTRICT COURTS (1977).

ing case filings—civil cases in the federal courts more than doubled from 1959 to 1976⁴¹—fueled the “court management” revolution in many jurisdictions.⁴²

In 1976, leaders of the judiciary and the bar sponsored a conference on the state of the justice system, modeled after a famous turn-of-the-(last)century conference on “the causes of public dissatisfaction with the justice system.”⁴³ Polling results presented at the 1976 conference indicated that most Americans knew very little about the state of the justice system, but that those who had the most experience—primarily as jury members, rather than as parties to lawsuits—were least confident in the courts. The poll did not query people about their views of adversarial process, or about their preferences for various types of dispute resolution, for example mediation versus arbitration or trial. But at the conference, Professor Frank Sander of Harvard Law School gave a speech in which he argued against a “one-size-fits-all” justice system, and in favor of courts that would provide a variety of dispute resolution techniques to citizens.⁴⁴ Professor Sander’s speech, which was later published, became the impetus for a movement to create what he later called a “multi-door courthouse,” that would offer disputants different forms of dispute resolution from which to choose.⁴⁵ The goal, Sander said in later talks, should be to “let the forum fit the fuss.”

At the time of Sander’s speech, most civil lawsuits were already being resolved without trial. In 1976, less than ten percent of civil lawsuits filed in federal court reached trial and more than one-third were resolved or dropped with no interaction with a judge at all.⁴⁶ Some urban state courts with large civil caseloads had been encouraging lawyers to settle civil cases for decades, in an effort to save the court and the parties time and money.⁴⁷ In these courts, judges would use conferences with attorneys that had been scheduled to discuss the attorneys’ trial plans as an opportunity to en-

41. TERENCE DUNGWORTH & NICHOLAS PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 7 (1990).

42. WOLF HEYDERBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (1990).

43. See *supra* note 1 and accompanying text.

44. Sander, *supra* note 1.

45. *Id.* See also Maurice Rosenberg, Let the Tribunal Fit the Case, Address Before the American Association of Law Schools (Dec. 28, 1977), in 80 F.R.D. 147 (1977).

46. DUNGWORTH & PACE, *supra* note 41, at 29.

47. For example, Los Angeles had an active settlement program in the 1930s. See MOLLY SELVIN & PATRICIA EBENER, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT (1984).

courage or facilitate settlement. In some jurisdictions, such conferences were mandatory. But, in most jurisdictions, whether a judge would engage in settlement discussions or not was left to individual judges. Some judges had local reputations as “good settlers,” but just what they did in their meetings with the attorneys was unclear. Anecdotal reports suggest that settlement judges helped attorneys (and indirectly, the attorneys’ clients) evaluate the likely outcome if their case went to trial, and assisted the attorneys in negotiating a compromise between offers and demands. By evincing skepticism about the value of trying the case before them, some judges also may have signaled that attorneys who resisted settling would face obstacles at trial. Today, some judges and practitioners describe settlement conferences as “mediation,” but others view them as a different form of conciliation, aimed at finding a compromise between parties’ positions rather than finding an interest-based resolution of parties’ disputes.⁴⁸

Unless they significantly reduce the rate of trials, settlement conferences can have little effect on the courts’ workload, which is positively correlated with the proportion of cases that are tried. In 1964, a groundbreaking empirical analysis was published showing that judicial settlement conferences had no effect on trial rates,⁴⁹ a finding that was confirmed by later research.⁵⁰ Nonetheless, judicial settlement programs proliferated,⁵¹ and new judges were in-

48. The notion that such settlement is equivalent to mediation is an anathema to many mediation practitioners and scholars. See, e.g., Kimberlee Kovach & Lela Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERN. TO HIGH COST LITIG. 31 (1996). But see Joshua Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

49. MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964). Rosenberg’s work was one of the first empirical analyses of court processes to adopt an experimental design that permitted the analysts to compare the results of similar cases, some of which had been randomly assigned to a pretrial conference and some of which had not. *Id.* The results showed no statistical difference in settlement rates between the two groups of cases. *Id.*

50. THOMAS CHURCH ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

51. Just why settlement programs became so popular, given the lack of empirical evidence of their effectiveness, is somewhat puzzling. I suspect that when judges observed cases settling after the judge had met with the attorneys—perhaps even along the lines that the judge had suggested—it was hard for the judges *not* to believe that they had played a role in the process. That other cases in which the judges had not intervened were settling at the same rate was less salient (and perhaps even not known) to the judges. Only an experimental design such as Rosenberg’s could test the hypothesis that settlement conferences increased settlement rates, and there was then, as now, little understanding or use of such techniques in the legal system.

creasingly encouraged to settle cases and sometimes received formal training in how to do so.⁵²

Sander's 1976 speech had provided a benign context for promoting judicial settlement; it was simply one of a variety of ways to resolve disputes, each of which might be more or less appropriate for a particular lawsuit, depending on the circumstances.⁵³ But as more judges began to speak and write about their settlement efforts, they drew the attention of legal scholars who viewed these efforts more negatively. These scholars worried not only that judges' neutrality could be compromised by their attempts to promote settlement,⁵⁴ but that the settlement movement would disadvantage less powerful litigants, particularly minority group members,⁵⁵ and erode the public values inherent in formal adjudication.⁵⁶ Rather than providing more options for disputants, the critics saw Sander's movement as transforming the very foundation of the civil justice system.

The judicial settlement conference was not the only device available to courts interested in implementing Sander's vision. In the 1950s, Pennsylvania trial courts adopted an alternative to trial for civil cases that did not involve judges at all. Under this procedure, which was first adopted in Philadelphia and later spread statewide, the court *required* civil disputants whose cases involved modest amounts of money (but more money than a "small claims" case) to attempt to resolve their disputes through an arbitration-like process. Cases would be referred to arbitration just a few months after they were filed in court.

Court arbitration was not conceived as a conciliatory process. Rather, it took the form of a streamlined adjudication, with relaxed rules of evidence and a non-binding outcome. Like judicial settlement conferences, the purpose was to save the court and parties' time and money. The parties' lawyers would present their clients' cases in a brief and informal hearing to a panel of three arbitrators.

52. For a description of the transformation of federal judging from adjudication to case management and dispute resolution, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

53. See Sanders, *supra* note 1.

54. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

55. See Richard Delgado et al., *supra* note 37.

56. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); see also Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 212 (1995) [hereinafter Resnik, *Many Doors*].

The arbitrators were lawyers who had been appointed by the court and who received a modest honorarium for their time, which was paid from public funds. At the arbitration hearing, the parties themselves would usually testify, but they were not required to bring other witnesses. Instead, the lawyers would provide written evidence—medical records, affidavits, etc.—to support their clients' positions. As a result, the hearings were usually very brief, less than an hour on average. After the hearing, the arbitrators would immediately confer among themselves and reach a decision in favor of the plaintiff or defendant; if they found for the plaintiff, they would also decide damages. The arbitrators delivered their decision in writing, but did not provide an explanation for it. (Delivering a decision without findings of fact or law is traditional in binding contractual arbitration, on which this non-binding process was modeled.)

Arbitrators in Pennsylvania were expected to dispense “rough justice.” As one arbitrator interviewed in a study of Pittsburgh's court arbitration program said: “Occasionally . . . I've heard a case where the equities were clearly all on one side, but not necessarily the law. Then we [the arbitrators] might say: ‘Let's be *fair* here! If anyone wants to appeal, the judge can be *legal*.’”⁵⁷ Hence, court arbitration—at least in this jurisdiction—might be regarded as a form of “community justice,” in which the outcomes meted out conformed to informal norms. But rather than the norms being articulated and interpreted by community members, they were interpreted by lawyers selected to serve as arbitrators by judges.

After they received the arbitrators' decision, the parties had a brief time to decide whether to accept it; if not, they would request a trial, pay a modest fee to reimburse the court for the arbitrators' honoraria, and the case would go back on the regular court calendar. A decision that was accepted was recorded formally and was legally enforceable. In Pittsburgh, litigants could complete this process in less than six months.⁵⁸ By comparison to judicial settlement conferences, the process did not require as much judge time (because the arbitrators were lawyers rather than sitting judges), and it did not raise concerns about judicial neutrality (because if a case proceeded to trial after arbitration, the case would be tried *de novo* and the judge would not be informed of the arbitrators' decision).

By the 1970s, this method of dispute resolution—variously termed “mandatory non-binding arbitration,” “court-annexed arbi-

57. JANE ADLER ET AL., *SIMPLE JUSTICE* 14 (1983).

58. *Id.*

tration,” or, in California, “judicial arbitration”—had spread to other states, and a few federal courts also tried it out.⁵⁹ After Sander’s speech at the Pound Conference, judges and lawyers began referring to these arbitration programs and judicial settlement conferences as “alternative dispute resolution,” or “ADR.”

Jurisdictions that adopted mandatory non-binding arbitration hoped to reduce the time required to resolve civil cases involving smaller amounts of money. By removing these cases from the judges’ calendars, they also hoped to make judges more available for deciding larger cases. They expected that the net effect would be to reduce the average costs and time required to process civil lawsuits. In other words, the objectives of court arbitration were similar to the objectives of judicial settlement: saving time and money.

However, researchers who conducted empirical studies of court arbitration beginning in the 1980s found that the programs were achieving something rather different from what the courts had anticipated. In most instances, the programs did not save time or money. To achieve such savings, the programs would have had to divert cases from trial, the most expensive and time-consuming part of the litigation process. But most cases that participated in court arbitration would have settled before trial. Remember that by 1976 less than ten percent of civil cases in federal courts were being tried, and even smaller percentages were reaching trial in many state courts. Rather than diverting cases from trial, what court arbitration was actually doing was providing a different means of settling a case—a procedure that, unlike negotiation between the lawyers or judge-run settlement conferences, included an evidentiary hearing in which the parties participated. Court-connected arbitration generally did not cut time to disposition because cases that would have settled very early in the litigation process absent arbitration tended to delay disposition until the hearing (or afterwards). Court-connected arbitration also generally did not save litigants money because lawyers tended to charge just about as much for resolving a case with arbitration as they did for settling a case without arbitration, but in either event, the litigants were spared the cost and time associated with trial.⁶⁰

59. E. ALLAN LIND & JOHN SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1983). The features of court arbitration varied somewhat from jurisdiction to jurisdiction. See ELIZABETH ROLPH, *INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER’S GUIDE* (1984).

60. See E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT*

The researchers also discovered that parties whose cases were arbitrated felt that they had been treated more fairly than parties whose cases were resolved through simple lawyer-to-lawyer negotiation or judicial settlement processes.⁶¹ To the litigants, arbitration looked more like trial than settlement, and they preferred arbitration *and* trial to settlement. The empirical research on perceived fairness of court-connected arbitration confounded critics who had opposed the institution of such programs as “second class justice” intended for second-class citizens: individuals with small-value claims.⁶² But the research findings were consistent with a long line of psychological research—dubbed “procedural justice” or “procedural fairness” research—exploring the bases for lay citizens’ assessments of dispute resolution procedures.⁶³

As research demonstrating that ordinary citizens felt good about court arbitration programs mounted, state legislatures began to authorize or mandate non-binding arbitration programs in some or all of their courts. Although there was no evidence that the pro-

(1990); Robert MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. (1991). For a review of the empirical research on court-connected arbitration, see Deborah Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399 (1990).

61. E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (1989); E. Allan Lind et al., *In the Eyes of the Beholder: Tort Litigants’ Evaluations of their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953 (1990).

62. Diane Wood, *Court Annexed Arbitration: The Wrong Cure*, 1990 U. CHI. LEGAL F. 432, 435 (1990); Sharon A. Jennings, Note, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or “Second Class” Justice?*, 6 OHIO ST. J. ON DISP. RESOL. 313 (1991).

63. “Procedural justice” scholars have found that individuals use fairness standards to evaluate both the outcomes of dispute resolution processes and the procedures that yield those outcomes, and that they evaluate these two dimensions separately. Individuals who believe that both the process they encountered and the outcomes they received were fair are most satisfied with dispute resolution procedures, but those who believe the process was fair and the outcomes were *unfair* are almost as satisfied. (Such individuals may explain the outcomes as resulting from honest errors or ignorance on the part of the third-party decision-maker.) A variety of explanations have been put forward to explain the power of procedural justice in shaping assessments of dispute resolution, including the importance to one’s self-esteem of being treated fairly by authoritative individuals and institutions (the “relational” theory), and the possibility that lay individuals use their assessment of process fairness to help them assess ambiguous outcomes (the “fairness heuristic” theory). See, *inter alia*, E. ALLAN LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (M. Zanna ed., 1992); K. Van de Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034 (1997).

grams were saving courts or parties money, they did seem to provide something those parties valued—"a day in court"—at a price that courts and parties could afford to pay. Because court arbitrators were essentially contributing their time *pro bono*, the costs to hear cases were minimal. In some jurisdictions, a large fraction of cases that were arbitrated were resolved on the basis of the arbitrators' awards; in others, the awards mainly seem to have provided a benchmark for settlements that occurred sometime after the hearing. By the mid-1980s, court arbitration looked like it was firmly ensconced as a component of the multi-door courthouse. About half the states had adopted some form of court arbitration, and about twenty federal district courts also had such programs.

A second piece of the multi-door courthouse that fell into place during the 1980s was mediation of child custody cases.⁶⁴ As divorce rates increased, family counselors and other therapists urged policy-makers to adopt conciliatory processes to decide child custody. Movies like *Kramer v. Kramer*⁶⁵ that dramatized the negative effects on children of adversarial processes helped build support for family mediation. Many states adopted policies that required divorcing parents to meet with counselors to attempt to work out financial and custody plans, which were then presented to the court for approval. In some jurisdictions, counselors would provide advisory opinions to the judges who presided over custody cases. Family mediation practitioners included counseling psychologists and lawyers in family practice who were drawn to less adversarial approaches for resolving family disputes.

While some courts look to mediation to process child custody cases more quickly and cheaply than the courts alone could do, family law mediation programs do not seem to depend solely on such efficiency claims for their existence. This may be a good thing; empirical research on family law mediation shows at best mixed results with regard to time and cost savings.⁶⁶ But there is also remarkably little research on whether the programs serve *children* better—that is, whether the children of divorced parents are better

64. As I am not as familiar with the history of family law mediation as I am with ADR procedures designed for civil money suits, I offer only a brief summary here. For an overview of the field, see *DIVORCE MEDIATION: THEORY AND PRACTICE* (Jay Folberg et al. eds., 1988).

65. *KRAMER V. KRAMER* (Columbia Pictures 1979).

66. For evidence that mediation costs about ten percent less than conventional litigation, see Maryann Koch & Carol Lowery, *Evaluation of Mediation as an Alternative to Divorce Litigation*, 15 *PROF. PSYCHOL. RES. & PRAC.* 109 (1984).

off when custody disputes were mediated, rather than negotiated or tried to a conclusion.⁶⁷

During the 1980s, some courts adopted variations on mediation and arbitration for special sub-sets of disputes, or offered a menu of options that all disputants could choose among, including “mini-trials,” “summary jury trials,” and “early neutral evaluation.” By the end of the 1980s, while only a few courts had formally adopted the “multi-door” concept, many more seemed to be proceeding along the path towards Sander’s objective.⁶⁸

V. THE BUSINESS COMMUNITY JOINS THE ADR MOVEMENT: GETTING TO YES AND GETTING RID OF JURIES

During the 1980s, changes were also occurring in the business community that would prove important to the evolution of dispute resolution in the legal world. Like the courts that had adopted judicial settlement programs long before “ADR” became a buzzword, American businesses had long experience with one particular alternative to court resolution: binding arbitration. For decades, businesses had relied on arbitration to resolve certain classes of disputes. By including an arbitration clause in a business contract, manufacturers, suppliers, and buyers could establish the rules by which disputes among themselves would be decided, could select who would decide the suits, and could ensure that the outcomes of a dispute resolution would be binding—and generally not subject to appeal. This form of dispute resolution was particularly attractive to sectors of industry, such as the diamond industry, in which special business norms that businesses preferred to prevailing legal

67. *But see* Muriel Brotsky et al., *Joint Custody Through Mediation: A Longitudinal Assessment of the Children*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* (Jay Folberg et al. eds., 1988); Peter Dillon & Robert Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-term Effects*, 66 *AM. J. ORTHOPSYCHIATRY* 131 (1996); Katherine Kitzmann & Robert Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 *J. FAM. PSYCHOL.* 150 (1994); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* (Jay Folberg et al. eds., 1988). Although the attractions of mediating child custody disputes seem overwhelmingly obvious to many, family law mediation programs have attracted criticism from feminists who fear that women will find it harder than men to assert their rights in informal, conciliatory sessions. *See, e.g.*, Grillo, *supra* note 37.

68. On the spread of court-mandated ADR, see Lucy Katz, *Compulsory Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 *J. OF DISP. RESOL.* 1 (1993); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR,”* 19 *FLA. ST. U. L. REV.* 1 (1991); Resnik, *Many Doors*, *supra* note 56; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 *SMU L. REV.* 2079 (1993).

norms had evolved over time,⁶⁹ and sectors, such as the construction industry, in which many conflicts implicated technical judgment, so that specialist decision makers were preferable to generalist judges. Businesses could turn to a myriad of organizations for administration of arbitration, referrals to arbitrators, and rule drafting.

By the 1980s, tens of thousands of disputes were being arbitrated annually. But many business decision makers were critical of arbitration. Some complained that arbitrating disputes took just as long and cost just as much as it would have if these disputes had been taken to court. They said that lawyers were simply importing the same practices that they had learned for litigation, including discovery, to the arbitration forum. Other critics complained that arbitrators were too prone to reach “split the baby” decisions—to compromise outcomes—rather than to decide disputes on the merits. These complaints were persistent, but not new. No one actually had done any empirical research on the outcomes of binding arbitration (outside the labor management field), so no one was certain if and when arbitration was beneficial *vis-à-vis* court resolution.

But one thing that was clear was that arbitration produced distributive outcomes, that is decisions that declared one person the “loser” and the other the “victor” on some or all points in dispute.⁷⁰ A new book, published in 1981, urged business decision makers, lawyers, and others to look beyond distributive bargaining to find “win-win” resolutions that would better serve *all* parties to disputes.⁷¹ The authors argued that “interest-based” or “integrative” negotiation not only had the potential to maximize the joint gains to disputants from resolving their disagreements, but also held out more hope of preserving the relationship between the parties than would a hard-fought adversarial battle.⁷²

Of course, I am talking about Roger Fisher and William Ury’s book, *Getting to Yes*.⁷³ Fisher and Ury’s book dealt with negotiation, but it provided a framework for mediating disputes that was

69. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

70. For a discussion of distributive resolution of legal disputes, see Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

71. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

72. For a discussion of integrative negotiation of legal disputes, see ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

73. FISHER & URY, *supra* note 71.

soon taken up by the business community.⁷⁴ Like the Pennsylvania court arbitrators, mediation advocates in the business community had something in common with the community justice advocates of the 1970s and with the utopian Nationalists of the early twentieth century. Among their goals were the substitution of practical problem-solving norms—that is, “grassroots” business beliefs—for formal legal norms, and transferring power over dispute resolution from lawyers to business people themselves. Stories about how business decision makers seized the dispute resolution initiative from their lawyers and reached “win-win” solutions that led to new joint business ventures were centerpieces of business writing about dispute resolution in the 1980s.⁷⁵

Business decision makers and their advisors also urged their lawyers to make more use of mediation in resolving legal disputes. Mediation increasingly appeared on the agenda of business litigation conferences; some lawyers began to advertise their services as mediators in complex business disputes. Mediation training, offered by non-lawyers and lawyers, became more widely available. Some lawyers began to draft contract clauses that called for mediation instead of or in addition to arbitration.⁷⁶ The American Arbitration Association, the oldest and most consistent proponent of arbitrating disputes, began to offer mediation as an alternative to its traditional fare.

Enthusiasm for mediation may have been spurred as well by a series of federal and state court decisions handed down during the

74. *Id.*

75. See, e.g., James F. Henry, *Built-in Protection Against Litigation Blues*, WALL ST. J., July 22, 1991, at A8.

76. Because there are no comprehensive statistics on cases that use alternative dispute resolution mechanisms in the private sector, the relative popularity of arbitration and mediation is currently unknown. A 1990s RAND Institute for Civil Justice study of the private ADR market in Los Angeles County found that fifty-eight percent of disputes processed by private ADR providers were arbitrated, twenty-two percent were mediated and the remainder were handled with a mix of “private judging” and what the authors termed “voluntary settlement conferences.” See ELIZABETH ROLPH ET AL., *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* (1994). A survey of 528 Fortune 1000 corporations conducted in 1996 by the Cornell/PERC Institute on Conflict Resolution found that seventy-eight percent reported having used arbitration and eighty-seven percent reported having used mediation; more than sixty percent said they generally included mediation clauses in contracts, while eighty-two percent said they included arbitration clauses. See Thomas Donahue & Barbara Reinhardt, *Survey: ADR Use Increasing*, 15 ALTERN. HIGH COSTS OF LITIG. 66, 75 (1997). See also, Gregory Higgins & William O’Connell, *Mediation, Arbitration Square Off*, NAT’L L. J., March 24, 1997, at B18 (suggesting that “smaller dollar” disputes are more amenable to mediation than “larger, more complex” matters “over which no party is willing to compromise”).

1990s that significantly increased the risks of arbitration for litigants.⁷⁷ Prior to these decisions, parties who were unhappy with their agreement to arbitrate or with the outcomes of an arbitration proceeding had some room for wriggling out of the agreement or challenging an outcome. Subsequently, arbitration agreements were more rigidly enforceable. Attempting to work out a mutually agreeable resolution of a dispute with the help of a mediator, with recourse to the court in the case of failure, seemed more attractive to many business decision makers and their lawyers than this more rigid interpretation of arbitration. “Finality,” often cited as binding arbitration’s most attractive feature, looked less attractive when an outcome could not be challenged except in rare circumstances of outright corruption.

Businesses did not turn away from arbitration entirely, however. In many sectors where arbitration has long been the norm, it continues to be the norm today. Moreover, businesses have enthusiastically embraced arbitration for disputes between them and *individual consumers* and between management and its *employees*—a move that was also authorized by the court decisions of the 1980s and 1990s.⁷⁸ Today, an increasing number of consumer transactions and workplace disputes are governed by arbitration agreements that require consumers and workers to waive their rights to a legal remedy if a dispute arises as the result of the transaction.⁷⁹ These agreements, according to whose terms consumers may have little influence over arbitrator selection or arbitration rules, are generating increasing controversy. One does not have to be too much of a cynic to believe that at least some business decisions to impose binding arbitration have been driven not simply by desires to reduce the time and costs associated with conflicts, but also by desires to maximize desirable outcomes for the business—the drafting

77. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Advanced Micro Devices, Inc. v. Intel Corp.*, 36 Cal. Rptr. 2d 581 (Cal. 1994); *Moncharsh v. Heily & Blasé*, 832 P.2d 899 (Cal. 1992); *Lee v. Tech. Integration Group*, 82 Cal. Rptr. 2d 387 (Cal. Ct. App. 1999); *Moore v. First Bank of San Luis Obispo*, 80 Cal. Rptr. 2d 475 (Cal. Ct. App. 1998); *Amgen, Inc. v. Ortho Pharm. Corp.*, 708 N.E.2d 385 (Ill. App. Ct. 1999). But see *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998); *Prudential v. Lai*, 42 F.3d 1299 (9th Cir. 1994); *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997).

78. Katherine Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Katherine Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

79. See Linda Demaine & Deborah Hensler, *Consumer Arbitration Contracts: What the “Average Joe” Knows About His Choices*, LAW & CONTEMP. PROBS. (forthcoming 2003).

party. Whatever else arbitration contracts achieve, they preclude plaintiffs from taking cases to juries, which many business decision makers believe are prejudiced against them. Moreover, some consumer contract clauses now require consumers to waive their right to become a party to a class action, as well as to bring individual litigation. Forestalling class litigation in many instances is tantamount to eliminating disputes altogether.

VI. MEDIATION OF CIVIL MONEY LAWSUITS MOVES INTO THE COURTS

During the 1990s, courts seeking methods for reducing trial court caseloads and speeding civil case disposition turned increasingly to mediation, viewing it not just as a technique for resolving child custody disputes, but as an approach to resolving all kinds of civil lawsuits over money. The generally positive reception accorded non-binding arbitration programs may have encouraged courts to pursue other dispute resolution alternatives. Moreover, as some courts recognized that non-binding arbitration was not producing the sort of caseload reduction they had hoped for, it made sense to explore other possible alternatives.

Courts' attention was drawn to mediation by business defendants (who are well represented on bench and bar committees), by commercial litigators who had acquired experience with mediation, and by lawyers who had been trained as mediators and were looking for new domains in which to market their skills. As had been the case with neighborhood justice centers, some newly trained mediators were finding it difficult to identify enough dispute business to support their practices, and also like the neighborhood justice centers, they saw the courts as a source of referrals.

As had been true with court arbitration, court mediation was promoted as a means of reducing time and costs to resolve civil disputes.⁸⁰ Many mediation advocates were not familiar with the empirical studies that had found little support for the proposition that court arbitration saves time or money. But those aware of the studies were persuaded that mediation would produce more significant consequences, because it offered something fundamentally different to litigants—that is, the possibility of an integrative resolution of their conflict. (Recall that court arbitration, like bind-

80. For example, the Civil Justice Reform Act of 1990 urged courts to adopt alternative dispute resolution as one of the means to reducing costs and time to disposition of civil cases in the federal court. *See* JAMES KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1997).

ing arbitration, is intended to deliver a “win-lose” distributive outcome.)

By the mid-1990s, more than half of state courts, and virtually all of the federal district courts, had adopted mediation programs for large categories of civil suits.⁸¹ Because many courts had observed that disputants would not engage in other forms of court ADR voluntarily, some courts required parties to mediate their disputes—over the objections of some mediators who protested that volunteering was essential to mediation. As was the case with mandatory non-binding court arbitration, courts permitted litigants who could not reach a mutually acceptable resolution of their dispute through mediation to return their cases to the regular trial calendar.

Although courts embraced mediation out of the same concerns that had earlier led them to adopt non-binding arbitration programs, there were some important differences between mediation and arbitration rules and practices. Whereas many jurisdictions had restricted the use of non-binding court arbitration to suits over small amounts of money, many mediation programs applied to a broad range of civil lawsuits, including lawsuits for large amounts of money and over complex matters, such as medical malpractice. Many court arbitration program rules required that the court (a judge or bench-and-bar committee) appoint arbitrators with significant experience or specialized expertise to a panel from which judges would assign arbitrators randomly to cases, or from which parties could choose one or a few arbitrators to resolve their dispute. But courts’ mediation rules generally did not require the courts to vet mediators’ experience or expertise, and judges generally left selection of mediators entirely to the parties’ lawyers.⁸²

Some states do certify mediators who have completed a required number of training hours; in other jurisdictions, courts may publish rosters of lawyers who have indicated an interest in mediating. In either case, parties are not bound to use these mediators.⁸³

81. See ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1996).

82. However, there are anecdotal reports that some judges in some jurisdictions do direct attorneys and their clients to particular mediation services. Such a practice may present a conflict of interest if the judge is nearing retirement and contemplating joining that mediation provider.

83. The State of Florida, which has one of the most comprehensive mediation statutes in the country, provides, by court rule, for training and certification of mediators. The Florida Supreme Court publishes a list of certified circuit court (trial court of general jurisdiction) mediators, and has appointed a Mediation Training Review Board, charged with enforcing standards. See FLA. DISPUTE

Most legislatively adopted court arbitration programs establish usually modest fees for arbitrators, which in some jurisdictions are paid out of public funds and in others are split by the parties. Mediators who mediate cases in court mediation programs usually are free to set their own fees, which are constrained by the market and are generally considerably higher, on a per case basis, than arbitrators' fees in the same markets.⁸⁴ Perhaps because court arbitrators need to meet selection criteria or because they could earn at best modest honoraria, most court arbitrators are lawyers who arbitrate a few cases a year and consider their participation in the arbitration program a professional responsibility. In contrast, most court mediators are lawyers or retired judges, many of whom hope that mediation programs will provide sufficient numbers of cases to generate significant income.

The rules governing arbitration and mediation processes and outcomes differ as well. Court arbitration programs yield outcomes that become enforceable judgments if the parties accept them and, unless sealed, are open to public scrutiny. Mediation programs yield outcomes that are private settlements, reached in private meetings. In many jurisdictions, the parties, lawyers, and mediators are bound by law to keep whatever transpired during the mediation confidential. No special confidential provisions pertain to court arbitration programs; parties are free to discuss witnesses' testimony, material entered into evidence, arbitrators' demeanor and management of the process, and the ultimate outcomes.

Over time, court arbitration programs have withered away, and today mediation, on a voluntary or mandatory basis, dominates the "multi-door courthouse."⁸⁵ The consequence of the widespread adoption by legislatures and court rule of civil case mediation has been the development and growth of a new and largely unregulated industry that operates—by design—behind closed doors. That parties should be free, in most circumstances, to negotiate privately and to keep any agreements reached confidential is neither a new concept nor does it pertain solely to mediation. As I have discussed, one of the attractions of traditional contract-based arbitration is privacy, and courts in the past couple of decades have

RESOL. CENTER, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM (1995); FLA. DISPUTE RESOL. CENTER, THE RESOLUTION REPORT (1996).

84. But in some jurisdictions, courts expect practitioners to serve as court mediators *pro bono*. See, e.g., CAL. ST. TRIAL CT. R. 1640.3(d) ("In courts authorized to make voluntary referrals to mediation, as a condition for inclusion on the court's panel, each court shall require that mediators agree to serve on a pro bono or reduced-fee basis in at least one case per year, if requested by the court.").

85. See PLAPINGER & STIENSTRA, *supra* note 81.

rigorously protected parties' rights to contract for arbitration. But the notion that courts might *order* parties—as a condition for seeking access to the courtroom—to use a private process, run by private providers, in circumstances that impede public scrutiny *is* new.

I hasten to say that I do not believe there is a deep plot here to deprive people of procedural rights. Most of the differences between court arbitration and court mediation programs appear to be happenstance. Legislatures that adopt ADR programs by statute rarely engage in a close comparison of their features, uses, or consequences. Indeed, some legislators (and many lawyers) have only the haziest of notions about the differences among ADR procedures.⁸⁶ But other factors may have played a role as well. As I have discussed, court arbitration programs were often adopted in the face of opposition from critics who feared they would provide “second class justice.”⁸⁷ Perhaps as a result, courts maintained considerable control over arbitrator selection and practice. In contrast, most mediation programs have met with little opposition. Mediation and other conciliatory techniques are widely perceived to be “good”—by comparison with litigation. And it is understood that if the parties cannot agree on a resolution in mediation, they can return to the court. (Of course, that is also true of court arbitration programs, which are non-binding in every jurisdiction that adopted them.) Perhaps as a result, legislatures and courts do not feel that they need to regulate mediation or mediators closely.

Much is still to be learned about these new court mediation programs. The evidence to date indicates that they, like the earlier judicial settlement and arbitration programs, produce little in the way of time or cost savings.⁸⁸ We know virtually nothing about the outcomes of mediation programs, about whether they change the distribution of power between the “haves” and “have nots.”⁸⁹ We

86. For an example of the tendency—even among noted scholars—to lump all ADR procedures together, see Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995).

87. See, e.g., Wood, *supra* note 62.

88. See, e.g., JAMES KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1997). For a review of empirical research on court mediation of civil money disputes, see Deborah Hensler, *In Search of “Good Mediation”: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW (Joseph Sanders & V. Lee Hamilton eds., 2000).

89. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Some empirical data suggests that minority group members fare less well in mediation than white non-Hispanic parties, even when the mediator is herself a minority group member. See LaFree & Rack, *supra* note 37. But whether the difference in outcomes observed

have no idea whether mediation helps to open the courts to disputants of lesser means or those with “less important” claims, whether it has the effect of shunting them aside, or whether court mediation programs have no effect on access to courts at all. As with arbitration programs, litigants appear to be quite satisfied with court mediation. But we have yet to see the kind of detailed analysis of individuals’ assessments of the procedural features of mediation that has been performed for court arbitration. The assumption of practitioners and scholars alike is that litigants’ perceptions of the fairness of mediation procedures are at least as positive—practitioners might argue more positive—as their perceptions of the fairness of court arbitration.⁹⁰ But this hypothesis has yet to be tested either in the laboratory or in the field. And evidence from prior studies that litigants prefer trial and court arbitration to judicial settlement conferences⁹¹ suggests that the assumption of a general preference for mediation over adjudication may prove wrong.⁹²

VII. NEW PERSPECTIVES ON MEDIATION: TRANSFORMATION AND TRANSCENDENCE

As mediation’s popularity grew outside and within the court, so did debate within the practitioner community about what mediation really is.⁹³ Some practitioners saw the term as capacious enough to include all forms of third-party assistance in resolving disputes, including having a neutral “evaluate” what the likely outcome of the case would be at trial (which could then serve as a basis for negotiating a settlement). For example, an evaluative mediator

for mediation is different from the difference that might be observed for traditional litigation is unknown.

90. Recall that litigants’ perceptions of the fairness of court arbitration procedures are virtually undistinguishable from their perceptions of the fairness of trials, both of which are regarded as very fair. See E. Allan Lind et al., *In the Eyes of the Beholder: Tort Litigants’ Evaluations of their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953 (1990).

91. *Id.*

92. For a discussion of psychological research on dispute resolution procedural preferences, see Hensler, *supra* note 36.

93. The early social science literature on mediation is replete with analytic typologies for sorting mediator styles and tactics. See, e.g., DEBORAH KOLB, *THE MEDIATORS* (1983) (distinguishing “orchestrators” and “deal makers” among labor mediators); Kenneth Kressel & Dean Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179, 188-95 (1983) (proposing a two-dimensional grid for sorting mediators by their degree of assertiveness and the distribution of their “interventions” into “reflexive” (self-referential), “contextual” (relational), and “substantive” (outcome-oriented) categories); Debra Shapiro et al., *Mediator Behavior and the Outcome of Mediation*, 41 J. SOC. ISSUES 101, 109 (1983) (finding labor mediators’ styles can be distinguished as “deal making” versus “shuttle diplomacy,” and that most mediators adopt styles tailored for the dispute at hand).

(like a settlement judge) might suggest that an acceptable resolution of a lawsuit would lie within a monetary range dictated by the (perceived) relative strength (legally and factually) of the parties' claims. Other practitioners argued that the only "true" form of mediation is "facilitative" mediation.⁹⁴ A facilitative mediator would help disputants search for a resolution that reflected their underlying interests and maximized joint gains. A facilitative mediator would not suggest what the resolution *ought* to be. But a facilitative mediator might suggest that the parties should put aside notions of legal rights and remedies ("rights talk") and reconceptualize their dispute as a *problem* that would be best to solve and then move on.

Then, in 1994 a book appeared that set off a new round of debate about the proper objectives of mediation, and the proper role of mediators. In *The Promise of Mediation*, authors Robert Baruch Bush and Joseph Folger argued that the true purpose of mediation is to help individuals gain a better understanding of each other and themselves.⁹⁵ Mediation, they wrote, should be *neither* evaluative nor facilitative, but rather "transformative."⁹⁶ Whether or not the dispute that brings parties together with a mediator is resolved is less important than the individuals' gaining new understanding, new skills for dealing with problems that may arise in the future, and an enhanced sense of control over their lives. In its emphasis on empowerment, transformative mediation echoes the credo of community justice advocates of the 1960s and 1970s. But the new ideology is centered on *self*-empowerment, rather than on group empowerment. Disputants learn to take control of their lives, not control of society.⁹⁷

Among the many unexplored aspects of mediation is the motivation of those who have flocked so eagerly to its practice. Clearly, many of the lawyers who have moved into the field are searching for a new revenue-producing line of practice.⁹⁸ But others are at-

94. For an overview of this debate, see Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Leonard Riskin, *Mediation Quandaries*, 24 FLA. ST. U. L. REV. 1007 (1997); Stulberg, *supra* note 48.

95. ROBERT BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

96. *Id.*

97. Transformative mediation also shares the therapeutic perspective that characterizes some forms of family mediation.

98. Indeed, if mediation did reduce legal fees and thereby reduced revenues from client representation, this might provide an incentive for litigators who experienced such losses to seek out new lines of practice.

tracted by the promises mediation holds out for particular clients and particular types of disputes. Business lawyers are attracted by the “problem-solving” perspective of mediation, which many believe is particularly well suited to contract disputes. Family law specialists believe mediation is more likely to help preserve relationships between divorcing parents that are important to children’s future welfare. Still others see mediation as especially helpful in resolving the complex, multi-dimensional, multi-party conflicts that are characteristic of environmental and land use disputes, and in designing forward-looking remedies in class actions aimed at institutional reform. Over time, lawyers appear to have become increasingly positive about the use of mediation to resolve lawsuits.⁹⁹

Whatever their specialties, some lawyers see in mediation an opportunity to do something that they *themselves* find more personally fulfilling than litigation. Seemingly, for some lawyers, mediation is a transformative experience. Some mediators talk about the “magic” of resolving disputes. Others talk of their experience much as athletes do, saying they have a feeling of being “in the zone” when a mediation session is progressing satisfactorily. Still others talk of the connection between mediation and spirituality.¹⁰⁰ Some mediation education programs include sessions on “mindfulness” and meditation.¹⁰¹ A recent meeting of the Northern California Association for Dispute Resolution featured a presentation on

99. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 (2002).

100. Among the many sections of the Association for Conflict Resolution (“ACR”) is the section on Spirituality, which describes itself as “the vessel to hold the exploration of how our own spirituality, different spiritual philosophies and many spiritual practices support and enhance who we are as mediators.” See *Spirituality*, at <http://www.acresolution.org/research.nsf/1b16ae2e0ce7b8d285256a380066a51a/e9f3d4b3569f504985256a5700528d7f!OpenDocument> (last visited July 1, 2003). The ACR was formed by the merger of the Academy of Family Mediators (“AFM”), the Conflict Resolution Education Network (“CRENet”), and the Society for Professionals in Dispute Resolution (“SPIDR”).

101. See ACR Annual Conference 2001, *Mindfulness and the Presence*, at <http://www.acresolution.org/acr.nsf/SessionsWeb/C5E0782186917FAF85256AFF00744482> (last visited July 1, 2003); Leonard Riskin, *Enlarging the Canon: Mindfulness in Dispute Resolution*, Workshop at the Association of American Law Schools Annual Conference (2003), at <http://www.aals.org/am2003/riskin.html> (last visited July 1, 2003). See also, Tuan Pham, *The Zen of Mediation*, 11 RESOL.: Q. UPDATE ON DISP. RESOL. (Mar. 2003), available at <http://www.courts.state.va.us/drs/resolutions/march2003/zen.html> (last visited July 1, 2003) (describing author’s “Zen workshop for mediators,” and noting that “[m]editation and mediation are both instruments of peacemaking.”). Mr. Pham describes himself as a “dedicated Dharma practitioner, an experienced civil and family mediator, and a certified

Aikido for mediators, offering techniques for “increasing [the mediator’s] presence during mediation” and “learn[ing] to ground and center under stress during a mediation.”¹⁰² The speaker’s presentation was based on her theory of “conscious embodiment.”¹⁰³ With the growing popularity among mediators of what some have termed the “New Sciences,” one author has suggested we have entered a new era of “transcendent mediation.”¹⁰⁴ The links between spirituality and mediation, between a heightened sense of self and the facilitation of social harmony, evoke memories of the Theosophist movement of the early 1900s.

Just what kinds of mediation are being practiced currently in court-related programs is uncertain. Some state and federal court mediation programs train mediators to facilitate disputes and to eschew evaluation altogether.¹⁰⁵ To my knowledge, no court system requires transformative mediation.¹⁰⁶ But seemingly some courts are comfortable disseminating information on—if not promoting—the idea of transcendental mediation.¹⁰⁷

There are only a few studies that report empirical observations of what happens during court mediation. These studies found that parties were generally little involved in mediation—in some programs, parties rarely participated—and that mediators rarely encouraged integrative negotiation (much less transformative mediation). In the courts studied, mediation most resembled tradi-

training specialist.” *Id.* The newsletter in which his article appeared is published by the Department of Dispute Resolution Services of the Virginia State Courts.

102. Email from Adrnc.org, to Conference Participants (June 3, 2003) (on file with author). The speaker at the program was Wendy Palmer, author of *The Practice of Freedom and The Intuitive Body*.

103. *Id.*

104. See Tom Fisher, *Exploring Mindfulness in Mediation*, available at <http://www.leadr.com.au/FISHER.PDF> (last visited July 1, 2003). See also KABAT-ZINN J. HYPERION, *WHEREVER YOU GO THERE YOU ARE: MINDFULNESS MEDIATION IN EVERYDAY LIFE* (1995).

105. For example, two of the four mediation programs that RAND studied in its evaluation of ADR programs established under the Civil Justice Reform Act trained mediators to be facilitative. See KAKALIK ET AL., *supra* note 80. Florida’s Standards of Professional Conduct emphasize the facilitative nature of the mediation process. See FLA. ST. MEDIATOR CONDUCT R. 10.210, 10.220, 10.300, 10.310.

106. The U.S. Post Office recently adopted an agency-wide mediation program for workplace disputes that relies exclusively on the transformative model; the leaders of that program recently left the postal service to establish a mediation service that uses the transformative model. See Jonathan Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997); Lisa Bingham, *Mediating Employment Disputes: Perceptions of Redress at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20 (1997).

107. See *supra* notes 100-103 and accompanying text.

tional judicial settlement conferences, with a privately selected and privately paid mediator substituting for a publicly paid and publicly selected judge.¹⁰⁸ Anecdotal evidence suggests that rather than changing the conceptualization of a lawsuit or the definition of a good settlement, most mediators focus on helping parties overcome the barriers to negotiating settlements within the shadow of the law. In sum, there may be *less* going on here than meets the eye; rather than fundamentally transforming the dispute resolution process mediators may simply—but importantly—be helping lawyers to negotiate more effectively.

Perhaps lawyers, despite their rhetorical support for interest-based or transformative mediation, will wrestle the new procedures back into a shape that they recognize: fact and law based contests between parties seeking authoritative decisions, or negotiated outcomes reached in the shadow of those decisions. The anecdotal reports that evaluative mediation is the form of mediation that has taken firmest hold in the courts seem to be straws blowing in that direction. But if court mediation is just old wine in new bottles, then we ought to be questioning why courts are *requiring* litigants to engage in a private fee-for-service process that substitutes what once was available to all for a simple filing fee.¹⁰⁹ We might also ask why lawyers—who used to be able to negotiate settlements most of the time *without* a third party—now so often require the assistance of a mediator (at an additional cost to their clients) to resolve their cases.¹¹⁰

Ironically, the ADR movement ultimately may be more successful at transforming *courts* than transforming lawyers or disputants. Recent court decisions suggest that at least some jurists have embraced a new vision of the objectives of the justice system, a vi-

108. See Hensler, *supra* note 88. See also Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 (2002); Nancy Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002).

109. It is also a process that used to be provided at no additional charge by judges and (in some jurisdictions) by lawyers serving *pro bono*; another approach to settlement that pre-dates the ADR movement is "settlement week," when lawyers volunteered to help other lawyers with cases that had stacked-up on court calendars. See Deborah Hensler, *Court-Annexed ADR*, in *ADR PRACTICE BOOK* (John Wilkinson ed., 1990).

110. A striking number of lawyers who practice in different parts of the country have shared with me their bemusement that cases that they used to negotiate with opposing counsel now go directly to mediation (even when it is not required by the court) without discussion as to whether it is necessary or appropriate. None of these lawyers opposes mediation—they are just surprised to find themselves in this position.

sion in which the purpose of legal dispute resolution is to achieve social harmony, rather than to assess factual and legal claims and articulate public norms. In *Neary v. Regents of the University of California*, upholding vacatur of a trial court judgment that had been stipulated as a condition of settlement negotiated by the parties post-trial, the California Supreme Court held:

The primary purpose of the public judiciary is ‘to afford a forum for the settlement of litigable matters between disputing parties [citation omitted]. We do not resolve abstract legal issues, even when requested to do so. We resolve real disputes between real people. This function does not undermine our integrity or demean our function. By providing a forum for the peaceful resolution of citizens’ disputes, we provide a cornerstone for ordered liberty in a democratic society.

The Court of Appeal’s concern for the integrity of trial court judgments is flawed The notion that such judgment is a statement of ‘legal truth’ places too much emphasis on the result of litigation rather than its purpose The paramount purpose of litigation is to resolve disputes. If that goal is achieved, even after judgment, the trial court’s essential function has been fulfilled

[T]he public interest itself is served by the peaceful settlement of disputes and unclogging of court dockets.¹¹¹

There is little evidence that jurists who have embraced these new visions of the courts have carefully considered their institu-

111. *Neary v. Regents of the Univ. of Cal.*, 10 Cal. Rptr. 2d 859, 864, 865 (Cal. 1992). In dissent, Justice Kennard responded:

More than just a dispute resolution service, the judiciary is an integral part of our government. Working in the context of actual disputes, courts interpret and enforce the policies adopted by the legislative process, striving always to give those policies coherence and vitality. Thus, when a trial court renders judgment in a particular case, it is not just deciding who wins and who loses, who pays and who recovers. Rather, the ultimate purpose of a judgment is to administer the laws of this state, and thereby to do substantial justice.

Id.

Justice Anthony Kline refused to apply the *Neary* precedent in a subsequent case, on the grounds that “the doctrine of stipulated reversal announced in *Neary* is destructive of judicial institutions.” *Morrow v. Hood Communications*, 69 Cal. Rptr. 2d 489, 491 (Cal. 1997). The California legislature subsequently overturned the *Neary* holding with regard to stipulated reversals of judgment. See *In re Rashad H.*, 92 Cal. Rptr. 2d 723 (Cal. Ct. App. 2000) (noting amendment of California Rules of Civil Procedure overrules *Morrow*). For comment on stipulated reversals, see Jill Fisch, *Rewriting History: The Propriety of Eradicating Prior Decision Law Through Settlement Conditioned Upon the Vacatur of Entered Judgments*, 76 CORNELL L. REV. 589 (1991); Resnik, *Many Doors*, *supra* note 56.

tional implications. Should generalist judges lead courts dedicated to social harmony, problem solving and self-understanding? Or would such courts be better led by communication experts, risk management specialists, and counseling psychologists? What role should the public play in selecting the experts who will shape the new dispute resolution process? Can a justice system dedicated to conciliation rather than adjudication of facts and law maintain its status as a third branch of government, equal to the legislature and executive? Whatever their failures in achieving efficient and fair justice for citizens, the core competence of today's courts is adjudication. Re-imagining the purpose of courts requires re-thinking their institutional structure as well.

VIII. OUR COURTS, OURSELVES?

Just where we are in the story of the alternative dispute resolution movement—whether we are nearing the concluding chapter or still in mid-narrative, with many turns in the plot line still to come—is not clear. But some parts of the story seem clear. There is little evidence that neighborhood justice centers have substantially reduced urban social conflict or contributed to a significant redistribution of power within communities, although they may well be helping neighbors work out minor disputes. There is little evidence that alternative dispute resolution procedures within courts have reduced the average time to dispose of civil lawsuits, or the average public or private expense to litigate cases in a system that has long relied on settlement rather than adjudication to resolve most cases. There is also little evidence that alternative dispute resolution procedures outside of courts have reduced the transaction costs of resolving conflicts that would never have gone to trial anyway, although they may be contributing to a drop in civil case filings. By precluding jury trial, private binding arbitration may well have decreased the expected value of a dispute outcome, but any savings accruing from this may be outweighed by an increase in claiming, if arbitration simplifies the dispute process for ordinary consumers or employees. Whether alternative dispute resolution processes outside or within courts have significantly increased the preexisting imbalance of power between the “haves” and “have nots” is unclear. While there are reasons to believe that ADR sometimes disadvantages the less powerful, the traditional litigation process may not do much better in creating a level playing field.

If lawyers succeed in shaping alternative dispute resolution procedures to comport with traditional notions of settlement, the immediate outcomes of the dispute resolution movement may sim-

ply be to increase the costs of litigation by substituting paid lawyer-settlers for publicly subsidized judge-settlers. The story of the alternative dispute resolution movement might then appear to be just a very old tale, retold.

But I find it hard to believe that the myriad new statutes and court rules promoting or mandating private dispute resolution, the thousands of mediator training sessions, promotional videotapes, and educational programs, and the public rhetoric that has accompanied all of these will have so little long-term consequence. To encourage people to consider alternatives to litigation, in federal and state courts nationwide, judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change. To drive these messages home, courts and legislatures mandate mediation, preclude dissemination of information about what transpires during mediation sessions, and—in the case of binding arbitration—sharply limit the ability of claimants to challenge the process or outcome. Moreover, both legislatures and courts display a breezy indifference to the qualifications of those who act as third-party neutrals and to the costs imposed on litigants by alternative dispute resolution mandates—all apparently based on the belief that any alternative to adversarial conflict must be beneficial.

Looking backwards, we may well come to view the dispute resolution movement as contributing to—if not creating—a profound change in our view of the justice system. With increasing barriers to litigating, fewer citizens will find their own way into court (although they may be brought there to answer criminal charges). Those who are not barred from using the courts by contractual agreement will increasingly find themselves shepherded outside the courthouse to confidential conferences presided over by private neutrals in private venues. With little experience of public adjudication and little information available about the process or outcomes of dispute resolution, citizens' abilities to use the justice system effectively to achieve social change will diminish markedly. Surrounded by a culture that celebrates social harmony and self-realization and disparages social conflict—whatever its causes or aims—citizens' tendencies to turn to the court as a vehicle for social transformation will diminish as well. Over the long run, all of the doors of the multi-door courthouse may swing outward.

Why should we care? If disputes are resolved efficiently in private by private individuals and organizations, if conflict is avoided

and citizens learn to seek compromise when disputes do arise, won't society be better off? Leaving aside the still unanswered question about whether private dispute resolution is, in fact, more efficient than public dispute resolution, and the considerable evidence that in most circumstances people already avoid conflict by compromising or "learning to live with" life's misfortunes and unfairness, I think the answer is "no." Owen Fiss, Judith Resnik, and others have written about the importance of public adjudication for the articulation of legal norms. I think there are also important political values that derive from widespread access to, and use of, the public justice system.

The public spectacle of civil litigation gives life to the "rule of law." To demonstrate that the law's authority can be mobilized by the least powerful as well as the most powerful in society, we need to observe employees and consumers successfully suing large corporations and government agencies, minority group members successfully suing majority group members, and persons engaged in unpopular activities establishing their legal rights to continue those activities.

Dispute resolution behind closed doors precludes such observation. In a democracy where many people are shut out of legislative power either because they are too few in number, or too dispersed to elect representatives, or because they do not have the financial resources to influence legislators, collective litigation in class or other mass form provides an alternative strategy for group action. Private individualized dispute resolution extinguishes the possibility of such collective litigation. Conciliation has much to recommend it. But the visible presence of institutionalized and legitimized conflict, channeled productively, teaches citizens that it is not always better to compromise and accept the status quo because, sometimes, great gains are to be had by peaceful contest.